

Original citation:

Sidebotham, Peter. (2014) Giving evidence in court. *Paediatrics and Child Health*, Volume 24 (Number 12). pp. 562-566. ISSN 1751-7222

Permanent WRAP url:

<http://wrap.warwick.ac.uk/56494>

Copyright and reuse:

The Warwick Research Archive Portal (WRAP) makes this work by researchers of the University of Warwick available open access under the following conditions. Copyright © and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable the material made available in WRAP has been checked for eligibility before being made available.

Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

Publisher's statement:

“NOTICE: this is the author's version of a work that was accepted for publication in *Paediatrics and Child Health*. Changes resulting from the publishing process, such as peer review, editing, corrections, structural formatting, and other quality control mechanisms may not be reflected in this document. Changes may have been made to this work since it was submitted for publication. A definitive version was subsequently published in *Paediatrics and Child Health*, Volume 24 (Number 12). (2014) DOI: <http://dx.doi.org/10.1016/j.paed.2014.01.009>

A note on versions:

The version presented here may differ from the published version or, version of record, if you wish to cite this item you are advised to consult the publisher's version. Please see the 'permanent WRAP url' above for details on accessing the published version and note that access may require a subscription.

For more information, please contact the WRAP Team at: publications@warwick.ac.uk



<http://wrap.warwick.ac.uk>

Giving evidence in court

Peter Sidebotham MB ChB, PhD, FRCPCH, Associate Professor of Child Health

Warwick Medical School, Coventry CV4 7AL

p.sidebotham@warwick.ac.uk

024 7657 4878

Practice Points

- Health professionals provide a unique and valued contribution to court processes to protect vulnerable children
- Time spent preparing a thorough, comprehensive, clear and accurate report will save a lot of difficulties when the case comes to court
- In court, present your evidence calmly, impartially and clearly, answering the questions put to you and not straying beyond your area of expertise

Introduction

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.

The process of safeguarding children and young people's wellbeing 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 chapter, 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 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. Either way, you are unlikely to remember all the details of the case. You are therefore reliant on the quality of your records, and the thoroughness of your initial and ongoing assessments. When faced with a child about whom there are concerns, you need to be vigilant in carrying out appropriate, comprehensive assessments and documenting your findings (Table 1).

<Insert Table 1 here>

Your health record will be made available to the court, and it is on that, as much as your own testimony, that the courts will rely in forming their opinions. Thus, it is crucial to keep your records legible, complete, contemporaneous and up to date. In particular, it is helpful to record some of your reasoning behind any conclusions drawn or decisions made, including those conclusions or actions you rule out, as this is often what is picked up on in court proceedings. For example, you might want to make a note in the child's records that, 'physical abuse was considered as a possible explanation for the child's injuries; this was discussed on the consultant ward round, and it was agreed that there were no specific features of abuse, and the pattern of injuries fitted with the history given.' Or, 'although the possibility of an accidental explanation could not be ruled out, the pattern of injuries on both sides of the body made this extremely unlikely in my opinion; I therefore decided to refer the case to Children's Services as a case of suspected physical abuse.'

Evidence-informed practice

One of the great difficulties in child protection work is that child maltreatment is rarely obvious and clear cut. There are no pathognomonic findings, and no conclusive diagnostic tests. The clinician therefore has to rely on his or her clinical judgement, combined with knowledge of appropriate research evidence, and the context of the case. This is the basis of evidence-informed child protection practice:

the conscientious, explicit and judicious use of current best evidence, integrated with clinical expertise and an understanding of the context of the case, to guide decision making about the care of individual children.

When a case moves into the court arena, it is the responsibility of the courts to make judgements on the case and to determine what actions should be taken. As health professionals, we are there to support the courts in making those judgements, we are not there to win a case, or prove our own points, nor does the final responsibility for the outcome rest with us. It is important to keep that in mind throughout the process, from writing our statements, through to giving our evidence in the witness box. It is important that we try to remain impartial, and to present our evidence clearly, comprehensively and without bias. Thus, we need to present all the relevant facts of the case as we know them, and provide the basis on which we know them: for example, as related to us by the child or a carer in the history, or through our own examination of the child, or through a report on a special investigation undertaken on our behalf. Our findings then need to be interpreted in the light of relevant published research, our own clinical expertise, and our understanding of the context of the case.

There is a growing body of good quality published research on child maltreatment. We need to be able to draw on this as appropriate to the specific issues in the case. The nature of relevant research varies according to the questions being asked. While, for much of clinical medicine, the randomised controlled trial (RCT) is the gold standard of published research, for much child protection work, this is not the case. Thus, for interpreting possible signs and symptoms of maltreatment, large observational case series, or retrospective case-control studies may be the most appropriate level of evidence; for considering possible outcomes for children, prospective longitudinal cohort studies would be more appropriate. In applying an evidence-informed approach to child protection practice, therefore, the clinician should aim to:

1. Clarify what questions are being asked in this case, and define those questions clearly and succinctly;
2. Use appropriate search strategies to identify relevant evidence to support judgements and decision making;

3. Critically appraise the evidence found, so as to draw on evidence that is valid and relevant to the questions being asked;
4. Integrate that evidence with your own clinical expertise, and your understanding of the context of the case;
5. Present the evidence effectively to the court.

As a professional (as opposed to an expert) witness, it would not be appropriate for the busy clinician to undertake a systematic literature review for each clinical question posed by a case. Nevertheless, it is important that you are aware of the relevant research evidence and able to apply it to the case in hand. Resources such as the Welsh systematic review group evidence summaries (www.core-info.cardiff.ac.uk); NSPCC Inform (www.nspcc.org.uk/inform); the Royal College of Paediatrics and Child Health Child Protection Companion (www.rcpch.ac.uk/child-protection); and the NICE guidance on when to suspect child maltreatment (www.nice.org.uk) are all helpful starting points for gathering and using relevant evidence.

Preparing a court report – structure; tips for good practice

Preparing a good court report is the mainstay of effective legal practice. A report that is carefully put together, comprehensive and easy to follow will save a lot of difficulties later in court, and can even avoid the need to attend court at all. So it is worth spending time thinking about the structure and content of your report, writing it carefully (I always type mine myself as I find it easier to check the content and layout as I go along), discussing it with a senior colleague, and proof reading it for accuracy and completeness. Table 2 presents an outline of what should be covered in any court report; the details of what is contained in each section will vary according to the nature of the case and your involvement in it, but the basic principles are the same. Court reports from expert witnesses will vary slightly and need to include reference to the expert's instructions and to the practice direction.

<Insert Table 2 here>

Giving evidence in court

If you are called to give evidence in court, it is important to be prepared in advance. Ensure you know where and when you need to turn up (I have, before now, turned up at the wrong court in the wrong town through not checking carefully where I was meant to be!) You also need to make sure you know which child the case relates to. For family proceedings, this will usually be obvious; for criminal proceedings, the case is listed by the name of the defendant, so you will need to obtain the name of the child in advance. You need to get hold of and read both your own report, and where relevant, the original records, and check whether you need to bring any of these with you to court. If you are unfamiliar with giving evidence in court, it can be helpful to bring a Trust legal representative, or a named professional with you to court to give support and advice.

Make sure you turn up in plenty of time, and bring some reading with you, as court processes do not always run to schedule, and you may have a lot of time sitting around waiting for your turn. However, you will do yourself no favours if you turn up late and flustered. When you arrive at court, introduce yourself to the court usher, who will be responsible for ensuring you are in the right place at the right time, and will be able to advise you on how to conduct yourself in court. You need to check how you should address the judge and others in the court room. There are different levels of court, and judges are addressed differently in each, so it is best to check with the usher at the time. In a court room, while questions are normally put to you by the barristers, you should address your answers to the judge, or, where present, the jury. It helps to position yourself in the witness box facing the judge or jury, then turn your head to listen to the barristers' questions. Most people, when nervous, tend to speak quickly. It is a good idea, therefore, to deliberately slow yourself down. Most judges will take notes (on paper or on a laptop) during a case, so it can help to watch the judge, and only go on with your evidence when he or she has finished writing.

As a professional witness, you will normally be asked to wait outside the court room until it is your turn to give evidence. When you are called to the witness box, you will be asked to take an affirmation or an oath (on a Holy Book). You should choose whichever you feel most comfortable with. You will then be handed a card and asked to repeat the words on the card. You will then be taken through your evidence. In a family court, you will typically be invited by the Local Authority barrister to present your

findings. The magistrate/judge and any of the parties in the case may then ask you questions based on your evidence. In a criminal court, there is a much more rigid structure, typically with the prosecution barrister taking you through what is called your evidence-in-chief, followed by cross-examination by the defence barrister, and finally an opportunity for further questioning by the prosecution barrister. During this process, you must answer the questions put to you. Try to answer these questions clearly and succinctly, and avoid the temptation to elaborate.

In both family and criminal courts, you should remember that your duty is to the court, and that you have a responsibility to answer honestly and impartially. If you are uncertain about how to answer, if you don't understand a question that has been put to you, or if you feel you are being treated inappropriately, you may turn to the judge. Don't be afraid to ask for time to consider your answer, or to look at your notes to refresh your memory (it is worth asking the judge, 'do you mind if I look at my notes on the case?')

Conclusions

In my practice in child protection, particularly when giving evidence in court, I try to aspire to principles of authoritative child protection. There are three underlying principles to this:

- Authority – recognising that as professionals, we bring a unique and valued expertise to the court processes. We need to draw on our expertise to present our findings clearly and impartially to the court, and, where appropriate, to give our evidence-informed opinions to the court.
- Empathy – we should try to keep a focus on the child, doing our best to understand the context of the case and the implications for the child, within the wider ecology of that child's family and world. However, it is important to remember that you are not in court as the child's advocate, and must give objective and impartial evidence.
- Humility – we should recognise our own strengths and expertise, but also our limitations. We need to recognise our position within the wider context of the court processes, not go beyond the limits of our expertise, and be prepared to acknowledge where there are things we don't know, or where we may have made mistakes.

Attending court can, undoubtedly, be a traumatic experience. We can minimise the impact of this by careful preparation, undertaking relevant training, and seeking support from our colleagues, child protection named professionals, our Trust legal departments, or our professional defence bodies. We should ensure we are adequately prepared for giving evidence in court, and practice in a diligent and evidence-informed way. In doing so, it is quite possible to leave a court room feeling satisfied that we have contributed something unique and valuable to the process, and trusting that process to take its due course in protecting children.

Further Reading

Cardiff Child Protection Systematic Reviews Group: *Core Info website*. <http://www.core-info.cardiff.ac.uk>

Ministry of Justice (2013) Practice Direction 25A: *Experts and Assessors in Family Proceedings*.
http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_25a

NICE (2009) CG89: *When to suspect child maltreatment* <http://publications.nice.org.uk/when-to-suspect-child-maltreatment-cg89>

NSPCC *Inform Website*. http://www.nspcc.org.uk/Inform/informhub_wda49931.html

Royal College of Paediatrics and Child Health (2013) *Child Protection Companion*.
<http://www.rcpch.ac.uk/child-health/standards-care/child-protection/child-protection>

Conflicts of Interest

The author provides evidence as an expert witness in child protection cases. There are no other conflicts of interest.

Table 1 Assessments and Documentation in suspected cases of child maltreatment

<ol style="list-style-type: none">1. The nature of the presenting concern<ol style="list-style-type: none">a. The history given (who by, details, any changes in the history);b. Your examination (for physical injuries, note the site, extent and any patterns, plot all injuries on a body chart; for suspected neglect, note any markers of neglect; for alleged sexual abuse, this may require specialised colposcopic examination);c. Any appropriate investigations or photographs.2. Your assessment of the presenting concern<ol style="list-style-type: none">a. Do the findings fit with the history given, with the child's development, and the context of the case;b. Are there any other concerning features about the presentation (e.g. a delay in presentation);c. What are the possible differential explanations for the findings.3. Your assessment of the broader picture<ol style="list-style-type: none">a. An assessment of the child's health, growth (including plotting current and previous growth parameters on a growth chart), development, and wellbeing;b. Are there any markers of previous or ongoing physical or emotional abuse or neglect;c. What is the quality of the observed parent-child interaction.4. Your interpretation of the findings<ol style="list-style-type: none">a. Do you think abuse or neglect is a likely or possible explanation for the findings;b. What are the potential alternative explanations;c. How certain can you be (for example, do you consider maltreatment to be just one of several possible explanations, is it more likely than not that maltreatment is the cause of these findings, or do you feel that maltreatment is the only plausible explanation?).5. Any actions taken<ol style="list-style-type: none">a. Whether, on the basis of your findings and interpretation, you made a referral, or shared your findings with others;b. What action you took to address any immediate or outstanding health needs;c. What action you took to protect the child;d. The reasoning behind any actions taken or not taken.

Table 2 **Content of a court report**

<ol style="list-style-type: none">1. Designation, qualifications and nature of involvement<ol style="list-style-type: none">a. Name, current employment, length in serviceb. Qualifications (degrees, College or other membership, GMC or other registration, training/CPD relevant to child protection)c. Date(s) and nature of involvement in this case2. Findings in relation to the case<ol style="list-style-type: none">a. History (state from whom, give verbatim quotes where relevant); where relevant, chronology of events/involvementb. Examination findingsc. Any investigations or more detailed assessments (e.g. developmental assessments)d. Actions taken3. Analysis of findings<ol style="list-style-type: none">a. Consideration of differential diagnosesb. Relevant research evidence and/or personal experience to inform analysis4. Conclusions<ol style="list-style-type: none">a. Summary of key findingsb. Your opinion on the nature of those findings, and the basis of your opinionc. Where appropriate, consideration of whether, in your opinion, the child may have suffered/be at risk of suffering significant harmd. Where appropriate, consideration of the prognosise. Where appropriate, consideration of what may be needed to protect the child
