

“O TEMPORA, O MORES”

The Honourable Mr Justice Gillen

The Daniel O’Connell Lecture*

Bishop, Lord Chief Justice, Lady Carswell, College President, my Lords, ladies and gentlemen, may I say at the outset that I address you tonight acutely conscious of the privilege that I have been afforded and of the honour that you have bestowed by inviting me to give this the sixth annual Daniel O’Connell lecture. I have a number of reasons for saying that. First because of the distinction of those who have previously given this lecture. Secondly because it is taking place in the setting of this prestigious and historic school whose alumni have contributed so handsomely to the fabric of the community of which we are all part. Thirdly however, it is because even as a schoolboy studying Irish history, O’Connell was an object of fascination for me both as a politician and as a lawyer. One of the joys of being asked to give this lecture has been that it has given me good cause to escape the drolleries of life as a High Court judge and on one or two rainy windswept afternoons to have revisited, in the cloistered surroundings of the Linenhall Library in Belfast, the life of a boyhood hero. Arguably the most influential figure in modern Irish history, a figure of true European stature, his political career has always seemed enigmatic and perplexing.

Here was a man who whilst possessed of very human frailties wore with justice and dignity the trappings of greatness. Of course as a lawyer he was by far the most formidable Irish barrister of the age. His unparalleled success in court made him a legend in his own lifetime. One historian, extolling the virtues of his performance in court said:

“Within the folk tradition O’Connell is never forced to concede victory to his own or to the people’s traditional foes in court – the oppressive magistrate, the treacherous Englishman, the perjuring peeler, the religious bigot or the grasping merchant”.

I have to say that brings back old memories of a typical day in Belfast Petty Sessions.

The more one reads of him however, the more it becomes clear that it is impossible to separate this great man from the circumstances in which he was born and the state of the country in which he passed his life. The year of Daniel O’Connell’s birth, 6th August 1775, coincided with the outbreak of the successful American revolutionary war; three years later came the first Catholic Relief Act; when he was seven Ireland achieved legislative independence; and three weeks before his fourteenth birthday the fall of the Bastille was the signal that the old regimes were not necessarily permanent. Oppressive laws and the circumstances that created them were eventually to lead to the rise of modern democracy in Ireland. Yet many, including the

* Delivered at St Malachy’s College, Belfast on 28 November 2003.

lowest, believed these iniquitous laws and inequalities were essential to preserve peace and order.

In truth, they accorded with the underlying social norms of the era. In Ireland, Parliament, the courts, and the law did little to protect the Irish Catholic peasantry, and they were treated in much the same way that the peasants throughout Europe had been viewed with contempt. Over the centuries little had changed. Peace and good order justified all. Social norms were oblivious to many of society's victims. The peasants painted by Brueghel – stooped, gnarled and snaggle-toothed – looked much the same as those of Van Gogh three hundred years later.

Without doubt the nature of the injustice and the iniquitous laws against which O'Connell railed have passed away. Time has moved on, new realities have developed hand in glove with new laws. But the lessons of O'Connell's times still serve as a cautionary reminder that basic human rights and the rule of law are fragile plants that need constant tending. Shrill voices still need to be raised. A measure of any developed society is how it protects its weakest and most passive members. No less than in O'Connell's Ireland we must pause from time to time to reflect on whether our democracy and the rule of law meets that exacting standard in a time of shifting social morals and emerging human rights. Hence I have borrowed from Cicero the title of my address this evening "*O Tempora, O Mores*".

It is a widely held view that the central protection of the citizen today and the cornerstone of orthodox Westminster constitutional theory, is that Parliament is sovereign. The franchise has now been extended to everyone irrespective of gender, class, creed or religion over the age of eighteen years subject to some exceptions. Notionally therefore in a liberal democracy every voter has the right to make an input to all of our laws and they are the product of careful scrutiny by a widely elected truly representative deliberative body.

"The jurisprudential paradigm of our constitution, confirmed by the political settlement of 1688 and accepted as valid by officials and citizens today, is that Parliament has substantially unlimited legislative powers and no person or body can dispute the legal validity of its enactments. This rule is the foundation of legal reasoning and enables identification of laws without moral reasoning. Within this paradigm it is illegitimate for judges to use principles of political morality to undermine the authority of Parliament."¹

Like everyone else judges therefore must be obedient to the will of Parliament as expressed in its enactments. Again and again the courts at the highest level have emphasised this. Lord Scarman said in 1980²:

"The judge's duty is to interpret and apply the law, not to change it to meet the judge's idea of what justice requires – if the result be unjust but inevitable the judge may say so, and invite Parliament to reconsider its provisions. But he must not

¹ "Judicial Supremacy and the Rule of Law" Richard Elkins [2003] 119 *LQR* January.

² *Duport Steels Limited v Sirs* [1980]. 1 All E.R. 529.

deny the statute. Unpalatable statute law may not be disregarded or rejected merely because it is unpalatable . . . For if the people in Parliament come to think that the judicial power is to be confined by nothing other than the judge’s sense of what is right . . . confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application.”

Parliament is thus the place of debate where the social norms that inform the political process have to be discussed and distilled into approved laws. The oath that I took as a judge was to act without fear or favour, affection or ill-will but in doing so I would do “right . . . after the laws and usages of the realm.”

However the fact of the matter is that, until recently, Parliament was free to restrict any of our liberties and deny our rights for any reason it saw fit and indeed often did so provided that it clearly authorised the restriction by law. Our liberties were negative freedoms existing as Hobbes said “in the silence of the law” and guaranteed only unless Parliament decided otherwise. The common law has no tool with which to consider infringements of liberty where clear and unambiguous legislation interferes with it. In such a case we are reliant on the Government to protect our freedoms but the question arises as to whether even liberal democratic governments can always be trusted to do so. Is it realistic to expect Parliament and the politicians therein to have the capacity or the will to protect silent, weak or unpopular minorities and risk the wrath of the tabloids and perhaps the chances of re-election? Children whose voices are not heard, women who remain silent, men who do not conform are but a few of the groups in our society who tend to be overlooked or even brushed aside, in the onward rush of benevolent democracy. A famous US judge once declared:

“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest danger to liberty lurks in insidious encroachment by men of zeal, well-meaning but without understanding.”³

The dangers dwell in times where as Yeats described it, “the best lack conviction whilst the worst are full of passionate intensity”. The French philosopher Diderot said “the public does not always know how to desire the truth”.

These criticisms of the limitation of negative liberties were well rehearsed in the literature leading up to the introduction of the Human Rights Act. The Government recognised in the United Kingdom context that the common law alone could not meet the demands of the modern age and in particular the demands of the international obligations in Europe. The UK was on a number of occasions found wanting by the European Court of Human Rights and our own courts had no power to make comparable findings.

³ *Olmstead v United States* 48 S Ct 564.

Accordingly the introduction of the Human Rights Act 1998 brought about significant change. A member of the public can now for the first time go before the courts to secure a remedy based on a human right and judges have the power to declare legislation incompatible with the European Convention on Human Rights. It has therefore heralded a highly significant development in the role of the courts which can now change from enforcing public duties to protecting public rights.

However although the Human Rights Act has considerably strengthened the protection of the individual from State interference with specified rights and interests, the Act does not defend liberty itself.⁴ Whilst human rights techniques are a useful tool in protecting particular rights or freedoms, they are of little use in challenging restrictions and liberty which do not engage those specific protected rights under the Convention or where those whose rights have been taken away have not been heard or are ignored.

Two years ago the serried ranks of parliamentary democracy, the rule of law and the European Convention on Human Rights seemed to have rather little to offer Victoria Climbié, the little eight year old girl who had died at the hands of her parents after years of unspeakable neglect and abuse by them and persistent, scarcely comprehensible, professional failure to heed her plight.

I recently spent an uncomfortable part of a weekend reading the report of the inquiry into her death by Lord Laming from cover to cover. The horror of what happened to this child was captured by counsel in the inquiry Neil Graham QC who related:

“The food would be cold and would be given to her in a piece of plastic while she was tied up in the bath. She would eat it like a dog, pushing her face to the plate. Except of course that a dog is not usually tied up in a plastic bag of excrement. To say that Kouao and Manning treated Victoria like a dog would be wholly unfair; she was treated worse than a dog.”

This child was not hidden away but, along the way to her eventual death, was known to no less than two housing authorities, four social services departments, two child protection teams of the Metropolitan Police Services, a specialist centre managed by the NSPCC and she was admitted to two different hospitals because of suspected deliberate harm. She had 128 injuries. It is a sobering thought to recall that there have apparently been seventy previous public inquiries into severe child abuse in Britain since 1945 and still the same refrains emerge.

Virtually every day in the family court in which I sit, I witness children who, to the objective observer, might seem to be without rights. Born into a life of relentless misery, forgotten in care, robbed of their childhood and exposed to acts of pitiless cruelty where mothers and fathers, themselves often the helpless victims of a similar past, drift in and out of their children's existence as their own lives ebb and flow. Social services, particularly child care services, who are undermanned, under-trained, and under-resourced strive to

⁴ “A Right to Freedom?” John Wadham and Rachel Taylor (2003) *EHRLR*, 473.

perform a Herculean task to save these children whilst society seems oblivious to their plight or to their rights.

When democracies are stirred, governments, under pressure to take decisive and rapid action from the vociferous majority, invariably rapidly respond with measures that may limit even fundamental and cherished freedoms of individuals or groups in order to quell the national hysteria. Following September 11 2001 we have seen in the United Kingdom the introduction of draconian legislation, namely the Anti-Terrorism Act, authorising the detention of terrorist suspects for indefinite periods without charge. The USA detains without charge or prospect of trial well over six hundred people from forty two different nationalities in Guantanamo Bay. Withholding the benefits of the Geneva Convention, their cases will be heard before a military commission at some unspecified time in the future where they will not have free access to lawyers of choice, a right of appeal to an independent civilian court or a full knowledge of the charges against them. I emphasise that I make no judgment on whether these steps are justified under international law. A nation under threat must protect itself. I merely set the scene and invite the narrative. I use it simply to inform the debate as to whether typically parliamentary democracy is often selective about those it chooses to defend and those it chooses to abandon, about those whose rights are promoted and those whose rights are denied.

The key to that choice often lies in the dark recesses of our society. Formal laws no doubt are standard setting norms, regulatory and/or sanctioning in nature. However if there also exists, as I believe there does in our society, an “operative” parallel set of social norms, that are in some instances a more potent force, and which have legitimacy and validity in the eyes of at least a large proportion of the community, usually the strong and the powerful, then that can become the driving force behind a culture that serves to undermine the rule of law, determines selectively those who shall benefit from the law, and flaws a just society. It is the Joycean question of how far you can walk away from something culturally imprinted on us so deeply.

Recently I had the privilege to be part of a judicial delegation to Pakistan. Whilst there I became friendly with a High Court judge from Islamabad and late one evening we discussed in some detail the issue of forced marriage in Muslim countries. He had recently presided over a trial where a man had been convicted of the murder of his daughter, son-in-law and grandson because they had broken tradition and married outside their family. He explained to me that no country could have more explicit or detailed legislation against forced marriage than Pakistan and no religion regards forced marriage as more anathema to its basic tenets than Islam. Yet forced marriage, itself a contradiction in terms, continues to prevail in certain areas simply because it has become a social norm based on historical, religious, and customary norms to which the status and validity of law have been given.

In our own society, there are many similarities between the needs of victims of forced marriage and those of domestic violence and child abuse. In the course of my duties as a family judge, I tremble at the realisation that in this civilised society where the rule of law operates on such a sophisticated level, we seem to tolerate in the domestic setting behaviour characterised by unspeakable violence where children and adults are irreparably damaged by

exposure to it. A recent publication by the Government on domestic violence in Northern Ireland⁵ revealed statistics that constitute a stain on the conscience of our society. In Northern Ireland on average about six people are killed by a current or former partner each year. In England and Wales on average one hundred and twenty women and thirty men are killed every year by a current or former partner. In Northern Ireland on average two women are seriously assaulted by a male partner every day. Across the United Kingdom, at least one child will die each week as a result of an adult's cruelty. As many as one in four women and one in six men will be a victim of domestic violence at some point in their lives. A quarter of all recorded rape victims are children. Research indicates that at least eleven thousand children here are presently living with domestic violence. It occurs right across society regardless of age, gender, race, religion, sexuality, wealth and geography. About 90% of reported cases are perpetrated by men against women, but women too can be guilty of an offence against a partner. The Police Service of Northern Ireland respond to over fourteen thousand domestic incidents each year and more than half of these involve physical violence. It has the highest rate of repeat victimisation of any crime. These figures probably reflect but a fraction of the real picture. Many victims do not go to the police and do not disclose the violence to their general practitioner. The effect of family violence on children has traditionally not been widely recognised. It passes understanding that until comparatively recently it was widely assumed that unless directly involved, for instance by being injured, children were not seriously affected by violence or threats of violence between parents. It has become all too clear that domestic violence, whether experienced by the child as an observer hearing or witnessing the violence, or as a direct victim, is likely to affect their emotional, physiological, physical and sexual development perhaps irreparably⁶. I recently heard a case where a little girl of five had been so traumatised by constant exposure to drunken attacks of her father on her mother, followed inevitably by cuddles to quell her distress, that she now rejected hysterically any show of warmth or touch from her foster parents, conditioned as she was to the belief that this was but a prelude to another violent outburst. The reality of living with violent family relationships may result in some children re-enacting the behaviours they have been exposed to when they establish their own adolescent and adult relationships, thus perpetrating the cycle of maladaptive behaviour and ever widening the circle of victims, especially children.

Perhaps the most chilling aspect of the Government Paper was that it disclosed that research shows that one in five men and one in ten women amongst the young think that violence towards a partner is acceptable in some situations, for instance if the woman has been unfaithful. Despite the fact that domestic violence accounts for about a third of all recorded violent crime here, it clearly inhabits a place in the hierarchy of acceptable norms based on the myths that victims provoke violence, deliberately choose violent partners or is essentially a private matter acceptable in certain domestic situations. The knock on effect of this is that research to date

⁵ "Tackling Violence at Home. The Government's Proposals on Domestic Violence in Northern Ireland." October 2003.

⁶ *Re L* (2000) 2 FLR 334

suggests that prosecutions are entirely victim led and that even in the very serious cases, the wishes of the victim not to proceed can be crucial in the decision not to charge. The search for unflinching victim participation ignores the reality that victim withdrawal from the prosecution is typically a rational choice made within considerable situational constraints and is a decision often shaped by the abusers’ controlling behaviours. Well founded concerns for their personal safety, fear of the economic costs of separation, financial dependence on the violent partner, a determination to remain in the relationship for the sake of the children and a desire to see their violent partner treated rather than punished may appear to be all perfectly rational reasons why the victims should withdraw. Forcing the woman to participate holds her responsible for stopping the abuse and disempowers her from responding to the abusive relationship on her own⁷. Equally importantly, I am concerned that the failure to bring these perpetrators within the rule of law serves not only to undermine public confidence in the justice system and render victims helpless but perpetuates in the eyes of the community a parallel social norm which gathers legitimacy from the failure to question it. The most important initial step is the deconstruction of this social norm, challenging it and questioning its very legitimacy. We must consider a move towards the concept of the victimless prosecution where a process of thorough investigation obtaining independent and objective evidence coupled with strengthening of the law to protect women from abusive husbands or boyfriends is crucial. One uplifting thread in this gripping sorrow is that the Government does appear to be moving positively and creatively to embrace proposals which hopefully will afford all victims appropriate protection and justice. To some extent Northern Ireland leads the way in that, unlike in England and Wales, our Family Homes and Domestic Violence (NI) Order 1998 makes a breach of a non-molestation order or an occupation order an arrestable offence. If a perpetrator molests the victim or breaches an exclusion zone he or she will face imprisonment up to three months. Similar legislation is now proposed to be introduced in England and Wales along with proposals for example to grant women anonymity when they bring domestic violence complaints to the court and, more controversially, powers to permit a judge to impose a restraining order on a defendant even after he has been acquitted in circumstances where a judge considers the wife or children still require protection.

Our courts must be seen to be unbending in the severity of sentences passed on perpetrators with an emphasis on deterrence of offenders and protection of all the victims – the abused wife, the observing child and the inevitable subsequent victim. It has been remarkable and indeed gratifying to note how a forceful implementation of the law has completely altered public attitudes toward drunken driving so that it no longer receives dinner party sympathy or macho approval. We must now catch the passing moment and bring about a similar shift in the cultural climate in relation to domestic violence if we are to rid this community of one of the greatest current blights on our right to call this a just society.

⁷ “Prosecuting domestic violence without victim participation”, Louise Ellison [2002] *Modern Law Review* 834 at p 849.

However, children are victims not only in the context of abused mothers but also in the context of missing fathers. It is widely recognised that children who maintain their relationship with both parents after separation are healthier, better adjusted and more successful in school. They grow up to become better parents themselves. Sadly however, I fear that for all too long the social norm in our culture that women are necessarily better than men in looking after children has in some cases served to bedevil the lives of separated parents and their children and may have influenced the implementation of the law. The gathering momentum of fathers' rights groups asserting that courts allegedly handle child contact cases in a mother-biased fashion coupled with an alleged failure to enforce contact orders when flouted by mothers, is now a burning issue. Radical fathers' groups threatening civil disobedience and harassment of the judiciary unhappily serve only to set back the need to address a genuine problem. The caped crusaders who scaled the Royal Courts of Justice in London dressed as Batman and Robin diminished an issue which has the right to be heard. The fact of the matter is, that it is only in the rarest of cases that the courts refuse contact to a father, and this is usually in circumstances where there have been proven allegations of domestic violence or harassment of the mother and children. Certainly where that is a factor, the courts here in Northern Ireland strive to prioritise that issue, rigorously identifying the guilty, vindicating the falsely accused and offering the victim and children proper support. The real problem however lies with fathers, who whilst not denied contact in court, in fact rarely or never see their children. One estimate is that in 67% of cases children see their fathers less than once a fortnight. Understandably many of these fathers harbour a smouldering sense of injustice. Clearly the courts are not the only factor coming between separated fathers and their children, given that most families settle residence arrangements without recourse to law. Poverty, inadequate housing, lack of experience in caring for children, lack of knowledge of health and family services also contribute. Missing fathers include young men, often unemployed and feckless, given up as a lost cause by the child's mother, her parents and family services. However, there are a number of fathers desperate to see their children but who are prevented from doing so because the acrimony of the split makes any court order potentially unenforceable. The real victim of all this is the child. Perhaps the time has come to revisit the rights of fathers and children, and to reassess the central role that men have in their children's lives even when father and child are strangers. I recently read of a poignant extract from an 11 year old boy to his father which encapsulates the whole sad problem:

"Dear Father

I don't say Dear Dad because you have not been a dad to me have you? I haven't introduced myself yet. My name is Daniel. You might not remember my mother but I think about you all the time."

In England and Wales they are now looking at early intervention schemes based on a model that has been developed in the USA in the 1990s and has been successfully used in Norway, Denmark, Canada and is currently being tried in Australia. Under this scheme, once the issue of contact is raised, parents immediately receive an information pack that gives them a clear idea of the State's expectations. Unless there is cause for concern, such as

domestic violence, the non resident parent will usually be granted immediate access of alternate weekends and one evening a week. Parents are also directed towards compulsory mediation and parenting classes which help them make the transition. Separating parents are required to come up with a parenting plan covering everything from holidays to schoolwork and pocket money which helps them anticipate potential areas of conflict. Mediation works to optimal effect because everyone knows what the courts are going to offer. There is also a package of support services, including high conflict parenting classes, retraining for unemployed parents and drug rehabilitation programmes. The difficult cases involving allegations of abuse or domestic violence are dealt with by a rapid investigation which may or may not result in qualified access. The anecdotal evidence is that these schemes are being used throughout the United States with dramatic results. It is reported that in California 60% fewer cases now reach the courts and attending parenting classes is now the norm. It has received the *imprimatur* of senior members of the judiciary in England and Wales and in particular Mrs Justice Bracewell has said that it would be incomprehensible if the pilot project, modelled on the one that has run in Florida for ten years, did not receive official sanction. I trust that such thinking heralds a reassessment of antiquated social norms which in many cases have carried the *imprimatur* of old-fashioned and dangerous thinking.

The sad fact is, that in some respects, children emerge as forgotten victims in our society and our legal system. We have an enlightened and widely welcomed Children Order (Northern Ireland) 1995 which strives to be more compliant with the demands of international conventions such as the United Nations Convention on the Rights of the Child and the European Convention on Human Rights than previous children’s legislation has ever been. The changes emphasise the importance of the involvement of parents and children in decisions that affected them. A cornerstone of the legislation is the preference for agreement between the parties unless the facts of the case and the needs of the children dictate it otherwise. But is it enough to protect children? Do we painfully subscribe to a social norm that operates on a basis of “out of sight, out of mind”. There are thousands of children in care in Northern Ireland, 60,000 children in care in England alone, an increase of 22% since 1994. I am informed that just 4% get five A-C GCSE grades compared with half of children from family homes. More than half of all such children in care reach sixteen with no qualifications and only 1% go to university. The chilling fact is that these children are entirely blameless for their plight; Department of Health research showing that 90% of them are in care because of abuse, parental neglect or other welfare concerns. Day after day, I and other family judges make care orders in the case of such children. Thereafter, I have little or no power to deal with them. The fate of these children and their unconditional right to grow up to be a fulfilled adult thereafter is, I fear, a forgotten concern buried beneath a plethora of apparently more pressing concerns that capture the attention of the chattering classes.

The areas where children in our society are potential victims whose rights are not raised by the shrill voices in our society do not end there. The smacking of children is something that demands our attention. Since Sweden banned smacking a decade ago, child deaths at the hands of parents have fallen to zero. In Great Britain they run at one per week. Smacking has been banned

in twelve European countries in the past thirty years. Should we be examining our law that permits parents to use “reasonable chastisement”? In September 2002 the monitoring body for the United Nations Convention on the Rights of the child examined the United Kingdom’s government’s report on progress made in implementing the Convention. The bulk of this report is taken up with identifying and analysing the alleged shortcomings of government in delivering on children’s rights and with making recommendations that, taken together, form the basis for a strategy and a comprehensive action plan on children’s rights. The continued use of physical punishment within the context of private schools in Northern Ireland was specifically highlighted by the Committee. It expressed “deep regret” that the UK government continues to retain the defence of “reasonable chastisement” and noted that physical punishment still has not been outlawed within families or in all forms of daycare including childminding. The Committee noted that any steps by government to limit rather than remove the “reasonable chastisement” defence would not comply with the

“principles and provisions of the Convention . . . since they constitute a serious violation of the dignity of the child”.⁸

The Committee recommended that the government

“with urgency adopt legislation . . . to remove the reasonable chastisement defence and prohibit all corporal punishment in the family and in other contexts not covered by existing legislation.”

I do not pretend to know the answer on this issue nor do I express any view one way or the other. However, what does concern me is that a perfectly rational debate about a child’s rights to be protected from assault on the one hand, and on the other, the right of parents to discipline children in a modern society, is stifled by undue reliance on an ingrained outdated social norm based purely on the adage of “spare the rod and spoil the child” which is impervious to legal restraint or international conventions.

The UN Convention on the Rights of the Child is the most highly ratified international human rights treaty in the world. It applies to all children and the UK government has ratified the Convention in December 1991. In doing so the government committed itself to a set of non negotiable and legally binding minimum standards and obligations in respect of all aspects of children’s lives. Under Article 12:

“State’s parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly,

⁸ The UK Joint Committee on Human Rights 10th Report on the United Nations Convention on the Rights of the Child.

or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

The Children (Northern Ireland) Order 1995 enshrines the necessity to give due weight to the views of the child and the Northern Ireland Guardian Ad Litem Agency has been established. But is that the reality of the court system? Are we at times in danger of being locked in a time warp where the notion of protecting children implied that decisions affecting them will be taken by others irrespective of what domestic statutes or international conventions say? Whilst Guardians Ad Litem are appointed by the courts and have enabled children to be independently represented in public law cases, for example, where there is an application for a child to be brought into care or freed for adoption, yet in private law cases, for example, acrimonious contact issues between parents, representation for children is rarely afforded and their voices often muted. Even in the public system vulnerable groups of children such as the homeless, those in care and those with disabilities require particular consultation processes by those specially and properly trained to do so if they are adequately to participate in a determination of their future. When teenage children are the subject of the proceedings we often overlook the basic principle of enquiring whether it might be in their interests to actually attend the hearing. My enduring concern is that in a legal system, which is the envy of the world in many instances, the most vulnerable in our society, namely children, are sometimes not allowed to be seen or heard although they may have much to say and are entitled to observe the justice that determines their future. If we are to make progress we must increasingly consider the concept of rights which visualises that children will either take their own decisions or at least have a strong say in matters affecting them.⁹ We must be wary lest compassion for children shades into unthinking condescension. A system that potentially renders children passive in their dependency and where speaking out threatens the ethos of failure in which so many other children have become compliant must now be the subject of review. In our court system children need a voice, someone who is able to listen to anything they wish to say and tell them what they need to know¹⁰.

I often hear it said that one of the primary victims of our society and our evolving legal system is the concept of the traditional family. The question is posed, how can a family policy support marriage and strengthen traditional families whilst, at the same time, professing to acknowledge the social changes that have occurred both in family patterns and in the nature of intimate commitments?¹¹ Does respect for the increasing number of families that depart, in significant ways, from the old nuclear norm sit uneasily with a veneration of traditional arrangements? The notion of the family in crisis is a strong one. Let me illustrate the change. Some 20 years ago a senior judge in the Court of Appeal in England drew a clear distinction between years of cohabitation and years of marriage.¹² Specifically relying on public opinion at the time he said:

⁹ Bainham, A. (2002) 32 *Family Law* 279.

¹⁰ *Re A* [2001] 1 FLR 715.

¹¹ (2002) 12 *CFLQ* 135.

¹² Eveleigh LJ – *Foley v Foley* [1981] 2 FLR 215.

“In a great majority of cases, public opinion would readily recognise a stronger claim founded upon years of marriage than upon years of co-habitation.”

In contrast more recently a judge said:¹³

“The law is not moribund but must move to reflect changing social values. I cannot imagine anyone nowadays seriously stigmatising pre-marital co-habitation as ‘living in sin’ or lacking the quality of emotional commitment assumed in marriage. Thus, in my judgment, where a relationship moves seamlessly from co-habitation to marriage without any major alteration in the way the couple live, it is unreal and artificial to treat the periods differently. On the other hand if it found that the pre-marital co-habitation was on the basis of a trial period to see if there was any basis for later marriage then I would be of the view that it would not be right to include it as part of the ‘duration of the marriage’.”

I think it can be plausibly argued that the concept of family is not declining in the law but is changing in ways that are entirely consistent with the whole trajectory of historical evolution. The challenges inherent in society have fundamentally altered the accepted set perspectives of the law and how legislation is interpreted. Currently the law is in the throes of coming to terms with social reality and shifting focuses. Recently a seminal decision¹⁴ found that as between husband and wife on the dissolution of marriage a financial award must now measure up to the yardstick of real equality. Striding on from that initial step the courts have analysed and considered the different contribution that each spouse makes to the family welfare resulting in equal division for equal contribution. Equality of division as a yardstick of fairness is now to the fore as the means of balancing different contributions to a marriage. Gone are the days when the traditional approach of a wife receiving one third of the assets and one third of the income were regarded as proper justice. Gender discrimination against women in matrimonial resolution reflected for years the discriminatory view that society took of women. They faced the difficulty of finding a proper value for their contribution to the household in a world that attributed worth on the basis of market value. The generally low level of value attributed to domestic work and comparatively lower levels of wages paid to women for work done in the public sphere meant, and indeed still means, that woman cannot make the same financially tangible contribution to family wealth in many instances as their male counterpart. The courts are now unwilling to consider the process of weighing the spouses’ contributions other than on the basis that the contributions are of the same value rather than of the same type and consequently must be rewarded with the same share of family assets. We are attempting to destabilise existing gender stereotypes responding to the realities of the division of labour and individual marriages. In doing so of course we must be careful not to reinforce the aberrant norm that women are the principal care giver for a family and, to the detriment of men as

¹³ *GW v RW* [2003] 2 FLR 120.

¹⁴ *White v White* (2001) 1 AC 596

fathers, thereby revive the very gender stereotype that we seek now to challenge.

If the guidelines informing the application of judicial discretion in family law are to be derived from current values about family life which the court considers would be widely accepted in the community, what then of the fact that marriage rates continue to decline whilst co-habitation rates increase? There is an increasing diversity in the nature of family formation.

Perhaps if we are to ensure that we are not creating new victims in our society, we must stand back and at least debate whether family law, broadly defined, as it now exists does reflect and respond to the reality of domestic living arrangements in modern society. Should our family law be underpinned by broader human rights considerations? Are we being forced to wrap old laws around new problems? In New Zealand legislative reforms have ushered in the unified approach to property divisions for married and unmarried couples. The rules also apply to same sex couples and widowed parties. Co-habitants are gradually receiving some piecemeal concessions as the law develops, but is it likely the wider recommendations will receive requisite appropriate support unless the qualifying co-habitants are restricted to those who satisfy the marriage model? Those of us who are strong proponents of the institution of marriage must not be afraid to ask whether there may not be a plausible case for introducing a legal commitment between people who are unable to marry, particularly where we are legislatively moving towards an era when gay and lesbian couples can adopt children but stopping short of giving these relationships a proper legal status. Dame Elizabeth Butler-Sloss, the President of the Family Division recently highlighted couples who could not marry but had no recourse to a system of law that would protect them if they formed “partnerships sometime lifelong, which in their turn create a family structure”. Already the Government is proposing legislation to address the issue. I do not pretend to have the solution to these issues, but if we are to live in a civilised society where the rule of law is relevant to all our citizens, these are matters that warrant our attention in the spirit of growing awareness of the social angst occasioned to many.

Let me conclude by saying I have a seared conviction that showing the wound is a way of tending to it. Oliver Wendell Holmes said:

“The great thing in the world is not so much where we stand,
as in what direction we are moving.”

I hope we are moving in the right direction. No thinking person could suggest that the measure of discrimination, prejudice, and abuse of human rights that existed in O’Connell’s time exists today. Time and our sense of moral responsibility have moved on. But we must not blind ourselves to the frailties in the institutions that protect us and the confines of the rule of law that we observe. Reason, not emotion, must colour the thread of the court’s approach at a time when basic assumptions may be shifting and we are addressing the specific agenda of the moment. If our freedoms are to be preserved and the rule of law enhanced, then we must recognise that no tradition is sacred, no convention is indispensable and no precedent worth emulation if it does not stand the test of the fundamentals of a civilised society generally expressed through the law. Law is part of the human odyssey and achievement. It is a dynamic process but it has to be in tune

with the ever changing needs and values of a society, failing which, individuals suffer, victims emerge and social fabric breaks down. It is this dimension of law which makes it a catalyst of social change. Law, including judge made law, has to play its role in changing social morals where it is appropriate. Any other response to social norms that offend against the fundamentals of the civil society may amount to appeasement or endorsement. With typical lawyer-like hyperbole, may I conclude by quoting to you from one of the most brilliant of O'Connell's speeches which he made in the course of a famous libel case when he acted on behalf of John Magee the proprietor of the Dublin Evening Post. He concluded his peroration to the jury with the following words:

“If amongst you there be cherished one ray of pure religion, if amongst you there glow a single spark of liberty, if I have alarmed religion or aroused the spirit of freedom in one breast amongst you my client is safe and his country is served.”

The sad footnote to this case is that Mr Magee was not safe. He was found guilty and sentenced to two years imprisonment along with a massive fine. O'Connell encountered the failure often meted out to the messenger. If I have failed tonight, I shall be in good company.