Children law

John Vater KC, Harcourt Chambers

Head injury pilot: the unanswered questions

On 25 July, the Department for Education hosted an 'information' session about the Suspected Inflicted Head Injury Pilot Scheme (SIHIS). Mr Justice David Williams, consultant neuroradiologist Professor Stavros Stivaros, consultant paediatrician Dr Fiona Straw, and a representative of the department all gave presentations about the pilot from their perspectives.

More than 300 people attended the session, including judges, barristers of various seniority and some very distinguished medical experts. Time was limited and few of the submitted questions were answered. More worryingly, the various presentations raised several new and important questions, all of which remain unanswered.

One of the messages all the speakers seemed anxious to give was this: the pilot is a clinical scheme, designed to affect clinical practice and outcomes in these cases, using a multidisciplinary model. It is not, primarily, a legal initiative.

No one could object to a scheme, the purpose of which is to promote better clinical diagnosis and treatment for children with head injuries, whether they are suspicious or not. No one could object to a scheme, the purpose of which is to promote better standards of clinical reporting. No one could object to a scheme, the purpose of which is to promote a wider pool of experts willing to assist the courts in these difficult and anxious cases. There can be no argument about any of that.

But the questions which remain entirely unanswered are these: what is the proposed interplay between the SIHIS report (which will, apparently, be a pro forma report) and the forensic process? What is the proposed relationship between the clinical treating opinions and the court-appointed, objective, independent expert opinions?

We are told that the Part 25 statutory scheme for the appointment of independent experts will be unaffected by the SIHIS pilot, yet that part of the purpose of the pilot is to reduce the number of Part 25 experts. How does the proposition that the Part 25 scheme will be unaffected by the pilot sit with the proposition that one purpose of it is to reduce

the number of Part 25 applications? How will uniform, peer-reviewed, 'pro forma' clinical reports of themselves reduce the 'necessity' (within the meaning of the statute) of independent medical opinion? We already have clinical opinions in every case, on most aspects of the medicine (there will invariably be a paediatrician, an ophthalmologist and a radiologist), and yet a mechanism for the instruction of independent court-appointed experts is utilised in every case (to some or other extent) because all that exists at that stage is clinical, as opposed to forensic, opinion. The reason we have that mechanism at all is straightforward: as a matter of basic natural justice and fairness, the parties and the court must have, where it is necessary, a second, forensic (as opposed to clinical) opinion with independent, court-led parameters, into which the parties have an input, which is transparent, and which can be scrutinised and held to account as part of the forensic exercise. If that is right, then how could the production of a pro forma SIHIS report ever displace that fundamental requirement and reduce the number of Part 25 experts? How could anyone with any grasp of the basic requirements of natural justice believe that the SIHIS report could ever displace the requirement of a second forensic opinion?

Speaking plainly, there must be some concern, unallayed during the information meeting, that a second forensic medical opinion, through a joint instruction, is not regarded as a basic requirement of natural justice and fairness at all. While what really matters is what happens on the ground, there must be a very real risk that some judges will simply say, when faced with a SIHIS pro forma, that the court has all the expert evidence it requires to determine the

case justly and fairly, and that no further independent instruction is necessary within the meaning of Part 25. Whether the SIHIS pilot is a Trojan horse, designed to displace the instruction of independent experts in these cases, is a question which remains unanswered following the information meeting. Some might say that question loomed even larger despite it.

We are told that, once the judge has the SIHIS pro forma (and the very notion in itself of a pro forma report in cases like these rings very loud alarm bells) they will identify the 'areas of uncertainty' and then decide whether an independent expert should be instructed. But with great respect, how is a judge qualified to identify areas of uncertainty in such a complex area, without the assistance of independent medical expertise? How is the advocate qualified to identify those areas of uncertainty? The whole point of jointly instructed medical experts is to identify whether there are uncertainties in the clinical picture, to give a second opinion for forensic (as opposed to treatment or diagnostic) purposes, and taking into account an analysis of all the evidence. Where an advocate seeks a second, forensic opinion, how are they supposed effectively and fairly to argue for it in the face of the SIHIS pro forma? What duty (if any) will the SIHIS clinicians have to reveal areas of weakness or uncertainty in their opinions? Whereas the court-appointed expert bears a variety of duties towards the court, enshrined in the Rules, what duties towards the court do the clinicians bear? How is the court to test whether the SIHIS pro forma is in fact uncontroversial and complete? How can parents, accused of abusing their children, be assured that the SIHIS report is complete, and fair, accurate and right? There are all sorts of questions around transparency and accountability, and frankly none of them were answered at the meeting. Surely they must have been debated among the architects of the pilot, at some point?

The questions go on, and the concerns mount. Some might observe that in a jurisdiction as important as this, where courts are making genuinely life-changing decisions every day, it would be extraordinary to permit the rules of natural justice to be eroded by committee recommendations, groupthink, guidance or other sorts of pronouncements, without any parliamentary scrutiny. In this jurisdiction, uniquely, we are already in a position where those accused of inflicting injuries upon their children are not permitted to instruct their own experts to assist in their defence. We are already in a position where there are significant (and for many, discomfiting) constraints upon the cross-examination of experts, as well as their instruction in the first place. We are already in a position where there is a noticeable disparity between individual judges around the interpretation of guidance, where a judge in one town will immediately understand why a party ought to be permitted to instruct or challenge an expert opinion, but one 20 miles up the road would never permit this. All these factors (and this list is not exhaustive) can amount to a threat to the basic rules of natural justice.

The SIHIS pilot, depending upon its operation on the ground, might represent another threat. We are already uncomfortably close, in some courts, to reducing the scrutiny of expert opinion to little more than a paper exercise, undertaken by lawyers with no medical qualifications at all. The SIHIS pilot carries a real risk of further steps in that, wholly unacceptable, direction. A move towards better and multidisciplinary diagnosis, treatment and clinical reporting in the NHS is to be welcomed. But it is just as clear that the fundamental rules of natural justice cannot and must not be sacrificed on the altar of speed and efficiency. Enough is enough.

John Vater KC is a barrister and arbitrator at Harcourt Chambers, London