



Mr Justice Gillen speaking at the DLS conference

On 4 September 2003 we hosted a very successful conference on "Adoption and the Legal Process", the organisation of which was led by Hilary Wells, supported by the DLS team. Among an impressive list of speakers were the Honourable Mr Justice Gillen, Ernest Ryder QC, Angela Nield, Solicitor, Dr Hilary Harrison, Denise Hunt BL and Carole Sholdis BL. The conference was chaired by Henry Toner QC and was opened by Alphy Maginness, Director of Legal Services. The conference was attended by a large number of Board and Trust representatives from the field of social work, in particular childcare and adoption and other childcare professionals including psychiatrists, psychologists, health visitors and lawyers. An article on the conference, written by Hilary Wells, is included in this edition of the Newsletter.

We are pleased to announce the appointment of a Conveyancing

Specialist to our team of Solicitors. Paul Livingstone joined us on 26th August and given the Directive from the Department that all new conveyancing referrals must be made by Trusts and Boards to DLS, Paul's expertise will prove invaluable to the service.

We have also appointed two other Solicitors, namely Angela Maguire and Terry Brady replacing the recently retired Derek Burgoyne and Siobhan McCrory. They are working in our Litigation and Family Law sections, respectively. Both are very able, experienced lawyers who will contribute enormously to the future success of the Directorate.

DLS has relocated to the first floor of Champion House, Linenhall Street, Belfast, a move that has been enthusiastically greeted by staff. Our thanks to all those who contributed to the move itself, particularly the staff who spent the weekend organising and executing it. Remarkably, the move was carried out without a hitch and the Directorate was fully functional on the Monday (29th September) morning. This speaks volumes for those staff who contributed to the relocation. We also thank Administration in the CSA for the refurbishment and refitting of "our new home" and we offer best wishes for the ongoing building projects within CSA and the Eastern Board. We also thank the Eastern Board for accepting us; we intend to remain good tenants for a long time to come.

Alphy Maginness
Director of Legal Services

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DLS - ALG

Our Adoption Liaison Group has gone from strength to strength since its inception in January 2002. The original aim of the Group was to afford Senior Board and Trust Practitioners the opportunity to meet, on a regular basis, with lawyers - Judges, Counsel and Solicitors - to discuss legal developments in Adoption Law. This hopefully assists with planning and development of adoption services, and permits frank discussion in accordance with multi-agency working in the family justice system.

The next meeting is scheduled for Tuesday 27th January 2004 and will concentrate on legal and practice issues relating to Inter-Country Adoption. Representatives from all Community Trusts are invited. If you have any particular issue which you wish to raise in respect of the Hague Convention and Inter-Country Adoption cases, please advise your Trust representative, or alternatively contact Hilary Wells, who Chairs this Group.

Issues for forthcoming meetings include human fertilisation and embryology; adoption assessments



Some members of the DLS Adoption Liaison Group

of same sex couples; contact reduction in adoption cases.

Finally, in line with the DHSSPS recommendation at paragraph 9.59 'A Strategy for Children in Need' (August 2003), DLS - ALG has arranged a special day in Spring 2004 to consider the English legislation: "Adoption and Children Act 2002" and Regulations. Two leading Practitioners in the field of Adoption Law - Richard White and Tim O'Regan will join a group of

dedicated lawyers, Board and Departmental representatives to look critically at the English Act and consider what legislative change would best serve Northern Ireland.

Details of the discussion will be published in our next Newsheet.

Hilary Wells
Assistant Director



STATUS OF GENERAL PRACTITIONERS

The contractual status of GPs was the subject of a recent land-mark decision of the Employment Appeals Tribunal ("EAT") in England - the case of *North Essex Health Authority v Dr C David-John*. The case concerned the National Health Service (General Medical Services) Regulations 1992 ("the Regulations"), the equivalent of the General Medical Services Regulations (Northern Ireland) 1997. The functions of the Health Authority in this context were similar to those of the four Health and Social Services Boards in Northern Ireland.

Dr David-John alleged that he had been unfairly dismissed by the Health Authority and discriminated against on the grounds of his race when he was removed from the medical list. At a Preliminary Hearing, the Employment Tribunal decided that the Regulations effectively constituted a statutory contract of employment between the GP and the Health Authority. On that basis, Dr David-John was entitled to proceed with his

complaints of unfair dismissal and race discrimination.

On appeal, the EAT took the opposite view. Having reviewed all the relevant caselaw, the EAT concluded as follows:-

1. There was no contract of employment (statutory or otherwise) between the Health Authority and the GP.
2. There was no contract to personally execute and work or labour so the GP was not a "contract worker" within the meaning of the various discrimination statutes.
3. Finally, the relationship between the parties was purely statutory and not contractual in nature.

Whilst this decision is not, strictly speaking, binding on Industrial Tribunals in Northern Ireland, it will be highly persuasive, particularly as the EAT took the view that the law on this point was so clear that it refused leave to appeal.



Priscilla Corbet and Dr Hilary Harrison at the conference

If this decision is adopted in Northern Ireland, this will mean that GPs are effectively precluded from bringing complaints under employment and anti-discrimination legislation. This must be good news for the four Boards in the province!

June Turkington
Solicitor

Nursing Home Places & Human Rights

In a recent High Court decision - *Haggerty and Others v St Helens Borough Council* - it was held that the decision of a local authority in England not to allow an increased weekly fee by a private nursing home for places there, resulting in its closure, did not breach the elderly residents' human rights.

Nine of the twenty-six residents of Delamere House in St Helens Merseyside challenged the decision of St Helens Borough Council not to enter into a revised and more onerous arrangement with Southern Cross Healthcare Services Ltd who operated the Home in which the claimants were residents.

It was argued on behalf of the residents that there had been no proper consideration of the fact that moving the residents "could be their

death" and their right to life under Article 2 of the European Convention had been infringed. It was conceded that there had been some assessment by St Helens Council but it was insufficient.

It was not contended that the alternative accommodation proposed by the Council for the claimants was defective or that it did not comply with the statutory obligation owed by the Council to the claimants.

The Judge, Mr Justice Silber was prepared to assume that there was a positive obligation on the Council to take measures to protect the life of the individuals but that obligation was limited in that the obligation must not impose an impossible or disproportionate burden on the authorities. The Court held that the

financial resources of the Council were an important element to be considered and that the Council was entitled to a substantial degree of deference relating to the way in which it allocated its resources and provided services.

The Judge also held that there was insufficient evidence that the risk to life would reach the level needed to engage Article 2 of the Convention.

The challenge therefore failed. The Judge refused the residents permission to appeal, saying St Helens Council had agreed to liaise with "suitable consultants in old age psychiatry" on the best way to move the residents.

Wendy Beggs
Solicitor

RESOURCEFUL DEFENCE

The availability of the defence of lack of resources was subjected to judicial scrutiny in an important case heard in the High Court where judgment was delivered on the 29 July 2003. In the matter of an application by Margaret Hanna for Judicial Review against Craigavon & Banbridge Community H&SS Trust and the Department of Health & Social Services and Public Safety for Northern Ireland, the Directorate represented the Trust and instructed Bernard McCloskey QC (who was also instructed by the Department) and Patrick Good, BL.

The factual background of the case was that Mrs Hanna, who was 85 years old, had been admitted to Lagan Valley Hospital in November 2000 after suffering a stroke. At the end of January 2001, she was deemed fit for discharge from hospital and following assessment by the Trust and discussions with the family, it was decided to place her on a waiting list for admission to a Community Nursing Home. At the time of assessment, Mrs Hanna was 89th on the waiting list and by July 2001 she was 27th on that list.

Mrs Hanna's family applied for Judicial Review of the Trust's decision to put her on a waiting list rather than place her in a nursing home. The Applicant was placed in a nursing home before the case came to trial but the action proceeded given the importance of the legal issues.

The Applicant argued through her legal representatives that the Trust was in breach of Article 15 of the Health & Personal Social Services (NI) Order 1972 (some of the functions under the 1972 Order were of course delegated to Trusts under the 1994 Order). Under Article 15 the Department (through the Trust) shall make such arrangements and provide or secure the provision of such

facilities (including the provision or arranging the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate and arrangements may include arrangements for the provision by any other body or person of any of the Personal Social Services on such terms and conditions that may be agreed between the Department and that other body or person. The argument was that the Trust and indeed the Department had failed to provide for Mrs Hanna as required under Article 15.

The second limb of the Applicant's argument was that the Trust had failed to comply with the Human Rights Act 1998 and in particular had breached Article 8 of the European Convention on Human Rights which states that 'everyone has a right to respect for his private and family life, his home and his correspondence'. It was further argued that if Article 15 of the 1972 Order was not to be interpreted as imposing the same duty on the Trust and the Department as that imposed on a Local Authority under Section 21 of the National Assistance Act 1948, there would be a disparity between England and Wales on the one hand and Northern Ireland on the other which amounted to unlawful discrimination contrary to Articles 8 and 14 of the ECHR. (Article 14 of the Convention states that the enjoyment of the rights and freedoms set out in the Convention shall be secured without discrimination on any ground).

The Trust and the Department argued that Article 15 did not impose a specific duty, unlike the specific duty imposed upon Local Authorities by Section 21 of the 1948 Act. The Judge, Mr Justice Coghlin, agreed and stated that "*I do not think that it is appropriate to*

conceive of Article 15 in placing the Department, or in this case, its agent, the Respondent Trust under a mandatory duty to fulfil any specific need once that need has been assessed".

The duty imposed by Article 15 is to provide such facilities by way of residential nursing accommodation as considered suitable and adequate to meet the needs of the Applicant and those whose needs may, depending on the circumstances, be more urgent and pressing than those of the Applicant. In achieving this goal it would therefore be necessary to take into account available resources and in the instant case, the Judge ruled that this had been achieved in a reasonable manner by the scheme administered by the Respondent Trust. The Judge emphasised that the Trust had not refused to meet the Applicant's assessed needs, rather it had recognised those needs but had been compelled by the resources available to it to adopt a system which sought to balance the fulfilment of those needs with the needs of others, ie its use of the waiting list system.

The Court also ruled that the Trust had not breached Article 8 of the ECHR. The Applicant's desire to return home was considered by the Respondent Trust at a meeting with her son and daughter-in-law, as well as with the relevant medical staff and social care staff. The decision was taken to transfer the Applicant to a residential nursing home in accordance with the wishes of her relatives, but to do so by adding her name to the waiting list owing to the restricted availability of resources. In acting as it did, the Trust did have respect for the Applicant's private and family life, having regard to the balance which requires to be struck

between the interests of the Applicant and the interests of the other members of the community placed at a higher level of the waiting list, including those whose needs were assessed as being more urgent and pressing than those of the Applicant.

Furthermore, the Court found that there was no breach of Article 14 of the ECHR. The Judge was satisfied that *“the priority waiting list system used by the Trust is necessary for the protection of the rights and freedoms of others;”* He added *“it is a proportionate solution which is designed to secure the balance between individuals and other*

relevant members of the community which is inherent in the European Convention.”

Furthermore, no factual evidence was placed before the Court to confirm that a person in the position of the Applicant would have been transferred to a nursing home after assessment if she had been in England and Wales; in particular, no evidence was forthcoming to establish that she would have been so facilitated irrespective of others whose needs had been established as more extensive and urgent.

Accordingly the application for Judicial Review was dismissed, but an appeal has been lodged by the

Applicant’s solicitors. It remains to be seen whether the appeal will proceed.

Clearly this is a most important case, as it confirms the current position, namely the right of Trusts to take into account financial resources when engaged in a decision-making process. It also confirms that patients/clients and their families must be involved in that decision-making process and therefore Trusts should ensure that their procedures allow for such involvement.

Alphy Maginness
Director

LIABILITY FOR HEALTHCARE IN THE E.U.

In an important judgment of 1st October 2003 from the High Court in England in the case of *Regina (Watts) v Bedford Primary Care Trust and the Secretary of State for Health*, it was decided that prior authorisation for treatment by an NHS patient in another member state of the European Union at the expense of the NHS could be refused on the ground of lack of medical necessity only if the same or equally effective treatment could be obtained without undue delay at an NHS establishment.

The Applicant was in need of a hip replacement and as the waiting time for this surgery was approximately one year, she requested the Trust’s support in her desire to have the operation carried out in France and to be reimbursed for the full costs. The Trust refused this request and she therefore applied for Judicial Review of that decision.

The Court relied on European Law (in particular Article 49 of the EC Treaty which removes certain restrictions on the freedom to provide services) and followed the

relevant rulings of the European Court of Justice in deciding that the provision of healthcare under the NHS did fall within Article 49 and therefore in appropriate cases of undue delay an NHS patient should be reimbursed.

In the instant case the Applicant succeeded in establishing a principle, but her claim failed on the particular facts as the Court decided that she had failed to

establish undue delay since by the time she went to France for her operation the waiting time in England had been reduced to 4 months. Waiting times and waiting lists are clearly significant in determining whether reimbursement of costs is appropriate.

Alphy Maginness
Director



Angela Nield leads a workshop at the DLS Conference

ADOPTION AND THE LEGAL PROCESS

DLS CONFERENCE - 4 SEPTEMBER 2003

The following is a summary of the day's events at the conference.

- **New Rules**

The date of the conference was most timely, and served to promote the introduction of the new **Family Proceedings (Amendment Rules) (NI) 2003 No. 75** which came into operation on 1 June 2003. The new Rules changed the Court forms for domestic adoption and freeing applications, and Hague Convention adoption applications. The new Court forms are contained within **Schedule 2**, and the main documents in public law proceedings are:

- Form A1** Application for an Order Freeing a Child for Adoption (with Parental Consent)
- Form A2** Application for an Order Freeing a Child for Adoption (without Parental Consent)
- Form A3** Agreement to an Adoption Order (Freeing Cases)
- Form A6** Agreement for Revocation of an Order Freeing a Child for Adoption.
- Form A10** Notice to Board under Article 22(1) of the Adoption (NI) Order 1987
- Form A25** Interim Order (*allows Court to make an interim adoption order for a probationary period*)

Schedule 3 contains a new **Appendix 4** which replaces the old Appendix G Form.

The Forms are devised for adoption proceedings in both the County

Court and High Court. The High Court has now produced copies of the main forms which are available on request. The new Rules are found at <http://www.northernireland-legislation.hms.gov.uk/sr.sr2003/20030075.htm>

- **Speakers**

The Honourable Mr Justice Gillen captivated the audience when he spoke of Adoption In The Legal Arena "*The starting point for any consideration of an application to free a child for adoption is the awesome duty cast upon the Court in determining whether or not that most profound of all human links - between parent and infant - should be immutably broken by an order freeing a child for adoption*". The Judge reminded us of the Trust's positive obligation to try to work towards reuniting the child with the parent, subject of course to the best interests of the child. "*The possibilities of reunification must be seen to be progressively diminished and eventually destroyed if the biological parents and the child are not allowed to meet each other if at all possible or if it occurs only so rarely that no bonding between them was likely to occur*". Judge Gillen referred to an Article by Professor Maurice Place: "Attachment and Identity - Their Significance in Decisions about Contact and Placement" (Family Law, April 2003). Damage by adverse early life experiences may result in a young person finding it difficult to settle into supportive living environments. Article 8 ECHR rights and qualifications must always be considered if a decision to break contact between a child and his birth parent is being considered. The Judge reminded the audience of the importance of ensuring that those organisations of

the State making decisions about children to "*get the matter right first time every time*". In **Barrett v Enfield London Borough Council (2001) 2 AC 550** the Court commented that protection would no longer be afforded to Trusts - in that case when deciding whether or not to take a child into care. Any acts or omissions by Trusts in exercising their statutory responsibilities towards children can now be a ground in a claim for negligence against the Trust. This duty extends to views expressed by 'experts' engaged by the Trust and whose opinions influence the Trusts' decision making.

The Judge went on to comment on Trusts' responsibilities in child abuse investigations, and the positive obligations under Article 8 and 3 ECHR for proportionate intervention. "*The scale of child sexual abuse and exploitation as a background to resolution through adoption is simply enormous*". There is a need to treat both the child and family fairly in the course of such an investigation. Before making decisions the views and interests of the mother and father must be taken into account at all stages including the final decision-making forum. "*This process must not pay merely lip-service to the involvement of the parents in the decision-making process but must be real and transparent*". In this context Judge Gillen referred to **Re J (Care Order: Adoption Agencies Regulations) High Court November 2002**. In this case the Adoption Agency had failed to comply with Regulation 11(2) of the Adoption Agencies Regulations (NI) 1989 which provided that after the Adoption Panel's recommendation is available, the Adoption Agency will make a decision as to whether or

not adoption is in a child's best interests. As soon as possible after making this decision, the Adoption Agency shall notify the parent in writing of its decision. *"Although in that case I did not consider that non-compliance in the event had occasioned any prejudice to those parents largely on the basis that they had been given ample opportunities to express their views on other occasions, and I was affording them a further opportunity to do so at the hearing, nonetheless I made it clear that the Trust must as a matter of absolute urgency review its guidelines to ensure that staff comply strictly with the Regulations"*.

Judge Gillen endorsed the guidance given to Social Services vis-à-vis decision making in the case of **Re C (Care Proceedings: Disclosure of Local Authorities Decision Making Process) 2002 2 FCR:**

- i) *Social Workers should inform parents of material criticisms of their parenting and advise them of how they might improve their behaviour;*
- ii) *all professionals involved should keep clear, accurate, full and balanced notes of all relevant conversations and meetings, including emails.*
- iii) *a Trust should make a full and frank disclosure of all key relevant documents, including minutes of case conferences and contact recordings;*
- iv) *Social Workers and Guardians should routinely exhibit to their reports notes of relevant meetings and conversations;*
- v) *Meetings of an 'expert' with the professionals involved should:*
 - (a) *have a clear written agenda, circulated in advance;*
 - (b) *take place with advance notice to the parents and their representative (who*



Dr Hilary Harrison, Ernest Ryder QC and Henry Toner QC

should have the opportunity to make representations to the expert prior to the meeting);

- (c) *give parents and other parties the right to attend or to be represented at such meetings;*
- (d) *have full and balanced minutes that should be agreed as being an accurate record as soon as possible and then disclosed.*

Comment was also made about the necessity of the child having a voice in court proceedings, as enshrined in Article 12 of the United Nations Convention on the Rights of the Child (1989). Judge Gillen talked about the need for training to help lawyers, Judges, Social Workers and other professionals acquire the skill of communicating successfully with children.

The Judge emphasised the importance of making decisions about post adoption contact. He referred to an article which suggested that whilst the consensus appears to veer towards openness in adoption, it remains the case that general principles are hard to extract from the research

available. Judge Gillen shared the views of those academics who feel that post adoption contact has to be based on the child's individual circumstances and the imposition of inflexible rules based on doctrine attitudes or policies must be avoided.

The views of prospective adoptive parents must be considered also, and the Judge commented that Social Workers must not underestimate adoptive parents capacity to cope with contact. Also, meetings between the adoptive and birth relatives before placement can often lead to a greater likelihood that there will be sustainable and meaningful ongoing contact. *"The right time for the court to finally consider what kind of contact natural parents would have to children being adopted must be on the occasion when the adoption is under consideration. In order to make such a decision it is crucial that Social Workers canvas the issue, reflect on the research and arrive at an informed decision having taken into account the views of all those concerned."*

The Court will expect the natural father to be informed of pending adoption proceedings - even to be joined as a party in appropriate cases - unless there is good reason

not to, such as a history of rape or serious domestic violence. *"It is better to give the father an opportunity to be heard rather than to store up potential Article 6 claims for the future"*. The child has a right to know his or her true genetic heritage, even if the mother wishes to keep paternity a secret. The State itself has a responsibility towards the child and the natural father in terms of establishing the trust about parentage, especially in adoption applications.

"The law is changing, the duties are increasing but I remain firmly wedded to the notion that the cumulative result accrues to the benefit of the central party - the child."

Dr Hilary Harrison OBE, reminded us of the 99 recommendations in **Adopting Best Care (May 2002)**. The DHSSPS hopes to establish a dedicated Adoption Unit with a possible objective of 'Adopting the Future'. Such a move is to be welcomed, particularly since the number of looked after children being adopted in Northern Ireland has significantly increased since 1999. Figures from April 1999 to March 2003 have fluctuated from 2.2% to 4.5% per annum. Despite this, adoption rates in Northern Ireland fall well below average

adoption rates in England where in the year 2000, 4.7% of looked after children were adopted, and a target of around 7% has been set for 2002/2003.

Dr Harrison highlighted other differences between our local adoption practice and England, to include:-

- different patterns for family contact
- children in Northern Ireland wait longer for adoptive carers

Dr Harrison recommended: -

- more focused planning for children (including BAAF training)
- structured preparation of prospective adopters
- four Board initiative to review and standardise adoption policies and procedures
- develop partnerships with voluntary agencies involved in adoption
- Hague Convention: Regulations and Guidance to safeguard children, and give new rights to adoptive applicants
- potential for greater links with the Republic of Ireland in finding adoptive placements.

The DHSSPS published **A Strategy for Children in Need** in August 2003 which includes reference to a local departmental framework for assessment model. Paragraphs 9.54 - 9.59 looks at permanency planning and adoption. The Department proposes to issue a draft adoption strategy in autumn 2003 for consultation, to review the full adoption remit including proposals for new legislation and future adoption services.

Ernest Ryder QC addressed the issue of experts to include: -

- When should the appointment of an expert be considered?
- How to appoint an expert?
- Development of in-house expertise. Mr Ryder referred to the March 2000, DOH 'Framework for the Assessment of Children in need and their families'.

Specialist assessments may be necessary to inform the Court about a defined issue (eg sexual abuse) or assist the Court in providing a specialist overview *"where the tribunal of fact does not possess the necessary expertise to carry out that task"*.

Angela Nield, Solicitor complimented Mr Ryder QC's message, in her address: *"The Legal Context and Evidential Role of Family Assessments"*. Angela highlighted the judgement of **R (on the application of AB and SB) v Nottingham City Council (2001) 3 FCR 350** which held that even if a local authority was not preparing a core assessment, it still had to adopt a **systematic** approach to achieve the same objectives, and to cover the **three domains** of the DOH framework, namely the child's developmental needs, parenting capacity, and family and environmental facts. Thereafter followed a three stage process of firstly identifying the child's needs; secondly producing a Care Plan; and thirdly providing the identified services.



Angela Nield speaking at the conference



Denise Hunt BL and Carole Sholdis BL - two of the conference speakers

Angela highlighted the conflicting English case law regarding the extent of the Court's jurisdiction to direct a Local Authority to conduct an assessment, not of the child, but of the parent, particularly if the work with the parent is therapeutic. In Northern Ireland, Courts tend to use their influence to ensure all proper assessments are expeditiously carried out, thus reducing possible challenge to the Care Plan.

Angela reminded the audience of case law requiring Local Authorities to include parents in decision-making, and to honour decisions reached at Case Conferences and Looked After Reviews, otherwise there may be a challenge to any subsequent decision pursuant to Articles 6 and 8 ECHR; whilst Article 8 rights are qualified: Article 6 rights are absolute. In **Re L (Care: Assessment: Fair Trial) 2002** 2FLR 730 Munby J held that the process of assessment and decision-making "*must be fair and transparent at all stages both in and out of Court*". Documents must be openly available and crucial meetings at which a family's future is to be decided must be conducted openly and with the parents either present or represented.

Denise Hunt BL and Carole Sholdis BL announced the launch

of a book entitled '**A Practical Guide to the Freeing Process**'. The Guide runs to some 88 pages, with the aim to serve as an aide memoir to every Social Worker involved in permanency planning, decision-making or freeing applications. The Guide was created almost entirely by Denise and Carole with contributions also from Mr Henry Toner QC, Ms Priscilla Corbett and Hilary Wells. DLS is enormously indebted to its team of dedicated and specialist Counsel not only for their contribution to our conference and

the production of the Guide, but also for the high quality of their service and expertise shown to our clients.

- **Workshops**

The afternoon consisted of a series of workshops chaired by Priscilla Corbett, Angela Nield, Henry Toner QC and Ernest Ryder QC. This afforded an opportunity for multi-disciplinary discussions about best practice; court expectations and resource implications. Following feedback from the workshops, Mr Henry Toner QC, who chaired the conference summed up the key messages and in conclusion echoed the ethos contained within **Promoting Inter-agency Working in the Family justice System (March 2002) Lord Chancellor's Department**.

- **Conclusion**

Feedback following the conference has been very positive, with particular congratulations to Denise Hunt BL and Carole Sholdis BL for their role in the production of the Guide, which has an enduring usefulness long after the conference event itself.

Hilary Wells

Assistant Director



Hilary Wells and Alphy Maginness at the conference

DOMESTIC VIOLENCE

The most frequent cause of significant harm to children in cases presented to Court is the harm resulting from domestic violence. The violence may be between the child's parents, or the child's mother/father and new partner. In some cases - where domestic violence has been prevalent in the home - the child has committed acts of physical abuse and verbal aggression towards a parent, sibling or other child.

The type and degree of harm to a child will vary from case to case, depending upon the extent of the acts of domestic violence and the age of the child. The child may be physically assaulted; fret and worry about an abused parent; lose confidence and self esteem; suffer developmental delay; and in extreme cases suffer emotional harm which can lead to a range of psychological and/or psychiatric problems.

Often, incidents of domestic harm are combined with other causes of concern such as abuse of alcohol or drugs; poor parenting; neglect issues; parents with low intellectual capacity or suffering from a form of mental illness.

When a case is presented to a Family Court alleging domestic violence as a cause of concern, the Court must determine if the evidence of such alleged facts meets the evidential standard of a civil court - balance of probabilities. In a private law case - Article 8 Residence Order or Contact Order - the court may have to convene a 'Re L' hearing to scrutinise the allegations and sometimes counter-allegations, which may not always be true or may be grossly exaggerated, and make a determination. In public law cases the court will convene a causation hearing to determine if the harm

caused to the child is significant and thus satisfies the threshold criteria. Both the alleged act/acts of domestic violence and alleged resultant harm caused to the child will have to be proven.

Developments

- **COAC Domestic Violence Sub Group**

The Children Order Advisory Committee has a reformed Multi-Disciplinary Sub Group to look at domestic violence issues and its impact on children order cases. Hilary Wells is the Chair of this Sub Group. If there are issues which Health and Social Services clients have regarding domestic violence and children, please contact Hilary to discuss.

The issues which the Sub Group initially charged itself to explore included: -

- Effectiveness of ¹Re L Hearings and ²Guidelines.
- Understanding the potential harm which domestic violence can cause to a child, including relevant research.
- The review of The Family Homes and Domestic Violence (NI) Order 1998.
- PSNI strategy on domestic violence, including role of domestic violence officers.
- Proposed offence of domestic abuse.
- Review of assessment and treatment programmes, both for the abuser and the victim (including the child).
- **Review of the Family Homes and Domestic Violence (NI) Order 1998**

This major legislative enactment was intended to streamline and consolidate the law on domestic

violence and occupation of the family home. It replaced inter alia personal protection and exclusion orders in the Domestic Proceedings (NI) Order 1980 and replaced them with the following: -

- Non-Molestation Orders
- Occupation Orders
- Exclusion requirements attached to Interim Care or Emergency Protection Orders

The main provisions of the 1998 Order came into operation on 29 March 1999, but Articles 35 & 36 (provision to allow third parties to act on behalf of victims of domestic violence in certain cases) have not yet commenced. The Office of Law Reform has conducted a ³review of the effectiveness of this piece of legislation and its report is available in October 2003. Many of its recommendations will require further consultation through groups such as The Regional Forum on Domestic Violence and the COAC Sub Group.

- **DHSSPS**

The DHSSPS together with the Northern Ireland Office has released a report ⁴'**Tackling Violence at Home**' (October 2003) and will be considered in detail by the Sub Group. This is an excellent consultation document and should be read by all professionals who work with victims of domestic violence - adults and children. Responses to this consultation document are to be returned to Mr Leslie Frew, DHSSPS by 12 December 2003, though I am sure the department would welcome comments received thereafter.

- **PSNI**

Domestic violence is not a specific criminal offence. Instead, it is charged under a range of offences. Some have suggested that creating

a specific offence of domestic violence would improve protection afforded to victims by the criminal justice system. Others have suggested that the key is for the courts to treat domestic violence as seriously as other cases of violent crime, and for sentencing practice to reflect this.

This issue alone requires further debate and consultation; the task of the COAC Sub Group is to consider how such a change to the law or sentencing could reduce the harm caused to children and achieve better outcomes for them.

PSNI has drafted a report entitled 'Police Response to Domestic Violence'. The final draft should be available for publication soon.

- **Assessment Tools and Treatment Programme**

Assessment - the Sub Group has considered the ⁵Department of Health's Framework for the Assessment of Children in Need and their families (March 2000) and the 'Multi-Disciplinary Assessment Framework: Assessing Needs and Risks in Work with Children & Families' (May 2000) produced by the Western Area Child Protection Committee, WHSSB. The latter attempted to introduce a Northern Ireland assessment tool akin to the mainland framework, but regionalised to take into account local needs, structure and resources. The Sub Group is aware that DHSSPS is involved in the development of an assessment framework for Northern Ireland, but this may not be available until 2005.

Treatment - The Sub Group has discussed the lack of treatment programmes available for alleged perpetrators. Certain schemes are operated by Probation, such as Men Overcoming Domestic Violence, but places are limited and the programmes may only operate at certain times of the year. Effective and available programmes

would help to treat and thus reduce the risk posed to children who live in homes where domestic violence is prevalent.

Developments in respect of assessment tools and treatment programmes will be kept under review by the Sub Group as such important issues clearly have direct impact on the operation of The Children (NI) Order 1995.

- **COAC Best Practice Guidance (December 2003)**

The Children Order Advisory Committee **Best Practice Guidance (2003)** Chapter 3, 3.1.15 'Case Management in Private and Public Law Cases' gives specific guidance to practitioners in cases where there are allegations of domestic violence, to include: -

1. Parties are to prepare a schedule of allegations of violence and abuse (including any reference to alleged damage to the children in light of same) on which the Court is to make a finding.
2. Special hearings to deal with issues of domestic violence to be a priority before other determinations are made.
3. In Article 8 contact cases the **Guidelines** issued by the FLAAB Children Act sub committee should be regarded as good practice in this jurisdiction.
4. Consideration will be given to discovery of photographic, recorded and medical evidence together with PSNI statements and non-molestation applications.
5. Use to be made of ⁶Article 12A - Residence and Contact Orders and domestic violence; seven Articles 57A & 63A - power to include an Exclusion Requirement with an Interim Care Order or Emergency Protection Order.

- **Other**

Many other important issues have been raised and discussed by the Sub Group to include: -

- Human rights implications
- Representation for children - private law proceedings
- Area Child Protection Committee initiatives on domestic violence
- Court protocol for Article 57A applications
- Collation and recording of evidence of domestic violence incidents
- Role of Court Welfare Officers in domestic violence cases
- Role of Child and Adolescent Mental Health Services (CAMHS)

Conclusion

Cases of domestic violence coming before the Family Courts both under the Family Homes and Domestic Violence (NI) Order 1998 and the Children (NI) Order 1995 - sadly are increasing. This may be because incidents are increasing or because the public are becoming more willing to report such matters to the police and Social Services. It clearly is a demanding and challenging issue for COAC to continue to review and monitor.

Hilary Wells

Assistant Director

- 1 Re L (Contact : Domestic Violence) and others (2000) 2 FLR 334
- 2 Issued by Family Law Act Advisory Board's Children Act Sub Committee in 2000.
- 3 Review of the Family Homes and Domestic Violence (NI) Order 1998, www.olrni.gov.uk
- 4 www.dhsspsni.gov.uk
- 5 www.open.gov.uk/doh/quality.htm
- 6 Introduced by Article 28 of the Family Homes and Domestic Violence (NI) Order 1998.
- 7 Introduced by Article 29(2) and (4) respectively of said 1998 Order.

COAC BEST PRACTICE GUIDANCE

On 8th December 2003, the Children Order Advisory Committee launched its Best Practice Guidance. The Guidance must be read by all professionals involved in the operation of the Children (Northern Ireland) Order 1995, direct and indirect.

It is wrong to suggest that some sections are more important than others, but Social Services must consider in detail the following chapters: -

Ch 3.1	Directions Hearing
Ch 3.1.1	Attendance
Ch 3.1.5	Care Plan
Ch 3.1.6	Care Planning/Concurrent Planning
Ch 3.1.13 & Ch 6	Disclosure
Ch 3.1.14	Domestic Violence
Ch 3.1.27	Secure Accommodation
Ch 3.1.28	Schedule of Assessments
Ch 3.1.30	Threshold Criteria

The Guidance is intended as a living instrument and will be subject to periodical review and amendment. If HSS clients wish to discuss the Guidance with a view to

possible amendment, please contact Hilary Wells, who assisted the COAC in drafting the Guidance.

Hilary Wells
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BEWARE RECRUITMENT AGENCY FEES

DLS recently represented the Northern Ireland Ambulance Service Trust (NIAS) in a case in which a recruitment agency sued for certain fees. We successfully defended the claim in the County Court.

Human Resources and Finance Departments will no doubt be aware of the "temporary to permanent" fees claimed by agencies. These fees are charged when a temporary worker placed by an agency is later appointed to a permanent post with the same employer. Agencies often charge fees even where the worker is appointed following a normal, open recruitment process. In these cases, it may be difficult to identify any services provided by the agency in relation to the permanent appointment. However, agencies will often argue that their Terms of Business, which are generally fairly standard throughout the industry, allow them to charge fees in such cases.

In the NIAS case, the Agency accepted that it had provided no services whatsoever in relation to the permanent appointment, but maintained that it was, nevertheless, entitled to a "temporary to permanent" fee pursuant to its Terms of Business. The County Court Judge held that no fee was payable on this occasion as the Agency's Terms clearly envisaged a situation where the temporary worker was appointed to the same job on a permanent basis. In this case, there was a significant difference between the temporary job and the permanent post later filled by the temporary worker.

It is clear from this case (and others) that employers should "think twice" before simply paying "temporary to permanent" fees charged by recruitment agencies. Employers should consider the following:-

1. Whether their contract with an Agency is actually governed by the Agency's Terms of Business. Were the Agency's Terms furnished to the employer before the temporary engagement was concluded?
2. Was there any significant difference between the temporary job and the permanent post?
3. At the very least, you should enter into negotiations with the Agency with a view to achieving a substantial reduction in the fees. It was clear from the evidence in the NIAS case that Agencies expect such negotiation.

Seek legal advice if you are in any doubt about your liability to pay these fees.

June Turkington
Solicitor

COUNSEL'S CORNER

Compensation for Failed Sterilisations and Vasectomies - A Matter of Legal Doctrine

1. The recent decision in *Rees v Darlington Memorial NHS Trust* represents a landmark in the sphere of medical negligence compensation. This appeal was considered by a panel of seven members of the House of Lords. Judgments were given on 16th October 2003, reigniting the "benefit v burden" controversy.
2. In case law terms, the most important previous decision was that of the House of Lords in *McFarlane v Tayside Health Board* (2000) 2 AC 59, which rejected a claim by healthy and normal parents for damages for the cost of bringing up a healthy and normal child born to the mother, following allegedly negligent advice on the effect of a vasectomy performed on the husband.
3. Furthermore, in *Parkinson v St. James NH Trust* (2002) QB 266, the mother who had undergone a negligently performed sterilisation operation conceived and bore a child who was born with severe disabilities. The Court of Appeal, while acknowledging that it was bound by **McFarlane**, held that the mother could not recover the whole cost of bringing up the child; but that she could recover in damages *the additional costs she would incur so far as they would be attributable to the child's disabilities*.
4. In **Rees**, the variant was that the mother, rather than the child, was suffering from a severe and progressive visual disability which was the precipitating factor in the sterilisation operation she requested of the Trust. The operation was performed negligently and the mother subsequently conceived and bore a normal and healthy son. The Court of Appeal held, by a majority, that she was entitled to recover the additional costs she would incur *so far as attributable to her disability*. The Trust appealed. From the legal perspective, all issues were open in the House of Lords, since the mother was claiming not just the "disability financial factor" but *the whole cost of bringing up the child*.
5. The importance of the appeal is reflected in the composition of the Appellate Committee which, unusually, comprised seven Lords of Appeal in Ordinary, instead of the conventional five members. From the perspective of the interested legal practitioner, this represents the first striking aspect of the appeal. The second is that all seven members of the Appellate Committee delivered individual judgments. The third is that one of the questions which their Lordships had to consider was whether to depart from one of their previous decisions (**McFarlane**) in accordance with the well known "Practice Statement (Judicial Precedent)", made by the House of Lords in 1966 - cf., (1966) 1 WLR 1234. The final outstanding feature of the case is that the members of the Appellate Committee were deeply divided on the outcome, with the Trust's appeal being allowed by the slenderest of majorities viz., 4/3. It is instructive to consider each of the judgments delivered. In doing so, for ease of reference, the four member majority consisted of Lords Bingham, Nicholls, Millett and Scott. The minority was constituted by Lords Steyn, Hope and Hutton.
6. **Lord Bingham** identified three possible solutions to the issue:
 - 6.1 That full damages for the cost of rearing the child be allowed, subject to the ordinary limitations of reasonable foreseeability and remoteness, with no discount for the counterbalancing factors of joys, benefits and support.
 - 6.2 That damages be awarded in full for the reasonable costs of rearing an unplanned child to the age of economic self-reliance, with a deduction in respect of joys, benefits and potential economic support derived from the child.
 - 6.3 Awarding no damages.
 Continuing, Lord Bingham observed that in **McFarlane**, the five members of the Appellate Committee, in opting for the third of these solutions, gave different reasons. However, the unifying factor in their judgments was that they were motivated for reasons of legal policy which were "*... an unwillingness to regard a child (even if unwanted) as a financial liability and nothing else, a recognition that the rewards which parenthood (even if involuntary) may or may not bring cannot be quantified and a sense that to award potentially very large sums of damage to the parents of a normal and healthy child against a National Health Service always in need of funds to meet pressing demands would rightly offend the community's sense of how public resources should be allocated*" [paragraph 6 - my emphasis].
7. Lord Bingham, emphasizing that the decision in

McFarlane was both recent and unanimous, considered that it would be “wholly contrary to the practice of the House” to depart from it, a course which would “... reflect no credit on the administration of the law ...” [paragraph 7]. However, he acknowledged that the parent of a child born following a negligently performed vasectomy or sterilisation or following negligent advice on the effect of such procedure is “the victim of a legal wrong” [paragraph 8]. He noted that in **McFarlane**, their Lordships had considered that some award should be made to the mother. He described the real loss in terms that “... the mother has been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned” [paragraph 8]. He concluded that there should be two awards:

- 7.1 “An award immediately relating to the unwanted pregnancy and birth” (without elaborating on what the characteristics of this award should be).
- 7.2 A conventional award of £15,000, to be added to “the award for the pregnancy and birth”, which is not intended to be compensatory but to “... afford some measure of recognition of the wrong done” [paragraph 8].

8. Lord Bingham made clear that the approach and solution which he was propounding would apply **without discrimination to every case**. In other words, no special allowance would be made in cases where either the parent or the child is disabled. In his view, to do otherwise would create undesirable anomalies and uncertainties.
9. **Lord Nicholls** agreed with the conclusions of Lord Bingham. In doing so, he recognised that the appeal was concerned with “... the development of the law in a field which is highly controversial and, therefore, exceedingly difficult” [paragraph 11]. He emphasized that the law’s evaluation of the damages recoverable for a legal wrong is not “an automatic, mechanical exercise”, observing that the recoverability of damages is “... always bounded by considerations of fairness and reasonableness” [paragraph 13]. Accordingly, in his reasoning, the resolution of the questions thrown up by the appeal would require “... an assessment of what is fair and reasonable in cases of this nature”. He considered that a requirement that the National Health Service should be responsible for payment of the costs of rearing an unplanned child would be “a disproportionate response to the doctor’s wrong” and continued:

“It would accord ill with the values society attaches to human life and to parenthood. The birth of a child should not be treated as comparable to a parent suffering a personal injury, with the cost of rearing the child being

treated as special damages akin to the financially adverse consequences flowing from the onset of a chronic medical condition”.
[Paragraph 16].

10. Lord Nicholls concurred with Lord Bingham that a conventional award of £15,000 should be made “... to recognise that in respect of birth of the child the parent has suffered a legal wrong ... having a far-reaching effect on the lives of the parent and any family she may already have” [paragraph 17]. He further emphasized, in common with Lord Bingham, that the preferable approach is “an award of a lump sum of modest amount **in all circumstances**” [emphasis added - paragraph 18].
11. **Lord Millett**, the third member of the majority, expressed his view on whether there should be a departure from the **McFarlane** decision in uncompromising language:

*“The established criteria are nowhere near satisfied in the present case. I would not depart from the unanimous decision of the House in **McFarlane** even if, after further reflection, I thought that it was wrong. But I am not persuaded that it was.”* [paragraph 103].

He acknowledged, unashamedly, that the exercise in which their Lordships were engaged entailed the formation of a **moral** judgment, observing that in **McFarlane** the House “... considered it to be **morally repugnant** to award damages for the birth of a healthy child” [paragraph 108] and observing further [in paragraph 112]:

*“**McFarlane** decides that the cost of bringing up a normal, healthy child must be taken to be outweighed by the incalculable blessings which such a child brings to his or her parents and do not sound in damages.”*

12. Why, he asked rhetorically, should the legal policy approach to a **disabled** child be any different? In his view, a disabled child is worth no less than a healthy one. The blessings of the birth of such a child are “no less incalculable”. Anxious to convey that he was in touch with reality, Lord Millett accepted that the human joy at the birth of a disabled child is “tinged with sorrow for the child’s disability”. Unlike Lords Bingham and Nicholls, Lord Millett was prepared to leave open the possibility that in the case of a disabled child, the approach to the assessment of compensation should differ from the case of a healthy child [paragraphs 112-116]. But his refusal to countenance compensation in the case of a **disabled parent** was unyielding:

“Disability is a misfortune and it is the mark of a civilised society that it should provide financial assistance to the disabled. The United Kingdom discharges this responsibility by payment of disability allowance. But this is

*the responsibility of the State and is properly funded by general taxation. It is not the responsibility of the private citizen whose conduct has neither caused nor contributed to the disability ... Where it is the child who is disabled the costs are attributable either to the birth of the child or to the fact that the child is disabled. The former are not recoverable; the latter are. Where it is the mother who is disabled they are not attributable either to the birth of the child or to the fact that the mother is disabled. There is no third possibility. To the extent that they are due to the birth of the child **McFarlane** precludes recovery and to the extent that they are not due to the birth of the child, the causal link with the wrong is broken and the Defendants are not liable for them in any case.”* [paragraphs 118 and 120].

In his opinion, the need to draw a line between (a) the costs referable to the characteristics of the child and (b) the costs referable to the characteristics of the parent is demanded by “*common justice and the coherence of the law alike*” [paragraph 122].

13. Finally, Lord Millett concluded with Lords Bingham and Nicholls that a modest award of conventional damages should be made to compensate for “*the very injury to the parents’ autonomy ... available without proof of financial loss ... which should not be susceptible of increase or decrease by reference to the circumstances of the particular case*”, agreeing with the proposal that this should be in the sum of £15,000 [paragraph 125].
14. **Lord Scott**, the fourth member of the majority, identified as the unique feature of the problem under consideration the fact that “*... the consequence of the negligence is the birth of a human being and ... assessments about the value or the burden of a particular human life are impossible*” [paragraph 134]. In developing his reasoning, he attributed some significance to the element of parental choice, observing that the parents could choose to terminate the pregnancy or to place the unwanted child with an adoption society. Simultaneously, he recognised that many parents would “*... regard themselves as having had no choice but to keep the child as a member of their family and raise him or her to the best of their ability*” [paragraph 136]. This must undoubtedly be true.
15. For Lord Scott, there were two considerations of overwhelming importance. **First**, in every case of this kind it is implicitly accepted by the parents that the expense of rearing the unwanted child is the price to be paid for having the child as a member of their family. Why, he asked rhetorically, should the NHS bear “*the costs and expenses of providing the parents with something of unique value but incapable of valuation?*” How could the accounting

exercise of “*detriment and benefit*” be sensibly carried out? **Second**, “*... the placing of a money value on the net detriment to the child’s parents of having to rear the child would, it seems to me, be inconsistent with the status of the child as a valued and loved member of the family*” [paragraph 138]. This statement has strong parallels with the moral repugnancy undercurrent clearly identifiable in the other judgments of the majority.

16. Significantly, Lord Scott recognised that the conclusion favoured by the majority constituted an exception to the conclusion which would flow from “*the normal application of established tortious damages principles*”. He continued:

“It is an exception based upon a recognition of the unique nature of human life, a uniqueness that our culture and society recognise and that the law, too, should recognise ... There is no doubt that [the mother’s] baby adds value to her life and that the value is not capable of assessment in monetary terms”. [paragraphs 139 and 142].

In Lord Scott’s opinion, it simply would not be possible to draw up a “*balance sheet of detriment and benefit caused by the doctor’s negligence*”. [paragraph 142].

17. Finally, Lord Scott aligned himself with the conclusion of the other members of the majority that the mother should receive a conventional award of damages to compensate for “*the frustration of her expectation that her sterilisation operation would safeguard her against conception ... for being deprived of the benefit that she was entitled to expect*”. [paragraph 148].
18. **Lord Steyn** delivered a characteristically robust dissenting judgment. Significantly, he did not question the correctness of the decision in **McFarlane** (in which he was a member of the unanimous Appeal Committee). He was prepared to make an exception to the **McFarlane** principle in the case of a disabled parent, considering that this would represent “*the best available choice and hopefully a decision defensible as delivering justice*” [paragraph 39]. Lord Steyn was strongly opposed to the majority’s adoption of the conventional award of damages solution. He considered that it would be contrary to principle, belonging to forbidden territory and constituting “*a backdoor evasion of the legal policy enunciated in **McFarlane***”. [paragraph 46].
19. **Lord Hope** was also prepared to treat the case of a disabled mother as an exception to the **McFarlane** principle, considering that -

“... it would be fair, just and reasonable to hold that such extra costs as can be attributed to the disability are within the scope of the

tortfeasor's duty of care and are recoverable". [paragraph 63].

20. Lord Hope, interestingly, was also motivated by the consideration of **equality of treatment**. He stated:

"By allowing the seriously disabled parent to recover the extra costs of child-rearing which are due to her disability the law will be doing its best to enable her to perform this task on equal terms with those who are not affected by her impairment" [paragraph 68].

As to what would constitute a "serious disability", Lord Hope declined to prescribe any general rules or guidance, stating instead that "each case must be taken on its own facts". [paragraph 69]. Like Lord Steyn, he firmly opposed the conventional award of damages solution, describing as "disturbing" what he considered as "the lack of any consistent or coherent ratio in support of the proposition in the speeches of the majority". [paragraph 74]. In this particular respect, in common with Lord Steyn, he favoured intervention by legislation [paragraph 77].

21. **Lord Hutton**, the third member of the minority, described the mother's disability in some detail [paragraph 79]. He then summarised the decision in **McFarlane** as one to the effect that "... the wife was entitled to general damages for the pain, suffering and inconvenience of pregnancy and childbirth and ... to special damages for extra medical expenses, clothing and loss of earnings associated with the pregnancy and birth", but nothing more [paragraph 83]. He considered that it would be wrong to depart from **McFarlane**. He expressed himself in agreement with the Court of Appeal decision in **Parkinson**, which made an exception in the case of a disabled child, on the ground that "... it is fair, just and reasonable to award damages for the extra costs of bringing up a disabled child ..." [paragraph 91].

22. Lord Hutton's central conclusion was as follows:

"In my opinion where the mother is disabled it is not unjust, unfair or unreasonable to award damages for the extra costs of bringing up the child. In considering whether damages should be awarded there is, in my view, a clear distinction between a disabled mother and a mother in normal health". [paragraph 97].

In thus concluding, Lord Hutton recognised that the decision in **McFarlane** was itself an exception to the general principles governing tortious compensation.

23. What, therefore, is the current state of the law in relation to a negligently performed sterilisation or vasectomy or negligent medical advice in respect thereof? The following propositions would appear tenable:

23.1 Some damages are recoverable.

23.2 The damages will not be inflated if the mother is a disabled person and her disability has not been caused by the negligent act or omission.

23.3 In all cases, a conventional award of £15,000 will be made.

23.4 General damages, to be assessed, are still recoverable to compensate for "the pregnancy and birth" [per Lord Bingham] the "stress and trauma and costs associated with the pregnancy and the birth itself" [per Lord Nicholls] and "the normal and foreseeable heads of loss, such as the mother's pain and suffering (and where appropriate loss of earnings) due to the confinement and delivery" [per Lord Millett]. These might be described as the "**McFarlane**" damages which are summarised in Lord Hutton's judgment as "... general damages for the pain, suffering and inconvenience of pregnancy and childbirth and ... special damages for extra medical expenses, clothing and loss of earnings associated with the pregnancy and birth".

23.5 The decision in **Parkinson v St. James NHS Trust** (2002) QB 266 appears to have survived viz., where the child is born with severe disabilities, the mother can recover as damages the additional child-rearing costs attributable to the disabilities.

24. This is unquestionably a remarkable decision, in many senses. I would expect much ink to be spilled in legal commentaries, each with their own particular emphasis. For my part, one of the outstanding features of this decision is the blurring of the line between legal doctrine (on the one hand) and morality (on the other). As in **McFarlane**, the majority judgments are more akin in character and content to a lecture in moral philosophy than a pure legal dissertation. Their Lordships' fine distinction between legal policy and public policy is at best obscure. At the pragmatic level, the *blessing* will undoubtedly prove to be a *burden* for many parents and families. For legal practitioners, the law is essentially unchanged, with the exception of the introduction of the conventional sum of £15,000 damages as an additional award. Where this type of case is concerned, however, the audience is much wider than a narrow legal one. The decision will undoubtedly excite much controversy and debate. I recall one commentator condemning the **McFarlane** decision unapologetically as "odious, unsound and unsafe!" Will *Rees* escape similar censure?

Bernard McCloskey, Q.C.

