

Challenges in the justice system and the contribution of empirical research

Nuffield Foundation: 75th Anniversary Lecture

Lady Hale, President of The Supreme Court

14 May 2018

First of all, let us all congratulate the Nuffield Foundation on its 75th anniversary and admire the vision of Lord Nuffield, who set it up in 1943 while World War Two was still raging, but people were beginning to hope that there might be a better world when it came to an end. One of most rewarding things I have ever done was to be a Trustee of the Foundation from 1987, when still a Law Commissioner, until 2002, when had I reached the Court of Appeal. What's not to like about giving away some-one else's money for good causes you believe in? One of the principal aims of the Foundation is 'the advancement of social well-being through scientific research and practical experiment'. The reason for having a lawyer Trustee, with a mixture of academic and practical experience, was that the Foundation had developed a special interest in access to justice, in family law and in child protection. At first, we pursued these through the ordinary grant giving process, but in 1995, the Foundation set up a specialist Child Protection and Family Law Committee, to give strength and focus to this aspect of the programme. Working with the expert members of that committee was a great privilege and taught me a good deal about socio-legal research and practical experiment. I am glad to see that, although it has reordered its programmes over the last 16 years since I left, the Foundation has retained its special interest in children and families and in the law in society.

The important feature then, and surely now, is that the Foundation set out to do two things: to understand the problems and then to try and find practical ways of solving them – hence the focus, not only on social research but also on social experiment. In appropriate cases, the hope was that good ideas, pump-primed with our funding, would eventually be taken over by the

public sector. One of the things which has changed since my day is that this is no longer such a realistic ambition.

There are two obvious examples from those earlier days of the Foundation making a difference to the justice system. First, it was the Foundation which made possible the work of the Legal Action Group in establishing social welfare law as a respectable area of law and a critical part of the justice system in the 1970s, by funding the start-up of the LAG Bulletin, now known as *Legal Action*.

Second, it was the Foundation which first put family mediation on the map, by making a series of grants from 1978 onwards for various forms of development support to National Family Mediation, the not-for-profit provider, and its predecessor bodies. At the same time, family mediation has probably seen or suffered more research than any other aspect of family law practice. This was all in the hope of stimulating public funding, which did eventually arrive with the Family Law Act 1996, and is still with us under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. What, perhaps, could not have been foreseen was that family mediation would struggle to survive if public funding was not available for the legal advice and help which necessarily goes with it, both in stimulating referrals and in putting the outcomes into effect. Despite that, family mediation remains a shining example of the symbiosis between empirical research and practical experiment which has been the hall-mark of the Foundation's activities.

The point, as I have said, is not only to understand what is going on but also to make a contribution to making things better – the advancement of social well-being. So what about today? What are the challenges facing the justice system and how can empirical research help us to meet them and make things better?

In fact, the challenges facing the justice system today are too numerous to mention, let alone address, and many of them are the responsibility of others, not the Foundation. But it is all too easy for those of us who work within the system to focus on the problems from our own point of view – how can we organise the work more efficiently, how can we make better use of the court estate, how can we make ends meet, how can we recruit enough judges, and so on. The great benefit of an organisation like Nuffield is that it can look at the challenges from the point of view of the people using or affected by the justice system – the people for whom it is designed rather than the people doing the designing.

One of the findings of Hazel Genn's ground-breaking study of how people set about solving their legal problems, in *Paths to Justice: what people do and think about going to law* (Hart Publishing, 1999), was that legal problems often come in clusters. One thing can lead to another. So let's imagine one family's story. It is totally fictitious but not, I think, completely unrealistic.

A family story

I come from the small town of Richmond in North Yorkshire, the market town for Swaledale, the most northerly of the Yorkshire dales, a beautiful place but with pockets of very real deprivation. It is next door to Catterick Garrison, the largest army base in the country. Imagine, therefore, a young woman married to a soldier who suffers from post-traumatic stress disorder as a result of his experiences in Iraq and Afghanistan. They have three young children. The young mother has no car and no computer, no wider family living nearby and little social support. The young man becomes violent towards her and she fears for the effect upon her children. The social workers tell her that if she cannot protect them from the effect of his violence, they will have to bring care proceedings.

What does she need? She needs a way to separate from her husband in the short term and in the longer term she needs a divorce. But first she needs legal advice. The nearest available solicitor is in Richmond. Does she qualify for legal aid? Yes, if she can provide evidence of violence – the categories used to be very restrictive but were expanded in January. Social services may be able to supply this – they must have something on which to base their threats. She needs either to persuade Richmondshire District Council to rehouse her and the children or to get an occupation order to exclude him from the home. In either event she needs a non-molestation order to prevent his harassing her and the children.

But where can she bring proceedings? The nearest magistrates' court is in Northallerton, 15 miles from Richmond with a very limited bus service. It is threatened with closure and the transfer of work to Harrogate, 40 miles from Richmond with no obvious way to get there, or Middlesbrough, which involves getting a bus to Darlington and a train from there. The nearest county court is also in Middlesbrough. If she does get legal aid for her anti-molestation application, her partner may not, and she may face being cross-examined by him in person. So she feels defeated by the problems of going for a non-molestation order.

Eventually, social services bring care proceedings, for which she has to go to Middlesbrough anyway. The local press want to report the proceedings, because they are particularly interested in the problems faced by soldiers traumatised by their wartime experiences.

Multiple challenges to the justice system are raised by this not-improbable story:

- (1) The challenge posed by LASPO and the restrictions on public funding for all kinds of legal services connected with private family law disputes. This is a matter for government and LASPO is under review, but we cannot realistically expect much more than a re-

arrangement of existing funds. Empirical research could clearly help policy-makers understand the real impact and how access to justice could best be improved.

- (2) The challenge posed by court closures, especially for people in rural areas, or without access to transport, or with caring responsibilities. This again is a matter for government. The better use of the court estate is one way of freeing up resources, not only better to maintain the estate which is left, but also to fund the modernisation programme, which includes on-line access to courts. Practical experiments could look at how best to do this for people without a computer or in remote areas where internet and mobile phone access is difficult.
- (3) I could have added other challenges to the story, such as how to challenge her sudden loss of her part time job, how to get to the benefits office or appeal against a refusal of benefits – there is a whole strand of Nuffield-funded activity in the field of administrative justice which I don't have time to explore.
- (4) Instead, I want to concentrate on three specific challenges to the family justice system which the story reveals, because they too are relevant to the current work of the Nuffield Foundation: (i) the explosion in care proceedings, (ii) the transparency agenda in family courts; and (iii) the family law reform agenda.

The explosion in care proceedings

Twice in 2016, the President of the Family Division drew attention to the 'looming crisis' in care proceedings (14th and 15th *View from President's Chambers* [2016] Family Law 1102 and 1227). In the four years from 2005-6 to 2008-9, the average annual number of new care cases was 6,500. There was a dramatic increase to 8,000 in 2009-10, which is generally agreed to have resulted

from the Baby P case. But the numbers have continued to increase significantly since then: there was a 26% increase over the five years from 2009-10 to 2014-15. The President commented that there were three possible causes: a rise in the incidence of child abuse and neglect, which he did not believe; or that local authorities are becoming more adept at spotting it; or that they are setting more demanding standards, lowering the threshold for intervention. That the cause was changes in local authority behaviour was supported by the wide variations in the rates of increase between different local authorities. He called for much more detailed information about the characteristics of the care cases themselves and about judicial deployment in care cases. But of course he also wanted research into the causes of these changes, including the effect of judicial decisions: the example he gave was the repeated and strongly expressed disapproval of the prolonged use of accommodation under section 20 of the Children Act 1989 when it was clear that if the parents asked for the children back this would be resisted.

The Nuffield Foundation has risen to the challenge with enthusiasm. The *Child Welfare Inequalities Project* is a large-scale project comparing intervention rates across the four parts of the United Kingdom, led by Professor Paul Bywaters. This has revealed the extent of the inequalities in child welfare intervention rates – children in the most deprived 10% of small neighbourhoods in England were over ten times more likely to be looked after or subject to child protection plans than children in the least deprived 10%. The link with deprivation is perhaps not surprising but the extent of the differential is surprising. However, although there is less intervention in less deprived areas, low deprivation local authorities were in fact intervening more when similar neighbourhoods were compared, suggesting that their threshold for intervention was lower. Also, the processes for managing cases were focussed more on risk than on understanding the link between poverty and family relationships and behaviours. It was not seen as social workers' role to try and help families maximise their income, manage debts, maintain stable accommodation or cope with the stresses of low and insecure incomes (*Briefing Paper 1: England*).

This same linkage between deprivation and rates of intervention was found in all four parts of the United Kingdom. However, the most deprived country, Northern Ireland, had overall the lowest rate of looked after children and the second lowest rate of child protection plans. Why is that? Factors which might explain it are less inequality, stronger communities and a greater emphasis on community based family support services (*Briefing Paper 2: UK Four Country Quantitative Comparison*).

These findings have already made a difference. For example, all families referred for child protection concerns in Northern Ireland are now offered a full benefits check and debt advice. And Ofsted has acknowledged that there is a relationship between deprivation and the ability of children's social care services to provide high quality services. It stands to reason that if you are rushed off your feet managing risk you are less likely to be able to tackle the family's welfare needs. Yet that sort of preventative approach was, of course, exactly what the Children Act 1989 was designed to achieve.

Two other studies are trying to find out more about why the dramatic increase has happened.

The Foundation is funding the Family Rights Group to conduct the *Care Crisis Review: a sector led review of the rise in applications for care orders and the number of children in care*. This is examining the reasons for the increase; identifying changes in local authority practice, court systems and national and local policies which could help *safely* stem the increase; and to do so in a way which retains focus on achieving the best outcomes for children and families and takes account of the current national economic, financial, legal and policy context. This is a tall order indeed in a relatively short time scale, but the idea is that those who are most intimately affected by the crisis – the professionals, the families and the children – should take the lead in identifying solutions.

So the strands of activity include consulting children and young people, as well as parents and kinship carers. Both the present and the future President of the Family Division are on the steering group.

Alongside the sector-led review is a rather longer-term and more conventional piece of empirical work led by Dr Lauren Devine, *Investigating the reasons for the Rise in Care Order Applications*. This will include an analysis of around 400 court and Cafcass case files for cases that went to court in the Bristol area, compared with 400 local authority case files for cases which did not progress to a care order application. This ought to reveal the factors which lead to some cases being taken to court and others not and how and why decisions are made. It should also be able to detect how things have changed over the years from 2011 to 2018 and the impact of policy developments upon decision-making.

The transparency agenda in family courts

In the early years of this century, there was growing pressure from some politicians and sections of the media that the family justice system should become more transparent. Family cases were generally held in private and only a small proportion of the judgments, usually those involving interesting points of law, were made public. This might be acceptable when purely private family matters were in issue, but how could it be justified when the state was intervening in family life, often in the most drastic way, by separating children from their parents and parents from their children, sometimes forever? Open justice is a cardinal principle of our legal system – as Lord Atkinson explained in the leading case of *Scott v Scott* [1913] AC 417, at 463:

“The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a

criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.’

In other words, open justice is there, not only to police the courts and the professionals who work in them, to ensure that they are doing their jobs properly, but also to reassure the public that they are doing so. Thus the corollary of open justice is the freedom to report what goes on.

The Family Procedure Rules 2010 provide that the general rule is that family cases are heard in private (FPR, rule 27.10). But they were changed in 2009 to provide that amongst those who must be allowed to attend are ‘duly accredited representatives of news gathering and reporting organisations’ (FPR rule 27.11(2)(f)). These can only be excluded in specified circumstances, which include where this is *necessary* in the interests of any child concerned in, or connected with, the proceedings. The related Practice Direction states that the rule should be applied on the basis that media representatives have a right to attend throughout the case unless the court decides to exclude them from all or part of the proceedings on the defined grounds.

However, a study by Dr Julia Brophy for the Children’s Commissioner of *The views of children and young people regarding media access to family courts* (11 Million, March 2010) found that a large majority of the children studied were opposed to having reporters in court. They felt that the proceedings address issues that are private. They concern events which are ‘painful, embarrassing and humiliating for children’. These are not the business of the media or of the general public. The children feared bullying at school and in their communities. Nearly all of them said that if they knew that a reporter might be in court they would be less willing to speak openly to an expert about ill-treatment or disputes about their care or about their own wishes and feelings. In other

words, this would inhibit them in the exercise of their rights under article 12 of the United Nations Convention on the Rights of the Child, to express their views freely in all matters affecting them and in particular to be heard in any judicial proceedings affecting them.

As the proceedings are still in private, there are restrictions on what can be published about them. However, in Practice Guidance issued in January 2014 (*Transparency in the Family Courts: Publication of Judgments: Practice Guidance*), the President of the Family Division encouraged the publication of judgments: in summary, always when publication would be in the public interest, but, in particular, when finding facts where serious allegations have been made, or when making final orders in care proceedings, or when making placement or adoption orders. This applied, not only to the High Court, but also to any court exercising powers in relation to children. This resulted in far more judgments, not only from the High Court, but also from county courts which carry a much greater burden of care cases, being made available online on the British and Irish Legal Information Institute's website, BAILII.

In July 2014, Julia Brophy and her colleagues followed up their earlier work with a study commissioned by the National Youth Advocacy Service and the Association of Lawyers for Children, *Safeguarding, Privacy and respect for Children and Young People and the Next Steps in Media Access to Family Courts*. This showed children's continued opposition to media attendance at hearings in the family courts and their concerns about the publication of judgments. They were really worried about 'jigsaw identification' – simple anonymization is not enough. In these days of the internet and social media, it is particularly easy for tech-savvy young people to find out who is involved in a reported case, by joining up the dots. They were also worried about how young people might feel on reading about their case in a newspaper (and shocked by the gory details revealed in the judgments reported). They felt that there were better ways of improving public knowledge about the family courts and other avenues in which to explore allegations of

unfair treatment. The children's interests were not identical to their parents', who might want to exploit the media for their own purposes. Above all, the children wanted the courts to consult them and to ascertain the views, interests and long-term welfare implications for any child involved of allowing media access to the court.

After several meetings between Dr Brophy, the NYAS Young People's Participation Group and the President, and with the help of an advisory group chaired by Lord Justice McFarlane, she was asked to draft some Judicial Guidance on *Anonymisation and Avoidance of the Identification of Children and The Treatment of Explicit Descriptions of the Sexual Abuse of Children in Judgments intended for the Public Arena*. This was funded by the Nuffield Foundation, published in 2016 and has received considerable, although not universal support from the judiciary. It contains a detailed list of do's and don'ts to avoid inadvertent and jigsaw identification. It also gives guidance on how to abridge judgments to avoid explicit descriptions of child sexual abuse being placed on the internet for all to see.

The Nuffield Foundation has also funded research by Julie Doughty and others, into *Transparency through publication of family court judgments* (published by Cardiff University in 2017). This found wide variations in practice from court to court. Overall the cases available on BAILII represented judicial and professional decisions made in only some geographical areas. Analysis of the press coverage over the same period showed that allegations of secrecy in family cases had reduced, but there was still evidence of cherry picking facts and misleading headlines. The researchers felt that the 2014 guidance should be reviewed. Instead a scheme should be piloted which required the publication of a representative range of cases from every judge and every court, supported by adequate training and administrative assistance in safe anonymization, the

removal of identifying details and focusing on issues of genuine public interest. As far as I know this has not yet happened.

But the moral of this particular story is that empirical research into how the children and young people who are at the centre of family proceedings feel about the publication of their cases has made the grown-ups in charge think again.

The Family Law reform agenda

Family law reform is much in the news once more, with a five point plan vigorously promoted by The Times newspaper; Tim Loughton's Bill extending civil partnerships to opposite sex couples currently before the House of Commons; and Baroness Deech's bill on nuptial agreements and financial remedies currently before the House of Lords. Number one on The Times agenda, but not (at least yet) before Parliament is no-fault divorce. Here there have been two extremely important recent reports funded by the Nuffield Foundation and led by Professor Liz Trinder.

The first, *Finding Fault? Divorce Law and Practice in England and Wales* (Nuffield Foundation, 2017) supported all the criticisms of the present law which the Law Commission had made in 1990 (*Report on the Ground for Divorce*, Law Com No 192): it is confusing and misleading; it is discriminatory and unjust; it distorts the parties' bargaining positions; it provokes unnecessary hostility and bitterness; it does nothing to help save the marriage; and it can make things worse for the children. Indeed, *Finding Fault?* found that, if anything, later developments had made matters worse. 'Divorce petitions are best viewed as a narrative produced to secure a legal divorce' (p 12). The court's scrutiny is thorough but primarily an administrative process, not a judicial inquiry into the truth, and is no longer done by judges. The threshold of what will be

accepted as behaviour if the petition is not defended has dropped. The courts take the pragmatic stance that if one party has decided that the marriage is over then that is the reality. But unrepresented parties may not be let into the secret. Even lawyers may not know how low the threshold is in practice – and it may vary from place to place. The contents of the petition can trigger or exacerbate family conflict entirely unnecessarily. Respondents are encouraged by their lawyers to ‘suck it up’ even though the allegations are unfair. There is no evidence at all that having to give a reason for the breakdown makes people think twice. The decision to divorce is not taken lightly, but this is not because of need to prove one of the five facts.

These things are not known to the general public unless they have had some personal experience of the system. So it is not surprising that the researchers found a mismatch between the results of their general public opinion survey, which supported the retention of fault, and their more detailed study of people who had experienced divorce, who did not support it (p 169).

This has now been followed by *No Contest: Defended Divorce in England & Wales* (Nuffield Foundation, 2018). This found that most defences are not attempts to save the marriage, but quarrels about who should be blamed, generally triggered by allegations about behaviour. There were four primary drivers: money (wanting to protect an inheritance or to avoid reaching a financial settlement); mental health (being ‘in denial’ about the end of the marriage or having a dogmatic or obsessive personality); power and control (including abusive control); and religion and culture. Claims that the marriage is saveable either reflect tactical considerations or are wholly unrealistic. But only a few of the people who might want to defend the allegations made in a divorce petition actually do so: about one third of respondents in behaviour cases deny the allegations but do not defend. This is because of the emotional and financial cost of defending, and the discouragement they usually face from family lawyers and from the courts. Even those which are initially fought are eventually settled, with the active encouragement of lawyers and the

courts: the petition may be amended to remove the more contentious allegations; or the case may proceed on undefended cross petitions.

The researchers conclude (p 81):

‘This analysis of defended cases has only strengthened the case for law reform to remove fault. . . . the majority of disputes and defences are caused and/or at least facilitated by the law itself. Without allegations of behaviour it is likely that most defences would not occur. And having created a problem, it is clear that the intended solution . . . may only compound the difficulties. Both defence, as well as a frustration with the inability to defend, could result in additional conflict and perceptions of unfairness between the parties, whilst doing nothing to establish the truth of any claims or to protect the vulnerable.’

The *Finding Fault?* report canvassed four options. No change was rejected because it was not sustainable. A stricter interpretation of the current law was also rejected because it was not achievable. The Scottish solution – reducing the periods of separation permitting a divorce without alleging ‘fault’ to one year with consent and two years without - was rejected as unlikely to reduce the use of fault. This is because of the speed with which an adultery or behaviour decree can be got south of border and because of the culture here which has got so used to using adultery or behaviour to achieve a quick result. Thus the report proposes a notification system along the similar lines to the Law Commission’s 1990 scheme but with a waiting period of only six months.

Reform of the ground for divorce is not included in either of the Bills currently before Parliament, but devising a Bill to give effect to these proposals would be a natural extension to the project.

Before leaving this subject, I must emphasise that it is not the role of the courts to reform the law, merely to interpret and apply the law which we do have. Later this week, we shall be considering the wife's appeal in *Owens v Owens* [2017] EWCA Civ 182, [2017] 4 WLR 74, a rare example of the court rejecting a behaviour petition on the ground that the husband's behaviour was not objectively bad enough to make it unreasonable for the wife to live with him. This is definitely not a vehicle for introducing the sort of reforms proposed by Law Commission, by Resolution, or by Professor Trinder and her team. For that reason, we have refused applications to intervene by well-meaning organisations who wanted to explain what was wrong with the present law. What the current law is and what the law ought to be are quite separate matters.

The Nuffield Family Justice Observatory

There is one final Nuffield project which I must mention. We have known for a very long time the importance of inter-disciplinary work in the family justice system. Family justice is not like the civil and criminal justice systems: rather than looking to punish or redress what had happened in the past, it is looking to optimise outcomes for the future, particularly for the children involved. So all the people professionally involved in the system need to know about research which is relevant, either to the particular case before them, or to the working of the system as a whole, and how to make the best use of it. There is also a vast amount of administrative data, the analysis of which which could make an important contribution to our understanding of what is going on. So the Foundation has decided to 'incubate' the *Nuffield*

Family Justice Observatory. The aim is to support the best possible decisions for children by improving the use of data and research evidence in the family justice system in England and Wales'. The idea is to identify where empirical evidence can have the most impact, how to integrate it with other knowledge to ensure that it is relevant and useful, and how the family justice community can be motivated and enabled to use the evidence available to them. As Sir Ernest Ryder, the current lawyer Trustee, explains (in his Foreword to *The Nuffield Family Justice Observatory for England and Wales: Making it Happen* (Nuffield Foundation 2018), by Professor Karen Broadhurst and her team:

‘The Observatory will work with practitioners to identify issues where empirical evidence may help guide practice, and to provide reliable summaries of what is (and isn’t) known from research. It will ensure that knowledge from research is combined with insights from people working in or using the family justice system, so that this collective wisdom can be used to develop and update guidance and other tools.’

Conclusion

This is only a small sample, concentrating on a particular area, of the ways in which empirical research can help to meet the challenges in the justice system. There are at least three levels: helping us to make better decisions in individual cases; helping us to devise better procedures and practices for handling cases generally; and helping us to decide how the law might be improved.

There is nothing problematic about using empirical findings to help the lawmakers decide what the law should be: those devising and promoting law reform proposals can make use of whatever reliable information they see fit when trying to work out how the law might be improved.

Lawmakers may choose to give greater weight to other considerations, such as the results of their much less scientific consultations or their impressions of the weight of public opinion, but equally they can choose to give more weight to the science.

Nor is there anything inherently problematic about those in charge of managing the system making use of empirical findings, including administrative data, to help them to devise the best possible processes for handling situations and cases. In fact, these are the people who should be most alive to the weight of scientific evidence about what is most likely to work well.

But we have often struggled with how empirical findings can be incorporated into our decision-making in individual cases. It is acceptable, indeed expected, that expert witnesses will make use of the relevant science when offering their opinions to the court. There is rather less acceptance of other professionals, such as social workers, doing so. And in either case, the empirical evidence has to be married with clinical or 'hands-on' professional experience and judgment. But it is much more difficult for the other people in the system, and in particular perhaps the lawyers and the judges, to know what use they should be making of this material. That is why something like the Observatory should be so valuable.

In the end, we are all trying our best to get the best results we can, in the face of some formidable difficulties. I hope that I have convinced you that empirical research is an important part of that – but perhaps you didn't need convincing