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Public law and private law: two sides of the same coin?

Jo Delahunty KC argues for integrating public law's rigorous evidence and professional standards into private law to enhance justice

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I sit as a recorder in complex public and private law matters. I practice in complex private and public law matters. I lecture and write on public and private law matters. In March, I chaired the national NAGALRO conference titled 'So-Called' Parental Alienation – Debate and Controversies'.

Each had an audience that bridged private and public law. I questioned how to identify and get the best from a Part 25 Expert in complex and contentious cases and what good practice looks and sounds like to the children at their heart. The difference between the two fields, where families come to the court room divided and traumatised, is too often a matter of money – legal aid verses private or no funding and a status hierarchy in high-net-worth private law client cases.

Practice between public and private law is divided not only by pay, but by in- and out-of-court etiquette. I still fail to understand why in a 'cut-throat' dead baby case, where grim details of poverty and lost opportunity are exhumed for grotesque intimate examination, I can leave court and discuss daily life with humour and candour with an opponent, yet in private law, arguing which nanny might accompany a cherished child to St Moritz for a snap winter ski blitz break, the atmosphere in correspondence and court can be marked by its aggression with the mantle of the client's case being assumed by their counsel as comprehensively outside court as well as within it .

When giving the keynote speech to the annual resolution conference a couple of years back, I spoke about 'death by email': how often words were tapped out on a laptop that would not dare be said face to face; how the use of CAPITALS screamed at the reader as though in a virtual shouting match; how emails were used as part of a correspondence war of attrition, stockpiling arguments as weapons artillery for a looming case.

That speech hit a palpable nerve in the conference room. No one disagreed with me. All wanted the practice to change but didn't feel they could stop unless others did likewise – all despite resolutions, good practice guidelines and good intent.

So is private law a foreign land with a language and culture of its own? If it is, I argue that it is not always to the benefit of the practitioners, clients or child at the heart of the cases we are entrusted to act in. Why not embark on a 'conscious uncoupling' of those parts of private practice which do its practitioners and clients a disservice and look to the best of public law for an exemplar of what course to chart?

SPEAKING TRUTH TO POWER

I had been invited to chair and speak at the NAGALRO conference by Carole Littlechild. Carole wanted someone with the experience and confidence in both public and private law to call out the barriers in the way of best welfare decision-making in court – not someone who was looking to get briefs out of the gig. Speaking 'truth to power' was the brief. Given Sarah Parsons of Cafcass, Nicole Jacobs, Domestic Abuse Commissioner, Jenny Beck KC (Hon), Dr Julie Doughty, the FYJB and Dr Craig were speaking alongside powerful personal testimony, it was a heavyweight, challenging line-up to guide discussion through a controversial issue ad divided professionals, experts and families. Domestic abuse, controlling and coercive behaviour and 'so called' parental alienation are seen as weapons to be used in highly conflicted cases. Each has armies ready to wage war from either side of the battlefield. I had free range to speak frankly, and I did.

I said this. Too often when I sit or appear in a private law case it is as though the basic tenants of admissible evidence, case management and professional courtesy are left at the court room door. In public law we would not dream of using an unaccredited expert in a highly contentious field with a professional hypothesis that lay out with the range of mainstream scientific opinion.

We would not advance for instruction upon the court an expert where they would become as contentious as the family history. We would not countenance a situation where a previous judgment on fact was not taken as the bedrock for welfare assessment going forward. Therapy for child subjects mid

trial and pre fact finding would be subject to the heavy scrutiny and safeguards put in place were it to proceed to ensure it did not contaminate the core evidence that was for the court to determine disputed fact upon.

In public law there is no place for correspondence to become part of the court bundle as a standalone section and where competition to create the bundle sees material inserted into it that is advantageous rather than central to a party's case. Correspondence is not, of itself, evidence of any fact in dispute. So why have different practices grown up between the divisions?

It is an unspoken truth that, in the main, practitioners have a surprisingly good idea as to what the judge will decide in our cases out of a range of options we might hope to present. Why? Because the great leveller in a family case is that the advocates and the judge are all working from the same set of papers. There are no 'rabbits' to be pulled from beneath the magician's cape – evidence is case managed and filed with permission.

PREREQUISITES FOR INSTRUCTION

In those cases, regardless of seniority, one can tell which advocate has training in criminal or public law trials. A public law barrister neuropathologist, ophthalmologist, radiologist, or geneticist, required to challenge neuropathologist, ophthalmologist, pediatric, radiologist or histopathologists within their specialist fields are not going to break into a sweat questioning social workers, guardians or psychologists in private law. Legal aid lawyers do the work they do out of a sense of vocation. No one can pay enough for the hours they put in. Case outcomes are changed in court because of that work ethic.

A judge can sit in private law before they are qualified to hear public law cases. Training in public law has to be taken and certified before a public law 'ticket' is issued to authorise sitting in those cases. Think of that – why? For a practitioner, the issues one encounters in private law: contact, suspended contact, supervised contact, change of residence, risk assessment, abuse, addiction, DA/ CCB etc, are covered by and subsumed by the graver allegations of child abuse that are the basics of public law.

At the family bar, we are being urged to undergo training in cross examination of VP's. The take up is largely by public law practitioners because it is we who most often are called upon to cross examine children and vulnerable parties. The Bar Council now hold a list of those barristers qualified to do so. How long until that list becomes the 'go to' instruction list for advocates in all cases involving Part 3 and Practice Direction 3AA issues?

If one thinks of the recent case of Theis J (*D v R* (2023) EWHC 406) following on from Knowles J in *Re M (Private Law children's proceedings – Case Management intimate images)* (2022) EWHC 986, private law needs those skills in plenitude in court to avoid the prospect of successful appeals. And think of the draconian consequences of a decision adverse to your client in private and public law which the advocate stands in the way of in court. Public law is the only forum where a child can be permanently removed from its birth family and its legal identify as a child of that family severed for all time under state sanctioned forced adoption.

I exaggerate of course for the sake of making the reader think – obviously one can see parallels in private law where draconian orders are made for no contact, s91(14) orders for example – but cases removing PR are rare indeed compared to the numbers of adoption/ placement orders heard at all levels of the judiciary across the UK. Why would a private court room not want to have that public law provenance for the advocates it uses?

I argue that private law trials would be the richer (forensically) were the skill (and courtesy) of the public law advocate seen as an essential prerequisite for instruction in private law cases.

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