Children's Court of New South Wales

CHILDREN'S COURT CLINIC SEMINAR
Friday 26 October 2012

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"THE IMPORTANCE OF CLINICAL EVIDENCE IN CARE PROCEEDINGS" [abridged]

Introduction

I have been asked to present a paper to the Children's Court Clinic, which addresses matters that might assist Clinicians in the preparation of assessments for the Children's Court, and which will assist them when giving evidence to the Court.

Critical to this exercise is the fundamental notion that the Clinic is appointed by the Court to make the clinical assessment or provide the expert information the Court has ordered. This means the assessment or the information provided is provided to the Court, and is not evidence tendered by a party. This is intended to ensure that the assessment and information is independent and objective. The corollary is that the Court will give the assessment great weight in determining the issues in dispute.[i]

The principal role of the Clinician, therefore, is to assist the Court in its determination of the matters in dispute. This may occur in two ways.

The first way in which Clinicians assist the Court is by the provision of an expert opinion: that means providing the Court with the benefit of their specialised knowledge with respect to matters which are ordinarily likely to be outside the experience and knowledge of the average lay person, or the Court, but which the Clinicians possess by reason of their training, experience and study.

The second way in which Clinicians can assist the court, is by the provision of impartial, independent, objective information which is either new, or which provides context and detail in respect of other material before the Court. There are advantages available to the Clinician, not available to the judicial officer, such as the ability to observe the protagonists over a period of time, to interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes.

Against this background I have decided to focus on four topics that I hope will be of assistance to Clinicians in carrying out their professional responsibilities to the Court when writing their reports, or when giving evidence:

1. Understanding the key concepts in the Care Act.
2. Understanding the nature of the assessment the Court requires.
3 Understanding the Clinician's role as opposed to the role of the Court.
4. Some practical advice and guidance on giving expert evidence.

1. The key concepts in the Care Act

[This section omitted]

2. Assessment Orders

2.1 The Children's Court Clinic (which I will refer to in short form as the Clinic) is established under s 15B(1) of the *Children's Court Act 1987*, and is given the following functions:

(a) making clinical assessments of children,

(b) submitting reports to courts,

(c) such other functions as may be prescribed by the rules.

2.2 The rationale for the Clinic is to provide for expert, independent, specialist advice and guidance to the Court.

2.3 The Court may make an assessment order, which may include a physical, psychological, psychiatric, or other medical examination, or an assessment, of a child: s 53. Or, for the assessment of a person's capacity to carry out parental responsibility (parenting capacity): s 54. Or for the provision of other information involving specialist expertise as may be considered appropriate: s 58(3).

2.4 The Court is required to appoint the Clinic for the purpose of assessment reports and information reports, unless it is more appropriate for some other person to be appointed. The reports are made to the Court, and are not evidence tendered by a party.

2.5 "It is important to remember that the court has a discretion as to whether it will make an assessment order. An assessment order should not be made as a matter of course."[ii] In particular, the court must ensure that a child is not subjected to unnecessary assessment: s 56(2).

2.6 The Act sets out a number of factors to which the Court is to have regard in considering whether to make an assessment order: s 56(1). These are:

(a) whether the proposed assessment is likely to provide relevant information that is unlikely to be obtained elsewhere,

(b) whether any distress the assessment is likely to cause the child or young person will be outweighed by the value of the information that might be obtained,

(c) any distress already caused to the child or young person by any previous assessment undertaken for the same or another purpose,

(d) any other matter the Children's Court considers relevant.

2.7 The Court has issued a Practice Note (No 6) concerning applications for assessment, a copy of which accompanies this paper. It is designed to promote the efficient use of the Clinic and its resources.

3. The role of the Clinician

3.1 It is important to distinguish the role of the Clinician from the role of the Court.

3.2 As I have set out above, the Court only intervenes where there is a need for care and protection. This is a 'critical first step' that reflects the UN Convention (CROC) in acting as a safeguard, protecting families from unnecessary state intervention into their lives.[iii]

"Once having intervened, the role of the Court then differs from other Courts. One would normally expect a court to have powers of compulsion, to require parties before it to do certain things so as to resolve the issue in dispute. In fact, the children's Court has very few powers of compulsion. It can compel people to attend before it or produce documents to it. It can reallocate parental responsibility - notwithstanding the disagreement of everyone before the Court to the orders that the Court proposes to make. The Court can also compel attendance as part of a therapeutic program. But beyond those very limited powers all of the other powers of the Children's Court require the consent and co-operation of at least one of the child, the family, DoCS (now DFaCS) or other agencies.

This can prove extraordinarily frustrating for judicial officers. It is however a natural element which reflects the peculiarities of making an order in one point of time which will potentially bind a child and family for years to come."

3.3 Thus, for example, the Court cannot order restoration. It can only decide to accept or reject the assessment of the Director-General. The Court cannot direct the permanent placement. It can only approve or not approve the Director-General's permanency plan.

3.4 The court is, however, required to make findings.

3.5 The role of the Clinician, in simple terms, is to assist the Court in making those findings.

3.6 I have been at pains to point out that the clinical report, or assessment, and any oral evidence the Clinician gives, is given to the Court, and is not evidence tendered by any party.

3.7 It is absolutely critical, therefore, that the Clinician be, and be seen to be, completely impartial and independent of the parties, whether it be the Department, or family members. Or any of the lawyers involved. Perhaps one way of looking at it is to say, in accordance with the paramountcy principle, my role is to assist the Court to make decisions that best promote the safety, welfare and well-being of the child.

3.8 The Children's Court expects Clinicians to be aware of, apply and adhere to the provisions of the Expert Witness Code of Conduct set out at Schedule 7 of the *Uniform Civil Procedure Rules 2005* (UCPR). A copy of the Code accompanies this paper. You will see it referred to in various Practice Notes issued by the Children's Court, and you should read it at your leisure. I will be referring to some of the themes raised in the Code later in this Paper.

3.9 The Clinician's role, to impartially assist the court, has several practical consequences.

3.10 Assist means not attempting to guide, or shape the outcome, or to pre-empt a finding, or attempt to inappropriately influence the judicial officer. Don't try to be the lawyer, and interpret the Act, or the Convention, in forming your opinion. Your assessment should focus on clinical matters, consistent with your expertise, not the legal principles.

3.11 Don't say what you think the parties want to hear. Be aware of the audience, but where necessary, be firm, and frank, about deficiencies in the parents or others. That is why I introduced the key themes to you in the way I have. It is for the Court to apply the law to the facts as it finds them, with your assistance as to what those facts are.

3.12 As I mentioned in my introduction, first way in which Clinicians assist the Court is by the provision of an expert opinion.

3.13 That opinion must derive first from a body of specialised knowledge, obtained by you by reason of your training, experience and study. Thus, you should clearly identify and be able to demonstrate what that specialised knowledge is, and how you obtained it. You must not, therefore, stray outside your area of expertise. For example, a general practitioner should not venture to express a view on a matter of psychiatry, or at least should make clear that the view is based on a limited level of general medical knowledge derived from study or general practice.

3.14 Secondly, the opinion must derive from facts, that is, it must be based on matters that you have observed, or assume to be accepted facts, or which are assumed. The facts upon which you rely should be set out and differentiated,

in the sense that they are matters you have personally observed, read, or been informed about, or which you have assumed.

3.15 Your assessment report should clearly set out any written material you have considered, and all the persons you have spoken to, and specify which aspects of that material were regarded by you as persuasive in forming your view. If you have relied upon any paper or study, it should be identified.

3.16 Thirdly, you should articulate the reasoning process you have used to come to any opinion or conclusion, and be in a position to defend it.

3.17 In addition to providing the Court with the benefit of your expertise, Clinicians in the Children's Court have another very important facet to the way they assist the Court. As I said in the introduction, you provide information, not necessarily in the form of an opinion, but a hybrid factual form of evidence, which can greatly assist the judicial officer. Because you observe the protagonists over a period of time, interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes, you can provide the Court with insights and nuances that might not otherwise come to its attention. You can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the Court, trammelled by the adversarial process and the 'snapshot' nature of a court hearing, would not otherwise have the benefit of.

3.18 You should focus your evidence, at least in your written report, on the matters asked for in the assessment order. You should not interview persons that the order does not refer to, or at least not without consulting the Court or the parties involved.

3.19 Do not express a view that you are not prepared to defend in cross-examination. If, on the information you have been given, or obtained, you are unable to express a formed view, say so, and identify what further information you would require to do so. If you remain diffident or equivocal, say so, or qualify your opinion accordingly. Or, in the case of conflicting material, about which you are not sure, it is for the judicial officer to decide what facts are true and what facts are untrue. So you should either qualify your opinion, or otherwise make it clear that your opinion is dependent upon the truth of certain facts, and if proved to be untrue, your opinion would be different.

3.20 Finally, I want to give you this warning. A treating medical practitioner will accept and rely on a history given symptoms described, or signs recorded, generally at face value, to diagnose and treat a patient. You, however, in your role as Clinicians assisting the Court, must not approach issues in that way. You should question histories, particularly if at odds with other material you have read or heard, or observed. You should objectively assess and test the

facts you rely on, consistent with your duty of impartiality and independence. You can't take things at face value, or you otherwise risk misleading or confusing the court.

3.21 That is all I think I can usefully say on this topic in the time available, and I will now endeavour to assist you with some practical advice on giving evidence.

4. Giving expert evidence

4.1 First and foremost, the Court will be concerned to see that the Clinician is demonstrating independence. We have come a long way since 1848 when an American Judge, John Pitt Taylor, said this of expert witnesses:

"…it is often quite surprising to see with what facility, and to what extent, their views can be made to correspond with the wishes and interests of the parties who call them".[iv]

It might be noted that the Judge had a similar disdain for witnesses who were slaves, foreigners and women!!

4.2 It is important to distinguish between criminal trials and civil trials, where the burden of proof is significantly lower. In criminal matters the Crown is generally required to prove a fact beyond reasonable doubt, hence it is common to see a defence run along the lines of causing confusion, or "muddying the waters", to create a doubt.

4.3 In Care cases, however, the facts need only be established on the balance of probabilities: s 93(4) of the *Care Act*. In applying that standard, the Court will have regard to the gravity and importance of the matters to be determined in accordance with the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336: *Director General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250. Thus, the Court will not lightly make any findings in respect of the serious allegations: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.

4.4 The point might be demonstrated by a case study, in a case involving the so-called shaken baby syndrome, decided in the District Court on appeal in 2010: SS v Department of Human Services [2010] NSWDC 279.

4.5 The Director-General's case was that the baby in question had suffered a non-accidental abusive head injury causing severe brain damage, and that the perpetrator(s), although not identified, were, on the balance of probabilities the mother and/or the father. Reliance was placed principally on the hospital

records and the evidence of the Staff Specialist Paediatrician of the Child Protection Unit at the Children's Hospital at Westmead, a specialist paediatric ophthalmologist who had worked in the area for 21 years, and Professor David Isaacs, a senior staff specialist in General Paediatrics and Paediatric Infectious Diseases at Westmead Children's Hospital.

4.6 The parents contended, however, that upon analysis, the medical conclusion of a 'shaken baby' was based on less than unassailable foundations.

4.7 They submitted that the existence of alternative hypotheses, together with the "circular reasoning" of the 'science' of shaken baby syndrome, lead to the position where the Court could not be comfortably satisfied that the Director-General had proved the case against the parents.

4.8 The so-called alternative hypotheses as to the possible cause of the baby's brain damage, including for example meningitis, or a congenital condition, were advanced by two doctors from the United States, qualified on behalf of the parents and brought to Australia to give evidence. The reality was that these two American doctors were professional expert witnesses who were nothing more than hired guns, whose evidence was not directed at discovering the true cause, rather it was designed to create doubt as to the Director-General's hypothesis of shaken baby.

4.9 The Court said of the American doctors:

"Dr Gabaeff and Dr Gardner approached the task from a prejudiced and pre-judged perspective. Their evidence, which was wholly concerned to debunk the notion of shaken baby syndrome, is to be approached with considerable caution. The medical evidence led by the Director-General, on the other hand, involved a logical evaluation of all available material, was concerned to consider other possibilities, and was carefully and logically reasoned. That evidence is consistent with mainstream paediatric medical opinion. By their own admission, Dr Gabaeff and Dr Gardner are outside that conventional paradigm… They were unashamedly partisan, and the totality of their evidence must be viewed with suspicion."

4.10 The point was that creating a doubt may have been enough for a criminal jury to have a reasonable doubt as to the guilt of the parents, but in a Care case, where the paramount concern is the safety, welfare and well-being of the children, the Court looks at the probabilities. Hence, the Judge concluded:

"I am comfortably satisfied, on the balance of probabilities, that the proximate cause of the brain damage observed following the baby's hospitalisation on that day was non-accidental shaking in the previous 24 hours. The only persons who, on the balance of probabilities, were in the available pool of perpetrators, were the parents."

4.11 The second piece of general advice I give you is that the opinion you express must be based on, and within, your area of expertise, something I have already adverted to above. Where the Court is asked to accept an opinion of an expert, it will look to the substance of the opinion expressed. Accordingly, the cogency of the reasoning process plays an important role: *Dasreef Pty Limited v Hawchar* [2011] HCA 21 at [92]. A reasoned explanation or conclusion must be presented.

4.12 This requires the expert to explain the methodology employed to reach the conclusion expressed, that is, to identify the chain of reasoning leading to the conclusion.

4.13 Thirdly, Clinicians should be prepared to change their view, or have their view rejected by the Court, where the facts upon which their opinion was based are found not to have been established, or where a different set of facts about which the expert was not aware emerges, or the significance of which was not fully appreciated by the expert. As Mark Allerton has said on a previous occasion[v]:

> "…it is important to show that you have canvassed a range of views and information, but have made your own assessment of their validity and accuracy, and assessed the extent to which they support or weaken your own findings..."

4.14 Fourthly, be aware that the judicial officer is required to express a view about your evidence, especially where it conflicts with someone else giving evidence about the same issue. That means you should be measured in any criticism you make of other witnesses, objective but not pejorative. Conversely, don't take criticism of your views personally. It is in the nature of litigation that criticism will be made. If everything was straightforward and clear-cut, we would not need court cases. Don't take criticism personally, but use it to grow and improve, and learn from it to adjust how you operate in the future.

4.15 Thus, I have myself been critical of Clinicians, and caseworkers. But I have also been praiseworthy.

4.16 I once wrote this about a psychiatrist retained by some parents:

> "The superficiality and bias in the report is readily apparent. It is based entirely on the history given by the parents and their presentation. That history was selective in a slanted way, and tailored to the outcome sought."

4.17 A Clinician should be robust and confident in giving an opinion, and as concise as possible. Thus, I once wrote of a Clinician:

> "Pressed in cross-examination, the Clinician was long-winded and equivocal."

4.18 Avoid over-use of jargon, and explain technical terms as much as possible in simple language.

4.19 Sometimes it is helpful to provide an executive summary of your opinions in the assessment, bearing in mind that you have multiple audiences, some readers will have a short attention span, and limited understanding of difficult concepts.

4.20 I set out now something I wrote about a Clinician, as it seems to encapsulate some of the points I have been making:

> "I am persuasively guided by the opinion of the Clinician. He is, after all the court's witness (as counsel was at pains to remind me), and may therefore be presumed to be unbiased and objective. There was no suggestion that he wasn't. It is one thing for a judge to listen to the mother as she gave her evidence for a short period of time, and to observe her demeanour in the cloistered environment of the courtroom. She was undoubtedly on her best behaviour, which was at odds with some of the evidence emerging from the documentary material, and with the way she appears to have conducted herself at the hearing in the Children's Court…On the other hand, the Clinician has had extensive contact not only with the mother, but also with the children and the carers, including observation of them all during contact sessions, and at the homes of the carers. He has also carried out and interpreted the results of an extensive array of psychological tests and assessments. This and his experience as a clinician over many years of practice in this area make him far more equipped than me, and with respect, the Department's personnel, to evaluate the mother. I found the Clinician to be a most impressive witness. I've had occasion to hear evidence from a number of psychologists over the past eighteen months, and he was a stand out for lucidity, objectivity, thoroughness, careful reasoning and thoughtfulness."

4.21 There is no substitute for common sense.

4.22 Finally, I want to make a few observations about future directions in expert evidence. No doubt some of you have already participated in conclaves, or concurrent evidence giving (aka hot-tubbing, a phrase that is perhaps best not used in the Children's Court) in other courts. These techniques will be increasingly used in the Children's Court.

4.23 The Clinic has already made some forays into joint opinion writing. There are difficulties with that, as it gives rise to practical issues such as who expressed what opinion, who has what expertise, and who should be cross-examined about what.

4.24 On the other hand, there is great value in having the experts get together in advance of a hearing, or even during the hearing, to confer and identify what

they agree about, and what they differ on and why. I, for my part, will be utilizing these techniques in the Children's Court in the future.

Conclusion

I have endeavoured to write a paper that will provide practical assistance and guidance to Clinicians giving evidence in Children's Court. In doing so I have stressed the vitally important role that clinical evidence plays in the operation of the Court and the implementation of the objectives of the *Care Act*.

I have stressed the need for impartiality and independence.

I have sought to explain the key concepts in the Act in a logical and non-legalistic way that I hope will assist Clinicians in addressing the issues upon which they are asked to express their views and make assessments.

Finally, I have differentiated the role of the Clinician from that of the Court in a way that I hope will guide Clinicians and increase the usefulness of their evidence in the decision-making process.

The Children's Court Magistrates greatly respect the role of the Clinicians in the Court and appreciate deeply the contribution they make to the difficult and demanding decisions that the Court is regularly required to make.

Peter Johnstone
President of the Children's Court

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[i] My paper draws on parts of the paper delivered by Judge Marien to the Children's Court Clinic on 30 October 2009 entitled "The Crucial Role of the Children's Court Clinic Assessment Report in Decision Making by the Children's Court of New South Wales".

[ii] Judge Marien at p 15 of his 2011 paper.

[iii] From a paper by Jennifer Mason, then Director-General of DoCS, entitled "Courts, DoCS and Child Protection in NSW" delivered to District Court Judges in May 2009 at p 7.

[iv] From a paper by Justice Ian Binnie of the Supreme Court of Canada delivered at a Symposium of Australian Judges on 15 November 2010.

[v] A paper by Mark Allerton entitled "How to be a Real expert, and Not Just an Old drip Under Pressure", August 2008