

Relative values

Dr Chris Pamplin takes a hard look at the expert witness-specific recommendations from the Family Justice Review

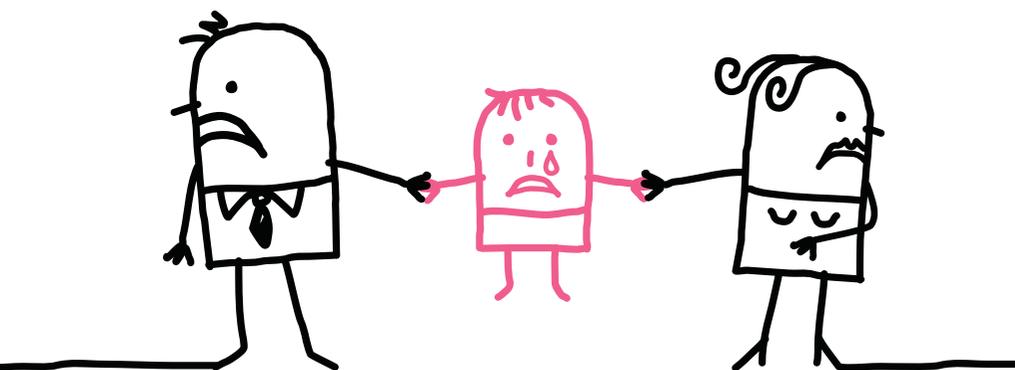


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The Family Justice Review Panel report (published in November 2011) contains several recommendations that are of particular significance for both expert witnesses practising in the family courts and those who instruct them.

Announcing publication of the report, the Panel said that its recommendations were aimed at tackling “shocking delays in the system” and generally improving the family justice system.

Usefulness of expert evidence

The 155-page report devotes a little over nine pages to matters relating directly to expert witnesses. The section commences with a somewhat ambiguous statement as to the usefulness of expert evidence in child cases in the family courts. Acknowledging that expert evidence is “often necessary to a fair and complete process”, there has been a trend towards what the Review Panel believes is “unjustified use of expert witness reports, with consequent delay for children”.

It will be apparent, therefore, that this section of the report begins with a rebuttable presumption that there is an overuse of expert witnesses with a consequent increase in the length of hearings. According to the Ministry of Justice (MoJ), 92% of all family cases involve expert reports and there is an average of 3.9 reports per case (see *Research Summary 5/11*, published November 2011). There is no direct reference to cost, but

a cost-influenced subtext can be readily detected. It should, then, come as no great surprise that the topic for the Family Justice Council’s annual debate in December 2011 was *Experts in the family courts: are they worth it?*

The Review calls for primary legislation to reinforce the point that, in commissioning an expert witness report, regard must be had for the impact of any associated delay on the welfare of the child. The legislation should also assert that expert testimony be commissioned only where necessary to resolve the case. Doubtless, many judges already understand these points.

The Review continues by saying that the court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved, and that independent social workers should be employed only exceptionally. How easily does this sit with the pledge to uphold and protect the rights and interests of the child? Surely the child (and, indeed, the parents) should be entitled to best evidence and not merely such evidence as is available already, often from a professional whose first duty is not to the court.

The report further recommends that judges should direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management. Judges should set out the questions on

which the expert testimony should focus in the court order that gives permission for the commissioning of the expert witness. Of all the recommendations in the report, this is, perhaps, a provision that most would welcome.

Quality & supply

Turning to the question of the supply and quality of expert witnesses, the Review Panel report recommends that the Family Justice Service (a dedicated and managed quango the report recommends be created) should take responsibility for working with the Department of Health and others to improve matters. As a sort of general catch-all provision, the report makes the wishful recommendation that the Family Justice Service should agree and develop expert witness quality standards applicable to the family courts.

The report goes on to suggest that there should be another pilot of multi-disciplinary expert witness teams, building on the previous pilot that arose out of the chief medical officer’s 2006 report *Bearing Good Witness*. It acknowledges, however, that some (primarily experts themselves) have expressed doubt that multi-disciplinary teams of experts would have the flexibility and independence of individual experts. But it isn’t just experts who have concerns about what might be called “opinion by committee”.

The original, somewhat small, pilot ran between April 2009 and March 2011. Six teams were set up, but they attracted only 31 cases. Indeed, two of the teams attracted no cases at all. The evaluation report commissioned by the Legal Services Commission (LSC) (Tucker J, Moorhead R, and Doughty J [2011] *Evaluation of the “Alternative Commissioning of Experts Pilot” Final Report*) concluded that concerns (particularly among lawyers) about the implications of team-based expert witness services inhibited take-up. Furthermore, Tucker *et al* stated that the take-up under the pilot scheme raised issues regarding the viability of multi-disciplinary teams.

Of course, even if experts and lawyers were fully behind the idea of multi-disciplinary teams providing expert evidence, there is still the issue of resources. The evaluation report said: “Resourcing such teams, and ensuring that they have the necessary capacity to provide expert witness services, requires more detailed planning and discussion with clinicians and their employers to establish whether (and in what form) teams are viable and able to contribute significantly to capacity

within the [family justice] system.”

If, as the report stated: “This is likely to be a matter of financial incentives as well as persuading NHS providers that such work is consonant with the values of the NHS”, one wonders how the recent capping of fees by the LSC will play out. We have heard from a number of medical doctors that the capped fee levels are so low that many NHS institutions would lose money on any clinicians who undertook LSC-funded court work. That’s no way to ease the log-jam in the family courts.

In one of the few places in the Review Panel report that directly references the question of cost, the recommendation is made that the LSC should collate data on expert witnesses, to include type of expert, time taken, cost, etc. It appears that this recommendation arose out of the surprising lack of data that the LSC had been able to supply in relation to the use of expert witnesses. In a similar data-collecting exercise, it was recommended that studies of expert witness reports supplied to the family court should be commissioned by the Family Justice Service.

An early example of the breed is an evaluation of psychological reports that has just been published (“Evaluating Expert Witness Psychological Reports: Exploring Quality” Professor Jane Ireland, University of Central Lancashire). Despite acknowledging that its qualitative methodology was one that precluded the possibility of knowing if its findings were representative, the report attracted much media attention. This was perhaps not surprising when its main conclusions included:

- one in five expert psychologists were found to be “inadequately qualified” on the basis of their CV;
- 90% of the psychologists reporting had no clinical practice; and
- two-thirds of the expert reports reviewed were rated as below the required standard.

It is to be hoped that future attempts at research adopt a more refined methodology.

Discontent

Lastly, the report notes the discontent about the way that experts are remunerated and the suggestion that this affects their willingness to take on work. Instead of experts having to chase individual solicitors, often for fractions of the total fee (there are regularly several parties in a family case), the report recommends that

alternative means of payment should be investigated. It further suggests that, in due course, a system of direct payment from the LSC should be considered.

Responses to the report

The Government response to the Review Panel report was given on 6 February. The Government states that it will be accepting the majority of the Review’s recommendations in full. It says that,

“Instead of policies that would avoid unnecessary court cases by investing in the alternatives, *The Guardian* sees the axe being taken to legal aid”

taken together, they will help strengthen parenting, reduce the time it takes cases to progress through the courts and simplify the family justice system.

Maggie Atkinson, the Children’s Commissioner for England, said that she welcomed the Government’s commitment to ensuring that the family justice system places the best interests of the child at the heart of court cases.

Although the Government has indicated its acceptance of the Review Panel report’s recommendations, this is often subject to qualification. The Association of Lawyers for Children has suggested that many of the Review’s proposals are qualified so as to show that it is not really children and families that are at the heart of the Government’s proposals, but a drive to reduce costs. By way of example, the review recommends another pilot of multi-disciplinary expert witness teams, yet it has postponed a roll-out of the family drug and alcohol courts, even though this latter model is said to show a successful multi-disciplinary expert team in action. The Association comments that: “The overwhelming impression of the government’s response is that, contrary to both aims and expectations, it intends to do very little. Reforming the family justice system in the interests of children requires time and investment. This government intends to provide neither; indeed the plan is to reduce both.”

Austere angst

The Guardian commented that the Family Justice Review was overshadowed by “austerity’s dark cloud”. Instead of policies that would avoid unnecessary court cases by investing in the alternatives, *The Guardian* sees the axe being taken to legal aid. This might very well reduce court caseloads but, if so, says the newspaper, it will be by denying families access to justice, leaving disputes unresolved and trapping children in a cycle of their parents’ conflict.

These fears were, in part, echoed by the Law Society of England and Wales. The Law Society’s Chief Executive, Desmond Hudson, said that the Society supported the report’s aims and recognised the need for “radical and lasting change” in the family justice system. But he warned that adequate resources would be needed to implement the changes. He added that: “To effectively halve the time which cases take now will require additional resources—more court time and more judges’ time. It will also require more time from family solicitors.”

He warned that the legal aid reforms will threaten this, adding: “Legal aid cuts will lead to the family courts slowing down even further, as more and more people go to court unrepresented, which takes up court time as everything has to be explained and some people have completely unrealistic expectations of the process.”

The general view appears to be that, although some aspects of the report are positive (eg the stress on the paramount welfare of the child), the majority of the proposals are unlikely to result in significant improvements. Some commentators go so far as to say that they are more likely to result in the system deteriorating still further.

Among users of the family justice system, there is an almost universal scepticism about the motives behind the Review and the extent to which any improvements dependent upon significant investment will be implemented.

The Family Justice Review’s conclusions and recommendations may well be an aspiration that has been accepted in principle by a government that has given no sign of either the intent or the ability to provide the resources to give effect to them.

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