

We are all on a spectrum. Empathy and mental health in family cases: a new dawn

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Empathy is everything. The physical, emotional and mental health of our clients is at the heart of what family lawyers do. A family lawyer who is not empathetic and who does not care about clients is surely in the wrong profession.

The wellness of family law clients and lawyers was the subject of keynote talk given by The President of the Family Division, Sir Andrew McFarlane, to a packed Law Society Common Room on 31 October 2019.

Fellow speakers included barrister Claire Heppenstall of 1 Garden Court, and solicitor Gillian Bishop of Family Law in Partnership. Also speaking was Jane Mahon from the charity Support Through Court, the inspirational charity which organised the timely debate. The writer chaired the event.

We will shortly come to the wellness and mental health of family lawyers themselves, and judges and court staff.

But it's the mental health of our clients which has become such an important ingredient of the family lawyer's working life over the last twelve months. There has during this year been a sea-change in the public's recognition of the importance of wellness and of challenges to mental health.

As the public has become more educated about mental and emotional health, so have family lawyers. With education comes understanding, and with understanding comes better family law practice.

This development has been a path through the damage that separation and divorce does to families. The writer's former work colleague Professor John Dewar wrote a paper called 'The normal chaos of family law' (1998) *Normal Chaos of Family Law*,

Modern Law Review, 61, 467–485. He commented that family law engages with areas of social life and feeling – namely love, passion, intimacy, commitment and betrayal – that are themselves riven with contradictions or paradox. For Professor Dewar the main restraining force on the 'chaos' of family law is the 'practices of legal and other professionals associated with its day to day interpretation, application and administration.'

The overriding message from the speakers at the event was a positive one, emphasising the help provided to clients and practitioners alike within a family law system that is well tuned to current pressures.

The President emphasised the broad appreciation of mental health by society and courts and an approach towards individuals that sees us ALL as on a spectrum – from extreme illness on one end to excellent health at the other. We are all somewhere within that spectrum. Contrast the narrow approach of thirty years ago, which looked askance at variations from the norm.

The wisdom of the new President's approach is exemplified by him requiring all 52 court districts in the country to produce their own blueprints for wellness. The point is to make these aspirations local, and to get them accepted in each locality. He will then abstract the essence of each blueprint and produce an overarching national document showing best practice. This is a visionary's look into a better future for users of family law advice. How inspiring that family law is being led in this manner.

It would be truly inspirational to see government responding to advice from enlightened lawyers to restore legal aid to most family law cases. The President is particularly keen to see government

introduce the old ‘green form’ legally aided initial advice given by family lawyers. Sagely, the President starts with realisable aspirations.

Jane Mahon of Support Through Court described the daunting and hostile environment that family courts represent to the most vulnerable in society. Being a litigant in person, and more than 50% of hearings don’t involve lawyers, is a disability in itself. It is ‘near impossible’ for a mentally ill person to put their case. Every penny of support to the charity reduces the court time that would otherwise be taken up by their cases.

The President would like to see all 52 court districts served by units of Support Through Court, to give focus to unrepresented divorcees. And to take them away from the echo chambers of the internet who peddle false hopes and information. This charity truly changes the landscape.

All this is well and good – but family lawyers are not going to be equipped to guide clients down a path to order and resolution unless they themselves stay well, healthy and emotionally protected.

Again, the public acceptance of a path to wellness has helped to shine a light on the wellness of lawyers, judges, court staff and everyone else in the system.

And the support given by barristers’ chambers to their tenants, and by law firms to their employees, has dramatically increased over the last twelve months.

It is now commonplace for law firms to have programmes to promote wellness and to set standards for sound mental health. For example, the writer’s firm has a wellness charter which:

- requires all holiday allocations to be taken, including at least one block of ten days holiday;
- imposes regular monitoring by line managers;
- encourages life/work balance. Remember

in these days of Brexit that the Greeks, who inscribed on to the walls of the temple in Delphi the immortal words ‘meden agan’ – which means ‘nothing too much’, or ‘everything in moderation’ – understood proportionality and disproportionality well before those words made their way into the Family Procedure Rules.

Ms Bishop of Family Law in Partnership described her firm’s wellness innovations, which include personal supervision of all staff, young and old, twice a month by a trained expert. The sessions are paid for by the firm and are confidential. She would like the initiative to be mandatory in the legal profession. With good cause. One only has to survey the range of mediation, collaborative law and other initiatives produced by her holistic firm to gauge the value of this approach.

There does need to be far more soul-searching by lawyers about how they create rods for their own backs. To take one example, old-fashioned charging models built around an hourly rate and annual hours targets is bound to cause massive amounts of stress – quite apart from not necessarily being in the interests of clients. It’s easy to envision charging models which would reward lawyers who settle cases well without having to resort to litigation – thereby saving stress and costs.

Family law is not an island, as the Supreme Court keeps telling us. Criminal lawyers carry similar burdens on their shoulders, and civil litigation practices need to learn from ours.

Heartening though to hear The President, in answer to an economist from the floor who questioned whether ‘bad law’ practised in the adversarial atmosphere of the court room was chasing out ‘good law’, praising the standards set by family lawyers who are members of Resolution and who practise family law constructively.

Lest one dismisses the conservatism of the Bar, where barristers are self-employed and row their own boats, Ms Heppenstall

explained how 1 Garden Court have introduced initiatives to support the wellness of barristers. Whether that's Pilates for all, healthy eating or cultural events, the spotlight of enlightened Chambers is on a broad appreciation of life. The true model of a good family lawyer is the empathetic lawyer who can retain detachment and objectivity, rather than enter into the theatre hand in hand and cheek by jowl with the principal actors.

Yet to be properly debated and bottomed out is whether in this respect there is a difference between the objectivity and detachment of a barrister, as opposed to the more hands-on and involved representation provided by a solicitor under the English law model.

It's perhaps the advocates, judges and court staff who are subject to most stress as a result of the deadlines, the high stakes and the sheer pressure of litigation. And they have a ready champion in The President of the Family Division, who has led from the front on these issues since his appointment just a year ago.

Respect for the mental health of lawyers and judges has commensurately increased. Prominent lawyers, just as the Archbishop

of Canterbury, are subject to depression and anxiety, and take anti-depressants. Survivors of such illnesses talk about the additional empathy that they bring to their work. There are truly silver linings for those clouds. They know that depression passes as bad weather passes, and that, as Stephen Fry says, it will be sunny one day (see www.lettersofnote.com/2009/10/it-will-be-sunny-one-day.html).

There is still work to be done to promote wellness. For a start, the lawyer's mindset perhaps needs to be more flexible and reflective, and less analytical. Something that the celebrated psychologist Susanna Abse once remarked has really stuck with the writer – lawyers will improve their resilience by becoming appropriate help-seekers. Lawyers are not natural help-seekers; they are natural problem solvers, so it can feel unnatural to us at first if we instead seek help for ourselves and for our clients.

So it's a positive path that family lawyers tread, beginning with financial support and sponsorship for Support Through Court and the most vulnerable in society, and continuing, via sensible self-help, to the better care of the most important people in all this, namely our clients. We are on a journey. And the sun will shine.