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# Evidence Matters in Family Justice: Wales second edition

## Practice Briefing 1

## Evidence and standard of proof in the family court

Dartington

# Evidence Matters in Family Justice

## Evidence and standard of proof in the family court

This briefing looks at evidence and standard of proof in the family court. It looks at what the court has to decide and the implications for social work practice. It also looks at the duties of the expert witness and how these relate to the social worker giving evidence in court as a professional witness. It will help you:

- Develop a clear understanding of the types of evidence that can be brought before a court and the weight it will be given.
- Understand the respective roles and expectations of the social worker and the expert witness.
- Improve your understanding of what judges and magistrates are likely to know about research-informed evidence in social work.

## Key messages

- Although they are not 'expert witnesses' in the sense of having been formally appointed by the court, local authority and Cafcass Cymru social workers are professional witnesses whose evidence comprises both factual information and professional opinion (the balance between these will vary depending on their involvement with the case and experience).
- Social workers and experts have a duty to provide the court with all the information it needs to make a judgment in the child's best interests. So local authority social workers are not just representing the local authority – like experts, they are under a duty to be objective and even-handed in the evidence they give.
- Children's guardians are provided by Cafcass Cymru but appointed by the court to the individual child.
- Social workers need to be analytical in their presentation of information for the court.
- Social workers need to develop more confidence in the way they use research and professional judgment in their evidence.
- Social workers need to be aware of and participate in interdisciplinary training across all the professional groups involved in the court process and play their part in developing agreed and effective approaches.

## DIG DEEPER

**One of the Family Justice Review's (2011) recommendations was for more consistent training and development for family justice professionals, including a greater emphasis on child development. The Childhood Wellbeing Research Centre was commissioned by the Department for Education and the Family Justice Council to publish an evidence paper *Decision-making within a Child's Timeframe* (Brown and Ward, 2013) which brought together key research in areas relating to:**

- **Neuroscience perspectives on children's cognitive, social and emotional development**
- **The implications of maltreatment on childhood and adulthood wellbeing**
- **The outcomes of interventions by the courts and children's social care**
- **Timeframes for the developing child and how they fit with the timeframes for intervening.**

**The paper was intended to assist decision-making by family justice professionals and promote greater understanding of individual children's needs and appropriate timeframes. In fact, the paper, and in particular its presentation of neuroscientific research, became the focus of fierce debate across research and policy communities on issues such as the policy readiness of emergent research findings (Bywaters, 2015; White and Wastell, 2013)**

# Evidence Matters in Family Justice

## Evidence and standard of proof in the family court

### What evidence can be brought before the court?

Social workers provide the court with:

1. **Evidence of facts**

- First-hand evidence of what they experienced.
- 'Hearsay' evidence – in Children Act cases, the usual rules of evidence are varied to allow a witness to also tell the court what they have been told, but sources of hearsay evidence should be identified.

2. **Evidence of opinion**

- As a professional witness, the social worker will also be expected to analyse the facts to explain their opinion of which are the relevant issues and how they should be resolved (Conroy Harris, 2014).

The more closely connected the evidence is to its source, the greater the weight that the court will attach to it. Documentary evidence usually contains the best available evidence – the closer in time it was recorded to the event, the stronger it will be.

*Of course the court can act on the basis of evidence that is hearsay. But direct evidence from those who can speak to what they have themselves seen and heard is more compelling and less open to cross-examination.* (Sir James Munby, President of the Family Division, 2013a)

### What the court has to decide

It is useful to summarise the stages of decision-making that the court must go through in deciding whether to make an order.

First of all, the court has to decide:

> Whether the child is suffering or is likely to suffer 'significant harm' – 'harm' is defined in s.31(9) of the *Children Act 1989* as 'ill-treatment or the impairment of health or development'. This includes impairment arising from seeing or hearing the ill-treatment of someone else and so includes exposure to domestic violence.

> That the harm, or likelihood of harm, is attributable to:

  - The care given 'not being what it would be reasonable to expect a parent to give', or
  - The child being 'beyond parental control' (this sub-section is now very rarely used.)

These factors constitute the 'threshold criteria' as set out in s.31(2) of the *Children Act 1989*. Only if the court finds the threshold criteria are met, can it decide whether or not to make an order.

**If the threshold criteria are met, the court has to decide:**

> Whether an order should be made. In making this decision, the court must apply the 'no order' principle (s.1(5) Children Act 1989) – ie, the court

should not make an order unless doing so would be better for the child than not doing so. The 'no order' principle applies to the court rather than the local authority. It should not inhibit the local authority from making an application – the local authority should not second guess the court by assuming it would not make an order (Carr and Goosey, 2017).

> If it is better to make an order, then which specific order.

The court weighs the evidence to determine whether the 'significant harm' threshold has been met on the balance of probabilities. Put simply, this means that where the local authority is arguing that the child 'has suffered' significant harm, the court has to be satisfied it is more likely the facts alleged took place than not. Where the local authority is arguing that the child 'is likely to' suffer significant harm, the court must be satisfied that the facts on which that risk is based are more likely than not to have taken place.

The application of the 'balance of probabilities' was confirmed by the House of Lords in Re B (Children) [2008] UKHL 35.[1] As Baroness Hale said in that case, assessing the likelihood of significant harm is:

*... a prediction from existing facts, often from a multitude of such facts, about what has happened in the past, about the characters and personalities of the people involved, about the things which they have said and done, and so on.*

In other words, the court can make a prediction only on the basis of facts that are proved. This can be especially difficult in cases of predicted emotional abuse. In Re B [2013] UKSC 33, Lady Hale set out the following approach:

*... where the threshold is in dispute, courts might find it helpful to bear the following in mind:*

*(i) The court's task is not to improve on nature or even to secure that every child has a happy and fulfilled life, but to be satisfied that the statutory threshold has been crossed.*

*(ii) When deciding whether the threshold is crossed the court should identify, as precisely as possible, the nature of the harm which the child is suffering or is likely to suffer. This is particularly important where the child has not yet suffered any, or any significant, harm and where the harm which is feared is the impairment of intellectual, emotional, social or behavioural development.*

*(iii) Significant harm is harm which is 'considerable, noteworthy or important'. The court should identify why and in what respects the harm is significant. Again, this may be particularly important where the harm in question is the*

[1] www.familylawweek.co.uk/site.aspx?i=ed12688

*impairment of intellectual, emotional, social or behavioural development which has not yet happened.*

*(iv) The harm has to be attributable to a lack, or likely lack, of reasonable parental care, not simply to the characters and personalities of the child and/or parents. The court should identify the respects in which parental care is falling (or likely to fall) short of what it would be reasonable to expect.*

*(v) Where actual harm has not yet been suffered, the court must consider the degree of likelihood that it will be suffered in the future. This will entail considering the degree of likelihood that the parents' future behaviour will amount to a lack of reasonable parental care. It will also entail considering the relationship between the significance of the harm feared and the likelihood that it will occur. Simply to state that there is a 'risk' is not enough. The court has to be satisfied, by relevant and sufficient evidence, that the harm is likely.*[2]

## Implications for social work practice – establishing threshold

The court rules require that key documents be filed with the court when the application is made, including the initial Social Work Statement and the Social Work Chronology. These documents are therefore key in contributing to the local authority case by substantiating the argument that the threshold criteria are met. If interim removal is sought, then the reasons for this have to be explicit.

Unless the parent(s) agree the Threshold Statement, which provides the factual basis put forward by the local authority for its order, the social worker (and others) will give evidence to establish the threshold criteria.

In drafting statements, the practitioner should bear in mind that they are likely to be challenged on any aspect of the evidence they use, so accuracy and careful analysis are essential (Watt, 2013). A well-drafted statement will be difficult for parents to challenge and will limit the issues upon which the court is asked to hear evidence.

Sir James Munby set out three fundamental principles for local authorities in asserting threshold in Re A [2015] EWFC 11:[3]

**1. Fact finding and proof.**

It is a common feature of care cases that a local authority asserts that a parent does not admit, recognise or acknowledge something, or does not recognise or acknowledge the local authority's concern about something. If this point is disputed, the local authority must both prove the fact and establish that it has the significance attributed to it by the local authority. The President also drew a clear distinction between evidence required

[2] www.familylawweek.co.uk/site.aspx?i=ed114409

[3] www.familylawweek.co.uk/site.aspx?i=ed143260

to prove an assertion and the assertion of fact. Only an assertion of fact should be pleaded in forming threshold and the schedule of findings sought. Allegations that 'X appears to have' lied or colluded, that various people have 'stated' or 'reported' things, and that 'there is an allegation' should not be used.

The relevant allegation is not that 'X appears to have lied' or 'he reports'; the relevant allegation, if there is evidence to support it, is that 'X lied' or 'he did Y'.

**2. The need to establish the link between facts relied upon in a threshold document and the conclusion that the child has suffered, or is at risk of suffering, significant harm.**

Sometimes this linkage will be obvious, as where the facts proved establish physical harm. Sometimes the link may be less obvious where the allegation is only that the child is at risk of suffering emotional harm or neglect.

In Re A, an important element of the local authority's case was that the father 'lacked honesty with professionals', 'minimised matters of importance' and was 'immature and lacks insight of issues of importance'. This did not, however, naturally lead to a conclusion that the child was at risk of neglect. The local authority's evidence and submissions must set out the argument and explain explicitly why it is said that, in the particular case, the conclusion follows from the facts.

**3. The court will recognise diverse styles of parenting and is not in the business of social engineering and providing all children with perfect homes.**

This principle can be related back to the wording in s.31 of 'significant harm', caused by ill-treatment or resulting in impairment to health or development.

In a case heard in Wales in 2016, Re A (A Child) [2016] EWFC B101[4], Judge Gareth Jones cited the Re A case above when he carefully considered the threshold argument made by the local authority. He made clear that, just because the mother had had seven children removed by care orders, it did not automatically follow that her eighth child would be removed. The threshold for significant harm still needed to be proved. The judge said he relied on the legal framework of support for the family in accordance with their wellbeing under the *Social Services and Well-being (Wales) Act 2014*. This may include directing an assessment of the 'care and support' needs of the birth parent(s) in their own entitlement and distinct from their parenting role under section 19 of the Act.

If the threshold criteria are proved, the child's welfare is the court's paramount consideration in making a decision about an order. In accordance with the welfare principle set out in section 1(3) of the *Children Act 1989*, the court must take into account those items in the 'welfare checklist':

[4] www.bailii.org/ew/cases/EWFC/OJ/2016/B101.html

- the wishes and feelings of the child
- their physical, emotional and educational needs
- the likely effect of a change in circumstances
- age, sex, background and relevant characteristics
- harm suffered or at risk of suffering
- the capability of each parent or other relevant people
- the range of powers available to the court.

At the subsequent welfare stage, a care plan will be presented, determining the future plans for the child's welfare. It is here that a social worker will be more likely to give opinion evidence with regard to future risk to help the court decide whether it is better to make an order – and if so, which order is a legitimate and proportionate response to meet the needs of the particular child.

## Implications for social work practice – the care plan before the court

When the section 31 threshold has been reached, the local authority must produce a care plan which sets out the realistic permanence options. If adoption is the plan, lawyers acting for the child and the parents often ask for evidence of the success rate the particular local authority has in placing children speedily for adoption, and the number of placement orders that are revoked because adopters could not be found. Plans will need to include details of the support that is to be offered to adopters, special guardians or other carers.

As set out in the handbook (of this resource pack), an evaluation of all the realistic options is required. These will depend on the individual child's needs and the capacity of their parents and extended family to meet those needs. It may be helpful to consider research on the relative success and breakdown rates of different types of placement. Selwyn and Masson (2014) compared these and concluded that:

1. Disruption and breakdown rates are highest for children who are reunified with their parents after care proceedings.

2. Children are more likely to have to move placement if they are in foster care than if they are in special guardianship or residence order (now child arrangements order) placements.

3. Special guardianship and residence order disruption, if it does occur, tends to occur within two years, whereas adoptions are more likely to disrupt in teenage years (though since special guardianship orders were only introduced in 2002, longitudinal data on outcomes is emergent).

4. The disruption rate reported in the Selwyn studies was 3.2 per cent of adoption orders over a 12-year period.

Adoptions when children are more than four years old were 13 times more likely to end in disruption than those of children adopted at a younger age.

5. The special guardianship order disruption rate was 5.5 per cent over five years, and the residence order disruption rate was 25 per cent over six years.

Recent case law, Re W [2016] EWCA Civ 793[5], has emphasised that a human rights analysis must always be undertaken by the court. This includes the rights of parents to respect for their private and family life. However, there is no assumption that if a family member is willing and able to care for a child who cannot be returned to her parents, then the child has a right to be placed with that family member. The pros and cons of the different options must be weighed against each other. The social work assessments must evaluate the attachment of the child to her carers. Where a child is already attached to adoptive applicants, there is no assumption that an alternative placement with extended family would better meet her welfare needs.

## DIG DEEPER

**The implications of the *Re W* judgment are explored by Sir Andrew McFarlane in a speech he gave in March 2017. You can download a transcript at** www.judiciary.gov.uk/wp-content/uploads/2017/03/lecture-by-lj-mcfarlane-20160309.pdf **or a podcast at:** https://archive.org/details/moj-london-09032017.

Social workers therefore, need to define risk and the likelihood of future harm at three stages within legal proceedings:

- At the outset, in establishing that the threshold criteria (s.31 *Children Act 1989*) have been met in order to apply for an interim care or supervision order (s.38). (The local authority will have taken legal advice in a 'legal planning meeting'.)
- At a final hearing or earlier 'finding of fact' hearing.
- When making recommendations as to what order(s) should be made.

## TOOL 10

**Social workers can use Tool 10 to help them reflect on the quality of the evidence in their court reports. It can be used in supervision or team discussion.**

## Establishing the threshold for removal of a child under an interim care order

Social work evidence in support of removing a child under an interim order must follow these principles laid down in case law:

- An interim care order is an impartial step intended to preserve the status quo pending the final hearing; it is not to be perceived as a tactical advantage to the local authority (*Re G (Minors) (Interim Care Order)* [1993] 2 FLR 839). The question of whether an interim

[5] www.familylawweek.co.uk/site.aspx?i=ed162144

order should be granted requires an assessment of the child's welfare and need for protection during the interim period, based on the information then available (Re B *(Care Proceedings: Interim Care Order)* [2009] EWCA Civ 1254). The interim decision must be limited to issues that cannot wait until the final hearing and must not extend to issues that are being prepared for determination at that hearing (Re B *(Refusal to Grant Interim Order)* [2012] EWCA Civ 1275[6]).

- Where the effect of an interim care order is to remove a child from their parents, this can only be necessary if the child's safety demands immediate separation (Re S (*Authorising Children's Immediate Removal*) [2010] EWCA Civ 421[7]). 'Safety' is not confined to physical safety, but includes emotional safety or psychological welfare *(Re GR (Children)* [2010] EWCA Civ 871[8]).

## Commissioning expert witnesses

Although family proceedings cases can be complex and expert evidence may sometimes be needed, in the years leading up to the Family Justice Review (2011) there had been considerable concern about an over-reliance on expert witnesses. The need to curtail their over-use was a key theme of the review. To this end, and in anticipation of legislative change in April 2014, the Family Procedure Rules were amended from January 2013 in relation to the use of experts and the presumption that cases will be completed in 26 weeks.

The amendment to Practice Direction 25B restricts the court to appointing an expert only where it is 'necessary to assist the court to resolve the proceedings'. This changed the test for admitting evidence from what is 'reasonable' to what is 'necessary'.

In the words of Sir James Munby, President of the Family Division, this 'raises the bar significantly' (Munby, 2013b). It means expert witnesses are now appointed less often and are likely to be limited to specialist areas. It also supports a significant shift in focus to pre-proceedings work.

*So, in every case we must consider the reasons behind the request for an expert's report. Why is this additional evidence necessary? How will it add to the information the court already has? Is there not already an expert in the case who can provide that information – the social worker or the children's guardian?* (Munby, 2013b)

As to what is meant by the word 'necessary', Munby says the answer is to be found in Re H-L (A Child) [2013] EWCA Civ 655, para [3] – it has 'the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable'[9] (Munby, 2013b).

[6] www.bailii.org/ew/cases/EWCA/Civ/2012/1275.html
[7] www.familylawweek.co.uk/site.aspx?i=ed57731
[8] www.familylawweek.co.uk/site.aspx?i=ed63478
[9] www.familylawweek.co.uk/site.aspx?i=ed114450

## Courts' interpretations of the test for the necessity of expert evidence

- Clear parameters must be set for the instruction of experts, so the letter of instruction, the timeframe for reporting, the fee-scale of the expert should all be made known to the judge at the point at which authorisation is sought. Re AD (Children) (Fact Finding: Re-Hearing) [2016] EWHC 2912 (Fam)[10]
- Section 13 of the *Children and Families Act 2014* provides a statutory scheme with criteria for expert evidence and it is mandatory to have regard to these criteria. 'Welfare and procedural justice are key components of the task [of case management by the judge] and if they are missing this court [Court of Appeal] will be bound to intervene.' Re C (A Child) [2015] EWCA Civ 539[11]
- In a case where the Legal Aid Agency had refused to fund an assessment by an independent social worker, following a court order authorising the instruction, the Court of Appeal advised that, in future, every order directing the instruction of an expert, whatever the discipline, should contain an express recital to the effect that 'the court is satisfied that the appointment of [name] is, in accordance with section 13(6) of the Children and Families Act 2014, necessary to assist the court to resolve the proceedings justly'. Re F (A Child) [2014] EWCA Civ 789[12]
- Succinct reports are now expected. Experts should conform to the specifics of what is asked of them rather than provide a lengthy paediatric overview. (This case was heard before s.13 was enacted but has been seen by lawyers as discouraging paediatric overviews, confining paediatric reports to specialist issues about injuries or conditions.) Re IA (A Child) [2013] EWHC 2499 (Fam)[13]

### *Expert opinion in pre-proceedings*

The revised PLO introduced from July 2013 placed explicit emphasis on the importance of local authority pre-proceedings work and the case management hearing. This focus on pre-proceedings assessment means the need for expert opinion prior to proceedings should be considered carefully. Such a step will normally be expected in cases where, for example, it is suspected that a parent has a learning disability or is experiencing mental health problems. However, the local authority should not assume the need to involve an expert when the social worker is already able to provide a well-evidenced assessment and well-argued statement. Since the test changed to one of 'necessity' it may still be necessary to commission a report from an independent expert in cases of suspected non-accidental injury or assessment of litigation capacity – but not where an assessment of parenting

[10] www.familylawweek.co.uk/site.aspx?i=ed168288

[11] www.familylawweek.co.uk/site.aspx?i=ed145323

[12] www.familylawweek.co.uk/site.aspx?i=ed130403

[13] www.familylawweek.co.uk/site.aspx?i=ed116036

capacity is required. This should be undertaken by the local authority social worker.

***The expert's role***

It is important to differentiate the function of the expert in each particular case. Is their role to assist the court in establishing what happened – for example, the nature of an injury and how it occurred? Or is their role to look at specific difficulties faced by a parent that are outside the expertise of the social worker and to advise on what this means for the parent's ability to meet the child's needs – for example, the impact of a traumatic brain injury on parenting.

## TOOL 3

**This tool will help you think about when it might be necessary to seek the appointment of an expert.**

## TOOL 4

**This tool will help social workers reflect on their own areas of expertise.**

In deciding whether to permit the instruction of an expert, the court will need to balance the respective rights of the parties to a fair trial (Article 6) and the right to private and family life (Article 8) under the European Convention on Human Rights embodied in the *Human Rights Act 1998*. A summary of a series of cases on assessments in interim care order applications (Johnson, 2011) highlights that the court has to ensure the case is fully investigated and all the relevant evidence is in place, and has to balance factors for and against an assessment.

***Parents who may lack capacity***

Where a parent may lack capacity because of disability or mental illness, the guidance issued by the Family Justice Council (2010) should be followed.

## DIG DEEPER

**The Family Justice Council guidelines (2010) describe good practice in public law cases where a parent lacks capacity to conduct proceedings. These are available at:** www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Parents_who_Lack_Capacity_with_appendices.pdf

A study on the characteristics of parents who have been represented by the Official Solicitor because they lacked mental capacity found that assessments of capacity were sometimes made later than was fair to the parents. The researchers observed that local authorities, and solicitors representing protected parties, should consider the implications of the duty to protect the right to procedural justice for meetings outside the court setting as well as in the court process itself. There appears to be variation in the extent to which local authorities fund advocates to help parents attend meetings, including with their solicitor, child protection conferences and other key decision-making meetings (Welbourne et al, 2017).

## DIG DEEPER

**Mencap Cymru has developed a toolkit by to support parents with learning disabilities through the child protection system. It is available at: https://socialcare.wales/research-and-data/research-on-care-finder/supporting-parents-with-a-learning-disability-through-the-child-protection-system**

***Children's guardians***

It is the role of the children's guardian to safeguard the interests of the child in care proceedings and the guardian is empowered and obliged to carry out an investigation into the child's circumstances and make recommendations to the court in accordance with the duties set out in Part 16 of the Family Procedure Rules 2010 and Practice Direction 16A. However, their task is to scrutinise the assessments that have been undertaken, not to embark upon a piece of work as an alternative to appointing an expert.

## The duties of the expert witness

The Family Justice Council issued draft 'Standards for Expert Witnesses' for consultation in May 2013 (MoJ and FJC, 2013). The resulting Standards are now found in an Annex to Practice Direction 25B[14], which came into effect in October 2014. They apply to all expert witnesses commissioned by the court, including medical experts, psychologists and independent social workers.

1. The expert's area of competence is appropriate to the issue(s) upon which the court has identified that an opinion is required, and relevant experience is evidenced in their CV.

2. The expert has been active in the area of work or practice (as a practitioner or an academic who is subject to peer appraisal), has sufficient experience of the issues relevant to the instant case, and is familiar with the breadth of current practice or opinion.

3. The expert has working knowledge of the social, developmental, cultural norms and accepted legal principles applicable to the case presented at initial enquiry, and has the cultural competence skills to deal with the circumstances of the case.

4. The expert is up-to-date with Continuing Professional Development appropriate to their discipline and expertise, and is in continued engagement with accepted supervisory mechanisms relevant to their practice.

5. If the expert's current professional practice is regulated by a UK statutory body they are in possession of a current licence to practise or equivalent.

6. If the expert's area of professional practice is not subject to statutory registration (eg, child psychotherapy, systemic family therapy, mediation, and experts in exclusively academic

[14] www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-25b-the-duties-of-an-expert,-the-experts-report-and-arrangements-for-an-expert-to-attend-court

appointments) the expert should demonstrate appropriate qualifications and/or registration with a relevant professional body on a case by case basis.

7. The expert is compliant with any necessary safeguarding requirements, information security expectations, and carries professional indemnity insurance.

8. If the expert's current professional practice is outside the UK, they can demonstrate that they are compliant with the Family Justice Council (2011) 'Guidelines for the instruction of medical experts from overseas in family cases'.

9. The expert has undertaken appropriate training, updating or quality assurance activity – including actively seeking feedback from cases in which they have provided evidence – relevant to the role of expert in the family courts in England and Wales within the last year.

10. The expert has a working knowledge of, and complies with, the requirements of Practice Directions relevant to providing reports for and giving evidence to the family courts in England and Wales. This includes compliance with the requirement to identify where their opinion on the instant case lies in relation to other accepted mainstream views and the overall spectrum of opinion in the UK.

11. The expert should state their hourly rate in advance of agreeing to accept instruction, and give an estimate of the number of hours the report is likely to take.

Research commissioned by the Ministry of Justice recommended that a good expert witness report should be less than 20 pages long, and ideally be 'technical but understandable'. Like social workers, their evidence should not make judgments on facts or pre-empt outcomes of the cases (Brown et al, 2014).

### DIG DEEPER

**Guidance for psychologists as expert witnesses is published by the British Psychological Society and the Family Justice Council (2016). Go to:**
www.judiciary.gov.uk/wp-content/uploads/2016/05/psychologists-as-expert-witnesses.pdf

## Social workers' evidence

How, then, does the evidence provided by social workers fit into the picture?

In their reports and evidence, social workers have to provide the court with the information – both by way of facts and by way of professional assessment – that the court needs to make decisions in the child's best interests.

Social workers are not simply making the case for the local authority. This reflects the less adversarial and more problem-solving nature of family proceedings and the fact that the child's interests are paramount. So while social workers' statements set out the case for the local authority, they must also present all the facts to the court, whether

or not these promote the local authority's case. Wall J in Re JC (Care Proceedings: Procedure) [1995] 2 FLR 77 set out the responsibilities placed upon the local authority:

*All parties have a duty in family proceedings not to be tendentious [biased] in the presentation of their evidence. That duty is, however, particularly acute in relation to local authority evidence, and never more so than when the local authority is advising the court of its view of the outcome of an assessment of parental capacity or otherwise setting out its recommendations and plans. The duty of local authorities to be objective, fair and balanced cannot be overemphasised.* (Sir Nicholas Wall, Re JC (Care Proceedings: Procedure) [1995])

The notion of reasonableness is relevant here:

*The notion of 'reasonableness' is crucial to the lawyers because of its wider relevance in public law in England and Wales. Local authority decisions can be challenged through a procedure known as 'judicial review' and can be overturned if (amongst other reasons) they are considered to be 'unreasonable'.* (Dickens, 2004)

In his journal article, 'Being the epitome of reason', Dickens (2005) highlights the tension that can arise between a social worker's expectations of a local authority lawyer and the lawyer's duty to keep a social worker's decisions within legal grounds, particularly in relation to 'reasonableness'. This may require the lawyer to challenge the social worker and advise that all relevant matters are included (not just those that support the authority's case) and that all decisions must be the result of analysis of all sides (including involving parents).

Dickens's own research (see also Dickens, 2006) found that social workers or their managers sometimes feel a lawyer is being 'weak' by not 'fighting the local authority's corner' or not 'defending' the social worker. But what lawyers are actually striving for is a transparent and defensible argument, and this must be underpinned by good social work practice and thorough analysis.

## The social worker as a 'professional' witness

*Social workers may not be experts for the purposes of Part 25 of the Family Procedure Rules 2010, but that does not mean that they are not experts in every other sense of the word. They are, and we must recognise them and treat them as such.* (Sir James Munby, 2013a, President of the Family Division)

Although the social worker is an expert on questions of general child development, courts do not consider that social workers have expertise in diagnosing sexual abuse. In Re N *(A Minor) (Child Abuse: Video Evidence)* [1996] 2 FLR 214, the Court of Appeal said that even a very experienced social worker or guardian should not offer

an opinion on sexual abuse allegations; the court could only admit an opinion from a child psychologist or psychiatrist with a high level of specialist expertise.

As noted earlier, reliance on opinion evidence will usually be limited when evidencing the threshold criteria. However, opinion evidence will have more of a role at the disposal stage when the court is considering whether to make an order and, if so, what order to make. The social worker's role will change from presenter of facts to provider of opinion, inferring that opinion from observed facts based on the witness's expertise.

Johns (2011) describes the social worker's role as a professional witness, meaning that courts expect them 'to be able to support their conclusions by reference to research-based evidence as well as reference to the facts of the case'.

There is little guidance for social workers about how research should be incorporated into their evidence and how it should be presented (or indeed, if it should be presented at all). However, the Practice Direction on expert witness reports is clear:

- Reports must be properly researched
- Gaps in research should be noted
- Reports should be objective and not biased.

These principles can be applied to social work and we have drawn on that guidance in this resource pack. Social workers cannot simply select the research that supports their recommendation, or add a quote that supports their opinion.

There is a responsibility on social workers to apprise themselves of the research that is made available to the courts. This will help social workers decide whether research referred to in court guidance needs to be referenced in the social worker's statement, or whether it can be assumed the court will be working from the same knowledge base as the social worker (see the Dig Deeper below on Family Justice Research Bulletins).

Whereas in the past social workers have sometimes welcomed the reassurance of a second opinion that the instruction of an expert or independent social worker can bring, an assumption can no longer be made that there will be any expert evidence other than that which the social worker brings to the proceedings.

## What do judges and magistrates know about the research used in social work?

The impact of research on social work practice inevitably permeates the family justice system as a whole. For example, there was a time when evidence of exposure to domestic abuse would not, on its own, necessarily have been accepted as proof that a child had suffered, or was likely to suffer, significant harm.

However, research highlighting that exposure to domestic abuse will cause a

child emotional harm has been accepted and adopted within the family justice system (Stanley, 2011). It is now a key consideration in the court's safeguarding role. Indeed the amendment to the definition of significant harm in s.31 (9) of the *Children Act 1989* to include impairment suffered from seeing or hearing the ill-treatment of another was brought about by research, including research specifically commissioned to assist the judiciary. [15]

The knowledge base of the court is constantly evolving as new ideas, developed through research, become accepted. A useful practice has been for judges to explain the court's position on certain issues based on the knowledge currently available. For example, in Re JS [2012] EWHC 1370 (Fam)[16] Mr Justice Baker summarised (paragraphs 48-64) current medical knowledge on subdural haematomas.

And in Richmond *LBC v B, W, B & CB* [2010] EWHC 2903 (Fam)[17] evidence was heard from a chemist, a forensic toxicologist and a laboratory manager. At issue was the validity of hair testing to establish whether or not a parent had consumed alcohol and, if so, to what extent. It was established that hair strand testing was relatively new and that the results, rather than being relied upon as a definitive indicator of alcohol consumption, should be used as part of the overall evidential picture. See also *Re E H (A Child) (Hair Strand Testing)* [2017] EWFC 64[18] where the court gave guidance on writing hair analysis reports in a way that explained the true significance of the data.

A recent scoping study (Broadhurst et al, 2017) collated responses from stakeholders in the family justice system (including judges) about the way they used research and the role of the proposed Family Justice Observatory.[19] Judges described the Judicial College[20] as an important forum for both formal learning and also informal sharing of good practice. However, judges identified themselves as particularly detached from other opportunities of knowledge exchange. In particular, judges felt they lacked opportunities for learning about local good practice initiatives that were judge-led.

Accounts of the functions of Local Family Justice Boards (LFJBs) indicate wide variability in their development. Although the Family Justice Review (2011) envisaged an active network of LFJBs that would support implementation of the Review, the reality on the ground is of boards that vary in the range of functions they fulfil, and vary in the extent to which stakeholders perceive them as useful. Broadhurst et al found a consistent complaint among

[15] Two experts, Sturge and Glaser, had been asked to report on the impact of domestic violence on children in the case of Re L, Re V, Re M, Re H (Contact: Domestic Violence) [2000] 2 FLR 224.

[16] www.familylawweek.co.uk/site.aspx?i=ed98022

[17] www.familylawweek.co.uk/site.aspx?i=ed71271

[18] www.familylawweek.co.uk/site.aspx?i=ed181045

[19] The role of the Family Justice Observatory will be to improve the use of research and data in the family justice system to support the best decisions for children. For a full discussion see the handbook in this resource pack.

[20] The Judicial College is responsible for training full (salaried) and part-time (fee-paid) judges in the courts in England and Wales, and for training members of tribunals. It is also responsible for overseeing the training of magistrates.

stakeholders was that boards 'dealt narrowly with court performance issues and did not sufficiently support the broader development of local family justice policy and practice' (Broadhurst et al, 2017: 17).

LFJBs are very well placed geographically to support the work of a new research observatory. However, evidence from the stakeholder consultation indicates there is 'much work to be done to maximise the capability of this potential key knowledge exchange network'. In contrast, Local Children Safeguarding Boards (LSCBs) 'appeared more proactive in the identification and exchange of research, although the LSCBs appeared to disseminate locally produced knowledge and research, rather than report major national studies' (Broadhurst et al, 2017: 17-18).

A number of recent developments, including those introduced by the *Social Services and Well-Being Act (Wales) 2014*, will help facilitate shared safeguarding learning. These include the regional safeguarding boards and the National Independent Safeguarding Board, closer alignment between the adult and children's safeguarding boards and the further development of the Adult Practice and Child Practice Review frameworks.

## DIG DEEPER

**In 2012 the Ministry of Justice began producing a series of Research Bulletins[21] to disseminate relevant research and good practice throughout the family justice system. These contain peer-reviewed summaries of recent research and are freely available by subscribing to: knowledgehub@justice.gsi.gov.uk**

**They were intended to help establish an environment in which social workers do not have to speculate about what the judge may or may not know and so make it easier for social workers to gauge the extent to which research needs to be referred to in their statement.**

## What does this mean for social worker expertise in the courts?

Social workers need to be confident that the court seeks their professional opinion and will respect it when it is clearly well founded and well presented. Social workers, along with their managers and agencies, need to consider how they can develop more confidence and expertise in giving evidence. 'Evidence' includes:

- writing reports
- writing witness statements
- writing care plans
- giving evidence in the witness box.

## DIG DEEPER

**See Conroy Harris's (2014) 'ten top tips' for going to court (published as part of CoramBAAF's Ten Top Tips series). This is available to buy from: https://corambaaf.org.uk/books/ten-top-tips-going-court**

[21] Publication has been sporadic but resumed in summer 2018 after a two-year gap. See: www.gov.uk/government/publications/family-justice-research-bulletin-7

## TOOL 2

**Use this tool to strengthen your knowledge of your local family court. Social workers who have used this tool say it has increased their knowledge of the 'unknown' and boosted their confidence.**

With the focus now on extensive work taking place prior to proceedings being issued, it is imperative that the integrity of that earlier work can stand up to scrutiny within the court process.

Where there are issues of need or safeguarding, the process of careful scrutiny of the factual matrix and analysis must be implemented from first contact with a family.

Research, then, will inform all aspects of a social worker's analysis of any case. But is there a need to quote research – and if so when?

Social workers will often be advised to avoid making specific reference to research – and before they do so they must consult with their managers and legal advisers. Certainly there is little to gain by throwing in the name of a well-established social work academic if the point to be made is an obvious one – the court will be familiar with general attachment theory as propounded by Bowlby in mid-20th century, for example.

There may be issues where the social worker feels it is necessary to cite or use research in order to establish that the approach they have taken is appropriate and justifiable. This is most likely to occur in cases that have unusual features – examples might include the separation of siblings, post-adoption contact or cultural issues.

The social worker should be able to demonstrate how their view was arrived at and how research was relevant to this process.

## TOOL 9

**Use this tool to review recent local judgments in your family court and see what lessons you can learn for future practice.**

Before quoting research the social worker or Cafcass Cymru officer must be aware that they may be cross-examined on it. They will, therefore, need to have a thorough knowledge of that piece of research (as well as any contradictory research) and be able to argue why it is appropriate to the case.

## FILMS ONLINE

**At www.rip.org.uk/resources/video-resources you can watch a series film clips based on mock cross-examination scenarios. The clips have been developed by Research in Practice and feature a judge, family barrister and local authority social worker acting out issues that might arise when using research in written and oral evidence given in court.**

Original text Lewis J and Erlen N (2012). Updated and adapted for Wales by Doughty J (Cardiff Law School) and James A (Care Council for Wales) (2013). Current version Doughty J (2018).

Evidence Matters in Family Justice



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