Expert witnesses, courts and the law

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J R Soc Med 2002;**95**:431–434 SECTION OF CLINICAL FORENSIC & LEGAL MEDICINE, 15 JUNE 2002

Most judges have no more medical expertise than the average intelligent lay person. It is for this reason that we rely heavily on expert opinion. In family proceedings, the evidence given by a medical expert can play a large part in determining the future of a child. In the criminal courts it can be the deciding factor in conviction of a parent or other member of the family for injuring or killing a child.

THE PAST 15 YEARS: CLEVELAND AND THE CHILDREN ACT

In 1988 I submitted my report of the inquiry into child abuse in Cleveland detailing the committee's recommendations on future investigation of cases where abuse is suspected. The publication of that report in 1989 prompted much debate. At around the same time, the Children Act 1989 was passed. Family courts were already relying on the expert evidence of the medical profession in child care cases but since the Act came into force the courts have undoubtedly put more weight on the evidence of paediatricians and child psychiatrists—particularly in the context of cases involving physical and emotional abuse, neglect and sexual abuse, and in the assessment of children's relationships with their parents and the risks posed to children by any given placement.

The importance of medical evidence in child protection cases is illustrated by a brief look at two difficult physical injury cases, in each of which the argument might equally well have been tried before a jury with the parent in the dock.

In *Re A and D*[1], a baby of 5 weeks was found to have acute subdural haematomas and retinal haemorrhages. The question for the court was whether the injury was caused by the parents shaking the baby or whether, as the parents suggested, the injuries were the result of rough play by elder siblings. In coming to a conclusion on that question, I was almost entirely dependent on the medical evidence. Written reports were submitted by seven consultants, six of whom gave oral evidence before me. They included a neuroradiologist, a radiologist, a neurodevelopmental paediatrician, an ophthalmologist, a forensic pathologist and an ophthalmic pathologist. The burden of the expert evidence was that the force required to cause a subdural haematoma was more than would occur in the ordinary rough and tumble of family life, and the injury must therefore have occurred through inappropriate handling of the child. It became apparent during that case, and I stated this in my judgment, that further research is needed on the mechanism of subdural haematomas and the degree of force required to cause them in young children and babies. That case also reinforced the importance of courts' continuing to deal with medical evidence on the basis of generally recognized medical opinion. Due weight must of course be given in individual cases to any advances in medical knowledge, but judges must take their cue from mainstream medical opinion.

Another recent case involving complex medical questions was that of *Re A*[2], decided by Bracewell *J*. That case involved a baby who was found unconscious in his cot and who later died. The cause of his death was disputed. The baby had retinal haemorrhages but no cerebral haemorrhage or any of the other signs normally associated with non-accidental injury. The local authority asserted that the retinal haemorrhages could on their own amount to proof, on the balance of probabilities, of a violent non-accidental death caused by the shaking of the baby. That view was supported by the majority of experts appointed in the case (of which there were a large number), although other experts were of the view that the cause of death could not be ascertained. Bracewell *J* concluded that the majority medical view was correct, and that the death was in fact non-accidental. When reading her judgment it is clear that she was faced with a very difficult exercise. At the beginning of her judgment she chose to highlight those difficulties in the following passage:

> 'It is undoubtedly true that the frontiers of medical science are constantly being pushed back and that the state of knowledge is increasing all the time. That is why I find that when presented with speculative theory based on an unlikely hypothetical base an expert will rarely discount it and will in effect never say never. Fanciful speculation is not an appropriate method of inquiry. What is needed and what the experts have done in this case is to piece together all the available information and look at the differential diagnosis.'

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I wish to underline the comment from Bracewell *J* that judges are best assisted by experts who provide opinions based firmly on clinical findings and recognized medical knowledge.

Research

I have referred to the need for research. On child sexual abuse there seems little prospect of obtaining better evidence from physical signs. It is rare to have clear physical evidence of vaginal penetration and, other than evidence of anal penetration, the majority of these cases rely on information given by the child or behavioural problems and similar circumstantial factors. Clearly research that provided helpful data in these areas would be gratefully received by social workers and by the courts.

The area which to my mind stands out as needing focused research—which ought to be manageable—is physical injury to children and particularly to babies. Professor H L Whitwell and her group[3,4] have lately reported important work on the neuropathology of inflicted head injury in children, and clearly this must be pursued—particularly with reference to the effect upon a baby three months or younger of shaking or other inappropriate handling and the degree of force required to cause subdural haematomas or retinal haemorrhage. More information is needed, also, on the time-scale of healing for fractures and bruising in childhood; judges and lawyers always want to put everything into a time frame with dates, so as to include or exclude suspects. Another priority area for research is cot death or sudden infant death syndrome.

Feedback

Feedback to expert witnesses might improve their performance. Inquiring into this, I consulted Wall *J*, who told me that he arranges for his judgments to be provided to the medical experts at the end of the case and recommends a debriefing letter from the solicitor who instructed the expert. This is a very interesting idea, and I propose to discuss with the Family Division judges what we should do to make sure our conclusions on the evidence of experts get back to those who gave evidence. Clearly any views we put together would also have to be supported by the circuit judges trying the majority of care cases round the country.

EXPERTS' DUTIES AND LORD WOOLF'S REPORT

The Access to Justice report

Since Lord Woolf's 1996 review of the civil justice system, *Access to Justice*[5], the manner in which expert evidence is obtained and used in civil trials has undergone a major overhaul. The report dealt in part with the rising concerns about expert witnesses, including complaints that the existing system was rife with delays, lacking in impartiality and openness, excessively adversarial, excessively costly and profligate in use of experts. One of the main aims in drafting part 35 of the new Civil Procedure Rules was to raise standards. Proceedings under the Children Act, which amongst other things covers all residence, contact and care proceedings, are covered by the Family Proceedings Rules rather than Civil Procedures Rules. However, the philosophy behind the Woolf reforms is apparent in both and I hope that when our Family Proceedings Rules are overhauled they will be wholly in tune with the Civil Procedures Rules.

The overarching principle is that total judicial control is exercised over the use of expert evidence. The judge's case-management powers apply not only to the issue of whether an expert should be appointed at all, but also to the directions to be given on the nature of the evidence required, the matters it should cover and the way it should be delivered. Where two or more experts are involved in a case, they are encouraged to meet and discuss, and to record areas of agreement and disagreement (with reasons). As a result, the need for the giving of oral evidence is much reduced. This approach ought to be normal practice in family cases with a medical element. My own experience is that, when experts come face to face, they tend to agree on more than they expected. Disagreements sometimes arise out of differences in expression, and meetings are useful in narrowing the issues in dispute.

Some specific duties of experts

Lord Woolf's report highlighted specific duties of expert witnesses. First and most important is the requirement to be impartial: experts must not be seen or see themselves as additional advocates, there to promote the case of the instructing party. Their task is to assist the court to deal with cases justly.

As part of the attempt in the Civil Procedure Rules to move away from gladiatorial matches between partial witnesses, parties are increasingly encouraged to instruct a single joint expert. Such an expert can be appointed either by agreement or by order of the court—a practice that has indeed been part of the Family Proceedings Rules for some time. These are encouraging trends: this approach not only encourages a less adversarial approach to proceedings, particularly important in family cases; it also limits the ambit and cost of expert evidence, and reduces delays.

Another important theme in the Woolf Report is the need to ensure that, in every case, we are getting the right expert for the job. Expert witnesses must be up to date in knowledge and able to draw on continuing practical experience rather than theory. Before accepting instructions, it is the responsibility of the expert to decide whether

he or she is adequately qualified to provide the opinion sought. Medical opinions given should always be well-researched and thorough. Expert witnesses must resist any urge to present without appropriate warning an opinion that is controversial in the profession. Of course, genuine disagreements will arise; but where an expert advances a hypothesis to explain an injury, he or she owes a very heavy duty to explain to the court that what is being advanced is a hypothesis, to say whether the hypothesis is widely accepted, and to place before the court all the material contradicting that hypothesis.

The foregoing comments are of relevance to experts in all types of proceedings. Yet for experts in Children Act cases, I must add a further point. Proceedings relating to children are in a special category of litigation. In most cases the court's paramount consideration is the welfare of the child, and expert witnesses must adopt the same approach. The court does not welcome partisan experts or those with a particular hobby-horse to ride.

If there is one issue that continues to attract criticism and concern, it is delay. When the Children Act was introduced, the hope was that public law cases would be dealt with in twelve weeks; by the time Dame Margaret Booth was asked to investigate delays in 1996, the average time was around forty-six weeks; and by the end of 2000 it was around fifty weeks. Both the Booth Report and a scoping study commissioned in 2000 by the Lord Chancellor's Department concluded that the use of experts is a major contributor to delay in Children Act cases, particularly where mental health experts are engaged.

Medical experts must get their reports out in the time set within the court framework or say at the beginning that it cannot be done. If the case cannot be heard as arranged, the person who suffers is the child, the most important person in the process. Of course, part of the reason our courts suffer delays where experts are needed is that the pool of experts willing and able to undertake the work is small. There is a danger in becoming over-reliant on a small number of experienced and qualified experts, whilst neglecting to encourage non-regulars to become better experienced in the requirements of giving evidence in court. I am quite concerned to ensure that more junior experts are invited to participate in proceedings and become trained in giving evidence. The President's Interdisciplinary Committee is trying to encourage more junior specialists to attend court and see how things are done. Several judges now offer 'mini-pupillage' schemes, in London and across the country, for specialist registrars: these provide an invaluable opportunity to see the court process in action and become comfortable with the legal system. I also commend the numerous witness training days run by courts around the country, which provide an opportunity to practise the skills necessary to become a good expert witness. I have been encouraging the family judges in the High Court and county court to welcome specialist registrars to give evidence in these difficult cases. It is not only senior consultants who can assist the courts.

Improving the experience of being an expert witness

Having made the duties of the expert sound rather onerous, I would like to sound a note of sincere appreciation. As judges we are sympathetic to the fact that, for the expert, participation in court proceedings can be intimidating, time-consuming, confrontational, complex and unpleasant. Not only that, but the time and effort involved is considerable. In the past, less than adequate attention has been given to making the experience as efficient and convenient for witnesses as it could have been. Efforts are being made by judges to address these issues.

Yet many doctors still see the courtroom as a hostile environment, and some perceive the purpose of cross-examination as being to impugn their professional integrity by means of a personal attack on their credibility. If I might borrow from the words of Wall *J*,

> 'The idea that appearances in court are some kind of gladiatorial combat where the naked doctor armed only with net and trident is torn to pieces by the legal lions waving machetes whilst the judge smilingly gives the thumbs down—these ideas ought to have gone'[6].

As judges it is our duty to ensure that cross-examination does not get out of hand, and that all witnesses (including experts) are treated fairly and with respect. Overly ferocious cross-examination by counsel is not viewed well and does not necessarily do a party's counsel any good. I would hope that the judiciary as a whole is becoming increasingly vigilant about control of proceedings, and that the gladiatorial style is becoming less and less common.

Some recent publications are very helpful in clarifying the responsibilities of being an expert witness. The Expert Witness Working Party in December last year produced a *Code of Guidance on Expert Evidence*[7]. A code of guidance has also been produced by the Academy of Experts. In relation to child proceedings there is good advice in the *Handbook of Expert Witnesses in Children Act Cases*[6] written by Mr Justice Wall, an experienced Family Division judge. The *Handbook* is down-to-earth, practical and witness-friendly; it answers many of the questions that arise from operation of the new scheme, including how to obtain your fee.

In closing, I return to my point that expert medical witnesses are a crucial resource. Without them, we could not do our job. I hope that recent developments have

allayed some of the concerns about this work, and that the coming years will see many more in the medical profession offering their skills to the courts.

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