

BARONESS BUTLER-SLOSS FAMILY LAW LECTURE 2019

University of Exeter

“If only we had known then what we know now”

Sir Andrew McFarlane, President of the Family Division

It is a great honour and a real pleasure to have been invited by the University of Exeter to give this, the inaugural Baroness Butler-Sloss Family Law Lecture. The pleasure is, I must admit, mixed with a certain degree of apprehension as I stand here and regard the Noble Baroness seated in her place of honour on the front row, fixing me with a kindly but beady stare that I know only too well! It is a position that I have found myself in on very many occasions starting, I believe, in the High Court in Middlesbrough as long ago as 1987 and continuing down the years through many court appearances and, more recently, appearing as a witness before a Parliamentary pre-legislative scrutiny committee that she chaired a few years ago.

These occasions have always been stimulating and enjoyable encounters which were often marked in the Court of Appeal by my failing to get out much more than my first sentence before the Bench would make a ‘helpful’ interjection and thus start a constructive dialogue which then might move far away from the points that I had intended to make!

This evening, whilst my level of apprehension is as high as ever, as the lecturer, rather than as counsel or a witness, I have some expectation, or at least a faint hope, of proceeding a tad further before the first interruption occurs: we shall see!

Partly because mention of the name ‘Butler-Sloss’ inevitably brings the topic to mind, but mainly because I apprehend that there is from time to time a need to lift one’s eyes from the day-to-day work of the courts and the child protection system to look back on the road that has been travelled thus, I have chosen to adopt a retrospective view point.

Those born after the mid-1980's must find it difficult to imagine that those of us who were working then operated in a world where the fax machine was the state-of-the-art gadget, and where computers and word processing were yet to become part of our lives. In the same way, the generation that came into child protection work in or after the mid-1990's may well have assumed that physical abuse, sexual abuse and emotional abuse had always been acknowledged and understood by child protection professionals and the courts; it being hard, once one has realised the existence of such abuse oneself, to contemplate that it was not always so.

There is, therefore, in my view, benefit in 'telling the story' of the growth of our understanding of child abuse, partly so that the lessons that have been learned along the way can be retained in memory, and partly so that we may contemplate the current position in the context of a developing body of understanding, rather than something that is necessarily set in stone. I also believe [and I earnestly hope for your sakes that you will agree] that it is an interesting, and at times striking story, which shows, alongside clear success, a number of occasions when the pendulum of understanding has swung too far in one direction or the other, so that that which we would now class as child abuse has either been undetected or over-sensitively diagnosed.

I, I suspect in common with anyone who works in the field of child protection and child abuse, will have faced a question from a friend or acquaintance along these lines: "There seems to be much more child abuse around; are people abusing children more or are we just better at detecting it?"

Whilst, of course, one answer to that question may be "Yes" to both elements, but as I will suggest, the latter is certainly the case.

It is, I hope, helpful to take this opportunity to set out an account of our developing knowledge of child abuse and, by doing so, demonstrate just how little was known, understood and, importantly, publicly accepted only fifty or so years ago, and to demonstrate just how far our understanding and acceptance has developed during the past half century.

Although this theme has been at the back of my mind for a long time, the invitation to give this, the first Butler-Sloss Lecture at Exeter University, has provided the catalyst and focus to bring it to the fore, given the prominent place that Baroness Butler-Sloss has played down the years both as a judge and, of course, as the chair of the highly influential 1988 Inquiry into child abuse in Cleveland.

Before embarking on my narrative, I do wish to express my great gratitude to Dr Polly Lord, a Research Assistant here at Exeter University, who conducted an extensive literature review of the topic to assist me. Much of the detail in this address comes from Dr Lord's endeavours and the credit for any scholarship that I might present is entirely hers; the mistakes and poor grammar are, of course, entirely my own work.

The nineteenth and early twentieth century

It is not my purpose to delve deeply into the manner in which children were treated and abused in Victorian times or in the period up to the Second World War. As Hogarth's print of 'Gin Lane' and the works of Charles Dickens indicate, life for many, perhaps particularly children, was nasty, brutish and short. Much that we now regard as child abuse will have taken place in plain sight and will have been accepted simply as part of ordinary life. The law relating to the care of children was couched in terms of property rights, as opposed to welfare. The mothers of children had few parental rights against the father, and society as a whole regarded the upbringing and discipline of children as essentially a matter for each parent, rather than something about which society, in the form of the State, should intervene.

Any concern about child abuse was framed by reference to questions of poverty, and social circumstance, rather than the behaviour of any individual adult towards a particular child. In the nineteenth century, reformers who sought to bring in legislation to prevent the battering and sexual abuse of children, were met with resistance by parents who had endured the same treatment and concluded that it had 'never hurt me'¹. At this time, however, an episode in America caught the public attention and

¹ Lloyd Demause, 'The History of Child Abuse' (1998) 25(3) *The Journal of Psychohistory* 233

represents the first tentative step towards greater acceptance and understanding of child abuse.

Mary Ellen Wilson was a nine year old girl who was regularly beaten by her foster parents and was, eventually, found malnourished and confined to her bedroom. Her suffering was discovered by a missionary, Ellen Wheeler, who was unable to persuade the authorities to intervene due to the countervailing legal right for parents and guardians to discipline their children as they wished. As a last resort, she contacted Henry Bergh of the Society for the Prevention of Cruelty to Animals, who, together with Elbridge Gerry, initiated court action. The case was heavily publicised and caused a public outcry, leading to Gerry and Bergh forming the New York Society for the Prevention of Cruelty to Children.

The case has gone down in history as the first example of modern social work. The formation of the New York Society signalled the beginning of the movement towards statutory child protection together with growing public support. Similar institutions grew up elsewhere with the aim of saving children, the targets of these endeavours were, however, employers, foster carers or adopters as 'rarely did an SPCC intervene against the 'natural' balance of power between parents and children.'² As a result, the victims of child abuse, while more visible, were still considered part of the problem of poverty.

The seminal work, which very significantly moved matters on, and with which this account really begins, did not, however, take place until the 1960's, only some sixty years before today and a time which is in the living memory of a number of us in this room tonight.

The first half of the twentieth century saw sustained development in the science of paediatric radiology. It became progressively possible to see more details of injury and the healing process in the bones of children. The beginning of the recognition that children were being physically injured in a significant way is widely ascribed to John Caffey, who wrote an article in 1946 on child fractures. Despite this growing

² Stephen J. Pfohl, 'The "Discovery" of Child abuse' (1977) 24(3) *Social Problems* 310, 312

knowledge, the medical profession seemingly accepted accounts which exonerated parents from responsibility and for some decades there was an accepted diagnostic condition known as 'Unexplained Infant Trauma Syndrome' in cases of bruising and broken bones

Then, in 1955, Wooley and Evans studied twelve children with multiple fractures but no history of trauma. While subtle in their explanations, they noted that the families showed signs of instability and 'concluded that the injuries were the result of undesirable vectors of force'³. Despite that careful wording, the message hit home, and the public were shocked, although, it is said they remained somewhat disbelieving. Then in 1962 Henry Kempe and his team coined the term 'Battered Child Syndrome' and heralded a new acceptance of physical child abuse. Henry Kempe, a Paediatrician, had observed a high number of children admitted to his practice with unexplained injuries. He set out with colleagues to survey hospitals and law enforcement agencies to determine the extent of the abuse. Out of the 71 hospitals who responded, 302 instances of abuse were reported.

In reporting their findings, Kempe and his team noted that parents were reluctant to provide information, whilst physicians struggled to believe that parents could have attacked their children and had thus failed to question the parents adequately. As a result, the instance of abuse may have been far higher. In addition, and marking a shift from previous thinking, they found the beating of children was not restricted to those with a psychopathic personality or of borderline socio-economic status, but it also occurred amongst people with good education and with a stable financial and social background.

All that I have just described thus far was taking place across the Atlantic. It was, however, being closely followed in Britain. The UK NSPCC prominently published Kempe's findings and he himself spent a year in the UK in 1969/70.

Just as with the case of Mary Ellen Wilson a hundred years earlier, the next leap forward in public awareness occurred as a result of the appalling treatment of a particular child.

³ Paul V. Woolley Jr., William A. Evans Jr., 'Significance of skeletal lesions in infants resembling those of traumatic origin' (1955) 158(7) *Journal of the American Medical Association* 534

Indeed, as this talk will demonstrate, almost every significant development has occurred in direct response to a particular incident or episode. The event of which I now speak was the death of Maria Colwell in 1973.

Maria Colwell was seven years old when she was killed by her stepfather, having been beaten and starved. Maria had been fostered by her aunt and uncle but returned to her mother under the supervision of the local authority. Fifty official visits had been made to the family from social workers, health visitors, police and housing officers, but, as the official inquiry into her death demonstrated, a lack of training and communication between the agencies and the individual workers led to a failure amongst the professionals to identify and understand what was going on until it was, appallingly, too late.

In contrast to earlier times, child abuse was no longer seen as a consequence of poverty, but increasingly, as a social problem.

Cases such as that of Maria Colwell, and the work of Kempe and his team, swiftly lifted the scales from the eyes of the medical and other professionals and the concept of 'Unexplained Infant Trauma Syndrome' evaporated. From now on, where a child was found to have significant injuries, it was accepted that the cause must be trauma and the primary purpose for the investigators was to identify the traumatic mechanism and the perpetrator or perpetrators. The concept of a parental right to treat one's child as one wished and the long-held assumption that no parent would actively cause physical harm to their child no longer held sway.

Sexual abuse in the 1970s and 80s

The taboo surrounding child sexual abuse took longer to break than that relating to physical abuse. Whilst the criminal law targeted 'incest' or sexual 'assault', convictions were comparatively low as cases were difficult to prove. Although there was some undercurrent of awareness of issues of child sexual abuse promoted by feminist and other campaigners, it was not until the 1970s (in the USA) and the 1980s (in Britain) that child sexual abuse was recognised as a serious problem for the first time. Prior to

that, it would seem that those children who complained of sexual abuse were frequently marginalised or ignored. Following a review of pre-1970 literature Myers highlighted four common themes⁴:

- “1) Children are responsible for their own molestation.
- 2) Mothers are to blame.
- 3) Child sexual abuse is rare.
- 4) Sexual abuse does little harm”.

Such statements, made only a few decades ago, underline my central theme more than any other words in this lecture. They are wholly astonishing to our eyes in 2019 yet were apparently the received wisdom in their own time.

The late 1970s and early 80s saw an explosion of interest following detailed research, mainly in America, in which ordinary members of the public were interviewed and a significant proportion volunteered that they had experienced sexual abuse during their childhood. In 1979 a researcher, David Finkelhor, wrote ‘child protection workers from all over the country say they are inundated with cases of sexual abuse... Public outrage, which has for several years focused on stories of bruised and tortured children, is shifting to a concern with sexual exploitation. Between 1977 and 1978 almost every national magazine had run a story highlighting the horrors of children’s sexual abuse.’⁵

This explosion of interest in and awareness of potential child sexual abuse inevitably led to professionals having to develop their own understanding of the intricacies of the subject, and their own strategies for the investigation and evaluation of any evidence. This was new territory. Almost inevitably some initial practices and methods of intervention missed their target. As with many areas of family law over recent decades, a sudden increase in interest causes a pendulum to swing and, at times, the swing may travel too far in one direction and require correction.

⁴ John E. B. Myers, *Child Protection in America: Past, Present and Future* (Oxford scholarship online, 2010) 108

⁵ David Finkelhor, *Sexually victimized children*. (Free Press, 1979) 1

This was so, in relation to child sexual abuse. Sexual activity with a child can, of course, take place without leaving any physical sign of injury on the victim. Where, however, potential signs could be identified, the medical profession was required to develop, at some speed, an understanding of those physical manifestations which might be regarded as 'normal' and those which were indicative of, or compatible with, sexual abuse. In ordinary life, an innocent infection in the genital area or constipation can produce symptoms which in other circumstances might mirror the consequences of abuse. These subtle signs required expert interpretation. In addition, the very act of examining the child had the potential, itself, to be traumatic and occasions for examination, and the length of examination, were kept to a minimum.

As a physical example of the degree to which the understanding of these subtle matters has developed amongst paediatricians over the past forty years, one only has to look at the size of the relevant guidance. In 1997 The Royal College of Physicians issued the second edition 'Physical Signs of Sexual Abuse in Children'. The booklet is small. It is printed in A5 and runs to some 90 pages. In 2015, in cooperation with its sister organisations in America, the latest edition of that guide was published. It is now in A4 format and runs to 280 pages.

In addition to the assessment of any physical signs of abuse, investigators were, naturally, interested in what a potential child victim had to say. Here, as is well known, a carefully structured and calibrated scheme by which police officers and social workers might interview potential victims was rapidly developed under the umbrella title of 'Achieving Best Evidence' (ABE). The aim was to encourage the child to speak, to do so without suggestive or leading questions and in a manner where the precise words and demeanour of the child could be accurately recorded on video, rather than in the pocketbook of a police officer or the notes of a foster carer written up some time after the event.

At the same time child psychiatrists and psychologists sought to develop interview techniques which were designed to draw a child's understanding and knowledge of sexual matters to the fore without direct questioning. In particular, a number of groups of workers began to introduce 'anatomically correct dolls' (with appropriate genitalia) into discussions with children and then interpret what the children might do on

discovering these novel features. The social work and legal professions, and ultimately the courts, had to develop an approach to determine how much of this evidence was reliable. It was a time of much activity, as is demonstrated by the 'special edition' of the Family Law Reports issued in 1987 in which every case reported related to the analysis of evidence of child sexual abuse.

It was in this context of rapidly developing understanding, at times by trial and error, of physical, psychological and other evidence that events in the North East of England led to the timely and seminal inquiry presided over by Mrs Justice Butler-Sloss, as she was when the inquiry opened.

The Cleveland Inquiry

This is not the place to give a detailed explanation of the statutory 'Inquiry into Child Abuse in Cleveland in 1987' which was conducted, as the report proclaims in a sign of the times, by Lord Justice Butler-Sloss (as she then was). The Inquiry report was of the greatest importance. In addition to giving a comprehensive account of the events in the North East that had led to the Inquiry, it went on to analyse and make recommendations about:

- Medical examination and assessment
- Listening to the child
- Social work practice
- Training; and
- The work of the courts.

Above the detail, the overall conclusion represented a significant step-change in our understanding. I can do no better than quote from paragraph 1 of the Final Conclusions:

"We have learned during the Inquiry that sexual abuse occurs in children of all ages, including the very young, to boys as well as girls, in all classes of society and frequently within the privacy of the family. ... The problems of child sexual abuse have been recognised to an increasing extent over the past few years by

professionals in different disciplines. This presents new and particularly difficult problems for the agencies concerned in child protection. In Cleveland an honest attempt was made to address these problems by the agencies. In Spring 1987 it went wrong.”

If that cliff hanger hooks those who have never read the full report, the I would encourage them to track it down and do so now⁶; it is still a compelling read.

The wider perspective

Rather than simply ploughing on at this stage with further more recent examples of our own development in this country in the understanding of child sexual abuse, I wish, for a moment, to step back and look at the bigger picture and ask whether it is by chance that our knowledge has developed in the way that it has, or are we following a more widely accepted path that either has been, or will be, replicated in other countries?

The short answer is that the journey upon which we have embarked, and continue to travel, is familiar across the world. It starts with a lingering reluctance in societies to accept the fact that child abuse takes place. For example, Jean Renvoize noted in her 1993 study into child sexual abuse⁷:

“Consistently over the years I have found people of every kind in every country I have visited, including my own, claiming that, although child abuse obviously exists elsewhere ‘it does not happen here’.”

In addition to the, perhaps natural, reluctance to accept that an individual would act in a wholly abusive manner, there is a second, wider, more a cultural inhibition with a society’s members disbelieving that the problem would arise in their own state. Renvoize, again, contacted Indian professors following reports of child abuse in India

⁶ *Report of the Inquiry into child abuse in Cleveland 1987* Cm 412 London: HMSO.

⁷ Jean Renvoize, *Innocence Destroyed: a study of child sexual abuse* (Routledge Publishing 1993) 4.

to which they replied, 'Fortunately in India child sexual abuse has not yet become a problem'⁸.

For my own part, as recently as 2005, I attended a conference in Sweden where professionals from Britain came to speak about child sexual abuse only to be told by a number of delegates that this was not a problem in their country; they referred to child sexual abuse as 'the British disease'.

In 2002, a World Health Organisation review of the international literature on child abuse showed that 'there is clear evidence that child abuse is a global problem'⁹. However, in announcing his report, it's author Desmond Runyan commented:

"Whether child abuse is uniquely American or Western is a question that's been raised by a number of people around the world. Not long ago, a Chilean physician said to me that clearly it happens more in North America than any other place. 'just look at Medline (an online search engine for medical information),' he said. 'It is American journals that write about child abuse'."

This poses the question whether certain societies are ahead of others in accepting the problem of child abuse, and whether that translates into a 'curve of understanding' for recognising new forms of abuse.

Whether or not there is a 'curve' of understanding, a word which suggests an orderly and proportionate progression, it has been possible to identify a number of step changes, or stages, of development within a particular society in accepting and understanding child abuse. In his work, in 1978, Henry Kempe identified five developmental stages which societies progress through. They are, in short:

⁸ Ibid.

⁹ Desmond Runyan, Corrine Wattam, Robin Ikeda, Fatma Hassan, Laurie Ramiro, 'Child abuse and neglect by parents and other caregivers' in *World Report on Violence and Health* (World Health Organisation, 2002) 59.

Stage One: Denial that either physical or sexual abuse exists to a significant extent. Serious abuse that surfaces is ascribed to psychotic, drunk or drugged parent or to foreign guest workers with different styles of child raising – in short ‘nothing to do with us’.

Stage Two is paying attention to the more lurid abuse – the battered child – and beginning to cope in more effective ways with physical abuse including early intervention when abuse is perhaps not so severe.

Stage Three comes when physical abuse is better handled and attention is now beginning to be paid to the infant who failed to thrive, an example of passive abuse, and the general area of significant physical abuse.

Stage Four comes in recognition of emotional abuse and neglect.

Stage Five is the paying attention to the serious plight of the sexually abused child.

As I have already indicated, rather than a smooth progression, these stages are achieved in fits and starts with developments in medical and professional practices achieving sudden prominence and escalation as a result of one-off cases which shock the public into consciousness.

One problem in reviewing this area is that there does not appear to be a common definition of what does or does not constitute ‘child abuse’. Although the term is in widespread use, the behaviour to which it relates may vary from culture to culture and from time to time. Some suggest that ‘child abuse’ is best considered as a social construction, dependant on time, place and culture¹⁰. Thus cultural differences frequently lead to certain practices being viewed as acceptable in one culture, but viewed as abusive by another.

¹⁰ Laura Hoyano and Caroline Keenan, *Child Abuse: Law and policy across boundaries* (OUP 2010) 7.

The practice of Female Genital Mutilation provides a striking example. It is estimated that more than two hundred million girls and women alive today have undergone Female Genital Mutilation. Forty-four million are girls below the age of fifteen. FGM has been documented in thirty countries, mainly in Africa, the Middle East and Asia¹¹. However, in many Western countries, including this one, FGM is considered to be a form of child abuse [Female Genital Mutilation Act 2003].

A further example, going the other way, is that all forms of physical punishment, including corporal punishment, have been banned under the criminal law of Sweden since 1979. There is no similar blanket ban here or in America.

Other examples exist, but I think the point is made that, to a degree, the concept of and definition of ‘child abuse’ is culturally constructed. No one suggests that child abuse is a modern invention or that children were never abused in the past. It has, during the past century simply been ‘discovered’ and brought to light.

That process of ‘discovery’ is itself progressive and developing. There has been an upsurge in understanding new forms of abuse, particularly in Britain and the USA. For instance, in the UK’s 2006 Statutory Guidance ‘Working Together to Safeguard Children’, four forms of abuse were noted: physical abuse, emotional abuse, sexual abuse and neglect. In its most recent, 2018 edition, just 12 years later, the guidance listed the following nine forms of child abuse: Sexual, physical and emotional abuse; neglect; exploitation by criminal gangs and organised crime groups; trafficking; online abuse; sexual exploitation and the influences of extremism leading to radicalisation¹².

In a report for the Council of Europe in 2003 researchers commented that ‘awareness and understanding of the problem [of child abuse] varies from country to country’. In some countries, due to ‘a backdrop of transition, major social economic difficulties, organised conflict and individual trauma’, the childcare professionals struggled to get issues onto the public agenda. In others public awareness grew incrementally following each high-profile case of child murder, abduction or sexual abuse.

¹¹ UNICEF Data 2016.

¹² Department of Education and Skills, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children* (HM Government 2018) 8.

At the risk of overgeneralisation, any significant development in a society's awareness and understanding of child abuse requires two core elements. Firstly sufficient professional knowledge and acceptance of the form of abuse and, critically, a sufficient level of general public consciousness, which may, on occasions, rise to that level rapidly and immediately following some appalling tragedy.

Emotional abuse

Returning to the progress of understanding and awareness in the UK the next topic to consider is that of 'emotional abuse'.

Interestingly, given the prominent place that emotional abuse now has in the understanding of all child care professionals, magistrates and judges, it was only in the late 1970s and early 1980s that this form of harm began to be recognised as a freestanding form of abuse.

In 1978 James Garbarino attempted to define it as 'the wilful destruction or significant impairment of a child's competence'¹³. This, it was said, could include four aspects: the punishment of positive behaviours, discouragement of care giver – infant bonding, the punishment of self esteem and the punishment of developing interpersonal skills necessary for use outside the family setting. Whilst all forms of child abuse will inevitably include a significant element of emotional harm, the acceptance that emotional abuse can occur, without any other form of harm was plainly and important and fully justified step.

Other forms of abuse

For periods during the time since the 1980s other distinct categories of abuse have achieved prominence, for example the suggestion that groups of children in Rotherham and on the Isle of Orkney were the subject of organised Satanic Abuse. In another

¹³ James Garbarino, 'The Elusive "Crime" of Emotional Abuse' (1978) 2 *Child Abuse and Neglect* 89, 92.

context, cases of alleged ‘Munchausen’s syndrome by proxy’ were diagnosed in prominent numbers in the 1980s and 90s. [complete this paragraph]

In the first part of this lecture I have concentrated on the concept of ‘abuse’ and described, in broad terms, the development in our understanding of the sorts of behaviour, astonishingly, some human beings are capable of exhibiting towards children. From the perspective of a family judge, however, the category of abuse, whatever it may be, is of secondary importance to the harm, or likelihood of harm that the impact of such abuse may have on the particular child before the court.

As Sir Alan Ward famously said in 1990, in every case there will be ‘a spectrum of abuse and an index of harm’.

The alteration in focus from abuse to harm is mirrored in the change of language as between the Children and Young Persons Act 1969 which gave jurisdiction to the court to make a care order where there was an impairment in a child’s development because it was being avoidably prevented or neglected, or he was exposed to moral danger or beyond parental control. This is in stark contrast to the Children Act 1989 where the focus is, as is well known, upon ‘significant harm’.

This shift away from simply looking at the behaviour of the perpetrator to, instead, considering the harm to the victim that that behaviour causes is mirrored elsewhere. For example, as a young barrister one would frequently apply for ‘a domestic violence injunction’ under the Domestic Violence and Matrimonial Proceedings Act 19... and find that the concern of the judge was solely upon whether a physical assault had taken place and, if so, whether the resulting physical injury was significant or not. Now, the concept of ‘domestic abuse’ is, rightly, altogether more widely drawn so as to encompass emotional harm even where, and perhaps particularly where, there may have been no physical assault at all.

This movement from focus on the perpetrator’s behaviour to concentration on the harm that that behaviour causes has been slow in its development and can be traced back through the past century and beyond. The Prevention of Cruelty to Children Act 1889 had, as the primary mechanism for bringing children into care, the making of a ‘fit

person order' where a person considered suitable by the court could assume responsibility for a child in need of care and protection. The fit person could be a corporate body, for example the local social services department. So far as one can tell, the turning point in the decision making under the 1889 Act was a determination that a parent was not a 'fit person'. There is no reference in the provisions of that Act to any harm, or otherwise, to the child concerned.

It was only with the advent of the CYPA 1969 that 'fit person orders' were removed from the statute book and replaced with a new concept, namely 'a care order'.

The real turning point in this movement towards predominance of the concept of 'harm' was, of course, the Children Act 1989. It has its origins in a working party report of July 1984 from the Department of Health and Social Security which recommended that 'the primary justification for the state to initiate proceedings seeking compulsory powers is actual or likely harm to the child.' Various elements in the definition of 'harm' were put forward by the working party, but the word 'harm' was not qualified by any adjective. It was only in Parliament, during the report stage of the Children Bill, that the term 'significant harm' was adopted.

In this 30th anniversary year following the implementation of the Children Act 1989, it has been of interest to look back at some of the parliamentary debates which were so inspirationally led by the then Lord Chancellor, Lord Mackay of Clashfern.

Once the word 'significant' had been tabled, there was debate as to whether or not it required some additional definition within the Act. Lord Mackay was not in favour. He said, with regard to 'significant', 'I could only do that in other words, and every word is open to some form of construction. I believe that the word 'significant' in this context will signify for a court the kind of threshold that would be right for intervention by an outside body. A merely small matter that could have no consequences would not be significant. Anything that was likely to produce consequences for the child would be good enough.'

How right he was. Professionals and courts soon became used to operating the ‘threshold criteria’ of significant harm and it remains the applicable standard today, with no suggestion that it should be amended in any way.

Just as the understanding within society, the professions and the courts with respect to abuse has developed, so too has understanding with respect to the concept of ‘harm’. Most significantly, in my view, this is demonstrated with respect to ‘emotional harm’. Here, the seminal case is that of *Re L and others (Contact: Domestic Violence)* [2000] 2 FLR 334, a decision of the Court of Appeal presided over by the then President of the Family Division, Dame Elizabeth Butler-Sloss.

The court in *Re L*, with the benefit of advice in a joint report from two eminent child psychiatrists, Dr Glaser and Dr Sturge, held that there was a need for a change in the approach of family courts to issues of domestic violence. Dame Elizabeth said this:

‘The family judges and magistrates need to have a heightened awareness of the existence of and consequences (some long term) on children of exposure to domestic violence between their parents and other partners. There has, perhaps, been a tendency in the past for courts not to tackle allegations of violence and to leave them in the background on the premise that they were matters affecting the adults and not relevant to issues regarding the children. The general principle that contact with the non-resident parent is in the interests of the child may sometimes have discouraged sufficient attention being paid to the adverse effects on children living in the household where violence has occurred. It may not necessarily be widely appreciated that violence to a partner involves a significant failure in parenting – failure to protect the child’s care and failure to protect the child emotionally.’

It is hard to underestimate the importance of that single decision. Dame Elizabeth’s judgment brought together, crystallised and broadcast thinking with respect to emotional harm that had been developing over previous years. It provided an authoritative statement that the emotional impact on children of the behaviour of their parents, whether or not that might, in old fashioned ways, have been seen to be directly abusive, was of significant importance.

As is often the case in this field, where the courts have led, Parliament has followed. Thus it was that in January 2005, s 120 of the Adoption and Children Act 2002 was brought into force so as to widen the concept of 'harm' in the Children Act 1989 to include emotional harm suffered by those children who witnessed domestic abuse or who are aware of domestic abuse within their home environment.

Looking forward the Domestic Abuse Bill, which was before the last Parliament, but which failed to complete its stages prior to dissolution, seeks to extend the definition of domestic abuse to include:

- (a) physical or sexual abuse;
- (b) violent or threatening behaviour;
- (c) controlling or coercive behaviour;
- (d) economic abuse; and
- (e) psychological, emotional or other abuse.

The importance of this draft definition is that it puts on a statutory footing the approach to domestic abuse that is already being taken by family magistrates and judges up and down the country every day of the week.

The concept of harm has continued to evolve as courts face modern day issues which were almost certainly not within the contemplation of those who drafted the Children Act, only 30 years ago. For example, in the case of *Re M (Children)* [2017] EWCA Civ 2164, the Court of Appeal considered the risk of psychological harm to children from living with a transgender parent. In a different context the Family Division of the High Court has extended the umbrella of its inherent jurisdiction to provide protection for children who have been, or are likely to be, radicalised as a result of parents who seek to travel to areas of the world controlled by Islamist extremist organisations. In such a radicalisation case, Hayden J commented¹⁴:

¹⁴ *The London Borough of Tower Hamlets v M* [2015] EWCA 869 (Fam), paragraph 57.

“The family court system, particularly the Family Division is, and always has been, in my view, in the vanguard of change in life and society. Where there are changes in medicine or in technology or cultural change, so often they resonate first within the family. Here, the type of harm I have been asked to evaluate is a different facet of vulnerability for children that that which the courts had to deal with in the past.”¹⁵

In a further, and different, development by the Children Act 1989 (Amendment) (Female Genital Mutilation) Act 2019, the Female Genital Mutilation Act 2003 is now included within the definition of family proceedings so that a court may now make an interim care order where FGM has occurred, rather than, as was the position previously, simply relying upon the criminal law to protect the child.

Conclusion

I hope that this historical review has been of interest – if not, I hope you may have slept well during the last forty-five minutes! The importance of looking back and observing the journey that society has undertaken over the past fifty or more years, coinciding with the professional and political life of Baroness Butler-Sloss, is that it demonstrates just how little we all knew only a few decades ago. Activity which we would now readily regard as abusive by modern standards, was being played out in plain sight before our very eyes, yet not recognised as such at the time. If proof were needed that this was the case, one only has to contemplate all that has followed the death of Jimmy Saville, the many historical sexual abuse prosecutions that have been heard in the Crown Court and the painstaking investigations which are currently being undertaken by the Independent Child Sexual Abuse Inquiry [check name].

As the developing history readily demonstrates, there is no ground for us, meeting as we do in 2019, to be complacent. There is no basis for thinking that our current understanding demonstrates that, at last, ‘we have got it right’ and that we will not

¹⁵ The London Borough of Tower Hamlets v M [2015] EWHC 869 (Fam) (paragraph 57)

learn more in the future. On the contrary, one of the great interests of a life practicing in family law is the confidence with which one can predict that, in the future we will undoubtedly know more, and understand more, than we do now.

Sir Andrew McFarlane

President of the Family Division

22nd November 2019