



## **The Role of Experts in Care Proceedings**

Experts are appointed by the court to provide evidence for use in family proceedings and assist the court in making decisions on matters within their expertise. Experts operate within the framework of the Family Procedure Rules (FPR) and they have an overriding duty to the court to provide objective and independent advice that conforms to the best practice of their profession.

In cases with suspected abuse, medical experts may be instructed to give a view on whether injuries to the child are likely to be accidental or deliberate.

The Children and Families Act 2014 introduced a change to the threshold for permission to put expert evidence before the court from 'reasonably required' to 'necessary' to resolve the case justly.

The Court will not grant permission for the instruction of an expert unless this test is met and will consider:-

- a) whether the evidence could be provided by another source, such as one of the parties or professionals already involved in the case;
- b) the issues to be addressed by the expert evidence and the questions to be put to the expert; and
- c) the cost and impact on the court timetable of obtaining the evidence.

## **Letters of Instruction**

When experts are appointed, a Letter of Instruction is written that outlines the questions that the expert is asked to address for the court. The instructions are written and agreed by the solicitors of all parties involved in the proceedings and the court. This instruction is, therefore, referred to as a joint instruction.

Experts should not step outside of their areas of expertise and must not offer opinions on areas that are not within their remit or specialism. They must also not stray into the duties of the court by pre-empting or providing advice regarding the outcome of the proceedings.

If a case involves a multi-disciplinary analysis of medical information carried out by a group of experts with different specialisms, the court must be careful to ensure that each expert keeps within the bounds of their own expertise and defer to other experts where appropriate.

## **The Role of the Court Appointed Expert and/or Treating Professionals**

It is important to understand the difference between a professional with expertise who examines and treats a child (ie. a community paediatrician who conducts a Child Protection Medical when injuries are first noticed or a psychologist who is providing therapeutic treatment to a patient) and an 'expert witness' in court proceedings.

The medical professionals treating a child or recording injuries are not 'expert witnesses' as far as the court is concerned. They are experienced and knowledgeable, but they are witnesses of fact, not expert witnesses.

This means that the court will be interested in what they saw and recorded, and what they can tell the court about what the family said or did at the time of the examination and the opinion they formed on the information available at the time.

Their record of what injuries look like at the time a child is presented to hospital is really important and is often the evidence on which the local authority relies when making an application to court in the first instance.

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The task of the community paediatrician asked to carry out a child protection medical is to do an initial assessment to see whether there is any reason to be worried about inflicted injuries or if any treatment, scan or testing is required. However, that often has to be carried out with incomplete information so an initial view may be open to challenge.

In contrast, an expert appointed in court proceedings will be given all the necessary information and will have time to work through and consider all the material before giving their opinion with full analysis.

The difference between the roles of the treating team and the expert witness can be thought of in this way:-

- a) the treating team is asked to answer the questions
  - Is there anything to be worried about?
  - Is there anything further we need to do now?
  - Does the child need treatment?
  
- b) the expert witness however is trying to answer a different question:
  - On the basis of all the material you have, what is your expert opinion about how (and when) these injuries were caused or might have been caused?

Within court proceedings it is also possible to ask written questions or to hear oral evidence of a treating professional, such as a paediatrician, about points of clarification around the facts of the case and the clinical opinion that they came to with the facts available to them at the time. The treating paediatrician must remain within their expertise. This is distinct from being instructed as an expert to provide an opinion on the medical issues.

Ultimately, the treating doctor is a witness of fact and is not called to give an expert opinion beyond an explanation of their diagnosis and treatment and generally the work they have done in the case.

### **Requests for Further Information or Challenging an Expert**

Upon receipt of an experts' report, any party to the proceedings may ask further written questions of the expert. The questions must be proportionate, and they must be aimed at clarifying something in the report that isn't already clear or further information that has come to light since the filing of their report. Any questions sent to the expert this way must be copied to all the other parties when sent.

Where several experts have been instructed, it is also possible to arrange an Experts Meeting, whereby all the experts involved in the case are able to discuss their respective findings with the solicitors for the parties to the case and clarification sought in relation to issues raised.

A party may challenge an expert's report by asking for them to come to court and give evidence and to answer questions on their report in person (cross examination) during a Finding of Fact hearing or at a Final Hearing.

Questions asked of an expert in cross examination might be aimed at showing that the expert has not had, understood or read all the relevant information and that this may have affected their opinion or recommendations or considered all options available before formulating their conclusions.

Permission may be granted by the court for an expert assessment to be disclosed to an appropriate health professional, but this is only for the purposes of obtaining health care or counselling for a child or party to the proceedings. This cannot be disclosed for the purposes of seeking an alternative experts' opinion.

### **The Finding of Fact / Final Hearing**

Findings of Fact must be based on evidence, not speculation. The judge is not allowed 'to sit on the fence' and has to find for one party or the other. The court has to find on the balance of probabilities.

If, following the conclusion of a Fact Finding Hearing in relation to a single issue case that involves an injury to a child, the court determines that it is unable to make findings as to the cause of the injury, the local authority cannot rely on the injury as part of the threshold on which it is asking the court to find significant harm.

The local authority will then need to give urgent consideration as to the merits of its case based on the evidence before the court and may need to withdraw its application.

If, however, it is not a single issue, there may be other limbs that continue to meet the threshold test of significant harm and the case will proceed to Final Hearing.

### **Challenging the Outcome of a Court Hearing**

Challenges to court decisions can only be made by way of appeal. The grounds for appeal are:-

- a) The law was not applied correctly by the Judge
- b) The Judge didn't follow the correct procedure
- c) There is a strong reason to demonstrate the decision was wrong or unfair

You cannot appeal a court decision just because you do not agree with it.

An appeal can only be brought by a person with legal standing (*locus standi*), ie. a party to proceedings.