

30 Years of the Children Act 1989

Scarman Lecture 2019, Law Commission, London

Lady Hale, President of the UK Supreme Court

13 November 2019

It is a great honour to be delivering a lecture named after the great Lord Scarman, first Chair of the Law Commission and revered amongst child and family lawyers for at least two reasons: his role in securing the reform of the grounds for divorce in the Divorce Reform Act 1969 and his judgment in the case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

I was appointed a Law Commissioner in May 1984. At my interview in January I had been asked whether the reform of child care law or the reform of the ground for divorce should be the priority. I had no hesitation in choosing the former. It is difficult now to remember what child care law was like then. I can think of at least ten things that were wrong with it.

First, there was different law in different courts – the law for the poor in magistrates’ courts and the law originally for the better off in the High Court or the divorce courts.

Second, however, the two sorts of law got mixed up when the High Court in wardship proceedings and the divorce court in matrimonial proceedings were given the power ‘in exceptional circumstances’ to commit children to local authority care. Local authorities found it increasingly convenient to resort to wardship, where the criterion was so flexible and the procedures were more appropriate to a dispute between the authority and the parents.

Third, this meant that there were numerous different routes into compulsory care with different grounds and different consequences. There was a very broad and flexible ground in wardship and in matrimonial proceedings. The grounds for bringing care proceedings in the magistrates’ courts were much more specific and narrower, particularly in relation to the risk of future harm.

Fourth, the distinction between so-called ‘voluntary care’ – a service for children whose parents were for some reason unable to look after them – and compulsory care was blurred. After six months in voluntary care, the parents had to give 28 days’ notice if they wanted to have their children back. Perhaps worse, the local authority could assume parental rights over a child in voluntary care simply by passing a resolution to do so and without giving notice to the parents. The parents could challenge it after the event but this was an unjust pre-emptive strike.

Fifth, if children had been committed to their care in care proceedings (or they had assumed parental rights) the local authority was in complete control of where the child was placed and of the contact that the child could have with parents and other family members. The authority could deny any contact between them. There was originally no way of challenging this – the courts refused to devise one by allowing wardship to be used for this purpose. Eventually statute provided a means of challenging the permanent denial of all contact, but that was all.

Sixth, this was in stark contrast with the theoretical position when wards of court were committed to local authority care. The court was still in charge. It could direct the local authority what to do and require periodic reviews. Any important change in the child’s life, such as a placement with a view to adoption, had to be approved.

Seventh, care proceedings lumped together delinquent and naughty children with abused and neglected children. This meant that the procedure was deeply unsatisfactory. The model was based upon proceedings in respect of delinquent or naughty children – those who were out of control, falling into bad associations or in moral danger – rather than proceedings in respect of children who were suffering or at risk of suffering neglect or abuse. So the case was brought against the child, not the parents. The parents’ rights to participate were severely limited but there was in most cases no independent evaluation of what was in the child’s best interests.

Eighth, the wider family, including grandparents, uncles and aunts, or older siblings, were largely ignored in looking for placements for children in care. They were generally thought to be part of the problem rather than a possible solution.

Ninth, children could be removed from home to a place of safety for up to 28 days by an ex parte magistrates' court order without the parents' having any right of challenge.

Tenth, the powers and duties of local authorities to provide social services for children and their families were scattered throughout statute book.

I was anxious to do something about all this, but this was the responsibility of the then Department for Health and Social Security, rather than the sort of 'lawyers' law' which was seen as the province of Law Commission. However, soon after my arrival, the House of Commons Social Services Committee published a report on children in care which recommended a comprehensive review of child care law. The Department had suggested this to the Committee but had no idea how they would be able to do it. The visionary Secretary to the Law Commission, the late John Gasson, offered our services.

The result was an innovation. An Interdepartmental Working Group was set up, with representatives from the DHSS policy makers (Rupert Hughes), legal department (Edwin Moutrie) and social work (Pam Thayer), the Home Office (Bill Jeffrey), the Lord Chancellor's Department (Peter M Harris, later to become Official Solicitor), and me. But there were two objections. First, though not civil servants, Law Commissioners were on a par with Grade 2 civil servants. Rupert Hughes, who chaired the group, was Grade 5 (shock horror). Second, what were we doing offering the resources of the Law Commission to a project led by a government department? Fortunately, we managed to overcome both those obstacles.

The group was served on the DHSS side by a policy maker (Robin Chapman) and a lawyer (Robert Aitken) and on the Law Commission side by an energetic and visionary staff lawyer (Peter Graham Harris) and a brilliant, scholarly and seriously industrious research assistant (Jonathan Whybrow). The teams quickly formed a strong working partnership. I suppose that I supplied the long background in the subject and a commitment to the Law Commission's mission to modernise, simplify and codify the law. The Group produced the *Review of Child Care Law* in a remarkably short time. I still think that it was a great document.

The project was also most unusual in that Rupert Hughes remained in charge of it until it reached the statute book and indeed beyond. It was also unusual in that after the Review was published in 1985, Rupert continued to involve the Law Commission team in developing next steps, leading to a White Paper on *The Law relating to Child Care and Family Services* in January 1987 (Cmnd 62).

Meanwhile, in parallel with the child care project, the Law Commission was examining the law relating to the care and upbringing of children in their families - guardianship, custody and access, and wardship. This suffered from many of the same defects as child care law. Principally, that the remedies available in magistrates' courts were different from the remedies available in the High Court and divorce courts. Once again, this stemmed from there being one law for the rich in the higher courts and another law for the poor in the magistrates' courts.

At some point we had the grand idea that we could bring two projects together to make a single coherent statutory scheme, with the revolutionary idea that all courts could be applying the same law, the same principles and the same procedures.

We have three things to thank that something close to that is what eventually happened. First, the Government kept promising to introduce a Bill to implement the white paper, but it kept on being put off for more urgent things.

Second, the child care scandals of the 1970s (Maria Colwell) and early 1980s (Jasmine Beckford, Kimberley Carlile, Tyra Henry) had concerned the failure of the system to rescue children from gravely abusive homes; but these were then balanced by the Cleveland child abuse scandal where children had been removed too readily from homes which may not have been abusive. In her Report (also produced in double-quick time for such things) Dame Elizabeth Butler-Sloss supported our recommendations to improve the position of parents in care proceedings.

Third, and most important of all, Rupert Hughes had a brainwave. In the Law Commission we had the privilege of direct access to the Parliamentary counsel seconded to us: we could instruct

them to draft law reform Bills, whereas government departments had to get drafting approval from the relevant cabinet committee before they could do this. Rupert suggested that we try to draft a Bill which brought together the recommendations of the white paper with the emerging recommendations of the Law Commission into a single coherent whole. We were keen to do it. And of course the senior Parliamentary counsel seconded to the Commission (Edward Caldwell) really wanted to do it, not only for its own sake but because it felt like a proper programme bill (not like so many Law Commission bills in those days, which did not make it into Parliament). It was Edward who insisted that the first section in the Bill should be the rule that the child's welfare is paramount in all court decisions about his care and upbringing - even though logically that should come after the provisions allocating parental responsibility to parents and statutory responsibilities to local authorities before anyone gets to court. But of course Edward was right – just as cars are made to sell, Bills are made to pass.

That is how Children Act 1989 came into being. I don't think that Rupert could have got it done without us. But we certainly could not have got it done without him. We adopted a similar model when it came to the review of adoption law which led to the Adoption and Children Act 2002.

Indeed, I suspect that I would not be doing the job I am today had it not been for the Children Act project. The Review of Child Care Law and later developments went down very well with the then President of Family Division, Sir Stephen Brown (still with us). The Lord Chancellor, Lord Mackay of Clashfern, successfully steered the Bill through the House of Lords. Incidentally, there were two further innovations which may have helped. Jonathan Whybrow joined the Bill team in the DHSS and I was allowed to sit with the civil servants in their box in the House of Lords. Eventually, Lord Mackay took the brave step of appointing me a High Court judge – brave because of my background in academic law and public service rather than in successful practice at the Bar. I doubt whether this would have happened had it not been for that remarkably successful project.

What were the main aims of the Children Act project? I think there were five:

First, to reform, simply and codify the substantive law: to find solutions for all the problems listed earlier and end the chaos and injustice of different law in different courts in different proceedings and not being able to get all issues related to the same child dealt with together.

Second, to create a new family justice system. This fell short of the integrated family court which we now have, but it could have procedures which were the same or virtually the same throughout, and cases could be transferred between courts so as to arrive at the one most suitable to handle all the issues. The new system combined with new enthusiasm for inter-disciplinary co-operation in family justice.

Third, to unify children's social services. The Act brought together the law relating to services for disabled children and services for children in need of protection from harm or other forms of support. The hope was that all would be seen simply as children in need of help. The principle was of working in partnership with families rather than in opposition to them. Bringing these services together exposed the full extent of local authorities' existing legal obligations for the first time.

Fourth, to clarify the boundaries between what courts did and what social services providers did. Courts were for deciding upon the allocation of parental rights and responsibility, local authorities were for providing services for children and families and looking after children. Controversially, this diluted what had been the role of the court in wardship proceedings, although it enhanced the role of the court in care proceedings.

Fifthly, to separate the family and youth justice systems. This was controversial, because so much of the previous century had been devoted to trying to bring juvenile offending into the child protection system – as had happened in the Children's Hearing system in Scotland. But it was essential if we were going to have a coherent system of public and private family law. At the time, the emphasis in juvenile justice was all on diversion, so the separation did not have to mean more punitive approach to juvenile offending.

Looking back, although we were aware of the European Convention on Human Rights, it played a remarkably small part in our thinking. Yet the principal defect of the previous law was its failure adequately to protect the rights of both children and their parents to respect for their private and family lives. Interference, as we all know, has to pursue a legitimate aim and be

necessary in a democratic society to achieve it. It is fortunate that what we came up with has largely turned out to be compatible with the Convention rights.

But surely it wasn't all good news? Taking each of five achievements in turn, there were also downsides or disappointments.

First, of course, however clear the drafters' instructions and however skilfully they had turned them into statutory language, there were bound to be gaps, ambiguities and potential for misunderstanding which had to be cleared up later. Many of these reached the House of Lords or the Supreme Court: they fell into three broad categories, those exploring the meaning and application of the welfare principle; those exploring the meaning of the new criteria for removing children from home; and those exploring the scope of local authorities' powers and duties towards children in need.

Section 1(1) of the Act seemed quite clear: "When a court determines any question with respect to . . . the upbringing of a child . . . the child's welfare shall be the court's paramount consideration". This was a change from the "first and paramount" consideration in the section 1 of the Guardianship of Minors Act 1981; it was also a change from the "sole" consideration recommended by the Law Commission; but it was not a change from the meaning given to "paramount" by the House of Lords in the leading case of *J v C* [1970] AC 668: "it rules on or determines the course to be followed". The hidden issue was where this leaves the child's "natural" or "biological" parents. Do they have a right or a claim to bring up their own child which is an independent consideration in its own right? Or is their relationship with their child to be considered as one of the factors, usually one of the most important factors, in determining what will be best for him? In *Re G (Children) (Residence: Same Sex Partner)* [2006] UKHL 43, [2006] 1 WLR 2305, at para 30, the Law Lords emphatically chose the latter, citing the Law Commission, 'the welfare test itself is well able to encompass any special contribution which natural parents can make to the emotional needs of their child'. That was in the context of a dispute between the woman who had given birth to the children and her former woman partner who was undoubtedly their social and psychological parent. But the idea that birth parents have a prior claim lingered on until *Re B (A Child) (Residence: Biological Parent)* [2009] UKSC 5, [2009] 1 WLR 2496, one of the first cases decided by the new Supreme Court. A little boy had been

brought up since birth by his grandmother because neither his mother nor his father was able to look after him, the mother because of substance abuse issues and the father because he was in prison. When the father came out of prison and got married he applied to change the child's residence but the family proceedings court decided that the child should stay with his grandmother where he was settled and thriving. The judge disagreed, relying on the "right of the child to be brought up in the home of his natural parent". The Supreme Court restored the decision of the family proceedings court. Lord Kerr explained that the common experience, that children tend to thrive when brought up by parents to whom they have been born, does not necessarily provide a reliable guide. 'It is only as a contributor to the child's welfare that parenthood assumes any significance' (para 37).

However, that is the position between private individuals. When the state wishes to intervene in family life, the child's welfare is not enough. Something more is required. This is provided by the 'threshold criteria' which must be proved before the court can go on to consider whether it will be in the child's best interests to make a care or supervision order. The court must be 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.'

The Law Commission's draft had been that the child 'has suffered or is at real risk of suffering' significant harm. Parliament changed it. So the first question was: to what point in time did 'is suffering' refer? Logically and linguistically it should be when the court comes to consider whether the threshold is met; but by then the child will usually have been temporarily removed from home and no longer suffering the harm complained of or likely to do so; so in *Re M (A Minor) (Care Order: Threshold Conditions)* [1994] 2 AC 424, the House of Lords held that it must refer to when the proceedings began or even earlier if there had been protective measures continuously in place.

The next question was: what does 'likely' mean and how is this to be proved? The first would not have been a problem had the Law Commission's 'real risk' been retained, because there can clearly be a real risk even if it is not more likely than not to happen. But 'likely' can mean 'probable'. However, in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, the Law Lords decided that it meant 'a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case': in other words, the more serious the risk, the less likely it had to be to justify protective action.

But how do you prove such a likelihood? Is it enough that you suspect that harm has been caused in the past? Or does your prediction have to be based on proven facts? The majority held that it had to be based on proven facts: it would be nonsense if a case that the child 'is suffering' had to be based on proven facts, rather than reasonable ground for belief, but the court could find that the child is likely to suffer on the very same evidence. This conclusion came under severe attack in the later case of *Re B (Children) (Sexual Abuse: Standard of Proof)* [2008] UKHL 36, [2009] 1 AC 11, a case which seemed almost deliberately contrived to make the Law Lords reconsider: the judge was unable to make up his mind whether the allegations of sexual abuse of one child were true and thus that it was likely that another child would be abused. But the Law Lords unanimously followed the majority in *Re H*.

And to what standard do the facts have to be proved? The mantra that 'the more serious the allegation, the stronger the proof has to be' has had a curious hold, even though in *Re H* the House of Lords had held that there was only one standard of proof, the civil standard on the balance of probabilities. In *Re B*, the House of Lords discarded the mantra once and for all – it was not even the case that the more serious the allegation, the less likely it was to be true. It all depends. If you are walking in Regent's Park it may be unlikely that an animal you see in the bushes is a lion, unless you are in the zoo, next door to the lions' enclosure and there is a great big hole in the fence. It may be unlikely that anyone would swing a tiny child by the arm and slam him into the wall. But when there is incontrovertible scientific evidence that this is what happened, it is not unlikely at all and the question shifts to who did it.

The 'whodunit' question has caused the most trouble. The 'care' which is talked about in the second, attributability, limb must refer to the care which is given to the child at home, rather

than in school or hospital or somewhere for which the parents whose parental responsibility is at stake are not responsible. But what if a child's care is shared between the parents and a child-minder and the court cannot decide who was responsible for the serious injuries she suffered? In *Lancashire County Council v B* [2000] 2 AC 147, the Law Lords decided that the criteria were met in relation to that child, but not in relation to the child-minder's child, who had suffered no injury: the likelihood of future harm was based on a possibility, not a proven fact.

If parents are living together and the child is harmed in the home, the criteria will usually be satisfied even if the court cannot decide which parent was responsible. In most cases of multiple injury, this will not be unjust, because the other parent must have realised that something was wrong and done nothing to protect the child. But occasionally you might get a one-off injury – bruises which could all have happened at the same time and there was nothing which the other parent could have done to prevent it. The court has to do its very best to decide who did it – and, as the Supreme Court reminded us in *Re S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17, [2010] 1 AC 678, the standard of proof is the balance of probabilities. The Supreme Court accepted that it might sometimes not be possible to do so and then the trial court would have to identify a pool of perpetrators on the basis of 'likelihood or real possibility' rather than on the basis that they could not be ruled out. The point can be very important when it comes to judging whether children in a parent's new family are likely to suffer significant harm.

I mention all this to illustrate just how difficult the task of law reform is. The criteria we devised were a definite improvement upon the vague 'exceptional circumstances' test in wardship proceedings – that had indeed been used to justify removing children from their families on no better basis than a list of social work 'concerns', I am ashamed to recall. But trying to tighten it up brought its own problems of statutory construction. And those are quite apart from the inevitable problems of fact finding in this difficult area, together with the problems of evaluation. When does less than perfect parenting tip into significant harm? When is a risk of future emotional harm sufficient to justify removing a child from home? These are the sorts of intractable problems which family court judges have to wrestle with day after day.

The second downside – or rather disappointment – is that we would have liked to have concurrent jurisdiction in all courts in all proceedings. Under the old law, private law proceedings

between husband and wife or father and mother could begin in either the magistrates or county courts and that would continue. But under the old law care proceedings could only be brought in the magistrates' juvenile court. It was thought too revolutionary to allow them too to be brought in the county courts. So all care proceedings, no matter how difficult and complicated, had to begin in the magistrates' courts. They could then be transferred up (just as private law proceedings could be transferred down) but this all took time and the right cases did not always reach the right place. This was a big contributor to the delays which developed in public law proceedings.

A third disappointment was that the aspiration of developing a partnership between children's services and families with children in need proved very difficult to achieve. It is not actually in the Act, although it was a strong theme of the Guidance which accompanied it. The trouble is that, if efforts to work with families run into difficulties, the local authority can always resort to care proceedings and the families know that. When local authorities provided accommodation for children whose parents were unable to look after them, they were encouraged to make 'agreements' with parents so that there would be a clear understanding of the position. But we have seen agreements which did not make it clear to the parents that they could ask for their children back whenever they wanted to – in other words, that the arrangement was genuinely voluntary on their part.

So in the case of *Williams v Hackney London Borough Council* [2018] UKSC 37, [2019] AC 421, the Supreme Court had to emphasise that where parents made an unequivocal request for the immediate return of their child, the local authority had to comply, unless it was able get an emergency order to protect the child. We also emphasised that parents should be given clear and accurate information about what the local authority has done, their own rights under the Act, including the right to know where their children are, and the responsibilities of the local authority. 'Safeguarding agreements' may be good practice but they should not give the impression that the parents have no right to object or to remove the child. But there are also cases where the local authority clearly should have brought care proceedings, so that they had parental responsibility for the child, but did not do so even though the child remained in accommodation which they had arranged for many years. This, we pointed out, might be in breach of their public law obligations and in some cases of either the child's or the parents' rights under the Human Rights Act.

On the other hand, working in partnership with parents became harder after tragedies such as the death of 17 month old Baby Peter in 2007, after swallowing a tooth as a result of a punch to the face, and having suffered multiple injuries over a period of time, including a broken back, broken ribs, mutilated fingers and missing fingernails. Numerous opportunities to realise that he was being ill-treated were missed by both health and children's services. A major scandal resulted. Not surprisingly, children's services became more and more risk-averse and the number of care proceedings rocketed, putting a major strain on the family justice system, as well as on the resources available to children's services for preventive and rehabilitative work with families.

The family justice system was already under strain as a result of the fourth disappointment. Under the Act, if there were reasonable grounds to believe that the threshold was met, the court could make an interim care order temporarily removing the child from home. This lasted in the first instance for up to eight weeks, although it could then be renewed for four weeks at a time. The aspiration was that the care proceedings could be completed within that time, with the child either going home or becoming the responsibility of the local authority. That was probably always an unrealistic aspiration, because the evidence takes time to gather and the necessary assessments of the parents and possible alternative family carer also take time. But what also led to delays was the reluctance of courts to cede control to the local authority.

Once the threshold is crossed, the court's options are limited – no order, supervision order, care order or order for the child to live with someone else. Once a care order is made, the local authority has parental responsibility and is in control. This was a deliberate choice, explained in the Review of Child Care Law. The court was to decide who had parental responsibility and who had – or did not have – contact with the child, while leaving it to the local authority to decide how to look after the child – courts cannot look after children.

This was always controversial with the High Court judges and the lawyers who remembered the old wardship system, under which the court had power to give directions to the local authority about how to look after the child, and in particular had to give specific approval to any plan to place the child permanently with a view to adoption, and could insist on regular reviews. How, asked the judges, could they carry out their duty to make the child's welfare their paramount

consideration if they could not determine what plans should be made for him once he was in care? So they insisted on scrutinising the plans for the child and delayed making a “final” care order until they were happy with these.

But once the care order was made, what was to happen if the care plan was not implemented? In *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291, the Court of Appeal – of which I was one - thought that the Human Rights Act 1998 had made a difference. Failure to implement a care plan (whether for returning the child to the family or for permanent placement elsewhere) might be an unjustified interference with the right to respect for the family lives of either the parents or the child. The court should be able to identify those parts of the plan which were so important that the case should be brought back to court if they did not happen. But the Law Lords disagreed. We had not identified a specific provision in the Children Act which could be “read and given effect” in this way under section 3(1) of the Human Rights Act 1998; and in any event, section 3(1) could not be used to over-turn a ‘cardinal feature’ of the scheme which Parliament had enacted. The human rights lawyers thought this was obviously right, while the family lawyers were not so sure. This was a very early case on the use of section 3 and so we can also claim that the Children Act made a significant contribution to human rights jurisprudence.

The fifth disappointment was the way in which the juvenile justice system developed during the nineties and early noughties. As I said, when the Act was passed, diversion of juvenile offenders from the justice system was in the ascendant. Very few children were then placed in custodial settings within the penal as opposed to the child care system. It was not expected that the criminal justice system would become more punitive towards them. Perhaps the Bulger case changed the public mood. Certainly the government in 1998 decided that diversion had gone too far and started restricting police discretion. This meant putting children on the ladder of ever-escalating responses to bad behaviour. At the same time, we saw the introduction of ASBOs – a new way of stigmatising and eventually punishing children. Not surprisingly there was an explosion in the numbers of children in secure institutions, but fewer and fewer of these were sent to secure children’s homes (which are much better suited to their educational and developmental needs) and more and more to secure training centres and young offender institutions in the penal system (where the quality of education provided has been found wanting and many bad things can happen). Fortunately, by 2013, the numbers had dropped considerably,

probably because the Ministry of Justice had stopped giving the police targets for the number of offenders brought to justice. But the Children's Rights Alliance for England and the United Nations Committee on the Rights of the Child still find much to criticise in our youth justice system.

So, for each of the major achievements of the Act there has been a downside or disappointment. It has also been thought necessary to modify it. Some of those modifications are, to my mind, improvements: the replacement of residence and contact orders with child arrangements orders comes much closer to what the Law Commission had originally envisaged; and special guardianship as an alternative form of permanent placement which leaves the child in the same legal family is also something which we had also envisaged.

Overall, we are here to celebrate a ground-breaking piece of legislation – ground-breaking in what it did for the care and upbringing of children – and a ground-breaking Law Commission project – one which has largely stood the test of time as a piece of law-making and one of which I hope that the great Lord Scarman would be proud.