Child Care Law Reporting Project

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Findings of Project so far

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"Child Protection and the law: some reflections from the Child Care Law Reporting Project"

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This conference is interdisciplinary, seeking to look at the inter-action between the very different disciplines of law and social work. These disciplines meet in court, where social workers must satisfy legal standards of evidence to support applications, based on the welfare of children, which strike at the heart of fundamental human rights: the right of children to be reared by their own families, and the right of parents to rear their children. These rights are guaranteed in various international conventions, and are embedded in the Irish constitution and various judgments based on it.

Marrying these disciplines is not easy. One of the most striking things we saw in observing court proceedings involving child protection was how social work practice was very different from the legal process which determines what, if any, order should be made by the court. Law requires definitions and standards against which actions can be measured. Social work, while governed by law when court intervention is sought, also requires the exercise of judgment moulded by experience and sometimes informed by intuition, which is not amenable to standardisation.

Despite many efforts, especially in the neighbouring jurisdiction, to do so, social work is not reducible to the application of a set of rules and procedures. As Hoyano and Keenan, the authors of a major study of the law and policy on

child abuse across common law jurisdictions, have written: “Problems are caused by the plethora of guidance and procedures which professionals in a diverse range of disciplines are meant to read, digest and apply whilst performing an extraordinarily difficult and time-consuming job.”

So in considering child protection and the law we must look at these different disciplines and attempt to chart a way for them to interact in a way that serves the interests of vulnerable children and their families.

Child protection: what are we protecting children from?

This is not as straightforward as it appears at first glance, despite the terms of the 1991 Child Care Act, which state that a court order should be sought where a child suffers from, or is at risk of, assault, ill-treatment, neglect or sexual abuse.

Identifying abuse may seem easy, particularly sexual abuse and physical abuse leading to injury. But cases involving non-accidental injury or sexual abuse have been among the most contested we have seen. Child abuse is rightly considered a serious crime, subject to the sanctions of the criminal law. It is also hugely condemned by society, and perpetrators are understandably very reluctant to admit to it. Proving it to either the standard of proof required for child protection, or to the criminal standard of proof, raises many serious issues around the gathering and presentation of evidence, especially evidence from children.

Physical abuse, particularly if it leads to injury, is assault and is also a criminal offence. But again, where non-accidental injury is suspected parents will be very reluctant to admit responsibility and it may be difficult to prove who, if anyone, is responsible for the injury. Further, in a number of countries the issue of physical chastisement has proved to be contentious, where a cultural defence of this practice has been raised by certain minority groups.

More recently, abuse has come to include emotional abuse, which is more difficult to define and may depend on a more subjective evaluation on the part of the person seeking to protect the child.

Neglect: we think we know what it is, but opinions may differ, and environment plays a major role. Wilful neglect, or neglect arising from addiction or disability, is relatively easy to recognise. But can we accuse a parent of neglecting a child if the parent does not have access to adequate resources to feed, clothe and provide accommodation for themselves or their children? If, as is happening at present, a family loses its home and is in homeless accommodation, the children are likely to suffer from a lack of essentials like home-cooked food, a warm environment in which to do their homework and a safe play area. Can that be described as neglect and give rise to child protection proceedings?

Irish child protection legislation goes further than referencing abuse and neglect. The Child Care Act 1991 stipulates that the relevant State organ (now the Child and Family Agency) must apply for a Care Order or a Supervision Order if it appears that a child "requires care or protection which he is unlikely to receive" without such an order. This covers, not only abuse and neglect, but

if a child's "health, development or welfare" has been, or is likely to be in the future, "avoidably impaired or neglected."

Paul Ward, author of a commentary on the Child Care Acts, comments: "Of the three grounds [for seeking a Care Order] this [the likelihood of future harm] is the most difficult to satisfy in terms of proof."

He looked at English case law on this issue, and commented on the judicial consensus there: "Any conclusion that a child was suffering and was likely to suffer (future harm) had to be based on facts and not just suspicion." He also pointed out that the action being proposed by the child protection authorities must be proportionate to the risk. Automatically removing the children from their parents may not satisfy this requirement.

The interpretation of these provisions is in the hands of the agents of the Child and Family Agency, the social workers and their managers in child protection. This is clearly not an exact science, and no human being can get it right 100 per cent of the time. Misjudgements can be made which can lead to a disproportionate response of the one hand, or to tragedy on the other. The response to tragedies in other jurisdictions has been increased regulation and more defensive policies. But attempts to make social work more exact through increased regulation and procedures have not necessarily improved practice.

To quote Hoyano and Keenan again: "Because much of the safe-guarding work is nuanced absolute rules will not necessarily be useful or used; instead, clear principles combined with a reduced amount of guidance, and time and fora for considered decision-making, would be more effective…. Aspirational legislation

can never be implemented effectively by those who are besieged, over-burdened and poorly trained."

The views of these legal academics are echoed by social work academics Fetherstone, White and Morris, who write: "What rigid processes actually produce is the stripping of requisite variety and agility from the professional response …. The work with the family and the sense-making involved in deciding whether a child is at risk in the first place are not amenable to standardisation without compromising safety and system reliability."

Nuance, variety and agility are not easily translatable into law. However, the law requires a legal framework for the implementation of policy, and evidence on which to base decisions, especially decisions that are life-changing. Somehow, social work policy must combine the necessary nuanced judgment of properly trained and experienced social workers with an understanding of fundamental human rights, of the constitutional basis of all our law, and the need to transform observations of children and families into evidence that meets the required thresholds for State intervention.

The difficulty in achieving this is demonstrated by the very wide variations we found both in the practice of the Child and Family Agency in seeking child protection orders and in that of the courts in granting them.

While we collected our own statistics from the cases we attended, we also published every year the Court Service statistics on child care applications, and these guide us in allocating our reporting resources. They showed a very wide variation in the volumes of applications sought in different parts of the

country, with towns of roughly similar size having widely different numbers of child protection applications. The Courts Service statistics are not totally reliable, as there is some multiple counting, especially of Interim Care Orders, which are renewed on a monthly basis. But this multiple counting is widespread and cannot fully explain the differences. Nor can these discrepancies be explained solely by differences in demographics and levels of social deprivation in different areas.

Further explanations may be that in some areas voluntary care arrangements are very widely used instead of court-ordered care, and it may be that some areas have much better family support services, keeping children at home with support rather than placing them in care. Hopefully there will be further research to help explain these discrepancies.

Our own statistics also showed wide variations in the type of orders sought and made. In some parts of the country the CFA was more likely to seek Supervision Orders, where the children are monitored in their homes, than in others. Only four per cent of the orders sought in Dublin were for Supervision Orders, while in Cork and Clonmel it was 14 per cent, and in Waterford it was almost 25 per cent of all applications. Again, it is not clear why this is the case,. It is unlikely to be that the risks to children in Waterford could be met by Supervision Orders, while risks in Dublin required Care Orders. It may be related to the availability of social workers to visit the children and ensure they were receiving appropriate care, as provided for in Supervision Orders.

We also saw wide variations in the thresholds at which all types of orders were sought. Attitudes to drug-taking, in particular, varied around the country, with

a suspicion of cannabis use (which was denied) prompting the seeking and granting of an Emergency Care Order in one rural town. No evidence was given of neglect of, or risk to, the baby. Yet the judge accepted without question that likely cannabis use was sufficient evidence for the making of an Emergency Care Order, and made it clear that, if there was further evidence of such use he would make an Interim Care Order, which is preparatory to seeking a full Care Order. Happily, in this case there was no evidence of cannabis use on the part of the mother in the subsequent court appearance and the Emergency Care Order lapsed without being replaced by an Interim Care Order.

However, cannabis use alone, unless accompanied by much more serious drug use and a chaotic life-style, is rarely the basis for a Care Order application in the larger cities and towns. Indeed, in one case where the CFA was recommending the discharge of a Supervision Order for a baby who was being cared for by his father and paternal grand-parents, the social worker gave explicit evidence that the father's cannabis use was not impacting negatively on the child.

Yet in another part of the country the CFA was unable to obtain full Care Orders for six children when it seemed clear that the threshold that the children had suffered serious harm, and were likely to do so in the future, had been met. This included evidence that the younger children were strapped in their buggies for lengthy periods while their mother was very drunk. She herself spoke about one of her young children having been sexually abused. An older child, who was very traumatised, had revealed serious physical abuse by his mother.

The principal of the school also gave evidence of disturbed behaviour on the part of the children, and a doctor told the court that the three-year-old child in the family was the most bruised child she had ever seen, with bruises at his nipples, back, neck, thighs and under his eyes. The judge declined to make long-term Care Orders for the six children, and made Care Orders for seven months instead, saying when he came to review the matter after that time he would consider returning the three younger children to the mother.

He did not relate this decision to any assessment of the threshold required by the legislation for an order, in contrast with other judges who have, sometimes in lengthy written judgments, assessed the grounds for the making of an order under the different sub-sections of Section 18 of the Act. They related their decision to a detailed evaluation of the evidence, framing it in the context of the obligation to make the welfare of the child the paramount consideration, as well as the need to make an order proportionate to the risk identified.

In a number of cases we found that, where the mother was found to lack parenting capacity, the possibility of the father caring for the child, perhaps with support from his extended family, was not seriously considered. Yet in certain areas where this arose the child was placed in the care of his or her father and his family. Indeed, some judges were adamant in all cases they heard that the father, if identified, should receive consideration as the appropriate care-giver for the child. Others did not consider them at all if they were not brought to the court's attention by the CFA. Consideration of the possibility that the father could care for the child (even if in most cases he may be unable to do so) should form part of a proportionate response to the risk the child faced in the care of his or her mother.

It is clear, therefore, that there is no unanimity in how the Child Care Act is applied and what the thresholds are for bringing applications on the part of the CFA on the one hand, and for granting them on the part of the judiciary other.

Ambiguity surrounds the very nature of child protection proceedings, with lawyers for the CFA sometimes arguing that they are essentially an inquiry. There is general agreement that they are an inquiry into what will promote the welfare of the child at their centre. They also resemble civil proceedings, in that the burden of proof is on the balance of probabilities. But that does not exhaust the matter. Allegations of criminal behaviour may be made against the parents and, if found credible, will lead to the very serious consequences, the loss of parental rights and possible charges in the criminal courts. Even without that, parents whose children are removed from their care suffer great social stigma as well as the emotional trauma of losing their children.

As High Court judge Ms Justice O'Malley has put it, commenting on the CFA's presentation of such proceedings as simply "an inquiry": "The process itself is adversarial. Parents who contest the application made by the HSE can only do so by challenging the HSE's evidence and adducing their own. There are always issues to be determined, the primary one being whether the HSE was justified in making the application. The concept that 'there are no winners or losers' is an appropriate one for the attitude of the professional staff of the HSE and its lawyers, but it asks a degree of detachment that is very unlikely to be shared by a parent. The procedure is, as a matter of fact, adversarial."

This points to an ambiguity too in the role of social workers. On the one hand their role is to ensure children who come to their attention are safe and well, primarily within their families, as mandated by the legislation, the Constitution and international human rights law. In pursuit of this, they should help the family obtain the supports they need to parent their children adequately. However, if they come to the conclusion that the children are not safe within their families, they must bring forward evidence to justify to a court taking them from their parents and placing them in State care. Inevitably, this gives rise to mistrust between the parents and social workers.

This was expressed very graphically by one respondent parent in proceedings where a Supervision Order for his two young children was sought, who said: "I've been through this system. They say they're there to help, but it only leads to children being taken away from their parents. They say 'why don't you do this?' and 'why don't you do that?' They're not helping. They're just looking to find things. They took me off my mother when I was happy. I'm sorry if I don't trust social services."

In this case the evidence in support of a Supervision Order was compelling, as the father was a former heroin addict and a current cannabis user facing a number of criminal charges; the older child missed a lot of school and both he and his younger brother were often out of doors unsupervised.

However, in another case a young father acknowledged that he and his partner could not care for their child despite more than a year of sustained support from social services. They both accepted that the arrangement come to with social services and a foster family, in which he and the child's mother were

involved, was the best thing for the child. Here the evidence was not contested, and not perceived as an attack on the parents.

Courts cannot make decisions without evidence, yet the primary job of social workers, unlike, for example, police officers, is not the collection of evidence to present in court. Nonetheless, it is an essential part of their job, and one for which they may not be adequately trained or prepared.

We have seen confusion on the part of social workers about the different levels of evidence needed to support different types of applications: for ECOs, for ICOs and for COs. Such confusion can lead to an order being refused.

An Emergency Care Order can only be granted if there is “an immediate and serious” risk to the child. Evidence has to be given that the risk is both immediate and serious. Emergency Care Orders have been refused on the basis that a risk, while serious, was not immediate and therefore an Interim Care Order was more appropriate.

Interim Care Orders are granted on the basis that there is “reason to believe” there is a risk to the child, while Care Orders are granted on the basis that the court is “satisfied” that there is such a risk. This is a considerably higher threshold, and we have seen a number of cases where Interim Care Orders were granted and renewed many times while full Care Orders were later refused. In these cases the judge refusing the Care Order stated that the threshold had been met for an Interim Care Order (in some instances granted by a different judge), while there was insufficient evidence to justify a full Care

Order. It cannot be assumed that obtaining an Interim Care Order and having it repeatedly renewed ensures the granting of a full Care Order.

So what kind of evidence is required for the various orders?

In a recent case an Emergency Care Order was refused for a suicidal teenage boy who was being abused by his mother. The CFA sought the order *ex parte*, that is, without notice to the mother. There had been a Supervision Order in place but it had lapsed. A psychologist told the court that the boy was very distressed and threatening suicide. The judge pointed out that he had also been suicidal in 2011 and 2012, but the doctor said his state had worsened recently. The judge said that if it was an urgent mental health matter an application should have been brought under the Mental Health Act, otherwise an Emergency Care Order application should be made with notice to the boys' parents. She said the situation was serious but not immediate.

In another case last year an Emergency Care Order for a girl with complex mental health needs was also refused on the basis that the situation was serious but not immediate. In that case the judge said: "It's a chronic situation, a serious situation for a number of years, which has not enormously escalated in the last six months, the immediacy has not been established."

We have also seen a number of cases where children have been detained in psychiatric hospital under Section 25 of the Mental Health Act, so this is available to the CFA when a child is suffering from mental illness or under severe mental distress.

However, Emergency Care Orders are regularly made by the courts, often when the Gardai come upon a situation where a child is obviously at immediate risk. This happened when two members of the Gardai came across a very young child in car on a very cold night with two adults who were about smoke heroin. They were homeless and were spending the night in the car. In another case Emergency Care Orders were granted for three children who escaped out the window of their home, where they were being abused by their mother. In both these cases there was obvious urgency and immediacy to the applications, which was not present in the other applications, serious though they were.

There have been a number of examples of Interim Care Orders granted, preparatory to applications being made for full Care Orders, but these orders were later refused. While the Interim Care Orders are in place assessments should take place of the parenting capacity of the parent or parents, including their cognitive ability, and, where there are allegations of abuse, these should be investigated.

In one such case a baby was born prematurely to a young woman with mental health problems who already had a child (by a different father) in care. The child had medical problems related to his prematurity, and the CFA was concerned about the mother's capacity to care for him. An Interim Care Order was granted and renewed. However, during the Care Order hearing the judge, who endorsed the granting of the Interim Care Orders by another judge, said the threshold had not been met for the Care Order as the CFA had not adequately assessed the ability of the father to care for the child. He granted a

Supervision Order on the basis the child lived with his father and paternal grandparents, and this was discharged a year later.

In another case two children were returned to their parents after five and three years respectively (their whole lives), because the judge found that allegations emanating from another jurisdiction that the father may have been responsible for sexually abusing the mother's other child had not been proved. To decide the case in the absence of such evidence would violate the respondents' constitutional right to a fair hearing. It was for the CFA to prove its case, and it had failed to do so by not calling sufficient evidence, he said.

Because no evidence had been called to substantiate the suspicions of involvement in, or failure to protect from, child sexual abuse in the other jurisdiction, the basis for the application had not been proved, he said. "Reasonable concern or suspicion is not sufficient to enable this court to make Care Orders. This court only makes Care Orders on the basis of proved facts."

He said that in order to satisfy the threshold that the children's health, development and welfare was likely to be avoidably impaired or neglected, past facts must be proved to enable the court, on an objective basis and on the balance of probabilities, to determine the likelihood of future harm. "Findings of the court in cases of such import as child care proceedings must be based on facts proved in evidence, and not suspicions," he said, echoing the point made in Paul Ward's commentary on the Child Care Acts referred to above.

However, the court found that in this case the CFA and its predecessor the HSE had been entitled to seek an Emergency Care Order and Interim Care Orders,

having regard to the information which had been furnished and the child protection concerns arising from that information. This was a complex case which would have required detailed investigation and was not made easier by the necessity for extensive reports and documentation having to be obtained from outside the jurisdiction. “Further it was proportionate for the applicant, in compliance with its duty under S 16, to institute legal proceedings,” the judge said.

Thus well-founded suspicion of risk to a child is sufficient to seek an Interim Care Order, but not a Care Order, which must be based on proven facts.

This makes the period between the granting of an Interim Care Order and the hearing of an application for a Care Order of crucial importance. Evidence must be collected so that the court is “satisfied” there is a risk to a child that can only be met by a Care Order, removing the child from his or her parents, rather than just “have reason to believe” there is a risk to the child.

In the majority of cases, this evidence is given by one or more social workers. In 80 per cent of the cases we attended, the only witnesses were social workers. In 40 per cent of cases the parents consented to the order being sought, and in another 40 per cent the case was adjourned, it concerned an issue in a case already decided, or consent did not arise for some other reason. Thus the contested cases, where evidence was likely to be tested, only accounted for 20 per cent of cases.

In many of these cases there were allegations of physical or sexual abuse, which were denied. This raised difficult issues about the requirement to assess

risk on the basis of “proven facts”. The two sources of this evidence, apart from the social workers, were the children themselves and expert witnesses, usually experts in physical or sexual child abuse or in the assessment of the credibility of children’s allegations.

In Ireland the rules of evidence still exclude hearsay evidence, though there is an exception in relation to allegations made by children in Section 23 of the Children Act, 1997. In England and Wales the Civil Evidence Act 1995 abolished the hearsay ban for all civil cases, and this has been recommended by our Law Reform Commission, though not legislated for. Instead, under the 1997 Act, the admission of indirect evidence from children is examined on a case-by-case basis. This has been the subject of a number of recent written judgments in the District Court, including one from Judge ni Chulachain, who ruled that it would not be in the interests of three children, including two teenagers, to give evidence, but allowed them to speak to her in private on non-evidential matters. The evidence of their alleged abuse was given by third parties to whom they had spoken.

This approach also exists in Canada and it has the endorsement of Hoyano and Keenan, authors of the seminal work on the law and policy on child abuse referred to above, who said: “The Canadian approach of admitting hearsay evidence where it is reliable and necessary has the appeal of being strongly oriented towards the assessment of the circumstances of the individual case.” However, this approach means that each case where there are contested allegations from children will require a separate assessment of the circumstances before such evidence is admitted, inevitably prolonging the proceedings.

In many cases where child sex abuse is suspected, there may not be allegations from the children themselves, for various reasons. It may be necessary to examine the child's behaviour in order to draw conclusions about it, and this is frequently done by experts in the field of child sex abuse. But this can be contested too, as such experts are usually called by the CFA in support of its application for a Care Order, and parents may challenge their independence. It is rare that experts in this area are called on behalf of parents, but the courts themselves have, on a number of occasions, sought evidence from independent experts on child sex abuse and on the credibility of children's allegations.

Hoyano and Keenan urge caution in assessing the evidence of such experts, pointing out that phrases like behaviours being "consistent with" having been abused are problematic. Such a statement is an observation that some abused children exhibit this condition. Without elaboration, it does not indicate the frequency in which the behaviour occurs in abused as against non-abused children. Nonetheless, recent studies are beginning to lay the empirical foundation for the contention that the presence of sexual behaviours that are seldom observed in non-abused children could provide evidence of sexual abuse, but these authors warn that caution is warranted in analysing judicial pronouncements on the probative value of such evidence.

Given the tentative nature of such conclusions, it is essential that parents in child protection proceedings have access to qualified and experienced experts who can, if necessary, challenge the expert evidence put forward on the part

of the State. While this may prolong proceedings, the danger of miscarriages of justice in such cases, if fair procedures are not followed, are great.

These are not the only assessments that may take place and child sex abuse, along with non-accidental injury, are, thankfully, an issue in only a small minority of child protection cases, though they are among the most contentious. Parenting capacity assessments are more routine, and these can be crucial in providing the judge with evidence on which to base a decision.

But parenting capacity assessments can also present problems. Again and again we have heard evidence of the outcome of a parenting capacity assessment given in court where there is uncertainty about the cognitive ability of the parent or parents, and no cognitive assessment had been carried out. It is difficult to see how conclusions can be drawn about parenting ability without an assessment of how well the parent understands what is being asked of him or her.

There may also be cultural misunderstandings. The issue of physical chastisement is one which has been identified as a source of conflict between social workers and certain minority communities, but it is not the only one. Attitudes towards older children taking on responsibilities for younger ones and towards children being unattended for periods of time may differ from ours in certain communities. An emphasis on individual autonomy, which we take for granted, is also culturally specific, and is not seen as so important in, for example, some Asian cultures. All of these differences may feed into an assessment of an individual's parenting ability. As our society becomes more complex and multi-cultural, our institutions must become more aware of what

this means. As the American social work academic, Krishna Samantrai, has written: “Any child’s behaviour, play and symptoms have to be interpreted in the context of the norms, practices, values and beliefs of that child’s family and culture.”

So how can we improve child protection proceedings so that they best serve the needs of vulnerable children and their families?

First of all, multiple adjournments and delays must be eliminated as soon as possible. This will required the establishment of a dedicated family court, and dedicated child care courts, or child care days in smaller courts, within it, which hopefully will come soon. It may also require some changes to the Child Care Acts. But even without that the Courts Service and the judiciary should look at procedural and organisational measures to ensure that sufficient days are set aside to hear lengthy and complex cases without them having to be constantly adjourned, with lawyers for all the parties juggling their diaries to fit in another few days here and there. This will also require discipline from lawyers for all the parties, with realistic assessments of the time the evidence will take, avoiding the repetition of essentially the same evidence from multiple witnesses, and active case management to get agreement on as much evidence as possible.

However, much can be done before the case comes to court at all. Social workers don’t need to be lawyers, but they do need to understand the fundamental principles of constitutional law, international human rights conventions and child protection legislation so that they can inform their practice as social workers long before the issue of seeking a court order may

arise. The constitutional presumption in favour of a child's birth family, bolstered by international human rights jurisprudence, needs to be integrated into social work training, along with an understanding of the term "proportionate", recently inserted into our Constitution as part of the children's amendment.

The principle of proportionality means that assessing risk must be combined with assessing what will ameliorate that risk, and seeking an order which is proportionate. This is linked to the definition of the different thresholds at which various orders are sought. Recent judicial judgments elaborating on these thresholds, while they may not meet with universal agreement, provide rich material for discussion and for developing clarity and consensus.

Above all, there is a greater need for everyone in the child protection system – social workers, guardians *ad litem*, judges, lawyers – to understand each other's disciplines, their concerns and preoccupations and what best professional practice in each discipline entails. Education, training, discussion, need to be integral to the work of everyone involved.

It is worth repeating the words of Hoyano and Keenan: "Because much of the safe-guarding work is nuanced absolute rules will not necessarily be useful or used; instead, clear principles combined with a reduced amount of guidance, and time and fora for considered decision-making, would be more effective…. Aspirational legislation can never be implemented effectively by those who are besieged, over-burdened and poorly trained."

References

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All the cases referred to are published on the CCLRP website, www.childlawproject.ie. The judgments of the District Court which are quoted here are included in the cases reported on the website

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