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Presumed innocent From Salem to Soham

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***Crim. Law. 2** There have been several recent successful appeals by women convicted of killing their babies.¹ These appeals highlight questions concerning the interaction between state and family where the child protection and criminal justice systems become involved in an investigation into suspected child abuse.

The Development of State Protection of Children

Although most forms of child abuse amount to offences already defined by the criminal law² the investigation of an allegation of child abuse is usually undertaken by the local authority social services department. Although the police may pursue their own enquiries, local authority social services departments (social services)³ have a statutory ***Crim. Law. 3** duty to undertake an investigation pursuant to the Children Act 1989 s.47 to establish whether a child is at risk of abuse or has been abused. This investigation is likely to locate itself around the gathering of evidence to establish whether a child is at risk of harm.

Social services work from a set of procedures and guidelines published by the Department of Health.⁴ Following the conviction of Angela Cannings in 2002⁵ Gloucestershire social services revised some of its procedures for investigating allegations of child abuse particularly in cases where a child has died. However, following her successful appeal in 2004⁶ there has been no indication that these new procedures have been retracted. This reflects a trend seen in public inquiry recommendations of increased levels of surveillance and intervention into family life designed to detect and prevent child abuse.⁷ For example, the Children's Bill cl.8⁸ contains a controversial proposal for a database of all children to be kept in order that all Government agencies can share information regarding children and families without consent. At present consent can only be dispensed with when child abuse allegations are involved.⁹

Child abuse as a concept distinct from other forms of criminal behaviour grew from the idea that children are a group in need of specific protection. The recognition of children as a group separate and distinct from their parents has been evolving for over a century,¹⁰ and the ideologies of children's rights run parallel to the emergence of the theory of systems of governmental power.¹¹ Against this background, the development of law on child protection led to the cessation of theoretical debate around the issue of child abuse in relation to the autonomy of the family, and the implementation of a system via the Department of Health designed to address the issue of child abuse.¹²

By the 1950s, child welfare legislation demanded that local authorities act upon information about suspected child abuse.¹³ The first procedural guidance for local authorities concerning how they went about exercising their powers, however, did not appear until the 1990s in the Department of Health's procedural document "Working Together under the Children Act 1989."¹⁴ The impetus was a series of high profile tragedies and subsequent public inquiries involving children who died as a result of abuse although they were known to local authorities to be at risk, and the results of "The Report of the Inquiry into Child Abuse in Cleveland" in 1987.¹⁵ This considered the views of parents as well as the interests of the child and was commissioned after a scandal in Cleveland where an excess of social services intervention had occurred in respect of suspected child abuse. One of its findings was that intervention could itself be damaging to families.¹⁶ This has yet to be the subject of substantive research although references to such damage are available.¹⁷ It seems generally accepted that an allegation of criminal conduct against a parent in respect of their children will be traumatic, however, the long term effects if there is no substantiation and no criminal trial but the allegations are circulated

between Government agencies have not been adequately researched.

The Children Act 1989 came into force in 1991. This consolidating Act places a statutory duty on local authorities to investigate cases of suspected child abuse. The Children Act 1989 s.47(1) states that:

“Where a local authority -

(a) is informed that a child who lives, or is found, in their area -

i) is the subject of an emergency protection order; or

ii) is in police protection; or

iii) has contravened a ban imposed by a curfew notice imposed within the meaning of Chapter 1 of Part 1 of the Crime and Disorder Act 1998; or

(b) have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm, the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare.

In the case of a child falling within paragraph (a)(iii) above, the enquiries shall be commenced as soon as practicable, and, in any event, within 48 hours of the authority receiving the information.”¹⁸

Definitions are widely construed, e.g. s.31(9) states that:

“‘harm’ means ill treatment or the impairment of health or development; ‘development’ means physical, intellectual, emotional, social or behavioural development; ‘health’ means physical or mental health; and ‘ill treatment’ includes sexual abuse and forms of ill-treatment which are not physical.”

while s.31(10) states:

‘Where the question of whether harm suffered by a child is significant turns on the child's health and development, his health or development shall be compared with that which could reasonably be expected of a similar child.’

The intention of s. 47 was to codify the system for protecting children from abuse. “Working Together to Safeguard Children”¹⁹ enabled each local authority to draft its own procedures. With this, the modern concept of child protection came into being. The linear approach of the procedures is demonstrated in a number of steps that progress a family through a series of stages, based around the collecting of evidence from a variety of sources.

Public Inquiries

The justification for this system is located around concern for the welfare of children, highlighted via either incidents of child abuse resulting in the death of a child, or concern over the balance between the rights of individuals and the protection of children.²⁰ Public inquiries held when a child known to be at risk of abuse or has died led to a feeling that ***Crim. Law. 4** intervention was justified. The question of the justification for intervention was highlighted when the Secretary of State for Social Services ordered a public inquiry in July 1987 pursuant to the National Health Service Act 1977 s.84 and Child Care Act 1980 s.76. The purpose of the inquiry was to examine the arrangements for dealing with suspected cases of child sexual abuse in Cleveland since January 1987 and to make recommendations, following a series of child abuse allegations, some of which were subsequently shown to be unfounded or were unable to be substantiated, and the subsequent intervention of the local authority.²¹

In Cleveland, two doctors had developed what they believed to be a reliable method from which they could conclude whether children had suffered sexual abuse. The methodological validity of their theory was called into question and examined in the public inquiry. The issue of child abuse, in particular sexual abuse, had already been dramatically raised in the UK by means of the launch of the telephone help-line ChildLine on national television, and the media reporting of the number of children being taken into care suspected of being the victims of sexual abuse.

In 2000 Victoria Climbié died despite her situation having been referred to social services on several occasions. The subsequent public enquiry explored the circumstances of the failure of the “child

protection” system following her death.²²

“The Laming Report is clear that the lack of protection [for Victoria] came, not because no one was willing to refer Victoria, but because of mismanagement, unprofessional performance and the failure to put basic good practice into operation.”²³

The Report made recommendations on how safeguards for children might be increased with the aim of preventing the recurrence of this tragedy. However, these were based around assumptions that increased surveillance of all children and increased intervention would result in the early detection of criminal behaviour towards children. Such assumptions do not take into account the problem of false positive allegations and risk stratification, and seem at odds with Lord Laming's comment that:

“It is unrealistic to expect that it will ever be possible to eliminate the deliberate harm or death of a child - indeed no system can achieve this.”²⁴

Thus, the objective of the child protection system is recognised to be unattainable. Despite this, increasing controls and levels of surveillance were introduced in respect of child protection following the conviction of Ian Huntley in 2003²⁵ for the Soham murders.²⁶ Prior to his conviction, Huntley had been the subject of allegations, but had not been convicted of any crime. If he had been tried in a criminal court in relation to the previous allegations he may have been convicted of a different crime at an earlier stage and therefore would have had this conviction recorded against him. The police had not kept records of the earlier allegations; he was presumed innocent in the absence of criminal conviction. Huntley's conviction led to debate about the keeping of “soft intelligence.”²⁷ Public outrage is understandably provoked every time a child is killed and questions of accountability are asked in the context of whether such tragedies are predictable and preventable. Such a climate makes the objective consideration of the desirability of such a culture difficult. When tragic but rare situations such as this occur it is important that consideration is also given to the vast number of instances where unsubstantiated allegations are made but the accused do not go on to commit serious crimes. The implication for these individuals and the adverse impact upon their families must also be considered; human rights, privacy and the presumption of innocence must be balanced with the desire to prevent such serious but rare events.

Where is the Presumption of Innocence?

The model presented by the procedures in “Working Together to Safeguard Children”²⁸ empowers the state to enter individuals and families into its system, but does not provide a means for those individuals and families to remove themselves if allegations are unfounded. Although social service departments have guidelines that provide for the destruction of their files after several years (usually five), police files are usually kept for ten years, and if the allegation has been repeated in medical records it may remain without time limit. For innocent individuals accused of abuse and their families, this system can be viewed as contributing to the disempowerment of the family by the state via a system whose effect was intended to liberate children.²⁹

In English law, an individual is presumed innocent until proven guilty. In cases of suspected child abuse if there is insufficient evidence of abuse theoretically an individual should be able to continue to locate himself in the category of the innocent rather than the guilty. An examination of the system in operation, however, reveals otherwise.

In the case of Angela Cannings expert evidence was adduced to attempt to demonstrate that although there was no direct evidence to suggest Mrs Cannings had murdered her children, that it was probable she had. Professor Sir Roy Meadow, the Crown Prosecution Service expert witness, put forward a theory that three cot deaths in the same family was likely to be murder.³⁰ The “Report of the Inquiry into Child Abuse in Cleveland in 1988”³¹ had already addressed the dangers of using medical theory as “fact.” Fifteen years on the climate in which another doctor was able to do the same again had not altered to prevent further miscarriages of justice. At present, there are no plans for a public inquiry.

In “Operating the Child Protection System” the following is noted in relation to the progress of an individual through the investigation stage of an allegation of child abuse:

“so far we have treated the reported concerns about child maltreatment (the allegations, or referrals) as non-problematic; as if a reported concern about maltreatment was the same as a ‘case’ of maltreatment.”³²

This reflects the assumption under which the system allows cases to be investigated, despite references to the devastation such investigations can cause.³³

An examination of the statistics in relation to whether a ***Crim. Law. 5** presumption of guilt might be statistically justified suggests not. The Department of Health do not publish figures in respect of the number of unsubstantiated allegations, but an examination of their published figures suggests that three quarters of the 160,000 allegations of child abuse made each year are unsubstantiated.³⁴ The problem may arise in respect of the perceived difficulty of separating the unsubstantiated from the unjust. Consequently, the present system encourages the holding and circulating of records of unsubstantiated allegations of child abuse.

All allegations of child abuse are serious. In unsubstantiated cases, unless an individual is tried in a criminal court and acquitted, it is difficult to see how the presumption of innocence operates in respect of record keeping. It seems in respect of allegations of criminal conduct towards children the presumption of innocence is waived in favour of a belief that keeping and circulating records of allegations and suspicions will lead to increased detection and prevention, a presumption challenged by leading child protection expert Eileen Munro in evidence given to the Commons Education And Skills Committee.³⁵ Debate on this issue is justified due to the overwhelming number of false positive allegations and the consequences for the families concerned.

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 3. Part of the Department of Health
 4. Department of Health (1999) "Working Together to Safeguard Children", HMSO, London
 5. *R. v Cannings (Angela)* (Unreported, April 16, 2002, Winchester Crown Court)
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 14. Department of Health, HMSO, London, 1991
 15. Department of Health and Social Security, HMSO, London, 1988
 16. Department of Health and Social Security, 1988, *ibid* paras.2.1-2.65
 17. Department of Health, "Child Protection: Messages from Research", HMSO, London, 1995 paras.43-44; Hoggett B. "Parents and Children" 4th ed, Sweet and Maxwell, London, 1993, p.183
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27. Including unsubstantiated allegations
28. Department of Health, HMSO, London, 1999
29. Anyone believing a child may be suffering, or may be at risk of significant harm should always refer concerns to the local authority social services if necessary by anonymous telephone call (*ibid* Section 5.3)
30. Based on research by Prof. Peter Fleming on Sudden Infant Death Syndrome
31. Department of Health, HMSO, London, 1988
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33. *inter alia* Department of Health, "Messages from Research", HMSO, London, 1995, pp.43-44
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