When the expert is unregulated

Is the unregulated expert still an expert? Who decides? Chris Pamplin investigates

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IN BRIEF

- Covers two recent challenges to unregulated experts.
- Explores recent cases of an unregulated family psychologist offering expertise on parental alienation, and an 'app and payments' expert in a competition dispute.
- Highlights guidance given by the most senior family judge.

It is perfectly possible for a person to act as an expert witness even though they are not subject to the oversight of a professional regulating body. It is important, however, that the court is vigilant when deciding whether to admit such evidence.

Two unrelated cases before the courts have considered the nature and admissibility of expert evidence where the expert is unregulated or the area of expertise was not governed by recognised standards.

The psychologist

In the first of these, *Re C (Parental Alienation: Instruction of Expert)* [2023] EWHC 345 (Fam), Sir Andrew McFarlane, President of the Family Division, offered guidance on the instruction of unregulated psychologists as experts in family proceedings. The case involved an appeal by a mother against a finding by a lower court that the children concerned had been alienated by her against their father. The applicant mother had been refused permission, in the course of extended private law children proceedings, to reopen the findings of fact, and the court had also imposed a restriction on further applications.

The mother contended that the court, in making its finding, relied on a joint expert's report filed by a psychologist who was unregulated and not qualified to carry out the assessment. Consequently, she argued, the fact-finding determination could not stand.

Delivering his judgment, Sir Andrew noted that without the expert evidence in question there would have been a lacuna in the evidence, which would have prevented the court from reaching decisions in the children's best interests. The court had directed that the discipline of the expert should be either a child and adolescent psychiatrist or a psychologist, who would have permission to see both children.

A psychologist, 'Dr' A, was jointly instructed on behalf of all parties to undertake an assessment of the family. ('Dr' was apparently an error and this was subsequently amended to read Ms A.) The court noted that the directions order did not specify the required professional discipline of the expert. It also noted that Ms A's CV was seemingly never submitted to the court.

At trial, in a full and closely reasoned judgment, the judge accepted Ms A's conclusion that both children had been influenced and encouraged by their mother to think very negatively of their father, and that this had caused significant emotional damage to them.

There then followed a lengthy series of applications by the mother. These included an application to adduce further evidence in the form of a further expert's report commenting upon Ms A's qualification and suitability to give expert opinion. That expert (Professor B) had written an unsolicited letter to the court in which he had been critical of Ms A. Finally, the mother was given permission to appeal. Permission was granted not because her appeal was thought to have a reasonable chance of success, but rather because it was in the public interest for the court to consider:

- the instruction of unregulated psychologists as experts in the family court, in general, and
- Ms A's instruction and role in this case, in particular.

The grounds for the mother's appeal included that the judge was wrong:

- to determine the application without expert evidence as to Ms A's qualifications, and
- to hold that there was 'no new evidence or information' when the court ignored the communication from Prof B.

The appeal was supported by the Association of Clinical Psychologists (ACP-UK). Through leading counsel, ACP-UK effectively took over the prosecution of the appeal. It submitted this was a stark and troubling example of an individual who held herself out as an expert but had neither the qualifications nor the relevant skills to do so.

Dismissing the mother's appeal, however, Sir Andrew gave the following guidance.

- The Family Procedure Rules (FPR) 2010 r25.2(c) only states that 'expert' means a person who provides expert evidence in proceedings.
- Expert evidence is only permitted in children proceedings if it is necessary to assist the court to resolve proceedings justly.
- Opinion evidence is only admissible on any relevant matter on which the expert is qualified to give expert evidence—'qualified' is not defined.
- Whether an expert is qualified to give evidence is a matter for the court.
- The instruction and role of experts in the family court is already the subject of extensive coverage within Part 25 of the FPR.
- FPR PD25B Appendix 1 contains a list of standards applicable to the various UK health and social care professions. It includes a list of protected titles regulated by the Health and Care Professions Council (HCPC).
- The generic label 'psychologist' is not included in the list of protected titles. It can be used by any individual, whether or not registered.

The court cannot, therefore, prohibit the instruction of any unregulated psychologist

simply because they are unregistered.

Whether a proposed expert is entitled to be regarded as an expert remains a question for the individual court. In addressing this question, the court should identify whether an expert is HCPC-registered or holds chartered status in the British Psychological Society. Where the expert is unregistered, it is incumbent on them to assist the court by providing a short and clear statement of their expertise. It would also be sensible practice for the court to indicate in a short judgment why it was nevertheless appropriate to instruct them.

Sir Andrew recognised that the open-house nature of the term 'psychologist' is unhelpful. However, this is ultimately a matter for Parliament to decide whether a tighter regime should be imposed.

Expertise requires methodological rigour

A second recent case, *Kent v Apple Inc* [2023] CAT 22, at the Competition Appeal Tribunal (CAT), also merits attention. In these collective proceedings, Apple was accused of abusing its dominant position in the market.

The parties agreed they should be allowed to adduce evidence from two experts in competition economics, one in accounting and one in IT security. In addition, the class representative sought permission to call experts from the app and payment systems industries, while the defendant sought to call experts on intellectual property valuation and the economics of digital markets. Each resisted the other's application.

The defendant argued that evidence from experts on the app and payments industry was not admissible, the class representative having failed to establish that there was a recognised expertise governed by recognised standards and rules of conduct in relation to either industry.

As with the previous case, the CAT took the opportunity to offer some useful guidance on the circumstances when it is permissible to allow expert evidence that falls into this category.

The court identified that the CAT Rules 2015 give the CAT a general discretion as to whether to permit expert evidence. In exercising that discretion, the CAT can only admit evidence that is properly admissible. Admissibility depends on the existence of a recognised expertise governed by recognised standards and rules of conduct. The evidence must also be capable of influencing the court's decision on any of the issues it has to decide.

The CAT judges considered that the 'modern hurdle' for admissibility did not require an organised branch of knowledge; the question was only whether the proposed expert's qualifications or experience meant they could be regarded as a recognised expertise with some identifiable rigour in their knowledge and approach.

The CAT took the view that an app industry expert was likely to be able to explain matters such as the commercial drivers in the relationships between platforms and developers which the class representative would put forward in her case. This would be useful for the court, notwithstanding that the expert might not be regulated by a recognised professional body. The class representative had not yet identified the specific experts she proposed to call. She was, therefore, given qualified permission, subject to her satisfying the CAT that her chosen experts had the necessary experience or qualification.

Both cases indicate it is not necessary for an expert to be registered or accredited by a professional regulating body or, indeed, for their area of expertise to be formally regulated at all. However, in both cases it is important that the court be vigilant and rigorous when deciding whether to admit such evidence. **NLJ**

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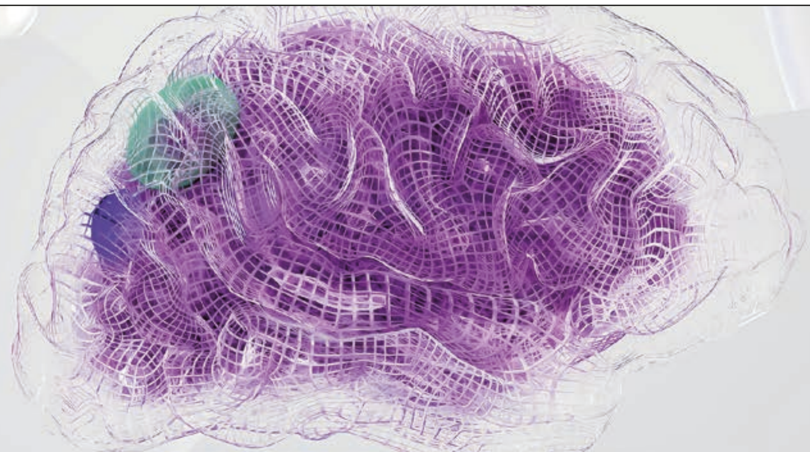

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