

# **SPEECH—THE ROLE, RESPONSIBILITIES AND ESSENTIAL SKILLS OF BEING A COURT-APPOINTED MEDICAL ASSESSOR**

**The Annual National Medicolegal Seminar 2016**

**Session 1: Medical Assessors**

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## **Introduction**

1 It is probably an understatement to say that the shape of medical litigation has changed greatly over the past century. This change has been driven by advances in medical practice, developments in the law, and—importantly—the shifts in our views on medical litigation and the processes by which it is conducted. One such shift is the court’s power to appoint medical assessors. This power was introduced in 1993,<sup>1</sup> but has gained popularity only more recently. Perhaps it is partly due to this that doctors, lawyers and even judges are not entirely clear on the role that a medical assessor should play. Today I hope to shed some light on what the possible roles and responsibilities of a medical assessor are, what an assessor can expect of the court process, and what skills or qualities he or she ideally should have to assist the court.

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<sup>1</sup> This power was introduced in Act 16 of 1993 by way of inserting s 10A into the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

**“Assessor”—a clarification as to its meaning**

2 To begin, I should clarify that the title “assessor” does not imply any decision-making powers.<sup>2</sup> Instead, the word originates directly from the Latin *assessor*, meaning a counsellor,<sup>3</sup> an assistant, or a person who sits with another to give advice. In the judicial context, it denotes:

... a person who, by virtue of some special skill, knowledge or experience he possesses, sits with a judge during judicial proceedings in order to answer any questions which might be put to him by the judge on the subject in which he is an expert.<sup>4</sup>

3 With that out of the way, I will now turn to the potential roles of a medical assessor.

**The role that an assessor has played in the courts thus far**

4 I mentioned that the role of a medical assessor is generally not very well-understood today. This may be because its use has gained traction only in the past few years. Second, this may also be due to the fact that there are myriad contexts in which medical litigation arises, and what the judge requires from an assessor varies from case to case. I am told by a brother Judge that it can even be difficult to tell how useful an assessor’s counsel will be before the trial begins. Third—and I think this bears a correlation to my second point—the legislation provides very little guidance on what an assessor can or cannot do. In this regard, the Rules

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<sup>2</sup> *The Beryl* [1884] PD 137, at 141.

<sup>3</sup> Oxford Latin Dictionary (1982). Retrieved through <http://latin-dictionary.net/search/latin/assessor>.

<sup>4</sup> Anthony Dickey, “The Province and Function of Assessors in English Court” (1970) 33 Mod L Rev 494, at 501.

of Court only state that the assessor shall assist the Court in dealing with a matter in which he or she has skill and experience, and shall take such part in the proceedings as the Court may direct.<sup>5</sup> Beyond that, there are no signposts.

5 Thus, I know of a Judge who has used his assessors as “private medical experts” in the sense that the assessor helps him understand the issues and the evidence both before and during the trial.<sup>6</sup> In the accounting context, another Judge has asked the assessor to prepare an independent opinion after having read the expert reports from both sides, and to help formulate questions or point out shortcomings in the expert evidence.<sup>7</sup> In the context of a patent dispute, one Judge dispensed with experts on a certain issue and instead asked an assessor to conduct certain experiments and produce a report based on the results.<sup>8</sup>

6 The experience in other jurisdictions varies. Within the Commonwealth, the assessor’s role is most open-ended in the UK, where the Civil Procedure Rules are framed in terms similar to our Rules of Court in that they provide that the assessor shall take such part in the proceedings as the court may direct. However, the rules go on to specify that the court may in particular require the assessor to attend the trial, prepare a report on any issue in the proceedings, or advise the court on any such issues.<sup>9</sup> A commentator has identified four possible roles of an

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<sup>5</sup> Rules of Court (Cap 322, R 5, 2014 Rev Ed), O 33 r 4(2)–(3).

<sup>6</sup> Woo Bih Li J, in *Chua Thong Jiang Andrew v Yue Wai Mun and another* [2015] SGHC 119 and *Koo Quay Keong (Administrator of the Estate of Lee Lee Chan, Deceased) v Ooi Peng Jin London Lucien* [2016] SGHC 168.

<sup>7</sup> Choo Han Teck J, *Rockwills Trustee Ltd (administrators of the estate of and on behalf of the dependants of Heng Ang Tee Franklin, deceased) v Wong Meng Hang and others* [2015] 4 SLR 239 (HC).

<sup>8</sup> Tay Yong Kwang J, *Rohm And Haas Electronic Materials Cmp Holdings, Inc. (Formerly Known As Rodel Holdings, Inc.) v Nex* (Suit 470 of 2012).

<sup>9</sup> Civil Procedure Rules (UK), r 35.15.

English medical assessor—tribunal member, court expert, court officer and scientific adviser.<sup>10</sup> The Canadian and American assessors are essentially scientific advisors<sup>11</sup> while the Australian assessor appears to be a combination of tribunal member, court expert and court officer.

### **What roles, responsibilities and ideal skills should a medical assessor have?**

#### *A medical assessor's roles and responsibilities*

7 In Singapore, there are as yet no detailed rules on how the court should conduct its proceedings with assessors, though this is something that is currently under active consideration. In the present context, the role an assessor plays will depend very much on the dispute at hand, and more precisely on the assistance that the Judge desires. Generally speaking, however, I think a medical assessor in Singapore can expect to find himself playing the role of a scientific adviser. In short, he assists the judge to come to grips with material that is beyond his usual range of expertise.<sup>12</sup> Given that he occupies a special position in the judicial process, there are two house rules as far as the lawyers are concerned. First, the assessor is not an expert witness and is not offered for examination by either party<sup>13</sup> and, for this reason, he should not be giving evidence but merely helping the judge understand the evidence being given.<sup>14</sup> Second, the assessor renders

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<sup>10</sup> Déirdre Dwyer, *The Judicial Assessment of Expert Evidence* (CUP, 2008) at p 318.

<sup>11</sup> David Sonenshein and Charles Fitzpatrick, "The Problem of Partisan Experts and the Potential for Reform through Concurrent Evidence" (2013) 32 Rev Litigation 1 at 33; Federal Courts Rules (Canada), r 52.

<sup>12</sup> Sundaresh Menon CJ, "Evolving Paradigms for Medical Litigation in Singapore", Speech delivered to the Obstetrical & Gynaecological Society of Singapore (28 Oct 2014), para 60.

<sup>13</sup> Déirdre Dwyer, *The Judicial Assessment of Expert Evidence* (CUP, 2008) at p 268.

<sup>14</sup> *Richardson v Redpath, Brown & Co Ltd* [1944] AC 62 ("*Richardson*") at 70–71 *per* Viscount Simon LC (with whom the other Law Lords agreed); Lord Woolf, *Access to Justice: Final Report* (1996) at para 59.

advice that is likely to affect the judge's decision even if he does not have decision-making powers. In view of this, the parties should know what he has told the judge and be given a chance to respond to it.<sup>15</sup> With this in mind, I will now suggest five possible tasks which an assessor might find himself performing, and the safeguards which parties can generally expect in relation to these tasks.

8 First, the assessor will almost invariably be required to prepare at an early stage by reading the expert opinions and the relevant medical literature in preparation for trial. This means the assessor should understand the facts that are being contended and—more importantly—the technical issues that may have to be decided by the judge. This means that parties should conduct their first pre-trial conference with a judge at an earlier stage of the proceedings to determine whether and when an assessor is needed, and to coordinate trial dates if the assessor is required to sit in when the experts are scheduled to give evidence.

9 The assessor will often be asked to sit in for the trial, at least when technical evidence is being given. His second responsibility, therefore, is to be there for the judge to consult, either during the trial proper or before the trial. He can help the judge to understand the technical issues, to understand the effect and meaning of technical evidence especially when the experts are being examined. He can also advise the judge as to the proper technical inferences to be drawn from proved facts, the shortcomings of an expert's opinion, or the extent of the difference between apparently contradictory conclusions.<sup>16</sup> One important way in which he can be actively involved is by suggesting questions for the judge to pose an expert

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<sup>15</sup> *Richardson*, at 71; *Watson v General Medical Council* [2005] EWHC 1896 (Admin) (“*Watson*”) at [66] *per* Stanley Burton J; Colin Tapper, *Cross and Tapper on Evidence* (OUP, 12th Ed, 2010) at p 83.

<sup>16</sup> *Richardson*, at 70–71.

witness with a view to testing that witness's view, to making plain his meaning or even to simply obtain an articulated basis for his opinion. It may even be possible for an assessor to directly pose questions to a witness. Although there are opinions to the contrary, I for my part see no objection in principle provided the judge is comfortable with it (and understands the questions).<sup>17</sup> There are also different schools of thought on whether the assessor should be permitted to retire with the judge, but it seems to me that the better view is that communications with the judge should take place in open court.<sup>18</sup> If the assessor's core mandate is to help the judge understand and form a view on the parties' evidence, it is hard to justify in principle why this advice should be conveyed privately even if it is convenient to do so. Perhaps, if the judge and assessor do spend time together in conclave, it would be desirable for the assessor to inform the parties at least briefly of what was advised.

10 Third, when the judge is preparing for the trial, the assessor may be required to act as his consultant or tutor. The assessor could be called upon to help the judge understand the technical issues and evidence, or to give the judge a general introduction to the field of study and to provide the "medical and scientific background and context which expert opinions may often assume without spelling out in detail".<sup>19</sup> In appropriate cases where a judge is at home with the broader subject area, it is possible that the assessor might be involved

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<sup>17</sup> Sundaresh Menon CJ, "Evolving Paradigms for Medical Litigation in Singapore", Speech delivered to the Obstetrical & Gynaecological Society of Singapore (28 Oct 2014), para 62; *contra* Anthony Dickey, "The Province and Function of Assessors in English Court" (1970) 33 Mod L Rev 494 at 505.

<sup>18</sup> *Watson* at [68] (*obiter*). This is also the case in Canada: Federal Courts Rules, r 52(3).

<sup>19</sup> Sundaresh Menon CJ, "Evolving Paradigms for Medical Litigation in Singapore", Speech delivered to the Obstetrical & Gynaecological Society of Singapore (28 Oct 2014), para 60.

only at the pre-trial stage, acting as a tutor to equip the judge with the knowledge required to handle the matter without further assistance.<sup>20</sup> This may happen more often in the accounting or engineering context than in the medical context. However, in the interest of transparency to the parties, any advice rendered or other training literature used in this period should be disclosed to the parties so they may make submissions on its content if they deem fit.

11 Fourth, the assessor might act as a court officer in the sense that he might be expected to assist the Judge or even the Assistant Registrar at pre-trial conferences, or even preside at the meetings of experts. This could be done to help the lawyers or the experts reach agreement on certain issues, or to refine the issues being disputed. I imagine that this will be helpful to the court especially at the pre-trial stage because that is often the time when the court is least familiar with the technical issues and evidence and where the area of disagreement is the largest.

12 Finally, after the trial, the assessor may be called to advise the judge based on the evidence that emerges. This could either take the form of informal oral advice or, in certain cases, a written opinion at some point in time. It would not be altogether surprising to ask for a written report given that the court may realise that it requires a more formal report over the course of trial. However, the preparation of a written opinion is sometimes considered more properly the province of a court expert, who would be offered to counsel for examination. Accordingly, more safeguards must be observed here, and in this regard we can borrow from the English and Canadian practice. In the ideal case, the range of

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<sup>20</sup> This was done in *Electromagnetic Geoservices ASA v Petroleum Geo-Services ASA and ors* [2016] EWHC 27 (Pat), at [35] *per* Mr Justice Birss.

topics on which advice might be sought from the Assessors should be canvassed with counsel before closing submissions at the latest. Ordinarily, the Judge's questions to the Assessor should not stray outside these boundaries. These questions—and any answers or advice that the Assessor may give—should be disclosed to counsel before any judgment is handed down.<sup>21</sup> Counsel should be given the opportunity to make submissions on whether the Assessor's advice should be followed. The interests of transparency on one hand and proportionality and finality on the other will guide the Judge as to whether this process should be repeated after the Judge and Assessor have considered the parties' submissions and any suggested further questions. Accordingly, unless the Judge in his discretion thinks it appropriate to disclose them to counsel before the judgment is finalised, any further answers will simply be recorded in the judgment, together with the Judge's decision as to whether or not to accept the Assessors' advice and his reasons for doing so.<sup>22</sup>

***The skills and qualities that a medical assessor should have***

13 In view of these roles that an assessor may play, I will now discuss some skills or qualities that I think will make him or her of great assistance to me and my colleagues.

14 First, it would be helpful for the medical assessor to be a bit of a lawyer. If he understands some rudimentary legal concepts—such as the burden of proof, and the elements of the tort of negligence, he can then understand the context in

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<sup>21</sup> *Contra* Anthony Dickey, "The Province and Function of Assessors in English Court" (1970) 33 Mod L Rev 494 at 501, which suggests that a Judge is not obliged to disclose to the parties any oral advice rendered by the assessor.

<sup>22</sup> *Global Mariner (Owners) v Atlantic Crusader (Owners)* [2005] 1 CLC 413 at [14] and [16] *per* Gross J; Federal Courts Rules (Canada), r 52(4)–(5).



which the dispute arises, and he can frame the questions and his advice, and perhaps direct the parties' experts in a way that suits the substance of the legal analysis. If he understands his role (as opposed to the role of experts), he will also be more aware of what he may say and what he may not.

15 Second, the assessor should be able to think like a researcher. He should be able to identify the flaws, limitations or shortcomings in the experts' medical opinions, and he should be able to test their strength by formulating the appropriate questions. He should also be able to explain how the conclusions is affected if certain premises are changed. Some doctors who have appeared before the court, albeit as expert witnesses, have insisted that their premises are "correct" when the judge has already said that he or she rejects it. The consequence of this is often that their opinion becomes unhelpful and the court then faces a gap in the evidence. It would be an added bonus if the assessor can think on his feet as the evidence develops organically in court. The "right" questions to ask depend on the evidence that is being given in court, and it would be helpful for evidence to be clarified as it is given.

16 Third, the assessor should also be like a teacher. He should be able to educate the judge appropriately on the area in which he is an expert and which is required for the judge to dispose of the matter at hand. Ideally, he should also be able to highlight matters that are easy to misunderstand or often misunderstood, or, even better, identify and correct any specific misunderstandings that the judge may have of the technical concepts. He should also be able to clearly articulate the basis for his opinion.

**Concluding remarks**

17 Today, I have shared some tentative views on what a court-appointed medical assessor can expect to do, and how lawyers and judges can expect proceedings to be conducted in that light. However, there are other issues that concern the appointment of medical assessors in court which need looking into. One of the most pressing issues is his remuneration—who should pay for his fees and how much should he be paid? These questions will also influence the parties' views on whether an assessor should be appointed, or even whether parties should explore alternative dispute resolution mechanisms. Moving forward, it may well be desirable to tap on the collective wisdom of judges, lawyers and doctors and collate a set of best practices which can guide lawyers, judges and doctors through the complex web of medical litigation.

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