

# ARCHIVES OF DISEASE IN CHILDHOOD

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## Annotations

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### Judicial attitudes to expert evidence in children's cases

The purpose of this article is firstly to explain the approach of the Family Division<sup>1</sup> to expert evidence in children's cases and secondly to discuss the professional and practical implications of that approach for the expert witness.

Expert evidence is frequently of critical importance in proceedings relating to children, and there are cases in which it is determinative. Given the importance of the outcome of court proceedings for the child, and bearing in mind that judges have no medical training or specialist medical expertise, the dependence of the court on the skill, knowledge, and above all the professional and intellectual integrity of the expert witness cannot be overemphasised.

The ethos of the Children Act 1989 has led since its implementation in October 1991 to a substantial volume of judge made law on the subject of expert evidence. There is not space to examine it all in this article.<sup>2</sup> What I hope to achieve is to explain the underlying judicial thinking, and to set out the practical framework within which we expect experts to operate.

#### Basic propositions

Three propositions underpin the approach of the Family Division to expert evidence. The first is that civil proceedings relating to children are confidential.<sup>3</sup> The second is that such proceedings are non-adversarial,<sup>4</sup> and the third is that the court has a duty imposed upon it by the Children Act to avoid delay<sup>5</sup> and to be proactive in timetabling cases so that they are heard without delay.<sup>6</sup>

#### Confidentiality of the proceedings

The fact that the proceedings are confidential means that the court papers in any case can only be shown to an expert with the permission of the court.<sup>7</sup> The court thus assumes a proactive role in deciding what expert evidence may be called, the issues to which it should be directed, and by whom experts may be instructed. The advocate who asks for permission to instruct an expert must satisfy the court of the need for expert evidence of the type sought; and since the court is also likely to be timetabling the case when it considers the question of expert evidence, advocates are encouraged both to identify and consult the expert concerned at the earliest possible stage in the case to ensure that he or she will be able to undertake the work within the time scale likely to be allotted by the court.

#### Non-adversarial nature of the proceedings

The phrase 'non-adversarial' is sometimes misunderstood.

It does not mean that difficult issues of fact which have to be resolved by rigorous investigation and detailed cross examination do not arise in proceedings relating to children. What it means is that the welfare of the child is the court's paramount consideration and that the duty of the court is to reach a decision which is in the best interests of the child concerned, as opposed to a result which favours a particular party to the proceedings.<sup>8</sup>

The fact that the proceedings are non-adversarial is of particular importance for the expert witness because what is known in other branches of the law as 'litigation privilege' does not apply in family proceedings.<sup>9</sup> In other words, a party who obtains the leave of the court to commission a report from an expert cannot refuse to disclose that report to the other parties and to the court. Thus, whatever the expert's opinion, it will be read by the judge, even if it is contrary to the interests of the party who commissioned the report.

The importance of the disapplication of litigation privilege cannot be overemphasised. The thinking behind it is, of course, straightforward. As Butler-Sloss L J said in a recent case: 'when dealing with children, the court needs all the help it can get'.<sup>10</sup> If one of the parties has a report from an expert which that party could refuse to disclose, the judge would be deprived of important information.

The consequence for expert witnesses of the disapplication of litigation privilege is that their primary duty to the child and to the court is emphasised. Whatever the source of the instructions, the witness is reporting to the court in order to assist the court to reach a decision which is in the best interests of the child. The primary duty is not owed to the party commissioning the report. Indeed, in cases in which the party who has commissioned the report chooses not to rely upon it, an expert may be called by one of the other parties, or by the court.<sup>11</sup> Expert witnesses are thus given the freedom to write wholly objective reports—and are expected by the judges to do so—in the certain knowledge that their opinions will be made known to the judge in any event and, of course, shown to and discussed with their colleagues.

#### Practical consequences of the non-adversarial approach: assembling expert evidence

A further practical consequence of the non-adversarial approach is that the preparation and presentation of expert evidence in children's proceedings in the Family Division

is, or ought to be, a cooperative exercise between the lawyers for the different parties and the doctors. In particular, the experts will not only be encouraged to meet in order to identify areas of agreement and disagreement; it may well be a condition of their appointment that they do so.<sup>12</sup> If logistics prevent face to face meetings, then telephone calls and exchanges of correspondence by fax are encouraged. The whole objective is to define and if possible to limit the issues upon which the court has to adjudicate. In some cases the areas of medical disagreement may prove to be either non-existent or so limited that it becomes unnecessary for any of the experts to attend to give evidence. In other cases, identification of the areas of agreement and disagreement greatly assists the court to focus on the precise issues in the case which it has to determine.

### Instructing the expert

The courts have also laid down guidelines for the way expert witnesses should be instructed.<sup>13</sup> It is, of course, essential that medical experts asked to give reports or opinions in child cases are fully instructed. The letter of instruction should always set out the context in which the expert's opinion is sought and define carefully the specific questions the expert is being asked to address. Careful thought should be given by the commissioning solicitor to the selection of the papers to be sent to the expert with the letter of instruction, and the letter of instruction should always list the documents that are sent.<sup>14</sup> No doctor wishes to have to spend valuable time reading through papers that are irrelevant to the opinion which he or she is being asked to give. On the other hand, a doctor who ventures an opinion on inadequate material is taking a substantial risk that his or her opinion may be unsound.

Expert witnesses should not hesitate to request further information and ask for additional documentation. Relevant information and documentation should always be made available. Thus, for example, doctors who have had clinical experience of the child or children outside the immediate ambit of the litigation (for example a paediatrician who has examined or treated a child before proceedings being taken) should carefully review their notes before writing a court report and ensure that all their clinical material is available for inspection by the court and by other experts called upon to advise in the case.

### Keeping the expert witness up to date

Experts who are going to be called to give evidence at the trial must be kept up to date with developments in the case relevant to their opinions. There is nothing more embarrassing for an expert (as well as time wasting in court) than to be confronted with a document or piece of evidence with which he or she has not previously been supplied, which he or she needs time to consider, and which may vitiate the opinion previously expressed in writing.

### Timetabling the expert witness

Finally, but importantly, judges have been at pains to try to impress on the legal profession that practical arrangements should always be made to ensure that where the attendance of experts is required at court, the oral evidence of expert witnesses is properly timetabled. It is my experience that in the past the legal profession often treated the convenience of expert witnesses with a casualness that was uncondusive to any concept of mutual cooperation and that was likely to reinforce the reluctance which many expert witnesses have about giving evidence in court. Even now, the legal system sometimes simply does not take note of the fact that expert

witnesses are busy people with many professional calls upon their time, and that giving evidence in court is both time consuming and takes the expert away from other important professional commitments.

Not only, therefore, should experts not be kept waiting when they come to court (in the Family Division judges usually ensure that this does not occur by interposing the expert witness where necessary) but more importantly, the time set aside for their evidence should be discussed among the lawyers for the different parties in advance of trial and carefully estimated so that the expert witness is given an allotted time and is not required to return on another occasion to complete his or her evidence.

### The expert in court: perceptions and experience

It is very much to be hoped that the procedures set out above assist experts in preparing reports, and also take into account the pressures on their time. However, actually giving evidence in court is still perceived by some as an unpleasant experience due, in large measure, to the belief that cross examination is designed not to examine issues but to mount a personal attack on the expert's credibility.

In proceedings involving children in the Family Division, I do not believe this to be the case. As I have already said, judges have no expert knowledge on medical issues. It is therefore axiomatic that the doctor will know more about the subject on which he or she is giving evidence than anyone else in court. Of course medical opinions must be sound, balanced, objective, fair, and well researched: and of course if doctors have made mistakes or come to conclusions which cannot be justified by the evidence they must expect their evidence to be rigorously tested; but in my experience as both advocate and judge, experts are treated with courtesy and respect by judges of the Family Division, and I hope that in our courts cross examination which is hostile, discourteous, or personal is simply not permitted.

### Footnote

I am conscious that this article is about the guidelines which have been set and about what should be happening. Practice may not always live up to the ideal. But if this is the case, the expert should speak up. Judges want to know if good practice is not being observed. Each circuit in England and Wales has a High Court Family Division liaison judge, one of whose functions is to promote multidisciplinary cooperation on circuit. If an expert has any suggestions to make about the way in which interdisciplinary cooperation can be improved, or any complaint about the way in which he or she has been treated, either by the court or by the legal profession, or if there is a perception that the rules and guidelines set out in this article are not being followed then the obvious person to approach is the Family Division liaison judge for the relevant circuit.<sup>15</sup> Expert evidence in the Family Division is vital for the well being of the children who are the subject of the proceedings: multidisciplinary debate about how we can maximise the quality of that evidence and focus it more clearly on relevant issues is itself also extremely important.

I therefore hope that this article goes some way to reassuring the medical profession that so far as expert evidence is concerned, the judiciary is alert to its importance and is endeavouring to facilitate its use in family proceedings by means of user friendly rules of practice and procedure.<sup>16</sup>

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- 1 The Family Division of the High Court exercises jurisdiction in family proceedings in England and Wales. A broadly similar jurisdiction is exercised under the Children Act in care proceedings and in private law disputes between parents by county courts and family proceedings courts. It should be emphasised that this article is about civil, not criminal, proceedings in which the burden of proof is different and the practice which I describe does not apply.
- 2 The most recent example is the acknowledgment by the Court of Appeal that paediatricians and child psychiatrists are entitled in family proceedings to express opinions on child abuse which are based on or take into account the expert's assessment of the child's truthfulness: see *Re M and R (Child Abuse: Evidence)* [1996] 2 FLR 195, CA. Equally, I do not have space to address the duties of experts generally, as to which there is agreement across all the divisions of the High Court 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. In *Re J* [1991] FCR 191 at 226/7, Cazalet J said that in children's cases the duty to be objective and not to mislead is as vital as in any case, because the child's welfare is at stake, and his/her interests are paramount. He added that an absence of objectivity may result in a child being wrongly placed and thereby unnecessarily at risk. It must also be borne in mind that a misleading opinion from an expert may well inhibit a proper assessment of a particular case by the non-medical professional advisers and may also lead parties, and in particular parents, to false views and hopes.
- 3 By section 12 of the Administration of Justice Act 1960, as amended by Schedule 13, para 14 of the Children Act 1989, it is a contempt of court to publish information relating to proceedings brought (inter alia) under the Children Act.
- 4 *Oxfordshire County Council v M* [1994] Fam 151, CA: *Re L (A Minor) (Police Investigation)* [1996] 2 WLR 395, HL.
- 5 By section 1(2) the court is required to have regard to the general principle that any delay in determining questions relating to the upbringing of children is likely to prejudice their welfare.
- 6 *Children Act 1989*, ss 11 (private law proceedings) and 32 (public law).
- 7 Family Proceedings Rules, 1991 r.4.18 and 4.23.
- 8 As HH Judge Wilson put it in *Oxfordshire County Council v M* [1994] Fam 151 at 158: '...the court is concerned from beginning to end and overwhelmingly with doing everything possible to come to the right conclusion for the future of the child with which the court is concerned. The game of adversarial litigation has no point when one is trying to deal with fragile and vulnerable people like small children. Every other consideration must come second to the need to reach the right conclusion if possible'.
- 9 *Re L (A Minor) (Police Investigation)* [1996] 2 WLR 395, HL. Heroin addict parents obtained the leave of the court to show the papers to a consultant chemical pathologist with a view to demonstrating that their 2 year old could have ingested a substantial quantity of methadone accidentally. The report was adverse, but had to be disclosed.
- 10 *Director of Public Prosecutions v A and BC Chewing Gum Ltd* [1968] 1 QB 159, 165A, cited by Butler-Sloss LJ in *Re M and R (Child Abuse: Evidence)* [1996] 2 FLR 195, 205H.
- 11 See *Re DH (A Minor) (Care Proceedings: Evidence and Orders)* [1994] 2 FCR 3 at 43.
- 12 In *Re CS (Expert Witnesses)* [1996] 2 FLR 115, Bracewell J held that it should be a condition of appointment of any expert that he be required to hold discussions with other experts instructed in the same field of expertise in advance of the hearing in order to identify areas of agreement and dispute, which should be incorporated into a schedule for the court.
- 13 For example *Re M (Minors) (Care Proceedings) (Child's Wishes)* [1994] 1 FLR 749.
- 14 Because of the disapplication of litigation privilege, the letter of instruction is not a privileged document and is invariably disclosed to the court and to the other parties.
- 15 The Family Division Liaison Judges are: Midland and Oxford Circuit Mr Justice Stuart-White; North Eastern Circuit Mr Justice Singer; Northern Circuit Mr Justice Wall; South Eastern Circuit Mr Justice Cazalet; Wales and Chester Circuit Mr Justice Connell; Western Circuit Mr Justice Holman; Family Division of the High Court Mrs Justice Hale. All are based at the Royal Courts of Justice, Strand, London, WC2A 2LL.
- 16 'The law of evidence should not be subtle and difficult to understand. And fine distinctions should be only tolerated if both unavoidable and user friendly—ie easy to make'. *Re M and R (Child Abuse: Evidence)* [1996] 2 FLR 195, 211 per Butler-Sloss LJ.

## Qualitative research methods in interventions in injury

### Not everything that counts can be counted

Injury is the major cause of death in childhood in the UK and other industrialised nations.<sup>1</sup> Moreover injury makes a considerable contribution to short and long term morbidity in children, and fear of injury to their children is one of many contributors to anxiety in parents. Injury is costly both to the NHS, and to the children and families concerned, and while there have been considerable advances in secondary and tertiary care in this area, injury prevention in childhood remains largely unevaluated in terms of its effectiveness.<sup>2</sup> In other words, we know very little about what works in reducing child accidents. The majority of meaningful data we have on injuries in children are based on the sequelae of accidents. What was the injury? What were the consequences? What was the treatment? Data like these, while important, are unlikely to generate the kinds of information we need to prevent accidents.

In order to develop effective interventions for the prevention of injury to children, we need a better understanding of the antecedents of accidents, the environments in which injuries are produced, and the behaviours—of planners, architects, drivers and others, as well as of children and parents—which make accidents more likely.

Some of the work needed to do this will be quantitative, and recent studies in paediatric epidemiology usefully address issues such as exposure to risk, and meaningful denominators.<sup>3,4</sup> But not everything that counts can be counted. A good deal of data are needed in order to develop and maintain effective interventions in child injury prevention, which can only be collected through careful qualitative investigation.

The preferred medical term in this area is 'injury' rather than 'accident', however, for the purposes of this note, the

term accident is preferred. This is because it is both more meaningful to children and parents, and because it encompasses those events that do not necessarily result in an injury brought to the attention of the medical profession, but which involve risk and danger. Not all accidents or unsafe behaviours result in injury, even if the sequence of events is similar. While in potentially high risk activities such as aviation and anaesthetics, data are collected on averted accidents, and used in the prevention of future disasters, we are less inclined to do this on a systematic basis for child accidents (though every child and parent uses this empirical method themselves).

### The need for qualitative data in effective injury prevention

The relationship between qualitative and quantitative research is not dichotomous, though it is sometimes presented as such, with qualitative data characterised as 'soft'; quantitative data as 'hard'; qualitative data as anecdotal; and quantitative as reliable and 'scientific'. An over-reverent approach to quantitative data supports the empiricist fallacy that figures are simply given objective facts, a proper understanding of which leads to one 'correct' conclusion and one conclusion only.<sup>5</sup> The suggestion that quantitative methods are reliable but not valid, while qualitative methods are valid but not reliable overstates the case, but the lack of 'fit' between the prevention messages and the realities of keeping children safe underlie the need for an approach that combines the best of qualitative with sound quantitative methods. Without an understanding of the lives and lay expertise of those on the receiving end of our well meaning efforts, we risk ineffective, or worse, intrusive and harmful interventions, which may, for instance, raise the level of anxiety about risk while doing nothing to reduce the risk itself. A recently