The use of experts in family court cases involving children

A guidance note for parents & professionals

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1. ABOUT THIS GUIDANCE NOTE

This guidance note is written for anyone involved in a family court case, who is trying to understand more about the use of experts in family proceedings.

The guidance note is written by The Transparency Project and is not legal advice. It is accurate to the best of our knowledge at the time of publication, and we will do our best to update it, subject to resources.

We have set out at the beginning some common things that people often worry about and then we set out the more technical details about how experts are instructed and how they go about preparing their report for the court.

Sometimes we have referred to cases decided by higher courts which clarify legal principles (rules) that apply, and which show what approach the court may take in similar circumstances. We have included references for the cases that we refer to, so that you can look them up if you want to - but in most cases you won't need to do this. The cases we've referred to can be found on the BAILII website at www.bailii.org.

The court rules we have referred to can be found at www.justice.gov.uk, and most of the law we've referred to can be found at www.legislation.gov.uk (but this site is not always up to date).

We've tried to include enough information from cases and rules and law so that you won't need to look things up elsewhere, unless you want to.

Nothing in this guidance note is intended to be legal advice. What we talk about in this note is general and not about your particular case. Every case is different.

We have used some abbreviations in this guidance note :

- FPR = Family Procedure Rules (the court rules)
- CFA = Children and Families Act 2014
- PD = Practice Direction (more detailed guidance that goes with the main rules)
- LAA = Legal Aid Agency
- MoJ = Ministry of Justice (a government department responsible for courts and justice)

You are free to use or copy this guidance note, but please copy it in full so that anyone who reads it can see where it has come from and the date it was produced.

2. SOME GENERAL PRINCIPLES

2.1. WHAT IS AN 'EXPERT' AND WHY DOES THE COURT NEED THEM?

2.1.1. The definition of 'expert' is 'a person who is very knowledgeable about or skilful in a particular area'. Their expertise means that others can have confidence that their opinion is informed and reliable. For example, the Medical Defence Union (insurers for doctors) recommends that any doctor who wishes to become an expert witness in court proceedings has 10-15 years of specialist experience and has completed training on giving evidence and the relevant law.

2.1.2. Expert witnesses are different from other witnesses who give written or spoken evidence to a court. If someone is an expert, the court is prepared to accept their *opinions* about a case, rather than just evidence about what they have directly seen or heard (this sort of witness is called a witness of fact).

2.1.3. The duty of an expert witness is to provide independent assistance to the court through their objective, unbiased opinion about matters within their expertise. This duty is owed to the court and overrides any duty to anyone who is instructing or paying the expert.

2.1.4. It is the judge's job in cases involving children to decide what the facts are if people can't agree, and, having decided the facts, to make decisions about what is in the best interests of the child. In straightforward cases, the judge can rely on the evidence of the people directly involved about what did or didn't happen and will not need any help from an expert.

2.1.5. However, some cases are more complicated and expert evidence is necessary so that the right decision can be made for the child. For example, if a child is physically injured and no one can say how it happened, or if the court needs to know more about the mental health issues facing the parents. These are areas which can only be properly understood by people who have specialised training and experience. It is unlikely to be useful to ask a judge to make a decision about such issues without some help. The same applies to social workers and children's guardians. They are

considered 'experts' by the court in their own area of expertise, i.e. social work, but will need help to understand issues outside that area.

2.1.6. Experts can play a role in many different types of court cases. This Guidance Note aims to examine what happens in family court cases involving children. The focus is therefore on:

- care proceedings ('public law'), where a local authority will need to prove its case that a child has suffered or is likely to suffer significant harm in the parents' care; or
- arguments between parents ('private law'), where the court will have to decide what amount of time spent with each parent is in the best interests of the child.

2.2. HOW DOES THE COURT TREAT EXPERT EVIDENCE?

2.2.1. *'The expert advises but the court decides' :* The family courts must approach expert evidence with respect, but also with caution and never lose sight of the fundamental principle that the roles of judge and expert are different. It is only the judge who makes the final decision about what happened, and these decisions must be made after considering all the relevant evidence.

2.2.2. A judge does not have to accept an expert's evidence, however experienced or well known they are in their field. However, if a judge disagrees with an expert, they must explain *why* the expert recommendation is rejected. See the comments of Lord Justice Ward and Lady Justice Butler-Sloss in the case of *Re B (Care: Expert Witnesses)* [1996] 1 FLR 667:

> *The expert advises but the judge decides …An expert is not in any special position and there is no presumption of belief in a doctor however distinguished he or she may be. It is, however, necessary for the judge to give reasons for disagreeing with experts' conclusions or recommendations… A judge cannot substitute his own views for the views of the experts without some evidence to support what he concludes."*

2.2.3. The importance of distinguishing between the roles of judge and expert can be clearly seen when examining cases of possible non-accidental injury. We discuss this in more detail below, and in particular the controversy surrounding 'shaken baby syndrome'. This has proved a strong example of the complexities that can arise when

dealing with controversial medical evidence and when experts are working from a hypothesis (a suggested explanation for what has happened), which is made on the basis of limited evidence and intended only as a starting point for further investigation.

2.2.4. Expert evidence is just one piece of a jigsaw that a judge needs to try and put together – it is rarely the entire answer to the case (*Re T* [2004] 2 FLR 838). Sometimes clear and persuasive expert evidence is really important, but the roles of the court and expert are distinct: only the court decides what happened if the parties can't agree, and does so by weighing expert evidence against the other evidence: see *A County Council v K, D & L* [2005] EWHC 144 (Fam) (paras 39-44) and Mr Justice Baker in *Re J-S (A Minor)* [2012] EWHC 1370 (Fam).

2.2.5. The court must take into account all the pieces of evidence in the context of all other evidence, including what the parents say, which is very important: see *Re W and another (Non-accidental Injury)* [2003] FCR 346 and also *Devon County Council v EB & Ors (Minors)* [2013] EWHC 968.

2.2.6. In family courts, the civil standard of proof applies, which means facts must be proved 'on the balance of probabilities': if it is more likely than not that the thing happened it is proved (*Re B* [2008] UKHL 35). A fact is either proved – and therefore 'true' – or not proved and therefore 'false'. This is known as a 'binary system' as there are only these two options before the court.

2.2.7. Findings of fact must be based on evidence, not speculation (*Re A (A Child) (Fact Finding Hearing: Speculation*) [2011] EWCA Civ 12). The judge is not allowed 'to sit on the fence' and has to find for one party or the other.

2.2.8. Even where the facts or injuries are very unusual the standard of proof is still 'more likely than not'. See, for example, *BR (Proof of Facts)* [2015] EWFC 41. For example, it is very unlikely to see a lion on the street – but if that street is near a zoo, this may not be so odd. It is not valid to argue that because something is unusual, it requires proof beyond the civil standard. It is unusual for parents to deliberately hurt their children – but some parents do. Once a child is injured and there is no clear explanation about what happened, then on the balance of probabilities the evidence may well point to the parent as the person who hurt the child.

2.2.9. When considering how important expert evidence is to any court decision, the court should always remember that medical knowledge is changing all the time. As Professor Luthert commented in *R v Harris and Others* [2005] EWCA Crim 1980: *It is very easy to try and fill those areas of ignorance with what we know, but I think it is very important to accept that we do not necessarily have a sufficient understanding to explain every case.*

2.2.10. This observation is just as relevant in family cases. As Hedley J observed in *Re R (Care Proceedings Causation)* [2011] EWHC 1715: *there has to be factored into every case…a consideration as to whether the cause is unknown.*

2.2.11. Cases where experts disagree are also difficult for the court. Barrister David Bedingfield commented in 2013 (Expert Evidence - Another Chapter in a Continuing Story, Family Law Week www.familylawweek.co.uk):

> *The expert, as we all know, is expected to give an opinion about the most significant issues in a case. A paradox underlies the use of all expert evidence: the reason an expert is required is that the decision-maker lacks the expertise of the expert and requires that expert's help. How is that same decision-maker also competent to judge the content of the expert's evidence? How is the decision-maker to choose, for example between two competing experts, each using different methodologies beyond the ken of any non-specialist?*

2.2.12. Experts may be victims of 'confirmation bias' – i.e. if they reach a particular conclusion, it's natural to want to support that and to pay less attention to the evidence that weakens the conclusion. The consequences of confirmation bias can be extremely serious, as demonstrated by the Cleveland Report (Report of the inquiry into child abuse in Cleveland 1987 Cm 412 London: Her Majesty's Stationery Office 0 10 104122 5).

2.2.13. In early 1987 there was a sudden increase in diagnoses of child sexual abuse at Middlesbrough General Hospital following the arrival of Dr Marietta Higgs. This revealed the tensions that can arise when child sexual abuse is diagnosed without clear supporting allegations from the alleged victim and led to children being removed from their parents' care. Dr Higgs was not always wrong in her diagnoses but the Report concluded that she regarded disagreement with her views as 'denial'

and thus caused unnecessary stress to children and families. The Cleveland Report led to the creation of the 'Achieving Best Evidence' Guidelines, to attempt to improve how children were questioned by adults. Those guidelines are still used today in both criminal and family cases (and can be found on the CPS website).

2.2.14. In 1991, the Orkney child abuse scandal provided another illustration of the serious dangers of pursuing a case from a starting and fixed view about what you expect the outcome to be. Children were removed from their homes because of allegations that included satanic ritual abuse. The children denied that any abuse had occurred, and medical examinations found no evidence. However, the children were questioned extensively on the basis that they had been abused.

2.2.15. More recently, Mrs Justice Pauffley commented in *Re P and Q (Children: Care Proceedings: Fact Finding)* [2015] EWHC 26 (Fam) - the fact finding hearing in the 'Hampstead Hoax' case:

I remind myself of the several cautionary considerations when a court is considering the contributions made by experts as comprised within Re U; Re B [2004] EWCA Civ 567 – i) The cause of an injury or an episode that cannot be explained scientifically remains equivocal. … iv) The court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour propre is at stake, or the expert who has developed a scientific prejudice*.

(*Amour propre means pride, 'own love', or a special 'thing')

3. SOME FREQUENTLY ASKED QUESTIONS

3.1. *DOES ASKING FOR AN EXPERT REPORT MEAN THEY THINK I AM MAD?*

3.1.1. A common concern voiced by many parents is that if a psychiatric or psychological assessment is ordered by the court, this is because the local authority or the other parent wants to find evidence to support a view that someone has a serious mental illness and this means they can't look after a child.

3.1.2. The first point to make is that mental illness is very common and many people can manage to parent well while at the same time dealing with mental health difficulties. If the court wants more information about this, it should not be seen as something that will automatically rule you out as caring for your child but it is clear that many parents are anxious and uneasy about such assessment.

3.1.3. We deal with the distinction between a psychiatrist and a psychologist below. The kind of assessment you will have will depend on the kind of issues that are relevant to the case. For example, there may be worries about whether or not someone can understand what is going on and give their lawyer instructions. This will require what is called 'a capacity assessment'. Or parents who themselves suffered trauma as children may find that this has an impact on how they parent their own children and the court will want to know if there are any therapies or other kind of support that could make things easier for the parent and how quickly the parent could make any necessary changes to their lifestyle. You may be asked to take 'psychometric tests' to understand how you react in certain circumstances and you may be asked questions about your own childhood.

3.1.4. If you don't understand why a particular expert has been instructed, please do ask your lawyer to explain, if you have one. As we discuss below, these reports can now only be ordered by the court if they are considered 'necessary' so they will be an important piece of evidence for the court and it's important that people understand why the assessment has been asked for and what it will involve.

3.2. *WHAT IF I DON'T WANT TO SEE AN EXPERT?*

3.2.1. You don't have to. No adult who has the capacity to make their own decisions can be forced into any assessment or to talk to any expert. Once a child is old enough to make their own decisions they cannot be forced to take part in an assessment either.

3.2.2. However, you need to think very carefully about why you are refusing. If it is because you have serious and reasonable concerns about the suitability of the expert's qualifications, experience or independence, then you need to make sure the court is aware of this and it may be possible to find another expert in whom you have more confidence.

3.2.3. The danger in refusing to co-operate is that the court may draw an 'adverse inference' from your refusal. This is particularly common in cases involving testing for drugs and the court is often prepared to warn parties that it will assume they have 'something to hide' if, for example, they do not offer a sample of hair for testing or interfere with that process by getting their hair cut or dyed.

3.2.4. If you don't want to see an expert because you are uncertain or worried about the process and what the expert will actually do, make sure you understand why the expert is being asked to report. Often expert evidence can be very helpful for everyone as it involves someone taking a step back from the case and looking at it with fresh eyes.

3.2.5. Adopting a 'siege mentality' and refusing to co-operate can have really serious implications for the proceedings as can be seen in *Hertfordshire County Council v F & Others* [2014] EWHC 2159 (Fam). The parents lost the care of their two children despite demonstrating some 'excellent qualities' due primarily to the father's aggression and suspicion towards professionals in the case. The judge commented:

> *I certainly have found the father in his evidence before me to show a degree of suspicion of all kinds of people, and a degree of conviction about malign associations between professionals, which is highly unusual. It does not seem to be based on any objective evidence at all. That mindset seriously inhibits the father's ability to see the interests of his children in an objective way and it certainly inhibits necessary working with professionals.*

3.2.6. If once the expert has reported you are concerned that they got something seriously wrong or didn't take into account relevant matters, you will be able to challenge that report in the court process and we discuss this below.

3.3. *WHEN ARE 'PAPER-BASED ASSESSMENTS' ACCEPTABLE?*

3.3.1. This will depend on what the expert is asked to do. For example, it is common when small children have unexplained injuries for medical experts to look at the X-rays, medical reports etc. that were made by other doctors nearer the time that the injury was first reported. In the case of bruising or fractures that have healed by the time the expert is instructed, there would be no point at all in subjecting the child to any further medical examination. This underscores the need for the first doctors on the scene to take careful notes, photographs and other images, such as X-rays.

3.3.2. However, if the expert is instructed to report on the state of someone's mental health or look at how they interact with their child, it is difficult to see how the court will find a report useful if the expert did not have direct contact with the people being assessed. For example, see *Re NL (A Child) (Appeal: Interim Care Order: Facts And Reasons)* [2014] EWHC 270 (Fam), where the court was critical of a decision to remove a child following a paper-based assessment of the mother that was turned around in a very tight timescale.

3.3.3. Similarly, if an expert is being asked to update a previous assessment, it may sometimes help just to provide a short update without further interview or tests, but the older the previous assessment gets, the less likely the court is to consider this a fair process as the more time that passes, the more the expert will need to rely upon the quality of other people's observations and comment.

3.4. *WHAT IF I DON'T AGREE WITH AN EXPERT ASSESSMENT?*

3.4.1. Make sure at the outset that you have been able to look at the expert's CV and you are content that they are indeed 'expert' in their field. If there is any concern about the nature of the expert's qualifications and experience, these need to be raised as soon as possible and ideally before the expert is instructed. The strict rules around

instruction and contents of the expert's report should deal with many issues of concern before they arise in the court setting. If the expert report does not follow the court's rules, the court may not be willing to rely on it.

3.4.2. You might want to search for the expert's name on www.BAILII.org to see whether there are any cases published that mention them.

3.4.3. However, even if at first glance it seems that the expert has been properly instructed and has given clear evidence in court, there have been some unfortunate cases where on closer inspection the evidence was found to be flawed and required challenge.

3.4.4. Some particular areas of challenge to an expert are set out below.

3.4.5. *Be sure that the expert is fully and properly instructed*.

- Everyone is expected to have carefully looked at the proposed letter of instruction before sending it to the expert, but problems can still crop up after the letter is sent, particularly if circumstances change and the expert needs to look at further updating information

- The case of In *C (interim judgment on expert evidence)* [2018] EWFC B9 set out some useful lessons to be learned for the future where an expert had not properly considered all the available evidence before reaching conclusions about the parents. If an expert is not confident that they have all the necessary documents/information needed before starting work, the expert must identify what is missing and set a deadline for when the missing information will be provided. Any updating documents need to be looked at before the court hearing starts and if the expert is not happy with the information or instructions, they need to let someone know as soon as possible.

3.4.6. *The expert must base opinion on verified facts, or make it clear what facts are verified*.

- If a 'fact' is completely obvious and uncontroversial such as 'what was the date last Wednesday' then it can be accepted as a fact without any further investigation. However, if people cannot agree what happened, then unless a 'fact' has already been proved in court – for example someone has a criminal conviction

or the family court has made findings of fact - then an alleged 'fact' cannot be relied upon as the truth and it is dangerous for an expert to report on the basis that controversial 'facts' are the accepted truth. If an expert thinks they do not have all the relevant information needed to form a view, they must let the instructing solicitor know as soon as possible.

3.5. *WHEN AN EXPERT GOES OUTSIDE THEIR FIELD OF EXPERTISE*

3.5.1. Experts must be careful not to 'step out' of their expertise and offer opinions about things they aren't experts about. This can have very serious consequences if an expert, rightly recognised as eminent in one field, gives an opinion about something else. There is a clear risk that the lay parties – and the judge! - may place too much reliance on such observations.

3.5.2. 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 (*A Local Authority v S* [2009] EWHC 2115 (Fam)).

3.5.3. A clear example of the dangers of an expert going outside their expertise is found in the criminal courts. Sally Clark was convicted in 1999 of murdering her two young children after the paediatrician Professor Sir Roy Meadows told the jury that *"the chance of two children dying naturally in these circumstances is very, very long odds indeed, one in 73 million"*. Her first appeal was dismissed but in 2003 the Court of Appeal found that the paediatrician had made an obvious statistical error. Squaring the risk of one event to give the risk of two such events was permissible only if the events were truly independent, which was not the case for cot deaths. Professor Sir Roy Meadows had offered his opinion on statistics, which was not an area where he was an expert.

3.5.4. The Royal Statistical Society commented:

Society does not tolerate doctors making serious clinical errors because it is widely understood that such errors could mean the difference between life and death. The

case of R v. Sally Clark is one example of a medical expert witness making a serious statistical error, one which may have had a profound effect on the outcome of the case….Although many scientists have some familiarity with statistical methods, statistics remains a specialised area. The Society urges the Courts to ensure that statistical evidence is presented only by appropriately qualified statistical experts, as would be the case for any other form of expert evidence

3.5.5. Recognition that some experts had stepped outside their own discipline was one of the reasons for the Chief Medical Officer's proposals for reform in 2006, *Bearing Good Witness*, and subsequent introduction of national standards in 2014.

3.6. *ISSUES AROUND NOTE TAKING AND RECORDING*

3.6.1. It may be necessary to ask to see the notes the expert took at the time of the interview or assessment, if there is any later disagreement about what was actually said or done. Any party to the court case may ask for the records of the assessment or communications between the expert and anyone else involved in the case.

3.6.2. Some experts record their interviews by taking notes on paper or a device, whilst others audio record their interviews. It is possible to obtain copies of those clinical notes and recordings if an issue arises about the accuracy of what is later written down in the report for the court.

3.6.3. An example of how important it was to be sure about what was recorded at the time is found in the case of *F (A Minor)* [2016] EWHC 2149 (Fam). A consultant clinical psychologist was instructed to assess the mother. She recorded their sessions, unknown to him, and was able to later transcribe those recordings to show that the psychologist had attributed words to the mother that she did not say. The judge found at para 26 of the judgment:

The overall impression is of an expert who is overreaching his material, in the sense that whilst much of it is rooted in genuine reliable secure evidence, it is represented in such a way that it is designed to give it its maximum forensic impact. That involves a manipulation of material which is wholly unacceptable and, at very least, falls far below the standard that any Court is entitled to expect of any expert witness… Common law principles of fairness and justice demand, as do Articles 6 & 8 of the ECHR, a process in which both the children and the parents can properly participate in a real

sense which respects their autonomy. Dr Harper's professional failure here compromised the fairness of the process for both Mother and children.

3.6.4. It is lawful for a parent to record any interaction they have with a professional, provided that recording is for their own personal use. The Transparency Project have considered that issue in our guidance note 'Parents recording social workers: A guidance note for parents and professionals'. However, secret recording may well be seen as evidence of hostility from parents and if any parent's working relationship with an expert has broken down to such a degree that they wish to secretly record their interactions with that expert, it is probably better to openly raise the issue of damaged working relationships sooner rather than later.

3.7. *IS THE EXPERT INDEPENDENT?*

3.7.1. Part of the concern expressed by the parents in the *Hertfordshire* case (discussed above at 3.2.5) was that some of the experts who had assessed them were not truly independent as they had close links with the local authority. It is important that justice is seen to be done and that each party can have trust in the process. If any party is uneasy about what they think are unhelpful close associations between an expert and any other party to the proceedings, it may be better for all concerned to choose another expert.

3.7.2. This may in time become an increasingly serious problem due to concerns that there will be fewer professionals who are willing to accept instructions at legal aid rates. If an expert does have any kind of association with any party involved in the instruction this should be raised immediately and explained to give anyone who is uneasy about this the opportunity to object. But the mere fact that the expert has reported in cases brought by the same local authority is unlikely of itself to be a valid ground for objecting to the instruction of that expert.

4. ASKING QUESTIONS AFTER RECEIPT OF THE REPORT

4.1. Under FPR 25.10 any party may ask further written questions of the expert within 10 days of receiving the report. The questions must be proportionate (you mustn't go over the top), and they must be aimed at clarifying something in the report that isn't already clear. Any questions sent to the expert this way must be copied to all the other parties when sent.

4.2. 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). Questions asked of an expert in cross examination might be aimed at showing that

- the expert has not had or read all the relevant information and that this has therefore undermined or affected their opinion or recommendations,
- they have misunderstood some fact or explanation and that this has therefore undermined or affected their opinion or recommendations,
- they have misapplied or misused statistics or research,
- they have missed something important out of their report or analysis and that this has therefore undermined or affected their opinion or recommendations,
- they have not carried out a test or done something they ought to have done before offering the / an opinion and that this has therefore undermined or affected their opinion or recommendations,
- they have not been even handed or thorough in their work and that this has therefore undermined or affected their opinion or recommendations,
- they have not considered all options and that this has therefore undermined or affected their opinion or recommendations, or
- that their recommendations generally can't be relied upon, perhaps for one of the reasons explored above (lack of independence, inaccurate representation of an interview etc).

4.3. Alternatively, they might be asked to reconsider or update their recommendation in light of some change of circumstances or new information.

4.4. It is possible to ask questions of a treating professional, such as a paediatrician (although this doesn't technically fall under FPR 25.10 the court will usually give permission). The document '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, Aug 2018) (we'll call this 'the RCPCH Guidance' (We'll call this 'the RCPCH Guidance') says this should be 'about points of clarification around the facts of the case' and that 'these questions should be provided in a timely manner and as soon as possible, to allow sufficient opportunity to consider the questions and the treating paediatrician must remain within their expertise'.

5. WHAT KIND OF EXPERTS ARE USED IN PROCEEDINGS ABOUT CHILDREN?

5.1. There are a wide variety of circumstances which lead to cases coming to the Family Court, and so there are a wide variety of experts in different fields who may be able to help the court. Below we set out the kind of experts who are most likely to be instructed in family cases.

5.2. EXPERT EVIDENCE ABOUT THE MIND AND BEHAVIOUR; PSYCHOLOGISTS & PSYCHIATRISTS

5.2.1. Psychologists: It is important to understand the difference between psychologists and psychiatrists. In some cases both types of expertise may be required but often the distinction is important. The word 'psychology' was formed by combining the Greek word 'psychē' – which means 'breath', 'soul' or 'life'- with the Greek word 'logos' which means speech, word or reason. Therefore, psychology is about studying *how people think and act*. Psychologists are interested in all aspects of behaviour and how people's thoughts and feelings can make them behave in different ways, which may cause problems for their day to day lives. If parents find it hard to interact with their child in a positive way, then a psychological assessment might help the court understand what is going wrong and find out if there is any possible support or therapy that could help. Similarly, children who have experienced serious trauma may start behaving in ways that are very harmful to them or those around them and a psychologist may be able to help recommend therapy or intervention that can help the child behave differently (or help the parents to manage the behaviour better). Psychologists will often carry out tests to find out a parent's IQ or see what kind of personality they have; some personality traits can make parenting more difficult, and a parent with a low IQ may find it difficult to understand the legal proceedings and give instructions to their lawyer.

5.2.2. Psychiatrists : Psychologists are not usually medically qualified, whereas psychiatrists are qualified medical doctors who have decided to specialise in psychiatry. The word 'psychiatrist' means 'a healing of the soul', taken from the Greek word 'psyche' and the word 'iatreia' which means 'healing' or 'care. In essence, psychiatry is the study of mental health problems and their diagnosis, management and prevention.

5.2.3. If the court is worried that a parent has a serious mental health problem which is getting in the way of allowing them to be good enough parents, then a psychiatrist is probably the more helpful expert. As qualified medical doctors, they are able to prescribe medication, which most psychologists cannot.

5.2.4. Both psychologists and psychiatrists might recommend that parents engage in psychotherapy, to help them overcome stress and emotional/relationship problems or that children require help to overcome traumatic experiences. There are a wide variety of different approaches such as 'talking therapies' – for example cognitive behavioural therapy or psychodynamic counselling. Some therapies will be available on the NHS but there is likely to be a waiting list.

5.2.5. If you are asked to undergo either a psychological or psychiatric assessment this is likely to require several hours of your time or even longer and the expert will probably need to see your general medical notes from your GP before hand (with your consent). They will usually summarise the relevant bits of your medical records without everyone else in the case seeing the whole lot.

5.2.6. Research commissioned by the MoJ in 2015 suggested that there had been an overall decrease in the number of psychologists and psychiatrists appointed since the CFA came into force and that greater reliance was put on social workers as having the necessary expertise to carry out general parenting assessments. However, judges still required psychological evidence in cases where it was necessary to assess an individual's capacity to instruct their solicitors or make legal decisions, and for other cognitive assessments.

5.2.7. See 'The use of experts in family law; understanding the processes for commissioning experts and the contribution they make to the family court' [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486770/use-experts-family-law.pdf]

5.3. EXPERT EVIDENCE ABOUT THE BODY: MEDICAL EXPERTS

5.3.1. Medical experts are usually needed in cases where a child is showing signs of being really unwell or has suffered some obvious injury – such as bone fractures or serious bruises. Very young children who are not mobile are unlikely to be able to hurt

themselves, so there will naturally be concerns about how the child ended up injured.

5.3.2. Cases involving injury to a child can be difficult and complex, and it is important that those representing the parents have experience in these types of cases. Mr Justice Baker commented in *Devon County Council v EB & Ors (Minors)* [2013] EWHC 968 (Fam), that specialist family lawyers played a crucial role. He highlighted his unease at the consequences for the family justice system as the number of litigants in person increases. Parents involved in a case where a child has been injured should ask their lawyer how much experience they have, and lawyers need to be careful not to take on cases which are outside their area of competence.

5.3.3. As soon as a child is suspected to be suffering from an injury or illness for which there is no clear explanation, lawyers and parents must start thinking about whether expert evidence is needed, and if so, of what type. Those who were looking after the child around the time the injury happened will have to think hard about what they can remember - what interactions did they have with the child, what kind of behaviour was the child showing? Also, there may be information from the parents' own medical histories that would suggest their child has inherited a condition that requires further examination by a specialist, such as a parent who bruises very easily.

5.3.4. The following is a brief summary of the type of experts most often considered in unexplained injury cases. This is not an exhaustive list – as the courts frequently state, current medical knowledge continues to expand and evolve. For example, in *re TG (A Child)* [2013] EWCA Civ 5, evidence from a biomechanical engineering expert about the amount of force that could be exerted on a child by an incident involving a baby bouncer was found not to be necessary, but the judge said that the courts must always bear in mind that such evidence could be deemed necessary in future cases, as scientific knowledge increased.

- Paediatrician – a doctor who specialises in the medical care of children. They are most likely to be asked about external injuries such as bruises or burns or to help the court understand how children react to painful injuries (see also the RCPCH Guidance).

- Radiologist – a radiologist deals with images of the bones. They will help the court understand if a bone has been fractured or has some pre-existing abnormality. They can examine how a bone fracture is healing and therefore help the court understand about when an injury occurred.

- Geneticist – a geneticist can examine the family history and medical records to see if further testing is needed to rule in or rule out any inherited cause of an injury - for e.g. such as 'brittle bone syndrome' (osteogenesis imperfecta).

- Ophthalmologist are doctors who examine eyes. This may be necessary if a child has suspected retinal haemorrhages (bleeding around or behind the eye).

- Haematologist – this is a doctor who is an expert in blood and clotting disorders. A child will usually undergo routine blood tests if presenting in hospital with an injury but more extensive tests may be required to help the court understand if there is any pre-existing condition that has caused or made bleeding worse.

- Endocrinologist – an endocrinologist looks at biochemistry and hormones within the body. They can help the court in cases where it is suspected injuries have arisen from e.g. rickets.

5.4. TREATING PROFESSIONALS

5.4.1. It is important to understand the difference between a professional with expertise who examines and treats a child (for example 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.

5.4.2. 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 can be really important. 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. That often has to be carried out with incomplete information so an initial impression can turn out to be wrong.

5.4.3. By 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 jobs of the treating team and the expert witness can be thought of in this way: the treating team is asked to answer the questions 'is there anything to be worried about?' and 'Is there anything else we need to do now to decide whether to be worried?' and 'Does the child need treatment?'. 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?'

5.4.4. The 'Paediatricians as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations' guidance is useful here :

"Treating paediatricians may be called as a professional witness to give evidence in relation to their role in the case. This is distinct from being instructed as an expert to provide an opinion on the medical issues. In the event that a treating doctor is called to give evidence, this is confined to the factual evidence that they can give on their role in the case, and where appropriate, the clinical opinion that they came to with the facts available to them at the time…

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 and reasons why they have come to the diagnosis.'

5.4.5. Although sometimes courts have been happy to treat the paediatrician who did the child protection medical as an expert in the case, the RCPCH guidance now makes clear that in the case of paediatricians this blurring should usually not be allowed. If the court needs a full, objective analysis of all the possible explanations for apparent injuries, it will need an expert report.

5.4.6. See above for when it is appropriate to ask written questions of the treating paediatrician.

5.4.7. In the case of mental health professionals who are treating a child or adult involved in the case, their direct involvement in the court process through giving evidence should usually be avoided because it can be difficult for the therapist / professional to be frank with the court without making it difficult for the patient to trust that professional in the future : in the counselling room or hospital the professional's duty is to the patient but in the witness box as an expert it is to the court.

5.4.8. The court may still ask for a report from a therapist or treating professional about how a patient is doing and whether they are engaging with or benefitting from therapy or treatment, but it is very unlikely to order a report or require a professional in a therapeutic role to divulge the details of their confidential therapy sessions.

5.5. HOW DO THE COURTS APPROACH THE USE OF MEDICAL EVIDENCE? LIKELY COURT PROCEDURE WHEN CONSIDERING A SUSPECTED NON-ACCIDENTAL INJURY

5.5.1. The court needs to make a decision about: *what* happened to the child, *when* did it happen and *how* did it happen (including who caused it). This will help inform a finding about whether or not the child was hurt by someone else, and if so, was the injury the result of an accident, carelessness or deliberate harm.

5.5.2. Medical evidence can help the court at every stage of this analysis, by offering opinion on:

- Whether there was an injury at all – was the child's presentation caused or made worse by an illness or medical condition?
- 'mechanism': how was the injury caused? Medical experts can help the court understand, e.g. the amount and type of force that has be exerted on a bone to break it - which may tend to support or undermine any claim of 'accident'.
- 'timing': when was the injury caused? Radiologists for example can examine images of bone fractures and suggest a timeframe for when the bone was broken based on how the bone is healing. However, bruises are usually said to be impossible to date with any precision.
- 'Presentation' – how do children tend to react when they are in pain? This can help the court narrow down the timeframe for when the injury occurred or help reach

conclusions about what kind of blame if any could be attributed to a parent. For example, should they have noticed sooner that their child was hurt?

- It may be that the court has pretty clear evidence about *what* the injuries are: for example there is no dispute that a child has a brain haemorrhage. However, even the experts may find it hard to be clear about how the brain came to be injured – sometimes the diagnosis of how an injury has been caused is disputed or controversial. We shall look at this in more detail below in the context of 'shaken baby syndrome'.

- However, if the court is clear about *what* has happened then it needs to try and find out if the child was hurt accidentally or deliberately and, if so, who is to blame. When talking about 'accidents' we need to remember the difference between something that is 'unexpected and unintentional' and an injury which does involve some responsibility falling on the adult carer (see *S (A Child)* [2014] EWCA Civ 25). For example, the adult could have failed to take enough care to watch what the child was doing. The most serious end of the scale of blame is a deliberate assault on a child. The courts will clearly have a different approach to a parent who hurt a child out of carelessness and now understands what went wrong, as opposed to the parent who deliberately hurt a child and then lies about it.

- Who hurt the child? The court should not 'strain' to find out who did it, but it is important to try and identify the person or persons responsible (the 'perpetrators'). A child has a right to the clearest possible information about what happened but also the court needs to consider how to manage risks for the future and protect the child from any further harm from any particular individual.

- If the court cannot narrow it down to one person, it should attempt to identify the 'pool of possible perpetrators' (see the decisions in *Lancashire CC v B* [2000] 2 AC 147 and *North Yorkshire CC v SA* [2003] 2 FLR 849). The identification of who should be in 'the pool' may be necessary if it is argued that the harm has been caused by someone outside the home or family, for example at school or in hospital or by a stranger. If someone else hurt the child that harm cannot have been 'caused' by the parents unless it would have been reasonable to expect a parent to have prevented it, for example by taking care to make sure that anyone left looking after a child was safe to do so. Parents who do not take such care may find the court

decides they have 'failed to protect' which is likely to have serious consequences for future decision making about the child.

- When considering whether a particular individual should be within the pool of possible perpetrators the test for the judge is whether there is a real possibility that he or she was involved (not whether that individual can be ruled out as the person who did it).

- A decision that injuries were caused either by one person or another person but the court can't say which is often called a 'Lancashire finding', after the case we've referred to above.

- Decisions about whether or not a child has been intentionally hurt or neglected are not made just on the basis of the medical evidence – all the other information available to the court will also be relevant, but medical evidence can be very important.

6. ISSUES OF MEDICAL CONTROVERSY

6.1. Cases involving disputed medical evidence are likely to be the most difficult and complicated facing the courts.

6.2. Some description and discussion of the questions arising over the years in regard to 'shaken baby syndrome' are a helpful way to put into context the challenges faced by the court when considering expert evidence, particularly when different experts disagree over the same issue.

6.3. The immediate and obvious problem for finding evidence to support doctors' speculation about how children get injured is that doctors cannot carry out experiments directly on children to support their theories. Doctors instead have to gather evidence from their own and others' experiences in practice. When dealing with very young children who cannot communicate, they must rely on the adult who was looking after the child telling them what happened. The adult may not have seen what happened or may not be able to give a clear account, particularly if the adult is worried that he or she in fact did something to hurt the child. There is little doubt that medical understanding of such issues will continue to expand and develop and lawyers, parents and experts will need to remain alert to identify developing research and competing theories.

6.4. The recognition of 'shaken baby syndrome' developed around the 'triad' of injuries which the majority of the medical profession accept are very strong indicators of abuse. This 'triad' is 1) bleeding in the retinas of the eyes, 2) bleeding under the dural matter of the brain (subdural haematoma) and 3) brain swelling.

6.5. Worrying patterns of injuries to children began to be noticed by radiologists in the 1940s and 50s as use of X-rays increased. In 1972 a British neurologist, Norman Guthkelch, suggested that damage was caused by the brain being thrown about inside the skull, in some kind of 'whiplash shaken infant syndrome', which was detected by bleeding in the brain and eyes. Thus the 'triad' emerged as a diagnostic tool for identifying deliberate infliction of violent harm upon a child.

6.6. Dr Waney Squier emerged at the forefront of those who disputed the science behind the 'shaken baby syndrome' following publications by neuropathologist Dr Geddes in 2001. The previously accepted view had been that violent shaking damages nerve fibres ('axons') in the brain. This damage prevents proteins from travelling along the axons, so

they accumulate and swelling occurs. Dr Geddes examined axonal swelling in brains of children after their death who had allegedly been shaken and found no axonal damage or none that was caused by trauma. The American forensic pathologist Dr John Plunkett suggested that the triad could result from 'accidental tumbles'. Dr Marta Cohen at Sheffield Children's Hospital and Dr Irene Scheimberg at Barts in London argued that sub-dural bleeding and swelling could arise from a variety of non-inflicted causes such as sepsis or heart problems.

6.7. Some also questioned why babies gripped hard enough to be shaken had no other signs of a violent assault such as bruises or broken bones. In 2003, Dr Geddes suggested that choking could cause a series of events that would result in the triad. However, when Dr Geddes was cross examined in 2005 during an appeal against three shaken baby convictions in the criminal courts, she conceded that her theory might not be 'quite right' and reminded the court it was a hypothesis not an established fact.

6.8. In June 2010 Dr Squier was investigated by the General Medical Council following complaints by the National Policing Improvement Agency that she had dishonestly misrepresented the science of shaken baby syndrome in criminal trials involving six infants between 2007 and 2010. In 2015 130 allegations were found proved and Dr Squier was removed from the medical register. She appealed and was found not to have been deliberately dishonest and was restored to the medical register although banned from working as an expert witness for three years.

6.9. Questions and scepticism about the 'triad' of injuries which prove shaken baby syndrome remain amongst a minority of practitioners. The majority of doctors however assert that clinical practice demonstrates that there is no evidence that 'short falls', choking or heart complaints etc, cause the kind of injuries noted in the triad for 'shaken baby syndrome'.

6.10. An example of the impact of disputed medical evidence can be found in the case of Effie Stilwell *(Buckinghamshire County Council v Andrews & Ors* [2017] EWFC B19). Effie had collapsed and was taken to hospital where it was found that she had serious brain injuries. The local authority were worried that Effie's parents had shaken her. However, Effie's mother had been diagnosed as suffering from Ehlers Danlos Syndrome (EDS), and so one expert recommended further tests for Effie. She was found to have a mutation in a gene called COL 3 A1 which confirmed a diagnosis of EDS Type IV (formerly known as 'vascular EDS'– the first time such a case had come before the family courts). This is a

condition that impacts on the formation of all tissue, particularly noted in the formation of the arterial and venous system. It is characterised by thin and translucent skin, easy bruising and vascular and arterial rupture which may occur spontaneously.

6.11. After considering the medical evidence presented by a consultant geneticist, the court concluded that Effie's collapse was 'most likely the consequence of a naturally evolving disease'. The local authority applied for permission to withdraw their application for a care order and Effie went home.

6.12. Dr Stoodley (the paediatric neuroradiologist expert) however did not agree with the conclusions, maintaining that he was not aware of any clinical evidence to support EDS as being causative of the pattern of injuries sustained by Effie. He had examined approximately 900 cases of 'triad injuries' and concluded that 90% were caused by abusive shaking but only 10% of those had suffered 'wilful and persistent abuse'. The majority in his view occurred as a result of a momentary loss of control on the part of a parent.

6.13. See also *LB of Islington v Al Alas and Wray* [2012] EWHC 865 (Fam), in which a child's injuries were thought to be shaking injuries but were eventually explained by the presence of rickets, a condition that had not been identified by the hospital where the child had been treated. The parents were cleared.

6.14. Best practice in cases of serious and unexplained injury to a child is for the earliest possibly identification of any possible underlying medical cause, so that the right experts can be instructed quickly and competing hypotheses laid out clearly for the court.

7. DRUG AND ALCOHOL TESTS

7.1. In cases where the court is worried about drug/alcohol use, an expert report may be needed to test how much and how often drink or drugs are taken. There are a variety of different tests for this - usually testing of blood, urine or hair strand tests (or a combination). Hair strand tests can be particularly useful as it may be possible to test sections of the hair to provide evidence about the period of time substances were taken. Particular issues arising from hair strand testing are considered below.

7.2. General rules that apply to any expert report which gives an opinion about the type and quantity of any ingested substance:

- experts must be able to explain their reports in a way that a non expert can understand – this is particularly important when evidence is produced in the form of numbers which can be over-interpreted or mis-interpreted by non experts.
- care should be taken to understand the report and not jump to a conclusion about drug or alcohol use without understanding the significance of the data and its place in the overall evidence.
- No test results should ever be regarded as determinative or conclusive and must be placed in the context of the broader picture, which includes e.g. social work evidence, medical reports and the reliability of the parents' evidence (see *London Borough of Islington v M & R* [2017] EWHC 364 (Fam) para 32).

7.3. PARTICULAR ISSUES AROUND HAIR STRAND TESTING

7.3.1. These tests have been the source of some controversy over the years, with concerns that the results of hair strand tests were being used to make decisions about the case that didn't fit the other evidence. Some recent cases have considered this issue.

7.3.2. In *Bristol City Council v The Mother and others* [2012] EWHC 2548 (Fam), Mr Justice Baker was concerned with testing for cocaine and opiates. Human error at the lab led to a false positive report. The judge endorsed four propositions (para 25) and gave some useful guidance :

- The science involved in hair strand testing for drug use is now well-established and not controversial.

- A positive result for a drug at a quantity above the cut-off level is reliable as evidence that the person tested has been exposed to the drug in question.
- Sequential testing of sections is a good guide to the pattern of use revealed.
- The quantity of drug in any given section is not proof of the quantity actually used in that period but is a good guide to the relative level of use (low, medium, high) over time.

7.3.3. The judgment of Mr Justice Peter Jackson *H (A Child: Hair Strand Testing)* [2017] EWFC 64 provided a helpful overview of how to interpret hair strand tests and considered (para 57 onwards), the type of information that should be included in such expert reports to best assist the family courts. The importance of hair strand testing is not in doubt but such reports would only usefully assist the court if the expert was able to describe the process, record the results and explain their significance in a way the non-experts could understand.

7.3.4. The judgment of HHJ Lazarus in *Kent County Council v A, M & Ors (Hair strand testing)* [2017] EWFC B104 para 162 relied upon the decision of Jackson J and repeated the dangers of potentially misleading expert hair strand test reports:

> *… it is quite clear that in this case, if the further questions had not been posed of Alere/Abbott [drug testing companies], if that in turn had not led to the instruction of joint Court instructed experts in the form of Drs McKinnon and Rushton, then the inadequate and misleading wording in the Alere/Abbott reports would have been fundamentally misleading and it would have been impossible for the representatives of the parties and for the Court to have a clear and accurate understanding of the true interpretation of A's hair strand testing results and their implications in this complex case.*

8. TECHNICAL ISSUES ABOUT INSTRUCTING AN EXPERT FOR COURT PROCEEDINGS

8.1. RECENT HISTORY

8.1.1. Before the Children and Families Act 2014 (CFA), concerns had been growing about the impact of expert evidence in care proceedings. In 2010 Dr Judith Masson of Bristol University examined two of the key problems in care proceedings - the time the proceedings took and the amount they cost; both issues were linked to the substantial use of experts (see 'The use of experts in child care proceedings in England and Wales, benefits, costs and controls', Judith Masson Bristol, Budapest, Ghent, Göttingen, Groningen, Turku, Uppsala Annual Legal Research Network Conference 2010, hosted by the University of Groningen, October 2010 www.bristol.ac.uk/media-library/sites/law/migrated/documents/alrnc2010masson.pdf).

8.1.2. Delay was caused due to difficulties in: identifying suitable experts; chosen experts being unable to take on cases because of their workload or not meeting the court deadline for completing the work; and requests for reports being made late in the proceedings. There was concern about the shortage of experts but research into medical experts established that there was a very large pool of potential experts who had never been asked to take on this work (see the report of the Chief Medical Officer in 2006, *Bearing Good Witness*). It has also been suggested by social work academics that the problem was exacerbated with regard to psychological or psychiatric assessments by 'the pursuit of an unattainable level of certainty through repeated assessments of the parents (in)ability to care' (Beckett and McKeigue 2003).

8.1.3. A further report questioning the quality of psychologists' evidence by Professor Jane Ireland received some publicity in 2012. Her findings proved controversial (for background see 'The Ireland Report and the Fitness to Practise Panel in respect of Professor Ireland', Transparency Project Blog, 6 June 2016 – and linked posts).

8.1.4. This combination of concerns about the use of expert evidence and its impact on proceedings led the Family Justice Review in 2011 to conclude that there was a culture of 'routine acceptance' of the need for experts in family law cases and raised concerns that this was duplicating the work of the local authority, leading to delays and potentially compromising the welfare of children (Family Justice Review, 2011).

8.1.5. This provided the impetus to changes in the law, relevant rules and practice directions about how the family court must approach the use of expert evidence. The intent behind these new structures is to ensure that: expert evidence is only admitted when it is necessary to help the court make a decision; experts must be carefully identified; and letters of instruction (which tell the expert what they are expected to do) must be drafted with care. In turn experts are also subject to strict obligations to report clearly and fairly.

8.1.6. Failure to abide by these strict requirements can be very harmful to the fairness of the court proceedings. When things do go wrong it is clear that feedback is useful and the report commissioned by the MoJ in 2015 (The use of experts in family law: Understanding the processes for commissioning experts and the contribution they make to the family court) recognised that experts were keen to receive feedback both on the outcome of the case and how they had contributed to judicial decision-making. The report recommended that consideration should be given to developing processes for the consistent provision of feedback to experts to support them in continually improving the quality of their work.

8.2. EXPERT REPORTS MUST BE 'NECESSARY'

8.2.1. The starting point is that a party must have the court's permission to instruct an expert, and this permission is only given if the person who wants the report can show that the expert report is 'necessary' to resolve proceedings justly (see section 13(6) CFA).

8.2.2. This test of 'necessary' sets a hurdle which is significantly higher than the old test of what is 'reasonably required' (see *Re TG* [2013] EWCA Civ 5 and *Re HL* [2013] EWCA Civ 655). The judgment of Lord Justice Munby in *Re HL* described 'necessary' evidence as being 'indispensable' as opposed just 'useful, reasonable and desirable'.

8.2.3. The court must consider :

- any impact which giving permission would be likely to have on the welfare of the children concerned,
- the issues the expert evidence would relate to,
- the questions which the court would require the expert to answer,

- what other expert evidence is available,
- whether evidence could be given by another person on the matters on which the expert would give evidence,
- the impact which giving permission would be likely to have on the case and the timetable,
- the cost, and
- any matters set out in the Family Procedure Rules.

(see section 13(7) Children and Families Act 2014)

8.3. HOW IS AN APPLICATION MADE? (PART 25 FAMILY PROCEDURE RULES 2010)

8.3.1. Part 25 of the FPR sets out the procedure that must be followed if you want to ask the court for permission to instruct an expert. As a general rule, you should make your application as soon as you can. Rule 25.6 sets out when an application is to be made and rule 25.7 describes how it is to be made - i.e. in what form and with what supporting documents and information. You will need to set out clearly the field in which the expert evidence is required, and it is always helpful to identify the expert by name so that others can comment on the suitability of that particular expert.

8.3.2. You must attach a draft of the order sought to your application notice requesting the court's permission to instruct an expert.

8.3.3. You will also need to attach a copy of the expert's CV and details of how long they will need to write a report and how much it will cost.

8.4. *PRACTICE DIRECTIONS*

8.4.1. You will also need to look at the relevant Practice Directions (PDs) which accompany the FPR. PD 25D relates to financial proceedings so will not be considered here.

8.4.2. Practice Direction 25A deals with urgent applications or applying for an expert before court proceedings have started. When experts' reports are commissioned before the commencement of proceedings, it should be made clear to the expert that he or she may in due course be reporting to the court and must therefore understand they are bound by the duties of an expert set out in PD 25B.

8.4.3. Practice Direction 25B sets out the duties of an expert, what must be included in the expert's report and how to make arrangements to get the expert to court to be cross examined.

8.4.4. Practice Direction 25C looks at the process of how an expert is instructed and sets out what is required in any letter of instruction.

8.4.5. Practice Direction 25E deals with experts' meetings and discussions between experts.

8.4.6. The duties set out in PD25B are strict. The expert must:

- have knowledge appropriate to the court case,
- have been active in the area of work or practice and have sufficient experience of the issues relevant to the case,
- be regulated or accredited to a registered body where this is appropriate,
- have relevant qualifications and has received appropriate training, and
- comply with safeguarding requirements.

8.4.7. See also ''the RCPCH Guidance'), which gives further details of the professional expectations in respect of paediatricians.

8.5. THE EXPERT'S DUTIES

8.5.1. The expert's report must (see para 9(1) of PD25B):

- Set out his/her qualifications and experience,
- Set out what the expert was told about the case and from that information, what the expert considers is relevant to his or her conclusions,
- If the expert report relies on any test or interview, the report must make it clear who was responsible for carrying that out. If it wasn't the expert, did he/she supervise the test and what were the qualifications of the person who conducted the test or interview?
- Answer the questions asked in the instructions,

- Take into account all material facts, for example, any relevant cultural or linguistic matters, and
- If the expert cannot reach a final view on the current evidence, he or she must make this clear.

8.5.2. If there is a range of opinion on any question to be answered by the expert, he or she must:

- summarise the range of opinion;
- identify and explain, within the range of opinions, any 'unknown cause', whether arising from the facts of the case (for example, because there is too little information to form a scientific opinion) or from limited experience or lack of research, peer review or support in the relevant field of expertise; and
- give reasons for any opinion expressed: the court is likely to find it helpful if the expert can set out clearly the kind of factors that support or undermine the opinion.

8.5.3. Participants in the research commissioned by the MoJ in 2015 which we mentioned above confirmed that a 'good' expert report needed above all to be clear :

> *It was considered that reports should include only information that is specific to the case and avoid unnecessary repetition. Further, experts should not repeat information from any of the documents with which they are provided to help prepare their report, as judges have access to this information, nor should they duplicate information from reports they have written for previous cases. Additionally, technical language, a large number of quotes, or lengthy discussion of interviews and assessments with clients were perceived as unnecessary. The ideal report, as summarised by one participant in the peer review discussion groups, was 'technical but understandable'.*

8.6. THE LETTER OF INSTRUCTION

8.6.1. The requirements for the letter of instruction are strict and set out in PD25C. Annexe A to this PD sets out some suggested draft letters. The Law Society also provides some useful sample questions. The letter of instruction should have already been

drafted and attached to the application for the court's permission to instruct an expert. This should have been seen and agreed by all the parties to the case, unless it involves something very straightforward, for example a simple request for a capacity assessment of one party.

8.6.2. Sometimes people are worried that an expert is instructed simply on the 'say so' of one party, such as the local authority, but we can see from the detail of the requirements of the Practice Direction that the process is designed to ensure input from all parties and most importantly the court – and to ensure that any communication the expert has with the parties or their lawyers is done openly.

8.6.3. In cases involving children the expert is usually instructed by all the parties but it is convenient for one party to 'take the lead' – for example to be responsible for sending the letter of instruction, ensuring that the expert is available to come to court and for being the first point of contact in the case of any queries.

8.6.4. The letter of instruction must set out the context in which the expert opinion is sought – for example are there any particular cultural, religious or language needs? The court must approve the questions asked and they must be within the ambit of the expert's area of expertise and not contain unnecessary or irrelevant details. The expert must have a clear list of documents provided – the easiest thing to do is to provide the indexed and paginated trial bundle. It is good practice to provide an agreed summary of the case and set out clearly what is or is not accepted by the parties.

8.7. WHO PAYS FOR THE EXPERT?

8.7.1. PD 25C says that the letter of instruction must be clear as to the basis on which the expert is being contracted to provide a report. If the parties are paying using their own money, it is up to them to enter into a contract with the expert to pay what is agreed.

8.7.2. However, if the expert is going to be paid by legal aid, you need to know how the Legal Aid Agency (LAA) operates.

8.7.3. Legal Aid

8.7.3..1. Para 1 of Schedule 5 to the Civil Legal Aid (Remuneration) Regulations 2013 provides that (subject to paragraph 2), the Lord Chancellor must pay the expert's costs at fixed fees, not exceeding the specified rates set out in a table. This document sets out a list of different categories of expert and the permitted maximum hourly rate for that expert.

8.7.3..2. Paragraph 2 of Schedule 5 of the 2013 Regulations sets out that an expert can be paid more than these set rates, but only if the circumstances are 'exceptional'. This is defined as meaning the evidence must be 'key' to the client's case AND either the material is so complex an expert with high level of seniority is required OR the material is so 'specialised and unusual' that only very few experts could deal with it.

8.7.3..3. If parties want to get their expert paid via the LAA, beyond these fixed rates, they have to apply to the LAA for 'prior authority' i.e. permission to go over the fixed rates. If they don't get this permission, the solicitors could end up with the bill, as they have now a contractual relationship with the expert to pay for his or her services. They are not expected to take this risk and can't be forced to take it.

8.7.3..4. There can also be difficulties getting the LAA to pay for the whole cost of an assessment if the assessment is going to need more hours of work than the LAA think is reasonable.

8.7.3..5. The application for prior authority is via a prescribed form. If refused, there is no right of appeal. The solicitor can ask the LAA to reconsider but the only challenge to refusal is by way of judicial review. The LAA suggest that they take 9 days to process an application but in reality it appears it will take much longer than that. This is potentially a cause for delay so all parties need to be thinking about making such an application as soon as possible. If the LAA refuses the application, it should give reasons for its decision, as fairness dictates that the parties are able to understand why it has refused to allow what the court has considered necessary. The parties may need to think about challenging the LAA's refusal.

8.7.4. How are costs divided between parties? And what happens if one party can't afford to pay?

8.7.4..1. The LAA will expect any joint instruction to be paid for equally by all the parties who want to rely upon the expert evidence. This can cause problems if any self representing or privately paying party says they cannot afford to pay. In care proceedings, at least for the moment, this problem can often be side stepped by looking to the local authority and the child's solicitors to pay the fees in those cases where parents are not legally aided (but see 8.7.4.3 below). Sometimes a local authority will agree to pay a shortfall in order to avoid an impasse or delay, but it is not clear that the judge has the power to order a reluctant local authority to pay any shortfall.

8.7.4..2. In private law proceedings involving two litigants in person there is no obvious route to secure an expert's instruction unless the parents pay for it themselves, and even where one party has legal aid the LAA are likely to query an order saying that they should pay both parties' share of the bill. This raises an interesting question about access to justice and how the court can make decisions in the absence of evidence that all agree is 'necessary' – but as yet, no answers to those questions have been found.

8.7.4..3. With regard to care proceedings, the decision of *J (A Child: Care Proceedings: Apportionment of Expert's fees)* [2017] EWFC B49 considered these issues about how to divide up payment of fees between the parties. Neither parent was able to pay anything as they had very limited means and they had refused to instruct lawyers, even though they would have been entitled to non means and non merits tested legal aid. If the parents had been legally aided the court had no doubt it would have ordered the expert fees to be shared equally between all parties. Looking at the circumstances of this particular case, the court approved the instruction of two experts and ordered that their fees should be split 50/50 between the local authority and the guardian.

8.7.4..4. The court concluded this was a case 'in which fairness and common sense dictate that an order requiring an equal sharing of the experts' fees is

wholly inappropriate'. While rule 25.12(6) FPR 2010 sets out the 'default position' that parties should equally bear the costs of instructing an expert, this does not mean it is a fixed position; the court retains discretion. Further, there were clear regulations setting out how much experts should be paid, but no similar regulations setting out how costs should be apportioned. The court must consider all circumstances but in particular, the adequacy of any work already done, the issues said to require expert input and the need for each party to have confidence in the integrity of the forensic process.

8.7.4..5. Para 4.5 of the 2013 regulations also recognises that unequal split of costs will not always be unusual in care proceedings – for e.g. one party may be an intervenor and it wouldn't be appropriate for them to bear an equal share of an expert report about an issue which is nothing to do with them.

8.7.4..6. The court was doubtful that the LAA could interfere with this kind of decision about how costs should be split between parties, but this could potentially arise in another case. It is likely that guidance and best practice about these issues is likely to continue to shift as it is likely the LAA will be looking for ways to avoid paying to instruct experts where there are a variety of parties who want to rely on that evidence. However, in the circumstances outlined in *J (A Child)* the LAA actually ended up better off, meeting only 50% of the costs as opposed to 75% had each parent been ordered to contribute.

VERSION INFORMATION

This January 2019 version of the guidance note incorporates only minor grammatical and punctuation changes to improve ease of reading and understanding.