

TORN FEALTY TO THE COURTS AND SCIENCE: CONUNDRUMS OVER MEDICAL EXPERT OPINIONS (I/II)

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I. THE CONUNDRUMS OF THE MEDICAL EXPERT WITNESS AND COUNSEL

The Singapore courts are well-accustomed to hearing technically complex disputes, and disputes involving medical issues may present the most complex of these cases. Where judges and counsel are unable to divine the implications of facts and evidence at hand, they inevitably turn to expert witnesses. Expert witnesses assist in interpreting the facts, opining on what these facts mean, and provide specialized knowledge and information so very crucial for a judgment to be made.

Expert witnesses have become necessary ever since complexity in technical matters increased beyond a layman's untrained capacity. It was understood that when the machines inevitably got involved in disputes, judges had to call on experts to advise them. However, judges do not blindly defer to the authority of the expert. Care is necessarily taken to differentiate between different opinions proffered by each expert, and not every testimony is given equal weight or admitted without any questions. A clear example where the judge departs from the views of an expert is where the expert witness is biased. Another possible difficulty is in finding an objective approach to evaluate competing expert opinions. In such situations, whose opinion is to be preferred and given more weight? Is a professor's academic opinion more reliable than that of an experienced practitioner lacking in qualifications? These questions continue to plague the courts today.

In a two-part series, this article sets out a preliminary examination of the main factors considered by the court in assessing the proper weight to be given to expert testimony. Medical experts are given foremost consideration as they feature prominently among the expert witnesses appearing before the courts. In a following article, we will also examine inconsistencies and incoherence in the courts' use of expert evidence, and discuss recommendations for future use of expert evidence.

A. The use of medical experts in court

Medical expert opinions are widely admitted in criminal and civil trials. In criminal cases, these opinions are necessary to determine the psychological or physiological state of the accused persons, from which the judge can establish the legal elements of the offence. When deciding on sentencing, expert opinion also informs the judge of facts from which he can find exacerbating or mitigating factors. In civil matters, liability of the accused and damages to be awarded often depends heavily on the assessment of a medical expert. After all, judges are hardly able to decide what an appropriate sum for medical expenses should be, or how much income would have been lost as a result of an injury. Of course, medical expert opinions are most often adduced in physical injury cases,¹ and when trespassing into the realm of medical expertise, judges are loath to substitute their own views for those of the proper experts in the field. In this regard, judges thus place a greater weight on the testimony of a defendant doctor's own peers, since they—having the most similar qualifications and experience—would be most able to give advice.

B. The present litmus tests for the admissibility and reliability of opinions of medical experts

Prior to the introduction of the adversarial criminal system in the 18th century, there was no legal procedure to define experts *qua* expert witnesses;² experts would usually be summoned as jurors or witnesses. Evidentiary rules and objections were subsequently developed to standardise the types of evidence and how they can be presented before the court. While the rule against opinion being admissible as evidence emerged alongside the prohibitive rule against hearsay, experts' opinions are an exception to this otherwise strict rule. This exception was necessary in the adversarial system for experts to provide opinions as witnesses without having observed the facts.

The present legal framework for the admission and giving weight to expert evidence bears two stages of analysis. Judges as finders of fact must contend with the question of whether the expert's opinion is admissible as evidence, and if so, whether the expert's opinion is of sufficient weight to

¹ This has been established in a number of American studies. See Andrew W Jurs, "Expert Prevalence, Persuasion, and Price: What Trial Participants Really Think about Experts" (2016) 91 Ind LJ 353, which records that physicians make up the majority of experts at 37.5%; and Champagne et al, "An Empirical Examination of the Use of Expert Witnesses in American Courts" (1991) 31:4 Jurimetrics J 375, which observed that most experts were physicians (48%), and experts were mainly used in physical injury cases, and Samuel R Gross, "Don't Try: Civil Jury Verdicts in a System Geared to Settlement" (1996) 44 UCLA L Rev 1, which observed that medical experts make up the majority of experts.

² Tal Golan, "The History of Scientific Expert Testimony in the English Courtroom" (1999) 12:1 Science in Context 7 at 9.

be relied upon to establish a fact in issue. The former is governed largely by Section 47 of the Evidence Act and interpretive cases, while the latter is largely a matter expounded upon by case law.

Section 47 of the Evidence Act essentially requires counsel to establish three points to admit expert opinions as evidence:

- (a) The pleaded point must be one of “scientific, technical or other specialised knowledge”.³ The ambit of such knowledge and whether a particular field would fall within it seems to be open to discussion, and local courts have yet to pronounce on the specific test. There have been suggestions for reference to tests in foreign jurisprudence, such as the more lenient test in *Frye v United States*⁴ (“Frye”); or a more stringent inquiry under *Daubert v Merrell Dow Pharmaceuticals*.⁵
- (b) The individual giving the opinion must be an expert, who must have obtained the knowledge applied in his opinion “based on training, study or experience”.⁶ A judicial determination of whether this is made out is discretionary, and often turns on the qualifications, experience, and credibility of the expert in question.⁷
- (c) In the round, the Court must be “likely to derive assistance” from the opinion when making its determinations of fact. This is a lower threshold than that under the same provision before the 2012 Amendments to the Evidence Act.

Once admitted, the court generally gives weight to the expert opinion unless it is later found to be “obviously lacking in defensibility”.⁸ In cases where only one expert opinion is adduced or where the experts are in agreement, there are few obstacles that may lead to the courts giving it less weight. This is contrasted to cases where competing expert opinions are adduced in court: in such cases, a brief survey of cases involving medical experts affirms that a multi-factorial approach is taken. Some of the factors are examined below.

³ *Evidence Act* (Cap 97, 2012 Rev Ed Sing, s 47(1).

⁴ 293 F 1013 (DC Cir 1923).

⁵ 509 US 579 (1993).

⁶ *Supra* note 3 at s 47(2).

⁷ *Fok Chia Siong v Public Prosecutor* [1999] SGCA 5 and *Wong Swee Chin v PP* [1981] 1 MLJ 212.

⁸ *Saeng-Un Udom v Public Prosecutor* [2001] 2 SLR(R) 1; [2001] SGCA 38 at [26].

1. *Expert's qualifications and experiences*

The most prominent factor is the expert's qualifications. "Qualifications", as explained by the Court of Appeal, refers not to an expert's "professional titles" but instead refers more generally to the expert's "knowledge and familiarity".⁹ While it is generally true that actual experience lends more weight to an expert testimony than mere paper qualifications, the High Court has qualified this by stating in *obiter* that this was "not an inevitable rule of thumb".¹⁰

The relevance of practical experience to the subject matter of the case is considered down to a micro-level: the court has differentiated between experts with clinical experience in cancer diagnosis and experts with clinical experience in cancer treatment,¹¹ and between experts in the treatment of drug addicts and experts in recognizing signs of drug addiction.¹²

Other factors that affect the weight given to an expert testimony are his experience doing research relevant to the case at hand,¹³ and his experience practising in the Singapore context.¹⁴ That a medical expert witness has experience treating one of the parties involved also lends authority to his testimony, since he would be more familiar with that party's condition(s); however, his familiarity and personal relationship with the party raises clear possibilities of bias that must be dealt with.¹⁵

2. *Impartiality of expert witness*

The testimony of even the most qualified expert will not pass muster if it is tainted by bias. Hired guns fighting for the parties that called (and paid) them can hardly be relied on to provide accurate testimony. The influence of bias is great in practice due to monetary incentives being available, the priming of experts to be a part of the legal team, and the lack of safeguards against errant experts trying to manipulate facts to support a biased opinion.¹⁶

Although expert witnesses are appointed by parties themselves, their ultimate duty is always to the court.¹⁷ They cannot become mercenaries for hire, bending the facts for the highest bidder.

⁹ *Muhammad Jeffry v Public Prosecutor* [1996] 2 SLR(R) 738; [1996] SGCA 44 [*Jeffry*] at [107].

¹⁰ *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983; [2007] SGHC 54 [*Sakthivel Punithavathi*] at [75].

¹¹ *Noor Azlin Bte Abdul Rahman v Changi General Hospital Pte Ltd and others* [2018] SGHC 35 ("*Noor Azlin*") at [63].

¹² *Jeffry*, *supra* note 9 at [90]-[91].

¹³ *Supra* note 11 at [23].

¹⁴ *Ibid* at [63].

¹⁵ *Tan Teck Boon v Lee Gim Siong and others* [2011] SGHC 76 at [7]; *AOD, a minor suing by the litigation representative v AOE* [2014] SGHCR 21 at [63].

¹⁶ Jeffery D Pinsler, "Expert's Duty to be truthful in light of the Rules of Court" (2004) 16 SAclJ 407.

¹⁷ *Rules of Court* (Cap 322, R 5, 2014 Rev Ed Sing), O 40A, r 2.

Expert witness bias is especially dangerous because, by definition, expert witnesses have specialised expertise that the judge does not; an errant expert could easily mislead the judge and dictate the outcome. Therefore, judges must remain alive to the dangers of expert witness bias. Given the high stakes, judges impose only a low threshold to disqualify a biased expert testimony, such that even “perceived partiality or inclination” on the expert’s part can suffice to disqualify him for bias.¹⁸

3. *Alignment with factual evidence*

The words of even the most illustrious expert have no weight if it does not comport with the facts. Although disagreement in expert opinions is so common as to be almost inevitable, expert opinions must remain based on the facts established by the court. Expert testimonies that contradict the facts often prove fatal to that side’s case.¹⁹ When faced with insufficient evidence or evidence that contradicts the point their side wants to prove, it would be better for the experts to concede “where they ha[ve] to”²⁰ than have the credibility of their entire report doubted by the court.

Factual evidence can also be used as a weapon to knock down opposing experts’ testimonies. In *Hii Chii Kok v Ooi Peng Jin London Lucien and another*,²¹ since the plaintiff’s expert could not provide “objective clinical data to support his assertions”, the court strongly preferred the defendant’s experts, whose testimonies “convincingly” countered the plaintiff’s expert’s testimony “point-by-point”.

Finally, expert testimonies should be precise and specific. Sweeping generalisations and conjecture are frowned upon, even more so when they are unsupported by evidence²² or are in relation to matters outside the expert’s field of expertise.²³

4. *Internal consistency of testimony*

¹⁸ *Public Prosecutor v Thangaraju Sarnkesi* [2007] SGMC 7 at [71].

¹⁹ See generally *Sheila Leow Seu Moi v Public Prosecutor* [2001] SGDC 376 [*Sheila Leow*]; *Yeo Henry (executor and trustee of the estate of Ng Lay Hua, deceased) v Yeo Charles and others* [2016] SGHC 220 at [63]-[67], [89], and [91]; *Eu Lim Hoklai v Public Prosecutor* [2011] 3 SLR 167; [2011] SGCA 16 [*Eu Lim Hoklai*] at [58], and *Public Prosecutor v Tong Lai Chun* [2003] SGMC 7 at [183].

²⁰ *Khok Ching Ching v SBS Transit Ltd* [2010] SGDC 220 at [95].

²¹ [2016] SGHC 21.

²² *Sheila Leow*, *supra* note 22 at [118]-[119].

²³ *Eu Lim Hoklai*, *supra* note 22 at [58].

Inconsistency in an expert's testimony casts a long shadow over his credibility. The degree of internal consistency has been described as one of the "paramount" considerations that courts will consider when assessing such reports.²⁴ Given that experts are meant to guide the court, accepting the evidence of a muddled and confused expert that would do little to assist the court would be inimical. Therefore, courts readily reject inconsistent expert reports or grant them less weight even if admitted. An example would be in *Chua Thong Jiang Andrew v Yue Wai Mun and another*²⁵ where the expert's quality was harshly criticized because of various self-contradictions in his oral testimony plus ambiguities and conflation in his expert report. The court issued a scathing dismissal of his report, describing it as an "illogical and unconvincing" explanation that was "completely off the mark".

On the other hand, courts appreciate experts maintaining a high degree of internal consistency in their testimony. In *Public Prosecutor v Tengku Jonaris Badlishah bin Tengku Abdul Hamid Thani*,²⁶ the court considered the prosecution's expert's testimony positively, describing the expert's opinion as "consistent, impressive and able to stand up to objectivity". It should be noted, however, that a dogmatic expert who refuses to change his view even in the face of overwhelming evidence to the contrary is not necessarily preferable to a reasonable expert who concedes in such situations. Experts need not defend their point to the death for fear of sounding inconsistent: courts understand and appreciate an expert changing his view to consider and account for shortcomings in his side's case. In *Khek Ching Ching v SBS Transit Ltd*,²⁷ the court noted that under "withering" cross-examination, the plaintiff's expert had conceded that he was unable to confirm with complete certainty the causation of the plaintiff's injury. Because he had continued to maintain his position while still conceding where he had to, the court commended him as a "generally good" expert witness that had testified "professionally", and noted that he had been "of assistance to the court".

5. Expert's methodology

Although courts are loath to put themselves into the expert's shoes, an expert report derived using objectively flawed methodology will still be dismissed. It should be noted that an expert's level of qualification is a separate and distinct factor from the quality of his methodology (although one

²⁴ *Sakthivel Punitavathi*, *supra* note 10 at [75].

²⁵ [2015] SGHC 119.

²⁶ [1998] SGHC 401.

²⁷ [2010] SGDC 220.

would hope that the former would lead to the latter). *Ong Pang Siew v Public Prosecutor*²⁸ is the main case where this factor has been relevant. In that case, where the accused pleaded the defence of diminished responsibility, the court harshly criticized the prosecution witness for his poor investigative methodology²⁹ when writing his report. The defence witness' "undoubtedly more comprehensive" methodology meant that his report turned the tide, and led the court to allow the appeal.

6. *Expert pushing his/her own case theory*

While it is natural for experts to form case theories from prolonged exposure to a case, it is prudent for experts to remain objective in their testimonies and not venture into interpreting facts. Once experts accept the responsibility of testifying, they must resist this temptation and stay impartial to the facts. However, this is easier said than done.

In *Eu Lim Hoklai v Public Prosecutor*,³⁰ the Court of Appeal explicitly pointed out the Prosecution witness' "over-enthusiastic allegiance" to her own case theory, and how, in her "absolute certainty" that it was correct, she had overlooked its "inherent improbabilities" and "uncertainty in the evidence".³¹ The failure of the Prosecution's "most important" witness in this important regard defeated the Prosecution's case.³² Advocacy must ultimately be left to the lawyers, and the experts should keep within their own field.

C. *Conclusion*

As explained in the introduction, the exception of admitting expert witness testimony was necessitated by the increasing complexity of legal disputes. In the years since, as the sight of experts

²⁸ [2011] 1 SLR 606; [2010] SGCA 37.

²⁹ Firstly, the witness had failed to interview people who had recently contacted the accused person (thus breaching the diagnostic guidelines in the DSM-IV-TR, a reputed psychiatric manual). Secondly, he had also failed to investigate what the court considered to be relevant considerations, *viz.* the accused person's changing jobs three times in the 18 months before committing the crime and his diabetes, which increased the risk of depression. Thirdly, he had interviewed the accused person in Mandarin even though he knew that the latter was more comfortable in Hokkien. The court thus condemned his methodology as an "unsatisfactory" one that "fell short of the requisite standard prescribed under the DSM-IV-TR", especially since he, being the prosecution witness, would have much more available resources. Because of this, his testimony was held to be "less convincing" than that of the defence witness, who not only interviewed the accused in Hokkien, but also interviewed the accused person's family members and the persons close to him.

³⁰ *Eu Lim Hoklai*, *supra* note 22.

³¹ *Eu Lim Hoklai*, *supra* note 22 at [56]-[57].

³² *Eu Lim Hoklai*, *supra* note 22 at [52] and [59].

in courtrooms became commonplace, rules in this area appeared and grew. Today, much of the law on the admissibility of expert's opinion is governed largely by Section 47 of the Evidence Act and interpretative cases, while the weight to be accorded to admitted evidence is a matter expounded on by case law.

Judges rely on experts to guide them through specialised fields of expertise, to assist them to reach justice, fairness, and truth. Thus, when searching for expert guidance, judges are just like the rest of us: they look for persons with impartiality, experience, clarity, and intellectual honesty. Such paragons of virtue may be hard to find, but there is hardly an alternative. The second part of this series will examine the trade-offs and such issues in greater depth.