

The bruised child; making your evidence stand up in court

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Abstract

At some point in any doctor's career, he or she may be required to give evidence in court and if a paediatrician, it may well be regarding a case of possible child abuse. The doctor may be acting as a witness of fact or as an expert witness. In either case, the doctor's prime responsibility is to the court and not to the instructing team or to the clinical care of the child. This is an important distinction as in legal cases it is for the court to decide on the conclusion and outcome of the case and not for the doctor. The doctor is there to put forward their observations on matters of fact or to give an expert opinion, not to judge causation or which sequence of events proposed is correct. It is the doctor's duty always to be objective, impartial and detached and to only give evidence within their area of expertise when appearing as an expert witness. This review outlines the requirements of the court and explains the duties of a doctor when acting as an expert witness with some comment on the duties of a doctor as a professional witness.

Keywords Child abuse; expert witness; haematologist

Introduction

Staff working in the National Health Service or other health care settings are bound by a legal framework governed by the Court. Agencies and individuals responsible for child protection operate within a statutory framework composed of both primary and secondary law and within codes of guidance which often have statutory force. The court's function is to identify key issues in the case and the evidence relevant to the issues identified; such issues will be determined by the information put before it. The information will be provided by the health and social care agencies, which although involved in the same case will give different perspectives. This results in a broad range of questions being raised, which will generally be case-specific and may be fundamental to determining the correct course for the child's welfare. A doctor's expert opinion may be crucially important in identification of the key issues and the power of such an opinion, especially in complex cases or where the witness is eminent, may be very compelling. It is therefore essential that the evidence given is reliable and can be understood by the court. Laws change and there have been some recent updates to family court proceedings and rules on admissible evidence in criminal courts. Of note, the courts in England and Wales differ from those in Scotland and Northern Ireland. It is for the court to determine the legal procedure; the doctor does not need to know the minutiae

of such procedure but must respect the court and heed the advice of the instructing legal team.

Legal proceedings

There are several different types of court proceedings where a doctor may act as a witness: criminal, civil and family court proceedings. There are also regulatory proceedings but these are not judicial proceedings but are undertaken by the professional's regulatory body, which is the General Medical Council in the case of a doctor. Care proceedings within the family court are those that have been brought by the local authority concerned that a child may have suffered abuse or neglect. At such proceedings, it is determined whether or not a child has come to harm and if so, how to protect them and ensure they receive appropriate care. Criminal proceedings are those at which it is determined who is guilty of such harm. The standard of proof is different between the two courts: in the former the standard of proof is 'on the balance of probabilities' whereas in the criminal court it is 'beyond reasonable doubt'. Both are different from the standard of proof for medical management, which is a balance between risk and harm in the light of current medical knowledge. Criminal and care proceedings may run side by side and information ideally should flow from one to the other but this is not always the case. It is most likely that the doctor will be giving evidence at the civil proceedings to determine whether or not harm has been caused to the child.

Types of witness

A doctor may be called as a witness in one of two capacities: a professional witness or an expert witness. Both have the same duties to the court and each has a distinct role, which should not be confused. In neither case is the doctor an advocate.

The witness of fact

Giving evidence as a witness of fact is also described as being a professional witness or treating expert. In this situation, the doctor will provide evidence either as the treating professional or as a clinician involved in the case, which may have been in an advisory capacity. The doctor will be expected to work from the notes taken at the time, which should include the record of the presenting history and immediate examination. This will not be possible to replicate and provides an invaluable and essential source of information for the court. Other clinical records such as laboratory or radiological reports or photographs may be available and an explanation of the results and interpretation of the findings in the context of the case, the conclusions drawn and rationale for the actions taken will need to be outlined in the evidence given. Such evidence, which will initially have been submitted as a report, is often the first that the local authority will turn to when determining whether specialist assessments or reports are required in order to ensure that the background and precipitating circumstances on which its core assessment is based are properly understood. It is apparent when acting as a professional witness, how important it is to keep clear, accurate and contemporaneous notes and records. Although the evidence given will be predominantly factual, some may be opinion, allowing interpretation within the context of the facts using

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professional judgement and experience, such as how an injury to a child might have been caused. It must be made clear when evidence is given, which is factual and which is opinion based on experience.

The expert witness

Giving evidence as an expert is also described as being a forensic expert. This is a very privileged position allowing the witness to give opinion evidence within their area of expertise and outside most jurors' or judges' knowledge and experience. Normally evidence given in court should be factual and not based on opinion. However, some cases concern subject matter that is specialised or technical such that a person, or in this case the court, without experience or knowledge in that area is not able to understand the complexities or arguments sufficiently to form a sound judgement. In these instances, explanation or assistance from an expert witness can be sought. The role of an expert witness applies to both criminal and civil courts. It is clear that the expert witness must be suitably qualified and experienced or knowledgeable in the subject matter in question to be able to give a reliable expert opinion. The expert is there to inform and not to mislead, the latter usually occurring unintentionally. The court must be satisfied on the balance of probabilities that the witness is a reliable expert and this can be challenging where the evidence is of a technical, complex or scientific nature. Medical expert opinion is often precisely of that nature and therefore assurance of reliability and impartiality is paramount. In the past, expert evidence has been admitted to proceedings too readily and without sufficient scrutiny and opinion evidence has been expressed as scientific fact. This has led to miscarriages of justice. The responsibility of the expert witness is to present the evidence such that the jury can understand and thus interpret the evidence and come to their own conclusion within the context of the case, not simply to defer to the expert.

It is apparent that the expert must have true expertise to be able to furnish the court with the best information and knowledge on which they have based their opinion so that the court can understand all the facts and interpretations and be able to draw a just conclusion. However, opinions may differ between the experts and it can be helpful to have a pre-hearing meeting, called individually or jointly by the instructing team or teams, to explore these differences and the reasons for them in order to come to a true consensus. It is important to know whether the final consensus opinion is a well recognised view or a minority view. The range of opinion on a particular point should be clarified and whether one of the opinions is 'cause unknown'. The reasons leading to the conclusion should be outlined so that the weight given to other opinions can be fully assessed. This is the same for an individual expert witness's opinion. It is essential to avoid the scenario where during a consensus meeting all the witnesses, each expert in their own field, defer to a single expert on a key but possibly contentious point and thus although appearing to be a consensus, put forward just the opinion of a single expert. To maintain impartiality, it is recommended that doctors clinically involved in the case of a particular child, should not also give expert evidence in that particular case, even if they themselves are experts. Their very involvement in order to be able to treat that child effectively will inevitably influence

them and their review of the actions taken at the time of presentation. The objectivity and neutrality required of an expert witness will be lost, or at the very least, difficult to demonstrate convincingly in a court of law. An independent expert may be appointed by the court to help the judge assess the reliability of the expert opinion evidence.

The expert witness in the case of a bruised child

The question of whether an injury has been sustained accidentally or in a non-accidental manner often arises in the case of a child with bruises. Of note, non-accidental injury is not synonymous with deliberate injury and the intentions of the perpetrator to cause the resulting harm cannot be assumed. A further question to be answered is whether or not the injuries, in this case bruising, are due to a pathological process or illness. A paediatrician may be well placed to give evidence on the first point, but a further expert may be needed such as a paediatric haematologist to fully address the second. If other injuries such as cerebral haemorrhage have occurred, experts from the fields of radiology and neurology may be required. Even within these groupings there is further subspecialisation such as neuroradiology or paediatric neurology.

The paediatric haematologist as an expert witness

In the case of a bruised child, the main role of the paediatric haematologist as an expert witness is to give an opinion as to whether the child has a bleeding diathesis accounting for the bruising or whether the bruising is more likely due to injury which may be accidental or non-accidental. The information that the haematologist has to rely on and form an opinion from is often incomplete and although in some cases further testing of the child can be arranged, in others it cannot, such as if a child has died, or when the circumstances cannot be replicated as in the case of a child presenting with bleeding at a time of severe hypoxia. It is under these conditions that the expert has to exercise utmost care to be objective and not over-interpret or misinterpret findings. Clinical experience in the expert's particular field and knowledge of the literature can inform interpretation of specific cases, but it must be made clear where such knowledge has been used and its relevance to the case in question.

Medical history

The commonest manifestation of a bleeding disorder is the appearance of bruising or bleeding in the absence of an appropriate history of injury. This discordant history is the same for a child who has been abused and is highlighted as one of the key findings leading to suspicion of abuse. The history of the presenting complaint and examination will only be available 'in real time' from the recorded notes. Important details clearly will be what injury, if any, is proposed to account for the bruising or bleeding, and the circumstances that led to that injury. Other details include the pattern, nature and appearance of the injuries and results of tests done at the time and sometimes of those undertaken subsequently.

A history of past bleeding and response to haemostatic challenge can add important information but such a history may not

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