



**Issue 5
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President's address

ASNTS President **May Dunsmuir** welcomes you to the latest edition of the newsletter.



Photograph by David Murray

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Dear members,

As we move towards the end of 2016 and start to plan for 2017, I want to focus in this edition on some of the changes ahead.

The Tribunal will transfer into the **First-tier Tribunal for Scotland, Health and Education Chamber**, in October 2017. Once we transfer, our conveners will become 'legal members' and our members will become 'ordinary members'.

Before then, you will be provided with regular updates from me, and our training in 2017 will address some of the more practical arrangements.

At this same time, you will also be equipped to address the changes introduced by the Education (Scotland) Act 2016, which provisions will commence in November 2017.

Health and Education Chamber

It is planned that the NHS Tribunal and NHS National Appeal Panel will transfer into our Chamber in 2018, with the Education Appeal Committees transferring in (from the existing control of the 32 local authorities) in 2020. One of the unique features of the Scottish Tribunals is that whilst there are advantages to be gained from consistencies in approach and judicial leadership, the specialist nature and functions of each jurisdiction will be maintained. There will be opportunities for legal and ordinary members to sit across the jurisdictions within our Chamber and you may be able to be 'assigned' to sit in other First-tier Chambers, subject to the decision of the President of Scottish Tribunals, Lady Anne Smith.

Member development

Once we transfer into the Scottish Tribunals, we will become subject to new provisions for member review. These will not look too different from our current Member Development Scheme, which has been adapted to largely mirror the new provisions. I intend to formally adopt the new provisions in the first half of 2017, prior to the transfer date, so that we have time to become familiar with the terms. The frequency of member reviews is something I will also explore over the next few months. At the moment our members and conveners are reviewed no less than once in every 5 years, with an aim to try to complete this twice in this time period. As we are constrained by the volume of sittings I have tried to be proportionate when applying our current provisions.

In addition to member review, we will become subject to new policies on health and welfare. These are a very positive addition, and, like the member review policy, I will adopt the new provisions prior to our formal transfer date.

Complaints in relation to judicial conduct

Once we transfer, we will become subject to the Lord President's *Complaints About Members of the Scottish Tribunals Rules 2016*, which will govern complaints against ordinary and legal members. Following discussions with the Judicial Office of Scotland, I have introduced a new Complaints Procedure for the ASNTS from December 2016 onwards, which aligns with the initial assessment provisions of the 2016 Rules. A copy of our new Complaints Procedure and the Guidance for Complainers was recently sent to you and copies of these have been uploaded on our website.

Age for retirement

Once we transfer, ordinary and legal members will have to retire at the age of 70 years. No-one within our jurisdiction will be 70 on or before our transfer in 2017; however, some will be close to the retirement age after our transfer. I hope those who fit within this category will continue with us as we bed into our new Chamber. It is imperative to our success that we do not lose the wealth of experience and expertise that we currently hold.

Judicial Oath

As soon as possible after our transfer in October 2017, legal and ordinary members will have to take the judicial oath before they can sit within our Chamber. It is likely that I will administer this to you in my new capacity as President of the Health and Education Chamber, after the President of Scottish Tribunals administers the same oath to me. I will explain the practical arrangements for this closer to the time.

Judicial Hub

You will be given access to the Judicial Hub in 2017, which is a resource for members of the judiciary in Scotland. The Health and Education Chamber will have a distinct area, identified by the following logo —



Education (Scotland) Act 2016

It is planned that the provisions of the 2016 Act will commence as a whole in November 2017. Additional training days have been set aside to accommodate your learning and development on these provisions in September 2017.

I will keep you updated as we progress through 2017 on both of these important provisions. This is an exciting time to be part of the Scottish tribunal landscape. I am confident that the ASNTS will bed in very well to the Health and Education Chamber. There will be opportunities ahead for those of you who are interested in sitting in other jurisdictions and I am confident that we will all benefit from the judicial leadership of the Lord President and the President of Scottish Tribunals.

In closing, may I offer each of you and your families my very best wishes for 2017. I hope it is a healthy and peaceful year. I am very grateful for the continuing commitment you give to the work of our important jurisdiction and I am immensely proud of all that we continue to achieve, not least, the growing level of knowledge and expertise which exists within our membership. I must also acknowledge the hard work of the staff of the ASNTS, who have ensured our very recent relocation to 1 Atlantic Quay in Glasgow has not disrupted the high standard of the delivery of our services.

Best wishes,





Julius Komorowski, convener

Julius Komorowski succeeds Lord Ericht as
Session Cases editor



Following his installation as a Senator of the College of Justice as Lord Ericht, Andrew F Stewart QC has resigned the editorship of *Session Cases*®, Scotland's most authoritative series of law reports, after 15 years as editor.

Julius Komorowski, advocate, and a convener with the ASNTS, has succeeded Lord Ericht as editor. He was formerly the deputy editor. The Scottish Council of Law Reporting (SCLR) is a charity, established by the legal profession in Scotland. The primary purpose of the SCLR is the publication of *Session Cases*®. The series publishes reports of Scottish cases heard in the House of Lords, the Privy Council, the High Court of Justiciary and the Sheriff Appeal Court as well as those heard in the Court of Session.

2017
Save the Date

22 March 2017

All members' conference

13 September 2017

Education (Scotland) Act 2016
(conveners)

14 September 2017

Education (Scotland) Act 2016
(conveners and members)

Tribunal Administration

An update on activities within the Tribunal's Administration

Contact details for the ASNTS administrative team are provided below.

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Deputy First Minister and Cabinet Secretary for Education and Skills

Mr John Swinney MSP



Thank you for giving me the opportunity to contribute to your newsletter.

It is a great responsibility and privilege to have been asked to become Education Secretary by the First Minister. I am relishing the opportunity to work with pupils, parents, teachers and the wider stakeholder community, to create a world-class education system in Scotland.

I am clear that my **main priority as Education Secretary is to close the attainment gap in Scottish education.** We will continue to raise attainment for all children but we will have a specific focus on ensuring every child has the same opportunity to succeed, with a particular focus on closing the poverty-related attainment gap. I believe that we will do that by raising aspiration and performance in everything that we do. To enable that to happen we've got to have a very clear agenda about how we truly deliver excellence and equity in every single part of the country. We are committed, through the Attainment Scotland Fund, to investing £750 million over the next five years to tackle the attainment gap. Through this, we will be, targeting resources at the children, schools and communities which need them most. If we want to get it right for every child, we have to make sure that we have the necessary focus and impetus to consider every single young person who is part of the education system in Scotland. We will identify opportunities throughout a child's educational journey to provide the support they need to substantially eliminate the attainment gap in the next decade.

“If we want to get it right for every child, we have to make sure that we have the necessary focus and impetus to consider every single young person who is part of the education system in Scotland.”



[@JohnSwinney](https://twitter.com/JohnSwinney)

<http://www.johnswinney.scot/>

We must also be willing to consider and question how each part of the education system – from early learning and childcare provision through to secondary school education – supports our vision of excellence and equity in education. I believe that the best people to decide the future of our communities are the people who live in those communities. I recently launched Empowering teachers, parents and communities to achieve Excellence and Equity – A Governance Review¹. This review, which will run until 6 January 2017, offers an opportunity to build on the best of Scottish education and to take part in a positive and open debate.

The review specifically asks questions about responsibilities and functions at every level of our education system and how these can be improved to ensure Scottish education is world class for all our children and young people. It also asks about how funding for education can be made fairer through the development of a needs-based funding formula for schools.

I encourage you all to take part in this conversation; we have a number of open events across the country, some of which I will be attending. You can book now through our website².

I know that obtaining the views of children and young people is important to the Tribunal. It is an area which I also feel strongly about. In 2017, we will be developing and supporting a more coordinated, systematic and sustainable approach to engaging with children and young people in the Scottish Government generally. We want to ensure that their views are meaningfully listened to and taken into account on issues that are important to them, with the aim of improving policy development and implementation.

“I know that obtaining the views of children and young people is important to the Tribunal. It is an area which I also feel strongly about...”

In 2017 we will also be aiming to commence legislation which will give stronger rights and responsibilities to children with additional support needs. I believe that this extension of rights will provide a huge opportunity for children, particularly those who are looked after, to take more responsibility for the provision of support they receive in school.

At the time of writing, I am aware that the President is due to publish her annual report on the work of the Tribunal. I am looking forward to the opportunity to read through the report and understand the types of issues you consider as Tribunal conveners and members. I am clear that the Tribunal plays a key part in ensuring that children, particularly those who are the most vulnerable, receive the most appropriate support to enable them to get the most out of their education experience. We must ensure that we continue to empower and support every single individual in our education system to fulfil their potential. If we do that, we will have lived out the values that are at the heart of *Curriculum for Excellence* – values of wisdom, compassion, justice, and integrity.

1. <https://consult.scotland.gov.uk/empowering-schools/a-governance-review>

2. <http://www.gov.scot/Topics/Education/thegovernancereview>

Advance Statements

A Young Person's Perspective



By Pauline Cavanagh, Glasgow Manager

Partners in Advocacy provides independent advocacy to children and young people with mental health issues throughout the Greater Glasgow & Clyde Health Board area. In the past year, we have been actively promoting the benefits of preparing an Advance Statement and Personal Statement with the young people we support, and can report that an increasing number of our young advocacy partners have decided to record their views and wishes should they become unwell in the future.

Provision for making an Advance Statement is made in the Mental Health (Care and Treatment) (Scotland) Act 2003. According to the Scottish Government guidance¹, an Advance Statement is 'a written statement, drawn up and signed when the person is well, which sets out how s/he would prefer to be treated (or not treated) if s/he were to become ill in the future. It must be witnessed and dated.'

Pauline Cavanagh, Glasgow Manager with Partners in Advocacy, states that:

"Since the implementation of the 2003 act, the uptake of Advance Statements has been relatively low; perhaps people do not want to think about becoming unwell again in the future, or they don't see the point in preparing an Advance Statement if a doctor can override their wishes. However, having seen how important an Advance Statement was during a recent Mental Health Tribunal, I do hope that more people, of all ages, will consider preparing this vital document to ensure that others know what works best for them'. This can be illustrated in the following case study..."

1. Scottish Government (2004). *The New Mental Health Act: A Guide to Advance Statements*. Page 5. Accessed on 29.10.16 @ <http://www.gov.scot/Resource/Doc/26350/0012826.pdf>

Case Study

'Jill' (16) had been an inpatient in a psychiatric unit for several months on a compulsory treatment order. Partners in Advocacy supported her at her mental health tribunals and through regular visits, got to know her well during her hospital admission.

When Jill was about to be discharged home, her advocacy worker discussed with her the benefits of recording her views about her care and treatment in the future in an Advance Statement. Jill agreed that it could be helpful. Her advocacy worker supported her to write it and ensured that it was distributed to the hospital records department, her GP, her named person and also informed the Mental Welfare Commission.

Several months later, Jill was once again detained under the Mental Health Act and admitted to hospital. Her Advance Statement stated that a particular medication worked well for her and this was administered, but her requests for other treatments including talking therapies and regular exercise were not actioned.

At her mental health tribunal, Jill's advocacy worker drew the panel's attention to the views and wishes expressed in her Advance Statement; thereafter the convener of the tribunal made explicit reference to Jill's Advance Statement regularly, asking her psychiatrist and mental health officer specifically why her requests for talking therapies and exercise were not being honoured. It was agreed during her tribunal that Jill should receive these treatments, which she knew would be of benefit to her, and which she had requested in sound mind. These were specified as part of Jill's care plan and implemented immediately. Jill reported that this had helped her enormously and she felt that her views had been listened to.

The services provided by Partners in Advocacy, such as the preparation of Advance Statements, can be accessed through their services across Glasgow, Edinburgh and Dundee.

Let's Talk ASN...

By Donna Morgan,

Senior Education Law Solicitor



Throughout the last six months there have been some changes within the Education Law Unit (ELU) at Govan Law Centre (GLC). The project had been led by Iain Nisbet for a period of almost 15 years until March 2016. The team now consists of Donna Morgan (Senior Solicitor), Jill Rogerson (Solicitor), Caroline Sedman Jaensson (Case Worker), Aysha Anwar (Case Worker), Niall Wilson (Volunteer) and Anne Taylor (Clerical and Information Officer). The project is managed by our Service Manager, Candy Walker and Principal Solicitor and Solicitor Advocate, Mike Dailly.

The Education Law Unit has two main initiatives. These are *Let's Talk ASN* and the *Strategic Litigation Project*.

Let's Talk ASN

Let's Talk ASN is a national advocacy service operated jointly by Govan Law Centre and Kindred, an organisation which provides advocacy and information on services available to children with additional support needs and their parents. Let's Talk ASN is independent and funded by the Scottish Government. They provide free advice, support and assistance for parents and carers of children and young persons with additional support needs.

The service is available to parents and young people who have the right to make a reference to the Additional Support Needs Tribunals for Scotland (ASNTS). **The right to make a reference arises in the following circumstances:-**

- **Where a placing request has been refused for a special school, or a placing request has been refused for a child with a co-ordinated support plan (CSP); to a mainstream school.**
- **Matters Relating to a CSP**
 - ◇ **Where the local authority refuse to open a CSP;**
 - ◇ **Where there is dissatisfaction with the contents of a CSP;**
 - ◇ **Where the contents are not being implemented;**
 - ◇ **Where time limits are not adhered to.**
- **Transition from child to adult services.**

Casework forms the greatest part of delivery of this project. In the period from 1 April 2015 to the 31 March 2016, case work was distributed as follows:-

- **65% related to placing requests;**
- **32% concerned co-ordinated support plans;**
- **3% dealt with transition;**
- **86.5% of the cases were resolved without the need of a hearing.**

Within this project, we have established and maintain an ASL Advocacy Group which meets at least twice a year for training purposes to build capacity in the field and exchange good practice. We also maintain an online resource for members to share information and practice. We work closely with local education authorities and other bodies to ensure there is an awareness of the service and seek to extend the 'central belt bias' reputation that may be said to exist in respect of *Let's Talk ASN* cases.

Let's Talk ASN is an inclusive, child-centred advocacy service, providing help for families which is appropriate, proportionate and timely. We work together with a wide range of stakeholders across Scotland to build capacity, raise awareness and promote effective, local dispute resolution in additional support for learning cases. We support and empower families, helping them to make informed choices and to secure improved outcomes for their children.

Strategic Litigation Project

We have three clear objectives in respect of our strategic litigation project, which are as follows:-

- We strive to ensure organisations, with whom we work, are more aware of the rights of children with additional support needs and those of their families and better able to assist in securing those rights, even in the face of difficulties and delay.
- We work to ensure children and young people with additional support needs will be successful learners, confident individuals, effective contributors and responsible citizens.
- We work to ensure that children and young people will benefit from changes to policy and practice which affect them directly, leading to better and more consistent implementation of their rights. Contributions and interventions by ELU have a positive impact on public policy nationally and locally, leading to positive change and outcomes for children and young people. Changes to public policy will be recorded internally in regular progress record documentation.

Individual case files only form a small part of the work conducted under this project. Cases that are concluded successfully provide benefit not only to the individual child or family in question, but also benefit the wider community at both a local and national level.

As a result of the ELU interventions, statutory agencies, commercial and voluntary providers have altered policies and procedures, leading to concrete benefits to children and young people. The involvement of the ELU has also led to national policy and legislation being framed in a manner that enables it to recognise the rights of children and young people.

Current areas of interest include collating information in relation to bullying in schools with a view to working with **Respect Me**, *the national anti-bullying campaign*, as we approached national anti-bullying week, commencing on the week beginning 14 November 2016.

We are also compiling a report in respect of Looked After Children in education with a view to training and pressing implementation of the current statutory rights of children who are looked after, particularly their right to be considered for a co-ordinated support plan. This ties in well with the requirement to close the attainment gap of the children from the most and least impoverished areas in the country and improving educational outcomes for care experienced young people.

We feel passionate about the voice of the child and have excellent links with *Partners in Advocacy*, who provide advocacy services for vulnerable children. We look forward to collaborating with them in the near future to ensure that the voice of the child can be heard within Education in implementation of the right to have their views taken in relation to their additional support needs. This is ever more important given the increasing rights of the child afforded by the Education (Scotland) Act 2016 (*not yet commenced*).

Also in relation to the Education (Scotland) Act 2016 there is concern in relation to the provision of learning hours which must be secured for each pupil. This is dependent upon whether wellbeing would be adversely affected with reference to the extent to which the pupil is or would be safe, healthy, achieving, nurtured, active, respected, responsible, and included. All of these aspects are subject to the Education Authority's discretion, in terms of the 2016 Act in its current form. This may lead to further informal exclusion of children with additional support needs where their disability challenges the resources available to support their need.

GLC's Education Law Unit operates a second tier advice service to partner agencies, advocacy agencies, local authorities, NHS, social services and other solicitors in relation to all education matters. A referral can be made by any of these agencies to the Education Law Unit for legal assistance where a child's educational needs are not being met. Each case will be considered in line with our strategic litigation policy and the priorities outlined above.

Let's Talk ASN, c/o Govan Law Centre, 18-20 Orkney Street, Glasgow, G51 2BZ

letstalkasn@edlaw.org.uk — 0141 445 1955

Conveners' Evening Training

Irene Stevens and Ian Morrison,
Training Committee Members



Additional Support Needs
Tribunals for Scotland

The evening training event for our conveners took place at Europa Building on 27 October 2016. The theme for the evening training this year was *Key Convener Decisions*. The evening started with a welcome and update from our President, May Dunsmuir. In particular, the President highlighted the changes for conveners that will arise as a result of the new Education (Scotland) Act 2016.

There were three tasks which focussed on different aspects of **decision making**.

The first task focussed on the **views of the child**. This task required conveners to look at the *President's Guidance Note on Independent Advocacy*¹ and to reflect upon how they might comply with that duty. The second task was on the subject of **review applications**. For this task, conveners were asked to consider rule 45A² and rule 47³ and to discuss what their views were on review applications and what constituted '*errors in fact or law*'. The final task had the conveners examining what constitutes **good practice in drafting reference or claim decisions**.

The hallmarks of the evening were the lively discussions between the conveners. Views were shared and disputed, and there was healthy debate and argument. At times, the participants agreed to disagree and it illustrated the complexity of our jurisdiction! The members of the training committee circulated around the tables. Ian Morrison and I reflected afterwards that we had learned a great deal from just sitting listening to the debates, and it is likely that some of our thoughts on this will find their way towards informing some of the next training events for our members. Feedback during and after the event showed that participants enjoyed the discussions and found them helpful.

As always, the event would not have been so successful without the Tribunal Secretariat. So the training committee would like to thank Lynsey, Hugh, Hazel and Megan for being on hand, for making things run smoothly and for tidying up after us. The finger food was particularly commented upon, and was much appreciated by the participants! Our thanks once again go to our President, for introducing the event, updating the conveners on the impending changes to their remit, and for contributing to the discussion throughout the evening. Irene and Ian from the training committee would like to thank Derek Auchie, the chair of the committee, who brought his convener expertise to bear and framed such thought-provoking questions and tasks.

Finally, our thanks also go to those who attended the training and took the time to fill in the evaluation forms. As we have said previously, and will continue to say, the evaluation forms which are submitted provide the basis for further training. So remember to contact Lynsey if you have any ideas or suggestions for future events.

1. <https://www.asntscotland.gov.uk/content/information-and-guidance>

2. The Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2010, Rule 45A

3. The Additional Support Needs Tribunals for Scotland (Disability Claims Procedure) Rules 2011, Rule 47



By Joanna McCreadie,
Chief Executive

About two years ago, the children at Seamab were invited to get involved with the Additional Support Needs Tribunals for Scotland (ASNTS) by the President, May Dunsmuir. This was part of the President's drive to have the voice of the child represented more strongly within the Tribunal. Around that time we had just completed work on rebranding the charity and the **Sea Changers**, characters who articulate our work. This fitted very well with the needs of the ASNTS. Drawings and paintings of **Hug**, **Brave** and all the other Sea Changers were happily sited in the ASNTS Annual Report for 2014/15 and training materials.



Seamab is a children's charity. We provide care and education for some of the most vulnerable children in Scotland. All of the children, whom we work with, have complex needs and many have experienced abuse, neglect, trauma and loss. Every child faces their own unique challenges – our role is to find out how we can best support them to heal, grow and learn.

“Every child faces their own unique challenges – our role is to find out how we can best support them to heal, grow and learn,...”

Over the last two years, much about Seamab has remained the same – but a great deal has changed as well. We have been willing to ask hard questions about the best way to support and educate our children, and from this questioning we have developed a new philosophy of learning and caring. We have also worked hard to train our whole staff team in our therapeutic approach, Dyadic Developmental Practice (DDP). A broad approach to supporting children who have experienced trauma, DDP is based in an understanding of attachment, relationships and the impact of trauma on children.



“We believe that to help children who have experienced trauma, we need to start with establishing relationships. As children begin to feel safe, they can relax and allow their trusted adult to support them,...”

As we have been **developing our philosophy and therapeutic approach**, we have also **changed how we provide education and care**. We believe that to help children who have experienced trauma, we need to start with establishing relationships. As children begin to feel safe, they can relax and allow their trusted adult to support them. This means that children can learn more effectively, accept guidance from adults and enjoy normal childhood experiences. Often children learn to play with adults and other children in new ways.



We have learnt that children need to have relationships with adults in school just as much as they do with their carers. We made changes to our model of education so that a child's day at school is planned to build and develop relationships. Children spend their time with adults they feel safe with; this helps them to manage their emotions and overcome previous experiences.

The curriculum at Seamab is now active: we offer yoga, skiing, music, art, climbing...all giving the children opportunities to experience success. Weekly praise assemblies celebrate children's achievements as well as being an opportunity for adults and children to enjoy their lives together.



A few weeks ago we had our first school sailing trip. Five children with five adults travelled down to Devon where they set sail in a traditional sailing vessel. In just over a week at sea, the children learned how to crew - and captain - the boat. It was a week of challenges which included: twenty foot waves, plotting and navigating a course, spotting dolphins at sea and eating freshly caught oysters. The children kept a daily log of their adventures and by the end of the week could name all the different sails, tie knots and cook a meal in the galley. Asked what was best about the trip, one of the children just said 'everything'.

The Sea Changers still live at Seamab – and we take them with us wherever we go. **Joy** has always lived here and **Safe** is warm and friendly. **Free** climbs the trees and **Hope** is never lost. **Brave** keeps a watchful eye over everyone while **Calm** has an influence that we all benefit from. And **Hug** – he's always there when we need him. But since the Sea Changers were last seen in the ASNTS Annual Report, they have won wider recognition. They have won design awards and most recently Seamab and StudioLR won a **Scottish Institute for Fundraising Award** for Best Partner Relationship in relation to our work on the Sea Changers.

*“And **Hug** – he's always there when we need him.”*

It's been great to have this kind of recognition, but the Sea Changers have also been helping our children. Every child at Seamab gives the adults guidance on 'how you can help me'. Using the Sea Changers, children are able to say how we can help them to be Brave, or accept Hug. We no longer have classes in school – we have groups named after Sea Changers. Projects use the Sea Changers as themes – for example, Project Free is our exciting outdoor education project.

The Sea Changers have also helped us to build relationships with new partners. We are currently working on a design for a new school building with a team of experts, led by Purcell UK (architects). And we are nearly ready to launch a new fundraising campaign based on the Sea Changers. The characters have taken on a life of their own as we've grown and developed over the last two years.

However, **Calm** is still one of my favourite Sea Changers, probably because I think he reminds us how important it is for children to experience adults who calmly care for them, as we describe it in our philosophy ‘without qualm or condition’.

Story of Calm:

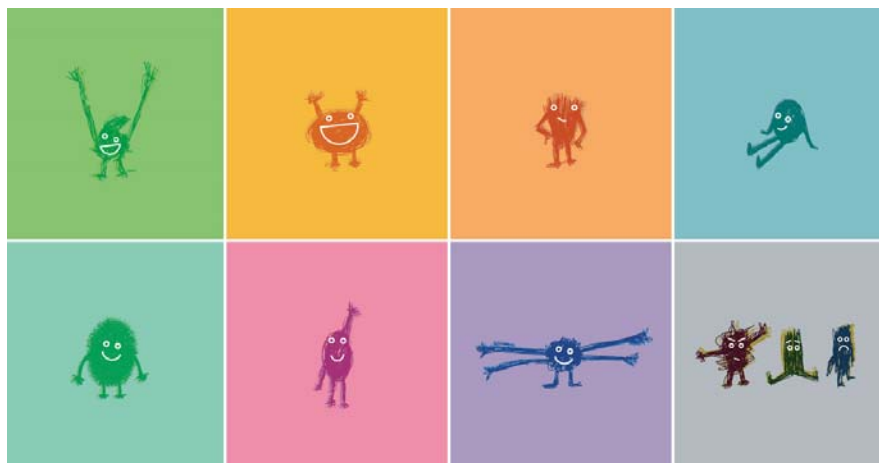


Calm is an influential figure at Seamab.

Sometimes it seems like **Calm** is never around but when the children need him he’s always there for them. A lot of kids had never met **Calm** until they came to Seamab – now they’re roommates, classmates and playmates.

Calm can help our children to settle down and focus on a brighter future. You can help too.

**For more information on Seamab School, you can visit
www.seamab.org.uk**



Skilled evidence and the tribunal

By Derek Auchie

Convener and Training Committee Chair



Earlier this year, **Charles Stoddart** delivered an excellent presentation on the subject of skilled evidence at the Members' Training Conference, following the very recent Supreme Court case of *Kennedy v Cordia (Services) LLP*¹. In this paper, I will explore two aspects of the subject which were discussed in that case and which impact on evidence the tribunal hears on a regular basis.

Before I do, I should deal with terminology. We often refer to 'expert evidence' and 'expert witnesses' but in Scots Law, the proper term is 'skilled evidence' or 'skilled witnesses'. This is a better term than 'expert evidence/witnesses' since the latter suggests a level of expertise within a particular discipline. Many witnesses who may provide evidence of their view based on their professional position are not 'experts' as that word is commonly understood. They are, however, 'skilled'. The word 'skilled' is used here, therefore.

Categories of skilled evidence

It is well recognised that, in the main, only skilled witnesses may give evidence of their professional views, known as 'opinion evidence'. Non-skilled witnesses may only give evidence of facts – events they saw or heard.

The Supreme Court in *Kennedy* used the expression 'opinion evidence of fact' which has not really been developed in previous cases. At first, this looks like a contradiction – opinion evidence and evidence of fact are supposed to be distinct concepts, with lay witnesses giving evidence of the former and skilled witnesses expressing opinions.

However, the **Supreme Court's analysis** means that there are two categories of skilled evidence:

Category (1): 'opinion evidence of fact' which involves giving an opinion based purely on expertise, and not on any direct involvement in the case; and

Category (2): 'opinion evidence' which involves giving an opinion based on both expertise and on direct involvement in the case.

1. [2016] UKSC 6; [2016] 1 W.L.R. 597; 2016 S.L.T. 209; 2016 S.C.L.R. 203.

The following *might be* examples of each category for the Additional Support Needs Tribunals for Scotland (ASNTS) purposes:

Category (1): A psychologist who is an expert (as that term is ordinarily understood) on autistic spectrum disorder who has never met the child but who has a wealth of experience with children with a similar diagnosis and needs; and

Category (2): The child's Support for Learning teacher, who has qualifications in teaching children with autistic spectrum disorder, and a wealth of experience of teaching children with a similar diagnosis and needs, and who has taught the child in question for a significant period of time.

Why does this distinction matter? For ASNTS purposes, the distinction affects how the tribunal compares and weighs skilled evidence. One task which the tribunal has to regularly perform is to choose between two skilled witnesses with different views on the educational needs of a child. One factor which assists in choosing the view of one skilled witness over the other is familiarity of the witness with the child, and especially familiarity in an educational environment. This is a perfectly valid factor to consider in making that choice. However, the categorisation above acts as a reminder that it is perfectly valid for a skilled witness to comment on the educational needs of a child on the basis of qualifications and experience only (and even in the absence of any detailed background information about the child in question – this would be 'opinion evidence of fact'). It is certainly valid for a skilled witness to give evidence based on qualifications, experience and access to pertinent records where the witness has never met the child ('opinion evidence').

It could be said that the evidence of the skilled witness who has never met the child is, in a sense, indirect evidence, while the evidence of the child's teacher is direct evidence. However, technically there is no hierarchy between these types of evidence. It is simply incorrect to say that the evidence of the teacher (with direct experience of educating the child) is superior to the evidence of the skilled witness who has never met the child, purely on the basis of the question of direct contact. It may well be the case that, overall, the teacher's evidence is to be preferred, but that should not, in my view, be purely on the basis of the direct contact question. In other words, direct contact with the child is a factor, but not the only one, which should be used in choosing which view is to be preferred. Placing too much emphasis on direct contact between a skilled witness and a child can be an error, and risks an appeal based on neglect of the expertise of the witness who may be more qualified and who may have more experience of direct access to other children with similar needs to those of the child in question. The counter argument to this is that each child has individual needs, and that mapping the experience of a skilled witness with other children onto a particular child with whom the witness has little or no familiarity offers a less reliable view than that of a skilled witness with direct and substantial experience of the child in the classroom.

As a point of practice, where a Tribunal member might be considering lack of direct contact between a skilled witness and a child as a factor in weighing the evidence of that witness, it would be advisable for that witness to be given an opportunity to comment on his/her view on the point. In other words, the witness should be asked if he/she feels that his/her ability to comment on the issues is hampered by a lack of direct contact (assuming that this is not brought out by the representatives of the parties).

One further observation is that as Tribunal members, we rarely have significant direct contact with the child (in some cases we don't have any such contact, and in no case will we have direct contact with the child in an educational environment) and yet we make decisions which will significantly impact upon the educational needs of children. It might be seen as illogical, then, if too much emphasis is placed on lack of direct contact between a skilled witness and a child. This point might be most obvious when considering the position of a member who is skilled in an area of expertise relevant to the issues in the case. I am not suggesting that there is equivalency between the position of a skilled witness and such a Tribunal member, since the latter has a judicial role, and in that role weighs all of the evidence offered, factual and opinion; but there is a certain difficulty in placing too much emphasis on the need for direct contact where none is afforded to the tribunal itself.

The general point I would offer here is that, following the recognition in Kennedy of the 'opinion evidence of fact' category of skilled evidence, more detailed reasons for the rejection of skilled evidence where the witness has not had direct contact (or a limited level of such contact) with the child may be required.

The 'ultimate issue' rule and skilled evidence

The 'ultimate issue' is, in essence, the issue the tribunal has to decide. Of course, there is always more than one issue, and although the rule refers to 'the ultimate issue' there are often a number of such issues. The reference to 'ultimate' does not, it seems, mean the final or overarching issue. It is a reference to a legal issue, or a legal test. A better label for this concept might 'the legal test rule'. The applicability of this long-standing rule, despite its abolition in England and Wales in civil cases in 1972², was recently confirmed in the Kennedy case³.

So, the 'ultimate issue' in placing request appeals is not: 'should the child be placed in School B?'. That is the outcome question; it is not the ultimate issue. An ultimate issue is an issue upon which the tribunal must adjudicate in order to reach a decision in the case. So, taking the main part of the 'respective suitability and cost' ground of refusal in *Schedule 2, para 2(3)(f)(iii) of the 2004 Act*, there are **seven 'ultimate issues'**:

1. Suitability of School A to provide for the ASNs of the child;
2. Suitability of School B to provide for the ASNs of the child;
3. Respective suitability of those schools;
4. Cost of meeting the ASNs of the child in School A;
5. Cost of meeting the ASNs of the child in School B;
6. Respective costs of the provision in those schools; and
7. Reasonableness, taking account of all of the above, of placing the child in School B.

These are all legal tests on which the tribunal must adjudicate in order to be satisfied whether or not that part of that particular ground of referral is met. Skilled witnesses must not comment directly on any of these tests.

2. Civil Evidence Act 1972, s.3. It is of doubtful application even in criminal cases: *R v Atkins* [2009] EWCA Crim 1876 [14]; *R v Stockwell* (1993) 97 Cr App R 260 at 265-6, per Lord Taylor CJ.

3. See para 49 of the judgement.

This may seem a little strange. In particular, the suitability of a school to meet the ASNs of a child seems to be something upon which a skilled witness, such as a teacher, a psychologist or an occupational therapist, would be ideally placed to comment. The answer is that while they should not comment directly on such matters, they may (and indeed should) comment on the factors which contribute to these issues. This may seem a little technical, but it is not and the rationale for this approach is clear.

The purpose of the 'ultimate issue' rule seems to be to avoid a skilled witness giving his/her direct view on the test to be applied by the decision maker. There is one obvious reason for this: that test may not be as simple as it seems. It may be defined in the legal authorities; it may have a complex definition. The problem is that if the skilled witness considers what he/she thinks the test means, he/she may not be considering the same test as the one which has been legally defined. This is a particular problem where the legal test is one that has a common, everyday meaning. That means that when a skilled witness says:

'School A is not suitable to meet the ASNs of this child'

He/she may simply be applying a common meaning of 'not suitable' and not considering how that word should be legally interpreted. In other words, the everyday usage of words used in legislation may not be the same as how those words have been legally defined⁴. The problem here is that the skilled witness's evidence is then tainted by his/her understanding of what he/she is giving evidence about. A skilled witness is not qualified to comment on whether or not a legal test has been met, any more than a lawyer may comment on whether a non-legal diagnostic test has been satisfied.

In addition, the skilled witness might not be fully aware of how the different legal issues interact – for example in dealing with the 'respective suitability and cost' ground referred to above, it is clear from both the wording of the legislation and relevant case law that these concepts (cost and suitability) must be considered together in concluding on reasonableness. So the test for considering if the ground is met is reasonableness (combining respective suitability and costs), not only suitability to meet needs.

Further, the determination of the tribunal on the statutory tests is one which will take into account all of the evidence, unlike any view formed by a single skilled witness. So, when a skilled witness is saying 'In my view, School A is suitable for the ASNs of the child' he/she is doing so from his/her perspective. That skilled witness will not have heard all of the evidence, in fact will probably not even have access to all of the documentation the tribunal will have, far less the totality of the bundle plus all of the oral evidence. When the tribunal is considering the same question of, for example, suitability, it does so from an understanding of all of the evidence, including that of the skilled witness. A skilled witness's expression of opinion on suitability therefore becomes meaningless, compared to the global consideration in which the tribunal must engage. In fact, there is no way of knowing if that skilled witness's opinion on, for example suitability, would have been different if he/she were in the position of having full access to all of the evidence the tribunal has.

There is a more practical consideration here too. If the skilled witness is preparing his/her evidence (and presumably report) from the standpoint of his/her perception of 'suitability', this might colour how he/she concludes on individual issues. In other words, rather than addressing individual issues, or factors, he/she may consider them through the lens of suitability, as he/she understands that term.

4. Roberts and Zuckerman, *Criminal Evidence*, 2nd ed. P.491 at notes 97 and 98.

This risks a distortion of his/her consideration of those individual issues. So the questions he/she should be addressing in his/her report should be 'raw' and not coloured or tainted by the relevant legal test – they should be about individual issues that might affect an overall legal interpretation of suitability, not an individual skilled assessment of that legal test.

Another way to consider the rule is to think about how questions would be framed by a lawyer taking a statement from a skilled witness. After all, if the skilled witness should not be asked to comment on the 'ultimate issues' in his/her evidence, he/she should not be asked about them during the pre-hearing, statement-taking interview. So, in asking about a child attending a particular school, the witness might be asked questions such as:

'Will school A be able to provide a curriculum which the child will be able to readily access?' 'Will the child have access to an appropriate peer group at school A?' 'Will effective speech and language facilities be available for the child at school A?'


The answers will be relevant to the overall question of suitability, but the skilled witness should not be asked to comment on the overall suitability of school A for the child, or that of school B; nor should the respective suitability of two schools be a point of comment.

Arguably, the skilled witness should be able to give evidence in complete ignorance of the 'ultimate issues', since it is the component factual issues the skilled witness is being asked about, the 'building blocks'. It is even arguable that the skilled witness should not know what the 'ultimate issues' are, since this might influence how he/she approaches the answers to the 'building block' questions. The skilled witness will be aware of the general purpose of the hearing, and that the two schools are under consideration and being compared, but he/she should ideally be blind as to the precise question the tribunal is considering. That question is of no relevance to him/her.

Where a witness expresses a view on overall suitability of a school, one way to probe this further is to simply ensure that the witness explains the reasons for that view. The reasons for the opinion of the skilled witness are as important as the opinion itself.

I should add that while I have concentrated on only one of the grounds of refusal of a placing request, a similar approach applies to all of the grounds for refusal. Indeed, the observations here apply to any other legal test in a CSP reference or Equality Act claim. Another example of a word which a skilled witness might be tempted to comment on is 'significant' in the context of a CSP reference; there is a judicial definition of that word and there has been disagreement in the past about what that word means⁵.

In practice, then, skilled witnesses should not be asked directly about their view on any of the legal tests; that is a matter for the tribunal. Instead, they should be asked about individual issues or factors which might contribute to those tests. Where a view on one of the tests is expressed (whether in a report or in oral evidence or both), the tribunal should be careful to avoid citing that view in support of its determination on that legal test, and to be influenced in its determination of skilled evidence on the 'building block' questions only. Indeed, an express exclusion of reliance on any such view might be wise, to put the matter beyond doubt.

 **“In practice, then, skilled witnesses should not be asked directly about their view on any of the legal tests; that is a matter for the tribunal...”**

5. *JT v Stirling Council* 2007 SC 783. The Code of Practice also provides guidance on the meaning of this word; again a skilled witness would not necessarily be aware of this.



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