



Experts Committee of the Family Justice Council

Guidelines for the instruction of medical experts from overseas in family cases

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Foreword by the President of the Family Division

These guidelines for the instruction of medical experts from overseas in family cases have been produced by the Experts Committee of the Family Justice Council. They have been approved by the Council and I wish to add my endorsement.

We live in an age where people and ideas are much more mobile than hitherto and it is, perhaps, not surprising that the use of experts from overseas has grown in recent years. The welfare of the child demands that the best quality evidence should be available to the court, and specific expertise unavailable in the UK may be found elsewhere. In addition, given the problems that family courts experience with the supply of appropriately qualified experts, any enlargement of the pool of expertise is to be welcomed.

However, there are a number of issues relating to the regulation of overseas experts and to the need to have a clear understanding of their qualifications and credentials, as well as the applicability of their expertise to the UK context, which are addressed in this guidance.

Ultimately, it is for the court to be satisfied that it is appropriate for a suitably qualified overseas expert to be instructed to provide evidence on the issues identified by the court. I believe that this guidance will be of benefit to the judges, barristers, solicitors and experts dealing with family proceedings where expert evidence is required.

The Rt. Hon. Sir Nicholas Wall

Background

Cases that come before the family courts involving issues of potential physical or psychological abuse and/or neglect and where there is a requirement for expert evidence are, by their very nature, complex.

The cases and the expert opinion which may be required cover the entire spectrum of child maltreatment and neglect. For the efficient delivery of justice in the Family Division, the courts require timely access to expert evidence and need to have confidence in the quality and validity of the expert advice and opinion given.

Whilst the initial draft discussion document was initially produced by a number of doctors who sit on the Expert Committee of the Family Justice Council, it is acknowledged that the principles discussed apply equally to non-medical experts working in the Family Justice system and indeed all experts in the jurisdiction. We are extremely grateful for the very helpful comments on earlier drafts of this document by the General Medical Council (GMC) and, particularly, by the Safeguarding Committee of the FJC and the Family Subcommittee of the Council of Circuit Judges.

Availability of Experts

Many different aspects of medical expert evidence may be called for by the courts but in cases of child maltreatment there are usually relatively small numbers of individuals who are willing to act as experts, a problem which is acknowledged to have been exacerbated by the publicity that a small number of high profile cases has attracted over recent years.

Although in the main these high-profile cases have related to cases before the criminal courts, the implications for expert evidence as a whole have been all too apparent in the courts of the Family Division.

Advantages and disadvantages of the use of experts from overseas

Experts from overseas represent a valuable resource for the family justice system but it is recognised that there are potential advantages and disadvantages to their use.

i) Potential advantages

- a. May create a greater pool of expertise available to the courts.
- b. May make available to the courts expertise from very small super specialist areas where similar expertise is simply not available in the UK (but the number of cases where this is likely to be an issue would be very small).
- c. Allows the availability of a further opinion from outwith the jurisdiction which may occasionally be of use to the court in arbitrating between opposing views.
- d. Use of an expert with genuinely new evidence and opinion can help promote discussion and dissemination of information.

ii) Potential disadvantages

- a. UK medical experts are almost invariably involved in active clinical practice appropriate

to their expertise and are usually current NHS employees. The clinical practice of overseas experts may be organised in an entirely different way and the reason they may become known to advocates is as a result of “headline” publications. There may be difficulties for the courts in obtaining appropriate information about an overseas expert’s practice and/or experience.

- b. Experts chosen because they are known to hold opinions which are acknowledged to be consistently outwith the range of mainstream or reasonable range of opinion runs the risk of returning to a “hired gun” mentality that the reforms of expert evidence over the past few years have sought to prevent.
- c. Need for the courts to ensure that overseas experts are familiar with UK court process.
- d. Cost.
- e. Possible need to ensure a regulatory system in place which is (i) applicable to all experts and (ii) has ability to impose sanctions on overseas experts who fail in their duties to UK courts.

Recommendations regarding the instruction of experts from overseas

We believe that there are sufficient safeguards currently available regarding the instruction of experts provided those safeguards are rigorously and consistently applied by the courts.

It is critical that all experts are properly instructed in accordance with the 2008 Practice Direction “Experts in Family Proceedings Relating to Children” and any subsequent relevant Practice Direction issued by the President. It is for the court and not the parties to determine whether a particular expert is instructed and, if so, on what terms. Strict compliance with the terms of the Practice Direction by both advocates and Judges should obviate the potential disadvantages of the use of overseas experts addressed above. The court will no doubt wish to consider whether the instruction of an expert from overseas is justified according to the welfare needs of the child or children concerned and/or the Article 6 rights of any of the parties.

An application to instruct an expert from overseas should set out in writing:

- a) Why a UK-based expert is not to be used;
- b) What efforts have been made to identify a suitable UK expert;
- c) The financial implications of the instruction of the overseas expert and
- d) What consideration has been given as to the practical arrangements required to allow the foreign expert to contribute fully to experts meetings and for giving evidence to the court?

Prior to the instruction of an expert from outside the jurisdiction that expert should provide information that fulfils the recommendations outlined in Baroness Kennedy’s report into Sudden Unexpected Death in Infancy¹. This details the characteristics of the expert which are of equal importance to all experts instructed by the courts in England and Wales and is a position

recently endorsed in a decision of the Court of Appeal (Criminal Division)².

Therefore, before an expert is instructed, the trial judge should in all cases establish:

- What is the expert’s area of practice in terms of the relevance to the issues upon which the court requires guidance? Does the expert have something genuinely exceptional to offer in terms of his/her expertise?

This should be detailed in the curriculum vitae.

- Whether the expert is still in active clinical practice?

This has been modified by the CMO’s report (Bearing Good Witness) to accept clinicians who are recently retired, within two years of active NHS equivalent practice.

- To what extent is the prospective witness an expert in the subject in which he or she will be required to give an opinion in written or oral evidence?

This should be apparent from the CV.

- When did he/she last see a case relevant to the instant case in their own clinical practice?

This is important and should differentiate those experts who offer an opinion in a clinical area in which they do not practise.

- Whether the prospective witness is in good standing with their Medical Royal College or overseas equivalent? Is he/she up-to-date with Continuing Professional Development? Is their current practice regulated by a Statutory Body? If so what is that body?

This should be apparent from the CV which should list membership of the appropriate professional organisation and make comment upon maintaining CPD.

- Has he/she received training in the role of the Expert Witness within the last five years? What experience does the expert have in providing reports for and giving evidence to the Courts in this and other jurisdictions over a similar period of time?

Expert Witness training is discussed in Baroness Kennedy's report, but is aspirational in the CMO's report.

- To what extent is his/her view widely held in terms of accepted mainstream views and the spectrum of opinion overall?

This information may be more readily available for UK based experts but should be sought as assiduously for experts from overseas.

- That the expert has confirmed his/her familiarity with the Practice Direction, is willing to comply with all its requirements and acknowledges the potential consequences of failure to so comply. These consequences would include:

- o that any judgment arising from the case is likely to be made available to the GMC (or any other equivalent regulatory body) should a complaint be made about the experts conduct within the proceedings and

- o that judgments in which criticisms are made of experts who are judged to be partial are likely to be made in the public domain.

- The Judge should also direct the means by which feedback regarding the outcome of the case should be provided to all of the experts instructed.

This should in most cases be by means of provision of a copy of the Judgment or those aspects of it of direct relevance to the Court's assessment of the relevant expert's evidence.

Conclusions

We believe that the above principles regarding the instruction of all experts, whether UK-based or from overseas, should be considered a Guide to Best Practice and that their universal and consistent application will go as far as is reasonably possible to ensure that appropriate

expert evidence is available to the courts of the Family Division and that, when required, such evidence is given by individuals with the appropriate expertise and experience.

References

1. *Sudden unexpected death in infancy: The report of a working group by the Royal College of Pathologists and the Royal College of Paediatrics and Child Health* (2004). Royal College of Pathologists and the Royal College of Paediatrics and Child Health.
2. Henderson v R. [2010] *EWCA Crim 1269*.

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