Journey to Justice Conference

Domestic Violence and Abuse

How can our policing and justice systems help?

Belfast City Hall
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His Honour Judge Burgess, Recorder of Belfast,
Presiding County Court Judge

Changing response to domestic violence

Thank you for inviting me to speak at today's conference. I must make clear at the outset that any opinion expressed today by me is a personal one. I hope that you will forgive me for having to leave so abruptly. I should have liked to stay to hear what I know will be absorbing presentations on one of the most important issues that concern the justice system and indeed our entire community.

Domestic violence is not a new problem in Northern Ireland. It has been, I am sorry to say, endemic in our society for a very long time. What is changing, though, is our approach to it. The Northern Ireland Women's Aid Federation has been in existence since1978. Personal protection and exclusion orders (as they used to be called) have been available since 1980. It is eighteen years since Monica McWilliams and Joan McKiernan's ground-breaking study *Bringing It Out in the Open: Domestic Violence in Northern Ireland* (1993) and fifteen years since the influential follow-up report *Taking Domestic Violence Seriously: Issues for the Civil and Criminal Justice System* (1996, with Lynda Spence). The framework for protection orders was updated in the Family Homes and Domestic Violence (NI) Order 1998. The work of the Northern Ireland Regional Forum on Domestic Violence in the 1990s has been succeeded by cross-Departmental and multi-agency work under the "Tackling Violence at Home" strategy (2005). The range of agencies and professions who have provided speakers today to describe the innovative and imaginative work which is being undertaken to rid our society of this scourge is testament to the extent to which we have grasped the nettle. And yet, domestic violence levels remain high.

Continued prevalence of domestic violence

The police record 24,482 incidents of domestic violence between April 2009 and March 2010, resulting in 9,903 crimes, of which 4, 228 were detected. In April 2009, the Minister for Health reported that in Northern Ireland 11,000 children are living with domestic violence on a daily basis. Every year, six people – mostly women - are killed and over 700 families have to be re-housed as a result of violence in the home. The cost to society of domestic violence is a staggering £180million.

We in the judiciary see domestic violence cases in the courts almost every day. I might describe it as shockingly routine. We regularly see offences involving domestic violence prosecuted in the criminal courts. In the family courts we see households where violence has led to family breakdown and to disputes about contact with children, or even to applications by the public authorities for children to be taken into care. The civil courts also provide non-molestation and occupation orders for spouses, partners and other family members.

I do not need to tell this audience that domestic violence is not limited to physical abuse, but can involve mental, emotional, sexual, financial and social abuse of intimate partners or family members. While the great majority of perpetrators are male partners of female victims, we also see female perpetrators, abuse in same-sex relationships, and inter-generational violence, including both domestic abuse by young adults and abuse of the frail elderly. It is not a problem which is limited to one class or group in society, and it is, tragically, as prevalent among younger people as among the older generation. I have not yet heard anyone say that the figure quoted by McWilliams and McKiernan has started to go down. More than one in four women in Northern Ireland still suffers domestic abuse at some point in their life.

I am sorry that today I cannot join the policy debate about what we should do to tackle domestic violence. Judges cannot comment on policy issues as they are for the elected institutions of government to deal with. But we do play our part in helping to drive forward the response to the problem, and I would like to talk today about some of the ways in which the courts do this.

Sentencing and domestic violence

Perhaps one of the areas in which the media most frequently report the court response to domestic violence is that of sentencing. There is a perception that in the past the fact that violence occurred within a family setting was treated as an offence which was somehow less serious. Whatever may have been the position in the past, the courts in Northern Ireland today are very clear that domestic violence is abhorrent and must attract condign punishment. Speaking at the Belfast and Lisburn Womens' Aid conference in 2004, the then-Lord Chief Justice, Sir Brian Kerr said:

> Often it is only in the context of court proceedings that public expression can be given to the abhorrence of society to this species of despicable crime. It used to be the case that lawyers would seek to diminish the culpability of their client by suggesting that it was 'only a domestic incident'. Such a suggestion would be given short shrift by our courts today. Violence in any form is an aberration, but to be assaulted or intimidated in one's own home, where we should feel most safe, by someone close to us, with whom we should be most secure, represents an appalling breach of trust and warrants the gravest and most condign punishment. Therefore, so far from being a mitigating feature, the fact that violence occurs in the home should be recognised as a substantial aggravating factor and I can assure you that all members of the Northern Ireland judiciary are aware of this and will not shirk from carrying out their responsibilities to reflect it in line with the law and proper practice."

Sentencing decisions are among the most complex and sensitive decisions that the judiciary have to take. It may be worth setting out in a little detail the factors that we take into account. Criminal trials are prosecuted by the State and represent the community's condemnation of certain types of behaviour. The penalties imposed have three functions. The first is retribution, the second is reparation and the third is rehabilitation. In arriving at an appropriate sentence, the judge has the benefit of hearing from both the prosecution and defence legal representatives. He or she also has a pre-sentence report on the offender's background, attitude and likelihood of re-offending, from the Probation Service. There will often be a Victim Impact Report, and the judge may also have access to medical or psychiatric reports on offender or victim, details of the offender's criminal record, and perhaps a community impact report or references and letters from members of the community about the offender's good character. Using this information, the judge will tailor a sentence within the maximum (and sometimes minimum) penalties set by Parliament or the Assembly, and will be able to draw on sentencing guidelines laid down in previous cases by the Court of Appeal, as well as guidelines from the English Sentencing Council, where they are appropriate to our circumstances in Northern Ireland and guidance available in the form of the judgment of lower courts in similar situations. The objective is always to create a sentence which is just in all the circumstances of the case, and takes fully into account the offender's behaviour, the effect on the victim and the interests of the community.

An example of how these principles were worked out in real life is the very serious case of R v Robinson [2006] NICA 29. The defendant, a 28 year old man, had been in a relationship for some five years, which was marked by regular and vicious violence towards his partner, a slight young woman who the judge found lived in fear of him. Four years into the relationship, a daughter was born, to whom the defendant declared himself to be devoted. Morbid fear that he would never see his daughter again if his partner left him was the reason he ultimately put forward for a frenzied stabbing attack one year later, in which he killed his partner. There is a mandatory life sentence for murder as you know, but the question is always what the appropriate tariff should be – that is the point at which the offender will first be eligible for consideration for release on licence. The guidelines as to where the tariff for murder should be set are in a case called R v McCandless, and that case sets out the mitigating and aggravating factors which the judge must take into account. It also sets out characteristics of cases which will make it appropriate to have a higher starting point of 15-16 years or a lower starting point of 12 years. It should be remembered that the offender will serve all of this time.

Considering the guidelines in Robinson, Kerr LCJ said:

> In view of the incidence of this type of crime in our community, we consider that where domestic murder occurs as "the culmination of cruel and violent behaviour by the offender over a period of time", this will normally warrant the selection of the higher starting point. Consideration of this issue should not be confined to its significance as an aggravating feature giving rise to an increase on whatever starting point is selected."

This statement is doubly significant. First, domestic violence is not a mitigating feature, it is an aggravating feature in sentencing. Second, it is a feature which

requires the higher starting point in murder to be used. The minimum term of 20 years imprisonment was upheld in Robinson's case.

The courts in Northern Ireland can also take into account the guidance of the Sentencing Council in England and Wales (which used to be known as the Sentencing Guidelines Council). We will not do so if the guidelines proposed are not appropriate for circumstances in this jurisdiction, but the Overarching Guideline on Domestic Violence provides a sophisticated analysis of the issues particular to domestic violence across the range of offences which is well-worth considering. The Guideline sets out the principle that as a starting point, offences in a domestic context are no less serious than those committed in a non-domestic context. The history of the relationship should be taken into account as well as the particular offences which are before the court. The guideline states that serious violence will warrant a custodial sentence in the majority of cases, and may cause an offender to be categorised as "dangerous". Where, however, the custody threshold is only just crossed, a suspended sentence or a community sentence with a condition that the offender attend an accredited domestic violence programme may be a better option if the court is satisfied that there is a genuine prospect of rehabilitation. The guideline recognises that this is unlikely where there has been a pattern of abuse.

The following aggravating factors are set out:

1. *Abuse of trust and abuse of power.* The breach of a "mutual expectation of conduct that shows consideration, honesty, care and responsibility" will indicate higher culpability. This will vary, for example, between a current couple and ex-partners who have been separated for a long time.

2. *The victim is particularly vulnerable.* This criterion allows the court to take into account cultural, religious, language, financial, health, disability, pregnancy or other reasons which make it almost impossible for the victim to leave, and a perpetrator who has exploited these factors will warrant a higher penalty.

3. *Impact on children*. The adverse impacts of exposing children directly or indirectly to domestic violence will be an aggravating factor.

4. *Using contact arrangements with a child to instigate an offence*

5. *A proven history of violence or threats in a domestic setting.* This factor recognises the cumulative effects of a series of incidents over a prolonged period.

6. *A history of disobedience to court orders*. This can cause significant harm or anxiety to the victim, and whether a breach of civil orders, of bail or of a previous criminal sentence, will aggravate the offence.

The victim is forced to leave home.

The Guideline also sets out two mitigating factors which provide a reminder of some of the complexities to which this area of law gives rise:

1. *Positive good character* – will be taken into account, but the guidline recognises that the ability of some perpetrators to have two personae is a factor that can allow domestic violence to continue unnoticed.

2. *Provocation* – the guideline recognises that this is a frequent assertion by perpetrators, and counsels great caution. It limits provocation as a mitigating factor to rare situations, such as the violent offence being a response to actual or anticipated violence and psychological bullying, more especially if it has taken place over a significant period.

Finally, the Guideline tackles the thorny question of wishes of the victim and effect of the sentence. It is adamant as to the undesirability of a victim feeling a responsibility for the sentence imposed, or having pressure put on her to plead for clemency. It recognises, though, that there may be circumstances where it is right for the court to take into account a victim's freely expressed wishes, where the court is satisfied that she is not at further risk, or the impact on children of the sentence, as weighed against the risk to them of witnessing further violence.

Many of you will be aware that the Lord Chief Justice has constituted a Sentencing Group, on which I sit, to consider areas in which sentencing guidelines are required. We have just completed a public consultation on a Priority List of areas to consider. While the finalised Priority List has not yet been published, I can confirm that domestic violence will be on it.

Bail in domestic violence cases

Before an offender has been convicted, a different set of factors come into play in deciding whether he should be remanded in custody or granted bail. Every offender is considered innocent until proven guilty, and can only be remanded in custody in one of three main circumstances. These circumstances are contained with a fourth in the European Convention on Human Rights. They are:

1. Risk that the accused will fail to surrender to custody.

2. Risk that he will interfere with witnesses or otherwise obstruct the course of justice.

3. Risk that he will commit other offences.

A fourth criterion is provided in the Convention – the protection of public order

This is an oversimplification of the law, but now is not the time for a treatise. I would recommend the Northern Ireland's Law Commission's paper now out for consultation, and on which workshops and presentations were made to a wide range of participants yesterday. At this stage it would be inappropriate to comment on the areas on which representations we believe we could respond, as we are in the process of concluding our position, but of course we will not enter into the debate on policy matters.

What I would like to focus on today is that remand in custody is only one tool to prevent domestic violence recurring. Bail can be granted on conditions, and conditions such as staying away from a certain address, or not making contact with a particular individual are common. The threat of withdrawal of bail will be enough to keep some offenders on the straight and narrow, but not all. It is very important, therefore, that the judge has as much information as possible to allow a proper assessment of the risks to be made and for those risks to be managed.

Domestic violence in the civil courts

The focus of the criminal and civil courts is quite different. The focus of the criminal process is to hold to account individuals whose conduct offends against the standards to which a civilised society expects all its members to adhere and punishing transgressors. The civil courts adjudicate disputes between individuals. The family courts, where there are children, are focussed on the best interests of the child. That is right and proper. But it requires the court to ask different questions, and to take into account different factors. We are only too aware, following the Baby P case in England, of the potential risks posed to a child by a parent who will not leave a violent partner. But where, for example, a perpetrator wishes to try to break the cycle of violence, and seems to have some chance of succeeding, and a child may suffer if the father loses his freedom, what are the best interests of that his child? The criminal court will take that into account, if at all, as only one factor among many. The family court, together where appropriate with social services, will try to work to assess the risks to the children and to bring together a package of court orders and support which will give them the best chance of an ongoing relationship with both parents, whether together or apart. That is a very different exercise.

Conclusions

One might say with some justification that every domestic violence case which comes to court represents a failure of our society as a whole; families, communities, education system, healthcare system and social support systems, to eradicate this curse at its root. An integrated, multi-agency approach will, as Northern Ireland's does, focus on the early warnings, on sources of help long before domestic violence comes to court. But when matters have escalated and come to court, the courts are committed to treating domestic violence seriously and to bringing all the tools at our disposal to bear on the issue.

Using all the tools in the judicial toolkit to respond flexibly and appropriately to domestic violence means dealing with the issue in the family courts and the criminal courts. It means ensuring that we grant effective non-molestation and occupation orders (about which Anne Caldwell will speak to you later). It means making sure that special measures to help vulnerable and intimidated witnesses are available to allow victims to give evidence where they need to. It means keeping our procedures under constant review to see if there is any aspect of what we do which is not working.

Let us not forget, across the criminal justice system, what a long way we have come in our response to domestic violence. But equally, we have no cause for complacency. The judiciary, like the other parts of the criminal justice system, have both the tools and the will to use them. But we will not have succeeded until the tools fall into disuse for want of cases.