EXPERT EVIDENCE IN "CARE PROCEEDINGS"

A paper presented to the
Legal Aid Commission Care & Protection Conference,
Sydney, on 19 May, 2005
by
Robert James McLachlan, Solicitor
(Principal of Ellis McLachlan, solicitors)

This paper does not purport to be an exposition of the general law of expert evidence. The focus of the paper, the time limits for its delivery and the limitations of the author, militate against that. Of necessity because of the writer's view that the general principles are of significance and guidance to the receipt of admissibility of expert evidence in Care Proceedings, those principles will be touched upon. For those interested in expanding their knowledge and information on this topic the following are suggested as reading that may assist in that goal:-

Expert Evidence: law, practice, procedure and Advocacy by Freckelton and Selby (2nd Edition) Law Book Company 2002.

ABC of Evidence (looseleaf Butterworth) by Bartley & Brahe.

Uniform Evidence Law by Stephen Odgers (6th Edition) Law Book Company 2004.

Legislation Rules, Practice Directions and Case Law Effecting Expert Evidence in Care Proceedings

The Children and Young Persons (Care and Protection) Act 1998 as amended (hereinafter referred to as "the Act ") introduced a revolutionary change to the primary basis of obtaining expert evidence in Care Proceedings. Under the preceding legislation the obtaining of expert evidence from psychologists and psychiatrists was usually the province of the Department of Community Services." Criticism as to this practice and the apprehension of lack of independence in such experts (particularly where they were "in house") led to Parliament incorporating in the new legislation Division 6. This created the Children's Court Clinic and a methodology for procurement of independent assessments and reports from independently appointed experts.

In Re: Oscar[1] Justice Hamilton held that Division 6 created a statutory code which the Children's Court could not circumvent. In that case they had purported to appoint a specific Clinician to carry out an Assessment purportedly pursuant to the provisions of Division 6. The Court found that that attempt was beyond the power.

The capacity for the Court to use its powers under Section 15 of the Children's Court Act was the subject of a comment by a number of authors of papers touching upon Division 6 in the appointment of expert[2]. The view that Section 15 enlivened the power for the Court to authorise such an appointment outside the provisions of Division 6 is perhaps more tenuous following the decision of the Court of Appeal in George –v- Children's Court NSW[3].

Practice Direction 22 was introduced on the 26 May 2004. Reference should be particularly be made to the provisions of Rules 26 to 35 inclusive in consideration of expert evidence in Care Proceedings.

Section 93(3) of the Act provides the Children's Court is not bound by the Rules of Evidence unless it specifically determines to apply the whole or part those rules to the whole or parts of the proceedings before it. In the Matter of F G[4] Magistrate Crawford considered whether he should apply the Rules of Evidence to the question of whether certain evidence was expert or not. In a learned Judgment, which is commended to the reader, Magistrate Crawford found that the rules and practices for the receipt of expert evidence pursuant to the general laws of evidence and under the provisions of Section 79 of the Evidence Act of 1995 created a matrix of practices and rules which should be

adopted and followed in the Children's Court. He accordingly found that the Rules of Evidence arising under Section 79 and under the general law should be applied to identify whether the author of evidence was an expert to identify whether that evidence could be received as expert evidence.

In the Matter of Ryan and Zena[5] Magistrate Mitchell held, inter alia, that an expert's report from the Family Court proceedings was not to be sent to the Children's Court Clinic because the report itself was not admissible under the Rules of Evidence. The implications of this decision was to require the application under Section 93(3) of the Act of the Rules of Evidence not only as to the identification of whether an expert was indeed an expert but as to the global receipt and admissibility of expert evidence in Care Proceedings. It is the writer's understanding that those Magistrates who have appointed to and sit in the Children's Court in the Care jurisdiction now, with limited exception, take the view that on the question of admissibility of the expert evidence the Rules of Evidence under Section 79 in accordance with the general laws, should be generally applied. It is therefore important that any practitioner familiarises themselves with the law and principles as to the admissibility of such evidence.

It is suggested that the requirements for the admissibility of expert evidence would appear to include the following principles:-

- The opinion has to be relevant to a fact in issue.
- There has to be evidence capable of proving the facts upon which the opinion was based.
- The expert has to disclose the facts upon which the opinion evidence was based.
- The expert has to be in a relevant field of expertise, which was sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.
- The expert purporting to give the opinion had to be an expert in that field.
- The opinion proffered could not be related to a matter of common knowledge.
- The expert cannot speculate[6].

Practice and Procedure in the Children's Court

The majority of experts opinions received in the Children's Court arise out of a successful Assessment Applications under Division 6. Most of those applications are brought by the Department of Community Services and are invariably drafted by caseworkers. With some exception, the writer's experience is that they are frequently unfocused and muddied in their identification of issues that are to be assessed. It is the writer's practice to draft his own Minute arising from that application which may bear only passing resemblance to the form of the original application drafted. Attached as an annexure to this paper is a copy of such a Minute which may give some assistance when considering such applications and attempting to consolidate and identify the issues to be assessed. The expert's role in an assessment is governed by the order. Care in drafting is therefore important.

As a matter of practice it is suggested that the following matters need to be borne in mind in seeking and/or making an Assessment Order:-

1. First and foremost, is it necessary? Specific attention should be paid to the provisions of Section 56. An enquiry should be undertaken of the Department to ensure that they had placed in evidentiary form copies of any relevant Assessments or documents that may assist in such an Assessment. All too often hiding in a Departmental file is an earlier assessment which, either provides the answer to the question posed, or at least will give considerable assistance in determining that issue if a Clinician is to be appointed.

2. Do the issues raised in the Application require an Assessment Order? This may be seen as asking the question posed in 1 in a different way. However it requires a consideration of whether in fact the applicant is seeking the Clinician to carry out what is effectively a

casework role. All too often applications, either in whole or part, seek the Clinician's guidance on matters that are substantially casework, based on evidence that the Caseworker already has. An example of this is to place before the Clinic a request to an evaluation of the level and frequency of contact. This is a matter that the Care Plan requires consideration of and is largely based on a consideration of a fact such as whether a long term order is sought, the age of the child and the length of the relationship with the parent to whom contact is to be provided plus these do not, with respect, require a Clinic Assessment. The Clinic does not wish to provide reports assessing a potential placement. The observations of contact that have taken place on an interim basis and the relevant benefits and detriments of that contact to the child.

3. Are the issues ones falling within the range of expertise of the Clinic?

4. What does whole of the evidence filed raise as significant issues that an expert may be able to assist the Court on. The Practitioner needs to look at the basis of the originating Application. The evidence that has been filed and other expert evidence that may exist to identify what are the critical issues that need to be assessed and whether they require an expert-assessment.

5. Identify the material that should go to the Clinic. For the reasons identified by Magistrate Mitchell In the Matter of Ryan and Zena[5] and by the Court of Appeal in Makita –v- Sprowles[6] in admissible material should not be included in the bundle. It is therefore important to identify the documents to be sent and if necessary to itemise them in a discrete list that can be attached to the Assessment Order. If a party seeks to remit subpoenaed material then it is important to identify the part or parts of that material that should be so remitted. The whole bundle should not simply be sent to avoid the Clinician being swamped and more importantly to avoid the Clinician being provided with material which is otherwise objectionable.

6. If any parenting capacity assessment is to occur be alive to the fact there is a need for the children to be involved at least for the purposes of observation to assist in that process. Invariably therefore a Section 54 Application relating to a parent will require a limited order under Section 53[7]. Once the order is made and if, as is usually the case, the Department is to forward the material to the Clinic, ensure that a copy of the covering letter which identifies the document sent is sent to all of the parties Legal Representatives.

This paper does not purport to give guidance as to how to cross-examine an expert. However, it is critical to prepare to cross examine an expert that the following steps be undertaken:-

a) Whether the expert be a Clinician or a party appointed expert, read the report thoroughly.

b) Identify the material and sources relied upon by the Clinician. If material is referred to which has not been served or is unclear, obtain a copy or clarify the uncertainty.

c) In the case of a non-Clinic expert subpoena that expert's notes and documents and read them carefully.

d) Read the Curriculum Vitae of the expert. If one has not been provided, request a copy to be provided to you. The obligation of a party relying upon an expert to do so is mandatory (see Practice Direction 22 Rule 27). Once you have obtained the Curriculum Vitae read it carefully. It may well be that the expert has a general expertise as a Psychologist but limited or little expertise to comment on some of the specific matters traversed. An example of this might be that a critical issue traversed in the Clinician's report are opinions as to whether sexual abuse may or may not have occurred based on clinical examination and documentary review. The Curriculum Vitae might disclose that in this particular expert area the Clinician has little or no training or expertise and indeed is not an expert as defined on that topic.

e) Identify the areas that you wish to cross-examine in. A good expert will know alot more about the topic upon which they are commenting than you will. It is important therefore not to simply embark upon an enquiry without focus. Apart from being ineffective it is just bad Advocacy.

f) Identify other material to which you wish to take the expert. This may require you copying it and placing it in a discrete folder along with the expert's reports so that you can remain focused in your cross examination on the topics that you wish to examine and the material you wish to take the Clinician to.

g) Consider whether you would agree to the Clinician giving evidence by way of telephone or video link. There is considerable pressure driven both by time constraints and availability of experts for the utilisation of either of these mediums to provide evidence from an expert. The Court in directing that evidence be given in this medium is effectively applying the provisions of the Evidence (Audio and Audio Visual) Act of 1997. Familiarise yourself with provisions of that Act and also with the authorities both in the Supreme Court of New South Wales and the Federal Court of Australia which deal with the practice and procedure of utilising that fiat for the receipt of evidence. Except in the case of an expert witness who is given limited specific evidence of short compass it is the writer's view that such expert should normally be present in the Court to give that evidence. That is not a view universally held by others particularly Magistrates. In the case of an expert witness of significance the point should be taken and the requirement for the expert to attend pressed.

h) As a matter of practice prior to the calling of an expert ensure that all updated material filed is before that expert and that they have had the reasonable opportunity of considering it. There is nothing worse than an expert being shown voluminous material in the witness box. It is unfair to the witness. It means the consideration of that material must necessarily be cursory and it usually causes delays when the witness, at either their request, the insistence of a party or by direction of the Court requires the matter to be stood in the list while a proper consideration of the material is undertaken out of Court.

i) Remember that subject to the consent of the parties whose expert evidence is under consideration, there is no right to speak to that witness outside of Court. See Kadian –v- Richards[8]. In undertaking a consideration of whether to cross-examine an expert we have highlighted the need to identify issues.

j) It appears to the writer that the usual issues on the instructions that you have received might give rise to:-

    I. Bias.

    II. Lack of expertise on the particular issue or issues canvassed.

    III. Reliance of opinion on incomplete factual matters or factual matters in error.

On a graduating scale an attack on an expert in respect of these three main areas is much harder from point 1 through to point 3. Bias even on an apprehended basis is extremely hard to prove and should only be undertaken unless there is clear evidence to support it. If it misfires then the effect upon the Court may be the reverse of what one sought to achieve. I have already touched upon the importance of understanding the factual basis of opinion and this is usually the main fertile area of cross- examination when an expert is called. Be aware of the issues that you want to cross-examine and remain focused about what you are doing.
Finally, in embarking upon a consideration of cross-examining an expert seriously consider whether you need to do so or not. If the opinions are based on facts which have changed or are substantially in error it may be the expert is not required at all. If the issue that the opinion seeks to comment upon is peripheral to the major issue identified as being required to be determined then do not call the expert. Some Advocates seem to believe that they are employed to ask questions. Remember your role is to determine what questions are to be asked. If there are none relevant, then do not ask them.

BIBLIOGRAPHY

1. Re: Oscar 2002 NSWSC 453; 2002 CLN 3.

2. (a) Role & Accountability of Clinician by Robert J McLachlan 2002 CLN 5.

   (b) Children's Court Clinic by Greg Moore Barrister 2003 CLN 1.

   (c) Assessment Orders; Conduct and Controversy by Debora De Fina 2003 CLN 3.

3. George –v- Children's Court of New South Wales 2004 NSWCA 389; 2004 CLN 1.

4. In the Matter of FG Crawford CM 2002 CLN 2.

5. In the Matter of Ryan Zena Magistrate Mitchell 2002 CLN 8.

6. Makita (Australia) Pty Limited –v- Sprowles 52 NSWLR 705 also see:-

   (a) R –v- P 53 NSWLR 664.
   (b) Idoport Pty Limited –v- National Australia Bank Limited 1999 NSWSC 828.
   (c) H G –v- The Queen (1999) 197 CLR 414.

   (d) Velevski –v- The Queen (2002) 76 ALJR 402.

7. Practitioners should avail themselves of the following material which is useful and helpful about the conduct of matters before the Children's Court Clinic and their practices and procedures:-

   (a) The website of the Clinic (www.lawlink.nsw.gov.au/ccc)

   (b) An article on the Children's Court Clinic published at 2001 CLN 5.

   (c) Article "Assessment of Parenting Capacity Under Section 54" a view from the Children 's Court Clinic 2002 CLN 9.

   (d) Formulating applications for an Assessment Order. Comment from the Children's Court Clinic 2003 CLN 10.

8. Kadian –v- Richards (2004) NSWSC 382.