JUDICIARY OF ENGLAND AND WALES

LORD JUSTICE WALL

FAMILY LAW UPDATE: THE USE OF EXPERTS IN FAMILY CASES: EXPERTS AND THE MEDIA: BABY P

A PAPER FOR THE ANNUAL SOLON EXPERT WITNESS CONFERENCE 2009

6 NOVEMBER 2009

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1. As I was recently - and I have to say quite unfairly – described by one of my colleagues as a "self-confessed publicist"[1] I propose to spend the first part of this paper unashamedly blowing the trumpet of the Family Division and describing particular aspect of the practice of the Family Division in relation to experts. This papers will be available electronically if anybody wishes to have a copy of it, and even better, if I am to live up to my character, the expert will find most of it (and a lot more) in my extremely modestly priced *Handbook for Expert Witnesses in Children Act Cases*, published in 2007 by Jordans. [2]

2. The first and most important point I wish to make is that even when the CPR were but a gleam in Lord Woolf's eye, the Family Division was putting into practice most of the reforms relating to experts now considered standard – including discussions between and meetings of experts, agreements between experts – the encouragement of attitudes of cooperation rather than confrontation – attempts to reach the truth by inquisitorial rather than adversarial means.

3. It is thus dispiriting in the extreme for a family judge to come to a conference such as this to find the agenda for experts – and certainly the lawyers – in such adversarial mode, and in a trial by combat mind warp. The attitude seems to be - my expert is better than yours, and the purpose of a meeting is to suss out the opposition, not to reach agreement. It is high time, in my view, that we all moved on.

4. We are, as I think the experts know, re-writing the Family Proceedings Rules. The new rules will appear, all being well, sometime next year. The objective is to provide a clear body of rules, written in plain English such as the ordinary person can understand. The rules themselves will contain a section on expert evidence, which will in turn be buttressed by a Practice Direction. The expert may, however, I think take it that there will be no relaxation in the good practice which we have introduced: if anything, the rules will be tightened up.

5. Hand in hand with the rules, of course, goes the question of transparency and, in

particular, the naming of experts. One of the real difficulties in the field of child protection is the availability – I hesitate to use the word "supply" - of experts willing to undertake the work. It was partly for this reason that I wrote my *Handbook*. The work – child protection - is extremely important, and this paper is addressed in particular to paediatricians. psychiatrists and psychologists, whose advice to judges in family justice is critical and sometimes determinative.

6. It is my firm view that the competent and conscientious expert has nothing to fear and much, intellectually, to gain from undertaking expert child protection evidence work in the Family Division. That is my principal message. The rest of what I will have to say is how you go about it.

7. Let me deal first of all, therefore, with some practical issues. It has been wisely said that in dealing with children, judges need all the help they can get. The role of the paediatrician in a child case is, usually, to assist the judge (1) on the mechanism of injury (non-accidental or accidental – the how did this happen?) and (2) timing (not usually when but within what time-bracket did the injury occur?) The psychiatrist is likely to be invited to make an assessment of the child and the risks involved in different disposals of the case. The psychologist will usually advise on adult capacity to act as a safe parent. Clearly, adult psychiatrists and psychologists are needed to assist the court in its assessments of parents and carers, and their capacity safely to care for a child. Child psychiatrists and psychologists can deal with attachment, child development and – where necessary – the credibility of the child whom the judge is unlikely to hear giving evidence. Indeed, the idea that a child should be cross-examined months – sometimes years – after the event and his or her credibility impugned strikes us as verging on the barbaric. I have yet to hear a child psychiatrist support it, and, as you will know, if was not part of the original Piggot proposals.[3]

8. We start from the premise that in any case under the Children Act or the inherent jurisdiction involving children, the expert can only see the papers and write a report if authorised to do so by the court. The whole process is thus judge led and controlled. Despite the recent changes in the rules, the expert is engaged because one of the parties – or the parties together – has / have made an application to the judge for permission to instruct a particular expert, and to show the papers to that expert.

9. Thus the party who wishes to have the child examined (which can only be done with the judge's permission) has to come to court with a properly prepared case and has to persuade the judge (a) that expert evidence is required; and (b) that he or she should be given permission to instruct Dr X. The party will be expected to provide particulars, not only of Dr. X's area of expertise, but of Dr. X's availability and his or her capacity to undertake the work within a given time-frame.

10. Three cardinal principles underlie the instruction of experts in family proceedings. They are: (1) that the proceedings are non-adversarial; (2) that the proceedings are confidential; and (3) that litigation privilege does not apply in them.

11. The Family Justice System has spent years seeking to rid itself of the partial witness, or the witness who has a particular thesis to propound. At least one medical practitioner has been struck off for seeking to mislead the court.[4] I repeat: the partial expert is not wanted in family justice.

12. I recall as advocate once calling a paediatrician who lived by the following syllogism: (a) parents do not injure their children; (b) this child has injuries; (c) therefore these injuries must have an innocent explanation. He had a very uncomfortable time trying to explain that the child's fractured ribs could have been caused by coughing. His attitude – and that of his kind - is, I hope, dead. It certainly has no place in family proceedings.

13. Not, should it be said, has the attitude which believes that every injury is non-accidental or sinister. All absolutes the enemy. What the family judge wants is a realistic, well researched objective opinion, not an argument, or a thesis.

14. Let me say a word about each of my three underlying principles. Non-adversarial means that the court is not concerned with whether one side or the other will succeed in achieving the result which that side wants. The court is not interested in point scoring. The court is concerned with the welfare of the children who are the subject of the proceedings: their welfare is the court's paramount consideration and the views and aspirations o the other parties to the proceedings are relevant only insofar as they reflect on the welfare of the children involved. The practical consequences of this principle are (1) that the expert's duty is owed to the court and to the child, not to the party who has instructed the expert; and (2) that whatever the expert's opinion, the judge and the parties will see it, even if it unfavourable to the parson who has instructed the expert.

15. Confidentiality – a subject to which I will return – currently means that statements and other papers generated by the court process in family proceedings are confidential to the court, and, with some exceptions, it is a contempt of court to disclose them to a person who is not a party to the proceedings – certainly to the Press - without the court's permission. It follows that an expert can be instructed and shown the court papers only with the permission of the judge who, in turn, decides both what issues require expert evidence and the brief the expert should be given. Furthermore, the current Family Proceedings Rules 1991 provide, by rule 4.18(1) that "no person may, without the leave of the court, cause the child to be medically or psychiatrically examined, or otherwise assessed, for the purpose of the preparation of expert evidence for use in the proceedings".

16. In other words - and I repeat -the whole process is judge led. The advocate is expected to come to court ready to argue that the case requires expert evidence, and that a particular expert is required who can do the necessary work within the time frame laid down by the judge.

17. Finally, the absence of litigation privilege means that the expert's report will be disclosed, whatever it says. A party cannot sit on or refuse to disclose a report in family proceedings relating to children. Disclosure thus has several particular implications for the expert witness . Amongst these are: -

    (1) The court will expect the report to be objective and wholly free from bias. The expert must avoid any attempt to write a report which is inappropriately slanted towards the commissioning party. Such an approach will be deprecated by the court and will devalue the expert's evidence.

    (2) Because the report will be read not only by the judge but by the other parties and any other experts instructed in the case, it is very important that it should address clearly the issues the expert has been instructed to address; that it

should be thorough, well reasoned and researched, and that the methodology the expert has used should be properly explained.

(3) The key concepts for the expert are openness and sound preparation. Remember that the expert's work is likely to be subjected to a fair, but rigorous analysis and challenge. It is therefore very important that the expert's methodology is transparent. Remember that everything experts do or say must be recorded. Any letters the expert writes relating to the case are liable to disclosure. When the expert talks to the solicitor instructing the expert, he or she will make a note of the conversation (called "an attendance note"), which may well be produced during the course of the case. If the expert has an important conversation with a solicitor, the expert should ask him or her to send the expert a copy of the attendance note he or she will have made. The expert must make sure that the his or her own notes of meetings or interviews with the parties or the child are contemporaneous, full and accurate. A parent's barrister may well be instructed to challenge the expert's version of a conversation. The expert must be prepared for that to happen.

(4) The fact that the expert's work will be subject of close examination should not deter the expert. What the expert is doing is very important, and may well have substantial implications for the lives of the children and adults in the case. A principal message of this paper is that if the expert's work is conscientiously undertaken, the expert's methodology sound and the expert's conclusions well reasoned, it is highly unlikely that there will be any adverse consequences for the expert.. Indeed, the expert may not only find the work the expert are doing is not only stimulating and very important; the expert may even find parts of it enjoyable!

18. In summary, therefore, if an expert is instructed to write a report in family proceedings, the expert's duty is to the court and to the child, not to the party who commissions the report. The expert cannot receive information "in confidence" from anybody. All relevant information must be shared with the other parties and the court. The expert's report will be disclosed whatever it says. The expert's duty is to be objective and wholly free from bias in favour of one party or the other. The expert's watchwords should be openness and sound preparation. The expert must be prepared for everything he or she does and says to be the subject of challenge. If the expert's work is done conscientiously, if his or methodology is transparent and if the expert's reports are objectively sound it is highly unlikely that the expert will be the subject of any sustainable criticism.

19. It is always important in family proceedings that you bear in mind throughout the respective functions of expert and judge. The expert forms an assessment and expresses an opinion within the particular area of his or her expertise. Judges decide particular issues in individual cases on all the evidence available to the court. The expert's function is to advise the judge. He or she not decide the case or any issue in the case.

20. The corollary to this is that it is not for the judge to become involved in medical controversy except in the extremely rare case where such a controversy is itself an issue in the case, and a judicial assessment of it becomes necessary for the proper resolution of the proceedings. The reason for judges avoiding medical controversy is obvious. Whilst most family judges have knowledge and experience from practice and previous cases, they rarely have more medical knowledge than the intelligent lay person. Judges, almost

by definition, are not experts in the field about which you are giving evidence. Judges bring to the inquiry forensic and analytical skills, and have the unique advantage over the parties and the witnesses in the case that they alone are in a position to weigh all its multifarious facets. In *Re U (Serious Injury: Standard of Proof; Re B*,[5] the Court of Appeal stressed the importance of the court deciding cases on all the information available to it, not just on the expert evidence. This process, of course, involves (but is by no means limited to) an evaluation of the expert's pinion in the context of the court's duty to make findings of fact and assessments of the credibility of witnesses.

21. It follows that the dependence of the court on the skill, knowledge and, above all, the professional and intellectual integrity of the expert witness cannot be over-emphasised. Judges have a difficult enough task as it is in sensitive child cases. To have, in addition, to resolve a subtle and complex medical disagreement or to make assessments of the reliability of expert witnesses not only adds immeasurably to the judges' task, but given their fallibility and lack of medical training, may help to lead them to false conclusions

22. I think I can pass over the general duties of experts since what Cresswell J said in *the Ikarian Reefer* [6] is of universal application. However, in family cases experts should appreciate that a misleading opinion may inhibit a proper assessment of a particular case by the non-medical professional advisers and may also lead parties, and in particular parents, to false views and hopes. Furthermore, such misleading expert opinions are likely to increase costs by requiring competing evidence to be called at the hearing on issues which should in fact be non-contentious. In children cases, the duty to be objective and not to mislead is especially vital because the child's welfare, which is paramount, is at stake. An absence of objectivity on the expert's part may lead a judge to reach the wrong conclusion. It may, for example, result in a child being wrongly placed or otherwise unnecessarily at risk

23. By virtue of section 3(1) of the Civil Evidence Act 1972, r opinion on any an expert's relevant matter on which he or she is qualified to give expert evidence is admissible in evidence. It is, however, of the utmost importance that the expert sticks to his area of expertise. This is a subject to which I shall return.

24. Experts in family proceedings are expected to be proactive. It is of the utmost importance that the expert is properly and fully instructed and that he or she has access to all the material which is necessary for the proper preparation of the report. The letter of instruction should be detailed and spell out clearly what is required. It is a disclosable document, and will be seen by the judge and the other parties. If it does not provide the instructions which she expert can properly fulfil, or if the expert does not have access to material which he or she feels is necessary for the preparation of the report, the expert should not hesitate to say so and to take steps to ensure that the necessary material is received.

25. Family judges positively encourage meetings and discussions between experts, together with minutes of areas of agreement and disagreement. Such agreements save huge amounts of court time, and sometimes make it unnecessary for experts to attend court. In making enquiries for the purpose of his or her report, the expert is free to talk to other professionals in the case. A note of any such discussions should, however, be made, and dereference to them made to them in the report. If any such discussion has been influential in reaching a particular conclusion, the expert should say so in the

report.

26. Equally, meetings of experts pursuant to a direction from the court are an important forensic tool. They can save much time, by narrowing issues or by reaching agreement thereby rendering the oral evidence of experts unnecessary. However, a strict intellectual discipline must be applied to them. Whilst the logistics of setting up, conducting and reporting on such meetings are largely matters for the lawyers, experts have a vital role in ensuring that meetings are set up only when they are necessary and that they are productive. For their success, they depend upon the manner in which they are set up and conducted, and upon all the participants in them focusing upon achieving a clear outcome. Their principal objective is to achieve a clear statement of points of agreement and disagreement and thus to limit or eliminate the need for oral expert evidence at the hearing of the case.

27. Family judges also encourage the appointment of experts on joint instructions, although time does not permit me to develop his point.

28. Experts should feel fee in family proceedings to change their opinions where appropriate. Experts who change their opinions for good reason on the receipt of fresh information are respected by the court rather than criticised – provided, of course, their reasons for doing so are sound.

29. Where, I hope, the family judges do lead the field is in their understanding that giving evidence and attending court is time consuming and takes doctors away from their clinical responsibilities. In the past, the legal profession often treated the convenience of expert witnesses with a casualness which was both unconducive to any concept of mutual co-operation and likely to reinforce the reluctance which many of you have about giving evidence in court.

30. Good practice now requires lawyers to recognise that expert witnesses are busy people with many professional calls upon their time, and that giving evidence in court is both time-consuming and takes you away from your clinical duties and other important professional commitments.

31. A number of recent decisions by judges have been designed to consult the convenience of expert witnesses and to try to ensure that your time is not wasted. Good practice now requires the lawyers in the case to ensure:

    (1) that a date and time for the expert's evidence is fixed substantially in advance of the hearing, so that you can fit it into your other professional commitments;

    (2) that, if oral evidence is not required, the expert is notified as far in advance of he hearing as possible so that the expert does not find him or herself travelling to court only to find that he or she not, after all, needed;

    (3) that the judge is given a sensible estimate of how long the expert is likely to be in the witness-box so that expert evidence can be time-tabled, and experts can fix other professional commitments around it. In particular, every effort should be made to ensure that expert evidence does not exceed the time allotted

for it so that experts do not have to come back on another day to finish it.

32. Where experts have been asked to attend court at a particular time on a particular day, judges hearing cases under the Children Act will normally interpose their evidence at that point, even if that means interrupting another witness. Alternatively, expert evidence in a contested case may be arranged so that experts from similar disciplines can listen to each other's evidence. However, experts need to be proactive in ensuring that suitable arrangements have been made for your evidence. Whilst the onus is on the lawyers to deliver proper case management, it would be sensible if the expert's secretary or somebody on his or behalf remains in regular touch with the solicitor who has commissioned the report to ensure in particular:

    (1) that the case is being heard on the dates fixed for it;
    (2) that expert evidence is still needed;
    (3) that a firm date and time has been set aside for the expert's evidence;
    (4) that the experts are up to date with any recent developments in the case;
    (5) that there are no additional documents which have come to light since the reports were written which the experts have not seen; and
    (6) that all the relevant documents referred to in the experts' reports are before the court.

33. In summary, therefore the lawyers and the court should ensure that the expert's oral evidence is fixed for a date and time which is convenient for the expert and that it does not exceed the time set aside. Experts need to play their part in ensuring that they attend court only if it is strictly necessary for them to do so.

34. I will pass over the topic of courtcraft in the interests of time, although you will find this aspect fully addressed in my book. What I think is important is that experts should receive feedback about what happened in the case. The solicitor who instructs the expert has a positive duty to inform the expert about what happened, and what the judicial reaction to the report was, and it is in my view good practice for the judge to direct that a copy of the judgment, when and if transcribed, is sent to the expert. My Handbook tells experts how to complain if they feel they have been badly treated

35. In my view, therefore, family judges have striven to render expert evidence efficient, and the process sensible.

Experts and the Media

36. One of the greatest difficulties in persuading experts to give evidence in proceedings under the Children Act in cases of child protection has been fear that the disaffected litigant will report the expert to his or her professional body with the consequential stress, delay and difficulty which that process involves. This anxiety has been fuelled by two cases in particular, involving Professor Sir Roy Meadow and Professor David Southall.

37. In the *Meadow* case, it took the Court of Appeal, by a majority, to decide that Professor Meadow had not been guilty of serious professional misconduct when, during the course

of his evidence in the Sally Clark trial, he gave statistical evidence which was plainly not within the area of his expertise.[7]

38. My assessment of the Meadow case is that there is nothing in the judgments of the Court of Appeal to deter the conscientious expert from giving evidence in family proceedings.[8] The decision of the Court of Appeal in *GMC v Meadow* does not change the law. Its principal messages are: (1) that experts in their reports and evidence should never stray outside the particular areas of their expertise; and (2) if experts are invited to do so in their instructions to advise or in evidence, they should either decline the invitation, or make it very clear to the judge that the area on which they are being invited to comment is not one to which your expertise extends. All three judges in the Court of Appeal repeat these two messages, and all three refer with approval to the decision of Cresswell J in *The Ikarian Reefer* to which I have already referred.

39. The judgment given by Thorpe LJ in *GMC v Meadow* (which you can find on *Bailii*) repays study. In the opening section of his judgment, under the heading Family Justice Background, he emphasises the importance of medical evidence in the area of child protection, and the substantial reliance which the court places on the professional integrity of the experts who advise it. He then goes on to point out that, in the field of family justice, demand for expert evidence exceeds supply. The system, he argues, is thus very sensitive to increasing or newly emerging disincentives.

40. The message of *GMC v Meadow* is, in my view. clear. Although this was a case which had its roots in Mrs. Clark's criminal trial, and although different evidential rules apply in proceedings under the Children Act, expert evidence remains of critical importance. The law has not changed. Expert witnesses, like everyone else who gives evidence in court, cannot be sued for what they write in court reports or say in evidence. They do not, however, enjoy immunity from disciplinary proceedings before their respective professional bodies. And they should not stray outside the particular area of their expertise.

41. What other lessons can we learn from *GMC v Meadow*? The first is that it is now a matter of urgency that the dearth of high quality medical evidence in child protection cases is properly addressed. Everyone engaged in the Family Justice System is aware of, and understands, experts' reluctance to become involved in giving evidence in public law cases under Part IV of the Children Act 1989. Quite apart from all the well known disincentives - the time-consuming nature of the work, the inconvenience of fitting it in with other clinical responsibilities, the disagreeable experience of your carefully articulated view being challenged in cross-examination, the need to travel long distances to give evidence, the risk that the case may not have been properly time-tabled in order to accommodate the expert's evidence - comes the risk, high-lighted in *GMC v Meadow* that the expert will be reported to your professional body by a disaffected party or one of his or her supporters.

42. It remains my firm view, however, that the chances of experts being reported to your professional body are minimal if they follow the guidance given by the Court of Appeal in *Meadow v GMC*. Thorpe LJ also makes the point which in my view is a very good one, that when, following the decision of the Criminal Division of the Court of Appeal in *R v Cannings*,[9] the government announced that there would be a review of care orders made on the premises so severely criticised in that case, only two appeals were brought from

care orders made in the Family Division, and both were dismissed.

43. As far as Professor Southall is concerned, I commend to your attention, the decision of Blake J in the Administrative Court.[10] He concluded that Professor Southall had made an unjustified allegation of murder against a parent and had speculated on non-medial matters in an offensive manner, entirely inconsistent with the status of an independent expert . Thus the GMC had been entitled to reached the conclusion that nothing less than erasure from the register would suffice. His conduct had not been a mere error of judgment in a challenging environment, nor had it been a "one-off".

44. I appreciate, of course, that none of this provides much comfort to the innocent expert who is reported to the GMC by a disaffected litigant, or who is pilloried in the press for his or her opinions. So what can be done about it?

45. The FPR now allow reports to be sent to the GMC or other professional bodies without the court's permission subject to an overriding direction from the court in appropriate case, although the GMC – or its equivalent – can only use the report for the purpose for which it was disclosed to them.. In addition, of course, the government, it appears, in minded to legislate on "transparency" and is not minded to exclude experts from being named. These rules have not, as yet, been tested in the courts So what is to be done?

46. Firstly, I think, judges will need to be much more proactive than they have been of late. If an expert has given sound evidence, the judge should say so, if necessary in public. The judge should also deal with the expert's evidence in the judgment, and release a copy of the judgment, anonymised appropriately to protect the interests of the child, to the expert and to the public. If the Press does not report the judgment, the judgment will, nonetheless, be in the public domain, and the expert will be able to use it in his or her defence.

47. I am appalled by the ignorance of the view that the expert in a given case is a "hired gun" willing to saying anything the payer for the report wishes him to say. Nothing, in my experience, is further from the truth.

48. The advantage of transparency, properly addressed, is, of course, that it will demonstrate to the public the difficulty and sensitivity of the decisions which the Family Justice System has to take on a daily basis. The disadvantage is that we are in the hands of the media, which is interested in personalities, not issues. Thus if, for example, a journalist reports day 1 of a hearing, the evidence may be contradicted or wholly negatived on day 2. when the journalist is not present. And of course, if the journalist chooses not to report the judgment, there is nothing, as I understand the government's present proposals, which can be done about it.

49. What is required, therefore, I think, is a detailed protocol, following tri-partite discussions between lawyers, experts and press. Issues, say the judges, do not depend upon identities, but if there is to be reporting, it must be fair. Experts must pay their part. They must, in my view, play the case according to the book. They must follow their instructions: they must abide by good practice. They must be honest and clear. If they are, they will be supported by a judiciary committed to rebut the *canard* of "secret justice".

50. One of the aspects which has most dispirited me has been the quality of the criticisms made. In *RP v Nottingham City Council and the Official Solicitor (Mental Capacity of Parent)* [11] a Member of Parliament, no less (Mr John Hemming), accused the Official Solicitor of forging documents and fabricating substantial parts of his file. The MP did so without a shred of evidence to support his assertions, and when publicly challenged in the Court of Appeal said that he had made the allegation and asked to "move on". In the public language of the Law Report I commented, and repeat: -

> I find it not only unacceptable but shocking, that a man in Mr Hemming's position should feel able to make so serious an allegation without any evidence to support it. In my judgment, it is irresponsible and an abuse of his position. Unfortunately, as other aspects of this judgment will make clear, it is not the only part of the case in which Mr Hemming has been willing to scatter unfounded allegations of professional impropriety and malpractice without any evidence to support them.

51. Since this judgment also contains me view of the role and function of experts, I propose to repeat it: -

> 97. It is plain to me from these documents, that in addition to the allegations set out above, Mr. Hemming believes that HJ (the expert in the case) was in the pay of the local authority and thus was "the local authority's expert". For good measure, he asserts that the system is "evil" and that "there does seem to be little concern in the legal profession about the reliability of opinion offered in court.". The clear implication behind the "witch findings" items on the website set out at paragraph 95 above is that "experts" like HJ are in it for the money; that they are happy to "manufacture 'evidence'"; and that they are in receipt of "phoney" letters of instruction. The result, Mr Hemming asserts is a "disaster".
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> 98. In my judgment, these comments are not only wrong and ill-informed; the simple fact remains that they have no foundation ....
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> 101. The position in the Family Justice System is that there is a very strict code for experts and for the instruction of experts. Appendix C to the *Protocol for Judicial Case Management in Public Law Children Act Cases* [2003] 2 FLR 719 at 771 (now replaced by the *Public Law Outline* (*the PLO*) and the latest *Practice Direction on Experts*) set out that code in considerable detail. I give only some of the more obvious points. The duty which the expert owes is to the court, not to the party instructing the expert. The process is subject to judicial control. The expert cannot have a sight of the court papers without the permission of the judge, and the letter of instruction to the expert is a document which, like the expert's report, has to be disclosed. The Family Justice System has been in the forefront over the past 15 years in attempting to do away with partisan experts who present the point of view sought by the solicitor instructing them. Long gone are the days when a report would be written for one side or the other, and automatically reflect that side's case or what that side wanted to hear. The clear duty of experts is to provide objective and independent advice to the court based on their expertise, and irrespective of the source of their

instructions.

> 102. In addition to the matters already listed, the onus is on the judge to ensure that the expert selected by one or more of the parties has the requisite qualifications to provide the advice which is sought. The expert will, invariably in my experience, provide a CV, setting out his or her qualifications and experience.

52. So, I am sorry that I cannot give you greater comfort. If the government has its way, you will be named in media reports. My response – if that happens – is that the judges will have to become more proactive and assist you whenever it is proper to do so by publishing judgment and supporting your work.
53. May I, however, commend to you the editorial written by Dr. Danya Glaser in the October issue of F*amily Law*[12]? I am in no doubt that if the government has its way, confidential information from children and others will dry up. Nobody is going to be frank about their problems if they feel that they are going to appear in the press.

Baby P

54. I think the first Laming report on Victoria Climbie was one of the most depressing public documents I have ever read. At the end of each chapter, when the child was in touch with the caring services, I thought she must be safe. It is deeply dispiriting that we seem to have made little or no progress since.

55. Baby P was, of course, the victim of administrative blunders, not the court process. What the case has done, of course, is to demonstrate the absurdity of the government's massive hike in the fees charged to local authorities to take care proceedings (the argument being that care proceedings should be self-funding) and to result in an equally substantial increase in the number of cases coming before the court. This has had a serous knock on effect, as CAFCASS is wholly unable to supply the requisite number of guardians for the children concerned, and the President has been forced to introduce a – one hopes – temporary system of "duty" guardians. I am not reassured by a proposed amendment to section 41 of the Children Act which will allow CAFASS the organisation to be appointed guardian rather than an individual named officer from CAFCASS.

56. This is, in my judgment, a wholly retrograde step. Everyone who practices in the field knows the importance of the role of the guardian in getting to know the child and acting as the child's protection against social work excesses and the rigours of the system. This is a change strongly to be resisted. I am very strongly opposed to this amendment, and invite you to opposed it also.

57. Amongst many effects of the Baby P case is the likelihood, I think, that local authorities will become increasingly risk averse. This may well have a knock on effect on the work of expert witnesses, and is something I would like to discuss with you.

A note on Bailii

58. *Bailii* stands for the British and Irish Legal Information Institute. If you either try *Bailii.org.uk* or Google *Bailii* you should be able to navigate your way around the site and find the case you want. I have given the *Bailii* referenced wherever possible. Remember: it is *free* and that there are times when it is important to read judgments.

ENDNOTES

[1] See per Wilson LJ in his otherwise admirable tribute to Mary Bryn Davies, published in ***Family Law*** vol 39 at page 766

[2] Price £30 an includes a CD Rom of the updated Expert Witness Pack

[3] My understanding of the original proposals that the child's evidence would be collected on video in the normal way. Shortly afterwards, the child would be cross-examined on video, with counsel having an ear piece in order to take instructions. That would be the end of the child's evidence, and the videos of examination in chief and cross-examination would be played to the jury. Quite why the original proposal was not accepted raises issues outside the cope of this paper.

[4] I have in mind Dr Colin Paterson who misled me in one case and Singer J in another. He advocated a theory of temporary brittle bone disease unknown to mainstream medical opinion

[5] [[2004}EWCA Civ 567,[2004] 2 FLR 263

[6] [1993] 2 Lloyds Rep 68

[7] You will find the decision of the Court of Appeal in the ***Meadow*** case at [2006] EWCA Civ 1390

[8] See, in particular, the discussion of the ***Meadow*** case in chapter 12 of my ***Handbook***

[9] [2004] EWCACrim 1

[10] **[2009] EWHC 1155 (Admin).** This is the ***Bailii*** reference for those with access to the specialist law reports the case is also reported at [2009] 3 FCR 223

[11] **[2008] EWCA Civ 462, [2008] 2 FLR 1516.**

[12] Vol 39 at page 911. I cannot but agree with Danya Glaser when she asserts that it is inconceivable that she should be put in the position of having to warm her patients that anything they tell her may come into the hands of the Press.