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Article

Introducing Social Science Evidence in Family Court Decision-Making and Adjudication: Evidence from England and Wales

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ABSTRACT

This article examines the use of social science research in case level decision-making and adjudication in public and private family law proceedings from the perspectives of judges and lawyers in England and Wales. To provide a context for our analysis, we first review a limited, but nevertheless important, body of international literature concerned with the place of social science in the family courts. We then turn to our empirical material, drawn from a scoping study commissioned by the Nuffield Foundation, to inform the design of a new family justice observatory for England and Wales. The study found that judges and lawyers in England and Wales described similar obstacles to the use of social science evidence at a case level as their international counterparts, despite differences in jurisdictional rules and norms. Specifically, they were concerned with due process and the admissibility of research evidence, as well as the potential for advocacy bias, given the contested nature of social science evidence. Questions about how to apply population data to the specifics of an individual case were also raised. However, analysis also revealed further contextual obstacles in England and Wales resulting from radical changes to the family justice system, following comprehensive review in 2011. Judges and lawyers indicated that a reduction in experts and far shorter timescales for the completion of public law cases, together with an influx of self-representing litigants in private law, have created a context that is less, rather than more receptive to interdisciplinary knowledge, including research evidence.

I. INTRODUCTION

It is widely acknowledged that questions concerning the best interests of children, which are at the centre of family court cases cannot be answered without drawing on knowledge over and above legal statute and rules. When faced with highly consequential options about children's futures, the family court must consider questions of children's development, likely outcomes of permanency decisions or child contact arrangements. Yet, the place of what Rathus (2012) has termed *extra-legal knowledge* remains uncertain in family court decision-making and adjudication. Although

practitioners in the family courts bring interdisciplinary background knowledge to their work, the idea that advocates or judges might directly introduce research evidence in advocacy or adjudication remains contentious.

In this article, we first set out the potential contribution of social science evidence to family court decision-making and the mechanisms through which broader social scientific knowledge find its way into cases. We then draw on a limited, but nevertheless important international literature to outline the range of obstacles that may stand in the way of application of robust research in the family courts. These obstacles fall into the following three categories: (i) a concern with due process and the potential for bias in the context of adversarial family proceedings, (ii) challenges presented by the contested nature of social science research as evidence, and (iii) a lack of clarity about how social scientific knowledge which is based on populations or subpopulations, can be applied to the specifics of a single case.

In the second half of this article we turn to our empirical materials and consider the extent to which obstacles, as set out in the international literature, resonate with the perspectives of judges and lawyers in England and Wales. Here, we revisit data collected for a scoping study commissioned by the Nuffield Foundation, to inform the remit and design of the new Nuffield Family Justice Observatory for England and Wales (Rodgers et al., 2015; Broadhurst et al., 2017). The new Observatory is currently under development (Broadhurst et al., 2018) and will be launched as a pilot in 2019. This new organization aims to close the gap between research evidence, policy and practice, based on longstanding concerns that frontline family justice practice is insufficiently informed by an interdisciplinary knowledge base.

From analysis of our own data, we conclude that judges and lawyers in England and Wales report very similar concerns to their international counterparts, despite differences in jurisdictional rules and norms. However, we also found that reforms resulting from the Family Justice Review in 2011 (Ministry of Justice, 2011a) have created a very particular set of further contextual challenges for frontline practitioners in England and Wales. Specifically, judges and lawyers referred to the reduction in the use of experts, together with shorter timescales for completion of public law cases and the sharp increase in the number of self-representing litigants in private law. These changes were seen to have generally eroded the quality of evidence put before the courts, including research evidence.

II. WHAT IS SOCIAL SCIENCE EVIDENCE AND WHAT IS ITS POTENTIAL CONTRIBUTION TO FAMILY JUSTICE?

In family court cases, the adjudicative facts of the case take centre stage; determining the truth of the particular circumstances of a case is uppermost in professional argument and analysis. Yet, few would dispute that a broader knowledge base is both relevant and essential to determining best interest options for children and their families. As Burns et al. (2016b: 283) argue, the adjudicative facts are not always sufficient to enable judges to make a decision, and in these circumstances, judges reach out to 'wider understandings of the nature of the world and society and how human beings behave'. From Cashmore and Parkinson (2014: 239), the following set of

statements capture the potential contribution of the broader social science research evidence to family court decision-making:

- providing the fact-finder with background knowledge about what children need for healthy physical and psychosocial development;
- pointing to factors that might be important in determining the child's 'best interests' in a specific case;
- illuminating the issues to be considered in making decisions in children's cases.

Thus, it is important to distinguish between the use of social science research in background understanding and the *direct introduction* of a specific study or body of research knowledge in submissions to the court. Social science research evidence aids decision-making and adjudication by providing a broader understanding of the likely patterns and outcomes of different care or placement arrangements for children. In addition, research evidence can throw light on questions about the impact of domestic abuse on children's safety and wellbeing, or equally the capacity of alternative carers to provide long-term substitute care for children. Legislation and policy is shaped by social science evidence as well as concepts of rights and entitlements.

Different jurisdictions have their respective rules regarding the use of expert evidence in family courts, but they have in common a general acceptance of the validity of evidence if it is presented by an expert or independent specialist instructed and approved by the courts (Cashmore and Parkinson, 2014). To supplement knowledge already presented by the parties, the expert is instructed to address specific questions and confine his or her 'opinion' to these specific questions. However, there are a number of noteworthy developments or peculiarities in the use of 'experts' in a variety of international contexts.

First, in the USA, the introduction of research evidence by social scientist experts through amicus curiae ('friend of the court') briefs has been subject to debate (Warshak, 2000; Kelly and Ramsey, 2009). Social science evidence may be introduced in key test cases and in appellate matters via these briefs prepared by members of a relevant scientific discipline and including 'a summary of the scientific information relevant to the matter before the court' (Kelly and Ramsey, 2009: 84). A non-party presents the brief, with an interest in the outcome of a pending case. The purpose of the brief may be to provide additional information in support of, or against one of the parties, or to draw the court's attention to the wider legal or public policy ramifications of the court's decisions.

Although there is scant published research regarding European jurisdictions, the varied stance towards lay or expert knowledge is particularly noteworthy in Nordic countries. For example, in Sweden, the county administrative court takes an inquisitorial approach to family cases. A combination of a single judge and three laypersons selected from members of municipal political parties, preside over cases. The particular expertise of laypersons is valued because they are seen to represent the general views or consciousness of the residents of the municipality. Laypersons can overrule the judge as they are in the majority (Burns et al., 2016a; Forkby et al., 2016; Svensson and Höjer, 2017). In contrast in Norway, the County Social Welfare Board, which is an independent court-like administrative body, is formed of a

County Board Chair who is a legal scholar, an expert member and a lay member. Requisite child welfare expertise is integral throughout the court process premised on a belief that specialist knowledge is critical to decisions about children's futures (Skivenes and Tonheim, 2017).

Of course, the evidence presented to the family courts is however, largely produced by those *routinely* dealing with cases, rather than experts acting on specific instruction. Alongside adjudicative facts, research evidence can find its way into the determination of individual cases through: (a) social work statements and oral evidence to the courts, (b) lawyer advocacy, and (c) by judicial notice. Whereas there has been some debate about the qualifications of court instructed experts, in regard to this broader cast of family court practitioners, there is considerably more disquiet about the introduction of research evidence in case level decision-making and adjudication.

1. Due Process in the Context of Adversarial Family Proceedings

The legal process is governed by formal rules that set out how family court cases should progress. From the sequence and timing of submissions to restrictions on what can be said in an open court and before the judge, family court activities are highly regulated. Judges are responsible for ensuring that standards of procedural justice are upheld. Procedural justice refers to ensuring that the legal *procedures* used for resolving disputes are transparent and fair, including even-handed treatment of cases (Lind and Tyler, 1988). Thus, a first consideration regarding the introduction of research specific to a case is whether all parties have had sufficient opportunity to respond to evidence put forward in argument.

However, due process not only relates to even-handed treatment of cases regarding the sharing of evidence, but also to the *kind* of evidence that can be introduced into cases. The judge acts as gatekeeper and must ensure that evidence introduced by advocates conforms to *rules* of evidence. Typically, evidence is considered admissible if it is both relevant and reliable, and where it involves opinion, is introduced by a witness with appropriate qualifications. Rules regarding the admissibility of evidence enable judges to consider whether hearsay evidence can and cannot be included. However, regarding research evidence, rules of evidence do not tend to provide sufficient guidance to judges. Burns and colleagues (2016b) have commented on the lack of clarity that current frameworks provide regarding extra-legal or broader social science evidence in a number of international jurisdictions. Although there have been some specific efforts to extend rules of evidence to research in Canada and the USA, this has largely been in the context of research or scientific evidence brought by *experts* – rather than by other practitioners in the family courts.

In England, the Civil Evidence Act 1995 sets out the conditions of admissibility. The role of the judge is that of gatekeeper responsible for excluding biased or unreliable expert testimony, but there is no specific reference to broader social science or research evidence. In Australia, both the Evidence Act 1995 (Cth) and the Family Law Act 1975 (Cth) govern evidence in family law proceedings before the Family Court and the Federal Circuit Court of Australia. The admissibility of evidence in

any proceeding is subject to compliance with the rules of admissibility, and the interpretation of those rules, by the presiding judge but again, there is no specific reference to research evidence.

In Canada, basic rules of law governing the admissibility of expert evidence have been subject to some development, but again developments largely apply to difficulties presented by expert evidence. Bala et al. (2017) state that in the past two decades, the Supreme Court of Canada has expressed repeated concerns regarding the 'danger' of the admission of expert evidence including that a trial might become a 'contest of experts', resulting in a prolonged trial process. In the Supreme Court of Canada's 1994 decision in *R v Mohan*,[1] it was held that a party seeking to call an expert must satisfy four threshold criteria of admissibility. These criteria are: relevance, necessity, absence of an exclusionary rule and a properly qualified expert. Where satisfied, a judge must ascertain that the evidence meets a threshold of reliability and also may undertake a discretionary cost-benefit analysis of admissibility 'to exclude otherwise admissible expert evidence if its prejudicial effect outweighs its probative value' (Bala et al., 2017: 8). However, in the aftermath of the 2015 Supreme Court decision in *White Burgess Langille Inman v Abbott and Haliburton*,[2] the Supreme Court ruled that the trial judge had been too strict in applying this analysis, and the test for the admissibility of expert evidence was refined and clarified (Bala et al., 2017). Thus, here we see some of the difficulty that the courts face, even when evidence is brought by experts, let alone by other professionals in the case.

The USA is the only jurisdiction that has attempted to further unpack what 'reliability' of scientific evidence might mean (Walker et al., 2004). However, again, it is experts that remain in scope, rather than everyday professionals operating in the family court. The US's Federal Rules of Evidence give trial judges a gatekeeping role and based on specified criteria, known as the *Daubert* standards, they are responsible for evaluating and deciding whether to allow scientific information into evidence (Beck et al., 2009). The criteria for scientific evidence under *Daubert* include: (i) testability, (ii) error rate, (iii) peer review, and (iv) general acceptance in the scientific community (see Beck et al., 2009). However, these standards act as guidelines only and do not require the trial judge to adhere to the four-step test of reliability set out by *Daubert* (Zirogiannis, 2001). This has led to variation in the admissibility of social science research across states in the USA, dependent on whether jurisdictions apply the *Daubert* criteria or not. Zirogiannis (2001) has also questioned whether the *Daubert* criteria, designed for scientific research, are also sufficiently applicable to social science expert testimony.

In contrast to Australia, the USA and Canada, there is a lack of legislative guidance on the use of experts and the admissibility of evidence in Ireland and Sweden and there is a lack of specific analysis of how this impacts on practice (Law Reform Commission, 2008). In Sweden, the court carries out an independent overview of submissions in any particular case and decides what may be considered as evidence (European e-Justice, 2014). A key weakness regarding the non-specialist district courts in Ireland, rests on inconsistency in approach, which results from differing levels of specialization of judges in child welfare and high-levels of discretion. Unlike in England and Wales, the rules are much looser regarding the admissibility of evidence.

It is up to the court to determine whether a particular witness is qualified as an 'expert' (Law Commission, 2008). In Europe, an increased awareness of the lack of consistency in the use of experts in court proceedings led to the formation of *EuroExpert* which promotes the use of agreed professional standards across Europe based on principles of: qualification; personal integrity; independence; impartiality; objectivity and respect for confidentiality (EuroExpert, 2018). However, there is a lack of literature about how this guidance has actually been applied in practice or to professionals other than experts.

From this brief review of rules of law governing the admissibility of expert evidence, it is clear that at present, jurisdictions continue to wrestle with questions about the quality or validity of expert evidence. In regard to social science evidence brought by judges or advocates, it is only in *Daubert* in the USA, that we perhaps find some direction regarding the considerations courts might apply in relation to evidence introduced by those who are not independent experts instructed by the courts.

2. Bias in the Context of Adversarial Proceedings

In the international literature, there is considerable reference to the fear of misuse of research by advocates in adversarial proceedings. Here, critics refer to the adversarial nature of court proceedings, which is seen to encourage the *partisan* rather than objective use of research evidence. Adversarial systems rest upon the presumption of advocacy by opposing parties. Hamer and Edmond (2016) argue that adversarial systems encourage the misuse of evidence by advocates, because advocates must defend their clients' interests over and above concerns with objectivity. Although bias is not seen to result from any deliberate intention to misconstrue or mislead, it is seen as an inevitable consequence of party representation in adversarial proceedings. Hamer and Edmond (2016: 294), write that a system of party representation 'gives insufficient weight to the fundamental goal of factual accuracy'.

In the USA, Faust et al. (2010) write that advocates may misuse scientific evidence to advance interests, even when the underlying knowledge base or validity of methods is wanting. In a similar vein in Australia, Cashmore and Parkinson (2014) have argued that research evidence can be used selectively to support a particular case-specific argument. Risk of misuse is compounded by the fact that lawyers and judges lack the knowledge and ability to cross-examine advocates who present social science evidence given that research training is not typically part of undergraduate or postgraduate legal training.

While the misuse of social science evidence has been consistently raised with specific reference to the position and intents of legal advocates, there have also been long-standing concerns about the partiality of expert witnesses formally appointed by the court (Ramsey and Kelly, 2004; Johnston, 2007; Dwyer, 2008; Emery et al., 2016; Bala et al., 2017). It is also difficult to ascertain whether jurisdictions, which favour a more inquisitorial approach to family proceedings, are more or less concerned about the misuse of research evidence given an absence of evaluative research or even debate.

3. The Contested Nature of Research Evidence

A further issue that compounds the anxieties of those tasked to make best interest decisions for children lies in the contested nature of social science research evidence (see Warshak, 2000; Rathus, 2014; Bala et al., 2017; Churchill et al., 2018; Rathus, 2018). Research is seen as contested because different researchers claim different findings, but also because research can be seen to be politically motivated or aligned.

Turning to the first of these issues, family justice practitioners often view social science as producing competing findings. Inconsistent messages from research undermine practitioner confidence in its application. Social science research evidence simply does not deliver the certainty that the courts seek in case determination. Such anxieties have been fuelled by high profile and very public debates between academics; for example on shared care arrangements in private law cases (Fehlberg et al., 2011) or on timescales for child removal in public law cases (Brown and Ward, 2013; White and Wastell, 2013). Limited research literacy means that frontline practitioners can struggle to navigate contested findings and search for an external source of resolution. This point was made by Lady Hale (2013: 15) in an influential speech to the annual conference of the Socio-Legal Studies Association when she stated that judges are 'not so well placed to assess the comparative merits of competing views of socio-legal scholars' and made specific reference to knowledge about the effectiveness of mediation. Robust or systematic syntheses of research evidence, as undertaken by the Association of Family and Conciliation Courts in the USA or by the Australian Institute of Family Studies offer such guidance, but in many other jurisdictions such guidance is wanting or is not sufficiently authorized by an endorsing body. The limited availability of authoritative reviews that provide guidelines for the family justice system stands in stark contrast to the field of health, where evidence informed practice has a far longer history greatly enhanced by endorsing bodies. For example, the National Institute for Health and Care Excellence (NICE) in the UK plays an important role in evidence-based medicine.

In a slightly different vein, but linked to the points made above, is a concern that research commissioned by government is biased due to political agendas (Melton and Flood, 1994; Murch and Hooper, 2005). Family justice practitioners are arguably sensitized to this influence, given family justice systems are shaped by political intervention, which may or may not be agreed on the frontline. Since the 1980s, Murch and Hooper (2005) state that governments have increasingly controlled the social policy and law reform agenda in the UK, with research becoming increasingly orientated to political priorities. In England and Wales, there has been concern about the energy successive governments have invested in reforming adoption, at the expense of considering other permanency options for children (Boddy, 2013). The 2012 Care Enquiry called for a 'broader and better differentiated understanding of permanence' encompassing 'a variety of possible pathways to permanence that are equally valued and that share common principles in planning to meet children's lifetime needs' (Boddy, 2013: 4, 2).

To summarize, social science research can deliver competing findings, or findings may be contested on account of political or other agendas. In the absence of respected, authoritative bodies tasked with summarizing evidence for the frontline, it

is difficult to imagine better use of social science evidence in everyday family court decision-making.

4. Difficulties in Applying Social Science Evidence to the Specifics of a Case

Judges and lawyers' primary knowledge base comprises substantive knowledge of the law. Legal practitioners have learned skills and a body of knowledge that typically is sufficient with some updating through case law, to serve their purposes (Melton, 1987). Engaging with social science knowledge requires engagement with language, concepts, and terminology that are unfamiliar and in addition, prone to change over time (Shuman and Sales, 1999; Kelly and Ramsey, 2007). As Rathus (2013) has described, social science is dynamic in nature, characterized by minor and more fundamental revisions of how issues such as family violence or family relationships are conceptualized. In addition, our understanding of social scientific truths changes over time, because social science is continually testing and refining what we know about key topics. Social science findings may not be entirely conclusive and frustrations arise when researchers provide judges with findings, followed by a description of the limits to date of this or that observation.

Setting aside the evolving nature of social science, a more fundamental issue results from the bare fact that lawyers and judges are not trained in the interpretation of a body of research evidence and how to apply this at the case level. Applying research evidence derived from population samples or sub-samples requires the practitioner to marry up the specifics of the case with what we know more broadly about populations. To put this simply, unlike adjudicative facts, social science facts are not particularistic and therefore pose particular difficulties in application at the case level by the untrained practitioner.

Application of social science evidence at the case level is further complicated by the fact that, when practitioners make decisions about children's futures, they rely not just on the available evidence of harm or neglect, but are asked to consider the child's likely future wellbeing in care planning. As Selwyn and Masson (2014: 1709) have described, state 'decisions in children's cases necessarily involve prediction and risk'. However, it is at this forward looking juncture that social science evidence fills a gap that adjudicative facts cannot, because planning can only be based on what we know about typical patterns and outcomes derived from population-based studies.

On the basis of these points, we can readily appreciate why the family courts prefer to be advised by experts. Experts are trained in the interpretation and application of broader social science evidence and practised in the tailoring of evidence to case specifics. Although experts, like lawyers and judges, must inevitably make an educated judgement and deal with the same issue of the lack of specificity of social science research evidence, their expertise is not just substantive, it also lies in interpretation, synthesis, and application.

Stakeholders make decisions within their own decision frames and decision-fields (see Hawkins, 2002), which means that they arrive at decisions influenced by their respective professional knowledge and experience. In addition, law has traditionally been viewed as a closed discipline – with legal practitioners tending towards disciplinary parochialism (Burns and Hutchinson, 2009; Hamer and Edmond, 2016).

However, best interest decisions for children do require an interdisciplinary lens. The fact that, in Australia and in the USA, a small number of studies achieve prominence in case law (which may be either undue or endure even in the face of new insights) does indicate some shortfalls in research literacy and opportunities for updating, on the part of the family courts (Rathus, 2013; Broadhurst et al., 2017). Perhaps we need to re-examine the legal curriculum both at qualifying and post-qualifying levels to consider how and where research literacy might be fostered (see Genn et al., 2006). Hill et al. (2017, p. 47) argue that 'it is not clear how legal training prepares a lawyer to determine what is in a child's interests' because such decisions require interdisciplinary analysis. It is reasonable to conclude that at present family courts are largely equipped to use social science research evidence selectively (accepted by others in the community) and passively (brought by an expert).

III. EVIDENCE AND EXPERTISE IN THE FAMILY JUSTICE SYSTEM IN ENGLAND AND WALES

Before turning to our empirical materials, it is important to consider key changes in the landscape of family justice in England and Wales, relevant to the issue of the use of social science research evidence. The landmark review of family justice (Ministry of Justice, 2011a) and government response (Ministry of Justice and Department for Education, 2012), has brought major changes in the conditions of practice for the key decision-makers including social workers, lawyers, barristers, and the judiciary. Critical issues pertaining to interdisciplinary decision-making in public law are the curtailment of the use of experts coupled with a far shorter statutory timeframe for the completion of care proceedings, introduced with the Children and Families Act 2014. In private law, the most radical change is the reduction in legal aid resulting from the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012, which removed most private law family cases from the scope of legal aid after April 2013. All of these changes have had profound impacts on the family courts in England and Wales.

The final report of the Family Justice Review (Ministry of Justice, 2011a) recommended stricter criteria regarding the instruction of experts, including independent social workers (ISW) with a suggestion that ISWs were duplicating work that was the responsibility of the local authority. The *routine* use of experts was considered to lead to lengthier proceedings, particularly if experts did not agree. In addition, there had been some discrediting of the credibility of experts appointed by the courts. For example, in 2012, research on the quality of expert psychological assessments presented to the family courts, found wide variability in report quality with evidence of unqualified experts being instructed to provide psychological opinion (Ireland, 2012).

However, critics argued that limited confidence in local authority social workers and a proportionate approach to deployment of children's guardians (specialist social workers who advice the court) by the Children and Family Court Advisory and Support Service, would leave an evidence gap in family court-decision making (Ward, 2012; Kaganas, 2014). In the interim report of the Family Justice Review (Ministry of Justice, 2011b), judicial mistrust of local authority assessments was

recognized, but with limited analysis of how this mistrust might be remedied. Concerns about a reduction in expertise were further compounded by the introduction of shorter timescales for disposal of cases in public law.

Critics such as Kaganas (2014: 156) argued that unrealistic expectations of judges might result in critical issues or questions being overlooked in both speedier and less well-resourced family court decisions. Notwithstanding the important contribution that the Judicial College makes – an organization responsible for training judges at all levels – it is clear that the current conditions of practice pose considerable challenges in relation to efforts to accelerate the uptake of interdisciplinary knowledge among judges. As has been widely documented, frontline practitioners struggle to access, interpret, and apply knowledge particularly when frontline conditions are far from ideal.

There have been a number of positive initiatives aimed at helping professionals working in or at the margins of the family justice system, access research knowledge. For example, in the 1990s the Department of Health Messages from Research series (see Aldgate and Stratham, 2001) proved a trusted source of reference for professionals. This was followed in the decade that followed, by the Nuffield Foundation funded Family Policy Briefing series, produced by Oxford University. However, both initiatives are no longer operational, although the legacy of this excellent work continues.

More recently and set up in response to recommendations made by the Family Justice Review, the Ministry of Justice's own Family Justice Knowledge Hub and Family Research Bulletins (published between 2012 and 2015 and again in 2018 (see Ministry of Justice, 2018)) provide brief summaries of research. However, criticisms are that practitioners struggle to access the research that lies behind the summaries and this resource has been produced at a time when frontline professionals have far less trust in knowledge resources produced by government. In addition, Churchill et al. (2018: 49) found a lack of awareness and use of the bulletins from a recent study of judicial use of research evidence. The authors identified 'significant gaps in the degree to which the judiciary are served by comprehensive, up-to-date, targeted and tailored research resources and dissemination mechanisms'.

Given this context, the preliminary case for a new Family Justice Observatory (initially spanning England and Wales as a single family justice system) was put forward by the Nuffield Foundation in 2015 (Rodgers et al., 2015). The new Observatory would address a perceived gap between the generation of robust research evidence and its uptake. A scoping study was commissioned to inform the design of the observatory and it is from this study that we draw the empirical material and analysis which now follows.

IV. FINDINGS FROM THE FAMILY JUSTICE OBSERVATORY SCOPING STUDY – THE PERSPECTIVES OF JUDGES AND LAWYERS ON THE USE OF SOCIAL SCIENCE EVIDENCE AT THE CASE LEVEL

Between August 2016 and July 2017, a scoping study, funded by the Nuffield Foundation, was conducted to inform the remit and design of a new Family Justice Observatory (Broadhurst et al., 2017). In the sections that follow we revisit the

perspectives of judges and lawyers in England and Wales regarding the use of social science evidence in the family courts, thus addressing a significant gap in the published literature. The following data sources were used for our analysis: four focus groups conducted with 36 judges at the Judicial College; eight multi-professional focus groups with 59 practitioners and two focus groups with 16 private law practitioners, including lawyers and mediators; and 47 submissions to a national call for evidence.[3] The article also includes data from high-level interviews with 27 judges and leaders in the field and five private law practitioners conducted after the national consultation to confirm the priority functions of the observatory. Full details of the study methodology and ethical approval gained for this research can be found in the team's project report (Broadhurst et al., 2017).

Analysis was both deductive and inductive, aiming to establish if perspectives from judges and lawyers resonated with themes in the international literature as described above, while remaining open to new learning. We found convergence with the international literature on the following key themes: (i) a concern with due process and rules of evidence, (ii) advocacy bias in adversarial proceedings, (iii) the contested nature of social science research and limited research literacy, and (iv) applying findings to case level decision-making. However, practitioners also reported further challenges specific to the family justice reforms that have followed wholesale review of the family justice system (Ministry of Justice, 2011a) which included: (a) a reduction in the instruction of experts and the court's limited confidence in social workers testimony, (b) far shorter timescales for case completion, and (c) an increase in the number of litigants in person in private law proceedings.

1. Concern with Due Process: Rules of Evidence

We found that lawyers and judges largely expected social science research to be brought to the court by experts; they were less clear about judges or lawyers introducing this kind of evidence at a case level. Lawyers and judges were mindful of rules of admissible evidence and how such rules impacted on the introduction of broader research knowledge. In keeping with the international literature, there was consensus that any specific study or body of evidence brought to a case ought to be made available to all parties, conforming with the rules of natural justice. Unilateral access to research by judges was not generally considered appropriate (Hamer and Edmond, 2016; Rathus, 2018).

> Whilst several judges across the focus groups said that they liked to keep themselves informed of social science research 'in general terms', judges also agreed that: 'unless it [social science research] is introduced as evidence in proceedings then I don't use it' (Judicial focus group 3).

Lawyers and judges felt that it would be useful to have a general overview of research to inform arguments as part of a general hinterland of knowledge but were ambivalent about whether they should be responsible for introducing research evidence in place of court appointed experts. One expressed the view that:

> I would find it very hard to conceive of a situation where a judge would be content to rely on research in place of an adult psychiatrist. . .Again, while it may be useful to have research papers available to assess one's understanding of attachment, I think it would be likely that one would probably still need expertise to deal with something like that. (Judge 1)

For some interviewees, there was a concern that if research was made more accessible this might be seen as an excuse not to appoint an expert. A judge cautioned against potential dangers of a new Observatory, if research is made available to judges to introduce to a case, but without a well thought-through process regarding the admissibility of evidence, access to this evidence by parties to the case, training for the judiciary and agreed standards for research evidence:

> I would not be foolish enough to say: "here you are – publish it all – let judges rely on it" - there is an extraordinarily sophisticated process that needs to be thought through. (Judge 7)

However, judges also appeared open to the possibility that if formal mechanisms were introduced that enabled reliable research to be introduced and shared with all parties then it might be appropriate for judges and lawyers to use research. In the following example, the judge in question states that research summaries were previously drawn on in exactly this way, because they were produced by government or inspectorates and therefore had authority:

> Those who practised regularly would take the collation of research material in the research documentation that the governments and inspectorates published and use it in cross-examination and to inform submissions expecting the court to rely upon it unless it was held to be unreliable or irrelevant. (Judge 7)

A number of participants made reference to the Department of Health, Messages from Research series (see Aldgate and Stratham, 2001), which no longer continues, but was clearly highly valued. This judge continued by saying, 'if one was in a similar position in the future' it would be appropriate for lawyers and judges to use research material but that this would be dependent on availability of research, and proper identification of sources. This is an interesting observation, which does indicate both an understanding of the potential added value of research but also possibilities for developing criteria to enable admission and the role of an endorsing organization.

2. Advocacy bias in the Context of Adversarial Proceedings

A key theme in the international literature as outlined above, was a concern with advocacy bias in the use of research evidence, given the adversarial nature of proceedings (Faust et al., 2010; Hamer and Edmond, 2016). Lawyers and judges made reference to an uneasy tension between the principles of evidence-informed decision-making based on transparency and objectivity and adversarial party

representation. The following extract from an interview with a barrister illustrates how evidence is viewed in the context of adversarial proceedings:

> If I find research, which is against my case, then I'm going to try and break it down. I'm going to try to find holes in it. I'm going to find other research, which contradicts it. (Barrister)

In a similar vein, in this second example, a CEO of a family justice organization explains to the interviewer that the validity of research is not uppermost in the minds of those contesting the facts of the case – rather what matters is the power of argument or persuasion:

> We have an adversarial system in which the whole point is argument/interpretation and in which fact is rarely central. . .And I'm not entirely convinced, as we sit here, that identifying whether the evidence that you're using is fully valid - is a principle driver of concern for the person using it. (National Organization CEO)

While the role of the judge is to establish the 'facts' in relation to a particular case, the role of the lawyer in both public and private law cases is to represent their clients. If, as Emery et al. (2016) write, legal practitioners are unlikely to question inconclusive evidence provided by experts or other professionals if it supports their case, then this does raise questions about what kind of family court process or code of conduct might enable more ethical or reliable use of research evidence.

3. The Contested Nature of Social Science Evidence and Limited Research Literacy

The contested nature of social science evidence was a further concern for judges and lawyers. Participants frequently made reference to permanency placement for infants and very young children and debates about whether the current increase in the use of special guardianship rather than adoption is in the best interests of the child. Limited research literacy among judges and other professionals in the court and questions about how the reliability of a particular study or body of evidence could be determined were raised.

Participants made reference to a high profile and heated debate that broke out between academics following the publication of a review of evidence commissioned by the Department for Education which aimed to aid professional decision-making in family court cases. This review was titled: *Decision-making within a child's timeframe* (Brown and Ward, 2013) and was contested by White and Wastell (2013). Controversy discredited the review, but in addition, the focus groups suggested that it had reduced practitioners' confidence in social science evidence more generally. This debate clearly illustrates the importance of a very carefully constructed and independent synthesis process, given the sensitivity of topics but also political agendas in the family justice system.

Although stakeholders were clear that a key priority for the new Family Justice Observatory must be to collate bodies of evidence and produce authoritative

summaries, at the same time practitioners commented on the lack of certainty that social science evidence was seen to provide in contrast to the more factual or finite nature of legal rules and statute. This tension is captured in the following example from a private law practitioner:

> If you think back to the domestic violence report – 'Glaser' [Sturge and Glaser, 2000], you know, that was authoritative. This is how you're messing up your children. This is the impact for them. . .And so that's a really clear example of how research can be used in an authoritative way. And that did bring change. That's your clear case. Whereas the other ones I've mentioned are helpful but are not authoritative enough and it may mean that in those sorts of areas there isn't a clear steer that can be given. (Private law practitioner 4)

In the following example, there is further reference to the contested nature of social science evidence within a focus group with judges. Here the judge in question contrasts medical research brought by experts, who are required to consider contradictory findings, with social science evidence – where the route into the court is less clear:

> In terms of medical research, that's brought to us usually through the expert written evidence and they have certain obligations upon them to produce and mention any other research that counteracts the argument that they're putting forward if it's controversial. So I think that's one of the things that would concern me slightly if you're talking about a sort of social research, you know, how is that brought before the court, and what weight do you attach to it? (Judicial focus group 3)

Regarding research evidence, practitioners also raised questions of political bias in regard to research evidence. A number of practitioners felt that Government Departments commissioned research to support particular politically motivated policy initiatives. Trust in evidence was a critical issue for practitioners and this extended to not only reliability or quality but also who had commissioned and paid for research and for what purpose.

> I remember this years ago when there was some research published and we all got the booklets for it and people saying I'm not accepting this - this is the government research. So, it has to be independent of the government. (Judicial focus group 3)

In the judicial focus groups, independently conducted research, for example that commissioned by the Nuffield Foundation or research councils, rather than government departments, was seen as crucial. This message was also frequently stated in submissions from organizations to our call for evidence.

Research literacy was reported as a considerable issue among lawyers and judges. Participants clearly stated that they lacked the skills to appraise the quality of research evidence. In the mixed professional focus groups and in interviews, research

training for practitioners was identified as a key priority function for the observatory – a judge commenting: 'I do not believe any judge should be excused from the need to have education about how to use research' (Judge 1). However, improving research literacy was also considered a significant challenge, given the high volume of both public and private law cases currently being dealt with by the courts.

4. Applying Social Science Evidence to Case Level Decision-Making

The difficulty of applying research knowledge based on populations or subpopulations to a specific case has been discussed in the international literature. This was also a key finding in the national consultation:

> I would be very interested in there being a body of research that was available to all, not just to me, which informed me with matters to do with the ins and outs of the case such as successful adoption placement, breakdowns, and those matters - but I wouldn't apply that directly to the case because it wouldn't be specific but it would certainly inform me and give me a better understanding of the matters of which I'm dealing with. If there was that body I would welcome it. (Judicial focus group 3)

In this example, the judge distinguishes between knowledge that forms part of general background understanding and the specifics of this case. He/she is far less clear that application at the level of the specific case is possible. Concerns were also expressed that research can be over-simplified by users:

> There is confusion over the evidence about achieving good outcomes for children - a tendency for a complicated issue to get over simplified e.g. lack of attention to such things as child's age, whether they are in a long-term and secure placement (whatever their legal status), how to measure 'well-being'. We have noted through our work with courts and children's services that there is still confusion, despite the efforts of organisations like Research in Practice or Making Research Count, about how best to use the learning from research in [application to] individual cases. (Submission to the national call for evidence from the Family Drug and Alcohol Court National Unit)

These statements reflect a view expressed by many stakeholders that social science research evidence lacks applicability to specific cases. In the report of the scoping study cited above, (Broadhurst et al., 2017), we argued that well-established research intermediaries and leading practice journals play a vital role in currently mobilizing knowledge for frontline policy and practice. For example, in England and Wales, legal practitioners most frequently cited the professional journal *Family Law*[4] as the key source of up-to-date information about new case law and research. The Judicial College in England was also recognized as important forum for sharing learning and practice between judges. However, the role of research intermediaries does not typically extend to direct work with practitioners to enable them to understand how the specifics of a case can be brought together with knowledge about general

patterns and outcomes of family court decisions or indeed, the options available to the court in terms of child placement or child care arrangements.

V. EVIDENCE AND EXPERTISE IN THE FAMILY JUSTICE SYSTEM IN ENGLAND AND WALES: IMPACT OF FAMILY JUSTICE REFORM

Recent radical reform of family justice in England and Wales, as described above, has given rise to particular contextual challenges that warrant separate consideration. Although, as we have described above, lawyers and judges share with their international counterparts' similar concerns, the following additional observations are notable.

First, strict curtailment of the role of experts appointed to advise the court has been followed by a very limited number of initiatives or mechanisms designed to either equip frontline practitioners to access relevant research more directly. In the following extract, judges interacting in a focus group speak to both these points:

> Judge 1: A couple of years ago, we were told how our work was going to become more efficient by having access to research and thinking particularly about attachment. That's really never happened because it's not been provided in a form which is made available to local authority lawyers, parents and the court on the basis that it is going to be central. That's just never happened.
>
> Judge 2: It's part of the family justice reform. LJ X was very very keen on this issue, I remember, but nothing actually happened.
>
> Judge 3: Well the idea was we'd get rid of the experts - we'd just go online to a family law hub - and there'd be stuff on addiction, alcohol. . .
>
> (Judicial focus group 3)

These quotes confirm that the recommendation of an online hub that would disseminate research knowledge directly to the frontline practitioner, has not been realized (Ministry of Justice, 2011b). The judges continued to discuss this issue, stating that they were now more reliant on social work evidence, but the content and quality of submissions to the court in both written and oral evidence were highly variable. Given the introduction of new rules limiting the cases where additional expert evidence should be provided, there has been a greater reliance on local authority social work assessments instead (Brown et al., 2015). Although research by Brown et al. (2015) suggests that some judges perceive this to represent a more efficient use of social workers' time, concerns were raised in this research that judges do not have confidence in local authority social workers.

Cuts to public service budgets and turnover in frontline social workers mean that inexperienced practitioners often appear in court, who struggle to withstand cross-examination. Of course, limited post-qualifying training opportunities for social workers also means their knowledge may be wanting over time.

Far shorter timescales for the completion of cases in public law were described as a further contextual barrier to better use of research evidence. In interviews and focus groups, many lawyers and judges noted how tighter performance targets for case

completion as well as resource issues limited opportunities to engage with research evidence in decision-making and adjudication. The extract from the submission to the call for evidence below highlights that without adequate mechanisms in place to synthesize and disseminate research evidence – it will not be utilized.

> Whilst legal practitioners may benefit from increased exposure to research, practical limits on time may prevent how well this is embedded into practice. We welcome a national Observatory, which offers practitioners a clear means of accessing relevant and well-tested research, which they can readily draw upon in practice. (Submission to the call for evidence from the Law Society)

Here legal practitioners referred to the possibility that the new Observatory might deliver authoritative reviews of evidence, in accessible formats. However, lawyers and judges remained concerned about how this would filter through to influence policy and practice, without significant activity on the part of the Observatory to promote its outputs in different regions of England and Wales.

Regarding private law, lawyers and judges, in England and Wales, referred to the very limited influence of research on practice. Interviews and focus groups revealed that frontline professionals lacked awareness of the latest private law research, even high-profile studies. In addition, it appeared that research played very little part in routine private law cases. In the following extracts, a private law practitioner evidences this point: 'I've never won or lost a case based on research ever' and 'my experience is that if you put it in a submission or if you begin to talk about it to the judge – the judge glazes over and is not that interested' (Private law practitioner 3).

In the next example, a private law practitioner referring to the routine disposal of cases makes a very similar point and laments the lack of influence of research:

> In my practice, which is court-based private law, so I do international children's law and I do domestic children's law between parents of all types, I would say that there is virtually no use of research whatsoever. The majority of cases are determined without any experts and there is purely the decision of the judge and it is very rare for anybody to refer to research or to be allowed to put into the case any research material. It is a huge absence in terms of the court process. (Private law practitioner 2)

The consistency of comments from frontline professionals about the use of research evidence in private law are concerning, with the following extract providing another stark example:

> Well, the first problem is that there's very little research in private law . . . . For example, in international relocation, which is when one child goes to live in another part of the world, which is something I do a lot of, there is virtually no research on what happens - the outcome for children when permission is granted - and the outcome if it isn't. That's a huge area of absence in terms of research. There are always arguments about whether shared care works for children or not. There are a couple of pieces of research on that from Australia

> which are out of date and quite poor methodologically, which I've occasionally used but usually the judge is not interested and says he's not going to read it. (Private law practitioner 2)

A further major issue regarding private law concerns the radical reduction in legal aid under LASPO 2012. The family courts in England and Wales have seen an influx of litigants in person, attempting to self-represent in high conflict separation cases. Lawyers and judges made multiple references to this issue in interviews and focus groups, indicating widespread concern about both the plight of the self-representing litigants but also the courts to deal with this change. In the following extract, a private law practitioner comments on the perceived gap between those who can and cannot seek funded help in private law family cases:

> Can I say also that you get the private law where they can afford it and so they get the independent social workers. So, you've got a Rolls Royce system happening there and the court is very relieved and assisted and actually they will do problem solving and work because they are not time constrained. And then, you'll have other people at the other end of the spectrum who aren't being assisted and it's really, it couldn't be more stark really. (Private law practitioner 4)

Litigants in person have become a high profile group of stakeholders in the English and Welsh system in their own right (Trinder, 2015; Trinder et al., 2014). One interviewee commented that the new Observatory, it if was to be inclusive: ' . . . would have enough detail not only for practitioners but also for litigants so that's the balance you should strike' (Private law practitioner 4). However, equipping litigants in person with interdisciplinary knowledge would be a hugely challenging endeavour, which again throws the spotlight on questions of who, how and through what mechanisms, family court decision-making might be better informed by research evidence.

VI. DISCUSSION AND CONCLUSION

The application of social science evidence in family court decision-making and adjudication has been the subject of limited but important debate in a number of international contexts. From the international literature, and based on the analysis of new empirical data presented in this article from England and Wales, it is possible to conclude that across a number of different jurisdictions, similar issues are raised about the potential for the misuse of research evidence (however, well intentioned to defend clients) in the context of adversarial proceedings, coupled with anxieties that social science evidence does not deliver the certainty that the courts pursue when making highly consequential decisions for children and families. In England and Wales, the recent reform of the Family Justice System appears to have created additional challenges regarding the introduction of research evidence, because timescales are tighter and the role of experts is reduced. In England and Wales, the limited

influence of research in private law cases is particularly troubling and more so, with the curtailment of legal aid and influx of self-representing litigants.

In thinking about international solutions, it is important to differentiate between initiatives that: (i) aim to broadly educate family justice practitioners in regard to the hinterland of knowledge that they bring to their understanding, analysis and decision-making, and (ii) aim to provide guidelines concerning the formal introduction of a particular study or body of research in submissions to the court. Regarding the first point, few would argue that all family justice practitioners ought to have baseline knowledge about patterns and outcomes of decisions concerning children in the family justice system, together with basic knowledge of child development and questions about child placement or childcare arrangements. However, regarding the second point, this is a far thornier issue. Where a particular study – *or ideally a body of evidence* – is to be directly introduced to the court regarding a particular case, then the family courts must be assured of its relevance and reliability. In a number of jurisdictions, experts are relied on to advise the court in this regard. However, mechanisms to inform the introduction (and acceptance) of research *as evidence* in real-time family court decision-making appear insufficient in regard to the range of professionals routinely dealing with case level decision-making and adjudication.

In England and Wales, we are yet to fully grasp the impact of a reduction in experts or to trial alternatives such as the production of robust research reviews endorsed by an expert body such as the new Nuffield Family Justice Observatory. International dialogue is critical to understanding where and how innovation is being tested and to what effect. For example, the Australian Institute for Family Studies is a government funded research organization that has a key focus on evidence on the operation of the family justice system. The Association of Family and Conciliation Courts in the US provide examples of how bodies of evidence can be collated for use across family justice system, from which others can learn.

Alternative problem-solving approaches to justice that bring an interdisciplinary team of combined, legal, social, and health expertise to family court practice, offer a more radical alternative. As yet, the value of treatment courts has been largely considered in relation to outcomes for children and families (Harwin et al., 2016, 2018). However, their contribution to evidence informed decision-making and adjudication is of considerable interest in light of the discussion we have presented in this article. The contribution of the treatment court model lies in interdisciplinary, real-time application of expertise, together with a problem solving rather than adversarial approach to best interest decisions for children. Inquisitorial approaches in parts of Europe may also offer more fertile ground for the uptake of research evidence – however, there is again a dearth of published literature with this focus (Burns et al., 2016a; Forkby et al., 2016; Svensson and Höjer, 2017).

Blackham (2016: 415) argues that courts must be 'informed and critical consumers of empirical evidence' – however, save for the introduction of evidence by experts, it does appear that social science evidence has limited and uncertain influence in a number of international contexts. Investment in the generation of high quality research is somewhat wasted, if it is not sufficiently translated for policy and practice – although as we have discussed the translation challenge requires careful consideration.

NOTES

1. [1994] SCR 9.
2. [2015] 2 SCR 182.
3. Submissions to the call for evidence are archived and can be accessed via the website of the Nuffield Family Justice Observatory: https://www.nuffieldfjo.org.uk
4. Family Law is published by Jordans at: https://www.familylaw.co.uk

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