**THINKING ABOUT THE ELLIE BUTLER CASE – THE VIEW LOOKING BACK**

**OCT 2012 : THE EXONERATION**

**JUDGMENT 1 HOGG J (JULY 12)**

The Exoneration

“I do not blame him for *causing injury* to Ellie, while I accept that he may have done so with all good intention to help her. I hope everyone will accept that I do not attach any culpability to him, and that in my judgment *he is exonerated from causing her any inflicted injury*. If, in fact, he did cause her injury it was purely accidental.” (my emphasis)

From the context it is clear the judge is referring to the injuries she has been dealing with rather than any broader canvas. Compare to the letter actually sent, which is broader (author unclear) :

“[The judge] concluded that not only was she satisfied that [Mr Butler] had never caused harm to his child, in fact there was an innocent explanation for his child’s suspected injuries” (taken from SCR)

On threshold

(Having set out the acknowledged history of dishonesty and denials of domestic abuse)

“I also have some concerns raised by the parents’ own behaviour…*I am not yet satisfied that those concerns bring me over the threshold criteria. I do have significant concerns and I wish to know more about the parents.* They have carried an intolerable burden for the last 5 ½ years…they have felt persecuted…now they have been unburdened from the shadow of findings against them…there may be more they want to unburden themselves of. I think there is more to learn about them, their reaction to this judgment, their ability to give priority to [the sibling], their ability to cooperate with professionals*….I need the context of their behaviour*…I think it might be much fairer for them to be assessed and for more information about them to be gathered before I make any final decision about the LA threshold.” (pas 695-699) (my emphasis)

**JUDGMENT 2 HOGG J (OCT 12)**

On threshold

(S4C report re sibling has been received). Remember, threshold is re sibling not Ellie.

“The LA has obviously considered that report and the comments about both parents. As a result they have decided to withdraw their allegations against the mother and additional allegations against the father and no longer seek findings against the parents. That approach has been welcomed and supported by all parties.

I too have considered the report and welcome the LA’s decision to withdraw their allegations. Indeed, although in July I adjourned that issue until this hearing, on all the evidence now before me I would have been hard pressed to make findings against the parents, and even more hard pressed to make findings against them that would cross the threshold required by section 31.

That being the situation the care proceedings in respect of [the sibling] fall away and come to an end… “ (pas 4-6)

On the grandparents’ position

“It has not been an easy time for the grandparents either. They are retired, of mature years and not always in the best of health. Their application for Special Guardianship incurred them in considerable expense. But, despite their own personal difficulties they have provided well for Ellie and are devoted to her.

Inevitably the grandparents will have heavy hearts, but they have recognized the parents burning desire to regain the care of their little girl; they recognize that age and health are not in their favour; they do not wish “to fight” to keep Ellie: they want the best for her, and for them now to play a more back seat role in Ellie’s life to be supportive, loving grandparents. With this in mind they have accepted and agreed that Ellie should return to live with her mother, with [her sibling] and with the support of her father.

It is a brave and appropriate decision, and one which I am sure the parents appreciate.

As a result it is agreed between the parties that Services for Children should undertake an assessment of how and when Ellie can be returned to her mother.” (pas 13-17)

**EXTRACT FROM A TAPESTRY OF JUSTICE (SUESSPICIOUS MINDS) (12 OCT 12)**

“You will notice the highly unusual step of the Court giving the full names of those involved, rather than anonymising them. That’s a marker of how important it is for this family to be exonerated, and the likelihood that there will be further media involvement – I note that journalists were present.

I would point out in this case, that the miscarriage is not a result of bungling or bad faith on anyone’s part, nor crookedness, nor incompetence, nor overly dogmatic experts. It just reflects what is becoming increasingly understood – that in complex medical cases involving injuries to children, sometimes our best working diagnosis on the balance of probabilities, can still be wrong.  As the Judge says late on, with reference to Mrs Justice Bracewell – in effect the Judge has to make the best conclusions they can from the evidence as it is presented, but being aware that today’s certainties can be tomorrow’s grey areas.”

**FROM A BLOG BY A PROMINENT LAWYERS FIRM ON 18/10/12 (STILL ONLINE – BREACHES RRO SO LINK NOT PROVIDED) :**

“…And so, unusually for a case where the State intervenes in family life, these proceedings have ended happily for Ellie and XXXX and their parents. The xxx are now back at home where they belong.

But the outcome could have been so very different… With the wholesale decimation of Family Justice and Social Service budgets, decisions about children like Ellie and xxxx are routinely informed by resourcing issues. Long-term foster care is expensive. It is a far cheaper option for local authorities to place children who cannot live with their birth families for adoption. However much it might like to dance around the reality, it is this budgetary consideration that is at the heart of the government’s apparent enthusiasm for adoption. Targets or quotas about the number of adoptions and how quickly they ought to happen are all about the money - how can children in need be processed through the system as cost-effectively as possible.

Had Social Services had their way, xxxx would have already been adopted. I highlighted in recent opinion piece for Family Law Online the almost impossible uphill struggle parents face seeking to have children returned to them after an adoption order has been made. If Ellie and xxxx had joined new families through adoption before the awful wrong done to them and their parents had been identified, they would not have been going home (see Webster -v- Norfolk County Council and the Children (by their Children's Guardian) [2009] 1 FLR 1378).

So perhaps the government would like to think again about its approach to Family Justice. Is it really such a radical approach that the welfare of children, rather than how much they are costing, should inform the life-altering decision made about them?”

**EXTRACT FROM : A ‘MISCARRIAGE OF JUSTICE’ CORRECTED (ARTICLE BY COUNSEL FOR F) (NOV 12) :**

“…At the conclusion of the evidence the local authority continued to assert that the court should find that Ellie had been non-accidentally injured by shaking. The parents and the children’s guardian urged a different course on the judge.

… On the one hand, this is a highly unusual case, unique on its facts; on the other, there are many lessons of general application for the practitioner, the courts and the forces of reform to draw from it.

*Miscarriages of justice do happen*. This case follows on the heels of *London Borough of Islington v Al Alas and Wray* [2012] EWHC 865 (Fam), [2012] 2 FLR (forthcoming).

… This case exceeded the new 6 month protocol by a factor of 5. But by the time this article goes to press, she is back in the care of her mother, supported by her now exonerated father. Had the ‘luxury’ of a full ‘Rolls Royce’ High Court retrial not been made available to her, she would by now have been adopted as the local authority advocated based on the now unreliable findings of a previous court.

…In the present case, the guardian, through her junior and leading counsel, took an active role in the trial and added to the understanding of what had happened to Ellie. They were not bystanders despite being neutral as to outcome. Hogg J gave the following guidance:

‘I appreciate that it is important to consider costs in such cases, but in this case the Guardian’s involvement and interventions have been of great assistance and significance in the final outcome.

There is no reason why a Guardian should not play an active part in a fact-finding hearing. There are very good reasons why a Guardian should.

A Guardian represents the interests of the child. It is in the interests of that child that the truth is ascertained with as much clarity as possible.

… *The extra mile*. ‘Unknown cause’ is a possible finding in many cases; how much more satisfying though for there to be a proven miscarriage of justice instead. There can be a profound difference for the parents, included in which is the necessary shift in the perception of the social care professionals from parents who escaped ‘on a technicality’ to parents who are the established victims of a miscarriage of justice. This, again, necessitates that extra expert, that extra day or week of court time, that extra hour or 10 of preparation: all of which are so under threat at the moment.”

**FROM RE-LITIGATION IN FAMILY CASES: THE EMERGING LAW AND PRACTICE (SECOND ARTICLE BY COUNSEL FOR F (JAN 13):**

“The application to re-litigate was made in new care proceedings brought in relation to a new child and in which case the local authority sought to rely on the old findings; it was also made in contact applications brought by both parents in relation to the child who had been subject to the initial care proceedings.”

**FROM AN ARTICLE IN THE DAILY MAIL (NOW REMOVED BUT STILL AVAILABLE ONLINE ELSEWHERE) : FIRST CHRISTMAS WITH HIS GIRLS FOR FATHER WRONGLY JAILED FOR CHILD CRUELTY (23 DEC 13) :**

“Family broken up in 2007 when Ben Butler was accused of abusing child Ellie. Mr Butler was forced to share jail cell with a convicted child abuser…the children and their parents are enjoying their first Christmas as “a proper family”. With their two smiling children cuddled up on his knee and his loving partner by his side, Ben Butler looks every inch the contented father. But such scenes of simple domestic bliss are a new experience for all of them – after the family was ripped apart when he was wrongly jailed for child cruelty. It took three years to clear his name…”

**29 OCTOBER 2013 : ELLIE DIES**

**DAILY MAIL ARTICLE : MAN, 33, ARRESTED AFTER UNEXPLAINED DEATH OF SIX-YEAR-OLD GIRL WHO COLLAPSED AND DIED LATER IN HOSPITAL**

* Girl named locally as Ellie Butler collapsed in Sutton yesterday at 3.35pm
* Death being treated as 'unexplained' and post-mortem is set to be held
* Ellie is believed to have lived with father Ben, mother Jennie and xxxx

(Note no reference to previous coverage of this case)

**Jun 14 : THE FINAL HEARING IN RELATION TO ELLIE’S SIBLING (KING J)**

**JUDGMENT OF KING J**

King J has substantially different material before her (graphic texts and diaries set out) and concludes :

* Although she declines to reopen (again) the issue of the earlier injuries there are “solid grounds for challenge” in light of new post mortem evidence, not available to Hogg J. (pa 46)
* “it would not have been surprising had Hogg J had available the information that I have about the violent and abusive relationship as between M and F if she had regarded the “broad canvas” against which she considered the medical evidence as being of a very different hue….Hogg J, denied as she was of the text messages and an understanding of the violence endemic in the relationship, found the evidence of the parents to be impressive and truthful. In fact what is now obvious is that both the M and the F were being untruthful about the nature and quality of their relationship” (pa 48)
* “even without the evidence now available showing, beyond peradventure, that this was a highly dysfunctional and abusive relationship, this was, on any view, a very challenging rehabilitation programme, albeit carried out with the assistance of an ISW.” (pa 51)
* Mother a victim of “domestic violence of the most serious type, including physical and psychological brutality, and I strongly suspect, but make no specific finding, in relation also to sexual abuse”…”overwhelming obsession with a man who treated her and her children with violence and contempt…” (pa 142)
* Mother completely “in the thrall” of Father…”so dominated and controlled by the father that she has been incapable… of protecting her children from him.” (pa 142)
* Mother continues (even in light of text messages) “to exhibit her unqualified support [of F] in the most deliberate and obvious way” (pa 142)
* F had sought to manipulate in the home environment and the court process (pa 142)
* “I am satisfied *so that I am sure* that F inflicted the head injury which led to Ellie’s death and, *on the balance of probabilities*, that he caused the fractured scapular 2-4 weeks prior to her death.” (my emphasis) (pa 145)
* F inflicted injuries on sibling (pa 148)
* Sibling saw Ellie moribund and was unable to wake her up. (pa 149)

These conclusions were withheld from the public until late July 2016, well after the narratives about the case had been established in the press. The judgment itself has been scarcely reported. Unclear if SCR panel aware of them (SCR ran Nov 13 – Aug 14).

**21 Jun 16 : THE CONVICTIONS**

**EXTRACTS FROM THE SERIOUS CASE REVIEW, PUBLISHED 21 JUN 16 (concluded Aug 14)**

[In July 12] S4C was appointed to carry out an assessment of Ms M and Mr F with a view to the rehabilitation of Child S [sibling] to Ms M (potentially with support from Mr F)…

In the course of a subsequent hearing in September 2012 the remit of the assessment was broadened to include Child D [Ellie] moving to the parents’ care and the Court approved a new plan of work to form the basis of a second Letter of Instruction to be issued to S4C.

The draft court order records that “the maternal grandparents agree in principle to [Child D] returning to the parents’ care.”

After brief introductory visits and with significant supportive input from the foster carer, Child S was placed with Ms M and Mr F on 08 October 2012. According to S4C Ms M and Mr F responded well to caring for Child S. (9/56)

The September 2012 court report of S4C stated *“*[Child D’s] *position is yet to be fully ascertained”* and no direct work had started with the child, but there was mention that a move to live with the parents and sibling could take some time. S4C became involved in mediation work between the parents, grandparents and extended family and were concerned about the potentially harmful effect on Child D of extended introductions in a climate of tension. Originally S4C had no predetermined plan or instruction to place Child D with the parents. They acknowledged the importance of the bond with the grandparents who had cared for Child D for more than five years, and hoped that it would be possible for the parents and grandparents to cooperate in an extended family arrangement whereby Child D would have the benefit of long term stability and might move between carers easily when Child D wished as the child got older. They had not appreciated the depth of the rifts and hostility between Mr GF (and Mrs GM) and Ms M (and Mr F) that they believed made it impossible to realise such an arrangement. Despite a range of sessions of mediation which aimed to bring family members together around Child D’s wellbeing, some of which brought positive steps forward, they eventually had to conclude that this was unlikely to be achieved. S4C’s September 2012 report says Mr F stated that he might have to “fight” for Child D through a residence order application. He behaved forcefully at times including “bouts of extreme shouting” which S4C worked hard to try to ameliorate, and there are accounts of similarly intransigent views from Mr GF. By the time they submitted their report to the court on 13 September 2012 S4C concluded that an amicable transition was unlikely, and *“Therefore the possibility of someone having to grieve the loss of* [Child D] *is real.” (9-10/56)*

During the last few days prior to moving to the parents’ home, concern was expressed by a number of agencies, including Child D’s school and a paediatrician who had seen the child that week, about the speed at which the move was happening and Child D’s lack of preparedness for it. It was suggested that Child D’s Guardian, CG2, might meet with the child, but due to sickness she was unable to do so. The move went ahead on 09 November 2012. (10/56)

S4C concluded their work with the family in March 2013 and submitted a report to Children’s Services dated 12 April 2013. The report is generally very positive regarding the development of the relationship between Child D and Child S. It also describes how the parents had made shifts in their outlook and S4C observed not only their appropriate attention to the children’s everyday needs but also an enjoyment of their parenting and shared activities with the children and a setting of boundaries where needed. (12/56)

There is a strong view from some health professionals that they were excluded by the Independent Social Work Agency [after return home] in that when S4C was the lead agency they did not consult professionals, who in some cases had known Child D for years, or inform them of what was happening. (17/56)

On a specific level, Legal Services considered whether the decision not to appoint a QC to represent the Local Authority’s case had a bearing on the outcome, but concluded there was nothing that would suggest that the Senior Counsel was *“anything but effective”* or that there was anything lacking in the way the case of the Local Authority was presented in Court. (19/56)

The Legal IMR author says *“Based on all the expert evidence before the Judge this* [the conclusion that the injury was not a non-accidental one] *was not an unreasonable decision”.* I agree with this conclusion. The Local Authority sought counsel’s advice on whether the judgement might be appealable and whilst it was considered to be “thin on analysis” there were not sufficient grounds for an appeal. (17/56)

Having made this judgement on the medical experts’ evidence, the Judge considered other evidence, documenting matters such as the parents’ histories of offending, the concealment, both of Child S’s existence and of the DNA evidence confirming Mr F’s paternity, missed contacts, alleged domestic violence and the lies and evasion in dealing with authorities. She concluded that the Local Authority’s case did not prove the threshold criteria in the proceedings. However she then went further than making a non-finding against Mr F and exonerated the parents of all wrongdoing stated that they had suffered a miscarriage of justice and should be completely exonerated. She also required the Local Authority to send a letter, to be displayed in files of all relevant agencies that had dealings with Child D, to ensure that the past conviction and fact finding was not to be taken into consideration in future dealings with the family. (20/56)

The IMR author for Children’s Social Care makes a strong statement in response to this question.

*“Judge 02 having decided that the medical evidence in respect of the injury to Child D did not hold, then chose to ignore all the other evidence”. “She chose to dismiss the evidence of the parents’ hostile and non-cooperative behaviours and appeared to conclude that it was to be expected given that Children’s Services had removed their children”.*

In the absence of an IMR or other report from the Court it is difficult to conclude just what weight was given to the non-medical evidence and it is not clear that the Judge would have necessarily been aware of the full scale of such factors as:

* Parents’ criminal behaviour…
* Long term mental health problems…
* Both parents’ numerous hospital attendances…
* The number of missed contacts with professionals…
* The scale of lies and deception…
* The frequent use of complaints…(21-22/56)

**Question – if this is the case why did the LA not put this material before the court? Can one infer from the fact that the authors of the SCR raise this issue that the S4C reports did not raise or deal with these areas?**

…it does not appear that information was sought [by S4C] from the many organisations, who had years of knowledge and experience of the family. (22/56)

It is perhaps surprising that the Local Authority did not convene a de-brief meeting (after the July or September hearings) to discuss the outcome of and learning from the case. It is believed that there was a meeting within the Local Authority Legal team but no record of it has been located. (23/56)

No-one at the time had an overview of the very high number of hospital attendances by Ms M for injuries, and there may be others of which we are unaware. Those known included lacerations to the legs, arms, head, bruising to the back and face, suspected broken nose, broken ankle etc. A range of explanations was given, two being assaults by unknown assailants, and Botox injections were said to be the cause of bruising close to her eyes. This was one of a number of explanations for events that were accepted by the Judge. (24/56)

**Question : presumably this “no-one” includes the Judge and LA?**

Whilst there is therefore no conclusive evidence of domestic violence found to be a feature in this case, the combined information raises concerns that it may have occurred and at the very least is highly suggestive of unhealthy power and control issues in the relationship with the potential for aggression and violence. (24/56)

**Question : if unclear at the time of the SCR presumably this was even less clear for Hogg J?**

No agency reflects on the potential impact of the repeated parental injuries (several reported to be linked to alcohol and assaults) on the parenting of the children and the possibility of them suffering neglect as a consequence.

**Question : If this had been considered perhaps threshold would have been pleaded/ run differently?**

Interestingly it is noted in the Legal IMR that Mr F’s legal team could also be very demanding and their e-mails and phone calls were perceived by the Local Authority lawyers as bullying and harassing in nature. Witnesses in court have also reported on the adverse tone of questioning and were left feeling dealt with in an unprofessional manner. (26/56)

**This is subjective – would be interesting to see the views of others about this. Unlikely due to LPP / confidentiality etc.**

After careful consideration I believe that [Hogg J’s] finding of fact (or non-finding), based on the balance of probabilities, was not unreasonable. It was almost entirely based on the experts’ medical evidence which was weighed at length and in great detail, and some believe that the other information about the parents’ suitability to care for their children was not so thoroughly considered or else that the parents’ explanations were too readily accepted.

However the Judge articulated that she wished to go further than the fact finding and her direction of a letter regarding Mr F’s exoneration goes much further in stating that he “had never caused harm to his child, in fact there was an innocent explanation for his child’s suspected injuries”. [32/56]

In another recently published SCR6 (the only one I have found with similar characteristics, where a finding of fact asserted a parent’s “innocence” of causing an injury and the child was subsequently killed by the same parent), there is a reflection that the court outcome undermined professional judgement. Whilst in both cases this does not appear to have prevented professionals from exercising “respectful uncertainty” in their approach with parents, they felt as though there was nowhere to go with their concerns.

The Derby SCR went so far as to suggest that a “Lesson Learnt” should be *“Professionals should treat court decisions for what they are; a legal finding not a manifestation of truth”. [33/56]*

After the outcome of the court hearing in July 2012, the judgement was interpreted as sending out a signal for agencies to “back off”  [34/56]

**Question : WHY?**

Q d) Why was the Judge so ready to accept the parents’ explanations, and to believe, once exonerated, that they would change?

 it is difficult to respond to this question in the absence of any analysis that would have come to the SCR if there had been involvement from the Judiciary or Courts’ Service via an IMR or attendance at the SCR Panel [35/56]

Q e) Why was no multi-agency meeting held either in July or September 2012 after the conclusion of the Court Case? This could have helped in understanding and communicating the legal ramifications of the judgement and the implications for practice.

Reasons may be:

* shock? One professional described this event as “*losing the unloseable case”* and others disagreed with the outcome and may have maintained the narrative that Mr F was responsible for the injuries to Child D and the Judge had “*got it wrong”*
* there was no set framework for such a meeting (in the same way that exists for example for Strategy Meetings or Child Protection Conferences)
* Children’s Social Care felt they had been excluded from or marginalised in managing the case and that it was for S4C to take the lead role  **7.4.5.** To conclude, the High Court judgement had a profound impact on this case in the messages it gave both to the family and to professionals. It is not possible to assess the extent to which individual professionals did or did not feel disempowered, and many continued to work determinedly with the family. However it certainly appears to have made securing the parents’ cooperation even more difficult, and there were serious consequences from the Judgement (or at least from its interpretation), even if they were unintended. [35/56]

**NB This seems to be a critical issue – a meeting could have dealt with the misapprehensions about the significance of the exoneration??**

The position of the Courts, specifically the Judiciary, in respect of SCRs should be clarified. In this case the request for an IMR was declined; no other form of report, other than a copy of the **Judgement**, was provided and there was no representation from the Courts Service (HMCTS) on the SCR Panel. Given the significance of Court judgements in this case, this lack of engagement raises questions that require serious consideration at a national level. The findings of this SCR should be brought to the attention of the President of the Family Division and the Family Justice Council. They should be asked to respond and to clarify the responsibility of the courts to LSCBs in respect of Serious Case Reviews. [38-9/56] (note singular “judgment”)

The Judge…pronounced with perhaps undue certainty that the parents’ previous patterns of behaviour would change…*“Now they have been unburdened from the shadow of findings against them” “They are going to change”.* Sadly this did not turn out to be the case. [39/56]

**Question : can any of us say with confidence we would have done better?**

**EXTRACT FROM SCR PRESS RELEASE BY SUTTON SAFEGUARDING CHILDREN BOARD (SSCB) (21 JUNE 16)**

“Issued on day of the verdict…Highlights of the report include…

Sutton Council strongly contested the Family Court’s subsequent decision to have Ellie and her younger sibling placed in her parents’ care. The Judge appointed an independent social work agency called Services for Children to assess and oversee the children moving to their parents’ care. Services for Children were accountable to the Family Court.

…This was an exceptionally unusual case because of factors which include the following:

* The extreme level of avoidance, deception and resistance from the parents, who were often evasive, contradictory and aggressive and who regularly resorted to complaints and threats.
* The use of an independent social work agency in the assessment and the management of the reunification of the children with their parents, and the exclusion of the Local Authority (Sutton Council) from this role.

**…**Christine Davies CBE, Independent Chair of the Sutton Safeguarding Children Board, said:

The serious case review concluded that the Family Court’s decision to exonerate Ben Butler of harming Ellie in 2007, combined with its subsequent order for agencies to be sent a letter to that effect, had a very significant impact on how agencies could protect his children from that point in time onwards.

Ben Butler’s exoneration and the Judge’s statement about him being a victim of a miscarriage of justice had the effect of handing all the power to the parents. This coupled with the assessment made by Services for Children to support Ellie and her sibling to be cared for by their parents were critical factors.

It was not possible for the serious case review to gain greater insight into the decisions of the Family Court, as the Judiciary did not provide an independent management review of its involvement. Similarly, although Services for Children contributed to the serious case review, they were unable to produce an independent management review in line with statutory guidance.’

…Christine Davies CBE, Independent Chair of the Sutton Safeguarding Children Board, and Marion Davis CBE, independent author of the serious case review, are available for interview by appointment.”

**See Recommendations at p 48 onwards esp legal, children social care and CAFCASS**

**EXTRACT FROM CHILD D ­ SUTTON LSCB STATEMENT (CHRISTINE DAVIS IND. CHAIR SUTTON LSCB) (21 June 16)**

“…*Sutton Council strongly contested the decision made by the Family Court to have Ellie and her sibling placed with their parents*. The SCR found that neither Sutton Council social workers nor staff from other LSCB agencies could have done anything more to save Ellie’s life. *Sutton Council fought to keep Ellie in care and away from her parents but this was ultimately dismissed by the Family Court. [my emphasis]*

**EXTRACT FROM SUTTON BC PRESS RELEASE (23 JUNE 16):**

“It is even more difficult to take given our social workers worked tirelessly to protect Ellie and keep her out of the custody of her father…*The serious case review has outlined how the Family Court decision in 2012 sidelined the council despite our serious concerns about Ellie being put in Ben Butler’s care.*” (my emphasis)

**EXTRACT FROM GUARDIAN ARTICLE : ELLIE BUTLER JUDGE 'TOOK UNWARRANTED STEPS' TO REUNITE HER WITH VIOLENT PARENTS (22 JUN 16)**

“She [Hogg] gave *permission* for a letter exonerating Ben Butler of causing any harm to Ellie to be circulated to all agencies and said he was victim of a miscarriage of justice,” said Davis.

“This is the most extraordinary element of the whole case. To say it’s surprising is an understatement, it’s an extraordinary step to take. Once that court judgment from Mrs Justice Hogg was in place there was virtually nothing that could be done to affect the outcome for Ellie.”

**NB The SCR says the letter was “required” or “ordered” not “permitted” to be sent by Hogg J. Q : What is extraordinary about sending a letter telling professionals of findings?**

**EXTRACT FROM BBC ARTICLE ELLIE BUTLER: GRANDDAD OF MURDERED GIRL DISOWNS 'AGGRESSIVE' DAUGHTER (22 JUN 16):**

“He said he and his wife "fought tooth and nail" to keep Ellie but were seen as "troublemakers"…

Mr Gray has called for a public inquiry into the case, adding: "Everybody failed Ellie completely and utterly."

…"We tried to fight it tooth and nail but every time we protested we were told we were troublemakers and we were elderly people and we weren't worthy of looking after children," Mr Gray said.

"I said I hope you all have a conscience because one day you might have blood on your hands."”

**EXTRACT FROM : SCHEMING FATHER PLAYED THE VICTIM ON TV CLAIMING THERE HAD BEEN A MISCARRIAGE OF JUSTICE AS HE LAUNCHED A CAMPAIGN TO WIN BACK HIS DAUGHTER - MONTHS LATER HE BATTERED HER TO DEATH (21 JUN 16) :**

“…The stay-at-home father then went on prime time television and protested his innocence, bemoaning his treatment by the justice system and claiming Ellie should be returned to him and his partner Jennie Gray…

In a blaze of publicity - *which included a series of newspaper interviews* - he insisted Ellie had been cruelly prised from their family home by social services and that prosecutors had 'wasted' public money pursuing him…

Butler also threatened to sue the Metropolitan police for wrongful arrest, claiming: 'If it can happen to me, it can happen to anyone.'..

His campaign led to a judge allowing Ellie to be returned to the couple's care. The judge even called it a 'joy' to see them reunited and praised the pair's 'tenacity and courage'.” [my emphasis]

**EXTRACT FROM CHILDREN’S COMMISSIONER PRESS RELEASE 21 JUNE 16 :**

“This was a deeply tragic and troubling sequence of events in which this little girl deserved much better. I’m concerned that all the circumstances in this family…may not have been fully considered when custody was awarded, despite custody being objected to by local children’s services, the police and Ellie’s grandparents.

“There remain a number of unanswered questions regarding this judgment. The role of the judiciary and their involvement in providing information to serious case reviews needs to be looked at as part of ongoing reform.”

**EXTRACT FROM CHILDREN’S COMMISSIONER PRESS RELEASE : VOICE OF CHILDREN LIKE ELLIE BUTLER MUST BE HEARD (28 JUN 16) :**

“Many, including myself, have asked how a six-year-old child, seemingly happily living with her grandparents, could be returned to a father with a long history of convictions for violence  –  despite objections from police, social services and the maternal grandparents.

… The process under which this happened, and the way in which this case was handled, is troubling – particularly given the father’s history of violence and aggression and the evasion of engagement with local agencies by both parents. All of these should have been considered and given weight in the decision to award custody.

We need to look at new ways in which legal judgements that may have contributed to a child being killed can be scrutinised and lessons can be learnt. Any reform of the court or review process will, of course, have to consider the need for judicial independence…”

**EXTRACT FROM DAILY MAIL (HOW DID I HAVE A DAUGHTER SO EVIL…) (16 AUG 16) :**

By then, Neal and Linda’s savings had run out. They could no longer afford solicitors and Mrs Justice Hogg would not allow Neal to represent himself. However, on the final day of the hearing, on October 12, Neal’s barrister offered to represent him for free.

‘They put me in the witness box and their [Butler and Jennie’s] QC said: “You don’t like your daughter and Mr Butler, do you?”

‘I said: “I hate them both for what they did to my granddaughter when she was a shaken baby.”

‘Justice Hogg intervened: “Well, Mr Gray, they’ve been exonerated. It was a miscarriage of justice. We’re sending Ellie back on November 9. Have you got anything to say?’

‘I said: “Yes, Justice Hogg.” I pointed my finger at her, looked her in the eye and said: “I hope you and all the professionals in this room have a conscience because one day you may have blood on your hands with regards to my granddaughter Ellie.” And, of course, it’s come true.’

For three months, the private social workers kept an eye on the Butler family, but in March 2013 the case was signed off and all support was removed. In addition was an order from Justice Hogg exonerating Butler and Jennie of any blame for Ellie’s injuries.

Crucially, this gave Butler permission to serve a copy of the order on any children’s department, local education authority or school, NHS trust or the police. In short, Butler had immunity to act with Ellie as he wished.

**EXTRACT FROM : HIGH COURT REFUSES TO PUBLISH BEN BUTLER JUDGMENT FROM 2014 (5 JULY 16)**

At a time when the family courts are under pressure to open up, her ruling could be seen as yet another barrier to reporting family court proceedings when they are linked to criminal court trials.

Pauffley was responding to an application by the Guardian and six other media organisations for access to a full judgment, handed down privately in the high court in June 2014 by Mrs Justice King.

The media was obliged to seek permission in the court because of reporting restrictions laid down in 2014 by King, who had held a review of the facts of the case following the death of Ellie months before.

Following an earlier application by the media, a separate high court judge granted permission to report one paragraph from the judgment after the verdicts.

That paragraph read: “I am satisfied so that I am sure that Ellie died as a result of the father either hitting her on the back of her head with the leg of the child’s table or swinging her with such violence that her head came so forcefully into contact with a table leg, that the leg broke and she sustained the skull fracture from which she died.”

**EXTRACT FROM : MEDIA APPEAL OVER ELLIE BUTLER JUDGMENT BAN (SOCIETY OF EDITORS) (5 JULY 16):**

Lady Justice King, as she now is, decided that as she now sits in the Court of Appeal it should be for another judge of the Family Division to decide whether her 2014 judgment could be now published.

The judge said her decision could not be reported while criminal proceedings were on-going - in case jurors were influenced - and her full ruling remains undisclosed.

The case has generated massive media coverage because of the way it was handled in the Family Division of the High Court.

Ellie and her younger sibling were handed back to Butler and Gray following a bitter custody battle in which Mrs Justice Hogg sided with the parents despite objections from Ellie's grandfather, Neil Gray, who had warned her that she would have "blood on your hands".

A serious case review published in the wake of Butler's conviction blamed Mrs Justice Hogg for having handed "all the power" to Butler when she decided he was the victim of a miscarriage of justice over the 2007 case in which he was found guilty of having injured Ellie by shaking her violently but the conviction was then overturned on appeal.

Ms Davis later said she would be writing to the President of the Family Division of the High Court and the Family Justice Council to ask for answers over the case as a "concern of national interest".

Mrs Justice Hogg, who retired shortly before the start of Butler's trial, has refused to comment on or contribute to the review, in line with a judges' convention.

But Anne Longfield, children's commissioner for England, has called for a reform of how the judiciary provided information to reviews in light of "unanswered questions".

**FROM A REPORT OF THE VALEDICTORY FOR HOGG J ON 23 MARCH 2016 BY PHILIP CAYFORD QC IN THE SPRING 2016 ISSUE OF FAMILY AFFAIRS :**

“About her future plans, she had said this:

*“I have my own plans which do not include being a lawyer. I am taking a gap year for the first time in my life and then will decide what, if anything, I will do. I have given away all my law books to the Law School of the University of Westminster, the only university to which I have an attachment and of which I am fond. I have decided not to mediate or consult or to return to sit as a Deputy, unless there is a catastrophic attack of flu”.*

At the time writing there has not been a catastrophic attack of flu, albeit that the tragic case of Ellie Butler has highlighted the enormous gravity of the decisions that Family Division judges often have to take. Dame Mary, and counsel in the case, would have much to say about the recent press reporting in that case, were they to say anything at all. Which they will not.”

**WHAT CAN WE MAKE OF ALL THIS?**

**EXTRACT FROM INVISIBLE GORILLAS & CHILD PROTECTION (LYN DAVIS) FAMILY LAW JUNE [2012] FAM LAW 686.**

“When things go wrong in child protection, we hold a Serious Case Review, accompanied in some cases by usually unhelpful media hyperbole. With 20:20 hindsight, the gorilla is no longer invisible and the continuity errors are in full view. But because most of us are unaware of the gorilla phenomenon, mistakes appear blatant and our reaction is often to ask ‘how could they possibly have missed that?' and to condemn those involved as incompetent or unprofessional.”

**So far, attention / criticism has focused on Hogg J’s failure to spot the gorilla in the room…**

**Questions about this case :**

* **Did the LA put all its eggs in one basket (physical harm to E)?**
* **How vigorously did it pursue the broader threshold?**
* **Why did it not continue to seek broader findings i.e. pursue the rest of its threshold?**
* **It appears DV / violence by F was never in the threshold at all in 2012 – why not? (magnetic effect of unexplained injury?)**
* **What should we make of the apparent inaccuracies and inconsistencies?**
* **How did the exoneration letter really come about?**

**The judge’s “disregard” of other issues e.g. domestic and other violence**

The judge remained concerned after the exoneration about other aspects of the parents behaviour. She reserved her position on threshold. She did not discount the other issues – but it is apparent that there was not sufficient evidence of threshold risk before her in Sept / Oct 12 as all parties conceded. Why not? Ask the LA.

**Apparent inaccuracies and inconsistencies :**

**The Grandparents position**

MGF subsequently says he warns of “blood on hands”, apparently on last day of July 2012 hearing. Hogg J does not record MGF’s evidence and in Oct 2012 she records the MGPs eventual consent. This must have been forthcoming by Sept hearing as it is the basis for the reinstruction of S4C to consider Ellie (previous report related to sibling).

If the GPs dropped the case under duress / financial pressure – this is not recorded in Hogg’s judgment.

GF’s assertion that Hogg J told him he could not represent himself seems unlikely to be accurate.

**LA’s position**

LA widely reported as resisting the return of Ellie throughout (including the SCR). This is plainly inaccurate. They considered (but ruled out) appealing the findings on the injury, and subsequently capitulated on the balance of threshold - in light of S4C report? They could have challenged the report. Whatever the view of social workers, they appear to have instructed their legal team to take a position of not resisting the return of the children by autumn 2012. In 2014 the threshold appears to have been more fully explored notwithstanding the magnetic factor of the death of Ellie?

**The role of S4C**

The Judgement does not say the LA are to be excluded from their statutory CP role. She simply says that an assessment by the LA would be doomed to failure. We might be able to get a better grip on this and on the quality / impact of the S4C work if we could see their reports (redacted)?

**The letter to professionals**

Is not an accurate transposition of the judgment – it is broader. Where does this imprecision creep in? Why wasn’t there a debrief?

**Some observations**

* Did the SCR REALLY only see Hogg J’s first judgment? (Hogg 2 or King J?? Orders etc?
* The minute that the parents are convicted the organisations and individuals involved begin perpetuating these inaccuracies. Hogg J has retired and cannot respond. The 2012 judgments have STILL not been re-published in redacted form – even though the King J judgment has been.
* Public debate continues to be hampered by the absence of the 2012 judgments in the public domain (which the press and interested parties elect not to report accurately), the S4C reports, and better information about the activities of legal professionals in the case.
* The Judicial Press Office do not even issue a statement about the constitutional reasons why Hogg J has not participated in the SCR, or assist with proper understanding of the matter by preparing a redacted version of the 2012 judgments. They do not have facilities in place to enable legal bloggers to understand the terms of reporting restrictions.
* Legal Professional Privilege and the need to maintain the independence of the judiciary will always be barriers to participation in SCRs and to transparency. Is there a way of us better understanding the behaviours and decision making of the various legal teams?
* There is a precedent for the Judiciary issuing press comment, and (exceptionally) for undertaking a review of its own work, and for the FJC to participate in review of systemic failures. The release of the S4C reports would be exceptional but is critical to placing Hogg J’s decision in proper context. It is apparent from the second 2012 judgment that it is the document that changed both the Judge’s and the LA’s position, and no doubt informed the grandparents own position.
* Could the senior judiciary have done more in this case to have helped us to talk more sensibly about Ellie Butler’s death? (proactive republication of redacted 2012 judgments, S4C report, redacted King J judgment?)
* Should there be a review of this case by a member of the senior judiciary along the lines of the Wall review in 2006?

**Lucy Reed
2 October 2016**

**A copy of this document will be placed on The Transparency Project website (**[**www.transparencyproject.org.uk)**](http://www.transparencyproject.org.uk))

**APPENDIX - AN ANALAGOUS SCENARIO?**

**Select Cttee on Constitutional Affairs, Minutes of Evidence, Examination of Witnesses (Questions 40-55)** 9 NOVEMBER 2004 : RT HON DAME ELIZABETH BUTLER-SLOSS DBE, RT HON LORD JUSTICE WALL AND HON MR JUSTICE MUNBY (questioned about 29 Homicides – view expressed that value of anecdotal evidence limited and not consistent with the witnesses’ own experience – leads directly to a discussion about transparency to aid understanding of what really happens) <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/116/4110904.htm>

**A Report To The President Of The Family Division On The Publication By The Women’s Aid Federation Of England Entitled Twenty-Nine Child Homicides: Lessons Still To Be Learnt On Domestic Violence And Child Protection With Particular Reference To The Five Cases In Which There Was Judicial Involvement** (March 06) [www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/report\_childhomicides.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/report_childhomicides.pdf)

When … I gave evidence to the Constitutional Affairs Select Committee in 2004, we were asked about Twenty-Nine Homicides. I expressed some scepticism about its conclusions and its methodology, particularly the implication that judges were indifferent to the safety of children when making contact orders. I also expressed the view that it would be very helpful if the cases in which it was alleged that an order for contact had led to a child’s death or serious injury were investigated by a senior judge.

…Having discussed the matter with officials from the Department of Constitutional Affairs (DCA), Dame Elizabeth [Butler-Sloss] and I agreed, that in view both of the importance of the subject and the Select Committee’s proper concern about it, I should examine all the available court files in all the cases identified by WAFE in which there had been court involvement. I would then report – either to her or, as was more likely, to her successor. …

Although this is a report which is written for you, it is, I recognise, likely that you may wish to give it a wider circulation.

…Finally by way of introduction may I say that, whilst I by no means agree with everything in it, I welcome WAFE’s initiative in publishing 29 Child Homicides. However painful they are, practitioners in the Family Justice System need regular reminders of the evils of domestic violence. The document provides one such reminder.

(Led to PD on consent orders PD12J and enhanced judicial training on DV)

**Report to the President of the Family Division on the approach to be adopted by the Court when asked to make a contact order by consent, where domestic violence has been an issue in the case. (undated but follows Wall’s report so ?2006?)** <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Reportoncontact.pdf>

..‘Working Together to Safeguard Children’ (HM Government 2006) establishes a process whereby all child deaths arising from maltreatment will be the subject of a serious case review, irrespective of whether the Local Authority Children's Social Care Department is, or has been, involved with the family (Section 8.5). In addition, a new process for reviewing all domestic violence homicides is to be implemented (Domestic Violence, Crime and Victims Act 2004 s9). The extent of the involvement of the family justice system, and the impact of any outcomes from the court proceedings, should form part of these reviews.

…The two systems outlined above should … help the courts and others in the Family Justice System to learn lessons from tragedies where children are seriously harmed by parents or carers after the intervention of the courts. We recommend that HMCS should explore with the DfES how the family court process should be included within Serious Case or Domestic Violence Homicide Reviews.

…The Council’s recommendations should not be taken to apply only to physical violence, but also to other forms of abusive behaviour between parents, and by parents to children, which undermine the child’s physical and mental health. Safeguarding children is ‘everybody’s business’, - the courts, CAFCASS officers, solicitors and counsel.

**Extract from article Opinion split on need for magistrates and judges to be involved in serious case review process (27 April 2009)** <http://www.communitycare.co.uk/2009/04/27/opinion-split-on-need-for-magistrates-and-judges-to-be-involved-in-serious-case-review-process/>

…Opinion in the sector is divided as to whether crucial legal decisions about children’s lives should remain outside the serious case review process, and whether the appeal system provides adequate accountability while also maintaining magistrates’ and judges’ independence…Domestic violence charity Women’s Aid says that more needs to be done to make family court professionals more accountable. In 2004, it published a report [the Homicides report]…The report called for mechanisms for holding family court professionals to account in cases where children are killed or seriously harmed and, if found to be responsible, to ban them from practising. It also called for family court professionals to be required to take part in serious case reviews whenever relevant.

[NB In this article Anthony Douglas (CAFCASS) argues for judicial independence and the continuing non-participation of the judiciary in SCRs.]