

Chapter 18: Court Proceedings (Giving Evidence)

Good Practice Recommendations

1. Know which court you are going to, why, prepare in advance and seek appropriate advice.
2. Understand the difference between professional witnesses of fact and expert witnesses.
3. Seek feedback on your evidence to enable improvement.

18.1. The role of the courts and the role of the paediatrician

- 18.1.1. The courts play an important role in the multiagency child protection process. This includes making decisions on protecting the welfare of children through the family courts and prosecuting those accused of harming children through the criminal courts. The responsibility for making decisions in both situations lies within the legal process. The courts are dependent on the evidence presented to them. Neither judges, nor advocates, nor the jury in criminal cases, will be experts in all matters presented to them. They are therefore dependent on the assistance of those who, by qualification, training and experience, are experts in their own field.
- 18.1.2. As paediatricians, you may be called to assist the courts. In whatever circumstances you have been called to court, you should remember that your overriding duty is to help the court on matters within your expertise. It is your duty to be independent and not to support a particular party, irrespective of who has instructed you. It is not your role to be an advocate for the child, the parents/carer, or any other party.
- 18.1.3. Paediatricians are likely to attend court in one of two capacities:
- As the examining/treating clinician (sometimes referred to as a 'witness to fact' or a 'professional witness'). Usually you will be called by the local authority in family proceedings, or the Crown Prosecution Service (CPS) in criminal proceedings.
 - As an instructed expert, commissioned to provide an independent opinion on the case (sometimes referred to as an 'expert witness'). Usually the expert will be instructed as a single joint expert (i.e. by one party on behalf of all parties) in family cases but on behalf of one party alone, whether the Crown Prosecution Service (CPS) or Defendant's lawyer, in criminal proceedings. This is fee paying work, and it is within your gift to accept or reject the request. It is strongly advisable that any paediatrician contemplating expert witness work should not only have achieved a recognised standard of expertise, but also special training to ensure they are fully aware of their duties and responsibilities.
- 18.1.4. In both situations, you will be called upon to explain the reasoning behind your opinions or decision-making. By virtue of your training and experience as a practicing

clinician, you have a level of expertise that can assist the court. Therefore, you should be prepared to state your opinion and the reasoning behind it, within your level of competence.

18.2. Evidence based legal practice

Evidence based medicine is the conscientious, explicit, judicious and reasonable use of current best evidence in making decisions about the care of individual patients. When applied to the use of evidenced based medicine in legal practice this will be combined with the clinician's clinical experience, to support the courts to make decisions about the care of individual children^{1,2}.

- 18.2.1. As with evidence based medicine, a number of key stages are involved, including: defining your questions clearly, finding and critically appraising the evidence efficiently, integrating your findings with your clinical expertise and context of the case, and presenting your evidence effectively to the court.
- 18.2.2. The key evidence required will be the facts of the case. These facts should be clearly presented to the courts. Each doctor may form an opinion, or opinions on the case, based on their understanding of the facts of the case, combined with their clinical expertise and their knowledge of any relevant published literature. These opinions may inform a differential diagnosis, working diagnosis, and any management plan.
- 18.2.3. The treating doctor will be expected to give a factual account of the history of any examination findings. Paediatricians (as treating doctor) can give an opinion on possible mechanisms of injuries seen on examination appropriate to their training, experience and specialist knowledge.
- 18.2.4. You should be prepared to refer to the literature to inform your decision-making and any opinion you give to the court, whether as treating doctor or instructed expert. Important resources such as those listed below should be referred to where relevant:
 - The Royal College of Paediatrics and Child Health (RCPCH) Child Protection Evidence systematic reviews, formerly Core-info (Cardiff Child Protection Systematic Reviews), provide a summary of the scientific evidence to complement the Child Protection Companion (CPC) and are updated on a regular basis. The systematic reviews can be found at <https://childprotection.rcpch.ac.uk/child-protection-evidence>
 - RCPCH Physical Signs of Child Sexual Abuse: An evidence based review and guidance for best practice³.
- 18.2.5. Other parties, or the court, may engage other expert witnesses who will have been asked to perform specific functions and to write an expert report and gather appropriate evidence based on the published literature. The court should accept an expert and talk to them about their experience to confirm expertise. Paediatricians should be prepared to advise their instructing solicitor if they have concerns that a medical expert is acting out with their area of medical expertise. The expert will form his or her opinion based on reading any case material provided and in answer to specific questions contained in a letter of instruction. This may be done solely from the case material ('bundle') or may involve examining the child or interviewing the

parents/carer. The expert should ensure he or she has systematically reviewed the relevant evidence to inform their decision-making on the case, and should refer to relevant published literature. They may need to help the court in interpreting the medical evidence within their area of expertise.

- 18.2.6. Experts instructed by the Family Court should adhere to the Family Procedure Rules⁴ and practice directions, the Civil Procedure (Amendment) Rules⁵ and relevant Practice Direction⁶, and should make a statement to confirm that they have read and understood that direction in their statement.
- 18.2.7. The hierarchy of evidence in relation to child protection cases may be different to that involved in treatment decisions. A systematic review of randomised controlled trials may be the gold standard for assessing the efficacy of a particular treatment, but would not be appropriate for commenting on the relevance of any particular risk factor. Longitudinal cohort studies and case series may be more appropriate for answering some questions. If you refer to any published literature in your evidence, you must be prepared to explain that literature and its relevance to the case. You should not selectively use literature that only supports one particular view.
- 18.2.8. In criminal trials, your testimony should be the same in substance; whether you are testifying at the request of the prosecution or the defence.

18.3. Family Proceedings

- 18.3.1. There are two main types of family proceedings about children:
- **Private law proceedings:** typically between the child's parents/carer and about matters such as with whom the child is to live, contact arrangements, the child's schooling or taking the child to live abroad. Paediatricians are very unlikely to be witnesses in these cases.
 - **Public law proceedings:** between local authority children's social care and the family: typically for a care order authorising and enabling the local authority to place the child in foster care, giving the local authority Parental Responsibility (PR) for the child. Although the aim will always be to restore the child to the immediate or wider family if possible (i.e. if consistent with the child's safety and welfare), if this is not possible the care proceedings may be followed by the child (especially a younger child) being placed for adoption.
- 18.3.2. The three most common type of orders in public law proceedings are:
- **Care orders:** which give PR for the child concerned to the local authority applying for the order to be shared with other holders of PR
 - **Supervision orders:** which place the child under the supervision of their local authority
 - **Emergency Protection Orders (EPOs):** which are used to ensure the immediate safety of a child by taking them to a place of safety, or by preventing their removal from a place of safety.
- 18.3.3. These proceedings are heard by a judge or magistrate, or by the sheriff or children's reporter in Scotland. Cases usually take place in a county court or magistrates' court and may move to the High Court especially where there is complex medical evidence.

- 18.3.4. In care proceedings the court must determine two matters⁷:
- Whether the 'threshold' for state intervention has been crossed, i.e. whether the child has suffered or is likely to suffer significant harm attributable to the care being given or likely to be given by the parents/carers not being what it is reasonable to expect a parent/carer to give
 - Which, if any, of a range of orders best promotes the child's welfare (i.e. is the plan proposed for the child the right one?).
- 18.3.5. In some cases, the issues will be dealt with in two separate hearings: first a 'finding of fact' hearing which addresses the first matter; then a 'disposal' or 'welfare' hearing to decide the second matter. In other cases, the matter will proceed as a composite hearing.
- 18.3.6. In England, Northern Ireland and Wales, for the purposes of the court, 'harm' means ill-treatment, or impairment of health or development of the child, compared with that which could be reasonably expected of a similar child. There are no absolute criteria on what constitutes significant harm, but this will depend on the severity (degree and extent) of ill-treatment or impairment, and the duration or frequency of that ill-treatment or impairment.
- 18.3.7. At an interim stage a court can make an interim care order to protect a child on the basis that there are reasonable grounds to believe that a child is suffering or is likely to suffer significant harm. At a final hearing, the court must determine whether the threshold criteria are met on the balance of probability. The court cannot make an order based solely on concerns or suspicions that the child has suffered harm. The public law proceedings will end if threshold is not crossed on the balance of probabilities although they could be reissued if important new evidence is later obtained about the harm alleged or about some new harm. The standard of proof in family proceedings is known as the balance of probability.
- 18.3.8. Except at an interim stage, the court cannot make an order to protect a child on the basis that there are concerns or suspicions s/he may have suffered harm; however great these concerns or suspicions may be. If, when the court determines the facts of the matter, it decides that a child has not been harmed (i.e. whatever the concerns/suspicions it has not been proved on a balance of probability) or that the harm suffered is not significant, and that therefore the 'threshold' has not been crossed, that will be the end of public law proceedings to protect the child; although they could be reissued if important new evidence was later obtained about the harm alleged or about some new harm.
- 18.3.9. Any paediatrician who has seen the child may be asked to present their findings to the court. Paediatricians may be called upon to help the court interpret the significance of clinical findings, including the nature of any findings in relation to what is normal, possible causes of any findings, and the impact of any findings.
- 18.3.10. Cases in family courts about children are 'quasi-inquisitorial'. They remain adversarial in the sense that parties have the right to challenge evidence by questioning but are inquisitorial in the sense that the court itself will often actively intervene to pursue issues it considers important. As well as the local authority and the parents/carers (and

perhaps other family members), the child will almost always be represented by a court-appointed Guardian ad litem (England, Northern Ireland and Wales), or curator ad litem (Scotland); while rare for a child to attend court, a party may make an application for the child to give evidence.

- 18.3.11. Hearsay evidence is allowed. Hearsay is 'a statement not made in oral evidence in the proceedings that is evidence of any matter stated' or in other words 'the report of another person's words by a witness'⁸. This type of evidence is admissible in the Family Court but would usually be disallowed in the criminal court.
- 18.3.12. Often written evidence from professionals is sufficient, and a professional's report can be submitted to the court without that professional having to appear before the court.

18.4. Criminal proceedings

- 18.4.1. Criminal proceedings are proceedings to prosecute an alleged offender for a specific crime. A range of possible charges may be brought against either or both parents/carers, or any other person alleged to have harmed a child. The person charged is presumed innocent unless and until proven guilty.
- 18.4.2. Criminal proceedings are brought by the CPS in England and Wales, the Public Prosecution Service in Northern Ireland and the Crown Office Procurator Fiscal Service in Scotland. Criminal proceedings can be tried summarily by magistrates, but in any serious case (or in any less serious case where the accused elects Crown Court trial) will be held before a judge, usually with a jury. Where the alleged offender is a minor (under 18 years), the proceedings may be heard in a juvenile court.
- 18.4.3. The court must determine whether the alleged perpetrator is guilty of the charge being brought, i.e. is that person guilty of causing that harm to that child in the alleged manner and at the alleged time/within the alleged time frame?
- 18.4.4. The standard of proof is 'beyond reasonable doubt', with the burden resting with the prosecution to establish, beyond reasonable doubt, that the alleged perpetrator is guilty of the crime.
- 18.4.5. Any paediatrician who has seen the child may be called to present their findings to the court. Paediatricians may be called upon to help the court interpret the significance of clinical findings, including the nature of any findings in relation to what is normal, possible causes of any findings, and the impact of any findings.
- 18.4.6. The style of examination is adversarial; with the prosecution presenting evidence-in-chief, followed by cross-examination by the defence, and finally re-examination by the prosecution.
- 18.4.7. Hearsay evidence is only allowed in limited circumstances. For example, you might be asked what history you were given before your examination of the patient. In a criminal court the judge and advocates will have seen the doctor's statement, but the jury will not. Therefore, all pertinent evidence from your statement should be

repeated in court. Typically, the prosecution barrister will ask you to read out, or take you through your statement.

18.5. General preparation

- 18.5.1. Giving evidence can be stressful and doctors may need support from colleagues including named or designated professionals or lead clinicians. The adversarial system of justice in the UK encourages vigorous cross-examination of testimony but the doctor is best protected if adequately prepared. Although it can feel as though your own competence and integrity is being questioned, it is important to remember that this is part of the process and the aim is for the courts to come to the best decisions in the interest of justice, and the best interests of the child. It is important to answer truthfully and not to become defensive. If you have made a mistake, acknowledge it. Confidence in your own expertise and practice, combined with an appropriate degree of humility, are two of the most important attributes for any professional appearing in court.
- 18.5.2. It helps to be prepared in advance. Take any opportunity to attend a course on training to give evidence in court or to arrange a mini-pupillage (where you are provided with an opportunity to shadow a court case) directly with a local barrister's Chambers.

18.6. Your report

- 18.6.1. The report that you submit to the court is the most important part of your evidence. A well written report makes the job of the courts far easier; while one that is poorly written complicates proceedings and is likely to result in you being questioned extensively in court. It is worth therefore spending time getting your report right, making sure it is factually correct, well-reasoned, evidence based, and neatly presented. See Chapter 16.

18.7. Experts' meetings

- 18.7.1. Pre-court conferences between doctors and experts or with lawyers or advocates are there to reduce court time and resolve as many issues as possible beforehand. If you are invited to one, you should attend if possible as this may avoid the need for you to subsequently attend court. Although legal teams refer to these as an expert meeting, both treating paediatricians and instructed experts may be invited and both should attend and give their opinions on questions asked within their level of expertise. A solicitor may be present to make notes, or you may be asked to take your own notes. Often the participants will be asked to draw up a schedule of agreements and disagreements which can be submitted to the court. Your comments will be used in evidence after you have agreed and signed a written record of the meeting.

18.8. If you are asked to attend court

- 18.8.1. You must attend if asked. Witness summonses are not usually served on doctors but if you receive one you must attend or you will be under threat of contempt of court, which carries a possible prison sentence. Usually the court will try to accommodate your duties and negotiate with you.
- 18.8.2. Schedule with the court. In care proceedings, the local authority lawyer or, where instructed, the lawyer who first instructed you should arrange for you to be contacted to provide a convenient date and time. Agree in writing and ask for written confirmation of the details. In criminal proceedings, reasonable notice should be given and if you cannot attend for good reason you should contact whoever has summoned you and explain your difficulty. A more convenient time should be arranged; ask for written confirmation. Ensure you know where the court is and how to get there. Check in advance which court the case is being heard at because some cities have more than one court in different locations.
- 18.8.3. In criminal proceedings, the case will be listed under the name of the defendant. You should ask the name of the victim to identify your own case records. Family cases are listed by their case number in order to anonymise the names of the parties. Ask court staff if you are unsure which court your case is listed in.
- 18.8.4. In criminal proceedings, the independent charity 'Victim Support' and 'Victim Support for Scotland' can provide support to all witnesses (accessible via www.victimsupport.org and www.victimsupportsco.org.uk). They will communicate with you prior to the case to arrange all details of your attendance and should meet you on arrival. In family proceedings, there is no equivalent service, so you should liaise directly with the local authority lawyers.
- 18.8.5. Once you receive notification of a court attendance, retrieve your records on the case and carefully read all your notes and other relevant clinical material, including viewing photo-documentation. Make sure you have a copy of your statement/report and familiarise yourself with it. Court cases may sometimes take place months or even years after your involvement; so do not rely on your memory of the case.
- 18.8.6. You may wish to seek support from your named doctor/lead clinician for safeguarding prior to the court date. Your Trust legal team may also provide advice and support.
- 18.8.7. If, having reviewed your statement, you notice any discrepancies, or wish to change any of it (for example because new evidence has come to light, you notice a mistake, or you have had further chance to reflect on your conclusions), then you should contact the solicitor who has called you to discuss this. You may be able to provide an additional statement, or to address this in court.

18.9. At court

- 18.9.1. On the day, you should be punctual, take copies of reports/notes as required, look presentable and prepare the case in advance, anticipate any difficult questions and

check details and references. You will often be required to wait around for long periods before being called, so make sure you take plenty of reading material with you.

- 18.9.2. Report to Victim Support, or the court usher, on arrival and check which courtroom the case is being held in. Victim Support or the court usher will be able to advise you on the layout of the courtroom, how the case will proceed and specifics, such as how to address the judge or magistrate. They will also give you expense claim forms where appropriate.
- 18.9.3. You may have an opportunity to meet with one or more of the advocates before the case. If this opportunity is not offered to you, ask. A short meeting before you give evidence will help both you and the barrister who is calling you as a witness. For example, by the time you are due to be called, the issues in the trial might have altered or narrowed, and so you can be informed which areas of your report the barrister particularly wants to ask you about, before you get into the courtroom. If you wish to change anything in your statement, you should notify the advocates at this stage.
- 18.9.4. Before you go into the courtroom, make sure you switch off your mobile phone.

18.10. Giving oral evidence in court

- 18.10.1. Giving evidence is never easy and requires practice and an expectation of frustration that you may not always feel you have had a fair hearing. Nevertheless, what a doctor says is important information and you are there to inform and sometimes educate. You are there to assist the Court. It is not your role to 'win' the case.
- 18.10.2. All witnesses are entitled to be treated reasonably at court. In practice, the courts recognise and value the input of doctors, and will usually treat them with a great deal of respect. Providing you respond to that respect, and treat your legal colleagues with equal respect, you are unlikely to run into problems.
- 18.10.3. When you are called into the courtroom, you will be directed by the usher to the witness box. This is usually to one side of the courtroom. In a criminal case, you should face and address your answers to the judge or to the jury if directed by the judge; in a family case, you should face and address your answers to the judge (or magistrates). In family proceedings there will be a 'bundle' of court papers available to you in the form of one or more lever arch files. These are divided into sections and each page is numbered. You will be directed to the appropriate page for any document the examining barrister wants you to refer to (including your statement). In some courts now this is all done electronically and you will have a screen in front of you which will be changed to the page automatically. In criminal proceedings, you will be provided with a copy of your statement. You should bring with you any additional material to which you may want to refer. Always ask permission from the judge if you wish to refer to any material you have brought with you.

- 18.10.4. You will be asked to take an oath (on a holy book) or an affirmation (non-religious), in which you will swear or affirm that the evidence you give shall be the truth, the whole truth, and nothing but the truth.
- 18.10.5. From then on, you must answer all questions put to you; truthfully and to the best of your ability. You will be asked to confirm your name, qualifications and place of work. Answer the questions put to you clearly and succinctly. Remember that you are not there to win the case, so don't feel you need to justify everything you say, or to contradict questions which seem to be leading down a particular path, but you should be prepared to elaborate on, or qualify, your answer where you think this is important for the court to understand. If you feel that a medical matter has not been clearly explained to the court, has been misunderstood, or has been inaccurately represented to the court, it is your duty to correct this. You may turn to the judge at the end of your cross-examination, and ask, 'Your honour I feel a medical matter has been misrepresented, may I explain to the court?' The judge will say yes. Your only role in court is to explain medical matters to the court. In care proceedings, there is much more freedom to talk generally about the child and to give hearsay evidence not allowed in criminal proceedings.
- 18.10.6. You will normally be led through 'examination-in-chief', during which the counsel for the local authority or the prosecution will take you through the key elements of your evidence. This will be followed by 'cross examination' by the defence barrister and, in family proceedings, those representing other parties. There may then be further 're-examination' by the first barrister. Particularly in family law cases, the judge may intervene and ask questions at any time.
- 18.10.7. Never go outside your expertise, and if you do not know an answer to a question put to you, say so. 'Your honour, this is out with my expertise' will install more confidence than 'I don't know'. If you do not understand a question, ask the examining counsel to clarify it.
- 18.10.8. Avoid appearing dogmatic in your evidence: a fair and balanced witness impresses the court most. Be prepared to reconsider your opinion if you are presented with new evidence or an alternative view, but do not bow to pressure to agree with everything that is put to you. If you need further time to consider any additional evidence presented to you in court, ask the judge; you can always take time out to read new material. You should not comment on new material presented to you without having had a chance to read and consider it properly.
- 18.10.9. Photographs of bruises, burns etc. may be used (you should give prior notice) but use body diagrams instead of photo-documentation of intimate areas, unless ordered to do so by the court⁹.
- 18.10.10. At the end of your evidence, the court should release you to return to your duties. In care proceedings, a formal judgement with reasons has to be made by the judge or magistrate and you should receive feedback on the case. This is not available in the same way in criminal proceedings.

18.11. How judges and juries evaluate evidence

- 18.11.1. In family law cases it is the judge (or magistrates) who evaluate the paediatric evidence.
- 18.11.2. Key principles are:
- The paediatrician advises but the judge decides;
 - However, the judge must give reasons if he/she rejects paediatric evidence;
 - The judge must decide the case against the totality of the evidence.
- 18.11.3. The following is a summary of what a judge does in assessing the paediatric witness: 'The mere expression of opinion or belief by a witness, however eminent ... does not suffice. The court has to evaluate the witness and soundness of his opinion. Most importantly, this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witness's opinion by examining the internal consistency and logic of his evidence; his precision and accuracy of thought as demonstrated by his answers; how he responds to searching and informed cross-examination and in particular the extent to which a witness faces up to and accepts the logic and proposition put in cross-examination or is prepared to concede points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether or not a witness is biased or lacks independence'.
- 18.11.4. To view guidance given to judges about how they should direct a jury and to view a specific direction, consult the Crown Court Bench Book¹⁰.

18.12. After the hearing: expenses and fees

- 18.12.1. It can be helpful to arrange a debrief after any court attendance, so you can review and learn from the experience, and address any emotions this may have raised.
- 18.12.2. If you are called as an examining clinician in the course of your NHS duties, you may be eligible to claim a standard 'compensatory allowance' or claim for loss of earnings, along with any travel and subsistence expenses according to set guidelines. If your attendance has been within your contracted working hours, this should normally be paid to your employing Trust. You should check what the local arrangements are.
- 18.12.3. Instructed experts will be expected to agree a schedule of fees prior to taking on instructions. The level of fees are left to the discretion of the individual, depending on the hours spent on the case, and should be agreed in advance. If the work is carried out within your contracted working hours, this should normally be paid to your employing Trust, and should be negotiated in advance.

Further reading

The 2018, guidance written jointly by the Family Justice Council and the RCPCH, 'Paediatricians as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations'¹¹, provides further information to all stakeholders regarding the use of paediatricians as expert witnesses, directing the reader to discipline specific information in relation to regulation, codes of conduct, competencies, supervision and quality of service. It forms the basis of an agreed minimum standard for all stakeholders to be guided by, and to adhere to, whenever instructing or being instructed as expert witnesses in family proceedings.

Other further reading includes:

- Crown Prosecution Service (2011) Non-accidental head injury cases (NAHI, formerly referred to as Shaken Baby Syndrome [SBS]) - Prosecution Approach¹²

References

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Update information

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