What do Judges do in the Family court?

Professor Jo Delahunty QC

Tweet: @JoDQC @GreshamCollege #FamilyCourtJudges

This lecture will explore

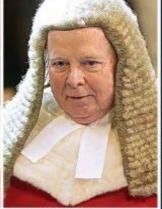


- How the family court room works and who is needed to make it work.
- What challenges the family justice system faces
- What does a judge do and what respect are they due for it?
- What makes for a good judge and what happens when a judge slips below a standard to be expected of them?









Fury over 'out of touch' judges who defied 17.4m Brexit voters and could trigger constitutional crisis

of touch' judges for ruling that embittered Remainers in Parliament should be allowed to frustrate the verdict of the British public.

The Lord Chief Justice and two senior col-eagues were accused of putting Britain on

course for a full-blown 'constitutional crisis' by saying Brexit could not be triggered without a

Westimmster vote.

The judgment by Lord Thomas—a freinding member of the European Law Institute a can of Lawyer, shown as decision early and excelente similar chance Mrs. May's timefault for invoking furnito Page 2

They warned that Mrs May could be forced to irold





Why did no one save little Elsie? Social services visited gay father

who murdered his adopted daughter FIFTEEN times but failed to intervene - even after she had broken her leg and 'fallen down the stairs in the company of th

Birth grandmother who tried and failed to adopt little Elsie Scully-Hicks before she was murdered by her adoptive father says her killer should be HANGED

November 17, 2014 – Elsie is born, taken from her drug addict mother and put in the care of Vale of Glamorgan Council

September 10, 2015 – Elsie comes to live with the Scully-Hicks

May 12, 2016 – Elsie is formally adopted by the Scully-Hicks

May 29, 2016 – Elsie dies at the University Hospital of Wales after suffering extensive brain damage

MailOnline



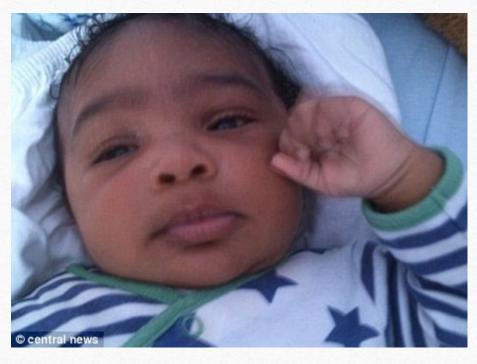
Ben Butler jailed for life for murdering six-yearold daughter Ellie

Girl's grandfather demands full inquiry into why high court judge reunited her with Butler less than a year before she died

Ben Butler and his daughter Ellie. Her grandfather, Neal Gray, had warned the high court judge who reunited Butler and Ellie she would have 'blood on your hands'.

Judge who sent Ellie Butler back to the father who killed her REFUSES to apologise saying merely 'It's not personal'

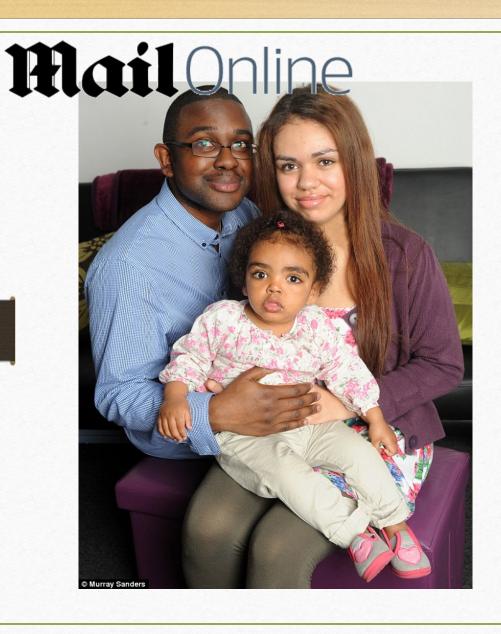
MailOnline



- Four-month-old baby with rickets 'was shaken to death'
- Brain damage so severe he was 'incompatible with life'
- Staff at Great Ormond Street
 Hospital found multiple
 fractures including to Jayden's
 arms, leg and skull

By DAILY MAIL REPORTER

2 November 2011



Accused of killing our son... then robbed of our newborn daughter: The couple wrongly blamed for shaking their rickets-stricken baby to death relive their horrific ordeal

- •Rohan Wray and Chana Al-Alas endured murder trial over death of Jayden
- •Police and doctors adamant they had beaten him and damaged his brain
- •But cleared after post-mortem revealed he had bone-weakening disease
- •Then forced to face another hearing to win back custody of daughter Jayda
- •'We've had no apologies from those who caused us this unforgivable agony'

By <u>SUE REID FOR THE MAIL ON SUNDAY</u> **PUBLISHED:** 01:34, 24 April 2012 | **UPDATED:** 01:37, 24 April 2012

There is no right, per se, to bring up ones own child if, to do so exposes that child to the risk of significant serious harm, abuse or neglect and that risk cannot be ameliorated adequately by support. If there is at risk of that happening then the state will apply to the court.

Munby P endorsed at [26] the approach of Hedley j in Re L (Care: Threshold Criteria) [2007] 1 FLR 2050, para 50:

"Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent ... it is not the provenance of the state to spare children all the consequences of defective parenting. in any event, it simply could not be done."

Her story in her words

When I was born, I was a child in need. My parents were heavily drug dependant.
I assume I came into contact as a baby with various healthcare professionals, my parents encountered the criminal justice system and other agencies were involved around the drug issues.

Her story in her words

Age 4. At this point in my life I started primary school. Often being the last child to be collected at the end of the day, often not doing homework, not bringing in the right books or P.E kit, not fitting in with the other kids, being tired, withdrawn, protective of my sisters. Bruised, late, problematic at times, phases of bedwetting and little to no parent interaction with the school.

Her story in her words

Age 11-12 I started high school, often late, truanting, not doing homework, disruptive, tired. I don't recall a single teacher throughout any time in my school days, asking me what was going on at home? I of course wouldn't just tell them of my own back, because as far as I was concerned, my life was normal.

Her story in her words

When I was 16 I was constantly ringing, turning up to the office of my mum's drug worker, expressing concerns over mental health issues, providing evidence, explaining risk concerns. No one listened, no concern still, over my own wellbeing or safety. I was 16 and a child, being ignored when expressing serious, heart breaking concern of my mother.

Her story in her words

Is in not the case, that all of the professionals knew I was at risk, knew I was experiencing these things, knew I was in need but chose to ignore it? Labelling me as a teenage rebel, a naughty girl, the black sheep was easier that recognising I was a CHILD, easier than flagging up a situation of a child at risk of harm and easier than dealing with a very troubled and traumatised young child.

Her story in her words

Maybe I am hoping, through this brief story of safeguarding, a professional may consider viewing these 'rebels' these 'black sheep' these 'troubled teens' as CHILDREN. Vulnerable, traumatised, exploited, neglected CHILDREN. Who don't cry out for help, who don't open up



"We are all frail human beings, with our fair share of unattractive character traits, which sometimes manifest themselves in bad behaviours which may be copied by our children.

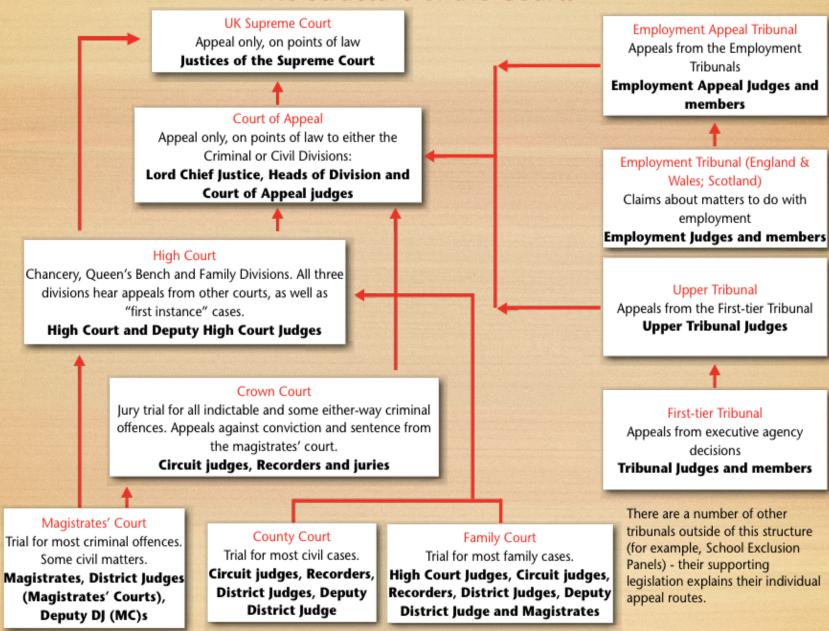
But the state does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, who suffer from physical and mental illnesses or who espouse antisocial political or religious beliefs."

Re B (A child) (care proceedings: threshold criteria) [2013] UKSC 33:

THE TEST OF THE MORALITY OF A SOCIETY IS WHAT IT DOES FOR ITS CHTI DRFN'

DIETRICH BONHOEFFER

The Structure of the Courts





The oath:

'I will do right to all manner of people after the laws and usages of this Realm without fear or favour, affection or ill will."





Public debate and the jealous vigilance of an informed press have an important role to play in exposing past miscarriages of justice and in preventing future miscarriages'.

...if confidence in the system is to be 'maintained, or, if eroded, restored' it is vital that its workings be as open to public view as possible.'

The President of The Family Division Sir James Munby



Mr Justice Bodey

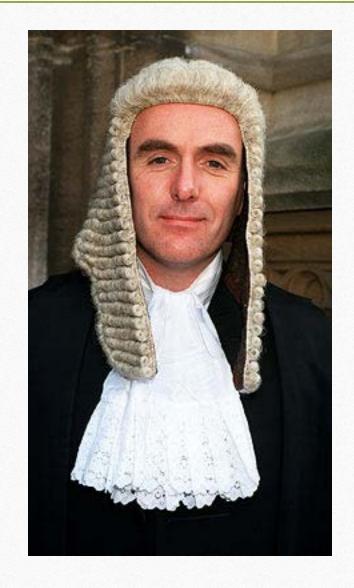
"I find it shaming that in this country, with its fine record of justice and fairness, that I should be presiding over such cases."

It is a stain on the reputation of our Family Justice system that a Judge can still not prevent a victim being cross examined by an alleged perpetrator. This may not have been the worst or most extreme example but it serves only to underscore that the process is inherently and profoundly unfair.

I would go further it is, in itself, abusive.

For my part, I am simply not prepared to hear a case in this way again. I cannot regard it as consistent with my judicial oath and my responsibility to ensure fairness between the parties.

Re A (a minor) (fact finding; unrepresented party) [2017] EWHC 1195 (Fam) per Hayden J:



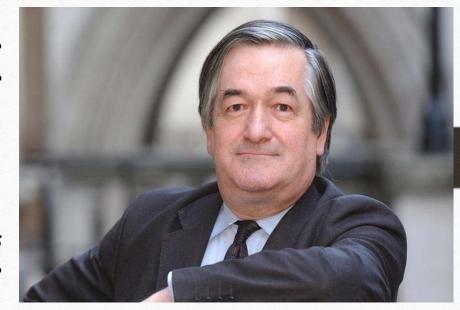
'the parents were entitled to non-means, non-merits, tested legal aid when facing the proceedings under section 31, at a time when removal of their child was not the plan.

Yet when they are now facing an application for the permanent removal of their child and his adoption they are denied legal aid.

Some might suggest that it is irrational.

No doubt it is some imperfection on my part, but I confess that I struggle to understand the policy or rationale underlying this part of the scheme.

D (A Child) [2014] EWFC 39 per Sir James Munby, The President of the Family Division





AN ACT

T vision with respect to the powers of the Home of Lords in relation to those of the Lords of Commons and to limit the duration

The Legal Aid,
Sentencing and
Punishment of
Offenders Act
(LASPO) 2012

'No fair-minded person could read Appendix 5 without being very seriously worried about the condition of justice today – for the millions of people who rightly expect the courts to deliver even-handed justice when they need it.

Without this help, warring couples who are not rich enough to pay for a lawyer often have no idea that the courts will put the interests of their children first, or that mediation may be far the best way of settling the way forward.

Mothers are now denying fathers all contact with their children for fear, rightly or wrongly, that they will not be entitled to legal aid to help them if their father does not bring them back.' The final report of the Bach Commission September 2017

Sir Henry Brooke



I count off the days to retirement- I would leave if escape wasn't so near. I am in excellent health and would have stayed on many years longer.

Until the last eight years all areas of the legal system, to which as a barrister and judge I was so proud to belong, were advancing in dispensing justice but now we go ever more backwards.

The morale of judges and staff is on the floor for a multitude of reasons.

No one has hope.'

In a chilling passage Sir Henry has written 'In housing law nearly 100,000 fewer people are now entitled to early legal help than was the case five years ago.

One of the most poignant moments of our inquiry came when a **Grenfell Tower tenant** told us that when they went to their local law centre for help with their landlords, they were told they could receive no help until someone was actually threatened with eviction, or until any disrepair was so bad it was seriously endangering someone's health.





- Consortium of expert Witnesses in Family Courts to The Bach team
- litigants in person and have no access to representation or to expert reports, so that they and their children are denied justice in serious matters concerning sexual, physical, and emotional abuse, and neglect.
- When expert witnesses are instructed in private and public law cases, the scope of reports is driven by financial cuts, they often have only a limited number of documents made available to them, only allowed limited interviews with family members; when they request more time for complex cases, determinations are made by non-clinical Legal Aid Agency staff, who routinely over-ride the decisions of the Judge who knows the case first-hand.
- Many highly-experienced medico-legal experts from all disciplines have abandoned or restricted their Family Court work because of the rate cuts, the insufficient hours that are allowed to properly undertake an assessment properly, and the difficulty in collecting fees

In a survey conducted by Rights of Women in 2015:



- 71% of respondents said it was difficult, or very difficult, to find a legal aid solicitor in their area.
- 53% said that they took no action in relation to their family law problem as a result of not being able to apply for legal aid.

In effect, we now have a three-tier family justice system

- those who can afford legal advice and representation
- those who are entitled to legal aid to provide legal aid assistance and representation
- those who cannot

The gulf between the bottom rung and those above is a chasm.

From Emily Duggan of Buzzfeed

- The Personal Support Unit, which works in 20 courts to provide emotional support and advice for people without lawyer, has seen a **520% increase** in people going to it for help since 2011.
- 2010-11: the PSU had 200 volunteers helping people on just over 9000 times.
- 2016- 2017 more than **700** volunteers helped people on more than **56,000** occasions.
- That's a quarter of all those who have received help from the PSU since the charity's foundation 16 years ago.

Birmingham University study 2016 from 200 q'aires and direct i/v

- 2/3 of 200 litigants in person did not have A-levels.
- . ¼ had no formal qualifications at all.
- 45% of people said they had understood what was said in court
- 22% did not have English as a first language.
- 32% had mental health or learning difficulties,
- half of these people also ticked the box for depression.
- Only 29% were in full-time work
- 85% declared an income of less than £30,000 a year.



In real terms, the comparable budget in 2010/11 was £9.3bn and in the current financial year it stands at £6.4bn.

Budget on 22nd November 2017 from which we learnt that spending plans for the Ministry of Justice have been cut by a tenth over two years:

In real terms the MoJ budget will fall from £6.6 billion in this financial year to 36.2 billion in 2018-2019 to £6 billion in 2019-20

Why did I apply to be a judge?

- Because I want to make a difference, for the better, to the most vulnerable of our society
- Because I want to make decisions as a judge rather than seeking to shape them as an advocate
- Because I think I can do it well
- Because it is important that judges represent the public they serve and for too long the judiciary has been predominantly male, white and drawn from the ranks of the privileged (socially, educationally and financially)
- Because it makes me a better advocate
- Because it carries a certain professional and social prestige to be a judge

A day, a week, as a roving Recorder Ms Delahunty QC

You are appearing before me: what can you expect?

The mood of the family court: judicial morale

'During this follow-up inquiry attention was drawn to a fresh problem of recruitment to the judiciary arising from diminished morale among serving judges and, for potential applicants, the reduced attractiveness of a judicial appointment.

In particular, we heard alarming evidence that insufficient candidates of the requisite quality have been applying for appointment to the High Court. The issue of diversity on the judicial bench was addressed in our report in 2012, but remains a problem.

The Lords Select Constitution Committee confirmed on 2.11.17





Fury over 'out of touch' judges who defied 17.4m

Brexit voters and could trigger constitutional crisis

ENEMIES OF THE PEOPLE

MPs last night tore into three 'out of touch' judges for ruling that embittered Remainers in Parliament should be allowed to frustrate the verdict of the British public.

The Lord Chief Austice and two senior collengues were accused of putting Britain or By James Stack Political Editor

course for a full-blown 'constitutional crists' by saying Brexit could not be triggered without a Wentminster vote.

Westimmster wite.

The judgment by Lord Thomas – a founding menber of the European Lew Institute, a object lawyer
and sendentics strong to Insprove EU law – three

Article 50 in March next year. Senior EPs - led by an ex-justice missioner - said II was an outrage that an unionly allocor of judges and smitthered Bernam become could theset the wishes of

They warned that Mrs May could be forced to in
an election early next year if the courie did not be
shown. Leave compagnions said the redges be

Turn to Page:

Remember this headline?

It had consequences that led to a unprecedented public, debate between the most senior levels of the judiciary and the the government



Liz Truss MP "Where perhaps I might respectfully disagree with some who have asked me to condemn what the press are writing, is that I think it is dangerous for a government Minister to say this is an acceptable headline and this is not. I am a huge believer in the independence of the judiciary; I am also a very strong believer in a free press and the value it has in our society."

The then Lord Chief Justice disagreed

"I regret to have to criticise her as severely as I have, but to my mind she is completely and absolutely wrong about this, as I have said, and I am very disappointed ... she has taken a position that is constitutionally absolutely wrong."





Lord Thomas, although accepting that "criticism is very healthy", said that

"there is a difference between criticism and abuse which I do not think is understood."

"it is not understood either how absolutely essential it is that we are protected, because we have to act, as our oath requires us, without fear or favour, affection or ill will."

Transform Justice

penelope@transformjustice.org.uk Charity number:

Sir Alan Moses,

Reasoning and speaking through judgments, within the confines of a court, and in no other forum, was, we were all taught from those with the authority they learn, the safest rule.

Of course, we need reasoned and reasonable decisions.

But we also need to understand how judges work, and discuss and develop the extent to which they can and are willing to engage with the community. They can, in a modern society, no longer command respect from mere deference.

Penelope Gibbs and Matthew Rogers and their publication 'Rethinking judicial independence' published July 2017

In 2015, the then Lord Chief Justice said:

The judiciary must reflect society to maintain legitimacy: The maxim, "justice should not only be done, but must also be seen to be done," is ordinarily taken to require transparency, impartiality, fairness, and propriety.

But in a broader sense, it must also encompass the principle that the public needs to have confidence in the judiciary that serves it, so as to strengthen the legitimacy of the judicial process.

https://www.judiciary.gov.uk/wpcontent/uploads/2015/09/speech-lcj-judicial-independence-in-a-changing-constitutional-landscape.pdf

When it Goes Wrong

Judicial conduct

Three categories I'd like to consider:

- a) points of appeal based on judicial mismanagement and
- b) complaints based on judicial behaviour and trial mismanagement
- c) judicial bullying and how much of it goes unchallenged



LL v the Lord Chancellor [2014] EWCA Civ 237

LL v the Lord Chancellor [2017] EWCA Civ 237

M (Children) [2016] EWCA Civ 942:



G (Child), Re [2015] EWCA Civ 834

'Managing a trial can be challenging, even for an experienced judge, and it is sometimes necessary to react without much time for refined consideration.

Generous allowance always has to be made for this and also for the fact that, even with counsel's help, it is very difficult to tell from a transcript, or even from listening to a recording, precisely what was going on at all stages during the hearing.

Furthermore, different judges have different styles and counsel and litigants can usually be expected to cope with the talkative, the uncommunicative, the robust, and even the irritated judge, provided the judge's behaviour does not stray outside acceptable limits."

Complaints against the judiciary

As a point of interest, one can bring a complaint against the judiciary if the judge has transgressed the following and

- 1. Used racist, sexist or offensive language
- 2. Fallen asleep in court
- 3. Been generally rude
- 4. Misused judicial status for personal gain or advantage
- 5. Has criminal convictions
- 6. Failure to declare a potential conflict of interest

The complaint will be reviewed in line with the Judicial Conduct (Judicial and other office holders) Rules 2014.

Judicial Conduct (Judicial and other office holders) Rules 2014

The judiciary comprises approximately 26,000 individuals serving across a range of juris- dictions.

The JCIO received 2,126 complaints in 2016/17, compared to 2,609 in 2015/16.

The team also dealt with 526 written enquiries, compared to 662 in 2015/16.

'It is a testament to the high standards of conduct maintained by judicial office holders that, in 2016/17, only 42 investigations resulted in the Lord Chancellor and Lord Chief Justice taking disciplinary action.'



Stephanie Hack - Joint Head of the Judicial Conduct Investigations Office

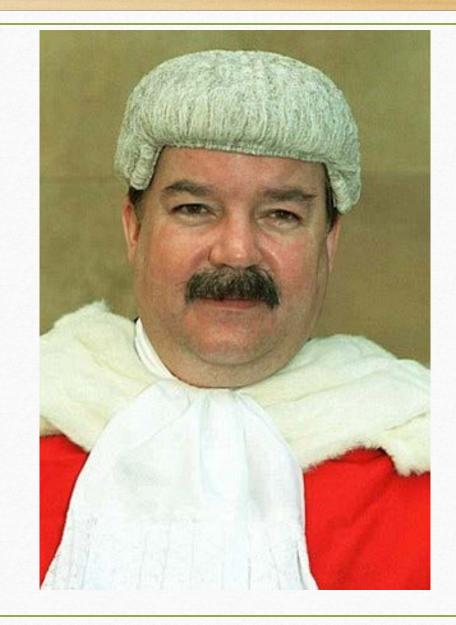
27 October 2017 – Mr Justice Peter Smith

"The JCIO confirmed in July 2015 that it was investigating Mr Justice Peter Smith about a matter involving British Airways and his luggage which came to light during Emerald Supplies Ltd v British Airways, a case he was hearing.

In Spring 2016, the JCIO confirmed that it was investigating a second linked matter connected to the case of Harb v Aziz which he had heard and was subject to an appeal.

In May 2016, the JCIO said that the judge had agreed to refrain from sitting until Harb v Aziz had been resolved. He subsequently agreed to continue to refrain from sitting while investigations continued.

A disciplinary panel hearing was set for 30 and 31 October 2017.



Joshua Rozenberg Commentator in Law and BBC journalist has multiple times written on Smith J, first wrote about him 10 years ago suggesting he should leave the bench.

As he explains "It is just over 10 years since I wrote a column for the Daily Telegraph headlined "Mr Justice Peter Smith loses his judgment". It began: "The time has surely come for Mr Justice Peter Smith to leave the Bench." That time has finally arrived. But at what cost?

'The Smith debacle demonstrates that the rules for investigating judicial misconduct are designed to protect judges rather than to expose wrongdoing. Those rules must now be changed. There should be no less transparency than there is in other areas of public life.'

Facebook.com. (2017). Joshua Rozenberg. [online] Available at:

https://www.facebook.com/JoshuaRozenbergQC/posts/370107010077888 [Accessed 30 Oct. 2017].



The Telegraph

Judge Patricia Lynch QC cleared of misconduct after calling racist thug a 'bit of a c---'

said her remarks were
'a momentary lapse of
judgment which should
have never happened

CREDIT: DAVID BARRETT

<u>Telegraph Reporters</u> 9 JANUARY 2017



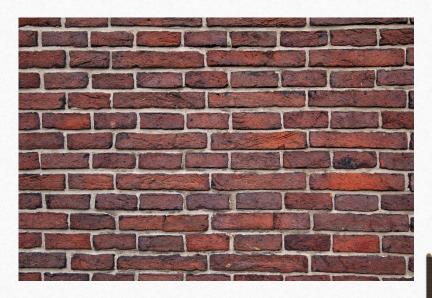
Transparency?????

Wherefore Art thou

Although these snippets and statements are published on the websites, the procedure remains hidden.

We can read that a matter was considered and it did not amount to misconduct, but we do not know who investigated, what was looked at and who was the complainant.

There remains a lack of transparency in the procedure for which I have sought, and can find, no rationale or explanation





ACAS defines workplace bullying as "offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the person being bullied".





Mary Aspinall-Miles @MAM12CP · Oct 11



Moreover, we are spoken to in a tone on occasion, that would make most have employment lawyers on speed dial.



4 1 1







Mary Aspinall-Miles @MAM12CP · Oct 11

Replying to @MAM12CP @WellbeingCBA

In any event you won't improve advocacy or performance by undermining & belittling advocates or welding yourself to an old view of the job







I'm not going to tell that story here, because it is intimately bound up with the private details of my client's case, and because in my heart I hope the judge in question was acting out of character and regrets their behaviour and would be mortified to read of it.

But also, because it is actually too hard a story to relive. Having done so earlier this week I was unexpectedly right back there, a gibbering wreck, wracked with guilt for breaking down at court, for failing a client (I didn't but at the time I felt that I had), humiliated at my inability to cope and the treatment of me in front of peers and clients, powerless to make it stop because the judge had complete control."

Per Lucy Reed, Barrister @Familoo Pink Tape Blogger

A (Children) [2015] EWCA Civ 133 on appeal from HHJ Robert Stephen Dodds

a serious procedural irregularity and criticised the "unrestrained and immoderate language" used by the judge "which can only leave advocates seeking to present, on instructions, their cases to the court feeling browbeaten and impotent".

They formed this view after reading these (sample) exchanges took place"

'Can I tell you how bitterly resentful I am at how much of my Saturday I spent reading this codswallop?

HHJ Dodds warned the assembled lawyers, "You may want to put your crash helmet on," before saying (loudly):

'If she told you that the moon is made of green cheese will you say, 'Yes, S, no, S, three bags full S?'— he continued 'For heaven's sake, in this day and age especially, just because the lunatic says, 'I want, I want', you do not have to respond by spoon-feeding their every wish.

Lady Justice King called his "unrestrained and immoderate bombast" both "deplorable" and "unacceptable"

Through the helpful official of "Legal Cheek' (a mine of useful blogging) I read

'In another case, Dodds slammed lawyers who wanted a young boy to live with his grandparents in Poland.

Recalling Alan Partridge at his very best, he told them: This is a game of chess, not draughts.

Finally, Dodds' extreme grouchiness meant that, in another family case, everyone in court "crumbled under his caustically expressed views".

Dodds' reaction to this was to blast the mother for looking "upset and bewildered" by his rant.

The Judicial Conduct Investigations Office (JCIO) said His Honour Judge Robert Stephen Dodds' behaviour amounted to 'serious misconduct' in relation to three cases. A similar charge about a fourth case was dropped.

Lord Chancellor Michael Gove and Lord Chief Justice John Thomas agreed that Dodds' actions in three of those cases amounted to "serious misconduct

He remains in post

https://www.legalcheek.com/2015/11/hhj-dodds-dubbed-britains-rudest-judge-after-series-of-kevin-the-teenager-rants/ Hyde, J. (2017). 'Gratuitously rude' judge stays in post after conduct probe. [online] Law Society Gazette. Judicial bullying towards advocates often includes (but is not limited to):

- Shouting at them
- Deliberately saying things to embarrass or humiliate them
- Asking them to justify themselves in circumstances that are unfair
- Calling them names
- Calling into question their professionalism in circumstances that are unfair;
- Accusing them of incompetence in circumstances that are unfair;
- Using various facial expressions to demean or intimidate them;
- Interrupting them or making 'comment' on your question before the witness has answered
- Refusing to give them time to formulate an argument or response in circumstances where it is unfair to them and their client to do so.

Bullying by sarcastic comment, disparagement, rudeness, obvious disrespect is not acceptable

Such judicial excesses undermine the client's confidence in the barrister and the barrister's confidence in themselves



360 degree feedback: time for it to happen?



- The role of the judge is pivotal in the lives of the people who cross their paths in the court room
- We have an excellent disciplined, principled judiciary who strive to do the best they can for the public they serve
- The demands placed on the judge are high and becoming all the more onerous because of unsupportable cuts in finding for the family justice system
- The inexorable rise in unrepresented litigants is placing an almost unsustainable burden of court staff, the judiciary and the ability of the court system to deliver swift and fair justice
- Becoming a full-time judge is becoming less attractive at the highest levels of court appointment: moral has dived, the pension no longer compensates for salaries that are lower in sitting than in private practice, vacancies in the High Court are going unfilled and lack of female and BAME candidates for many years has created a diversity gulf between the judiciary and the public they serve and should better reflect.

- Morale of the professionals who came into legal aid work as a vocation has plummeted
- The ability to sweep up the unrepresented by pro bono work is becoming unsustainable sunder the weight of demand for legal advice and assistance
- More than ever, the family court needs to be transparent so that the stresses it labours under can be understood by the public.
- The public deserve to see, through transparency or process and a fair, informed and engaged press, how much hard work goes into making an under-resourced system fit for purpose: the family justice system needs public ownership of outcomes through the sharing of information.

- In an age of misunderstanding, which flows from misinformation, if judges contributed with greater vigour and clarity to an explanation of the issues involved and how the judiciary should approach them, then, at least if ignorant criticisms will not altogether be avoided, the ignorance of the criticism would be all the more apparent. The institution of the judiciary is surely, by now, of sufficient strength to withstand abuse while developing more modern and open channels of communication.' Sir Alan Moses: see the Gibbs/ Munroe report
- It is no longer acceptable for judges to be on pedestals: judges must be see to meet high standards and to be held to them.
- The unspoken challenge is whether the system can survive as it is or if resources are to continue to deplete while demand rises, whether a new way of administering justice is required



Next lecture:

Thursday 1 February 2018, 6 pm, Barnard's Inn Hall *Vulnerable Clients and The Family Justice System*