

Giving evidence in court

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Abstract

Any health professional working with children is likely, at some point in his or her career, to have to give evidence in court. It is a prospect that fills many with anxiety and dread. Standing in the witness box, being cross-examined by a barrister, it is easy to feel that it is you who are on trial, that your every action is being criticised, your motives questioned, and your integrity challenged. And yet, the courts are an essential part of safeguarding the welfare of our most vulnerable children and young people, and as health professionals we bring a unique and valuable contribution to the court processes. Giving evidence in court can be one of the most rewarding and challenging aspects of our work as child health professionals. Rewarding when we see positive outcomes as children are protected from harm and perpetrators of abuse are brought to justice, and challenging as our contribution forces us to take a critical look at our own practice, research evidence, and the context of the cases we are dealing with. This review will provide paediatricians and other child health professionals with an overview of court processes relating to children's welfare; to equip them with the knowledge and skills to prepare high quality legal reports, and to give evidence in court.

Keywords child protection; criminal courts; family courts; professional witness

Introduction

The process of safeguarding children and young people's well-being is enshrined in UK law through the Children Acts, 1989 and 2004; the Police (Scotland) Act, 1967; the Children (Scotland) Act, 1995; and the Children (Northern Ireland) Order, 1995. The processes to be followed and roles of different professionals and agencies are outlined in statutory guidance for England, *Working Together to Safeguard Children, 2013*; Wales (*All Wales Child Protection Procedures, 2008*), Scotland (*National Guidance for Child Protection in Scotland, 2010*), and Northern Ireland (*Cooperating to safeguard children, 2003*). In this article, I shall focus on England, although the procedures are very similar in all devolved administrations, and the principles remain the same. Specific details for Scotland, Wales and Northern Ireland can be found on the relevant governmental websites.

Where there are suspicions that a child may have been harmed or be at risk of harm through abuse or neglect, social services and the police work together with other agencies, including health and education, to investigate the suspected maltreatment, carry out a comprehensive assessment of the child and family, and the circumstances of any incident, and formulate a plan for protecting the child. In most cases suspected maltreatment is dealt with outside the court arena through multi-agency child protection plans. However, where there is evidence

that a child cannot be adequately protected through this process, or that a crime has been committed, these agencies must turn to the courts.

One of the key principles underpinning the legal process is that it must remain independent of all agencies working in the child protection arena, and must follow due process of law. This can prove difficult for those who work in a different culture. It is important therefore to have some understanding of these processes so that we can support the courts in carrying out their duties.

As health professionals, we may become involved in the child protection process at a number of different levels:

- In primary or secondary prevention, providing support and healthcare to those children and families who may be at risk, and offering advice to parents on appropriate child care;
- In identifying those children and families at greatest risk of maltreatment;
- In identifying signs and symptoms of maltreatment, including physical injuries, and the effects of neglect and emotional or sexual abuse;
- In assessing injuries and other signs and symptoms, documenting their nature and extent, and distinguishing between maltreatment and other natural, medical or unintentional causes for those signs and symptoms;
- In evaluating the needs of children who have suffered or are at risk of suffering maltreatment;
- In providing healthcare for those who have suffered harm as a consequence of maltreatment.

In all of these areas, the health professional may need to give evidence to the courts as well as to the wider child protection process.

Types of court proceedings

Two separate but complementary legal frameworks may be involved in relation to suspected child maltreatment: the family courts, whose remit is to ensure the safety of the child or children involved; and the criminal courts, responsible for bringing to justice the perpetrators of any harm to the child. Both operate in very different ways, and have different standards of proof.

Family courts

Family courts are charged with determining whether a child has suffered, or is at risk of suffering, significant harm; with assessing whether the child requires a court order to ensure his or her future safety; and with applying such orders. This typically takes place in a dual process: first, a finding of fact hearing, in which the facts of the case are established, and a judgement made as to whether the child has suffered, or is at risk of suffering, significant harm, and whether any such harm is attributable to a lack of parental care or control; and second a disposal or welfare hearing, to determine which, if any, court orders are appropriate for protecting the child. Family court, or public law proceedings are typically held before a judge or magistrate and do not involve a jury. The process is inquisitorial, trying to establish the facts of the case and assess their significance. Family courts operate on a standard of 'the balance of probability', meaning that the

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presiding officer only needs to determine that their findings are more likely than not to be fact.

The concept of 'significant harm' is not straightforward. Essentially it requires evidence that the child has been ill-treated or has suffered impairment of health or development, compared to that which might be reasonably expected of a similar child. Determining whether a child has suffered significant harm will depend on the severity of the ill-treatment or impairment, its duration and frequency, and any evidence of premeditation, coercion or threat.

The second stage of the family proceedings, the disposal or welfare hearing, involves the court determining whether a court order is required to ensure the child's safety, and if so, what type of order is appropriate. There are a number of different orders available to the courts, the most common of which are:

- Care orders: These assign parental responsibility (PR) to the Local Authority applying to the order. The PR may be held jointly with one or both parents, and may be issued on an interim or permanent basis.
- Supervision orders: These place the child under the supervision of the Local Authority.
- Emergency protection order: These 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.

Family proceedings in child protection cases are normally initiated by the Local Authority in which the child lives; they will be represented in court by the Local Authority legal services. The child or young person will normally be represented in court by an advocate from the Children and Family Court Advisory and Support Service (CAFCASS); each of the relevant parties may represent themselves or be represented by their own barrister.

Criminal courts

In contrast to the family courts, criminal courts are concerned with the alleged perpetrator of any harm, and operate in a very different manner. The process is adversarial rather than inquisitory, and the balance of proof is much higher, relying on the court establishing, beyond reasonable doubt, that the person accused is guilty of causing the alleged harm to the child, and that this constitutes a criminal act. Thus it is not uncommon for the family courts to determine, on the balance of probabilities, that a child has suffered significant harm, and that a court order is issued to protect the child, while the higher threshold of the criminal court is not met, and the case is either not brought before the court, or the alleged perpetrator is found not guilty of the act.

Criminal cases are brought before the court by the Crown Prosecution Service, represented by a prosecution barrister. The defendant is represented by a defence barrister. The case may be heard before a jury, or solely before a judge. The defendant will be tried according to a specific charge, and there are a number of charges which may be appropriate in child protection cases. Once the jury or judge has determined whether or not the defendant is guilty, the judge will determine the appropriate sentence. Unlike family courts where all evidence, including hearsay evidence, is admissible, in the criminal courts, only evidence presented directly to the courts is admissible. Thus, it may be possible, in the family courts, for a witness' written statement

to be used as evidence; in the criminal courts however, if a professional's evidence is to be used, that evidence must be given in person.

Professional and expert witnesses

In most circumstances, health professionals will appear before the courts in their capacity as professionals, giving evidence of fact. This is distinguished from the expert witness, who is appointed by the court to give an expert opinion.

As a professional witness, you will be called upon to bear witness to your findings, for example, the symptoms and signs you elicited in your history taking and examination, or the nature and extent of your previous involvement with the child or family. You may in court be asked to explain your actions and the decisions you made. You may also be asked to give your assessment and opinion on the facts presented to you. For example, in a case of physical abuse, as a paediatrician you may be asked to describe the injuries you saw, and also to explain how you interpreted those injuries and any other findings, whether you thought they were non-accidental in nature, and any alternative explanations you considered. In this sense, the distinction between professional and expert witnesses becomes blurred. As a practicing health professional, you have expertise in your area (whether as a paediatric trainee, consultant, children's nurse, or other profession). That is expertise that the courts do not have. You need, therefore, to be prepared to draw on your expertise to assist the courts in interpreting the evidence that you and others give. However, you must not step beyond the bounds of your knowledge or expertise.

If you are called as a professional witness, you are obliged to attend the court, and not to do so could be construed as contempt of court. Normally, the courts are very aware of the busy roles professionals play, and will try to be accommodating of particular dates or times that conflict with other work demands. However, this is not always possible within the constraints of the court timetable, so it is important to plan in advance and make alternative cover arrangements where needed. Professional witnesses are entitled to claim travel costs and an allowance for any costs incurred, for example through appointing a locum to cover.

An expert witness is someone who is appointed by the court to provide an opinion, drawing on their own recognised expertise. Anyone can put themselves forward as an expert witness, and if invited to provide an expert opinion, has no obligation to do so. Having committed to providing an expert opinion, the expert is then bound by the 'Practice Direction' and their instructions – a letter setting out the particular issues that the court would like the expert's opinion on. The expert witness will be provided with a 'Bundle' of documents (including copies of health records, and other witnesses' statements) and needs to take all relevant information into account in forming their opinion. The expert witness is entitled to claim a fee for his or her services, along with reasonable costs; these should be agreed in advance.

Assessing and documenting findings in child protection cases

Child protection cases can sometimes take many months to come before a court. As a health professional, you may be familiar with the child and family, or you may only have seen the child once.

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