

# Medico-legal psychiatric assessments in the age of video-linking

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## SUMMARY

Following the COVID-19 pandemic, assessments by video link became a standard and acceptable form of medico-legal evaluation. The various challenges to achieving an accurate and robust medico-legal assessment via a remote platform are explored in this clinical reflection. It is concluded that any limitations to a remotely undertaken assessment must be highlighted to the court and an in-person assessment considered as a reasonable alternative in some cases.

## KEYWORDS

Remote assessments; video; medico-legal.

By necessity to enable litigation to continue, the COVID-19 pandemic brought about an abrupt change in how medico-legal psychiatric assessments were undertaken, with remote assessments replacing those carried out face to face (in person). Following the end of the national lockdowns, the trend for remote assessments appears to have continued. As well as potential shortcomings, there are a number of practical and procedural issues to consider when undertaking a remote assessment for the purpose of a medico-legal report. These will be explored below.

## Purpose of a medico-legal assessment

Expert witness practice is directed not at the benefit of the defendant, claimant or other party to the litigation but at ‘justice’, represented by the justice process into which an expert report is served (Rix 2023). The purpose of a psychiatric medico-legal assessment is to test evidence obtained both from the subject and from external sources in order to assist in the court’s determination of matters in issue – such as, in a criminal case, the state of mind of an accused, or in a civil case, issues of causation and condition and prognosis – via a psychiatric evaluation. The pertinent question is whether or not such

testing can be adequately carried out using a remote platform.

## What is face to face?

In 2020, during the COVID-19 pandemic, NHS England and the Department of Health and Social Care, endorsed remotely delivered Mental Health Act assessments, stating that ‘developments in digital technology are now such that staff may be satisfied, on the basis of video assessments, that they have personally seen or examined a person in a “suitable manner”’ [National Health Service (NHS) England 2020]. This guidance was challenged and clarified in a judgment that ‘the phrases “personally seen” [...] and “personally examined” [...] require the physical attendance of the person in question on the patient’ (*Devon Partnership NHS Trust v Secretary of State for Health and Social Care* [2021]: para. 62).

However, in a more recent case the judge noted that some deem ‘remote’ assessments to be ‘face to face’, the judgment stating: ‘I consider there is an element of ambiguity in the expression “face-to-face”, in that interactions between individuals communicating remotely by means of sound and vision are sometimes described as occurring “face-to-face”’ (*Derbyshire Healthcare NHS Foundation Trust v Secretary of State for Health And Social Care (Rev1)* [2023]: para. 80).

Given this ambiguity, I have adopted the Derbyshire definition of ‘in person’ to define an assessment that occurs in the physical presence of the subject.

## Similarities and differences between medico-legal and clinical assessments

A recent evaluation of remote assessments undertaken for clinical purposes found that remote assessments are as safe and effective as those undertaken in person (Brunt 2023). However, there are important differences between assessments carried out in clinical practice and medico-legal assessments.

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First received 1 May 2024

Final revision 5 Jun 2024

Accepted 10 Jun 2024

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### Similarities

- Both clinical and medico-legal assessments gather a history of current symptoms/mental state and background.
- Both consider clinical plausibility in relation to the validity of history and description of symptoms.
- Both involve diagnostic formulation.
- Both identify risks to self and/or others.
- Both identify a treatment plan.
- Both depend on establishing rapport – but for different reasons:
  - clinical – rapport as the basis of agreement on a treatment/care plan.
  - medico-legal – rapport to enable provision of answers to searching questions and to tolerate challenge.

### Differences

- A medico-legal assessment is not prompted by a request to assist with assessment/treatment of a disturbed mental state but is a consequence of litigation.
- A medico-legal assessment does not necessarily assume that the subject is telling the truth, whereas this is the default position in a clinical assessment.
- Causation and prognosis are both considerations in most civil medico-legal reports.
- A medico-legal report considers reliability and whether the subject's presentation may provide evidence for a finding by the court of malingering or fundamental dishonesty.
- There is no duty of direct clinical care for medico-legal assessments – but there is a duty to undertake an assessment with reasonable competence and a duty to advise further investigation or treatment from the subject's treating doctors should the expert deem that to be required.
- In a medico-legal assessment, the expert's overriding duty is to the court.

### Mental health assessment

Both clinical and medico-legal assessments involve history-taking and mental state examination. In theory, history-taking can be achieved:

- in person
- by remote video link
- by telephone
- in a written exchange of questions and answers, for example via web-based texts, a virtual assistant, emails or WhatsApp messages.

An accurate account of the person's history/narrative can therefore be obtained remotely.

A mental state examination is the objective contemporaneous evaluation of a person's mental state, comprising assessment of their:

- appearance and behaviour
- speech/form of talk
- thought content
- affect and mood
- perceptions
- cognitive state
- insight
- reaction to the area/topic being explored (see below).

A remote examination may restrict the accurate evaluation of some of the components of the mental state.

### In-person or remote mental state examination

An important question is: does a remote assessment hinder an effective mental state examination and if so, how and does it matter? For example a telephone assessment cannot evaluate a person's appearance, their affect, whether or not they are responding non-verbally to unseen stimuli such as hallucinations, or whether or not they are showing non-verbal signs of agitation or low mood. A mental state examination is also informed by other observations, such as touch (firm handshake, sweaty palms) or smell (alcohol on the breath, perfume, body odour, etc.), none of which can be assessed remotely.

An in-person assessment begins with observation in the waiting room (perhaps before the assessor is known to the subject) and observation of mental state when the subject knows that the formal assessment has concluded. These covert observations are not possible in a remote assessment.

Visualising a subject's gait or mobility when transferring to a consulting room for an in-person assessment may be relevant.

The ability of a subject to set up and engage in a remote assessment may offer an insight into their cognitive state and executive functioning and may or may not correlate with the results of formal cognitive testing.

There are potential limitations where psychometric testing involves tests of cognitive ability, such as use of pencil and paper tests, or require sight of more than upper body (e.g. touching knees, carrying out a three stage task). The validity of self-assessment questionnaires may be compromised if the questions/statements are read out by the assessor to be answered by the subject rather than the subject completing them in person.

Assessment sometimes needs to include physical examination and clearly this cannot be undertaken remotely.

These ‘soft signs’ may not amount to anything significant in most cases, but in some cases they may contribute significantly to an impression formed by the interview and other aspects of the mental state examination.

## Performing a medico-legal assessment

A medico-legal assessment should be a formal, structured, systematic examination. How it is undertaken is important. The skill of an assessment includes asking the right questions at the right time, using silence to bring out history, interrupting to explore what has been said and/or keep a focus on obtaining answers to questions, and picking up soft signs of defensiveness, hostility, evasiveness and irritability that guide the interviewer in how to conduct the interview.

Two aspects of relevance when comparing a remotely undertaken assessment with one undertaken in person are:

- What are the challenges in undertaking and controlling a remote interview?
- Are there fundamental or material differences in the quality of a remote assessment?

### *What are the challenges in undertaking and controlling a remote interview?*

#### Environmental factors

Anecdotally, subjects undergoing psychiatric medico-legal assessments prefer being at home in a familiar environment, without needing to travel to an unfamiliar setting. However, there are a number of potential difficulties when undertaking a home-based assessment remotely. The hardware used to log in remotely may be a mobile phone, tablet, laptop or desktop computer with varying degrees of clarity of video stream. The subject’s face may be obscured or in shadow because of backlighting. The whole person is unlikely to be seen. There may be internet connection problems. It may not be possible to determine whether there are third parties present. There may be interruptions. Confidentiality may not be maintained.

There are particular challenges in the assessment of criminal defendants, such as:

- the prisoner’s late arrival (very common), with the risk that the assessment is hurried owing to the time allocation
- inadequately soundproofed video booths, such that:
  - the prisoner may be afraid of being overheard
  - there may be difficulty hearing the prisoner

- lack of flexibility in ending the assessment (also a problem with in-person prison assessments but easier to negotiate with prison officers if in person)
- ‘crossed wires’:
  - the prisoner being connected at the scheduled time and attending the end of the previous consultation
  - another person being linked in.

Although the likelihood is that a remotely undertaken medico-legal assessment in a civil case will take place with the subject in their own home, this is not always the case. Subjects may be at work, in their car or van, outdoors or in their solicitor’s office. These environments may be unsatisfactory for a number of reasons, such as lack of confidentiality, risk of interruption or liability of other distractions.

#### Internet factors

A number of connection issues could interfere with the quality of both history-taking and mental state examination, including echo, distortion, delay, pixelated picture, cutting out, freezing, unexpected automatic software updates and computer ‘crash’ due to memory overload.

#### Control of the interview

Controlling an interview is fundamental to its success. As well as posing questions at the right time and in the right manner, a psychiatrist will need to acknowledge and react to emotional distress, hostility or apathy displayed by the subject. A psychiatric assessment by its very nature explores potentially sensitive areas within the history, such as ascertaining the details of a violent offence, evidence of abuse or trauma, relationship history, sexual history and religious beliefs. Gauging the subject’s reaction to revealing past trauma or exploring an index injury and adapting one’s interview style accordingly may be less effective when interviewing remotely. A poor internet connection and/or satellite delay of verbal exchanges can hamper the control needed to respond to such reactions and carry out an effective assessment.

Unlike with an in-person assessment, if a subject becomes very distressed or disturbed during or by the end of a remote consultation, providing support and monitoring the distress is extremely difficult, particularly if the subject is able to terminate the video link so that contact is lost. If, however, a subject is seen in person in a clinic or office, it should be possible for a receptionist to keep an eye on them in the waiting room while help is sought, to fetch a relative from the waiting room, or even to contact a relative to attend to support the subject.

### *Are there fundamental or material differences in the quality of a remote assessment?*

The quality of history-taking may be affected by interruptions such as deliveries to the home or third parties entering the room. The internet factors set out above and their effect on how the interview is controlled could result in a reluctance to challenge or explore contentious issues, particularly with an evasive, contradictory individual or one suspected of inconsistency and misrepresentation.

Internet factors could also have an impact on a mental state examination, leading to an impaired assessment of affect, eye movements, restlessness, distractibility, tone of voice, emotional distress or mood. A false impression of some aspects of the person's mental state may occur, such as wrongly perceived blunted affect or disjointed speech, or misinterpretation of facial expression, long pauses or apparent distractibility.

### **Choice**

Remote video assessments by experts became the norm during the COVID-19 pandemic by necessity. However, as the pandemic receded into the past some prisons have insisted that all assessments be carried out remotely and some solicitors have sought to insist on a remote assessment. The expert's report needs to make clear if this has been the case, particularly if any of the above difficulties were encountered. Otherwise the court may ask why such matters and any associated limitations were not mentioned. Some experts now choose whether to undertake medico-legal assessments face to face or by video. Whichever format is decided on, expect to justify the decision made.

The decision to undertake an in-person assessment may be predicated on how distressed the subject might become, so that adequate support can be provided (see above), or because a thorough in-depth evaluation is necessary to assess clinical plausibility or reliability.

If it is the case that a remote assessment has been so unsatisfactory as to necessitate an in-person

assessment, then this should be recommended to the instructing solicitor and made clear in the report.

### **Summary**

If a video assessment is preferred, it is incumbent on the expert to ensure that a secure platform is used in order to maintain confidentiality. It is important to comment in the report as to whether a remote interview may have affected the assessment by interfering with the accurate determination of aspects of the mental state examination that can only be reliably evaluated in person. Connection difficulties could affect the ability to establish rapport and control the interview, there may be interruptions and third parties may be present (possibly out of view).

### **Funding**

This work received no specific grant from any funding agency, commercial or not-for-profit sectors.

### **Declaration of interest**

None.

### **References**

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### **Cases**

- Derbyshire Healthcare NHS Foundation Trust v Secretary of State for Health And Social Care (Rev1)* [2023] EWHC 3182 (Admin).
- Devon Partnership NHS Trust v Secretary of State for Health and Social Care* [2021] EWHC 101.