ASPEP Disputes Resolution & ASNTS Seminar
30th March 2016
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1. ASNTS

Began operating – November 2005.

Statistics – taken from 2014-15 Annual Report:

References Received by Type

	2014/2015	2013/2014
Placing Request	50	32
Contents of CSP	11	9
CSP not Required	5	1
Implementation of CSP	2	4
Deemed Refusal of CSP	1	3
Timescales (Issue CSP)	1	1
Transitions	2	0

Vast majority of References are resolved/withdrawn.

Sits in panels of three, one Convener and two Members – 13 Conveners and 22 Members, latter from a mixture of education and health, former are legally qualified.

Reference types – placing request, CSP, disability discrimination.

Tribunal reform – 2017-20: Education and Health Chamber. Upper Tribunal for appeals.

2. The Skilled Witness

Sometimes referred to as an ‘expert witness’, but ‘skilled’ is the better term.

Will provide a mixture of factual and opinion evidence. When providing an opinion, a skilled witness is in a special position – opinions are not normally permitted.

Preparation for a hearing

A witness statement may be ordered by the Tribunal. Where it is, it should be well-structured, with key dates and events, and with opinions on the key issues expressed clearly and in a separate section. Might be prepared by a solicitor. Where none is ordered, you could offer to lodge one. At very least, you should prepare one for your own reference.

Know the bundle content.

Know dates and events.

No substitute for good preparatrion.

Duties of a skilled witness

Since an expert is called as a witness for a particular party (as opposed to in some jurisdictions, where the expert is chosen from a court list) and given that there can often be conflicting expert evidence led from different parties in a case, one might easily take the view that the principal duty of an expert witness is to give evidence supportive to the case of the party calling him/her (and paying his/her fees, and in some cases, his/her salary). However, this is not correct; the duties of an expert are much more onerous than this, and the main authorities are the cases of National Justice Compania *Naviera SA v Prudential Assurance Co. Ltd. (‘The Ikarian Reefer’)* (1995), and *R v Harris* (2006) where the main duties of expert witnesses were outlined as follows:

- the expert must be independent an uninfluenced by the case
- he/she must offer independent and unbiased assistance to the court
- any facts or assumptions on which his/her opinion is based must be stated
- any material facts detracting from his/her opinion must not to be omitted from his/her evidence
- if a matter falls outwith the area of expertise of a witness, he/she must say so

- if insufficient data is available, the expert must indicate that his/her opinion is provisional
- the expert must, in his/her evidence, set out the full range of available expert opinion in the relevant area, even including opinion that is contrary to his/her own

The same duties apply in the tribunal. For a tribunal case where the evidence of experts was assessed and that assessment was examined on appeal, see *JC v Midlothian Council* (2012).

In the Supreme Court case of *Kennedy v Cordia (Services) LLP* (2016), the law on skilled evidence in Scotland was reviewed. The court emphaised that it is the reasons for the opinion which carries the value, a baldly stated opinion is worth very little.

Limit of scope of skilled evidence

Although skilled evidence is crucial to the decision of the tribunal in many cases, it should not be presented in such a way as to usurp the role of the tribunal. In *City of Edinburgh Council v MDN* (2011) the Inner House offered these comments about the evidence of a particular skilled witness:

> *"In his report [the expert] had gone so far as to conclude, among other things, that '[the child] is appropriately placed in [X] School' and '[the child] does not require education in a residential school'. These conclusions come close to usurping, if they do not usurp, the responsibility of the tribunal deciding for itself where the respective suitability of the alternative schools lay."* (para 39)

It is for a skilled witness to present his/her views on specific educational issues, not to form an overall view on an issue such as suitability of a school for a child.

Assessing reliability of skilled evidence

Some of the following considerations will be taken into account by tribunal members in considering reliability:

– **Demeanour**: was the witness impressive, confident, and was he/she willing to make concessions and did he/she seem to be offering evidence in a measured way? Was the witness hesitant or did he/she seem uncertain? Was he/she stating his/her position too stridently, unable to accept or consider that he/she might be wrong, even in the face of clear contrary evidence?

– **Internal consistency**: did the witness change position or make a statement in oral evidence which conflicted with the position stated on paper, or even change position during oral evidence?

– **External consistency**: was the evidence at odds with other credible and reliable evidence from other witnesses or sources?

– **Qualifications/experience to state a view:** where a witness offers skilled evidence, what are his/her qualifications and experience and extent of contact with the child?

3. The Voice of the Child

There has recently been an increased focus on consideration, where possible, of the views of the child in the ASNTS process.

Such views represent only one factor in the decision. These views, where available, will not be around the suitability of a school, or provision within a school. Instead, they will be in areas such as: what the child likes or dislikes or general questions, for example about how school is and about peer groups, subjects, activities and facilities.

Views can be taken by an Advocacy Worker, and the Tribunal can instruct a report, but there is a major question around capacity (ability) to state views.

> Article 12 of the UNCRC states:
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Section 12(2)(b)(i) of the 2004 Act places a duty on the education authority to seek and take account of the views of the child or young person (unless the authority are satisfied that the child or young person lacks capacity to express a view).

The following paragraph appears in new Advocacy Guidelines issued this year by the Tribunal, but the paragraph is relevant more generally:

> "5. Except where there are good reasons for not doing so, where the education authority, in execution of its section 12(2)(b)(i) duty, expresses the opinion that the child or young person lacks capacity to state his/her views to the tribunal, the convener should, at the case conference call, seek from the education authority full reasons for this opinion. In doing so, the convener should make enquiries with the education authority (and the appellant/claimant, where appropriate) as to the range and appropriateness of communication methods potentially available for the taking of views, bearing in mind the abilities and needs of the child or young person."

This should be read in conjuction with s.3 of the 2004 Act:

> "3 Children and young persons who lack capacity
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> (1) For the purposes of this Act, a child or young person lacks capacity to do something if the child or young person is incapable of doing it by reason of mental illness, developmental disorder or learning disability or of inability to communicate because of a physical disability.
>
> (2) However, a child or young person is not to be treated as lacking capacity by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise)."

The new Advocacy Guidelines, along with a stronger concerntration on the rights of the child more generally, may well, in many ASNTS cases, lead to more rigorous inquiry into whether the views of the child could be taken by using creative methods. Education authorities may have to work harder to persuade a Convener/tribunal to accept the view that the child is not capable of stating his/her view. This might mean that an opinion on this issue from an educational psychologist might be relevant, and indeed such a report could even be ordered.

Changes in this area are coming in the Education (Scotland) Act 2016, Schedule 1, which will allow, in certain circumstances, children to make References to the Tribunal, and the test for capacity to do so will change. There will also be a provision for a decision by the EA on the capacity of a child to be challenged by the child; in other words, there will be a separate right to appeal a child capacity decision reached by the EA.

4. Questions for further consideration

The following questions arose during discussion on the above points, and these (or some of them) might warrant further exploration by the group:

1. Training on how to give evidence as a skilled witness in tribunals (training which would be applicable in other settings).

2. Avoidance or mimimisation of the conflict between the EP's role as a skilled witness (carrying the duties outlined above) and his/her role as an employee of one of the tribunal parties.

3. More general consideration of the conflicts inherent in the EP's position with regard to other statutory duties and roles.

4. The question of a potential route back to the tribunal where a successful placing request (following a Reference) begins to encounter problems.

5. The extent to which the 'ultimate question' issue might impact on how EPs give evidence to tribunals; more specifically, should EPs refrain from expresing a conclusion on suitability of a school, and if so, what *should* their evidence cover?

6. The future role of EPs under the new capacity test in the Education (Scotland) Act 2016: should EPs be involved in assessing capacity in future, given the nature of that test? If so, what is the test? How should capacity be assessed under it?

7. More generally, recource planning issues around the likely increase in workload for EPs which will come with: an increase in References under the current system; the inevitable increase in References as the tribunal reforms unfold; increase in workload arising from the new capacity test and additional routes for children to the tribunal (both under the 2016 Act).

8. Whether, for the purposes of the 2004 Act 'respective cost' test, the predicted global cost of placement in an independent school should be the reference point, as opposed to the current annual cost comparison (this is a more general point, but was raised in discussion).

9. The meaning of 'significant expenditure' under the relevant 2004 Act ground of refusal (again, a more general point).