

Role of Medical Experts

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When allegations of medical malpractice against a medical practitioner escalate to litigation, the predominant issue for determination by a court of law is whether that practitioner has been negligent in his duties. As the practice of medicine is highly specialised, the assistance of medical experts is required in most instances for the determination of said issue. This might be frustrating to aggrieved patients as they often face an uphill battle in securing a medical expert. This is because one medical practitioner may be unwilling to provide evidence against another (a scenario which has been dubbed as “*conspiracy of silence*”¹).

Position in Malaysia

Decades ago, a medical practitioner being sued would not be found liable where it could be demonstrated that he had acted in accordance with a practice accepted as proper by his own peers posing similar skill and competence.² It was immaterial if there was another body with a differing opinion that does not accept the action taken by the medical practitioner. The justification for the development of this principle, popularly known as the “Bolam test”, is that the courts found difficulty in setting a standard for the medical profession and the majority opined that it should be left to medical judgment.³

However, legal inroads started to be made as early as 1995 when Richard Tallala J (as his Lordship then was) held that it is for the court (not medical judgment) to determine if the medical practitioner breached the standard of care in medical law.⁴ Following the decision of the appellate courts in a number of cases between 2006 and 2010, it has become settled that the determination of liability of a medical practitioner falls within the purview of the courts and not medical judgment.

Medical experts

The general rule of evidence is that a witness to a proceeding shall only give evidence of fact and not opinion, except where he/she is an expert on the subject matter in dispute.⁵ The role of the expert is crucial as he/she has the qualification, skill and expertise to guide the court on matters that it may not be well versed in. Considering

¹ *Salgo v Leland Stanford Jr University Board of Trustees* 317 O 2d 1093 (1960); 154 Cal App 2d 560

² *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

³ *Mahon v Osborne* [1939] 2 KB 14

⁴ *Kamalam A/P Raman & Ors v Eastern Plantation Agency (Johore) Sdn Bhd Ulu Tiram Estate, Ulu Tiram, Johore & Anor* [1996] 4 MLJ 674

⁵ Evidence Act 1950, s 45



this, the medical expert must understand that his or her role in the proceedings is as an “officer of the Court”, meaning that he/she must always remain independent, unbiased and maintain neutrality.

In other words, the medical expert’s overriding duty is to help the court understand technical details of the case. Thus, the medical expert should not tailor his or her opinion for the sole purposes of advancing the case of the party that has engaged and/or compensated him or her but unfortunately, it cannot be denied that this does happen from time to time. According to a professor at Durham University:⁶

“A very recent survey of 500 expert witnesses revealed that 70% of them said that they had been asked by lawyers to modify their report or opinion in some way and that around one-third had done so. Most of the resulting amendments would have taken the form of innocent clarification and correction of factual errors in reports. However, about a quarter of the respondents’ recorded comments are more equivocal, in some instances acknowledging the alteration of opinions... Despite the requirement ‘that expert evidence presented to the court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation’, it remains the case that ‘expert witnesses instructed on behalf of parties to litigation often tend... to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties’...”

The court, having experience dealing with various litigants, has an eagle eye and can identify discrepancies and biasness in the evidence provided by a medical expert. For example, in a much-publicised case of 2018,⁷ the court expressed dissatisfaction with the biased evidence provided by two in-house medical experts of the defendant hospital.

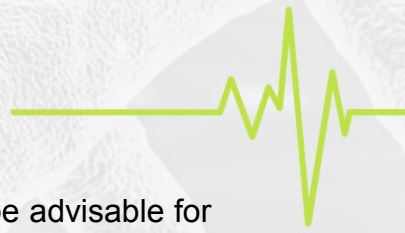
To avoid being called out by the court, it would be wise for medical practitioners to consider the following questions⁸ when approached by a party to act as an expert in any given legal proceeding:

- (a) Do they have the required qualification, expertise, and specialisation to provide an opinion on the matter?
- (b) Are there any potential conflicts of interest in accepting the brief?
- (c) Are there any personal biases that may interfere with their ability to provide an objective, unbiased opinion?
- (d) Do they have the time to act as an expert witness and are they able to work within court-imposed dates and deadlines?

⁶ Harvey Teff, “The Standard of Care in Medical Negligence — Moving on from Bolam?” (1998) 18 Oxford Journal of Legal Studies 473-484

⁷ Dato’ Stanley Isaacs (suing by himself and as the administrator of the estate of Puan Suzanna Thomas, deceased) v The Government of Malaysia & Ors [20019] 8 MLJ 331

⁸ “The role of the expert witness in medical malpractice litigation”, Hospital News <<https://hospitalnews.com/the-role-of-the-expert-witness-in-medical-malpractice-litigation/>> (accessed 21 October 2020)



If the answer to any one of the above is in the negative, it would not be advisable for the medical practitioner to be engaged for the purposes of providing expert opinion on the matter.

Conclusion

The presence of medical expert(s) in medical malpractice trials is necessary, but not all experts are equal, or totally impartial and unswayed by the demands of his or her client.⁹ In this instance, it would fall upon the lawyers to remind the medical experts of their duties owed to the court instead of giving in to histrionic tendencies.

If you have any queries, please contact the author, **Shona Anne Thomas** (sat@lh-ag.com).

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⁹ Dato' Dr Sarjeet Singh Sidhu, *Medical Negligence: The Expert Witness* [2016] 2 MLJ xlvi