OUR TREATMENT OF THE VULNERABLE – CHALLENGES FOR THE FAMILY JUSTICE SYSTEM

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Royal Holloway University of London Symposium

'Inequality and Rights – Contemporary Challenges in the Child Protection and Family Justice Systems before and during the Pandemic'

Held remotely on 16 March 2021

My topic is important and topical, but time is limited so I must focus on a few key issues. I start with an obvious question: What do we mean by vulnerable? Who is vulnerable?

Who is vulnerable?

Before the turn of the Millennium, our understanding of vulnerability was limited. Vulnerability was not a term of art. A family lawyer if pressed might have suggested that the vulnerable included those (children and the elderly) unable to protect themselves because of their age; the physically disabled; and those who by reason of mental disorder lacked capacity to take decisions. Beyond that, the thoughtful might have identified those protected by the Domestic Violence and Matrimonial Proceedings Act 1976 and, perhaps, those protected by the equitable doctrines of undue influence and unconscionable transactions – though those were of course a matter for the Chancery Division, not usually the Family Division. But that was really as far as it went.

Gradually our understanding broadened and became more sophisticated, as the judges of the Family Division were confronted with the social and domestic realities of such things as forced marriage and other forms of 'honour-based' violence and, a little later, female genital mutilation and transnational marriage abandonment. Unsurprisingly, the judges turned for solutions to the inherent jurisdiction.

In 2005, I said:

> "I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind or dumb, or who is substantially handicapped by illness, injury or congenital deformity. This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive."

The key concept was the linkage between vulnerability and abuse: the vulnerable are those who are, for whatever reason, susceptible to abuse.

Driven in large measure by the judges was the substitution of the comprehensively defined and more accurately re-labelled 'domestic abuse' in the revised PD12J, issued in September

2017, *Child Arrangement and Contact Orders: Domestic Abuse and Harm*, in place of the previous concept of 'domestic violence' This was defined as including:

> "any incident or pattern of incidents of controlling,[1] coercive[2] or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality."

The definition went on to explain that:

> "This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment."

This definition can be compared with that in the Domestic Abuse Bill currently at Report in the House of Lords. Clause 1(3) contains the core of the proposed definition:

> "Behaviour is "abusive" if it consists of any of the following –
>
> (a) physical or sexual abuse;
>
> (b) violent or threatening behaviour;
>
> (c) controlling or coercive behaviour;
>
> (d) economic abuse … ;
>
> (e) psychological, emotional or other abuse;
>
> and it does not matter whether the behaviour consists of a single incident or a course of conduct."

We have come a long way in the last twenty years.

<u>Vulnerable people in the family court</u>

What accommodation in its normal procedures does the family court make for those who are vulnerable?

The family court is not as welcoming as it might be even for those who are not vulnerable. The typical litigant in the family court is in the grip of powerful emotions and worries. Those of us who spend our lives in the family court (and most of us have never been a litigant or witness in any kind of proceedings) can be ill-equipped to understand what even the most robust litigant in the family court is going through. The layout of the typical family court is unwelcoming to parents who are often banished to the back row, where they may have difficulty in hearing what is going on, are distant from and unseen by their advocate, and

[1] Defined as meaning "an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour."

[2] Defined as meaning "an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim."

might be forgiven for thinking that they are mere spectators rather than centrally important. And the procedural rules and processes are incomprehensible to lay people.

For the physically disabled, the realities are still grim in too many of our court buildings. Even assuming there is level access from the street for those in wheelchairs, what are they to do when, more often than should be tolerated, a critically important lift is broken down, sometimes for months waiting a missing part?

Such matters are obviously important, but do not begin to address the more fundamental needs of the vulnerable.

In June 2014, I set up the Children and Vulnerable Witnesses Working Group (CVWWG), chaired by Hayden J and Russell J, to examine the related issues of how the family justice system accommodates the needs of children attending court to give evidence or to visit the judge, and the needs of vulnerable witnesses and parties for special measures.

As part of the latter piece of work, I asked the CVWWG to address the fact, condemned by a judge of the Family Division as long ago as 2006, that in the family justice system we are obliged to tolerate what in the Crown Court would be forbidden: the cross-examination of an alleged victim by an alleged perpetrator. This can sometimes amount, and on occasions quite deliberately, to a continuation of the abuse, as the court has to stand by, effectively powerless, while the abuse continues in court and, indeed, as part of the court process. I have repeatedly emphasised that in these matters the family justice system lags woefully, indeed, shamefully, behind the criminal justice system.

The CVWWG worked quickly, publishing its interim report in July 2014 and its final report in February 2015. The report was comprehensive and detailed in its analysis and recommendations, in particular as to the detail of the new rules and practice directions that were proposed and which, it was contemplated, would be in place by the end of 2015.

Now, six years later, what has been achieved? Much has been done, but not enough and much of it too long delayed. For example, it is only surprisingly recently that the family courts have begun to get to grips with the difficulties faced by, to take two issues, the learning disabled and the deaf. For the moment I focus on:

- Special measures,
- Cross-examination, and
- Children.

<u>Special measures</u>

Eventually, on 27 November 2017, the Rules in FPR Part 3A *Vulnerable Persons: Participation in Proceedings and Giving Evidence*, and the accompanying PD3AA, took effect, implementing, in part, the recommendations of the CVWWG and the wishes of the Family Procedure Rule Committee (FPRC). This undoubtedly marked a big step forward, though it had taken over three years to get this far, but the new arrangements could, and, in my view, should, have gone further. The giveaway is to be found in Rule 3A.8(4): "Nothing in these rules gives the court power to direct that public funding must be available to provide a [special] measure.'

The inclusion of this reflected Government's concern that proper implementation of what in the view of the FPRC was desirable would cost more than Government was prepared to commit.

Much has been done, but much more still needs to be done. I was not surprised to read the criticisms in the May 2018 Report by Queen Mary University of London and Women's Aid *"What about my right not to be abused?" Domestic abuse, human rights and the family courts*, of the inadequate special measures at present available in too many family courts. Much needs to be done as a matter of priority, for example, the provision of separate entrances, separate waiting areas, better screens, and audio and video links. When can we expect decisive action? And we shall have to see what difference in reality is brought about by the need for special measures now being put on a statutory footing by clause 61 of the Domestic Abuse Bill.

Cross-examination

In relation to cross-examination, a Government Minister gave a commitment in the House of Commons in January 2017 that there would be legislation. He said "I do not think that this is a complicated matter. It is a simple one that needs urgent action." Four years later we are still waiting.

The case for reform of this stain on our system is overwhelming. There is only one possible argument: it is the right thing to do. So why are we still waiting?

I pass over the depressing history of inactivity punctuated by occasional fitful and ineffective activity. At last, on 3 March 2020, the Domestic Abuse Bill which is currently before Parliament received its First Reading in the Commons. It is still pursuing its hardly speedy passage through Parliament.

Clause 63 of the Domestic Abuse Bill is intended to prohibit inappropriate cross-examination. The latest iteration is a distinct improvement on previous versions but is still deficient in some respects.

Children

And what, in all this time, of progress in relation to how the family justice system should meet the aspirations and accommodate the needs of the increasing number of children, particularly older children, who want to participate themselves in the process – a process which, after all, is primarily about them? There is a pressing need to meet the needs of children who want to come to court themselves, whether to see the court, to give evidence, to put over their point of view, or to meet the judge. What has been achieved? ***Nothing, absolutely nothing***, effective, despite continuing and unrelenting pressure for change since 2014.

The FPRC had worked up detailed proposals – new draft rules and a draft practice direction – but nothing can come into effect without the approval of the Minister. The Ministerial decision, set out in a letter in July 2018, made clear that approval was not going to be given because (and I quote): "these proposals cannot be implemented at the current time given their assessed operational impacts." You may be wondering what is meant by "assessed

operational impacts". In plain English, it means it would all cost too much. The Minister acknowledged that this decision would be "disappointing". I would use a much blunter word.

The deplorable reality is that what children want and need, what their welfare demands, is, according to the Ministry of Justice, too expensive.

In adopting this stance, we are failing to meet standards which are increasingly treated as a matter of course in many other countries; indeed, we are failing to meet our international obligations under Article 12 of The United Nations Convention on the Rights of the Child. And we are failing children and their families. The fact that, even now, the Convention, although ratified by the United Kingdom, has not been incorporated as such into our domestic law, says much about our systems. And it is not a matter for pride. However, it is probably utopian to imagine that any Government within any reasonably foreseeable future will decide to incorporate the Convention in English law, not least because to do so would cost money.

Why does this matter so much? The answer, I believe, is simple: we owe it to the children whose welfare is our responsibility as judges and whose futures are in our hands. There are, perhaps, two aspects to this.

First, the kind of involvement by children which I advocate will undoubtedly *improve* the quality of our decision-making and help to reduce the chances of us getting it wrong.

Secondly, how would we feel if correspondingly important decisions about us were arrived at by faceless individuals who we were not allowed to see? The way in which children are treated by the family justice system when they are not able to participate is not a practice which would commend itself to doctors and nurses treating children with serious illnesses – they know that their patients, even if children, have to be part of the process. And, perhaps most important of all, how will the child feel, years later, trying to come to terms with what may have been a life-changing decision which they feel (whether or not with justification – it matters not) might have been different if only they had been able to participate?

Is this really the best we can do? I hope not. For if it is, then we face the damning judgment of history which will, I fear, place this particular defect high on the far too long list of all that is still so desperately wrong with our family justice system.

Change is necessary, and urgently, for one very simple reason: because it is the right thing to do.

<u>PD12J</u>

While all this was going on, in September 2017 I had issued the revised PD12J, accompanied by a circular which included this:

> "Domestic abuse in all its many forms, and whether directed at women, at men, or at children, continues, more than forty years after the enactment of the Domestic Violence and Matrimonial Proceedings Act 1976, to be a scourge on our society. Judges and everyone else in the family system need to be alert to the problems and appropriately focused on the available remedies. PD12J plays a vital part."

Unhappily, the indications are that PD12J is not working as it should, and as it must. We are waiting for a judgment from the Court of Appeal which, I fear, may make for uncomfortable reading. And the Report from the Ministry of Justice Expert Panel on Harm in the Family Courts, published in June 2020, with its shocking findings about how the system is failing vulnerable women is a wake-up call for even the most complacent. What is being done?

The care system

There are many problems with the care system and with that part of the Family Justice System which deals with care cases. We would do well in England to ponder Sir John Gillen's 2017 *Review of Civil and Family Justice in Northern Ireland* and Chapter 7 of *Justice in Wales for the People of Wales*, the 2019 Report of The Commission on Justice in Wales, chaired by the former Lord Chief Justice, Lord Thomas. Vitally important is the very recently published Final Report of the President's Public Law Working Group chaired by Keehan J. Without going into detail, the sooner its admirable recommendations can be implemented the better. But the remit of the PLWG was comparatively narrow, and I want to focus today on the bigger picture.

I start with three fundamental propositions:

- Children in care have *greater needs*: Most children taken into care have suffered neglect and emotional harm. Many have suffered serious – sometimes very serious – abuse. So, their needs are greater than those of other children. They, and those looking after them, need *more* support, *more* services, than other children.
- The State has neither the legal nor the *moral* right to take a child into its care unless it can provide the child with *better* care. As I said as long ago as 2001, in a shocking case of two brothers 'lost in care':

  > "The State assumes a heavy burden when it takes a child into care … if the State is to justify removing children from their parents it can only be on the basis that the State is going to provide a better quality of care than that from which the child in care has been rescued."

  This, unhappily, is a message that can never be repeated too often. If that seems an unduly bleak and pessimistic message, consider the equally shocking state of affairs exposed in another case some 17 years later by Keehan J.
- It is common wisdom that children who have been in care, and particularly those who remain in care until they are 18, suffer many disadvantages in adult life, that their life chance are not what they should be and not as good as other children's life chances. Those who have been in care are disproportionately over-represented, for example, in prisons and mental hospitals and under-represented in universities and other places of higher education.

This is the basis upon which we have to address the fundamental reality, which dominates everything else: the State is failing to meet its children's needs and failing in its moral duties. If this is thought over-dramatic, consider the shocking article in the Guardian of 11 November 2019 by the well-respected journalist and commentator Louise Tickle, *We are failing children in care – and they are dying on our streets*:

> "If one in four young adults found themselves homeless once they turned 18, with 14% sleeping rough, we'd be asking where the hell their families were. But these figures are the reality for young care-leavers."

The current prevalence of rough sleeping, as of food banks, is an indictment of how society treats its most vulnerable. It is deeply troubling that it took the anguished pleading of a prominent footballer to rouse the conscience of the nation in relation to school meals and to drive the Establishment to action.

Tickle quoted the then children's commissioner Anne Longfield:

> "It seems unbelievable that you could take the most vulnerable kids and put them into independent living without a package of support."

Who could possibly disagree? And why is this? Essentially, because local authorities and the family justice system are unable to cope with the increasing numbers of children in care. Why? Because of budgetary constraints and lack of resources.

But there are many other problems.

First, there are structural problems:

- There are wide variations (national, regional and local) in what local authorities and family courts are doing.
- There is a fractured / divided court structure: eg, separate courts for family, criminal and migrant cases involving children.
- Family courts are not sufficiently focused on problem-solving: there is a pressing need for the expansion of FDAC to cover the entire country, to put an end to the present desperately unfair postcode lottery, and, more generally, to extend the concept of problem-solving cross the family courts.
- The inability of court to direct provision of resources / services.

Second, there are systemic failings:

- There is often inadequate planning / monitoring of the child's journey through the local authority care system: before, during and after court involvement.
- There is often inadequate pre-proceedings work: both in diverting cases away from court and in preparing cases properly for court.
- A serious re-vamp of the failing IRO (independent reviewing officer) system is essential. Although there have been some local successes, the overall picture is of a system which has never worked as effectively as was hoped and as it must if it is to achieve its vitally important objectives.
- We must make a reality, rather than an empty promise, of the entire 'leaving care' system, essential to enabling children in care to transition into adult life but still too often a matter of mere rhetoric rather than practical help.

Third, there are failings in relation to the family:

- Sibling relationships are immensely important, and for two quite separate reasons:

- The sibling relationship lasts longer than any other; and though it inevitably changes down the years, as the sibling group grows older, moving from childhood, into adulthood and then into old age, it is immensely important, rewarding and enriching.
- Secondly the sibling relationship means that children can have proper relationships – which again will last through the decades – with their cousins.

Does the care system do enough to maintain, nurture, support and sustain sibling relationships? I have very real doubts.

- A pervasive problem, affecting far too many children, is the unfair treatment of kinship carers. There is serious inadequacy in the financial, professional and other support available to too many kinship carers and to the children they are looking after – in stark contrast to the support available to foster carers and adoptive parents. This justifiably concerns and angers many of the carers. They can be forgiven for feeling exploited, and in a way that can only be detrimental to the welfare of the children they are caring for. Providing the financial and other support that kinship carers so desperately need is an intractable problem. Substantial increases are essential in the funding made available by central Government to local authorities, which are under-resourced and gravely over-stretched.

  One of the most depressing aspects of the system is the assumption that, in relation to support, kinship carers should be treated in the same way – no better, no worse – than the parents of any child living at home. This is wrong, and for two different reasons:

  - Kinship carers are not parents: often they are required to take over the care of children at short notice and, as in the case of grandparents, with unsuitable accommodation and inadequate resources.

  - Children who have passed through the care system into kinship care typically have *greater* needs than other children: they, and their kinship carers, need *more* support, *more* services, than other children.

Fourth, too many children in foster care experience unacceptable instability: over-frequent moves between foster carers and lack of continuity of social worker.

Finally, and worst of all, there are even more serious failings in relation to the children themselves. It is, unhappily, notorious that the State – I say the State, for local authorities are not provided with financial support sufficient to meet their needs and the needs of the children for whom they are responsible – is failing far too many of the children in its care. These serious failings are the subject of increasing concern and frustration by judges (as their published judgments continue so vividly to illustrate) and increasing criticism in the media. Let me give three examples – no doubt there are others – of what I do not shrink from saying are serious failings by the State, failings which increasingly put into question our right to call ourselves civilised and compassionate. I take them in no particular order:

- First, there is the serious lack of adequate provision, residential and non-residential, for the increasing numbers of children with mental health difficulties.

- Secondly, there are the increasing difficulties in finding suitable secure accommodation and other therapeutic resources for some of our most troubled children. Judges, in desperation, find themselves, far too often, having to put damaged children in unsuitable placements which are:
    - unregulated;
    - far too far away from the child's family and other support systems; and/or
    - outside the jurisdiction, in Scotland.
- Thirdly, there is the scarcity of suitable housing accommodation available for young people in care or as they transition out of the care system into adulthood. In relation to this, we need look no further than the judgment of His Honour Judge Dancey sitting at Bournemouth in *Dorset Council v A (Residential Placement: Lack of Resources)* [2019] EWFC 62, a shocking case accurately epitomised by a journalist as the grim story of a child passed around the local authority care system like a bag of potatoes, ending up in a caravan park. I need not repeat the distressing details of a truly terrible case. What I should set out, however, are the considered conclusions of this very experienced judge, the Designated Family Judge for Dorset:

    > "It is my experience in Dorset that the number of vulnerable young people who need to be looked after or otherwise supported by the local authority is increasing. There are growing concerns around child sexual exploitation, County Lines and other forms of criminal exploitation as risks for these young people … The problems are huge. That is why I have told A's story."

    Only someone with a heart of stone could read Judge Dancey's judgment without wanting to weep or to rage. He also draws attention to the growing and deeply worrying 'County Lines' problem and other ways in which children are being criminally exploited. Is the system really geared up to dealing with this criminality effectively?

Thus far the response of Government has been to propose banning the use of unregulated accommodation. But how is that going to help, when the fundamental problem is the absence of suitably regulated accommodation?

<u>What is wrong with us?</u>

Sadly, far too much of this seems to fall on deaf ears.

What all this illustrates is the shameful lack of housing and other resources which impacts so adversely upon some of the most vulnerable in our society. It is a commonplace that we live in an era of austerity. But however great the temptation, in or out of Whitehall, to use this as a convenient explanation for the serious problems currently facing us, the truth is bleaker and more profound. For these problems have their roots in policies, seemingly shared by Governments of whatever political stripe, long pre-dating the banking collapses and ensuing financial crisis of 2008. And although the problems afflicting the vulnerable have been made much worse – often very much worse – by the pandemic, none of these problems has been created by it. What the pandemic has done is to shine a powerful searchlight on to the unnecessarily damaged lives of too many of our most vulnerable people and children – but what action is being taken in response?

We are, even in these times of austerity, one of the richest countries in the world. Our children and young people are our future. As is often said, one of the measures of a civilised society is how well it looks after the most vulnerable members of its society. If this is the best we can do, what right do we, what right do the system, our society and indeed the State itself, have to call ourselves civilised? The honest answer to this question should make us all feel ashamed.

What is to be done?

Many things need to be done – and urgently. I mention just three.

- First, we need much more research into and analysis of what is going on in the care system including research into what we know are very significant national, regional and local variations between different local authorities and different family courts. Such research would enable us better to understand, as an essential precursor to improving the system:
    - what is going on and why;
    - the child's journey through the care system and beyond – both individual children and children generally; and
    - the impact on the child's journey of such things as
        - ethnicity,
        - deprivation (in all its forms), and
        - the legal framework which has been put in place.

  This research will be invaluable not merely for policy-makers but also for decision-makers. The new partnership between the Nuffield Foundation's Family Justice Observatory and the SAIL database at Swansea University will transform our ability to conduct such research and analysis. No longer will research be confined to selected case-files; whole system analysis will become possible.
- At the same time, local authorities, the courts and others need to make much more use of data science and data visualisation tools.
- Fundamentally, however, we need a drastic increase in the resources necessary if these problems are to be tackled effectively; but given the lack of compassion and political will in our society, how likely of achievement is this in contemporary Britain?

This is not a cry for some distant and unachievable utopia. It is a call for decency, humanity and compassion to be afforded their proper place in a very affluent society so that this affluent society can properly claim the right to be called civilised.

If we, as a society, are not prepared to provide the necessary resources, then we face a very stark, and fundamentally moral, question: How can we go on as we are at present? On one view there are, objectively analysed, too many children in the care system – how, after all, can we explain, let alone justify, the astonishing increase in the care population over the last ten years *since*, I emphasise, the *Baby Peter* 'spike'? Indeed, only last weekend an interview in the Sunday Times with Isabelle Trowler, the Chief Social Worker, was headlined *Too many children wrongly taken into care, admits chief social worker*.

Be that as it may, it is surely indisputable that the present systems – both the local authority systems and the court processes – are incapable of dealing properly, and in a manner compatible with children's welfare, with the current numbers of children in the system. If society is not willing to provide us with adequate resources, should we not be *significantly reducing* the number of children we bring into a failing system, so that those reduced numbers might actually benefit from a system which would then be able to cope? Should we not be considering, for example, how to re-set 'threshold', not as a matter of statute but as a matter of understanding and practice?