

Introduction

Several high-profile criminal cases, such as those of Sally Clark, Angela Cannings, Trupti Patel and Donna Anthony – all wrongly convicted of the murder of their children on the basis of flawed expert evidence – have raised serious questions about the use, nature and quality of expert evidence in such cases. As well as the injustice and suffering inflicted on innocent families, the publicity surrounding these cases has seriously undermined public confidence in the criminal justice system. Further, this publicity has deterred suitably qualified clinicians, already in short supply, from acting as expert witnesses. In the wake of these cases, the government commissioned the Chief Medical Officer, Sir Liam Donaldson, to produce proposals for the reform of expert evidence in family law cases more generally.

Such reform was long overdue since there were already serious concerns about unacceptable delays in cases where experts were instructed. These delays were attributed partly to a significant increase in the number of experts being instructed, their limited availability for hearings and the late submission of reports to the court. Such issues are addressed in the Report from Sir Liam Donaldson on this issue, which concentrates on public law proceedings in Children Act cases and makes 16 proposals for reform. As the Report makes clear, the issues raised are relevant to medical evidence in both criminal and Children Act cases.

Research cited in the report shows that there have been surprisingly few instances in family law cases where the evidence of expert witnesses has been disputed. The Minister for Children had required local authorities to review cases of children who were the subject of care proceedings where certain expert evidence was likely to have had a significant bearing upon the decisions of the courts. Of 150 local authorities surveyed, 130 responded and the results showed that in only 47 out of 5,175 cases was the evidence of the medical experts in dispute.

The Current System

In public law family cases generally, the term 'expert' is not restricted to doctors, but covers other specialists including social workers. However, the Report restricts the term to qualified doctors:

The term 'medical expert witness' describes a qualified doctor who produces a report for the courts ... and may then appear as an expert witness in court ...

Medical experts may undertake assessments of evidence or of people, including children, and provide explanations for medical conditions and behaviour.

(Department of Health 2006: para 2.3)

Medical expert witnesses appear in criminal cases and in non-family civil proceedings as well as in family cases. In the particular cases under consideration – public law family cases – proceedings are brought under s 31 of the Children Act 1989 where the court is required to consider the welfare of one or more children who may be at risk. In the first instance, the court has a duty to consider the 'threshold test': whether the child in question is suffering or is likely to suffer from significant harm. If that test is satisfied the court must then consider whether it is necessary to make an appropriate care or supervision order. This is referred to as 'the disposal stage'. Medical experts may be involved in these court processes, but not all appear as 'expert witnesses' in the specific sense used in the report.

Medical professionals may also appear as a 'witness of fact' in a court case, 'in other words, as the doctor who treated or is treating the individual concerned' (Department of Health 2006: para 2.2). As the report makes clear, providing an opinion on the cause of the illness is 'part of the role of the treating clinician' (Department of Health 2006: para 2.2). It is for this reason that these cases do not require the presence of any additional expert witnesses. The sources of funding of the two types of medical professional are different. A witness of fact carries out his role in the course of his normal duties and is not paid any additional remuneration. In contrast, medical expert witnesses are paid a fee

which is met by the parties to the proceedings or, more usually, because most cases are publicly funded, their fees are a cost borne by the public purse.

Proposals for Reform of the Current System

The Report's main proposal is that expert evidence in public law family cases should be provided by NHS organisations as a public service. NHS organisations are referred to as NHS Trusts, Foundation Trusts and Primary Care Trusts. There should be expert teams of clinicians. Various suggestions are made as to the appropriate membership of these expert teams, though the report is not prescriptive in this respect: team members might come from one discipline or from multidisciplinary backgrounds, from a single NHS organisation or from a few adjoining ones, and recently retired experts might be appointed.

The main contract for the provision of expert evidence to the court would be with the NHS organisation. However, with the approval of the judge or magistrate, an individual expert could be appointed. Team leadership would be allocated to the person with the expertise most relevant to the subject matter of the report. That person would decide who should write the report and give evidence in court. The cost of the service to the NHS should be fully met on the basis of a service level agreement. It is suggested that an existing organisation, with experience of this field of work, should be made responsible for commissioning medical expert witness reports. The four organisations mentioned as candidates for such commissioning work are the Children and Family Court Advisory and Support Service (CAFCASS), Her Majesty's Court Service (HMCS), the Legal Services Commission (LSC) and NHS Primary Care Trusts. The Report invites comments from these bodies.

The Report further suggests that the quality of instruction to expert witnesses is in need of improvement and that there should be consultation between the legal profession and the medical profession as to how this can be achieved. The training of experts is also regarded as important and it is argued that medical students should be taught about court procedure and the work of medical experts in child protection cases as a part of their education. In addition, there should be links between the local legal profession and the expert teams so that they can assist each other with training and all medical expert witnesses should be accredited.

The General Medical Council would be required to issue guidance to its members on recent developments and issues in expert evidence and it should review the way in which complaints are dealt with in relation to medical experts and ensure that, if appropriate, appeals can be made through the courts.

To enable them to evaluate the credentials of potential experts, the advocates and judiciary in each case should be provided with a checklist of questions designed to ensure a searching examination of the skills and experience of 'experts'. Such a checklist would include questions on the following matters: their level of expertise in the subject on which they are testifying; whether their views are widely held by colleagues and peers; when they last saw such a case in their own clinical practice; whether they are a member of their Royal College or professional organisation; whether they have had any recent training as an expert witness; whether they have appeared in court before, and; whether they are being helped or supervised by someone else in this work.

Lastly, a National Knowledge Service would be established. This would support the work of the medical expert witness program. This body would not provide advice on particular cases, but on the state of scientific knowledge generally in the subject area in question. It would also make recommendations for future research where gaps in scientific knowledge are identified.

There are already a few NHS Trusts where teams of expert witnesses have been established to deal with work for the family courts. One of these is a child psychiatry team at Great Ormond Street Hospital, currently led by Dr Danya Glaser, a consultant paediatric psychiatrist and a renowned expert in her field. The team is multidisciplinary, containing one psychiatrist, one specialist registrar

who is a child psychiatrist in training, two child psychotherapists and two child psychologists. For some cases, when deemed necessary, a social worker is involved. After receiving instruction, two members of the team carry out the assessment and become co-signatories to the assessment report, but only one of them goes to court unless there are exceptional circumstances. In addition to the professional training received by members of the team, in-house training is provided. This training covers relevant law, giving evidence in court and the preparation of reports.

Evaluation of Proposals

Public Confidence

The strength of the proposals depends upon their ability to overcome the problems identified within the current system. The Report considers that the main problem is one of supply rather than quality. Nevertheless, the issue of public confidence was foremost in the minds of the politicians. It is therefore necessary to ensure that the public have faith in the ability of experts to give credible evidence that is within their area of expertise.

A sensible step towards ensuring that this happens is the proposal to confirm an expert's credentials by use of a checklist. The existence of such a checklist, with a requirement to use it, should help to overcome any tendency to blindly accept that the 'expert' status of a witness necessarily implies that their evidence is compelling in the context of the particular case. Public confidence requires that the courts draw a clear distinction between an expert who is putting forward an established opinion, one which has been tested and respected by a wide range of practitioners, and an expert who is advancing a novel view which he, himself, has formulated. The latter may, in time, become an established view, but it would be wise, until then, to approach it with greater caution.

Towards a Statutory Test?

Although the checklist is a good starting point, the Report should perhaps have proposed a statutory requirement for the courts to critically examine the reliability of the expert's evidence. In the United States, for example, the court acts as a gatekeeper with regards to the admissibility of all expert evidence, a role established by the Supreme Court in the case of *Daubert v Merrell Dow Pharmaceuticals Inc.* 509 U.S. 579 (1993). The evidence must be both relevant to the facts of the case and it must be reliable. Factors to be considered in relation to reliability include the following:

Can the theory or technique be, or has it been, empirically tested?
Has the evidence been subject to peer review or publication?
What is the potential or known error rate?
Does the evidence have widespread acceptance within the scientific community?

The *Daubert* test initially applied only to scientific expert evidence, but since the case of *Kumho Tire Co v Carmichael*, 526 U.S. 137 (1999) it has been extended to other types of expert evidence.

However, the adoption of this test is controversial. Critics have expressed concern about the ability of judges to evaluate scientific evidence. They suggest that this has led to arbitrary and inconsistent decisions about admissibility, where evidence admitted by one judge may be dismissed by another. There has, however, been support for the test amongst those who administer it. In a survey of 400 American state trial court judges (Gatowski *et al.* 2001) the test was viewed positively, with 55% of respondents believing that it had a great deal of value in aiding their judgments. Another 39% felt that it had some value, although concerns were expressed that the test was 'not precise or specific enough to be truly helpful'. Additionally, 91% of respondents felt that the role of gatekeeper

was an appropriate one for a judge; it is 'what judges do', and 'a necessary role'. The 9% who felt that the gatekeeping role was not appropriate expressed concerns about 'a lack of scientific training' making their role 'difficult' and 'untenable'. (Gatowski 2001: 443).

The positive views expressed are obviously encouraging, but the negative comments cannot be dismissed out of hand. The main objection to the test appears to be that it requires judges to make assessments beyond their normal remit. However, there are cases in which judges have already been called upon to determine similar issues. In English tort law, particularly in cases concerning an alleged breach of a duty of care by doctors, judges may be called on to make this type of decision. In *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 583, McNair J, in a direction to the jury on the standard of competence required of a doctor or another person professing to be an expert, stated that he would not be guilty of negligence if:

... he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.

(McNair: 587)

In *Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771, it was accepted that the court could still reject such a body of opinion if the trial judge thought that it was unreasonable:

... the court has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such opinion has a logical basis. In particular, in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter. (Browne-Wilkinson HL: 779) Lord Browne-Wilkinson makes it clear (at p 772) that in 'the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion'. However, this decision accepts that an evaluation of the opinions of experts is an integral part of the judicial role.

Training

Some of the objections to the idea of judges acting as gatekeepers could be overcome by taking the further step of ensuring that judges receive some scientific training. The House of Commons Science and Technology Committee (House of Commons Science & Technology Committee 2004-05) recommends that all judges should receive an annual update of scientific developments relevant to the work of the court in which they sit. The Vice-President of the Forensic Science Society, Dr Ann Priston, goes further and suggests that lawyers at all levels should receive training in forensic science, to give them the confidence and knowledge to adequately challenge the evidence of expert witnesses. (House of Commons Science & Technology Committee 2004-05: 78). The Report takes this on board to an extent by suggesting that the expert teams will form a focus for training activities and that links should be developed with local judges and lawyers. Nevertheless, although the Report proposes that the knowledge and skills needed in court settings should be taught to medical students, it makes no recommendation to the Law Society and Bar Council that trainee lawyers should receive appropriate scientific training to enable them to deal with expert witnesses. This is a regrettable omission, given the lessons of past cases. For example, in the trial of Sally Clark, Professor Sir Roy Meadow famously argued that the chances of two children from an affluent middle class family dying from natural causes was one in 73 million, a figure which undoubtedly influenced the jury's guilty verdict. He arrived at this statistic by squaring the figure for one child dying from natural causes, which he alleged was one in 8,543. The Royal Statistical Society and other experts have since stated

that the true figure in the case of cot death is nearer to one in 200. Surprisingly, these seemingly inaccurate figures were not questioned by Mrs Clark's defence counsel in her original trial and it was only after a second appeal, on the grounds of non-disclosure of material evidence to the defence, that Mrs Clark's conviction was quashed.

Professor Meadow's discredited evidence resulted in the Fitness to Practice Panel of the General Medical Council finding him guilty of serious professional misconduct and he was struck off the medical register. His appeal to the High Court (*Meadow v GMC* [2006], EWHC 146 (Admin)) was successful. The High Court held that expert witnesses who act in good faith should be immune from disciplinary action by their regulatory body. The Court of Appeal (*Meadow v GMC* [2006], EWCA Civ 1390) upheld the High Court's ruling that he was not guilty of professional misconduct, but overturned the ruling that expert witnesses should be immune from disciplinary action by their professional body, thus finding a balance between the need to protect the expert who gives evidence in good faith and the need to protect the public from potential miscarriages of justice. However, the lawyers in the case escaped relatively unscathed. This is something that the House of Commons Science and Technology Committee criticise: Expert witnesses have been penalised far more publicly than the judge or lawyers in cases where expert evidence has been called into question. These cases represent a *systems* failure. Focusing criticism on the expert has a detrimental effect on the willingness of other experts to serve as witnesses and detracts attention from the flaws in the court process and legal systems which, if addressed, could help to prevent future miscarriages of justice. (House of Commons Science & Technology Committee 2004–05: 75).

If issues of supply are related to the inequality in the treatment of lawyers and expert witnesses, this is significant in the context of the issues identified by the Report. Expert witnesses should not be exempt from criticism or immune from litigation. However, given the difficulties of supply, it is equally important that expert witnesses are not portrayed as the sole wrongdoers in these tragic situations.

Supply

The content of the Report itself does not cast significant shadows over the Court of Appeal decision in the Roy Meadow case. Although fear of litigation is one factor preventing doctors from acting as expert witnesses, it is not the predominant reason. A survey of paediatricians, psychiatrists and psychologists commissioned alongside the Report looks at their experience and attitudes to the work of the medical expert witness. Of the initial 997 respondents, 80% had never acted. After initial screening, 358 surveys were completed and returned, though the Report does not indicate how many of these had acted as expert witnesses and how many had not. However, table 3 (Department of Health 2006: para 3.1) cites reasons given by 177 respondents for never having acted as an expert witness. The most important reason, given by 84 respondents, was that they had 'never been asked'. The second most important reason, given by 39 respondents, was that they 'didn't feel qualified'. The next four most important reasons given were: (1) the experience was 'too stressful'; (2) the 'adversarial procedure of the courts is intimidating/off putting'; (3) there was 'no time to do it'; and (4) 'I don't know how the courts operate'. Less commonly, fear of 'adverse publicity' and 'fear of referral to the GMC' were then cited, though each of these was cited by less than 10 respondents. Other less common responses included uncertainty about the 'evidential base' and uncertainty about 'how to write a report'. Those responses again point to a feeling of being unqualified (the second ranked response), though this feeling here perhaps relates only to a specific facet of the role rather than the role itself. When combined with the fears of court procedure that emerged, there does seem to be a strong case for training potential expert witnesses in what the role entails.

The respondents were then asked what would make them willing to act. A large number (though no actual figures are given) highlighted the importance of training and the need for support from their peers. It is notable that, of the 25 doctors in the survey who had given up work as expert witnesses, in addition to lack of time and other unspecified reasons, the third and fourth most common responses for stopping the work were that the work was too stressful and that the adversarial process in the courts was intimidating or off-putting. It could be argued that the training of expert witnesses, both initial and ongoing, would help to diminish this problem. A greater understanding of how the courts work might also make the process less intimidating. This is particularly true in respect of the adversarial procedure. However, this research does not elaborate on the exact causes of the stress felt by the experts who responded. If stress was linked to the experience of having to go to court, training might help the issue, but without further information on this point it is not possible to be sure.

Similarly, and with the same caveat, the idea of experts working as part of a team might prove valuable. Although an expert may still write the report on his own, or with a colleague, and attend court on his own, the team structure would prevent this being a purely singular experience. The Report refers to interviews with members of existing teams (Department of Health, 2006: paras 4.6–4.8), which emphasised the mentoring role of the teams in helping more junior members to gain experience. It was also made clear that there was collective responsibility for the work produced, with knowledge pooled to ensure the quality of the outcome. The Report suggests a move towards such collective responsibility (Department of Health 2006: para 4.7), although it is suggested that one individual, selected by the leader of the team, write the report and be called upon to give oral evidence if it should be required. This group structure could help the expert to feel more supported in a court environment, even if he is there alone, since he will have the confidence and the knowledge that the other group members agree with the conclusions.

The proposal to base these teams within the NHS should help to address the issue of supply, which was considered the most significant problem. The Report suggests that, 'any recommendations for increasing the supply of medical expert witnesses to the family courts should focus on the major source of potential supply, which is the NHS' (Department of Health 2006: para 4.2). This conclusion appears to be justified. Those within the NHS will, almost necessarily, have a far greater number of contacts within the medical profession than any solicitor who is trying to find an expert witness. This should ensure that teams are maintained at full strength, increasing the likelihood that lawyers seeking an expert witness for a case will be able to identify a source of relevant expertise. It would also have the advantage that lawyers could go to an established source for an expert witness rather than having to seek them out using a number of different methods, as at present. The Report (Department of Health 2006: para 4.6) also suggests that the teams would be able to more easily identify the precise medical speciality required in a case because 'the clinicians in an NHS Trust will be able to suggest the involvement of other sub-specialities where this seems necessary'. The focus on work within the NHS could also help to solve some of the other problems of supply. Most obviously, if the NHS was responsible for these teams of experts it would, at least in theory, reduce the reluctance of employers to release expert witnesses to undertake this work. Although this reason was not cited by many of those who had decided to leave the work or had not undertaken it, the issue did arise. It is also likely that a system based upon NHS institutions will be better able to ensure cover for any staffing shortfall which could arise from medical professionals undertaking this work.

A further advantage of teams organised within an NHS Trust is that the evidence would be more locally based (Department of Health 2006: para 4.8). Not only would the travel times for expert witnesses be reduced – something that emerged as a problem in the interviews conducted with former expert witnesses – but the

evidence would perhaps be more directly tailored to the particulars of the case. The Report gives the example of an expert recommending therapeutic interventions that were not available in the area where the case was taking place, but which would have been available in the area where the expert was based.

Funding

Major difficulties are likely to arise in ensuring that the NHS can deal with yet another role without a further source of funding. The Report states that any costs for taking on this extra work, and the additional training involved, will be met in full. However, it would be vital that funds are ring-fenced for the specific purpose and do not form a part of general NHS budgets, where they would be at risk of diversion into other areas considered more pressing at local level. The team of experts established at Great Ormond Street Hospital currently receives funding from two sources, each of which funds a particular aspect of the work. The NHS Trust funds the clinical aspect of the team's work. The children who are the subject of court proceedings are registered as patients, so that any clinical work is undertaken during ordinary salaried hours. However, the work of expert witnesses also involves reading large amounts of material and preparing reports for use in court proceedings. This work is undertaken outside NHS hours and is funded by the Legal Services Commission. Such funding is then utilised to employ people for the team and to finance research. This approach appears to be a practical and workable option to guarantee funding for the teams proposed by the Report, since it ensures that funding goes directly to the teams and that experts are remunerated for work undertaken outside their normal clinical hours.

Delay

The report refers to '5000 instances of delay identified in family proceedings in 2004', of which '12% were caused by lack of availability of expert(s) or by delay in submission of their reports' (Department of Health 2006: para 3.7). One cause of such delay is a shortfall in certain medical specialities, in particular, child psychiatry, paediatric pathology and paediatric radiology. The only real solution to this problem lies in NHS recruitment, which is not something that the recommendations in the Report can solve.

A further problem is timescale. Lawyers reported that even when experts were willing to provide reports for the court, their caseload made it nigh on impossible for them to complete the work within the required timescale. However, delays in the submission of reports are not always the fault of the medical expert. The legal profession must take its share of the blame. JM Walshe (2002) recounts an example from his own experience where, despite submitting his preliminary report in good time, delays by both legal teams caused the case to drag on for over two and a half years, thus delaying the submission of his final report. Additionally, the gap between preliminary enquiries and formal instruction puts unnecessary pressure on the expert to produce the report in a very short timescale. As one expert in the survey states: 'Currently, I can wait three months between an initial phone call and receiving instructions – then with only a few weeks to prepare the case and arrange court availability' (Department of Health 2006: Annex B, para 19). It seems clear that, however positive any reforms flowing from the report may be, only a relatively small number of the causes of delays will be tackled. In the bulk of family cases, delays will persist for a variety of reasons outside the remit of the Report.

Conclusion

The Chief Medical Officer's Report contains a number of viable proposals for the reform of expert evidence in family law cases. The Report appears to have been received positively, although it is early days. However, it is not without its critics. The UK Register of Expert Witnesses refers to it as 'Opinion by Committee' and adds that '... to say that it has been met with fierce resistance by doctors is somewhat of an understatement' and the proposals '... have a curiously dated appearance', although there is no elaboration on this last point. Nevertheless, the experience of those involved in the Great Ormond Street expert witness system is

very positive. A measure of its success is that it receives three times as many referrals as it can take at any one time.

However, a change of the magnitude proposed cannot take place overnight. As has emerged from the, albeit brief, discussion of funding, there are a number of issues that need to be carefully analysed before any new system is implemented. Another significant issue may well be the provision of training. If such training is designed to target even medical students, it is likely to require a great deal of planning, and probably negotiation, with medical bodies and university medical departments. It seems unlikely that this would be a straightforward or rapid process. Until a more solid infrastructure is in place, training may well occur on a less structured basis.

Leaving aside the problems of implementation, the proposals for training do seem to address a number of different issues. Public confidence is likely to be restored, at least to an extent, which is an important issue in the background to the Report. Additionally, it may be tentatively suggested that this could aid the issue of supply. The real flaw in the proposals in the Report is the failure to target legal professionals in the same way as medical experts. Such legal professionals also have a responsibility to ensure the quality of evidence given to a court and some scientific training could certainly better equip them to do this.

Even if the proposals are fully implemented they are unlikely to be universally well-received. Existing, solo expert witnesses may be allowed to continue working as at present, but a successful new system is likely to lead to a diminution in work for those solo experts. To remain in the field, they may need to switch to working in teams which, with changed working practices and reduction in pay, would undoubtedly be unpopular. The issue of pay may be even more controversial if sources of funding are not carefully established and secured. If funds can be put at risk of diversion to NHS crisis areas, or if funding levels are inadequate, problems of supply are likely to be exacerbated rather than resolved.

References

- **1.** [Adshead, G.](#) 2005. 'Evidence-based medicine and medicine-based evidence: The expert witness in cases of factitious disorder by proxy'. *J Am Acad Psychiatry Law*, 33(1): 99–105. [[PubMed](#)], [[Web of Science ®](#)]
- **2.** [Butler-Sloss, E.](#) and [Hall, A.](#) 2002. 'Expert witnesses, court and the law'. *J.R. Soc. Med*, 95: 431–434. [[CrossRef](#)], [[PubMed](#)], [[Web of Science ®](#)]
- **3.** Department of Health. 2006. *Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases*, London: Department of Health.
- **4.** [Gatowski, S.](#) 2001. 'Asking the gatekeepers: A national survey of judges on judging expert evidence in a post-Daubert world. *Law and Human Behavior*, 25(5): 433 [[CrossRef](#)], [[PubMed](#)], [[Web of Science ®](#)], [[CSA](#)]
- **5.** [Gross, S. R.](#) and [Mnookin, J. L.](#) 2003. 'Expert information and expert evidence: A preliminary taxonomy'. *Seton Hall Law Review*, 34: 139
- **6.** The House of Commons Science and Technology Committee Report, Seventh Report of Session 2004–05. *Forensic Science on Trial*, London: House of Commons.
- **7.** [Murphy, P.](#) 2005. *Murphy on Evidence*, Oxford: Oxford University Press.
- **8.** The Royal College of Paediatrics and Child Health. 2004. *RCPH's Survey on Child Protection*, London: RCPCH.
- **9.** [Wall, N.](#) 1997. 'Judicial attitudes to expert evidence in children's cases'. *Arch. Dis. Child.*, 76: 485–487. [[CrossRef](#)], [[PubMed](#)], [[Web of Science ®](#)]
- **10.** [Walshe, J. M.](#) 2002. 'Expert witnesses, courts and the law'. *J R Soc Med*, 95: 576 [[CrossRef](#)], [[PubMed](#)], [[Web of Science ®](#)]