Limiting the evidence

What is the expert's role in gathering and presenting evidence? **Chris Pamplin** reports

IN BRIEF

- Experts have a duty to express an opinion on the need for any additional expert evidence.
- Experts must not be allowed to stray into the role of decision maker.
- If there are unusual features in a case that might give rise to alternative opinions, the expert should highlight these and take the court through the range of alternative diagnoses.

Limiting the amount and scope of expert evidence has long been one of the functions of the case management procedures of the civil courts. The time and expense involved in the provision of expert evidence means that the courts must have regard to the proportionality of any request. Indeed, the court should refuse permission where reasons for the request are viewed as frivolous.

However, given that the need for additional evidence is sometimes critical to the court's ability to make an informed decision, and that the expert evidence itself is often of a highly technical nature, two questions arise:

- How should the courts deal with such requests?
- How much influence should the experts or the parties have upon the court's decision?

If an expert feels that there is insufficient evidence before the court to prove or disprove a case, does the expert have discretion to request that further tests be carried out? If so, what is the expert's role in that evidence-gathering process? These were questions considered recently by the Family Court.

In *Re M (a child)* [2007] EWCA Civ 589, [2007] All ER (D) 257 (May) an expert witness was called in by a child's mother to report on whether unexplained fractures to her child's ulna and tibia might have been due to *osteogenesis imperfecta* (brittle bone disease). The expert examined the child and could find no indication that this was the case. However, the expert made a strong suggestion that further tests be carried out to rule out the possibility. The judge at first instance, refusing the request, said that (i) further testing was unnecessary and (ii) in making the request the expert had exceeded his brief. The mother appealed.

CLEAR DISTINCTIONS

The Court of Appeal upheld the trial judge's decision and said that there was a clear distinction between a medical issue and a forensic one. The medical decision dealt with what was clinically required to inform the proper current and future treatment of the patient; it was a decision that could be taken by the expert doctor only. The forensic decision, on the other hand, dealt exclusively with what was required to determine the legal issues in cases of disputed causation. Forensic decisions, said the Court of Appeal, were case management issues and were for the judge to decide, not the expert. The court's reasoning in this case is plain to see. In every case there must come a time when the court feels that there is sufficient evidence before it upon which to make a finding. In the civil courts, of course, such finding will be on a balance of probabilities, and the gathering of evidence should be sufficiently full to support the weight of the evidential burden.

Consequently, as part of its case management function, it was for the court to determine precisely when this point had been reached. In *Re M* the cost of further testing was likely to have been around £5,000 and would have taken an additional eight weeks. The judge was perfectly entitled to take the cost and time into consideration and, indeed, has a duty to do so when considering issues of case management. In this case, he decided that there was already sufficient evidence before the court and that any benefit that might result from further testing would be outweighed by the attendant expense.

SECOND OPINIONS

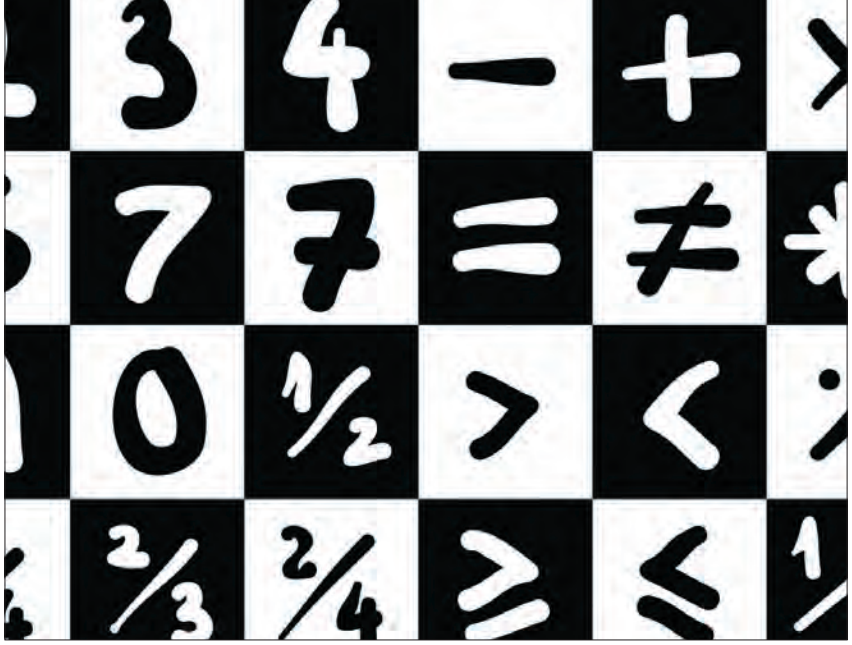
This contrasts with another case that came before the Court of Appeal this year. *In Re W (a child) (non-accidental injury: expert evidence)* [2007] EWHC 136 (Fam), [2007] All ER (D) 159 (Apr) the parents had been suspected of inflicting non-accidental injuries on their child. Following care proceedings, a decision was taken to remove the child from the parents. There then followed a 12-month separation. It subsequently became apparent that the child was suffering from a rare medical condition and that there had been no attempt by the parents to harm the child. In this case, said the Court of Appeal, the family court and the advising expert had got it wrong. In analysing where the mistakes had been made, Mr Justice Ryder said that, in difficult cases, it was no longer sufficient for experts to leave the decision on whether there should be a second forensic opinion to the courts. He appeared to suggest in his ruling that, from the outset, the expert should be involved in this decision. The remit would include considering whether any additional expert evidence was necessary and, if so, in what discipline.

EXPLORE RANGE OF OPINIONS

Ryder J took the view that the court and the experts might have become too focused on reaching agreements in difficult cases. He pointed out that, in such cases, areas of disagreement might be just as important as areas of agreement in reaching the right judicial decision. To highlight this, he said that it was not sufficient for experts simply to be asked whether their opinion was orthodox and mainstream, but experts should also be asked to report:

- what the range of orthodox opinion might be; and
- whether, within that range of opinion, the cause of injury could be stated as unknown or undetermined.

If there were unusual features in a case that might give rise to alternative opinions, the expert should highlight these and take the court through the range of alternative diagnoses. In appropriate cases, then, it would probably be open to the expert to suggest that further evidence be obtained, or even that an additional expert be instructed to report on matters which are inconclusive or outside the



current expert's field of competence. Provided circumstances allow, the court is likely to attach considerable weight to an expert's request when making decisions in relation to forensic issues.

THE FULL PICTURE

The final decision on whether additional evidence or forensic investigation is necessary for the proper determination of the issues is one that rests with the court. Yet the boundary between medical and forensic decisions identified in *Re M* is a valid one. However, the decision in *Oldham* makes it clear that the expert has a duty:

- to assist the court in this process; and
- to bring to the attention of the court any issues likely to inform that decision.

The expert must not stray into the role of decision maker, said the court. Indeed, at the earliest stage the expert should be asked for—and in any event should volunteer—an opinion on whether another expert is required to bring expertise not possessed by those already involved and, if possible, what question(s) should be asked of that expert. The court asked that there be an amendment to the *Code of Guidance for Expert Witnesses in Family Proceedings* to incorporate this recommendation.

ADDITIONAL EVIDENCE

A recent case before the employment tribunal considered a similar request to that of the expert in *Re M*. This time, though, it was the claimant who made the request, not the expert. In *Howard v Hospital of St Mary of Furness* [2007] All ER (D) 305 (May) the nursing director of a hospice, Mrs Howard, claimed compensation of around £0.5m. She alleged unfair dismissal due to disability discrimination. She had been absent from work with what she said was a bad back and had been dismissed from her post following an orthopaedic report and an MRI scan which failed to reveal any significant pathology. The hospice disputed that she was disabled within the meaning of the discrimination legislation or that her complaint was genuine.

A jointly instructed medical expert found that Howard was, indeed, suffering from a back complaint, but he was not able to diagnose its precise cause or extent. As the expert was unable to clarify his findings, the hospice asked its own independent expert to provide a report using only the documentary evidence garnered to date. He concluded that Howard suffered from "low-level intermittent symptoms" and that these were "unlikely to affect her day-to-day activities". Relying on this, the hospice requested that Howard be physically examined by its expert, with a view to producing a full medical report.

The Employment Appeal Tribunal considered the request. It ruled that the hospice had taken proper steps in agreeing to the appointment of a single joint expert and in subsequently seeking clarification of his report. In the absence of any clear conclusions in relation to the diagnosis of her medical condition, there was insufficient material upon which the tribunal could base its finding. Given that the existence of a real condition was an issue in the case, it was open to the hospice to adduce evidence in relation to this. The initial report of the hospice's own expert based on the documentary evidence had suggested that the claimant's symptoms were low level. Therefore the reason put forward by the hospice for seeking a full medical report was not a fanciful one and so the tribunal allowed the request.

As in the case of *Re M*, the tribunal was obliged to consider the proportionality of the request for further expert evidence. In *Re M* the trial judge considered the additional time and expense to be disproportionate to any benefit that might accrue from the additional evidence. However, in *Howard*, the tribunal took the view that the large sum sought in compensation by Mrs Howard, and the fact that the first expert's report was inconclusive, meant that the additional expense and time could be justified. It was held that a respondent should be permitted to seek further medical evidence to disprove the genuineness or basis of a complaint if it acts reasonably and the action would be proportionate in the circumstances.

SERIOUSNESS OF SANCTION

There is, perhaps, one other instance in which a request for additional expert evidence might be granted in circumstances where it could otherwise be thought unnecessary or disproportionate.

> "The judge had taken the view that there was nothing relevant that could be added to the reports already obtained by the local authority"

In *Re B (a child)* [2007] EWCA Civ 556, [2007] All ER (D) 241 (May) the parents of a baby in care proceedings appealed against a refusal by the judge to allow them to instruct independent experts. The judge had taken the view that there was nothing relevant that could be added to the reports already obtained by the local authority. The Court of Appeal acknowledged that, in proceedings where parents were running the risk of being separated from their child forever, there was a great need for them to have confidence in the fairness and even-handedness of the court procedure. In refusing them the right to test the evidence of the local authority-appointed experts, there was a danger that the court might be perceived as biased.

Accordingly, the court allowed the appeal, notwithstanding the trial judge's view that nothing useful was likely to be added and despite the additional time and expense involved. In this case the interests of natural justice demanded a balanced approach. The Court of Appeal was also mindful that if the expert instructed by the parents agreed with the local authority's expert, there was a chance that the proceedings would be abbreviated.

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