SENIOR PRESIDENT OF TRIBUNALS

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Senior President of Tribunals

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'Experts under the Judicial Microscope'

1. On 31 October 2005 the Court of Appeal heard an appeal from the county court in public law Children Act proceedings concerning alleged non-accidental head injury to the first born child of a young couple. The case attracted subsequent notoriety because the media christened the proceedings as the first miscarriage of justice case reported by the family courts. It was not, of course, but both the Court of Appeal decision in *Re W (a child) (non-accidental injury: expert evidence)* reported at [2005] EWCA Civ 1247 and the subsequent re-hearing which is reported at [2007] EWHC 136 (Fam) were to re-set the judicial balance relating to expert evidence in that jurisdiction.

2. I did not hear the original application but had the task of dealing with the subsequent re-hearing when that was transferred to the High Court. I also felt it necessary to apologise to the couple who had been separated from their child for most of the first two years of its life and who I decided had been wholly innocent of the allegations made against them: to a mother who had to make a choice between supporting her innocent partner and losing her child. Not only that but the child's mother had terminated the pregnancy of her subsequent child given that had the allegations been accepted, that child would have been removed at birth. It was right and proper that the error that had been perpetrated was acknowledged in public and that their innocence was vindicated in public. Hence the opportunity for media comment.

3. The cases identified a series of important adjectival ie procedural and good practice issues that were subsequently written into our procedural jurisprudence, including practice directions, guidance and protocols, that will be familiar to many of you. They were not specific to children proceedings and could arguably be deployed in any adversarial fact finding and opinion based determination.

4. Let me just quote from the two decisions: the Court of Appeal's analysis was that "any medical consensus had to be a true consensus, with each medical discipline making its own contribution. The medical consensus in the hearing in the … case was only a consensus because all the other doctors, including the neurologists and the neuroradiologists had deferred to [their senior colleague, Dr A]"

   The High Court held that:

   > "In the instant case, Dr A had abided by all the expert's duties placed upon him. However, he and the court at first instance had fallen into error when Dr A had unconsciously strayed from the role of expert into the role of decision maker and the court had failed to detect that that was what had happened. He had done what he would have done if there had not been any court proceedings. Knowing of the extreme risk that K would have been subjected to if he had been cared for by a perpetrator of NAHI, he had analysed the diagnostic information and come to a conclusion based upon the balance of risks that existed. He had assumed the role of child protection that every clinician had to undertake in consultation with his colleagues who had agreed with him."

   The High Court gave the following guidance:

   > "Once instructed, experts in their advice to the court should confirm to the best practice of their clinical training and, in particular, should describe their own professional risk assessment process and/or the process of differential diagnosis that has been undertaken, highlighting factual assumptions, deductions there from and unusual features of the case. They should set out contradictory or inconsistent features. They should identify the range of opinion on the question to be answered, giving reasons for the opinion they hold. They should highlight whether a proposition is an hypothesis (in particular a controversial hypothesis) or an opinion deduced in accordance with peer reviewed and tested technique, research and experience accepted as a consensus in the scientific community. They should highlight and analyse within the range of opinion an 'unknown cause', whether that be on the facts of the case (eg there is too little information to form a scientific opinion) or whether by reason of limited experience, lack of research, peer review or

support in the field of skill and expertise that they profess. The use of a balance sheet approach to the factors that support or undermine an opinion can be of great assistance. An expert should be asked at the earliest stage and in any event should volunteer an opinion whether another expert is required to bring a skill or expertise not possessed by those already involved…."

5. The essential error was to conflate the role of the forensic expert with that of an expert decision maker – often and appropriately part of the role of the clinician. In the context of contested child protection proceedings where one joint expert may be appropriate or where, as here, each expert deferred to one key expert who was encouraged to and did come to a conclusion on the questions asked of him that were outside the area of expertise of each other expert, the single joint expert was placed in an invidious position. I must stress, the error was the system's. I found that the expert had abided by his duties and answered the questions asked of him because he thought he had to when in fact it would have been better for all of the experts to say "we do not know" or to leave the court with the problem of finding yet another expert who had the expertise to answer the question.

6. In the re-hearing the answer came from an international expert identified only after a comprehensive review of the available research. It was only because a court of appeal judge who was himself an internationally acknowledged expert in the field of family justice had identified the error with the assistance of expert counsel and one of your brethren who flagged the problem to them, that the parents were given the chance to be vindicated.

7. The error was systemic: there are multi-disciplinary experts who can help a court walk through the minefield of different specialisms (in child care they are often professorial paediatricians who themselves identify the need for specialist advice as part of a matrix of conclusions – radiological, ocular, skeletal, psychiatric and so on and then bring it together in the most complex cases), but that is rare and was not a feature of *Re W*. It is the function of the court albeit with the assistance of others to identify the jurisdictional and factual issues which require evidence and then the evidence that is necessary, relevant and sufficient. A failure to detect what is necessary can have catastrophic consequences, not least in a system that has to set so much store by its ability to case manage to achieve proportionality i.e. a system arguably overloaded with both volume and complex cases.

8. If I may be allowed to digress for a moment, the issue of proportionality is one that continues to divide our most noted jurists. The concept of proportionality imports both systemically in relation to all outstanding cases in a jurisdiction and in relation to the issues in the individual case, jurisprudential principles that include questions of judgment about priority, issue identification and relevance, among others. In the family jurisdiction there are also statutory time limits. At the level of a head of jurisdiction, and using my own duties as an example, I am required to administer justice by making arrangements for the deployment and allocation of work, which inevitably needs quality forecasting and information about types and complexities of cases in different specialisms. I am also required to have regard to accessibility, procedural fairness, effectiveness, efficiency, the specialist expertise in the tribunal and innovative ways of dispute resolution. At the level of the leadership judge responsible for proceedings in a busy court or hearing centre, the Rules, in particular the overriding objective, invite difficult comparisons between cases and the priorities to be given to them that can skew justice unless adequately argued.

9. Let me give you an example from rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008:

> "(1) The overriding objective of these rules is to enable the upper tribunal to deal with cases fairly and justly.
> (2) Dealing with a case fairly and justly includes –
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
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> (d) using any special expertise of the Upper Tribunal effectively; and
> (e) avoiding delay, so far as compatible with proper consideration of the issues.

10. Given that an Upper Tribunal is an appellate superior court of record that has the power to make a decision without a hearing i.e. on the papers, it is critical that the questions identified in rule 2 are flagged for consideration by the court's registrars and lead judges so that they can fulfill their function properly and also that the judges, registrars and specialist panel members are genuinely expert in the jurisdiction being exercised: no mean fete when there are well over a hundred jurisdictions that are as different as tax, immigration and mental health. Although

my specialist appeal judges deal primarily with points of law, as a general proposition specialist judges need to understand what specialist lawyers and subject experts know, what the body of reasonable experts would advise and whether the issue that arises on the facts of the case is novel or mainstream science.

11. You may be forgiven for asking where does this take you – the body of informed experts who are available to be instructed but who may not be best used particularly to assist case management and identification of the issues or indeed used at all. You will recollect that I have an obligation to consider accessibility, that is but one aspect of my constitutional duty to provide effective access to justice. In that context, a lack of funding cannot be the only answer to an identified need for specialist expertise. So let me develop an hypothesis which is a request to you for help.

12. The traditional adversarial mechanisms we use are the well tested methods of the lawyer and judge. We derive principles from the interstitial conclusions of cases that identify or give rise to good practice. We create rules and practice directions to govern procedure so that there is consistency around the application of those principles and we permit those conclusions to be challenged, so that by the process of giving evidence in guideline cases and the process of appeal on points of principle, better practices can be identified, errors of practice can be condemned and replaced and new or alternative investigative techniques and processes of decision making can be approved, including our own.

13. This is second nature to all of you but it is neither innovative nor swift and does not provide the litigant who has a point but as yet nothing to justify their funding with a means of getting your assistance. It also deprives the court or tribunal of your assistance in that circumstance. That is what would have happened had it not been for the specialist expertise that was deployed before the Court of Appeal in *Re W*.

14. Five years after *Re W* I had the opportunity to re-visit expert evidence in relation to family justice. Some of you will have read the seminal report of Sir David Norgrove on the family justice system and the detailed questions that he advised upon. I had the privilege of being the judge appointed to provide judicial solutions to the problems he identified and to provide a new strategy and plan for family justice – a plan for its modernisation. I worked with representatives of Government and over 5000 judges, lawyers, court users, interest groups and experts of all kinds to help develop two Acts of Parliament creating the Family Court and a series of principles

that I described in my 2012 report. In that report I asked practitioners – both lawyers and clinical and forensic experts - to go further than the legislative improvements we had achieved. I wanted to improve the quality of decision making in a specialist court and I identified two bases upon which a strategy could be developed for that purpose – the creation of frameworks for leadership and good practice. My recommendations were accepted but have not as yet led to what I will suggest is still necessary.

15. The leadership project is becoming ingrained, although it is slow. We will soon have essential, experienced and senior leadership courses at the Judicial College looking at the very issues that those judges must deal with if they are to comply with their rules based duties and their delegated functions from the statutory obligations that I mentioned earlier. We have relied upon experts in many disciplines to advance our knowledge and practice of leadership and if you are one of them from the medical Royal Colleges, the Defence Academy and RMA Sandhurst, the Police College, the NHS academy and many more, we thank you.

16. The development of frameworks of good practice will however take longer and it is in this endeavour that I ask for your help. You will be aware of recent projects sponsored by the Royal Society, the Royal Society of Edinburgh and the Royal Statistical Society, among others, which are producing up to date, online materials that are available as primers for judges in specialist fields. They are intended to help judges in individual cases but also to improve the working knowledge of the justice system as a whole by making available evidence based good practice to all. Like practice directions and guidance, they are intended to be capable of challenge, amendment, addition, and, if necessary, substitution. We want to improve quality by focusing on skills i.e. training for specialist judges but also to focus on good practice and what works – a publicly available, transparent description of that material, empirically validated and peer reviewed.

17. I have on another occasion this year considered how this will help with the quality of decision making. That is where we came in. With expert help we will not only improve our specialist knowledge, we may be better able to match the style of decision making to the problem to be solved – as those who know of the tribunals record of judge-led mediation, early conciliation and investigative or quasi-inquisitorial process, not every dispute needs to obtain its resolution through an adversarial contest. We want to offer dispute resolution choices, particularly as part

of the digital revolution which the courts and tribunals modernisation programme will encompass.

18. The quality of decision making will be improved by the ability especially but not only in issue identification during case management to have available expert material that identifies the central scientific propositions that are in play and where the debate among reasonable bodies of experts lies. That will be as important to causation arguments as it is to effective remedies and outcomes. Both expert and judge can then identify what else is necessary and or whether the issue is the application of settled principles to the facts or something out of the ordinary. The judge can identify whether the issues to be resolved may be more quickly or more satisfactorily resolved by alternative dispute resolution opportunities.

19. As I have said on a number of occasions:

> "Decision-making is a risk based judgment call based on principles. That is what we appoint and train our judges to do. They are not alone in performing that task…Judges identify and solve problems which lead to an ultimate decision and the best judges, like the best advocates, learn to discard the noise of peripheral disputes and concentrate on the key issues. The art of a quality decision-making process is the balance between the risk being taken and the protection against that risk which is part of the process."

20. I want to make the debate about the outcomes of justice more sophisticated and informed so that our practices and processes keep pace with scientific developments, the settled law is informed by the best of what you know and do with the ultimate consequence that we can use the data we collect to analyse what works – are we providing the optimal dispute resolution and remedy.

21. In the Administrative Justice Council, which is my advisory council, an independent body similar in nature to the Civil Justice Council and the Family Justice Council, we have put together an impressive academic panel and also a panel of pro-bono experts, both from the academy and from a diverse range of practitioners and users. They are developing an agenda of issues relating to good practice in my jurisdictions that they wish to have investigated, researched and advised upon. Less than six months since the inauguration of the Council, we have four major projects involving decision makers, academics and others in workshops, seminars and data collection and

analysis to underscore good practice initiatives. The end product will be advice sponsored by the Council about good practice. Advice that is based on research.

22. At the same time, we are collaborating with the Legal Education Foundation and the Nuffield Foundation to develop a number of major projects: the Nuffield Family Justice Observatory which will bring together family research from across the world, a What Works centre for civil justice issues which will focus on what works in access to justice, fair process and the remedies that are available and an HMCTS data lab which will be able to provide access to justice data for researchers. These sector-wide projects will open up data to researchers and new research opportunities in the justice system.

23. There is also pioneering work being done in data ethics and research methodologies by the Alan Turing Institute and the new Ada Lovelace Institute and their associated academic partners. We are entering a new chapter in data research and its dissemination and use. Through your justice councils and professional organisations I urge you as strongly as I can to be involved to help shape improved decision making and the availability and use of specialist knowledge. The history of the tribunals' jurisdictions demonstrates as clearly as anything else the benefits in terms of effective, efficient, and expert decision-making and we would say that given the chance we can also point the way in terms of less delay, innovative process, plain language and improved access to justice.

24. If you were a member of the public, what would you like your justice system to look like. If you have a view, we would like to hear it.

Thank you.