

The Nuffield Family Justice Observatory Stakeholder Event

'Born into Care' – Infants in the Family Justice System

Manchester 9 October 2018

Opening address by Sir James Munby, lately President of the Family Division

I am so sorry that circumstances beyond my control make it impossible for me to be with you today. I can only apologise to you. For my part I am very disappointed, because both the Family Justice Observatory and all the work being done at Lancaster University are subjects very close to my heart.

The Family Justice Observatory is one of the most innovative, exciting and important developments for the family justice system in recent years. Many have played important roles in the campaigning, thinking and planning which have led us to where we are today, but especial thanks are due to the Nuffield Foundation. As you all know, the Foundation has for many years played, and continues to play, an essential role in supporting research into topics of critical significance for everyone involved with family justice. Its commitment of funding on a particular generous scale will enable the Family Justice Observatory to 'get off the ground' and to become, as I am sure it will, an established and vital part of the wider family justice system.

Research across many disciplines has been a familiar part of family justice for many years. But some of us have felt for quite some time that the family justice system has not made, in truth has not been able to make, the best use of the vast amount of research which is available 'out there'. And we have also found ourselves too often frustrated because the research which, if it was available, would be so invaluable, seemingly simply does not exist.

Put shortly, I suggest that what is needed is:

- a much more co-ordinated approach to ascertaining what research is in fact available
- making it available not merely to the academic community but also to those concerned with the formulation, consideration and implementation of policy
- most important of all, making it accessible to busy practitioners, whatever their discipline – lawyers, judges, social workers, CAFCASS officers, experts – involved day to day in the family justice system in all its varied facets; and
- where research is not available, encouraging and supporting potential researchers to undertake the research and to publish it.

It is still early days, and please do not assume that I am speaking on behalf of either the Nuffield Foundation or the Family Justice Observatory, but I thought it might be helpful if I were to sketch out a purely personal view of where we are and where we need, and I hope the Family Justice Observatory will find it appropriate, to go.

Let me begin with some examples of where I think our current systems fall short of what is needed and which, I emphasise, we ought to be capable of doing, not in some distant utopian

future but within the lifetime of the Nuffield Foundation's funding of the Family Justice Observatory. I take them in no particular order.

- First, far too much of the research which is in fact available is in practical terms inaccessible to the busy practitioner or accessible only with more difficulty than the busy practitioner has time for. It is often said that a failing of archaeology is that some artefact excavated and briefly exposed to public gaze after being buried for centuries or millennia then disappears from view being reburied in the storage cellars of a museum. This may be more the fault of practitioners than of researchers, but too often important research disappears from practitioner's awareness very soon after its initial publication.
- In surprisingly many areas of family justice, research is either lacking altogether, too limited in scope as to be as helpful as it might be, or not as up-to-date as one would wish. We are notoriously lacking in the longitudinal studies which, ideally, we should have if we are to be able to justify our approaches to long-term planning for children. Caution may be required in relying too uncritically on elderly research – one thinks of the extreme age now of Bowlby's pioneering work on attachment – particularly if underlying professional approaches have since changed. May there not be dangers, for example, in accepting, too uncritically, research underpinning our approach to adoption when, as is notorious, that approach and accompanying professional practice have changed so dramatically over recent years. In the medical sciences, yesterday's dogma may dissolve, sometimes very rapidly.
- The research we would welcome is too often hindered by the absence of the necessary data or by its being scattered across too many government departments and other agencies and compiled on inconsistent bases. Too often, for example, the court system is unable to provide answers to the simplest questions because the relevant data and statistics are either not collected at all or are compiled in a way which does not admit of easy interrogation for the task in hand. Sometimes it is difficult to 'marry up' or compare different data sets. A striking example is the different approach of those who measure care cases by the number of children involved and those who measure them by the number of cases. Obviously, the first approach is the correct one if measuring the effects on children; if, on the other hand, one is concerned with the *operational* impacts on the family court, the second approach is the right one, the simple point being that a care case involving (say) three sibling children does not take three times as long as one involving a single child. There may, therefore, be no 'right' approach, but it can cause problems.
- Until recently, there has been, I suspect, much more focus on qualitative than on quantitative research and analysis and, perhaps in some quarters, insufficient appreciation of just how informative and invaluable the results of pure number-crunching can be. In the context of understanding the family justice system, and, in particular, understanding how the courts operate, statistical analyses linked with operational research (to use the war-time expression) or its modern-day successor data science, have just as vital a role to play today, if you will forgive an analogy which may seem strange, indeed offensive, to some, as they did in wartime. Operational research was fundamental during both World Wars in jolting the 'Top Brass' out of their easy professional complacency. Can we be confident that those, policy-makers, judges and administrators, who are responsible for the modern family justice system would not benefit from a similar jolt? One would like to think not, but I am not that sure.

Things have already begun to change.

First, and foremost, there has been revelatory work analysing what I might call the operational data of the family court system, in terms of both brute number-crunching and statistical analysis, as well as in the way it is presented, both on paper, in a variety of tabular, pictorial and graphical ways (including the use, unprecedented in the justice systems, of that otherwise well-established tool the 'funnel graph') and by inter-active IT systems which enable differing data-sets to be interrogated and presented in different formats. Much of the focus of this has, rightly, been on the care system and it is that on which I wish to concentrate, though recognising that many of the lessons we have learned in that context are equally applicable across the family justice system.

It is impossible to over-emphasise the importance of this work and the key insights it has already given us. It is always invidious to refer to individuals but special praise must be given to Professor Judith Harwin and her team at Lancaster University, whose work has already done so much, and in so short a time, to improve understanding of what has been going on in relation to care cases and special guardianship orders and – this is really important – to show us not merely what we do not yet understand but also how we might go about finding the answers.

Let me elaborate a little.

Work on the raw data in relation to care cases very quickly established that the dramatic increase in recent years in the number of applications being issued could not be explained by changes over time, which by and large were few and small, in the age or gender profiles of the subject children or in the number of children per case.

Of much more significance, a single slide showing a set of 'bar charts' demonstrated what anyone who understood the system would have known intuitively, while helpfully exploding the notion, which for a time had surprising traction in Whitehall, that a significant cause – or, in the more extreme form of the argument, *the* cause – of the increase in the number of care cases was an increase in the sexual abuse of children. What the figures demonstrated was that, overwhelmingly, as we all intuitively knew, the increase was in cases where the allegation was of neglect or emotional abuse.

What this and other research being undertaken at Lancaster and elsewhere also demonstrates, as I believe beyond sensible contradiction, is widespread national, regional and more local variations in the practices and approaches of both local authorities and courts, variations which are not readily explicable by reference to such obvious factors as demographics and deprivation of whatever form.

There are many examples of this in the data. Let me mention just three to illustrate the point. A striking feature of the 'headline' figures for increases in the number of care cases is wide variations between different local authorities: if the national figure at any particular time is, say, an increase of X%, there are many local authorities where the figure is either significantly higher or significantly lower than X. Why? This is also manifest in strikingly different figures for the percentage of the local child population who are the subject of proceedings. Why? And there are, similarly, strikingly different approaches to the kind of orders being sought in care proceedings and, more particularly, the kind of final orders being made, for example, in the use of special guardianship orders. Why?

Put shortly, there are what appear to be very significant differences between what local authorities and courts do in areas where one might not expect it, given superficially similar demographics and indices of deprivation. Why is this so? The simple answer is that we still do not know, though all the available statistical and other evidence strongly suggests – and, until the evidence demonstrates the contrary, I think we would be wise to treat this as a safe working

hypothesis – that, in the final analysis, these differences are the outcome of different professional and institutional *behaviours*.

So far so good, but which are the driving behaviours? In one sense the answer might be thought pretty obvious – after all, in a care case it is the local authority which decides when to make an application and what order to seek. But we need to ask, amongst much else, to what extent local authority behaviour is in fact being driven by beliefs or assumptions as to what the local family court and the local family judiciary want and expect. It is very early days in the exploration of this crucially important topic – crucially important because, if ‘something’ needs to be done, we need to know ‘who’ should be doing it – but research undertaken by the Lancaster team comparing the various local authorities all of whom ‘feed into’ the same family court at Manchester, has identified such striking differences between those authorities as to suggest that it is local authority behaviour rather than judicial behaviour which is, *in this particular instance*, the key driver. The outcome of this particular research is revealing and suggestive, but not of course definitive. As with all the sciences, whether natural or social, a thesis is only good for so long as it survives intact in the light of further work.

I have spent a little time on this because it brings out a number of key messages which must in part be the basis for any future research agenda in relation to the care system.

- Data science, operational research, statistical number-crunching – call it what you will – is vital if we are to understand what is going on in the family justice system.
- While they can often tell us that X is *not* the, or a, cause of Y, these approaches will usually not themselves tell us what the causes of Y are.
- On the other hand, they can identify all kinds of critical questions we need to ask, all kinds of inquiries we need to make, if we are indeed to identify these causes.
- Crucially, what the research to date has shown is that:
 - typically, the causes are multi-factorial
 - at root, the causes are the outcome of differing professional *behaviours*
 - there are wide national, regional and local variations whose existence is not seriously in doubt but whose causes are still largely obscure
 - there is a pressing need to compare, contrast and evaluate the impact on the system of both *local authority* and *judicial* behaviours.

This material ought to enable us to plan the necessary research to enable us, for example, to get to the bottom of what has been going on. Although the statistical number crunching takes us so far it cannot, itself, provide the answers. It provides us with a solid platform on which further research can proceed and, crucially, a statistical basis for questioning and challenging the assertions, assumptions and so-called “evidence” – often little better than intuition or anecdote – which are so often put forward by those, professionally involved, who are seeking to explain what is going on.

In essence, that research, moving from the purely quantitative to the qualitative, requires the more traditional research techniques, in particular examining and analysing case files – both local authority files and court files – and interviewing representative ‘key players’, including both local authority officials, judges and, where appropriate, other litigants and practitioners. I am sure there is also a valuable role to be played, if only their enthusiasm can be harnessed to the task, by the various local Family Justice Boards.

Some of the necessary work is already underway and producing immensely valuable results: there is for example, taking just some of the many recent or current research projects at random, the immensely valuable work done:

- by Professor Judith Masson in relation to care cases
- by Professor Judith Harwin in relation to special guardianship orders
- by Professor Karen Broadhurst in relation to ‘repeat mothers’
- by Professor Liz Trinder in relation to the divorce process.

So, what is the way forward?

- First, in relation to what I call the *operational* challenges facing the system we need ongoing research, both quantitative and qualitative, to explain what is happening and why – both in terms of what is bringing cases to court and in terms of the orders being made. The primary consumer of this will be policy makers and those in leadership roles, whether in local authorities, HMCTS or the judiciary.
- Secondly, and at the interface between the purely *operational* and the more traditional research into *outcomes*, we need more research into the related questions of *why* certain types of order or combination of orders are being made - for example, special guardianship orders with or without a supervision order or a family assistance order - and the *outcomes*, both in the short term and in the medium to longer term. This is needed both by policy makers and those in leadership roles and, crucially, by practitioners and judges involved in particular cases.
- Thirdly, we need more, and more up-to-date *longitudinal* research of the traditional type exploring outcomes.
- Fourthly, we need to identify where there are significant gaps in the research literature, or where the relevant research is, or may be, out of date, with a view to identifying, encouraging and supporting potential researchers to undertake the research and to publish it.
- Finally, we need an entirely new approach to the collation, publication and dissemination of all this material.

Elaborating on this last point, there is, I have long thought, a pressing need for an authoritative compendium, constantly updated, of all the relevant published research, geared, in particular, to the needs of busy practitioners in all disciplines and to the needs of busy judges across the family justice system.

What do I have in mind?

- First, a compendium which is authoritative, up-to-date and, within the limits of what it sets out to do, reasonably exhaustive.
- Secondly, a compendium which includes the three major types of research:
 - research in relation to the *medical sciences*
 - research in relation to what for shorthand, and in contrast to the medical sciences, I will refer to as the *social sciences, including psychology, child development, and so on*
 - research in relation to what I have called *operational* matters.
- Thirdly, a compendium which is kept up-to-date. Something which is out-of-date is worse than useless – it has the potential to be a snare and a delusion. Very careful thought will have to be given to this in planning the way forward. My own view, for what it is worth, is that this is not a task for Government but for a tri-partite joint venture between the Academy, those who, by and large are producing the research, practitioners (including the judges), those who, by and large, are using the research, and one or more of the established legal publishers, those who have experience in the publication of works which require regular up-dating. Whatever emerges, it has to be assured long-term sustainability.

- Fourthly, a compendium, perhaps arranged alphabetically by subject-matter, which in relation to each topic identifies and lists the relevant research, providing detailed bibliographic information and, perhaps hyperlinks, and including both an abstract of the research and, where appropriate, selected extracts.
- Finally, a compendium which:
 - must be published and available in both paper and electronic versions
 - must be kept within reasonable bounds, no more than at most (say) three volumes in the paper version, one, perhaps, for each of the three types of research I have referred to
 - must be authoritative – perhaps aiming to be the authoritative source which the Family Justice Review and the Judge in Charge of Modernisation envisaged as replacing the need for experts in some cases – and thus the responsibility of an editorial board of distinction, independence and manifest expertise.

I recognise, of course, that this is a bold, a daunting and, some may think, an impossible vision. But it is, I believe, achievable if we can only have the courage of our convictions. And with the Family Justice Observatory, supported by the Nuffield Foundation, we have the best – probably, truth be told, the only realistic – prospect of bringing it about.

Can I in concluding bring you back to earth with a bump? Today's programme, showcasing some of the latest research, and exploring a variety of recent innovations in practice, brilliantly illustrates what is being done and what, I suspect we can all agree, needs to be done. I hope it will merely be the first of an ongoing programme of Nuffield Family Justice Observatory Stakeholder Events.