

Public Family Law cases in the context of Miscarriages of Justice

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Abstract:

Public family law decisions in English courts are ostensibly made to serve the best interests of the child, whose interests are given paramountcy under the Children Act 1989. Hence, there is little recognition of the capacity for decisions to constitute miscarriages of justice. This issue is of concern as research suggests that some family court decisions can have devastating long lasting consequences. This article considers the reasons why the ‘best interests’ narrative has dominated discussion in this area and asks, by considering the process of public family court decisions, whether less restrictive thinking is indicated. It is concluded that the public family law process lacks the checks and balances of the criminal justice system in its decision making, however the consequences of a decision, although made on a lower standard than that of a criminal court, are as severe for the child, the parents, wider family and for society generally if decisions are flawed but not recognised and addressed in the context of a miscarriage of justice.

Key words:

Child protection, family courts, best interests, public family law, miscarriages of justice.

Introduction

The focus of public family proceedings in English courts is on the best interests of the child as opposed to a finding of ‘guilty’ or ‘not guilty’ in respect of parental conduct. The outcomes of

public family law proceedings where s.31 Children Act 1989 applications to take children into state care are made by local authorities and are consequently not generally considered to be capable of amounting to miscarriages of justice in the same manner ascribed to cases in the criminal justice system. Despite this, it is well recognised that the outcome of public family law cases can result in decisions that cause harm (*D v East Berkshire Community NHS Trust & Another; MAK & Another v Dewsbury Healthcare NHS Trust; RK & Another v Oldham NHS Trust & Another* [2003] EWCA Civ 1151; Williams, 2005:196-203). This article explains the reasons why public family law cases form part of the welfare narrative as opposed to the justice narrative, concluding that such decisions should be considered in the context of both narratives.

The state via a local authority application (and the NSPCC as an ‘authorised person’, although this is rarely invoked) is the only body which can make s.31 applications. The effect of a successful s.31 application is to place the child with respect to whom the application is made in the care of a designated local authority (s.31(1)(a) Children Act 1989) or under the supervision of a designated local authority (s.31(1)(b) Children Act 1989). The grounds on which the court may consider that it is in the best interests of a child to be placed into the care of, or under the supervision of, a local authority are that it is satisfied:

‘(a) that the child concerned is suffering, or is likely to suffer, significant harm;
and

(b) that the harm, or likelihood of harm, is attributable to—

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child’s being beyond parental control.’

(Ss. 31(2)(a) and (b) Children Act 1989)

The local authority’s decision to take action is made following an assessment designed primarily to establish whether the family should receive support services under the provision of s.17. This is conducted by the local authority following referral of a child to a local authority Children’s Services department. This triggers a protracted and comprehensive family assessment covering every aspect of a family’s private life (Department of Health, 2000:89; HM Government 2013:19-20). The boundaries of consent are unclear (see for example Radford, 2010:167) particularly as the framework for assessment was originally intended to be used to consensually assess children’s needs for service provision as opposed to suspected child abuse. A family may find itself consenting to assessment on the understanding that they may receive supportive services as a result, but by giving this consent they enable a fishing expedition to be carried out by the local authority leaving them vulnerable to a s.31 application being made. Families are unlikely to be legally represented during this process.

Unless there is an alleged emergency and the local authority applies for an Emergency Protection Order under s.44, s.31, applications are brought following assessment. Ss. 17 and/or 47 set out the duties of a local authority in relation to children ‘in need of services’ (s. 17) or ‘at risk of significant harm’ (s. 47). Following assessment, decisions will be made by the local authority about what action to take. This could range from a decision to take no further action, the provision of services intended to support the child, a decision by the local authority to make further enquiries, or the formation of a child protection plan. If none of those outcomes are

considered adequate a local authority can make an application to the court to for an order invoking the most coercive level of intervention; non-rehabilitative family separation, which in practice, will often be permanent. S.31 is the mechanism by which the local authority implements this stage by applying for a court order to remove a child into the care of the local authority. If the application is successful the child becomes ‘looked after’ by the local authority.

To decide a s.31 application the court is heavily reliant on the evidence presented by the local authority in reports, and on information it has collected to complete the family assessment. Most evidence adduced in proceedings is likely to be expert opinion evidence called by the state:

‘Many, if not all, family cases involving children feature expert opinion evidence’ (Per Butler-Sloss in *Re M & R* [1996] 4 All ER 239: para. 249C)

The evidence on which expert opinion is based will have been collected by the local authority during the assessment process, and in their further enquiries once a s.31 application was contemplated. Much of this evidence will be the findings of the assessment itself but it will also include the observations and opinions drawn from specialist assessment that the local authority may have asked a family to undertake. If a family refuse they can be compelled to produce the child for assessment under the provisions of a s.43 Children Act 1989 Order. Failure to comply with assessment may, in addition to an application under s.43, trigger an application under s.44 for an Emergency Protection Order. Under s.43(3) the application can also be treated as an Emergency Protection Order application. The effect of these sections and the use of assessment as a gateway to state services for children leaves the question unclear whether free and informed consent is able to be given for assessment given the wide and potentially draconian consequences.

The Miscarriages of Justice narrative

Miscarriages of justice are generally associated with the criminal justice system. However public family court litigation where a s.31 care order application is made following child protection investigations has given rise to jurisprudence describing some of these cases as amounting to a miscarriage of justice. In *Oldham Metropolitan Borough Council v GW, PW, KPW (a child) (by his children's guardian, Jacqueline Coultridge)* [2007] EWHC 136 (Fam) Mr Justice Ryder reiterated Munby J.’s comments in *Re B (a child) (Disclosure)* [2004] 2FLR 142, explaining that:

‘...it would be complacent of us to assume that miscarriages of justice do not occur in the family justice system.’ (Per Mr Justice Ryder, [2007] EWHC 136: para. 75)

First instance decided cases in the family courts are subject to reporting restrictions stifling public and academic debate and restricting publicity. The rationale is to protect children but this has been subject to robust criticism and media debate on the basis that secrecy stifles public understanding of the possibility of miscarriages of justices occurring in the public family law cases (Cavendish, 2009). In *Re B*, Munby J. explained the importance of media and public debate in relation to such cases:

‘we must be vigilant to guard against the risks and we must have the humility to recognise and to acknowledge the public debate, and the jealous vigilance of an informed media, have an important role to play in exposing past miscarriages of

justice and in preventing possible future miscarriages of justice ... We cannot afford to proceed on the blinkered assumption that there have been no miscarriages of justice in the Family Justice system ... open and public debate in the media is essential.' (Munby J., 2004: para. 101)

The concept of a miscarriage of justice is restricted even in the criminal justice system as the term usually refers to criminal justice system cases where defendants are eligible for state compensation under the provisions of s. 133 Criminal Justice Act 1988. The dominance of the narrow, statutory meaning has established a heuristic that enables a select group of unfair decisions to be considered capable of amounting to a miscarriage of justice: by creating narrow parameters the focus is no longer upon whether the system accurately adjudicates in relation to 'truth' or 'falsity' but on whether a case falls into the category of those where a flawed decision enables the ability to claim a remedy.

The restriction of the statutory definition to refer to a limited number of wrongful convictions eligible for financial remedy can be argued to fulfil the need of the state to restrict the number of citizens able to claim unfair treatment within the criminal justice system as much as a semantic distinction. For example Greer notes that a wider definition increases the number of cases recognised as miscarriages of justice (Greer, 1994) with the consequence that evaluation of the efficiency of the system is lower if a wider class of cases are taken into account.

Unsurprisingly, the narrow approach has been criticised leaving the meaning of a 'miscarriage of justice' distinct from the meaning of 'conviction of the innocent' (Naughton, 2007; Taylor and Wood in Walker and Starmer (eds), 1999). There is a large body of literature identifying this distinction and critiquing the adversarial justice system as more pragmatic than concerned with 'truth'. Lauden, for example, makes this distinction by explaining:

'...material innocence is an idle wheel in most of the machinery of justice.'
(Lauden, 2006:98)

The nexus of this critique has been to argue that the attempt of state discourse to define the parameters of miscarriages of justice is artificial and unsatisfactory. The state, however, considers the reason for the need to make a distinction between miscarriages of justice and conviction of the innocent is inherent in the efficient function of the criminal justice system. McBarnett, for example, observes that:

'The justification lies not in any idealism that 'the truth, the whole truth and nothing but the truth' results but in pragmatics.' (McBarnett, 1981:12)

The exclusion of certain categories of cases from the narrative has a number of detrimental effects. The narrow meaning excludes public family law cases brought by the state and consequently there is no emphasis on providing a balance of equal rights for parents involved in such proceedings, or on providing adequate state remedy for decisions in public family law cases that are wrong, or cause harm. Discussions on remedies in relation to such cases tend to be restricted to a description of the avenues available to unsatisfied parties but do not generally take a directly critical approach (for example see Harris-Short and Miles, 2007:899-984).

As the miscarriage of justice narrative within criminal justice discourse has evolved with wide and narrow meanings, it is consequently used inside and outside the legal narrative to mean different things. Discourse from sociology, zemiatics and philosophy tend to adhere to the wider definition whereas legal discourse keeps the definition conceptually narrow. Its wide meaning refers to cases where an unjust result has occurred leading to sanctions against

innocent citizens. The wider meaning, locating inherently unfair action against citizens by the state within miscarriage of justice discourse extends beyond the criminal justice system and could include public family law cases. Challenging the restrictive discourse recognising only cases which occur in the criminal justice system, more specifically cases eligible for state compensation. This excludes the type of case *Munby J.* mentioned *obiter* in *Re B* (2004).

Comparing criminal and public family processes

The welfare narrative surrounding public family law decisions focusses on how courts can best establish what is in the best interests of the child. To reach a decision about what is best, courts look at what has happened to trigger the state's involvement, the investigation the local authority has undertaken, the reasons for the local authority's decision to make a s.31 application and expert opinion evidence. This is reflected in the wording of the Children Act 1989 which requires that:

‘(1) When a court determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.’

(s.1(1) Children Act 1989).

Underpinning the decision to instigate a s.31 application will generally be an accusation of parental maltreatment or insufficiency, forming the original referral to a local authority. Once the process of assessment starts there are significant differences between the investigation of criminal offences and the investigation of accusations of child maltreatment. In the criminal process the issues surrounding the tensions between private rights of suspects and the powers of the state to investigate and prosecute crime are well rehearsed. In public family law cases these arguments have little prominence as accused parents at risk of having their children removed are not considered to be in an analogous position. The purpose of s.31 proceedings is not to establish ‘guilt’ and a conviction against a parent; and the outcome of the s.31 application will be to decide whether to remove the child from the family home as opposed to parental punishment. Consequently many of the safeguards embedded within criminal procedure, including a very high standard of proof at trial are absent or reduced in public family law cases.

S.31 cases occupy a unique position. Similarly to criminal cases, actions are initiated by the state. However, public family law cases are heard in the family courts where the standard of proof requires the state to discharge its burden on the balance of probabilities rather than beyond reasonable doubt. Experts in public family law cases give evidence to assist judges, including assisting in relation to the ultimate issue which the court is there to decide:

‘... when the judge is of the opinion that the witness' expertise is still required to assist him to answer the ultimate questions (including, where appropriate, credibility) then the judge can safely and gratefully rely on such evidence, while never losing sight of the fact that the final decision is for him.’ (Per Butler-Sloss in *Re M & R* [1996] 4 All ER 239: para. 254B);

Before bringing an action under s.31 the state has a statutory right under s.47 to interfere into private family life to collect evidence. The evidence gathering stage includes subjective observations undertaken by social workers in the family home. Families are very unlikely to be legally helped at this stage. Social workers in this context have wider powers than those afforded to the police but families have little power to resist. Police powers are regulated by the Police and Criminal Evidence Act 1984 but there is no analogous Code of Conduct regulating family assessment. Assessments are carried out without recording, witnesses or legal representation and include trawling family medical records and other available state records. Despite warnings that non-consensual access may be unlawful, or at best on the borderlines of what is permitted under the provisions of the Data Protection Act 1998 (Anderson *et al* 2006: 95) the data subject's consent can be dispensed with as long as a 'statutory gateway' under Schedule II of the Data Protection Act 1998 is identified. These methods of dispensing with consent were identified by Anderson *et al* to be potentially unlawful because they breach European Convention law (Anderson *et al* 2006:108).

If there is a consensus with the child and the parents that the events triggering the s.31 proceedings have occurred, the situation is less problematic than a situation where events and conclusions drawn from them are disputed. Disputed facts and opinions highlight the inequalities inherent within the process which, when compared with the criminal process, leave parents and children (if the children do not want the proceedings) in a very difficult position. Since decisions taken on a standard of the balance of probabilities have a lower burden of proof than those based on a standard of beyond reasonable doubt, they have a greater likelihood of being based on factual inaccuracy, breach of process and other forms of error. A defendant in the criminal process is also in a very difficult position, but has the protection of a number of safeguards, controls and rights for which there is no analogy in relation to public family law.

The reasons for the differences in approach between criminal and public family law cases refer to a policy reluctance to acknowledge that parents accused of child abuse have an analogous situation to a defendant in a criminal trial. Consequently for practical purposes the parent is simply not placed in an analogous position: a parent is not the defendant in cases arising from 'child protection' investigations and the welfare narrative construes the removal of the child from the family as taking action to protect the child rather than a sanction against either the child or the parent. When the rights and protections of parents in public family law proceedings are compared with those of a criminal defendant the vulnerability of parents is evident. The reluctance for this to be acknowledged may stem from a fear that any attempt to consider or address the position of parents accused of maltreatment but not specifically on trial in a criminal court for these events may erode the ability of courts to remove children from parents if it is considered to be in a child's best interests. This highlights the obvious tension between the belief that the state should take responsibility for protecting children from perceived parental maltreatment and the ideology of citizen's rights within justice systems, identified by Packer as regard for due process. (Packer, 1968).

State surveillance of the family

Child welfare ideology is embedded in the law, policy and practice surrounding the state's responsibility towards children. State practices of child protection emerged from the complex reasons why children historically suffered harm and maltreatment, and the emerging discourse of children's rights. Despite some variation of opinion in the extent to which the state should be involved, particularly in relation to coercive interventions, a consensus indicating a general principle of state duty emerged. For example Fortin notes that:

‘Indeed, although commentators have often approached this field of thought from a variety of viewpoints, they have all identified common areas of concern, principally surrounding how to identify children’s rights, how to balance one set of rights against another in the event of conflict between them, and how to mediate between children’s rights and those of adults’. (Fortin, 1998:3)

An underpinning child welfare ideology emerged in Western Europe of citizens’ holding a social contract with the state, and this model extended to parents in relation to a ‘contract’ to care for their children. In the late 1970s Donzelot examined the notion of social contract in relation to family welfare ideology by explaining that by having children, parents were in an implied contract with the state. If they breached that contract the state would intervene to correct parental behaviours. Parents could only remove themselves from this state tutelage when they could demonstrate their behaviours have changed. The state would withdraw as long as parents continued to uphold their obligations under their contract (Donzelot, 1979). If parents did not change their behaviours then increasingly coercive action would be taken, including action to remove children from their families.

Despite a common ideology and similarities of approach, the Western European response differs to the response adopted in England. The Western European model has a larger emphasis on universal provision of services for families. Resources are available to a higher number of families at an earlier stage than in England. The English model, which is also adopted in North America, New Zealand and Australia is characterised as being bureaucratic, investigative and adversarial, separating child protection processes from family support services (Hill, Stafford and Lister (eds.) 2002). This intensely adversarial position between parents and social workers puts parents in a difficult position. With no legal representation a parent can be construed as failing to ‘work with’ social workers if they disagree their care is substandard. This failure can trigger s.31 proceedings where parents have little realistic chance of rebutting the state’s case. (Per Mr Justice Ryder in *Oldham Metropolitan Borough Council v GW, PW, KPW (a child) (by his children's guardian, Jacqueline Coultridge)* [2007] EWHC 136 (Fam), para 39))

The Children Act 1989 covers virtually all areas of law relating to the care and upbringing of children, together with the social services to be made available to families. It placed the notion of parental responsibility on a statutory footing together with the means of policing the responsibility. S.47 enacted the state duty to collect evidence in relation to suspected child maltreatment and instigate litigation on behalf of children to remove them from families once established. Termed ‘child protection’, the statutory authority is laid out in *Working Together to Safeguard Children - A guide to inter-agency working to safeguard and promote the welfare of children* (the latest version is HM Government, March 2013).

Surprisingly, early analysis concluded the Children Act 1989 protected family autonomy. Allsop’s summarised that the Act:

‘..realigns the balance between families and the state so as to protect families from unwarranted state interference...’(Allsop, 1990:41-46).

Despite this interpretation there were already suggestions of serious problems inherent within the state’s attempts to protect children from abuse before the Act was in force, particularly when expert opinion evidence was relied upon. During the period of its enactment, the result of the *Report of the Inquiry into Child Abuse in Cleveland in 1987* by Butler-Sloss LJ was published (DHSS, 1988). The Report was produced following the Secretary of State for Social

Services' order for a public inquiry, made on July 9th 1987 pursuant to Section 84 National Health Service Act 1977 and Section 76 Child Care Act 1980. Its remit was to review what had happened to families in Cleveland following a doctor's opinion that many children had been sexually abused. These children were removed from their families before the state concurred that no abuse had occurred in the majority of cases. This major miscarriage of justice, however, did not provoke either debate or restriction of state power. It was considered an isolated and unfortunate situation, created mainly by a problem with the use of expert opinion, rather than a warning of systemic failure likely to result in repeated miscarriages of justice.

Interestingly, one of the Report's findings was that state intervention could itself be damaging to families (DHSS, 1988: 32 paras. 2.1-2.65). The Report also criticised the use of unfounded medical expert testimony that was the foundation of the decisions to remove the children from their families. This testimony concerned the use of unsupported medical theory adduced as objectively verifiable fact. The Report concluded that steps should be taken to ensure this problem would not reoccur.

In the early millennium an analogous situation arose following the increase over the last two decades of criminal prosecutions founded on medical opinion in relation to discrete areas of alleged child maltreatment. For example the controversial syndrome 'Munchausen's syndrome by proxy', now referred to as 'FII' (fabricated or induced illness) was argued by the prosecution in murder prosecutions of mothers where the child's death was initially thought to have been a sudden infant death syndrome death (SIDS). These cases included *R. v Cannings (Angela)* ([2004] 1 All E.R. 725); and *R. v Clark (Sally) (No.1)* (2000 WL 1421196); *R. v Clark (Sally) (No.2)* ([2003] EWCA Crim 1020). Another, similar line of cases involving prosecutions for murder involved mothers accused of shaking their babies. These cases invoked expert evidence in relation to the equally controversial shaken baby syndrome (SBS). Some of these cases were considered by the Law Commission in their Review (*Harris, Rock, Cherry & Faulder* ([2005] EWCA Crim 1980).

The Law Commission evaluated these cases and concluded that a common issue arose: once expert opinion has been given, the jury is likely to defer to that opinion regardless of its factual foundation; a conviction is therefore almost inevitable once expert opinion has been given. The position is no different in public family law cases where the same issue was also of concern. The difference in these cases, however, is the different status of parents, the lower standard of proof and the decision based on the best interests of the child as opposed to forensic analysis of what has occurred. The consequence of the unsatisfactory position in family cases in relation to expert evidence was described by Mr Justice Ryder in the following terms:

'An 'innocent' parent caught in the glare of accusation and without knowledge or support is in a difficult position. Their attempts to find anything that might explain what had happened will inevitably have had something of the character of desperation if not hopeless medical conjecture. There is little that even an experienced judge can do other than to remind himself or herself of this possibility when considering the credibility of their evidence in this difficult context' (Per Mr Justice Ryder in *Oldham Metropolitan Borough Council v GW, PW, KPW (a child) (by his children's guardian, Jacqueline Coultridge)* [2007] EWHC 136 (Fam), para 39)

In addition to the incredibly difficult position in which parents find themselves in such cases, the use of terminology such as 'innocent parent' is analogous with terminology used in the

criminal justice system, indicating family court judges acknowledge the parallels in the position of parents compared with the defendant in a criminal trial.

This analysis of how expert evidence is received explains the danger of a drift towards ‘trial by experts’ in public family law cases. This was one issue the Law Commission had concluded was problematic in relation to the criminal justice system where ‘jury deference’ was identified as a contributing factor to miscarriages of justice following flawed expert evidence (Law Commission Consultation Paper No 190 (2009): 9, para. 2.6; Law Commission (Law Com No 325) (March 2011): 170). Given the comments made in *Re M & R* (Per Butler-Sloss in *Re M & R* [1996] 4 All ER 239: para. 254B) about the extent to which public family law cases rely on expert evidence this issue alone encapsulates why it is important that flawed public family law decisions are also understood as capable of amounting to miscarriages of justice. In the family courts, parents are not the defendants and are thus unable to rely on a robust criminal appeal process where they are recognised as potential victims of a miscarriage of justice. They face the decision of whether their child is removed from them being made on a welfare criterion which is a broader consideration than whether or not they have carried out the acts or omissions of which they are accused. In addition, they face the decision concerning the child’s best interests being made to a much lower standard of proof than that required in a criminal trial. The use of expert evidence in such cases, including the use of expert evidence to assist with the ultimate issue which the court has to decide (Per Butler-Sloss LJ in *Re M & R* [1996] 4 All ER 239: para. 254B) in conjunction with the weight placed upon complex medical evidence has made it extremely difficult to see how a parent, once accused, can avoid an almost inevitable conclusion. A further problem is that if the judge in public family law proceedings considers that it is not germane to the proceedings to establish certain facts in order to ascertain what is in the best interests of the child, parents may find themselves unable to call their own experts on matters amounting to accusations against them. Parents may simply be unable to persuade the court it is relevant that they should be given the opportunity to rebut accusations.

The successful criminal appeals of mothers accused of killing their children as a result of the prosecution’s reliance on flawed expert evidence (*R v Cannings (Angela)* [2004] 1 All ER 725; *R v Clark (Sally) (No.1)* 2000 WL 1421196; *R. v Clark (Sally) (No.2)* [2003] EWCA Crim 1020) prompted the recent Law Commission Consultation Paper *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales: A New Approach to the Determination of Evidentiary Reliability* (No 190, 2009) and the final Report *Expert Evidence in Criminal Proceedings in England and Wales* (Law Commission (Law Com No 325), 21st March 2011) which included recommendations for statutory change to the rules surrounding expert evidence in the criminal justice system. This has recently been rejected by the Government primarily for fiscal reasons (Ministry of Justice, 21st November 2013). All these cases concerned alleged parental maltreatment of children, but the critical difference is that the litigation took place in the criminal courts as opposed to the family courts. This placed the mothers in a forum where decisions could be successfully challenged in the Court of Appeal (see: *R v Cannings (Angela)* [2004] 1 All ER 725; *R v Clark (Sally) (No.1)* 2000 WL 1421196; *R. v Clark (Sally) (No.2)* [2003] EWCA Crim 1020; *R v Patel (Trupti)* [2003] (unreported)).

There is an interesting difference in the government’s response to the problems of flawed expert opinion testimony relating to child abuse. The welfare response in the 1980s was a public inquiry; the criminal justice response in the millennium was a Law Commission Review. Of the two, the Law Commission Review achieved a lower public profile as there has been little publicity over the Review and its proposed changes, or of the government’s

response. By contrast the *Report of the Inquiry into Child Abuse in Cleveland in 1987* (DHSS, 1988) attracted a high profile critical media response.

The welfare narrative promotes a legitimate fear of ‘getting it wrong’ in relation to cases involving suspected child abuse. This fear is compounded by the state’s response to the high profile tragedies involving child fatalities following social service involvement, generally leading to public inquiries, for example *The Victoria Climbié Inquiry Report* (Lord Laming, 2003) and *The Protection of Children in England: A Progress Report* (Lord Laming, 2009). This fear has contributed to a reliance on expert evidence in public family law cases, much of which is produced by the local authority during their investigation of the family, including extensive access to otherwise confidential medical and social data. The local authority not only conducts the investigation using its own experts, it relies on other state agencies to support it to help it build its case. The unrepresented parent may not be aware of the extent of the information collected against them or of the implications of consenting to assessment. There is no opportunity for the parent to instruct their own experts at this stage. Once in court there is judicial reliance on expert opinion evidence. Butler Sloss L.J. explained that practically all family court cases involving children feature such evidence:

‘Many, if not all, family cases involving children feature expert opinion evidence. ... In cases involving children, expert medical and psychiatric evidence from paediatricians and allied disciplines is often quite indispensable to the Court. As Parker L.C.J. said in *Director of Public Prosecutions v A & BC Chewing Gum Ltd.* [1968] 1 Q.B. 159 at 165A, when dealing with children, the court needs ‘all the help it can get.’ (Per Butler Sloss in *Re M & R* [1996] 4 All ER 239: paras. 249C-249E)

This raises a further issue that could lead to miscarriages of justice in public family court decisions. In the mid-1980s the Crown Prosecution Service was formed following concerns about the consistency of police decisions to prosecute, and the undesirability of the police having power to both investigate and deciding to prosecute (The Attorney General, June 1998: para.1). The CPS became operational in 1986. The police are now the body charged with the investigatory role, and the CPS, led by the Director of Public Prosecutions decides whom to prosecute. In contrast, public family law decisions follow a different and partisan process of investigation and decision making: investigations and decisions to litigate are brought from within the same organisation (the local authority) so a case can be brought to court without an external body’s scrutiny, or a Code of Conduct analogous to PACE to regulate how investigations are carried out. If the judiciary are reliant upon experts’ views to help them to form their views on what is best for a child it does not seem unreasonable to conclude that a judge would need cogent reasons to reject the state’s case, if only out of deference to the welfare narrative that it is better to be over cautious when dealing with issues concerning children. This leaves the state in an extremely powerful position.

Under the doctrine of separation of powers the final arbiter should, and indeed must, be the judiciary. However, cases following ‘child protection’ investigations are heavily reliant on the state and state experts, including on matters of credibility and the ultimate issue. The process is so heavily controlled by the state, its dominance leaves parents more vulnerable in the process than if they were faced with a criminal trial. The state dominates the decision making process throughout because there is little in the way of separation of powers or protection of the innocent.

The position of parents and EU compatibility

In public family law cases the local authority is purportedly championing the best interests of the child whose interests are ‘paramount’ (under Section 1(1) Children Act 1989). Parents’ interests are subordinate, and interestingly so are the child’s views unless they are synonymous with those of the state. Children cannot stop the state acting ‘in their best interests’ and although they can refuse to comply with a s.43 order for assessment (s.43(8) Children Act 1989) they cannot prevent the local authority from making an application under s.31.

On the face of it, paramountcy in favour of children over adults (and other children who are not the subject of litigation) seems incompatible with equality of rights under Article 14 of the European Convention on Human Rights 1950. Article 14 concerns the prohibition of discrimination setting out that:

‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’
(*Convention for the Protection of Human Rights and Fundamental Freedoms, 1950*).

Following the ratification of the *Lisbon Treaty* (Lisbon, 2007) in 2009 the European Convention is now a general principle of EU Law (Lisbon, Article 6(2) & 6(3)) which under the supremacy of EU Law over national law (for EU member states) imports the convention into domestic law. Notwithstanding this, the English judiciary have proved reluctant to re-interpret of the meaning of ‘paramount’ in the Children Act 1989 which could be achieved via a declaration of incompatibility under the provisions of the Human Rights Act 1998 s.4. This leaves parents and children (if their views differ from those of the state, or if they are children affected by the state’s actions but not directly involved in a s.31 application) in a difficult position.

The reluctance to critically challenge the orthodoxy in relation to the ‘paramountcy principle’ seems to be another result of the reliance on expert evidence in relation to welfare issues concerning the best interests of the child. The reliance on the social welfare narrative has created a largely uncritical approach by the judiciary to issues concerning children. Despite academic criticism where Herring for example identified ‘fundamental differences’ (Herring, 1999:223-231) there seems to have been a conclusion that decisions informed by the best interests of the child will automatically conform to the requirements of Article 8, concerning the right to privacy and the right to private family life, and will not be in breach of Article 14. Decisions such as *Re H (Children)(Contact Order)(No.2)* [2001] 3 FCR 385 (FamDiv) and *Re B (A Minor) (Adoption: Natural Parent)* [2001] UKHL 70, [2002] WLR 258 illustrate this approach.

The judiciary has interpreted the law to mean that it is not incompatible to place the child ahead of their parents. Contentiously the judiciary also interpreted the law to mean that children subject to proceedings should be considered ahead of other children who are not part of the proceedings. The decisions in *Re KD ((A minor) (ward: termination of access))* ([1988] 1 AC 896, 820)) and in *J, P v Miss C, S County Council (Case No: IP33/03)* ([2005] EWHC 1016 (Fam)) decided this issue.

Some of the relevant case law concerned non-UK cases heard in the European Court of Human Rights. *Johansen* for example concerned the paramountcy principle in relation to a Norwegian

'care order' case and discussed how a 'fair balance' could be struck between the child and the parent's interests. In *Johansen* it was recognised that the rights of the parents must be given separate consideration from those of the child. It was explained:

'...a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child. In carrying out this balancing exercise, the court will attach particular importance to the best interests of the child, which, depending upon their nature and seriousness, may override those of the parent. In particular, as suggested by the government, the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development.'
(*Johansen v Norway* (1998))

Johansen has been followed in subsequent cases, although the 'fair balance' approach has been argued to be incompatible with the 'welfare principle' as it is understood by the UK courts (Bonner, Fenwick and Harris-Short, 2003: 582-3). The decision in *Yousef v Netherlands* (2003) more specifically held that the interests of the child must prevail if a balancing of interests is necessary:

'the court reiterates that in judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail' (*Yousef v Netherlands* [2003] 1 FLR 210: para. 73).

Taking these factors together, it is clear that the state has significant advantage even when EU legislation is taken into account. The trend has been a reluctance to erode principles prioritising children over parents. Reluctance to give parents equality is also evident in the development of the English position in relation to the inclusion of children as a class of litigants with *locus standi* in relation to negligence claims against local authorities whereas there is case authority preventing parents from bringing such actions (*D v East Berkshire Community NHS Trust & Another; MAK & Another v Dewsbury Healthcare NHS Trust; RK & Another v Oldham NHS Trust & Another* [2003] EWCA Civ 1151; Williams, 2005:196-203). The dominance of the welfare narrative has ensured that EU law has had little impact on the fundamental issues leaving parents vulnerable in the public family law system.

Conclusions

Throughout the process of investigation, the decision to make a s.31 application and the subsequent court proceedings parents are at a significant disadvantage when compared with the position of a defendant in the criminal justice system. The lack of separation of the investigate body (the local authority) from the body deciding to bring proceedings carries with it the same issues that led to the formation of the Crown Prosecution Service in relation to criminal investigations and prosecutions.

The status of parents in the proceedings and the criteria and standard on which the court will decide leaves parents unable to robustly address specific allegations unless the court considers them relevant to the ultimate issue. The lower standard of proof leaves parents particularly vulnerable, especially if the focus is not on whether specific acts or omissions have occurred, but on a broad 'picture' painted at a time when parents are not legally represented.

The reliance on expert opinion evidence leaves parents, children and the court in a difficult position. Successfully rebutting expert opinion evidence, particularly in areas of scientific or

methodological uncertainty (such as psychiatric evidence) may be too high an expectation for parents. Judges may realistically be reluctant to disregard the local authority's conclusions or their experts. This is particularly evident in relation to the interpretations of European legislation.

The Law Commission (Law Com No 190, 2009; Law Com No 325, 21st March 2011) considered the problems in the criminal justice system of over-reliance on expert opinion evidence. Despite the findings being equally applicable to public family law cases, the Review and Report's remit have largely remained applicable to the criminal justice system, resulting in some minor alterations to the Criminal Procedure Rules (Part 33, 6th October 2014). There is also a need for the issues to be considered in relation to public family law cases, particularly as the standard of proof here is significantly lower.

Remedies for parents where decisions have been made that fit the wide criteria for classification as miscarriages of justice do not have the same rights to a remedy as criminal defendants. They do not have the right to claim state compensation, and although the consequence for a parent of a miscarriage of justice in the public family courts is not imprisonment, it is important to recognise that the consequence of the removal of children into state care is well recognised as potentially extremely damaging which is why parents brought their unsuccessful actions against local authorities claiming damages in negligence (*D v East Berkshire Community NHS Trust & Another*; *MAK & Another v Dewsbury Healthcare NHS Trust*; *RK & Another v Oldham NHS Trust & Another* [2003] EWCA Civ 1151; *Williams*, 2005:196-203). There is limited European jurisprudence awarding small sums of damages under narrow circumstances, but not the return of children despite their removal having been carried out using a flawed process (see the judicial reasoning in *AD and OD v United Kingdom* (Application No 28680/06) [2010] ECHR 340).

Public family law cases, intended to meet the need to ensure children's welfare, have become connected to some of the most draconian and extreme interferences into private family life, with the potential for children to be unfairly removed from families. The acknowledgement of public family law cases as giving rise to miscarriages of justice is essential: recognition contributes to the discourse in relation to challenging the narrow doctrinal understanding of miscarriages of justice, and child welfare discourse which has not willingly acknowledged injustice or imbalance in the child protection system and related litigation. Under recognition of the capacity for public family law decisions to constitute miscarriages of justice has led to a dearth of research investigating the consequence of such injustice, either for children or their parents. Without appropriate recognition of miscarriages of justice in public family law, remedies are likely to remain restricted and inadequate.

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