Social workers and children's guardians in the family justice system: a research-based future

A talk by Sir James Munby at the 30th anniversary celebration of NAGALRO at Gray's Inn on 21 May 2019

We are here to celebrate the 30th anniversary of NAGALRO. But it is also almost 30 years since the Children Act 1989 became law on 16 November 1989, though it was not of course until 1991 that it came into force. The Children Act was – is – a remarkably carefully thought through and skilfully drafted piece of legislation. It has served us very well down the years. In its fundamentals it has stood the test of time. Whatever else needs to be done – and, as I will shortly be suggesting, there is much to be done – radical amendment of the Act is not one.

Of critical importance to the legislative scheme is the so-called 'tandem' model – the requirement that in every care case the child must be separately represented by both a children's guardian and a specialist solicitor, the team being supplemented in appropriate cases by a specialist barrister. I repeat what I said in 2016 in my *15th View from the President's Chambers: care cases: the looming crisis*, [2016] Fam Law 1227, 1230:

> "The tandem model is fundamental to a fair and just care system. Only the tandem model can ensure that the child's interests, wishes and feelings are correctly identified and properly represented. Without the tandem model the potential for injustice is much increased. I would therefore be strongly opposed to any watering down of this vital component of care proceedings."

The tandem model serves us well, so well that its absence in the pre-proceedings phase of public law cases and in private law cases calls forth many laments. The tandem model not merely means that the child's interests are represented separately from the parents, as surely they should be; it means that in every case there are at least two experts there assisting the court in coming to the correct answer. For, and I wish to emphasise this, both the social worker and the guardian are experts – not experts in the technical sense referred to in PD25, but experts nonetheless.

The most pressing matter which confronts us in the care system is what I do not repent having called a "crisis" in 2016. Views may differ as to whether the latest figures still justify such a description, but only time will tell, because *we still do not know*.

I set out in the attached Table the annual figures for new care cases in England for every year since 2005/6. For the first four years from 2005/6 to 2008/9 the figures were fairly stable, hovering around, on average, about 6,500 per annum. In the single year from 2008/9 to 2009/10, the figure rose by 36% to 8,832 – this was, it is commonly agreed, the 'Baby Peter

effect'. Over the next five years, from 2009/10 to 2014/5, the figure rose by 26% to 11,159. In each of the next two years, 2015/6 and 2016/7, the figure rose by 14%, to reach 14,599 by 2016/7. Over the last two years the figures have fallen back, to 14,221 in 2017/8 and 13,553 in 2018/9.

While this is probably welcome news, it remains the fact that the figure of 13,553 for 2018/9 still represents an overall increase of 21% over the four years since 2014/5, when the figure was 11,159, and that it is more than *double* the figure 10 years previously in 2008/9, when the figure was 6,488. It is too early to be confident whether the last three years' figures mark the beginning of a sustained downward trend, as the optimists affect to believe, or merely the prevailing level of a new plateau.

This is mirrored by the substantial increases over the same period in the numbers of children in local authority care or receiving local authority support but who do *not* become the subject of care proceedings. And, as the attached Table also shows, *private law cases* (which it is important to note currently outnumber care cases by more than 3 : 1; in 2018/19, 44,141 to 13,553) have been increasing relentlessly, year on year, overall by 29% over the last four years.

Yr end March	Care cases started	% Inc	Private law started	% Inc
2006	6,613			
2007	6,786			
2008	6,241			
2009	6,488			
2010	8,832	36%		
2011	9,203			
2012	10,255			
2013	11,110			
2014	10,620			
2015	11,159	26%+	34,119	
2016	12,792	14%	37,415	
2017	14,599	14%	40,536	
2018	14,221		41,844	
2019	13,553	21%*	44,141	29%*

+=%increase since 2010; *=%increase since 2015

So the important point, looking no further than to what is going on in the family courts, is that it would be prudent to imagine that aggregated caseloads will continue to rise, at a time when, generally speaking, there are, and are going to be, no additional resources, whether for the courts or for local authorities.

The stark reality in relation to care cases, on which I now focus, is that the present situation is unsustainable even in the short, let alone the longer, term. Absent a massive increase in resources – and who really believes that is going to happen in any near future – there are, truth be told, only two options. Either, which in my view is unthinkable, we cut corners (because there is very little, if any, scope left for improving efficiency) or we somehow reduce

demand – put plainly, reduce the number of care cases coming to court. That will, for many of us, be a most unpalatable choice to make. My task is to speak truth to power. I would rather – much rather – see fewer care cases coming to court than any cutting of corners. In particular, as I have already said, the maintenance of the tandem model is essential and, as I will go on to illustrate, the role of the children's guardian, far from becoming simpler, is, if anything, becoming more complex – with corresponding increases in the time which children's guardians will need to spend on all but the simplest care cases.

I focus on care cases. What has been going on? What is causing it? And what is to be done?

As to the first of these questions, we are in a much better position to provide answers than even three years ago; but much remains to be done before we can provide answers as comprehensive as one would wish. As to the second question, we still know surprisingly little, despite quite a lot of research and the excellent work of the *Care Crisis Review* sponsored by the admirable Family Rights Group. In the nature of things, lack of knowledge in relation to the second question poses major problems in tackling the third.

What, then, is needed, and as a matter of pressing priority, is research, much more research. Much has been done but there is an immense amount still to do. As its recently appointed Chair, I intend that the Family Justice Observatory, which is supported and very significantly funded by the Nuffield Foundation, will be the catalyst for major research initiatives.

I have set out my thoughts on this already, first in my 15th View, [2016] Fam Law 1227, more recently in a paper prepared for a Family Justice Observatory Event at Manchester in 2018, *'Born into care' – infants in the family justice system*, [2018] Fam Law 1527.

Thus far, the research has demonstrated three things of critical importance.

The first is that the increases in the numbers of care cases (indeed also of the numbers of children known to local authorities) over these last ten years cannot be explained simply by rises in the child population. In my 15th View in 2016, when first drawing attention to the problem, I said this, [2016] Fam Law 1227, 1228:

> "There are, in principle, three possible causes for the increase: (1) that the amount of child abuse / neglect is increasing; (2) that local authorities are becoming more adept at identifying child abuse / neglect and taking action to deal with it; (3) that local authorities are setting more demanding standards – in other words, lowering the threshold for intervention."

I refused, and refuse, to believe that child abuse / neglect is rising as fast as the numbers of care cases. So, as I said, "this cannot be the sole explanation. It follows that changes in local authority behaviour must be playing a significant role."

The second thing demonstrated by the research is the pervasive existence of largely inexplicable variations, nationally, regionally and locally, in professional behaviours, behaviours both in local authorities and, I emphasise, also in family courts.

Research plainly bears out this conclusion. As I pointed out in 2016, [2016] Fam Law 1227, 1228:

> "This conclusion [that changes in local authority behaviour must be playing a significant role] is supported by two striking features of the statistics. One is that there have been very wide variations between Designated Family Judge (DFJ) areas, and thus between local authorities, in the scale of the recent increases. If the 'average' DFJ is struggling to manage an increase this year [so far] of 20% or thereabouts, some DFJs are facing much smaller increases, and others much, in some cases very much, larger increases. The other striking feature of the statistics are the figures which Cafcass has published, showing, for every local authority for each year from 2008–9 to 2015–16, the number of care cases per 10,000 child population, the wide range of figures as between different local authorities and the significant fluctuations within individual local authorities of the figures from year to year. In neither case are there obvious demographic explanations."

More recent research merely reinforces this fundamental fact and points up the crucial significance of variations at every level: variations as between the four nations which make up the United Kingdom (treating England and Wales as distinct for this purpose); and variations within England at both the regional and the local level. And it is very important to appreciate that neither demographic variations nor variations in any of the various types of deprivation – important as those factors undoubtedly are – are capable of explaining what increasingly sophisticated analysis of the numerical data is so plainly and consistently demonstrating, namely the significance and pervasiveness of these differences in what I have called local authority behaviour. An important example is the recently published research by Professor Karen Broadhurst of Lancaster University, *Born into Care*, into the varying rates of removal of children at or very shortly after birth.

Thus far I have spoken largely of *local authority* behaviour. There is an equally important need to understand why there are similarly unexplained variations, regionally and locally, in the way in which the *family courts* handle care cases. Recent research, shortly to be published, by Professor Judith Harwin, also of Lancaster University, draws attention to the differential use of the different types of order that can be made when, at the end of proceedings, children are returned to their parents or wider family. Put plainly, the data shows clearly that where a child lives affects the likelihood of a supervision order being made: a child who lives in London is more than twice as likely to be reunified with birth parents under a standalone supervision order as a child in the North West.

So, as I observed last year in my Manchester paper, [2018] Fam Law 1527, 1529:

> "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*."

I went on:

> "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."

Two pieces of research throw some light on this. Professor Harwin's research which I have already referred to, demonstrates that far more supervision orders were made at the conclusion of proceedings than were applied for – which would suggest that, in this particular context, judicial decision-making is decisive. Other research, which I referred to in my paper last year, points in a rather different direction, [2018] Fam Law 1527, 1529:

> "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."

I went on to sound this note of caution:

> "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."

The third thing demonstrated by the research is that there is no one cause of these increases. As I have already said, we need to know much more than we yet do about what is driving the increases, but it has become fairly apparent that typically, the causes are multi-factorial, though not necessarily, and almost certainly not, the same everywhere.

So, we need more research, much more research, to enable us to understand first *what is going on and why* and then *what needs to be done*.

One of the problems is that, until recently, there has been, I suspect, much more focus on *qualitative* than on *quantitative* research and analysis, and insufficient appreciation of just how informative and invaluable the results of pure 'number-crunching' can be. Qualitative research is, of course, vital, but quantitative research is at least as important. Things have begun to change, but only quite recently. As I said last year, [2018] Fam Law 1527, 1528:

> "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."

At this point I need to refer you to a concept which may be unfamiliar though at least some of its applications will be very familiar indeed: *data visualisation*, the presentation of data (information, statistics, etc) by pictorial or graphical rather than numerical or verbal means.

For present purposes, the important two most important uses of data visualisation are (a) to convey particular information that is hard to grasp and (b) as an aid to decision-making.

Obvious and familiar examples are such things as the graph, bar chart or pie-chart. A striking example of the utility and importance of such tools was the single slide, showing a set of 'bar charts', which, in the 5 or 10 seconds it took the viewer to understand what was on the slide when it was shown in 2017, exploded the notion, which for a time had 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 slide demonstrated was that, overwhelmingly, as we all intuitively knew, the increase was in cases where the allegation was of neglect or emotional abuse.

An equally familiar, if less recognised, example of data visualisation is the London Underground Map, a work of genius where all the key information the traveller needs to know in order to travel from A to B, is set out in diagrammatic form using only *two* pictorial indicators: a *colour* to represent each particular line and a *circle* to represent where you need to change from one line to another.

An older, and very famous, example is the street plan[1] on which Dr John Snow plotted, house by house, every death from cholera in a particular area of London during the great cholera outbreak of 1854. This exercise – what would now be called 'disease-mapping – demonstrated to most sensible observers, though it took long to persuade the medical profession, which stubbornly clung to its theory that cholera was transmitted by a miasma in the atmosphere, that the cause was to be located in the polluted water taken by the inhabitants from the pump at the street corner around which the greatest proportion of deaths clustered.

Much data visualisation of course relates to historical data – for example, a graph showing the number of new care cases in each of the last ten years – or, as with John Snow's map, presents a historical snapshot. But data visualisation also enables us to see what is happening in 'real time', as, for example, with the plotting tables in the RAF's Fighter Command Group Operations Rooms during the Second World War showing, by means of markers moved, by hand, round a huge map of South-East England, what was happening, minute by minute, during the Battle of Britain; the scene will be familiar to anyone who has watched the classic 1969 war film, *Battle of Britain*.

But well before the Second World War, the railways were already utilising 'real time' data visualisation where the information was automatically gathered and presented; using

[1] The curious will find the map reproduced in Sandra Hempel, *The Medical Detective: John Snow and the Mystery of Cholera*, Granta Books, 2006, p 212.

electrical track circuits the progress of a train could be shown in real time by a sequence of lights moving along a diagrammatic representation of the train's route. In those pre-digital days there was no easy way of storing and re-playing the sequence. Today, in a world which has moved from electro-mechanical to electronic technology, the data is all stored digitally and can be retrieved at the click of a mouse – so in addition to displaying what is happening *now* the data visualisation can be recovered for some defined date and time in the past or replayed, either in real time or speeded up, for some defined period in the past. For example, GPS technology enables the position and movement of every ship anywhere in the world's oceans, or every airplane anywhere in the sky, to be automatically tracked and shown in real time, either present or past.

Data visualisation, as you will appreciate, is something that has been around a very long time in spheres as different as the military, the railways and other transport systems, and health. We need to catch up.

In this respect, we are much indebted to the Coram Foundation for its research project, *Data Visualisation in Children's Social Care*, funded by the Nuffield Foundation, which has done so much to bring to the attention of practitioners – both social workers and lawyers – the exciting possibilities which data visualisation opens up for us. Two seminars held by Coram have proved pivotal. At the first, in October 2016, Professor Sir David Spiegelhalter of Cambridge University described to a largely innocent audience of lawyers and local authority managers the potential of data visualisation and introduced us to the 'funnel graph', a well-known tool in the world of medicine but still largely unknown in our world. A further seminar in December 2018[2] provided further exhilarating explanations of what data visualisation is and how it may be used to illuminate what is happening in the care system, as well as unveiling a mass of research which is shortly to be published.

I have referred to 'funnel graphs'. I need to explain what they are. Typically they involve plotting two variables, one, volumes, along the horizontal axis, the other, outcomes, along the vertical axis. Sir David Spiegelhalter's example plotted, hospital by hospital, the numbers of heart surgeries being performed against the numbers of such surgeries where the patient died. If there is a correlation between the variables the dots on the graph will tend to fall within two lines forming the shape of a horizontal funnel, narrowing from left to right. Importantly, for our purposes, the funnel graph will illustrate graphically:

- the average outcome – this being shown by a horizontal line drawn through the middle of the funnel;
- which institutions are performing better and which less well than the average; and, importantly,
- which are the outliers – those institutions where the relevant dot lies outside the funnel.

[2] See the very detailed report of the seminar on the Coram website https://coram-i.org.uk/data-visualisation-in-social-care/

Funnel graphs are now being increasingly used in family justice research, and their utility is increasingly being recognised. Examples include:

- a funnel graph showing performance for each DFJ area in meeting the 26 week target, illuminating for identifying both the very high and the less successful performers;
- a funnel graph showing that the proportion of children ever in care varies as between local authorities from a minimum of <1% to 7%;[3]
- a funnel graph showing the variation as between DFJ areas in the use of supervision orders, distinguishing by the use of different coloured dots between London and each of the five circuits in England.[4]

While tools such as this are of very considerable use and are to be encouraged, it is vital to appreciate that their use is not so much in providing answers as in identifying key questions that need to be asked if we are ever to understand the system.

Another exciting form of data visualisation which has emerged from the Coram project is an electronic tool being trialled by Kent County Council which tracks, in real time, the route through its systems of every child for whom the local authority's social services are responsible. These systems, reflecting the provisions of the Children Act 1989, are set out in a diagrammatic form which resembles the London Underground map, the decision points, at which the child's future route through the system is determined, being represented, as on the Underground map, by round circles linking the various routes. Each child is represented by a coloured dot – different colours distinguishing children with different characteristics – which moves round the system in real time, enabling social workers and managers not merely to track individual children though the system but also to monitor how the system is operating and, crucially, to see how it can be improved.[5]

Such tools will become an increasingly familiar part of the family justice system, and not just for managers. But what of the children's guardian in this emerging world? The themes I have been considering and the research I have been describing suggests important new challenges. I do not have time for elaboration, so I merely list some key topics in the care context which, I suggest, social workers and children's guardians will increasingly have to grapple with:

- There is widespread consensus that the key to ameliorating present problems lies in better and more focused management of the pre-proceedings phase: both pre-proceedings in the narrower technical sense of the steps preparatory to the start of care proceedings and also in the wider sense of all the stages in the child's journey, whether or not ending up in court, starting with the local authority's first involvement. In the nature of things this is more a matter for the local authority and its social workers than for children's guardians, and an important area for future research must

[3] See the Coram website https://coram-i.org.uk/data-visualisation-in-social-care/ attached slides by Professor Ruth Gilbert.

[4] See the Coram website https://coram-i.org.uk/data-visualisation-in-social-care/ attached slides by Professor Judith Harwin.

[5] See Renuka Jeyarajah-Dent, *Visualising a child's care journey,* Children & Young People Now, March 2019, which shows the route map.

be evaluation of the many interesting initiatives being undertaken by various forward-looking local authorities. But may I suggest that once care proceedings have begun children's guardians should be astute to assess how the matter has come to court and whether, indeed, the case, although requiring some local authority action, may be one that does not merit care proceedings. This thought, which is hardly new, reflects what research demonstrates, that in what might be thought a surprising number of care case children are actually returned home to the care of their parents. And, even if that is not possible, does the case necessitate care proceedings rather than, for example, a *proper* use of section 20? Careful, informed, professional comment, even criticism where appropriate, surely have a part to play in more general attempts to control and, if possible, reduce the flow.

- Social workers and children's guardians likewise, I suggest, need to adopt a questioning approach in cases where children are being removed at or shortly after birth and immediately made the subject of care proceedings. Are care proceedings really necessary? May there be time to work with the mother?
- Cases involving repeat children or repeat mothers, that is where the child or mother has been involved in previous care proceedings, present particular problems (as the Kent County Council data visualisation tool demonstrates, similar issues arise where, although there may not have been any care proceedings, a child re-enters, perhaps more than once, the care or support of the local authority). In the case of the repeat mother, what is the scope for adopting a problem-solving approach? In the case of the repeat child, unless circumstances have unexpectedly changed there must be a question as to the appropriateness of the solution which commended itself at the end of the previous proceedings and that suggests the need for a particularly focused analysis 'this time round'.
- Where the proposal is that the child should return home to live either with parents or with relatives, careful thought needs to be given to identifying and selecting the appropriate order or orders to give effect to the court's decision.

Finally, can I suggest that in all these care cases children's guardians and their managers need to be alert to the striking regional and local variations I have referred to and, in particular, be aware of whether the particular local authority and court involved in the case in hand are, as it were, inside the funnel or an outlier.