PRESIDENT OF THE FAMILY DIVISION

Bond Solon Experts Conference 2018

Keynote Address by Speech by Lord Justice McFarlane

As a family judge, and now the judge responsible for the family justice system throughout England and Wales, I am very pleased to be able to address this conference and to take the opportunity to say something about the role of experts in family proceedings, the role of experts more generally before concluding, on a topic which may be of general interest to each of you, by saying something about the radical changes which are currently being developed and implemented in every court and tribunal and in every area of jurisdiction, be it criminal, civil or family law.

Experts in Cases relating to Children

In contrast, I think, to any other area of litigation, cases involving the welfare of children almost always require the input of a professional expert other than a lawyer or judge. A family court judge, and by using that phrase I include lay magistrates, is not professionally qualified to assess and advise upon matters of child development, children's emotional well-being and, more generally, matters regarding a child's welfare. Whilst the judge will, hopefully, apply common sense and common knowledge to their decision-making, in every case where a local authority seek a care or supervision order for the protection of children, and in virtually every case where 2 parents are arguing about the future arrangements for their children's care, the court will receive professional social work evidence from the Children and Family Court Advisory and Support Service ('CAFCASS') and/or from a local authority social worker.

Despite that level of professional advice which is, in effect, the default position, most child protection cases and many of the more intractable private disputes between parents will also require the introduction of evidence from an independent expert. Where child abuse is suspected, the Family Court will typically have to address two basic questions:

- what has happened – in particular is the child suffering, or is she likely to suffer, significant harm?

And, if so, …

- [On the basis that the child's welfare is the paramount consideration] What is the best plan for the child's future care?

In answering the first question – "what has happened?" – The court will, not infrequently, receive expert medical opinion. Medical intervention, and, of course, the medical opinion upon which that intervention was based, may well form part of the basic factual matrix of the original event or events which have led the local authority to issue care proceedings in the first place. Thus it is, that ordinary clinicians may find themselves called as witnesses in family proceedings. Such witnesses are, however, and despite their obvious medical expertise, not treated as "experts" within the proceedings. Their evidence, and the working diagnosis upon which their interventions may have been based, are part of the factual background upon which subsequently instructed expert medical witnesses may offer an opinion and about which the judge may ultimately have to decide.

As I described this work, those of you in this audience who are unfamiliar with it may have a picture in your minds of the sorts of cases that I am describing. You would, I believe, be surprised by the range and scope of the cases determined in the Family Court and for which medical expert opinion is essential. There is neither the time nor the necessity in an address of this nature to descend to great detail and you, I anticipate, will readily imagine the spread of work which runs from cases of neglect through to cases of sexual abuse and serious physical injury. Each of these broad categories of cases, however, will often generate subdivisions of complexity requiring expert advice.

In a case of neglect there will, perhaps by definition, be no single appalling incident upon which the court may focus. No individual example of parental failure which may, of itself, justify categorisation as "significant harm". In such a case the court will need the expertise of a paediatrician to look at the impact on the child of months, and more probably years, of inadequate parental care. In addition, in determining "what has happened" and whether the parents are able, despite previous inadequacies, to care for their child in a safer way in the future, it will be necessary to understand why the parents failed in the first place. Here expertise in drug and alcohol abuse (including determining whether or not the parent <u>has</u> abused drugs or alcohol), learning disability, mental health and general psychological well-being, may be of importance.

More generally, and in all cases of child abuse of whatever character, the need to understand the potential for significant emotional harm to the child has gained prominence in recent years, to the extent that the court may well turn to the expertise of a child and adolescent psychiatrist or a child psychologist in such cases.

Where the allegation is of physical assault, expert witnesses will be required to advise upon the precise mechanism causing any injury and, importantly, the timing of any assault. Where the alleged assault leaves no external sign on the child's body, for example where a baby is thought to have been shaken causing internal injury to the brain, or there has been an attempted suffocation, or salt poisoning or, indeed, any other example of extraordinary parental behaviour designed to generate symptoms in the child in order to gain medical attention (so-called "factitious illness"), the court will, typically, hear from a whole range of medical witnesses each expert in a specific aspect of the child's condition.

Although the overall context within which this work is undertaken, namely that of child abuse, is depressing and, at times, emotionally draining on all of the professionals involved, these cases are plainly of a high level of importance both for the specific child and family involved and for society in general. The stakes are high; if the judge's decision is 'wrong', then a child may be removed from wholly innocent parents, or, conversely, returned to a home which was, contrary to the court's decision, abusive.

The medical and scientific interest in, say, a contested baby shaking allegation is also of a high order. These are genuinely important and interesting cases and the Family Court is most fortunate in attracting experts of the highest order to assist in the task of determining what, if anything, has taken place.

Having, I hope, said sufficient to interest you in the scope and importance of this area of the law, I will say something, briefly, of the context within which experts in the Family Court must operate.

Firstly, the need to avoid delay in concluding proceedings relating to children is a matter of priority. Common sense dictates that for a court to spend 12 or more months garnering evidence, then assessing it and determining the plan for the child's future care, when the child is, say, 18 months old, is wholly unacceptable given, as will normally be the case, that the child is for the time being living in a temporary home from which he or she will move, either back to the family or off to a permanent home at the end of the court process.

The need to avoid delay is also prominently embedded in the Children Act 1989 where s 1(2) states that

> "in any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child"

And, as welfare is, by virtue of s 1(1), the court's paramount consideration, the avoidance of delay must therefore be afforded priority by the court.

The instruction of any expert, coming as he or she will do, completely fresh to the case must take time and, therefore, be a cause of potential delay. Delay in the system, which at that time was indeed taking on average – on average – over 60 weeks to determine a child protection application, led the Family Justice Review panel, which was set up by the government and which reported in 2011 (and on which I was the legal member), to recommend that experts should only be instructed where it was necessary to do so and that an expert should be chosen on the basis that they could report at a time proportionate to the court's timetable and not on a date which was simply determined by the experts other professional commitments.

The instruction of an expert in proceedings relating to children is, as a result of that recommendation, now tightly controlled by section 13 of the Children and Families Act 2014 which provides that no person may instruct a person to provide expert evidence for use in children proceedings without the

permission of the court and that any expert evidence obtained without prior permission will be inadmissible unless the court rules to the contrary. Crucially, s 13(6) provides that the court may give permission for the instruction of an expert "only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly." The rules of court, in particular Family Procedure Rules 2010, Part 25, make more detailed provision, but the message is clear: the Family Court maintains a very tight rein upon both the decision to instruct any expert witness in the first place and, the timetable by which that expert's evidence is to be submitted.

A 2nd observation to make about the context within which expert evidence comes to the Family Court is that, in contrast to most other forms of civil proceeding, the funding for most expert instruction in family proceedings comes from legal aid, or local authority funds, rather than from the private purse of one or other of the litigants. Whilst, where a judge has held that the instruction of an expert is "necessary", the Legal Aid Agency will not normally question the fact that an expert is being instructed, the rates payable to experts have, with the passage of time, been eroded.

Prior to my appointment as President of the Family Division 3 months ago, my role as a judge of the Court of Appeal had taken me away from the front line of litigation for 7 years. Coming back now, as I have, to observe the operation of the Family Court first hand I have been struck by accounts from courts all over the country as to the greater difficulty that now exists in finding experts who are prepared to take on instruction in a family case. This is apparently a particularly acute problem in the field of paediatric radiology, which, as you will imagine, is a core discipline in many child abuse cases, and (even more worryingly) in the field of paediatrics itself.

Having now become aware of the problem, I intend to do what I can to understand why this has occurred. The provision of high quality professional expertise, where a court has held that such expertise is "necessary" so that the issues relating to a child's future can be determined "justly", is plainly essential. If the tightening up of the regime for instructing experts, in combination with a freeze in the rate of payment, has resulted in the supply of expertise drying up, then these elements in the operation of the family justice system may need to be looked at again.

One area where, I suspect, you would all agree that the courts could do better is in terms of case management and time tabling in so far as it impacts upon the experience of an expert booked to attend court on a particular day. Sometimes, one hopes many times, things go according to plan and the expert arrives, does not wait long, gives their evidence and then departs. When things go wrong, as they do, the experience from the expert's point of view may be very negative and the unplanned timetable changes made by the court may have a disastrous impact on the expert's own diary. I'm sure that this is an area that requires addressing now, just as it did 7 years ago when I was last involved directly in these cases. But, as I will explain in the closing stages at this address, there is some ground for hope that the environment in which you may be giving your evidence in, say, 3 years' time will be very different and markedly more beneficial to you than the current one.

The Role of The Expert

I wish, if I may, to speak now more generally of the business of being an expert witness. Many in this audience will be expert at being experts, and I have no wish to teach you how to extract the runny part of an egg through a tiny hole in the shell! But some observations, made by one who has now had experience of expert witnesses for over 40 years, may be of assistance.

[1] "Only put your hat where you can reach it". That maxim, which is drawn from a delightful West Indian bus driver, who, some 30 years ago, sought to explain to a judge that he always strived to live within his means, has stayed with me down the years. Asked by counsel whether he was an extravagant man, the witness replied "I never put my hat where I cannot reach it".

As an expert, you will find that one side or the other, or more probably both sides, will try to push you to move your opinion in one direction or another. At all times you should be clear that the opinion concerned is <u>your</u> opinion and not the opinion of anyone else. In your mind you should at all times have 'ownership' of your evidence in the sense of only stating that which you are professionally comfortable in stating. Don't be tempted to adopt a position which you cannot then rationally justify on the basis of the evidence in the case, the learning relevant to your field of expertise and your own professional experience: do not put your hat where you cannot reach it!

[2] Avoid being blatantly partisan and or too dogmatic. An expert, whilst ultimately disagreeing with an alternative opinion, can properly accept those parts of the alternative analysis which are acceptable, before then explaining why he or she disagrees with it. Such an expert is, in my view, a much more impressive and valuable witness when compared to one who simply tows the party line or holds unflinchingly to one particular theory refusing to countenance any part of the alternative case.

[3] In judicial circles it is a well-known phenomenon that some lawyers, who had hitherto been entirely amiable and mild-mannered individuals, subtly develop, immediately following their appointment to the Bench, a wholly unattractive arrogance and belief in their own self importance. These individuals are said to have caught a disease which we call "judgitis"! Whilst I have not yet heard of a case of "expert-witness-itis" I have, over the years, seen a few examples of seasoned expert witnesses who have become so used to giving evidence and to having their opinions accepted in the higher courts that they have become extravagant to a degree that has moved them well away from the sound scientific basis that had hitherto underpinned their valuable opinions. The most striking example is that of Prof. Sir Roy Meadow, but there are others. Hubris is, in my view, no friend of the expert witness and is to be avoided.

I have been asked to explain what the judiciary expects of experts. Having just spoken of hubris, and knowing that what follows is entirely my own opinion as a single judge, I am keen to point out that in saying what I do I am merely speaking for myself and not for "the judiciary" as a whole.

I will, if I may, put matters so succinctly as to reduce my advice to one single word: "clarity".

"Clarity" firstly in the sense of clarity of thought. No matter what your field of expertise may be, you are likely to have been brought into a case because it is not straightforward; indeed it may well be extremely complicated. Time spent by you in, as the military would say, "reconnaissance" before you commit a single word to paper is likely to be time well spent. If you have clearly thought through the detailed evidence in the case and your perspective on it, so that you have undertaken and completed the thinking that underpins your opinion before you start writing your report, that report is likely to be much more valuable than would otherwise be the case.

To describe the contrary, it is not unusual to encounter an expert report where the initial section runs for many pages in which the primary evidence is simply regurgitated in a manner which seems, at that stage, to afford each element of it an identical value. It is a landscape without contours. Only at the later stages may the reader discern that which the expert considers to be important before glimpsing the finishing tape where the expert's opinion is finally stated.

A senior family judge who has now retired once told me that he always wrote the concluding paragraphs of his judgment before writing anything else. In that way when he came, later, to set out his summary of the evidence he knew which elements of it were going to be of particular importance, and which were not. He then set out the evidential summary by accordingly affording prominence only to the important material.

"Clarity" is also important in a second context, namely clarity of explanation. Whether in a written report or oral evidence, the aim of every expert witness must be to explain their opinion clearly to lay readers or hearers. Here, a paragraph or two setting out the basic science applicable to the point in question is worth its weight in gold. So too is the odd photograph, diagram or other image. In this regard, I would suggest, "less is more" in the sense that succinctly worded but clear short paragraphs will be more valuable than densely written discursive text. In like manner a decent size font, good spacing and clear open presentation in the report is something that most readers will cherish!

In the witness box also, where, at least at first blush, the witness is less in control, the need to hold on to the goal of "clarity" remains as important as ever. State your opinion and, where necessary, give short explanations for it. Here, an example, just as with a picture in a written report, may be particularly enlightening. Always be aware that the questions you are asked are the questions of the barrister, but the answers, the evidence, is yours and yours alone. Take and keep control of your own evidence. Think before you speak. Give the answer that you want to give from your professional perspective and, unless you are comfortable in doing so, do not give the answer that counsel's question otherwise entices you to give.

Radical changes in the Courts and Tribunals

Some three years ago, the Judiciary, HM Courts and Tribunals Service ['HMCTS'] and the Ministry of Justice agreed upon a radical 'Reform' programme designed to modernise every aspect of the work of all courts and tribunals. The overall budget for Reform is set at £750 million, with almost all of this

sum coming from savings to be made by the implementation and operation of the reformed ways of working. It is the biggest 'change programme' currently being undertaken anywhere in Government and it is happening while the system continues to carry out its business as usual.

Hitherto you will not, I suspect, have seen much in the way of change. Those who appear before tribunals may now find themselves going to ordinary court buildings for hearings, rather than bespoke tribunal buildings – as part of the Reform programme is to increase the turnover and flexibility of the use of the buildings – but you are unlikely to have experienced other developments.

That state of affairs will progressively change over the next 18 months to two years. Two of the core changes to our ways of working that are likely to impact on experts are, firstly, the move to paperless court proceedings and, secondly, the development of 'virtual hearings' where none of the participants is in the same location as any other and all connect with the judge over the internet.

I can deal with paperless hearings facilitated by digital 'bundles' briefly. As we approach the 3rd decade of the 21st century it is something of a 'no-brainer' to suggest that the courts and tribunals should now abandon our reliance on each party and the judge working from ring binders, often many ring binders, of paper. Digital bundles have been used for some time in big commercial cases, the criminal court and in other areas of work, but they will now be the norm everywhere. Their introduction will coincide with all of the court processes, from making an application, to filing a statement and issuing an order, being conducted online. Those of us of a certain age who are so used to paper working may be apprehensive about this change, but, for my part, all that I have seen suggests that it will be far more efficient, reliable and modern than our current modus operandi. For the expert the receipt of all the documents in the case in a WinZip file, rather than by DHL, and the ability to carry all of this material on a laptop, would seem to be a very clear advantage.

The 'virtual hearing' is an altogether more radical departure. Much will, or course, depend upon the sophistication and reliability of 'the kit'. But, assuming that the kit will deliver what is required, then, for the right type of case, a fully or partial virtual hearing is likely to be an efficient, effective and economic way of conducting court business.

From the perspective of an expert, I strongly suspect that the ability to give evidence remotely in some cases will be very welcome, even if the rest of the case is not fully 'virtual'. The attractions are partly obvious; avoiding the need to travel to a court centre, sometimes a long way away, and reducing the time taken out of your diary sitting in a waiting room.

More subtle advantages will, I anticipate, become apparent as we all get used to working in this new environment. Can I offer one example? Some years ago, it was necessary for a hearing over which I was presiding to receive the key evidence from a leading paediatrician over a video link. The evidence was complicated and the process of giving it took most of a day. The expert was in an office which had a large conference table, over which he had positioned the key medical records and other material. As he gave his evidence, rather than standing confined in a witness box, as would be the case had he

attended 'live' in court, he was able to move round the room and access relevant material as and when he needed to. In addition, being technically adept, he was able to include his computer in the video loop and, where necessary, refer to photographs, diagrams and extracts from research papers from his PC in much the same way that a lecturer might when giving a lecture.

My strong feeling at that end of that day in court was that the process of giving evidence down the line had been far more effective in terms of allowing the expert to explain and deliver this complicated evidence than would have been the case had he attended to testify in the ordinary way.

I hope that I am right in looking forward to these and the other Reform changes, as indeed I do. If they result in a court and tribunal system that is fit for purpose and compatible with almost all other aspects of the modern world then that success will be welcome and will do much to remove that which causes frustration and delay in our current system.

Whatever the result of Reform, one thing is, however, absolutely clear: we in the courts and tribunals will continue to need and to rely upon the valuable contribution of sound and seasoned expert witnesses.

It has been a pleasure to join your conference today and to have the opportunity, which now I take, simply to say 'thank you' for all that you do and for your continued interest in enhancing the ability of expert witnesses to deliver the evidence and analysis that we in the courts vitally need.

The Rt Hon Sir Andrew McFarlane
President of the Family Division