The Role of Expert Evidence in Family Proceedings

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What we will cover

- Types of expert
- Key questions for experts
- Practice Direction 25A (2011)
- What sort of expert do you want?
- Multiple experts
- Capacity reports

What are experts trying to achieve?

- "Expert evidence ...is often integral to the safeguarding of children. The Courts rely heavily upon the objectivity, professional competence and integrity of experts.
- **The Courts expect careful and balanced opinions. Clinical judgment has to be soundly based and objectively justified**" (Rix, 2011)

Types of expert

- Related to NAI / CSA / neglect
  - [NB Information often already available from treating paediatrician or Safeguarding Lead paediatrician)
  - Paediatrician
  - Paediatric radiology and other specialties
  - Haematology
  - Child psychiatrist / psychologist
- Mental health and competence of parents
  - Clinical psychologist
  - Forensic psychologist
  - Psychiatrist
  - Child and Family psychiatrist
  - Neurologist / neuropsychiatrist

What is expert evidence?

- "...expert opinion about a question that is not within the skill and experience of the Court"
  - Practice Direction 25A
  - Alternate sources open to the Court
    - Social work evidence
    - Evidence from other professionals (e.g. midwives/ HVs)
    - Treating clinician's views (if willing)

Key questions for paediatric experts

- Was this an injury? Accidental or NAI?
- Is there evidence of sexual abuse or physical neglect?
- Is the development of the child within the normal range– if not, why not?
- Is there evidence of fabrication, exaggeration, induction of illness (FII)?
- Contentious areas:
  - "Shaken baby syndrome"
  - "Brittle bone disease"

Key questions for psych- experts

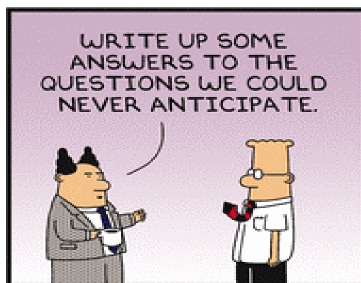
- Diagnosis of mental health problems
- Prognosis
- Treatment and timescales for change
- Ability to care for the child(ren) despite the psychological difficulties

- Contentious areas:
  - Personality disorder / chronic trauma
  - Diagnostic confusion-
    - mild bipolar / ASD / ADHD / EUPD / drug misuse

Practice Direction 25A

- Current version from 2011
  - To speed up the process of identifying when a report is needed, finding an expert, standardised instructions and coherent planning
- Overriding duty:
  - ... Duty to the Court takes precedence over any obligation to the person instructing or paying
  - Child's needs already paramount under Children Act
  - Best practice: independent, within expertise, taking all material information (eg culture, ethnicity, religion etc)
  - Indicate which opinion is based on hypothesis; best accepted practice; and / or based on research
  - Summarise the range of opinion- particularly if yours is not mainstream opinion
  - Statement of truth- including conflicts of interest

What are we *not* trying to achieve?



Capacity

- It is crucial to know whether the client has mental capacity to "conduct proceedings" at an early stage
  - Must know what the key issues are; take in, register and retain information; use information to form a view; and be able to express that view
  - There is a presumption of capacity under the Mental Capacity Act (2005)
  - Decisions are made in the client's "best interests"
  - "Instruction" of lawyer means being able to make clear what the client wants, take part in discussion, not necessarily to make a "wise" decision
  - Professionals must try to assist communication

What are we trying to achieve?

- Reports that make a difference:
  - Accurate diagnosis and predictions
  - Risk analysis
  - Practical suggestions about treatment and / or therapy
  - A clear opinion on the issues that matter to the child
  - Where possible, advice regarding the parents and their capacity to parent
- Robust reports
  - Outlining the evidence on which conclusions are made
    - from bundle and from personal knowledge
    - Specialised test results
    - Re-examination of evidence (eg blood results, X-rays)

Types of (psychiatric) reports

- Knowing what is needed and what is available
  - Pre-proceedings report [in PLO]
    - May complicate matters if case goes to proceedings
  - Capacity report only
    - Only addresses capacity of client to instruct and conduct proceedings [2-3 hours]
  - Basic Report (e.g. if there is already a psychology report)
    - on formal diagnosis, treatment and prognosis (narrowly defined) [6-10 hours]
  - Full psychiatric report
    - as above plus discussion about likely causes, complicating factors, engagement, parenting problems, risk [13-18 hours]
  - Highly complex report (eg in FII)
    - as above plus very detailed analysis of evidence and medical records and alternative scenarios [25 hours+]

Which psychiatric specialist?

- Adult general psychiatry
  - Diagnosis, prognosis and treatment of most problems
    - ? Specialist in addictions psychiatry
    - ? Specialist in psychotherapy
    - ? Specialist in learning disability
- Child and adolescent psychiatrist
  - Very young parents
  - Impact on the child
  - Attachment issues and sometimes family assessment
- Forensic psychiatrist
  - Criminal law issues in parallel
  - Long offending history
  - Detailed risk assessment

Limitations of report

- Diagnosis difficult
  - Especially in poorly defined areas such as
    - Borderline personality, Bipolar Type II, adult ADHD, Somatisation disorders / FII
  - Presentation different to other reports
- Incomplete information
- Multi-layered problems
  - several diagnoses, early childhood trauma, abusive relationships, and problems with taking excess medication, drugs or alcohol
- Motivation to change may be quite recent so difficult to assess fairly
- Difficulty predicting engagement in therapy and timescale for change

Formal testing needed?

Example 1:

Where a report may help: Single expert

- Depression and early trauma [Psychiatrist]
  - Triggered poorly controlled behaviour, but may have good prognosis when treated effectively
  - Easily mislabelled as Emotionally Unstable PD
- Mother coping poorly, not engaging ?IQ
  - Psychologist able to test IQ and functional ability
  - Formulation and psychological treatment plan
- Lack of weight gain in child- mother says allergy and lactose intolerance
  - Paediatrician can assess development and review medical notes
- Unexplained injuries and developmental delay
  - Paediatrician ? plus paediatric radiologist if fractures

Psychiatrist or psychologist?

- Key similarities:
  - Both give an overview of the problems
    - (diagnosis or formulation)
  - Both can analyse risk
    - (Forensic specialty in both do more formal test-based analysis)
  - Both can recommend treatment / therapy
    - (different comfort zone?)
  - Both can give a prognosis
  - Both *may* comment on problems in parenting (depending on experience)
- Key differences:
  - Psychologist
    - Formal testing including IQ
    - Detailed personality assessment with measures
  - Psychiatrist
    - Formal diagnosis
    - Medication review and recommendations

Example 2

Where a report may help: Complex case

- Mother with sudden change in behaviour at age 30, uses cannabis, has volatile relationships, several antidepressants and GP has queried “bipolar”
- Mother also has multiple physical complaints and admissions for extensive investigations for “fits”
- Baby of 9 months has low weight gain for age, and unexplained bruising to her head
- Reports to consider:
  - General paediatrician to look at development and possible NAI
  - May need paed. radiologist and other specialists
  - Psychiatrist to look at multiple diagnoses Possibly needs a neuropsychiatrist / neurologist
  - Psychologist to look at personality issues in depth

Example 3
Where a report may help – very complex

- ?FII queried because baby has been to GP or A&E 36 times triggering a safeguarding check
  - Children: multiple pathology and investigations several conflicting diagnoses given; and possibly some exaggeration. ? Factitious or Induced Illness
  - Parents: early history of abuse. Mum has multiple verifiable pathology with possible exaggeration plus overuse of analgesics. Dad stable on methadone.
    - Multiple experts needed to get a full picture.
    - Very extensive work on mother's medical notes and detailed review of children's medical notes from multiple hospitals
    - Poor engagement with assessments

References:

- A Handbook for Expert Witnesses in Children Act Cases (2nd Ed) [Rt Hon Lord Justice Wall (2007) Family Law: London]
- Expert Psychiatric Evidence [K Rix London: RCPsych (2011)]
- Psychologists as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations. [Guidance from the Family Justice Council and the British Psychological Society (BPS: 2016)]
- Paediatricians as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations [Guidance from the Family Justice Council and the Royal College of Paediatrics and Child Health (RCPCH 2018)]
- Mental Capacity Act Code of Practice Code of practice giving guidance for decisions made under the Mental Capacity Act 2005.
  - https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice

Thank you!