

SUBJECT FEEDBACK AND MAEP¹

MAEP does not provide a means of obtaining feedback *directly* from the subject of an expert assessment. There is provision for subject feedback to be obtained *indirectly* through the subject's legal representative or another feedback participant, such as a barrister.

The reasons for not incorporating direct subject feedback are legal, empirical, ethical and practical.

Legal reasons

The expert's duty is to the court and that duty includes assisting the court with independent evidence. This does not mean that the expert has no duty to the subject of the report and as General Medical Council guidance makes clear, some of the duties of a doctor are the same whether there is a traditional doctor-patient relationship or a relationship between the expert and the subject of their assessment. But other than very exceptionally where an expert has to render medical assistance to a subject in the course of an assessment or when attending for assessment, the expert fulfils their duty or duties as a doctor by fulfilling their primary duty to the court.

Direct subject feedback threatens the expert's independence. Their assistance must be independent of the parties' interests, including the subject of the report, and it must be seen to be independent.

Seeking feedback from the subject of the assessment, whether in the course of the litigation, or upon conclusion of the litigation creates a dependence on the subject. The expert is literally dependent on the subject for feedback. It is inevitable that what the expert hopes is that the feedback will be positive. This therefore creates a risk of bias in favour of the subject, whether the expert is instructed by those acting on behalf of the subject or those acting for the adverse party or parties. Even if the expert manages to avoid bias, they may not be seen to be acting independently if they directly solicit feedback from the subject. In a case where one expert has obtained feedback and another expert has not, it might be submitted to the court that the expert who has not obtained subject feedback can be seen to be independent whereas the expert who has sought feedback does not appear to be independent. In order to explore the issue, counsel might apply to the court for an order to have the subject's feedback disclosed to the court in order further to investigate possible bias.

The same risk would arise if feedback were sought after the conclusion of the case. There is a risk of a similar point being made about the difference between the expert whose evidence is always provided independent of feedback from the subjects of assessment and the expert who is always dependent on the feedback from subjects of the assessment.

¹ The MAEP team acknowledges the particular assistance of Dr Gwen Adshead in conceptualising the legal, empirical and ethical issues presented here.

Where feedback is given in the course of the litigation, issues may arise as to whether the parties or the court should be informed of the content of the feedback. The risk that this might happen would necessitate advising the subjects of assessments that, although the intention is to use their responses and comments for pooled, and therefore anonymous, feedback to the expert, it might be made known to the expert in the course of the proceedings. In the event that adverse feedback became known to an expert before they gave oral testimony, this could affect the ability of the expert to provide independent evidence or cause their evidence, whether or not biased, not to be seen as independent.

Particular difficulties could arise in some circumstances. Jointly appointed experts, very commonly instructed in the Family Court, are not permitted to have any contact with the subject without notifying all of the parties and there is a risk of one or more parties objecting to the expert seeking feedback. An expert instructed by the prosecution in a criminal case would have to list the request for subject feedback for the prosecution's schedule of 'unused material' to which the defence is entitled to have access. Listing it might prompt the defence to request disclosure of the request and then possibly an application to the court for disclosure of the subject's response to the request.

The place for feedback in the course of the litigation is the court process itself where there is transparency and scope for forensic investigation. Where there is complaint about an expert by a party, their legal representatives will decide whether such complaints should be put to the expert and sometimes they form, or are part of, the basis for a submission that the expert's evidence should be disregarded or accorded less weight than that of another expert or experts. But when this happens there is the opportunity for a submission to be made to the effect that for reasons identified in the course of the testing of the expert's evidence or consideration of other evidence, the court should not accept the submission. It is then for the court to decide. It is relatively common for the courts to reject such submissions and relatively uncommon for them to be accepted and for the judge to place criticism of the expert on the public record. It is easy for a subject to complain that the assessment was rushed and that they had insufficient time. Complaints about insufficient time for the assessment (along with failure to perform a physical examination) comprise the majority of complaints from claimants or their legal representatives about orthopaedic surgeons' medicolegal assessments.² But if it is an issue, it is the court which should investigate this, as sometimes happens (e.g. *Winterbotham v Shahrak (Rev1)* [2024] EWHC 2633 (KB)), hearing from the expert as well as the subject and considering relevant documentary evidence, such as phone records.

Empirical reasons

The empirical argument relates to the purpose of obtaining feedback. What information is gained about the expert's skill or otherwise? The most it could achieve is to explore the expert's communication skills but the conduct of a medicolegal assessment is not the same as a clinical consultation. The expert's role is to assist the court and not to act in the subject's interest. An expert may conduct a comprehensive and detailed assessment and provide a report that is

² Gargan MF. The orthopaedic surgeon's viewpoint. In: Foy MA, Fagg PS, editors. *Medicolegal reporting in orthopaedic trauma*. 4th ed. Edinburgh: Churchill Livingstone; 2010. p. 3-6.

recognised by both or all of the parties and the court itself as of the greatest assistance but the subject may be highly critical of the expert.

Although experts explain their duty to the court, in the course of obtaining consent for the assessment, this is not always understood by subjects and misunderstanding of the expert's role can result in misleading feedback.

Also, only a highly selected sample of subjects will agree to take part, and the ones that agree to respond may be more likely to be critical. Sampling bias is also likely to exclude the seriously unwell, some of whom, if they had the insight, might be particularly likely to make favourable comments.

Ethical reasons

There is a disparity of power between the expert and subject, and the jeopardy in which they find themselves in terms of what they perceive as the expert's favourable opinion. Seeking direct feedback places some subjects in an invidious position which exploits their vulnerability in order to benefit the expert.

In respect of court proceedings, many experts are meeting subjects at a very difficult time in their lives; and the court process is just another manifestation of a distressing and traumatic process through which they are living. They may find the proceedings alien and frightening. Parties in family court proceedings are often very concerned about what the expert will think of them. Sometimes subjects may be very suspicious and hostile toward the expert, particularly an expert instructed by an adverse party or even a jointly appointed expert, no matter what reassurance the expert gives. But most of all, arguably it is very unfair to ask people who are in desperate straits to relate to the expert as if they were equals, and as if this was an ordinary interpersonal transaction or clinical consultation. Being assessed by an expert is not a transaction between consumer and supplier, between a client and a business. It is dishonest to pretend that it is. And doctors are not allowed to be dishonest.

Practical considerations

A major practical problem is obtaining feedback before the subject is aware of the expert's findings and opinion which will usually be in the form of a report. It is inevitable in many cases that otherwise the subject's feedback will be influenced by whether they perceive the expert's evidence as being favourable or unfavourable to their case. Furthermore, if feedback is sought at this stage, it is difficult to see the parties or the court countenancing a delay in the litigation that might result from an expert withholding their report until the subject had provided feedback