The Burden of Proof in Findings of Fact - and Family Law.

Suggestions for a rethink:
The 'Balance of Probabilities' should be replaced by proportionality and relevance.

'The Law' in UK and in most western and ex-colonial jurisdictions is divided into two – Criminal and Civil. The first being where an offence against Society or the State has been committed, which calls for a sanction. The second is private disputes between citizens, where a decision needs to be made between them as to who is in the right and what restitution needs to be made.

The 'burden of proof' in the different categories of law follows this. In the UK it is that before someone is sanctioned for a 'crime' his or her guilt has to be established 'beyond reasonable doubt'. *Wikipedia* does not say when this particular phrase was deployed but is full of ancient references. The earliest perhaps goes back to a reported exchange in *Genesis* between Abraham and God. God intended to wipe out Sodom and Gomorrah and everyone living there. Abraham (one of the assets of the Hebrew God was a capacity to listen to his prophets, who were often much more astute) persuaded him that it would be wrong to do this if there were fifty or even ten innocent people to be found among them. So lest these were unjustly consumed in fire and brimstone, God arranged for their rescue first.

The most famous formula is 'Blackstone's ratio' (Blackstone was a 18th century jurist)

> '*...for the Law holds that it is better that ten guilty persons escape than one innocent suffer..'*

Such a formula obviously cannot apply to disputes between citizens. For example, how much, if anything, should be paid for shoddy building work, or over where the boundary is between one person's property and another's. There, where there is no reason to prefer one person over another, it can only be which claim seemed stronger or 'the balance of probabilities' .This cannot avoid miscarriages of justice. If these happened even nearly half the time that had to be accepted. There was nothing better. Further, most of the decisions have to be 'zero/sum', namely what one party gets was exactly balanced by what the other did not get.

In the UK Family Law is 'civil' so the 'burden of proof' is the balance of probabilities.

This is wrong where the welfare of children is concerned. And in particular, over 'Findings of Fact'. These most often occur when a decision about what parenting arrangements are best for children whose parents cannot agree is postponed for a special hearing or set of hearings into relevant 'facts'. They are nearly always about whether allegations of domestic abuse are true or false. The outcomes of these - 'Findings of Fact' - hearings is that a Judge then rules on the allegations that have been brought to court*. His or her decisions are 'binary', the jargon term for ruling whether the assertions are either True or False. With nothing in between. The judge may have before them a form to be filled in. There is insufficient space for anything else to be recorded.

With this settled, the main sequence resumes. This is usually the application from a father about whether his children should be allowed to see him, or how much or under what conditions. In those hearings the 'binary' conclusions about 'findings of fact' are accepted as final.

*Where there are many or complicated allegations the party making them is usually required to select a reduced number, conventionally six, which they think are the most important. In practice they are the ones that they, or whoever is representing them, think they have be best chance of getting rated as 'True'. This tips the balance in favour of the party making allegations.

Is this the only – or the best - way of dealing with allegations?

Agreed, that the main sequence of hearings – those normally about a 'Child Arrangements Order' - benefit from the advice of separate hearings in which a special subsection of the argument has been gone into. That is a useful move. But this question; Is a binary/'True or False' finding with the criterion being 'the balance of probabilities' the best – and most child-friendly- in which that advice is given?

The implications about allegations of abuse for child welfare vary along three dimensions. First, the probability of the events described having occurred. This will range from ones in which there is clear evidence – for example where there are medical descriptions of injuries, reliable witnesses and so on. At the other extreme, where these are totally absent. It is simply one person's word again another without a record, evidence or corroboration.

Secondly, they vary in the gravity of the alleged abuse. This can vary from slightly short of murder to being not much more than disrespectful.

Thirdly, they will be different according to their relevance to ensuring the children get the best parenting in the future. Something recent, serious with a direct effect on the children, and where there was a risk of recurrence would be highly relevant.

Allegations, even if true, but in the other corner for each of these tests, would clearly be less so. Especially if the situation has changed. For example the events happened when a home was shared between parents whose interaction now only needs to be handover arrangements.

The three tests interact. The most obvious one of many is exaggeration. For example it may seem highly probable that some incident occurred, for instance a domestic row, but was it as described? So pretty certainly, there was a scene. How probable, however that extreme things were said or threatened? Was there or was there not, physical contact, if so, what was its nature, even though there were no witnesses nor any corroborating evidence? Maybe less so? And even if so, what should follow for the future of the children?

The probability and gravity of the events are the remit of the FoF hearing, relevance possibly for the CAO hearing, although the Judge of the FoF may have useful things to say about that.

These three dimensions cannot be adequately summarised in a 'binary' finding of fact, simply on the 'balance of probabilities'. Nor, unlike areas of civil disputes over things like disputed bills, is there any need for them to be. *The issue is – what information, assessment and conclusions from a detailed Finding of Fact, does that Court think is important to convey to the Court deciding the future parenting arrangements of the children?* In some cases this might need to be in narrative form, but in most it should be much simpler. But not as simple or as crude as a binary 'True/False' finding on a list of allegations put forward by one party. With a burden of proof being the 'balance of probabilities' with its implication of miscarriages of justice being unavoidable, with even a 49% error rate being, however reluctantly, acceptable. Something more complex is needed.

Even more so, given the perception of the courts of a need to be cautious. If they get it wrong over a contact issue and allow the children 'contact' and the children come to some harm, there will be a stink. If children are denied contact, their lives might be impoverished, they may be unhappy, even develop depression and so on….but these will all be invisible. The capacity to be proportionate rather than rate an allegation 'false' is a counter to over protectiveness.

Our culture is, rightly, much concerned about prejudice. Some of these are applied to a whole category of people. More insidious ones are where characteristics that may apply to some people in a subsection of a population but are applied to more of them than have it. Again understandably, the primary concern is about negative stereotyping. There is also, however, positive stereotyping. The most relevant in this context is that women should be believed, especially when it comes to allegations of abuse.

The concept of 'balance of probabilities' allows far too much scope to all prejudices, because of its tolerance of mistakes being made. The concept also makes it difficult to identify, and therefore counter, prejudice and positive and negative stereotyping.

Of course, some judges, some courts are aware of these issues, and make allowances. *The question, however, is whether the rules and the system encourages assessments and decisions being made that do not fully reflect the reality of the situations as they really are. Namely, as very often uncertain, complex and nuanced.*

The binary Findings of Fact based on 'balance of probabilities needs to be replaced by ruling that take account of probabilities, gravity and relevance with provision, if the Judge deems it necessary, for a more complex ruling.

That is the end of the first part of his note. It continues with a broader but related theme.

The welfare of chidren is compromised, not only by this aspect but by Family Law being regarded as a subsection of disputes between citizens. It is, in contrast, a category of Law with its own needs and its own appropriate rules. A raft of frankly pernicious results follow from the failure to make these distinctions.

In some jurisdictions law concerning children are not treated like this. In France children legally belong to the state, merely entrusted to their parents. This may seem totalitarian – but they surely belong is some sense to 'Society' in that 'Society' has a stake in what becomes of them. *But they do not involve the State or Society in the same way as crime.* The relevant law should be in a category of its own that reflects that.

The financing of the hearings and the decisions reflect this. With Family Law treated as just another private dispute between people the question is often asked, why should be taxpayer fund the litigation? And this rule, derived from the idea that 'Society' is not concerned is – mostly- applied in family proceedings. But if 'Society' has a stake in disputes over children, should it not ensure that the ability to get the best outcome for children should not depend on the financial capacity of the parents to seek it?

The differences between the dealing with the welfare of children and other 'civil' disputes are obvious, but to restate some.

Firstly, in their importance. A dispute between a garage and a car owner, for example, rarely has implications beyond the two parties. Not so children – their whole future welfare may be at stake. And, using 'the shadow of the Law' argument, the future of a considerable section of the future of society is at stake. The thought given to, and investment in, the decisions is woeful. There is simply insufficient attention, in time and expertise, given.

Secondly, the children, whose future depends on the decisions made supposedly for them, often cannot, for reasons of age and maturity, be full participants. Even when they have sufficient

understanding, they cannot freely speak with their own voice. And they may not see the full picture, especially if they have been prevented from seeing their 'other parent'. They do not live independent and autonomous lives free of the consequences of any views they express. They are going to be dependent on their parents, or commonly mainly one. They are under their influence – especially if one has more power over them than the other. They will have bonds and loyalties that are 'situational' but which may have an impact on their input. And they need to be able to able to relate to both their parents afterwards. The shadow of the decision that might be made is a very dark one.

Thirdly, an aspect of the second, the important questions are not *between the protagonists*. They are about the needs of a third party – the children. Yet the process as currently organised is dominated by the demands of the parents in conflict. Take two aspects. They are adversarial. As if they are disputes about property, where what one party has the other party cannot. This is not the case in family disputes. The parties have contradictory views *when set face to face only with each other*. But, the fact that the issue is about the future of a third party means that these may not necessarily be in direct conflict. However, the adversarial system means that they are set to fight each other as if there was no third party involved. This can have appalling consequences afterwards. The system encourages them to malign the character, conduct and parenting of the other when the need in most cases is for them to co-operate after.

The welfare of the children, however, is not a 'zero:sum' to be divided between the parents – it is something elastic, that can be maximised or minimised*.

A second aspect of an adversarial stance is children's proceedings is that it encourages (though does not entail) the attitude that the decision made should reflect the deserts of the parties and their representatives rather than the benefits to children. There is obviously a big overlap, so the effect is insidious, but *they are not identical.* Depending on what they are, of course, parents who have faults or who have done wrong can have positive things to offer children. Very young children need consistency in parenting styles, but as they grow older differences between their parents in this and other things can actually benefit them.

It is possible even to think how well prepared for the outside world children with perfect parents might be.

However, particularly with the points of view of the parents dominating proceedings, it is understandable for Courts to see the parenting arrangements as not being for the welfare of the children but rewards for the parents and on occasion their representatives. **

A third consequence of the adversarial stance is this. A tendency to see that what all that needs to be said will be covered by what the parties say. The role of the Judge is to ensure a fair hearing, allow them to state their case, and then decide between them. A key to this is impartiality. *Not so in family*

*The division of parenting time is sometimes represented as this. With, for example, as over child maintenance, formulaic divisions. It should not be like this. The time the children spend with each parent should not be based on any formula such 'Every second weekend and half the holidays' or 70:30 or anything like this. The tests for the division should be 'what benefits to the children do we want to see achieved? For example, both parents being fully involved with their education. Or, how are the children get the full benefits of what both parents have to offer them?

* *An anecdote from the author's personal story, some years ago. My soliticor, on my instructions, said at the 'Directions Hearing' that I would be asking for a shared parenting order - as the terms then were. This angered the Judge who told him that he should have known better, for his Court never made such orders. A few minutes later, my solicitor asked for the children to have interim contact with me. The judge, still angry, told my solicitor, these very words or very nearly. 'No, given your stance, I am not giving you that'. Umm, the 'welfare of the children'?

Court proceedings. What is needed here, is precisely the opposite. Partiality, on behalf of the children. Judges should not be simply attentive listeners to what the parties think they should be told, making an appropriate judgement. They should be highly interventionist, subjecting what the parties and their representatives to rigorous examination about what they can offer their children. They should have a clear objective – to get the parents (and others involved) to agree and apply a Parenting Plan that is the best that can be achieved for the children. And imposing one if they cannot. Judges, at present, must have at least an unconscious checklist of what should underly the judgements they are called on to make. However, at present this is likely to be compromised by the issues that the submissions from the parties put before them. There is a partial move in this direction – the recommendations of CAFCASS – but this is insufficient.

However, the most important difference between Family Law and both criminal law and other civil law is this. The other divisions of law are about the past. And how, in the criminal law offences should be punished and in other aspects of Civil Law, restitution should be made. Findings of Fact are, of course, also about the past.

Family Law concerned with child welfare however, is about the children's future. The past may be a guide, but is always going to be an unreliable one. How good a guide to the past is going to be a matter of assessment.

However, there needs to a conscious exercise to think about how good a guide it is. The adversarial nature of proceedings, and Findings of Fact may be a big part of this, encourages too much attention being paid to the past. This means not enough on how what might remain the case and how much may change. This point may well be readily conceded in principle – the question however is whether the current arrangements sufficiently achieve it. Probably, they do not.

A related point, however, is even more likely to be overlooked, or downplayed. Decisions in other areas of law are, in principle 'final'. This person is sentenced to five years. This person is entitled to £x in compensation. Reviews and appeals may occur, but always with the notion that another 'final' decision should be made.

Decisions about the upbringing of children are all interim. They can always be changed, at least until the children are of age. If there are doubts or reservations, provided the risks are not too high, things can be tried and the arrangements adjusted accordingly. Of course there are elements of this in the current system. For example proposals to have first supervised contact of children one of whose parents is considered problematic, moving to supported contact, to 'community contact'. There may be similar arrangements, for example a building up of overnights stays. But these remain exceptions in a system with appears to yearn for 'finality'. And it does so too much, this argument goes, because of an overemphasis on the past and insufficient awareness of the future.

In sum, Family Law has, in theory, its own system. However, it still has common features inherited from other areas of law. These discourage its capacity to achieve the best for children. Instead there should be thinking from first principles of how they can do the best for children with Family Law being an area of law that is autonomous from others.

The most immediate practical importance is to substitute other criteria for the present binary judgements on Findings of Fact.

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