



## Articles

# Improving the use of experts in the Family Court – Unpacking the expertise of psychologists

Sarah Branson, a barrister at Coram Chambers and Dr Majella Byrne, a Clinical Director: Doctorate in Clinical Psychology at Kings College London consider the importance of improving the use of experts in the Family Court and explain clearly what is meant by the different psychological titles



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## Introduction

In 2012, the University of Lancashire part funded by the Family Justice Council conducted research into the use of psychologists in family courts and evaluated the quality of reports provided. The key findings of the report were striking. 1 in 5 of instructed psychologists were evaluated as inadequately qualified for the role. 90% of instructed experts maintained no clinical practice external to the provision of expert reports. Two thirds of the reports reviewed were rated at below the expected standard. The conclusions of this report were widely published, including on [Family Law Week](#).

The report made recommendations for sustaining good practice and improving report quality. These included:

- *Expert witnesses should be registered to practise with the Health Professionals Council and have full membership of an applied division of the British Psychological Society.*
- *The competence of experts to complete specific aspects of reports should be more thoroughly assessed by the Judiciary, who should be assisted more to do this.*
- *Not relying on the use of expert witness commissioning companies as a marker of potential good quality reports.*
- *The instruction should clarify whether the expert is to conduct all aspects of the work and not delegate any part to graduate psychologists or assistants.*
- *That instruction of experts should be restricted to those currently engaged in practice which is not solely limited to the provision of court reports.*

More than ten years on, how much have these recommendations been embedded into the practice of Courts approving the instructions of experts and lawyers agreeing their instruction?

A recent Court of Appeal decision, combined with two decisions of the Health and Care Professions Tribunal Service where well known and often instructed psychologists have been either struck off or suspended, (see [here](#) and [here](#) for example) suggests the 2012 recommendations have fallen by the wayside.

This is further compounded by the fact the label “psychologist” is not a protected term and much confusion still flows from what it means to be a chartered psychologist.

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This article seeks to explain clearly what is meant by the different psychological titles that might appear on CVs before us; the process by which accreditation is acquired and what to look about for when choosing an expert.

It seeks to shine a light on this poorly understood profession to ensure lawyers have the skill set to ensure the experts psychologists they instruct have got the right skill set.

### **What does it mean to be a psychologist?**

Well, the answer is not very much. Unlike a medical doctor, solicitor or barrister the term “psychologist” is not a protected title. This means that anyone can call themselves a psychologist and that term itself tells you little about the expertise of the person with that title.

### **What does it mean to be a regulated psychologist?**

Broadly speaking, psychologists fall into two broad categories: regulated and unregulated psychologists. Unregulated psychologists, as the name suggests, are individuals calling themselves psychologists, potentially practicing as some form of psychologist but not registered with the regulating body, the Health and Care Professions council (HCPC). The HCPC website records that professionals that are not regulated by them may be listed on other voluntary registers but are not regulated in law. They may use titles such as counsellor, psychologist, psychotherapist and therapist, none of which are protected.

The first things to check is whether the proposed expert is registered with the HCPC. They have a simple search engine which allows such a search to be undertaken [here](#).

To become HCPC registered, the psychologist will need to have completed a training course, or training route that is approved by the HCPC.

### **What does it mean to be a member of the British Psychological Society?**

Many psychologists choose to be members of the British Psychological Society, however, it is not a requirement for HCPC registration.

It might be listed on a CV that the expert is a member of the British Psychological society but this tells us very little about their expertise. It does not tell us if they are registered with HCPC or what their skill set or practice might be. There are a variety of ways that someone can become a member of

The title of Chartered psychologist, is often seen on the CVs of experts. The BPS website states that “The title of Chartered Psychologist is legally recognized and reflects only the highest standards of psychological knowledge and expertise” (BPS, <https://www.bps.org.uk/chartered-membership-cpsychol>). While people with Chartered membership are likely to have extensive psychological knowledge and expertise, it does not guarantee that the expert is registered with the HCPC and therefore their practice is regulated by law. It also does not guarantee that the expert has any expertise in an area of clinical practice.

### **What is a chartered psychologist?**

The term Chartered Psychologist (CPsychol) refers to a grade of membership of the British Psychological Society. In order to apply for this membership, an individual must meet the following criteria.

- *Achieved at least a 2:2 on an undergraduate honours degree (recognised as meeting Graduate Basis for Chartered Membership)*

*or have completed a society-accredited conversion qualification;*

*along with **one** of the following;*

- *Have undertaken society-accredited postgraduate qualifications and training*
- *Have completed an assessment of competence in coaching psychology (something still under development)*
- *Have appropriate postgraduate training and experience of teaching psychology*
- *Have completed psychology research to doctoral level*

A society-accredited postgraduate qualification could be in any specialty for example educational, clinical, sports and exercise, health, or forensic psychology. A person who has a 2:2 in psychology, and a Med (masters in educational psychology) could qualify for chartered status and may never have worked with a client outside of a school or educational setting. Similarly, a degree and a MSc in sports psychology would entitle them to Chartered status. A Chartered Psychologist may not have trained within the NHS or ever worked outside a very narrow field.

The term Chartered Psychologist does not tell you very much about the expertise of the person holding that title. A CV is an obvious place to start, but as the authority explored below demonstrates, CVs can be misleading.

Practitioner Psychologist include the following.

- clinical psychologists;
- counselling psychologist;
- educational psychologists;
- forensic psychologist;
- health psychologist;
- occupational psychologist;
- sports and exercise psychologist.

The full list and description of each of the modalities can be found here

<https://www.hcpc-uk.org/about-us/who-we-regulate/the-professions/>

The Health Care and Associated Professions (Miscellaneous Amendments and Practitioner Psychologists) Order 2009 made these titles protected titles and made it an offence to hold yourself out in one of those roles without being registered.

Searching the HCPC register should tell you whether the psychologist proposed is registered, but also the *modality* or expertise under which they are registered. In the same way you would not instruct an orthopaedic surgeon to advise on a brain injury, you should not instruct an educational or occupational psychologist to carry out a mental health assessment unless they can demonstrate that they have the expertise to do so. It is possible that they would be working outside their scope of expertise taking such an instruction, as was the case in the two experts referred to above.

When checking the expertise of the psychologist you may instruct it is crucial to make sure their modality of expertise is in the right field for the needs of the case. It is not enough to see that they are a clinical practitioner psychologist.

### **What is a Clinical psychologist?**

Clinical psychologist is a protected title under the 2009 order. Clinical psychologists can choose whether they also want to register as chartered psychologists with BPS, but in truth such registration adds very little to any understanding of their skillset. Holding the protected title clinical psychologist is key to understanding their level of attainment.

The majority of clinical psychologists will have completed a three-year doctorate in clinical psychology (DClinPsy), which is approved by the HCPC. The Clinical Psychology Doctorate is a programme of both academic, research and clinical training. As part of this training, they must undertake work experience in a clinical setting across a range of services within the NHS such as adult and child mental health, older adults, intellectual disabilities and other

the equivalence of the training and decide whether the practitioner meets the standard of proficiency allowing them to register with the HCPC as a practitioner psychologist. Clinical psychologist meets the criteria for registration as a chartered psychologist. It is simply a choice as to whether they wish to hold this registration. All practicing clinical psychologists must be registered with HCPC.

Even with clinical psychologists, lawyers must ensure the expert is practicing in the field in which they hold themselves out as experts. Ask the questions

- In what area is their clinical practice?
- For how long have they worked in the area?
- Are they truly an expert in this field?

In the Scottish court, an expert witness is called a skilled witness. It is helpful to think of what skills the proposed expert holds? What information or evidence base can the proposed expert draw on to help the court make a decision.

### **When is an expert truly an expert?**

Expert is unhelpfully defined in PD25B 2.1 as *"a person who provides expert evidence for use in family proceedings"*.

It does not go on to define what makes a person an expert, and we must look to caselaw to provide further guidance.

### **[Re C \(Parental alienation; instruction of an expert\) \[2023\] EWHC 345 \(Fam\)](#)**

considered the position of an unregistered, unregulated psychologist who had been instructed in that case. Re C confirms that *"The question of whether a proposed expert is entitled to be regarded as an expert remains one for the individual court, applying, as it must, the principles reiterated by the Supreme Court in Kennedy v Cordia (Services) LLP (Scotland) [2016] UKSC 6 (adopting the approach in Daubert v Merrell Dow Pharmaceuticals Inc (1993) 509 US 579)"*

So, whether an expert is an expert is a matter for the individual court, which places even more emphasis on the individual court and advocates at the hearing to properly understand the expertise of the proposed expert.

### **What principles should be applied?**

The principles reiterated by the Supreme Court in **Kennedy v Cordia (Services) LLP (Scotland) [2016] UKSC 6** must be considered. The key passages are as follows:

*acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.*

*And*

*(i) whether the proposed skilled evidence will assist the court in its task;*

*(ii) whether the witness has the necessary knowledge and experience;*

*(iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and*

*(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.*

So when we are selecting experts (having satisfied the separate test for necessity under part 25) the key question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the Court? Having satisfied yourself that they do, the second question to be considered is whether they have the necessary knowledge *and* experience.

So what is necessary knowledge and experience? One simple test is to ensure that the psychologist proposed is registered with the correct modality for the area of assessment. Eg, as outlined above, an educational psychologist should not be conducting mental health assessments, an occupational therapist should not be carrying out educational assessments.

What is less clear is what constitutes necessary experience. The 2012 research showed and subsequent guidance advised that those providing expert reports should be engaged in practice outside the provision of court reports.

The criminal case of **R v HENDERSON; BUTLER; OYEDIRAN [2010] EWCA Crim 1269 [2011] 1FLR** concerned the use of medical experts in the case of non-accidental injury cases (shaken baby). Echoing the Family Justice Council's recommendation in 2012, it provides a checklist of matters to be established by the trial judge before expert evidence is admitted:

1. Is the proposed expert still in practice?
2. To what extent is he an expert in the subject to which he testifies



The court of appeal placed emphasis on the third criteria, for the following reasons at paragraph 208 of the Judgment:

*The fact that an expert is in clinical practice at the time he makes his report is of significance. Clinical practice affords experts the opportunity to maintain and develop their experience. Such experts acquire experience which continues and develops. Their continuing observation, their experience of both the foreseen and unforeseen, the recognised and unrecognised, form a powerful basis for their opinion. Clinicians learn from each case in which they are engaged. Each case makes them think and as their experience develops so does their understanding. Continuing experience gives them the opportunity to adjust previously held opinions, to alter their views. They are best placed to recognise that that which is unknown one day may be acknowledged the next.*

This applies equally to the provision of psychological expert opinion as it does to the provision of medical opinion. A psychologist who only provides expert reports and has no current clinical practice may not have the experience to underpin an expert view.

The importance of getting the right expert with the right expertise and experience at the outset is compounded by the need to apply to the Court to cross examine an expert instructed. An application to call an expert to give evidence based on inadequate expertise is likely to be met with some resistance if the expert was agreed by all parties.

Research conducted by the Ministry of Justice and the Family Justice Council in 2015 found the attitude of some Judges when selecting experts was that *"some viewed their role as merely to 'endorse the agreement' between the parties involved in the case on which expert to appoint"* (see [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/368487/experts-family-law.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/368487/experts-family-law.pdf)).

The President of the Family Division in his report to the Family Justice Council recommended that "An expert witness handbook or information pack for experts and lawyers should be commissioned" and the minutes from the FJC meeting in January of this year suggests this is being progressed. This will be a very welcomed and hopefully lead to the good practice and recommended in 2012, outlined at the top of this article, becoming common practice across all courts.

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