F v H (Fact-finding) [2019] – lessons to be learnt

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The fallout from the controversial judgment in F v H *and what it will mean for judicial training*

As family law practitioners, we would all like to think that we are part of a forward-thinking sector that is fair to all and meets the needs of families up and down the country. The uncomfortable truth is that public confidence in the family justice system, and private children law proceedings (the focus of this article), is extremely low. Of course, in the absence of extensive academic research into the experience of litigants, this assessment is made from a purely anecdotal basis.

In an address in February 2020 by Sir James Munby, published on the Transparency Project's website, he alluded to a dichotomy that is symptomatic of the "crisis" in private children law. On the one hand he points to arguments that judges who hear private law cases do not believe, understand or sufficiently protect victims of domestic abuse (and their child/ren). On the other hand, the criticism is that judges believe these allegations too readily and are not sufficiently alive to the alienating behaviours of (generally) mothers.

Therefore when the appeal of *F v H (Fact-finding)* [2019] EWFC B80 made headlines in the national press earlier this year, pillorying the trial judge for his outdated (and frankly incorrect) views on consent and rape, it was a much needed wake-up call to family law practitioners that our revered system simply isn't doing as good a job as it needs to.

The appeal concerned a judgment at first instance made following a one-day finding of fact hearing in private Children Act proceedings. The mother had made allegations agaist the father of coercive and controlling behaviour and two incidents of rape. The trial judge did not make findings of rape on the basis that she had not physically struggled with the father, nor had she made life difficult for him. His approach to these findings perpetuated a number of outdated myths surrounding rape. There were also a number of major procedural irregularities in how the proceedings were conducted (on which, see below).

The mother appealed the decision, and it was overturned by a High Court judge in January 2020. Given the concern generated by the trial judge's approach to the proceedings, the appeal judgment explained that a formal request to the Judicial College had been made by the President of the Family Division "for those judges who may hear cases involving allegations of serious sexual assault in family proceedings to be given training based on that which is already provided to criminal judges" (para 59, *JH v MF* [2020] EWHC 86 (Fam)).

Many were understandably appalled by the trial judge's approach. The first instance and appeal judgments throw up an array of questions and have already been the subject of much legal commentary. This article aims to examine what lessons can be learned by exploring the following themes:

- What the training for family judges hearing cases with allegations of serious sexual assault might entail.
- The link between flawed finding of fact hearings and the proliferation of self-representing litigants.
- The possibility that similar outcomes to *F v H* might be avoided if there is greater diversity in the family judiciary and/or enhanced transparency in the family justice system.

The decision at first instance and appeal

The facts of *F v H* may sound familiar to children law practitioners. In 2013 the parties entered into a relationship and they had a son, born in January 2015. They first came to the attention of the police in 2014, and complaints of domestic abuse by the father towards the mother were made periodically throughout their relationship (by the mother and third parties). In August 2016 the mother made a further report to the police, and fled the family home with their son to a women's refuge. The father was arrested and interviewed under caution in relation to allegations of coercive and controlling behaviour and of sexual assault.

Bail conditions were imposed on him, but by September 2017 the police decided not to take any further action. Over a year later, in October 2018, the father made an application for a child arrangements order. The father was a litigant in person, with assistance from a McKenzie Friend, while the mother benefitted from legal aid and was therefore represented.

A finding of fact hearing to determine the mother's allegations took place in August 2019. Ultimately, the judge did not make the findings she sought, a decision which she then appealed.

The first instance judgment caused alarm in a number of respects:

1. The hearing was conducted in a way which had complete disregard of the safeguards that exist to protect victims of domestic abuse. Despite the mother having been identified as a vulnerable witness, Part 3A of the Family Procedure Rules (FPR) was ignored by the trial judge entirely, without him giving reasons as to why he was doing so. The mother was denied the use of screens, gave her evidence from counsel's bench (which meant the judge could not hear her evidence clearly, something which he then criticised her for) with the father also giving evidence from counsel's bench (and therefore benefitting from assistance from his McKenzie Friend, despite having been sworn in).

2. There was a complete failure to apply the definitions and principles of Practice Direction 12J of the FPR, relating to domestic abuse and harm in the context of child arrangement orders.

3. The trial judge was primarily occupied with the parties' oral testimonies, and failed to balance the evidence before him and take into account matters that were relevant to the history of their relationship. In particular, he did not take account of police disclosure (which he had himself ordered), which evidenced that the parties had been known to the police since June 2014. The disclosure also revealed a history of domestic abuse (including a conviction) between the father and previous partners. Third-party reports were also dismissed. Also, the mother had put forward evidence of sexually explicit and threatening messages sent by the father. The judge dismissed these as "sexting" and chose not to give them any weight, even though the father had put forward no such case.

4. The judge preferred the father's evidence without explaining why, save for describing him as "straightforward" and "forthright".

5. The judge concluded that the mother was "anxious" and "neurotic", without any forensic expert evidence before him to reach such a conclusion. (There was also a failure to appreciate that the reason for the mother's anxious presentation might have been because she was the victim of abuse and having to face her alleged abuser in court.)

6. Findings were made about the mother that she had been aggressive, despite this allegation having never been put to her in evidence.

7. The trial judge appeared to have difficulty applying the correct standard of proof. His comments suggested that he was applying a higher standard than the binary "balance of probabilities" test, as he was entertaining the idea that an allegation "might" have happened.

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8. What seems to have shocked the most was the judge's approach to the issue of consent, which the appeal judge deemed "manifestly at odds with current jurisprudence, concomitant sexual behaviour, and what is currently acceptable socio-sexual conduct" (para 21, *JH v MF*). Specifically, the mother's failure to physically stop the father from having sexual intercourse led to the conclusion that the intercourse must have been consensual.

The appeal judge therefore determined that the trial judge's "approach to the fact-finding is so flawed as to lead to the conclusion that it is unsafe and wrong" (para 17) and ordered a re-trial. As noted above, she announced the additional training for those family law judges determining cases where there are allegations of serious sexual assault based on that which is provided to criminal judges, and also commented on the need for a congruence of approach between the criminal and family jurisdictions.

What might the training for judges hearing cases with allegations of serious sexual assault entail?

In her judgment, the appeal judge drew on Sir Andrew McFarlane's decision in the case of *Re R (Children)* [2018] EWCA Civ 198, namely that "it is fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings in relation to the welfare of the children based on criminal law principles and concepts" (para 67). *Re R* made the point that, while criminal proceedings are "concerned with culpability and, if guilty, punishment" (para 62), in family proceedings the court is determining "what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established" (para 62).

This is an important distinction but, as the appeal judge concluded, it cannot be that family proceedings adopt a completely different approach to that which would be taken in the criminal jurisdiction. It also cannot be a justification for attitudes which have been determined to be wrong in both the criminal jurisdiction and accepted public opinion to be adopted in family proceedings. This is not the first time a "congruence of approach" between the two jurisdictions

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has been endorsed; for example in 2014, when addressing how far the family justice system lagged behind its criminal law counterpart in dealing with vulnerable parties and witnesses, Sir James Munby advised that there was no need to reinvent the wheel, and that the extensive work undertaken by the criminal courts could be adapted for use in the family courts.

Criminal judges have had to grapple with complex issues, including consent and the vulnerability of victims of abuse and sexual abuse, ensuring that they keep pace with evolving societal views. It has been recognised that outdated and stereotypical views remain embedded in peoples' psyches, and this has therefore been addressed in the approach taken by the police, the Crown Prosecution Service and the judiciary to these cases. Unfortunately, it cannot be said that such a comprehensive approach is taken by those involved in the family justice system.

What training and guidance is there within the criminal jurisdiction that might be drawn upon?

Responsibility for all judicial training sits with the Judicial College. In the criminal justice system, judges authorised to try serious sexual offences must attend the appropriate seminar at least once every three years, with any failure to do so without good reason referred to the senior judiciary. (Incidentally, the same applies to judges hearing public law family cases.)

According to the Judicial College prospectus (of April 2019 to March 2020), the training for this category of criminal judges aims to enable them to "try these cases with sensitivity and confidence" and to ensure that the trial process is "fair and appropriate to the needs of all parties and witnesses". The contents of the course specifically address the topic of vulnerability. The format of the course encourages discussion and sharing of judicial experiences and identified issues of concern, with the aim that judges talk with and learn from their colleagues. The induction courses for newly authorised judges go further, and train judges to deal with the psychology of victims of these offences and to learn how they impact on their subsequent behaviour.

Given the overlap in the complex issues involved in private family law proceedings, it is no great leap to suggest that family law judges hearing cases involving domestic abuse and sexual abuse should be subject to the same mandatory training schedule to provide the same knowledge and skills.

Further details about the training and guidance given to criminal judges can be seen from the contents of the "Crown Court Compendium (CCC), Part 1: Jury and Trial Management and Summing Up" (Judicial College December 2019), which is disseminated to criminal judges by the Judicial College to provide guidance on directing and managing juries and sentencing. It includes sample directions to "counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct", so that juries "approach the evidence without prejudice".

Interestingly, many of the issues identified in the CCC were in play in the first instance judgment in *F v H*, including:

- that people react differently to the trauma of serious sexual assault both at the time of the incident and at a later date (including while giving evidence);
- that a delay in reporting an assault and inconsistency of accounts does not necessarily affect the veracity of what has been alleged;
- the distinction between submission and consent in terms of sexual activity between partners (on which see below); and
- the fact that use of force, physical struggle or signs of injury are not a requirement for there to be a finding that someone has been raped.

The guidance deals with specific assumptions or scenarios, many of which appear in the current case, including the importance of drawing a distinction between consent and submission. Namely that:

> "if a person decides not to struggle or gives up struggling, that is not the same thing as consent. A person can in some circumstances simply let the sexual activity take place because they feel they cannot act to stop it or because that is the only way in which they see that the incident will conclude. Such actions or inactions are not an agreement by choice." (pages 20-9)

The guidance also emphasises the importance of juries looking at all the evidence to decide whether a party's evidence is true. Arguably (and of course without having heard all the evidence

and facts in the case) it could be said that if the approach suggested by this guidance had been followed by the trial judge, particularly the reminder to look at all of the evidence, a different decision might have been made.

Following the appeal decision and reaction to it, the President of the Family Law Division and the Lord Chief Justice have confirmed that an online resource is being developed, overseen by the chair of the Judicial College, for family judges dealing with issues of consent and stereotypes in sexual cases. Induction and refresher courses at the Judicial College will also be updated to address these topics. It seems both sensible and logical for it to draw on the CCC guidance, as well as the seminars already in place for criminal judges, to prevent any flagrant incongruence in approach.

Whilst family judges are not tasked with determining culpability, or even looking to establish the same standard of proof, they have the tools and evidence available to them to make a wider assessment of the factual matrix of family circumstances. In *F v H*, if applied correctly, this may have enabled a decision that focused less on whether a rape did or didn't happen and more on whether the allegation made was part of a wider pattern of abusive behaviour at the hands of the father.

Much comment has been made about whether training alone will fix the problem, not least in the open letter to the judiciary from family and human rights lawyers and women's rights organisations dated 19 February 2020. As the appeal judge identified, the Judicial College already provides "comprehensive training". The government's paper setting out its commitment to reform of domestic abuse law corroborated this, confirming that all family court judges received training from the Judicial College throughout 2016 to 2018 on "how to address the challenges faced by vulnerable persons in the courts, including those who are victims of domestic abuse". (Transforming the Response to Domestic Abuse Consultation Response and Draft Bill, January 2019). Despite this, the experience of many parties to private law proceedings (and especially litigants in person) is that there are wider systemic issues, including some lack of understanding of domestic abuse and serious sexual assault, and a failure to apply the practice directions to afford victims a fair trial.

Flawed finding of fact hearings and the proliferation of self-representing litigants

Finding of fact hearings can be complex and delicate, and the task of the judges adjudicating them challenging. In *F v H* the trial judge went into some detail about the difficulties he faced in having to make a decision as to findings (and the risk that he might get it wrong). He asked: "How do I find out precisely what happened behind the closed doors of a family home years after the event, based only on the evidence of the parties, neither of whom can be said to be independent?" (para 9). It is an unenviable task. (Although in the present case, the judge did have the benefit of additional, corroborative evidence.) When having to carry out this balancing exercise with parties that are unrepresented, and in a tight timeframe, the task becomes all the more challenging.

LASPO 2012 has meant that the number of litigants appearing in person and without legal advice in family law proceedings has soared. With it, the task of judges and their caseload has transformed. With parties that don't have advocates to guide them through complex hearings, judges have to actively manage cases, including sometimes carrying out cross-examination of parties.

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Having to play the role of advocate and arbiter is not without its problems, and can lead to a partisan approach, as in *F v H*. Indeed, the appeal judge warned: "This case is yet another example of the difficulties encountered by litigants when public funding is not available to the party against whom complaints are made; and of the way in which justice or a fair trial is compromised when the judge is required to enter the arena" (para 1).

In this case the mother had legal advice; she could be informed by those representing her of the errors in law and procedural irregularities in how the hearing had been conducted, and respond accordingly. But what would have happened had she been representing herself? Would she have known that she had legitimate grounds to appeal the decision? Would she, and others in a similar situation, be hesitant to seek protection from the courts? These were precisely the concerns raised by domestic abuse survivor and women's rights organisations upon publication of the judgment. They described this mother's experience as being the tip of the iceberg, pointing to numerous other women who had come forward sharing similar experiences of the family courts (including at the hands of the trial judge).

What practical solutions might there be to level the playing field?

One solution might be that, where one party has legal-aid-funded representation as a result of having made allegations of domestic abuse, the other party to the proceedings is also provided with legal aid. This would stop judges being drawn into cross-examination of parties (and also put an end to the cross-examination of individuals by the ex-partners they have accused of abuse, which the draft "enhanced" Domestic Abuse Bill aims to automatically prohibit in any event).

Another solution, proffered in the open letter sent in February 2020 referred to above, might be for trained domestic abuse champions to be appointed in each family court with the task of:

- aiding judicial understanding of domestic and sexual abuse, particularly in relation to minority and other vulnerable women;
- ensuring correct procedures are followed, consistent with PD12J; and
- ensuring accountability and monitoring where there are procedural errors and correct definitions are not properly applied.

Part 3A and PD12J of the FPR need not be rewritten; they simply need to be properly followed. More extensive judicial training will go some way to addressing this but is unlikely to be sufficient on its own. So the involvement of domestic abuse champions could be an effective means of addressing this. They could perhaps become involved at the early stages of proceedings being issued, at the same point that Cafcass does, to ascertain whether domestic abuse is a relevant factor and therefore whether special measures are applicable. This would amount to an effective check and balance on the court, by preventing cases from slipping through the net and monitoring whether the correct procedures are being followed.

As for the announcement in the Chancellor's budget in March 2020 that £5m would be earmarked for the rolling out of domestic abuse courts (which will hear family and criminal matters alongside one another) only time will tell how this might have a bearing on private children proceedings and cases such as *F v H*.

A brief word should be given as to the timings of the fact find. The evidence was heard, closing submissions made and judgment given all in a single day. The mother's counsel's closing submissions commenced at 16.45 (and were repeatedly interrupted and then cut short by the trial judge), no submissions were made by the father and judgment was given at 17.18. It begs the question of whether, had the listing been longer, the parties would have been able to present their cases in a way that was fairer, and the trial judge could have taken proper time to reflect on all the evidence before making his decision.

Delay was clearly something that preoccupied the judge, having expressed regret in his judgment that the parties were only just at a fact find in August 2019, when the father had issued proceedings over nine months earlier, in October 2018. The time allowed for the hearing also has to be viewed against the backdrop of the courts' resourcing being squeezed ever tighter, although dealing with matters expeditiously should never result in judgments being rushed in a way that compromises the fairness of the conduct and outcome of proceedings.

In view of the above, it is perhaps unsurprising (although not excusable) that the sheer number of litigants in person might lead to flaws in the approach and decision making in finding of fact hearings. The private nature of family proceedings may mean that any similarly flawed decisions may never be exposed to scrutiny.

Would similar outcomes to *F v H* be avoided if there were greater diversity in the family judiciary, and/or enhanced transparency in the family justice system?

Public perception and confidence in the family justice system is at an all-time low. This is clear from the steady stream of articles in the national press with scathing reports of significant failings in both private and public children law cases, and is fed by the sharing of anecdotal evidence by litigants and the experiences of journalists and bloggers attending family proceedings. Most concerning is Sir James Munby's acknowledgement in his address referred to above that "the attacks on our private law system have much less to do with the law and are much more focused on the alleged failing of the judges".

The fallout of *F v H*, and reporting of family cases more generally, indicates that, sadly, the experience of the parties in this case was not an isolated incident. It also appears that the views and stereotypical assumptions attributed to the trial judge have been seen previously by other judges. In the Law Society's written response to the Joint Select Committee scrutinising the Domestic Abuse Bill, there is further acceptance that judges may be getting it wrong; it acknowledged that judicial practice in dealing with cross-examination of vulnerable witnesses was "inconsistent" and said there was a need for "adequate training and education for the judiciary in order to avoid relying on gendered or stereotyped interpretations of the party's behaviour in determining whether cross examination will indeed cause stress".

Addressing gendered views of the judiciary

Much of the reporting of this case has blamed its failings, repeated in numerous other cases (although the extent to which is unknown), on misogynist and sexist views held by family judges. It is therefore relevant to consider to what extent the diversity of the family law judiciary (or lack thereof) might have a bearing on the decisions it makes. The judicial diversity figures as at 1 April 2019 (not solely in relation to family law) reveal that only 32% of judges in courts in England and Wales are women. Broken down in terms of seniority, this reveals the following percentages of female judges: Court of Appeal (23%), High Court judges (27%), circuit judges (31%), and recorders (21%).

At district judge (42%) and deputy district judge (39%) level – ie those who will primarily hear the private law cases similar to *F v H* at first instance – the figures are more positive. It is clear, however, that the lack of representation of women in the judiciary is a real issue. Further, only 8% of all judges are BAME and 76% are aged over 50. *[In this context, readers may wish to see the pieces by Jo O'Sullivan and DJ Howard Kemp elsewhere in this issue, Ed]*.

On a positive note, there are signs that steps are being taken to redress the imbalance, with women making up 45% of judges appointed to a senior judicial role in 2018/19. In the same period, 44% of deputy district judges appointed were women. The statistics also show that 46% of judges aged under 50 are women.

Of course it is not as simple as blaming the flaws in the family justice system on a lack of representation, but if the judiciary was comprised of a wider section of society, it might ensure that its decisions were less at odds with the views of modern society. While issues of gender certainly have some bearing, the criticisms levelled at private children proceedings do not come exclusively from female litigants, which demonstrates that the issues are much wider.

How might greater transparency contribute to the solution?

Demands for greater transparency in relation to family proceedings have been growing, with the intention that it will promote public awareness and understanding, and open up decisions to public scrutiny. Those looking in from the outside consider that the family courts are operating under a veil of secrecy, with the individuals making and influencing critical decisions about the lives of parents and children shielded from view. It is for this reason that successive Presidents of the Family Division have promoted greater public access to the practice and procedure of family law. This has happened through the admittance of journalists to family proceedings, the introduction of guidance to promote the publication of judgments, and guidance to enable journalists and bloggers to report more easily from family proceedings.

Despite this, there is a collective concern that there exists insufficient information and empirical evidence about what is happening on a daily basis in private family law proceedings. The fallout from *F v H*, and from other examples, indicate a pressing need for the public to have greater confidence in the system; in order to do so, those involved in private children law need to understand what isn't working so that changes can be made.

What is being done to address these concerns?

The establishment of a panel made up of members of the judiciary, academia, social care, policy makers and third sector organisations was announced on 21 May 2019 by the Ministry of Justice. The panel made a public call for evidence from professionals and individuals with experience of private law cases involving allegations of domestic abuse and other serious offences, in order to understand their experiences and "identify any systemic issues and build a more robust evidence base to inform improvements". The outcome of that review is still awaited.

Sir James Munby's view, given in his February 2020 address, is that any issues in the private law justice system can only truly be identified and addressed following a "detailed programme of rigorous, independent research". Some of the work suggested by him is covered by the Ministry of Justice review but, in addition, he proposes the completion of a time-limited survey by judges to capture data about what is actually happening in the family courts.

The publication of judgments in family cases also has a significant part to play in opening up access to family courts. Insufficient numbers of judgments are being published, especially from district judges, deputy district judges and magistrates (to whom the current guidance encouraging publication does not apply). Although the decision of *F v H* was within the category of cases to which the guidance regarding publication of decisions applies, it was only following the appeal (and outcry) that the judgment was eventually made available.

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The President is currently undertaking a Transparency Review looking at the existing arrangements that regulate access to and reporting from the family courts. Pending the outcome of this, and a radical change to the existing law to allow greater reporting from family proceedings, the publication of judgments from all levels of judges in an anonymised form will provide the greatest access (and scrutiny of) family proceedings. Malvika Jaganmohan discusses these issues in detail on page 14.

Summing up

There appears to be a consensus that judicial training alone, whilst important, is not going to solve the issues identified in *F v H* and in other private children law proceedings. Indeed, the problems in this case could have been avoided by a proper application of the existing rules and judicial training already in place. If anecdotal evidence is to be believed, the experience of litigants is that the system is not properly serving their interests or, more importantly, those of their children. More information is needed in the way of data collection and research to learn and then address what is going wrong. Such research would also reveal what is functioning well and would also highlight the significant pressures on judges and the system as a whole as a result of the cuts to legal services.

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