



PD12J & *Re H-N and Others*

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Introduction

1. This handout accompanies the Deans Court Chambers Spring Seminar Series, March 2021 and supplements the initial talk *PD12J: the correct approach to allegations of domestic abuse*. Please note the cases referenced in this handout are hyperlinked for ease of reference.

Court of Appeal Conjoined Appeals regarding Domestic Abuse

2. The highly anticipated Court of Appeal judgment ***Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448*** was published this week. There is no substitute for reading the judgment in its entirety. It is essential reading for all family practitioners.
3. In summary, the judgment is divided into two parts. It provides some general guidance (paragraphs 1-77) and it addressed the four individual appeals (paragraphs 78-223). This handout will focus on the general guidance. Practitioners are urged to read the points addressed in relation to the individual appeals.

General Guidance

4. The judgment surveys the legal landscape charting the progress made by the Family Court in its approach to domestic abuse. There is a bold reminder of the imperfections of the binary approach to allegations, §6:

“The evidence may not be crystal clear, yet the stakes may be high. If the court decides that an abusive allegation has not been sufficiently proved, the court must assess future risk on the basis that the event ‘did not take place’. If, in reality, the abuse did occur but there is a lack of evidence to prove it, the court’s subsequent orders may risk exposing the child and parent to further abuse. Conversely, if alleged abuse did not in fact occur, but the court finds the allegation proved, orders significantly limiting the ‘perpetrating’ parent’s future relationship with their child may be imposed.”

5. The number of appeals of private law cases remains low but the Court of Appeal readily accepts that *“even a small number of cases where the judicial approach to domestic abuse has been shown to fall short gives rise to deep unease.”* An unease which is illuminated by the experiences described in *The Harm Panel Report*. The Harm Panel is seeking to implement an approach to domestic abuse in the courts which is ‘investigative and problem solving based on open enquiry into what is happening for the child and their family’. These recommendations are being considered by the Ministry of Justice which is considering to implement the proposed new approach and pilots of Integrated Domestic Abuse Courts (IDAC) are being designed.
6. Whilst the structure of the definition of ‘domestic abuse’ differs from that contained within the Domestic Abuse Bill, it seems unlikely that the substance of the core definitions will substantially change. It is undoubtedly the case that PD12J will require review once the Bill becomes an Act. For the present purposes, PD12J is commended as remaining fit for the purpose for which it was designed. The challenge relates to its implementation.

The Proper Approach

7. There are 4 important issues identified regarding the proper approach of issues of domestic abuse:
 - i. Whether there should be a finding of fact hearing;
 - ii. The challenges presented by Scott Schedules as a means of pleading a case;
 - iii. If a fact-finding hearing is necessary and proportionate, how should an allegation of domestic abuse be approached?
 - iv. The relevance of criminal law concepts.

Whether there should be a finding of fact hearing

8. Paragraphs 35 to 36 summarised the applicable parts of PD12J when determining whether there should be a finding of fact hearing. The summary of principles to applied is outlined as follows:

The court will carefully consider the totality of PD12J, but to summarise, the proper approach to deciding if a fact-finding hearing is necessary is, we suggest, as follows:

- i) *The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).*
- ii) *In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.*
- iii) *Careful consideration must be given to PD12J.17 as to whether it is ‘necessary’ to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.*
- iv) *Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing is ‘necessary and proportionate’. The court and the parties should have in mind as part of its analysis both the overriding objective and the President’s Guidance as set out in ‘The Road Ahead’.*

9. The court indicated that it would welcome submissions from interested bodies on the wider issues, as such the following were joined as interveners: Cafcass (First Intervener); Rights of Women, Women’s Aid Federation of England, Welsh Women’s Aid and Rape Crisis England & Wales, (Second Intervener); Families Need Fathers, (Third Intervener); and Association of Lawyers for Children (Fourth Intervener).
10. Cafcass contended that the present system was ‘sub- optimal’ and suggested an enhanced form of safeguarding assessment which the court noted would justify close consideration by those reviewing PD12J

Scott Schedules

11. There was unanimity in the submissions that the utility of Scott Schedules in domestic abuse cases was limited. It was the view of some that they presented a barrier to fairness and good practice. The concerns centred on two issues:
 - i. The need for the court to focus on the wider context in order to establish whether there had been a pattern of coercive and controlling behaviour;
 - ii. The limits placed by judges on the number of allegations to be tried and that by taking this approach that the court *‘robbed itself of a vantage point from which to view the quality of the alleged perpetrator’s behaviour as a whole, and importantly, removed consideration of whether there was a pattern of coercive and controlling behaviour from its assessment’*
12. A significant number of submissions endorsed the approach of Hayden J in ***F v M [2021] EWFC 4 (Fam)***. The Court of Appeal noted that this judgment should be essential reading for the Family judiciary. Hayden J noted in the post-script to that judgment the limitations regarding Scott Schedules. The Court of Appeal confirms that the *‘the process before this court has undoubtedly confirmed the need to move away from using Scott Schedules’* although does not provide any guidance regarding the appropriate replacement for Scott Schedules.

If a fact-finding hearing is necessary and proportionate, how should an allegation of domestic abuse be approached?

13. The judgment question how best to determine allegations of coercive and controlling behaviour proportionately to prevent extending the length of finding of fact hearings in an already overburdened system which would undoubtedly result in delay which is inimical to the welfare of the children involved in private law proceedings.
14. The following ‘pointers’ are offered at §58:-

PD12J (as its title demonstrates) is focussed upon ‘domestic violence and harm’ in the context of ‘child arrangements and contact orders’; it does not establish a free-standing jurisdiction to determine domestic abuse allegations which are not relevant to the determination of the child welfare issues that are before the court;

PD12J, paragraph 16 is plain that a fact-finding hearing on the issue of domestic abuse should be established when such a hearing is ‘necessary’ in order to:

- i. Provide a factual basis for any welfare report or other assessment;*
- ii. Provide a basis for an accurate assessment of risk;*
- iii. Consider any final welfare-based order(s) in relation to child arrangements; or*
- iv. iv) Consider the need for a domestic abuse-related activity.*

Where a fact-finding hearing is ‘necessary’, only those allegations which are ‘necessary’ to support the above processes should be listed for determination;

In every case where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other.

The Relevance of Criminal Law Concepts

15. The Court of Appeal clarifies the approach in ***Re R (Children) (Care Proceedings: Fact-finding Hearing)*** [2018] EWCA Civ 198; [2018] 1 WLR 182 regarding the application of criminal concepts within family proceedings is the correct approach and

reminds that this is the binding authority not the consideration of those concepts as discussed by Russell J in **Re JH V MF [2020] EWHC 86 (Fam)**.

16. The Family court is not required to shy away from using terms such as ‘rape’ where appropriate but rather the Family court should avoid analysing evidence of behaviour by the direct application of the criminal law to determine whether an allegation is proved or not proved.

The Appeals

17. The judgment then details the approach to appeals against fact-finding and then considers each appeal in turn. The appeals are neatly summarised and identify the approach likely to be taken to appeals of this nature. There is no substitute for reading that section of the judgment in its entirety. The individual appeals are as follows:

- (i) *Re B-B* (paragraphs 78-114) – allowed
- (ii) *Re H* (paragraphs 116-153) – dismissed
- (iii) *Re T* (paragraphs 155-184) – allowed
- (iv) *Re H-N* (paragraphs 185-223) -allowed

18. The first instance judgments in relation to the HHJ Tolson QC cases can be found at: **H v C [2018]** and **H (A Child) [2020]**.

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