Paediatric expert witness

Sandra LJ Johnson

Discipline Paediatrics and Child Health, Sydney Medical School, University of Sydney, and Child Development Paediatrics, Specialist Medical Centre, Sydney, New South Wales, Australia

Abstract: Paediatricians may be asked to provide expert opinion in paediatric cases that come under legal consideration. This article provides suggestions to assist paediatricians in this role and emphasises their duty to the court when giving expert opinion.

Keywords: evidence; expert witness; legal system; training/qualification; unbiased opinion.

The longer a paediatrician is in clinical practice, the more likely it is that he or she will be approached to give expert opinion for court. Essentially, the question is ‘what is an expert’? In terms of medico-legal opinion, an expert is a person who has had specialised training in a particular field of study with a recognised training body, such as a medical college, and who has some years of clinical experience in that field. Paediatricians have extensive training over many years, and this, together with their clinical experience and knowledge, means that they un questionably fulfil the criteria for being experts to the court. In Notley’s opinion, 10–15 years of clinical experience is enough to be regarded as an expert.1

The question of expertise could become an issue in court if the doctor has not had specific training in the field under consideration. This is a matter for the court, in particular the judge, to decide. Importantly, if a doctorembarks on acting as an expert witness, it is imperative that he or she has training and experience with clinical knowledge in the specialty field under consideration. In addition, the doctor should be actively engaged in clinical practice, so that it is not advisable for this to be regarded as a career in retirement. A doctor in this position could face legal challenge when giving evidence in court because it is expected that the clinician who provides expert opinion to court be actively engaged in clinical practice.1

Key Points

1. Do not stray from your area of expertise.
2. Remain unbiased, and your opinion should be the same regardless of which legal team engages you to do the work.
3. Seek training on basic legal principles and on being an expert witness.

The Legal System

The Australian legal system is based on the English system of Common Law, which is an adversarial system where opposing legal parties present matters before the court and where these parties decide what issues will be raised in court. The judge with (in criminal proceedings) or without (in civil proceedings) a jury attempts to find the truth of the matter. The judge in this system is impartial and ensures that due process is followed. This differs from an inquisitorial system of law, where the judge plays an active role in deciding what matters can and cannot be brought to court. In this system of law, the judge is an investigator for the case rather than being an impartial fact finder.

In civil proceedings, the case is brought before a judge or magistrate, and the burden of proof rests with the plaintiff, who lays a claim against the defendant. The standard of proof in this setting is the balance of probability, where 50% is usually the threshold. In criminal proceedings, the case is brought before a judge and jury. In this instance, the claim is made against the accused by the prosecution, who represents the state and the community. Here the standard of proof is beyond reasonable doubt, which is a much stricter criterion than for a civil case.

All documents, investigations, statements and inferences based on fact constitute evidence. There are many rules that govern evidence, and evidence can be deemed inadmissible in court on the basis of these rules. The reader may find a summary of legal terms helpful, and the main rules of evidence will be mentioned briefly here.

The expert rule emphasises that the expert who gives opinion evidence must have qualifications and experience relevant to that field. The evidence provided by the expert must be based on reasoned and therefore logical fact that can be supported by valid research, ideally systematic reviews and meta-analyses, where possible. In addition, this evidence must be one that would be supported by the majority of peers in that field, referred to as the basis rule. When giving opinion, the expert must not be biased or influenced by either legal party, so that the evidence should be the same irrespective of who engages the expert to do the work, referred to as the bias rule. The expert is expected to assist the court on matters beyond the
court’s experience or knowledge, so that the opinion must not fall within the experience of the non-expert person, referred to as the common knowledge rule. The ultimate issue rule means that the expert witness must not encroach on the issue of whether the accused is guilty, or on whether the defendant is negligent or not, because this is a matter for the court and not the expert to decide.3

The Expert’s Role

The primary role of the expert is to assist the court in matters related to the medical facts of the case.1,4,5 The paediatric expert provides the court with factual evidence, based on the medical facts such as history, examination and investigations, as well as opinion evidence, where the expert gives an opinion inferred from the facts of the case. The latter is based on expertise and knowledge gained from training and clinical experience and which is likely to be supported by a majority of medical peers, as well as by valid and up-to-date research where available.

The expert must remain cognizant of the fact that he or she is not acting on behalf of the legal party and that evidence is governed by the Supreme Court’s Expert Witness Code of Conduct, which in NSW forms part of the Uniform Civil Procedure Rules Schedule 7.4 A statement must be made within the expert’s report that the doctor agrees to be bound by the Code, and therefore it is essential to be familiar with the requirements of the Code.

Briefly, the code states that the expert is not an advocate for the party and that the expert’s opinion is based on fact and is unbiased, so that the expert’s opinion must be the same regardless of who engages the expert to do the work. As mentioned, the expert must provide reasons for giving a particular opinion, which must be based on valid research. This information must be clearly referenced within the report. The expert must agree to confer with other experts in order to reach agreement, and where experts do not agree, reasons for disagreement must be given. A written report from this expert conference is subsequently provided to the court. It is important that the experts not wilfully act to disagree because this impedes the court process and results in wasting the court’s time, as well as escalating the legal costs.

In order for the expert’s report to be of assistance to the court, it must be written in clear and concise language, with headings and paragraphs, that readily delineates important facts and findings of the paediatric assessment and opinion. Where opinion is based on research or study, the work must be accurately referenced within the report.

Doctors who act as expert witnesses are not necessarily immune to being sued, as might have been the case in the past, and stricter criteria have been called for to make expert witnesses accountable for the evidence that they provide.6,7

A Challenge for the Paediatrician

There is no doubt that paediatricians are advocates for children on many issues related to their health and well-being, and they have the capacity to influence government and policymakers on matters that affect children and families in the community. However, when acting as an expert witness, the paediatrician agrees to assist the court rather than act as an advocate for any party. This is achieved by focusing on the facts of the case and by providing a clear, concise opinion based on the facts of the case.

By providing clear, honest and unbiased opinion, the paediatrician might indeed be acting in the best interest of the child, because the evidence will remain admissible in court. Where the well-meaning paediatrician works hard to act ‘in favour’ of the child, potentially good evidence could be found inadmissible on the basis of bias. Consequently, evidence that might have assisted the case for the child will be regarded as invalid. Therefore, it is advisable to remain impartial when providing expert opinion for court. Confidentiality about matters raised in relation to the case is imperative. The expert engaged in this work must also avoid conflict of interest and should not provide opinion where there has been prior involvement with the case. Where the doctor knows the defendants, for example in a medical negligence case, conflict of interest must be considered, and the doctor might wisely choose not to act as an expert in the case. Beyond the legal issues, the paediatrician must also give due regard to the ethical issues about being an expert witness.8

Conclusion

Paediatricians who act as expert witnesses may find the work to be both challenging and rewarding, but it is advisable to ensure that they seek some form of legal training about being an expert witness. They should not stray from their area of expertise when providing an expert opinion. They must remain impartial and circumspect to ensure that the opinion provided is of value not only to the court process but possibly also indirectly to patients by providing fair, reasoned and honest opinion.

Multiple Choice Questions

1 The Australian system of Common Law is:
   a inquisitorial
   b imperial
   c adversarial
   d all of the above
   e none of the above

2 Essential qualities of a good expert witness include:
   a being impartial
   b having specific expertise
   c having sufficient years of clinical experience
   d all of the above
   e none of the above

3 Which of the following are likely to be inadmissible in court?:
   a hearsay
   b expert not being adequately qualified
   c providing opinion that is within the ordinary person’s experience
   d none of the above
   e all of the above

Answers

1 c
2 d
3 e
References

5 Lyden A. Medical expert witnesses. Hospital Doctor 12 Jan 2006, 44.

Small paediatrician giving evidence. By Henry Kilham.