



PUMP COURT

CHAMBERS

‘Crime is from Mars and Family is from Venus’

The interplay between family and criminal proceedings

Leslie Samuels KC, Sarah Jones KC and James Holmes



Case Scenario



Alice Carter:

- Alleged to have caused a non accidental injury to her daughter Martha (is it the demon drink again?).
- Initially arrested by police, subsequently charged under s.18 Offences against the Person Act - causing grievous bodily harm.
- LA brings care proceedings. Interim care order made.
- Concurrent proceedings.

Introduction

The factual issues may be similar or even identical, but the process and the purpose of the process will be very different.

A jury will not give a reasoned judgment to explain their decision. Sometimes it can be difficult (even making allowance for the different standard of proof) to understand a jury's decision.

A conviction may not resolve all the issues e.g. failure to protect. An acquittal may not assist at all.

For criminal advocates:

- Because the finder of fact and the decider of the outcomes are the same person sometimes - just sometimes - there is a sense that the facts are being made to fit the desired outcome.
- They see judgments with an extraordinarily technical grasp of the medical evidence and a detailed and forensic analysis of the factual evidence, which then go to to “completely make up a conclusion without an evidential basis for it.”
- e.g. the Father maintains he did not cause the injuries that every expert says are non-accidental and then the judge concludes that the injuries are accidental caused by rough handling.
- Or a finding that the mother was not responsible for a set of injuries, when a later jury concluded to the criminal standard of proof they were sure she had.

Disclosure from criminal process

Disclosure of Information Between Family and Criminal Agencies and Jurisdictions: 2024 Protocol

<https://www.judiciary.uk/wp-content/uploads/2024/03/2024-Protocol.pdf>

Replaces 2013 Protocol

Relates to all private and public family law proceedings and all material held by the police.

Disclosure from criminal process

Use of Annex forms mandatory:

- Annex 1 - form for applications for police material by local authorities and solicitors
- Annex 5 – standard order to be sought from court for police material for litigants in person and solicitors involved in private law proceedings
- Annex 6 form to be used for applications made by the police.

Disclosure from criminal process

Part A Disclosure from the police to family proceedings:

1.3 In public law proceedings LA must notify the police of the existence of contemplated or ongoing proceedings where they believe police hold material relevant to the central issues in the case and seek relevant material by submitting the form at Annex 1.

1.4 Police to respond within 20 business days unless alternative timescale is negotiated or ordered by court.

1.5 In private law proceedings representatives must complete Annex 1 when instructed to do so by the court. This must be sent to the police with Annex 5. Disclosure will be provided as soon as reasonably practicable.

Disclosure from criminal process

Request for information from a criminal court about a case may be made pursuant to Rule 5, Criminal Procedure Rules.

Any request for police disclosure by a litigant in person should be made by Form C2 using Annex 5 as a basis.

Part B: Disclosure sought by an investigator.

Part C: Linked Directions hearings.

Disclosure from criminal process

Annex 2 – Guidance notes for private law proceedings:

- Information supplied by police subject to implicit undertakings by parties and legal representatives (parties to sign Confidentiality Undertaking).
- *“This process is designed to facilitate only requests for items of evidence... which only the police have and are of central and not peripheral importance to the issues and incidents under consideration by the Family Court... All parties should use the application proportionately having regard to what is reasonable, directly relevant and necessary...”*
- Police to determine what redactions are to be made, *“Directions for unredacted disclosure should not be sought from the court.”*

Disclosure from criminal process

Annex 2 – Guidance notes for private law proceedings:

- CPS to take the lead post charge.
- In the event that it is necessary for an application to be made claiming PII over material or specific information, the police will inform the court and if appropriate put the parties on notice.
- Electronic devices seized –
- Downloading / forensic analysis not always a priority in an investigation but police may expedite if asked.
- If police have not themselves reviewed content, then they may not permit disclosure as this content could give rise to further enquiries / investigative actions and so disclosure could jeopardise investigation / prosecution.

Disclosure from criminal process

Annex 2 – Guidance notes for private law proceedings:

- If police agree, one option may be to provide unredacted downloads to the owner's legal representative or to independent counsel.
- Where there are indecent images any request should seek the police description of those images, or a further and better description, rather than the images themselves. Access to images will not be granted without a court order. Any judge should only be asked to consider ordering police-facilitated, controlled access.

Disclosure from criminal process

Annex 3 – Guidance notes for local authority representatives:

- *“Local authorities must ensure that they use the application proportionately having regard to what is reasonable, directly relevant, and necessary when seeking disclosure... If a local authority fails to complete the application correctly, this may well result in this being rejected by the Police..”*
- Where there are redactions, and the parties consider these render the disclosure ineffective, the redaction should be identified and a request made to the Police to reconsider or provide further information as to why this is necessary. No general requests for removal of redactions should be made as this is not proportionate or appropriate.

Disclosure from criminal process

Annex 3 – Guidance notes for local authority representatives:

- *“Parties to proceedings should not seek orders of the court for disclosure from the Police without the usual protocol routes being followed first.”*
- Sample direction for disclosure of digital material in an unredacted format.
- CPS to take the lead on decisions post charge.
- Same provision re indecent images as with private law proceedings.

Disclosure from criminal process

Annex 4 –Checklist for the judiciary :

- Have the parties considered the records they already hold and sought permission from the police to disclose?
- Have the parties submitted an Annex 1 request?
- What information has been requested (proportionality)?
- Sample directions.

S.98 Children Act 1989

Section 98 of the Children Act 1989 provides:

*“(1) In any proceedings in which a court is hearing an application for an order under Part IV or V, no person shall be excused from
(a) giving evidence on any matter; or*

(b) answering any question put to him in the course of his giving evidence,

on the ground that doing so might incriminate him or his spouse or his civil partner of an offence.

(2) A statement or admission made in such proceedings shall not be admissible in evidence against the person making it or his spouse or civil partner in proceedings for an offence other than perjury.”

S.98 Children Act 1989

Section 98(1) of the Children Act 1989 removes a person's privilege against self-incrimination.

(but only in Part IV or Part V proceedings – not private law, see *Re P (Children) (Disclosure)* [2022] EWCA Civ 495 and *Re O (Children) (Privilege against Self-Incrimination)* [2023] EWFC 14)

Section 98(2) provides that a statement or admission given in the proceedings shall not be admissible against the person making it or their spouse/civil partner for an offence other than perjury.

What does this mean??

S.98 Children Act 1989

- 'Statement or admission' includes admissions to a social worker, a children's guardian or an expert
- (Oxfordshire CC v P [1995] 1 FLR 522 per Ward J, Cleveland County Council v L and F [1997] 1 FLR 235 per Hale J and Re AB (Care Proceedings: Disclosure of Medical Evidence to Police [2003] 1 FLR 579 per Wall J cf per Butler-Sloss LJ *obiter* in Re G (Social Worker: Disclosure [1996] 1 FLR 276)

S.98 Children Act 1989

- 'Admissible in evidence' does not prevent the use of material during a police inquiry or interview (Re EC (Disclosure of Material) [1996] 2 FLR 725) nor does it prevent putting inconsistent statements to a witness to challenge their evidence or credibility (Re X Children [2008] 1 FLR 589, Re X (Disclosure for Purposes of Criminal Proceedings) [2008] 2 FLR 944).
- Answers given in interview or in evidence may then be admissible as evidence in the criminal proceedings.

S.98 Children Act 1989

- The judge has the power to retain control over further dissemination, or to disclose only parts of documents or in an edited or redacted form, or to limit the use to which such documents might be put. Making such an order does not indicate a lack of confidence in those concerned in the criminal proceedings but they did not have the advantage of being immersed in the family process (Re X [2008] 1 FLR 589).
- But in general terms a judge cannot give a witness in family proceedings any guarantee as to confidentiality and judges 'may well like to' point this out to witnesses.
- Ultimately, it will be for the criminal court to decide the degree of protection afforded by s.98(2) in any given case.

S.98 Children Act 1989

There is no set form of words for a s.98 warning.

I like the 'plain English version' from the Child Protection Resource.

- I need to explain a rule of law to you. Its important you understand this. Your lawyer can explain it further to you, it is their duty to do so.
- allegations are made against you in these family proceedings. The family court is not involved in any decisions made in the criminal courts about whether you should be found guilty or acquitted of any criminal offence.
- However, in these family proceedings, the court will have to decide whether or not the allegations made against you are true. If they are found to be true, this would mean you have done something which may also be a criminal offence.
- in the family proceedings you aren't allowed to refuse to answer questions or provide evidence in writing on the basis that your answers might show you or your spouse had done something criminally wrong.

S.98 Children Act 1989

- If you do give evidence that suggests you have done something criminally wrong, this evidence is NOT allowed in any criminal proceedings against you UNLESS you are being prosecuted for perjury (i.e. you have lied on oath in the family court).
- BUT you must understand that if the family court gives permission that ANYTHING you say or write down for these proceedings may be given to the police for them to use during their investigations into your conduct AND if you did end up in a criminal court, the prosecution might make an application for permission to ask you questions about anything you said in the family court.

S.98 Children Act 1989

A failure to give the warning does not prevent disclosure: Per Baker J Re X and Y (Disclosure of Judgment to Police) [2015] 1 FLR 1218 at [33-34]).

“I accept that the fact that no warning was given is relevant to my decision as to disclosure of information relating to the proceedings, but only as one factor to be considered when undertaking the necessary balancing exercise.”

S.98 Children Act 1989

What does s.98 mean from a criminal perspective?

SFJKC: “What is s.98?”

Archbold 2026 says at 8-22 **“there is a paucity of case law from the criminal jurisdiction as to the operation of s.98”** – the editors are not kidding!

S.98 Children Act 1989

S.76 PACE:

Confessions.

(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

S.98 Children Act 1989

S.78 PACE:

“(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

Each case will very much be decided on its own facts without creating a precedent unless reported on appeal.

s.78 does not apply to defence adduced evidence.

Highly relevant to s.76 / s.78 analysis to know whether / when s.98 warning given to party in Part IV proceedings.

Disclosure from Family Proceedings

S.12 Administration of Justice Act 1960:

“... the publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say -

(a) where proceedings –

...

(ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002.”

Disclosure from Family Proceedings

Rule 12.73 FPR:

12.73.—(1) For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated—

(a) where the communication is to—

(i) a party;

(ii) the legal representative of a party;

(iii) a professional legal adviser...

(vii) an expert whose instruction by a party has been authorised by the court for the purposes of the proceedings;

(viii) a professional acting in furtherance of the protection of children;

(b) where the court gives permission including as provided for under rule 12.73A; or

(c) subject to any direction of the court, in accordance with rule 12.75 and Practice Direction 12G

Disclosure from Family Proceedings

PD12G:

1.2 “Subject to any direction of the court, information may be communicated for the purpose of the law relating to contempt in accordance with paragraphs 2.1, 3.1 or 4.1”.

2.1:

A party	A police officer	The text or summary of the whole or part of a judgment given in the proceedings	For the purpose of a criminal investigation
A party or any person lawfully in receipt of information	A member of the Crown Prosecution Service		To enable the Crown Prosecution Service to discharge its functions under any enactment

Disclosure from Family Proceedings

The leading authority remains *Re C (A Minor)(Care Proceedings: Disclosure)* [1997] 2 WLR 322 sub nom *Re EC (Disclosure of Material)* [1996] 2 FLR 725.

The court will consider the following matters in deciding whether to order disclosure of material from family proceedings to the Police and or CPS:

- The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor;
- The welfare and interests of other children generally;
- The maintenance of confidentiality in children cases;

Disclosure from Family Proceedings

- The importance of encouraging frankness in children's cases.
- The public interest in the administration of justice. Barriers should not be erected between one branch of the judiciary and another because this may be inimical to the overall interests of justice;
- The public interest in the prosecution of serious crime and punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children.
- The gravity of the alleged offence and the relevance of the evidence to it.

Disclosure from Family Proceedings

- The desirability of cooperation between various agencies concerned with the welfare of children
- In the case to which Section 98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings.
- Any other material disclosure which has already taken place.

Disclosure from Family Proceedings

The welfare of the children who are subject to proceedings is not paramount (Re X Children [2007] EWHC 1719).

Children have an interest in ensuring that there is no miscarriage of justice in any criminal trial – better for the children that the truth, whatever it may be, comes out (Re Z (Children) (Disclosure: Criminal Proceedings) [2003] 1 FLR 1994).

Family courts should not stand in the way of and should take all proper steps to facilitate the proper administration of justice elsewhere (Re W (Children) [2017] EWFC 61).

Disclosure from Family Proceedings

Cautious staged approach to disclosure may be warranted in certain cases:

Re X and Y (Disclosure of Judgment to Police) [2015] 1 FLR 1218
Baker J gave limited permission for the judgment to be disclosed to the Police but made the following additional directions:

“none of the said judgments, nor any information contained therein, shall be disclosed to or discussed with the First and Second Respondents to these proceedings or any other person outside the [Constabulary] or the Crown Prosecution Service, without further permission of this court; (b) a copy of this order shall be given to any individual within the [Constabulary] or the Crown Prosecution Service to whom any of the said three judgments are shown or given; (c) the [Constabulary] and the Crown Prosecution Service shall require any individual within the [Constabulary] or the Crown Prosecution Service to whom copies of any of the said judgments are shown or given to sign a written document confirming that they have received a copy of this order and understand its terms and effects, and shall deliver copies of the said signed documents to the local authority.”

Disclosure from Family Proceedings

12.73 FPR permits disclosure of information relating to proceedings to “a professional acting in furtherance of the protection of children”.

This is defined in FPR 2.1:

“professional acting in furtherance of the protection of children” includes—...

(b) a police officer who is—

(i) exercising powers under section 46 of the Act of 1989; or

(ii) serving in a child protection unit or a paedophile unit of a police force;”

Disclosure from Family Proceedings

A disclosure to a police officer, where that officer is acting in furtherance of the protection of children, would not, therefore, be a contempt of court.

In Hershman para AA [1004] it says that *“the phrase ‘acting in the protection of children’ should be given a broad interpretation”* (Re D [2006] EWHC 1465, [2006] 2 FLR 1054).

Disclosure from Family Proceedings

In *EBK v DLO* [2023] EWHC 1074 (Fam), [2024] 1 FLR 726 Mostyn J described the law of contempt as “arbitrary and bereft of logic” but said that

“My conclusion is that the right of a party to disclose to a specialist police officer working in furtherance of child protection any information about the s. 8 proceedings, coupled with the right of such a party to disclose to a non-specialist police officer for the purpose of a criminal investigation the text or a summary of the whole or part of a judgment given, or an order made, in the proceedings, defines conclusively the extent of lawful disclosure...”

Disclosure from Family Proceedings

As set out in the 2024 Protocol, the responsibilities of an investigator in respect of material held by a third party are provided in the Attorney General's Guidelines on Disclosure 2022.

An investigator will seek material from a third party if it is relevant to an issue in the case, constitutes a reasonable line of enquiry to obtain it, and it is necessary and proportionate to do so.

Any request should be made prior to charge so that the product forms part of the material submitted for the charging decision. The charging decision must be taken only when all outstanding reasonable lines of inquiry have been pursued.

Disclosure from Family Proceedings

Where a LA is party to proceedings, it must also provide a list (e.g. by providing a copy of a redacted court index) of material within the family proceedings papers to the police, without describing the specific content. The LA must where possible highlight the documents on the index which are likely to be relevant to the criminal proceedings and for which an application for disclosure might be made.

If following receipt of a Family Court judgment and / or the list of material, the police seek further information or material they will do so by completing an Annex 6 request to explain what is sought and why. Where proceedings are live, the LA must assist by establishing or assisting the police to establish whether the parties' consent to the provision of the material.

Disclosure from Family Proceedings

Form C2 must then be completed by the Police. The LA must assist in providing the Police with the information needed such as details of the court, the case number, allocated judge, details of the parties etc. The LA will upload the application to the portal and will provide the police with information about dates of hearings and orders made by the court.

A LA cannot automatically disclose to the police documents prepared for court proceedings or information which has emerged in the course of proceedings. The LA can, however, disclose documents which were in existence prior to the proceedings beginning even if then filed as evidence (e.g. child protection minutes and reports).

Disclosure from Family Proceedings

SFJKC:

We feel the relationship is not balanced. To put it bluntly, we share more with you than you do with us. We give you all the evidence police have taken, the phone downloads when we get them in, anything we have.

But then - you are a bit possessive over your stuff!

“You need to learn to play nicely – we are ALL interested in serving the interests of justice.

Linked Directions Hearings

Part C of the 2024 Protocol applies where the LA, CPS or a judge in either the criminal court or family court considers that a linked directions hearing may be appropriate.

The allocated criminal or family judge shall, in the first instance, make enquiries of the other court through their Resident Judge or Designated Family Judge. Once identified the allocated family and criminal judges will liaise in order to enable the linked directions hearing to take place. The criminal case shall be listed at the Crown Court in public with the linked directions hearing in the care proceedings listed for hearing in private immediately after.

Linked Directions Hearings

LA to file a case summary not less than 5 working days before the linked hearing.

LA and CPS to agree a schedule of issues not less than 2 working days before the hearing.

Protocol includes a helpful schedule of example agenda items.

Miscellaneous Issues to Consider

Public Interest Immunity

Evidence which is relevant to an issue in family proceedings may, nevertheless, be excluded if, as a matter of public policy, the public interest requires that it should be so excluded.

In *Durham County Council v Dunn* [2012] EWCA Civ 1654 the CA suggested the following approach:

- Obligations in relation to disclosure and inspection arise only when the relevance test is satisfied.
- If it is satisfied, then it is for the party or person in possession of the document or who would be adversely affected by its disclosure or inspection to assert exemption from disclosure or inspection.

Miscellaneous Issues to Consider

Public Interest Immunity

- Any ensuing dispute falls to be determined ultimately by a balancing exercise, having regard to the fair trial rights of the party seeking disclosure or inspection and the privacy or confidentiality rights of the other party and party whose rights require protection.
- The denial of disclosure or inspection is limited to circumstances where such denial is strictly necessary.
- In some cases the balance may need to be struck by a limited or restricted order which respects a protected interest by such things as redaction, confidentiality rings, anonymity or such other order. The limitation or restriction must satisfy the test of strict necessity.

Miscellaneous Issues to Consider

Public Interest Immunity

Practical considerations:

Should a C2 application be issued?

Who is to determine any PII application?

Would a time limited order resolve the issue, e.g. where the police object to material being sent to a party in advance of a proposed interview?

Miscellaneous Issues to Consider

Redaction

Warwickshire County Council v BN and ors [2025]EWHC 2080

Material disclosed by the Police was so heavily redacted that at times it was very difficult to understand. The Police had made no PII application and had put in no statement setting out the justification for the redactions.

Per Lieven J: “If the Police are seeking to redact documents which are otherwise disclosable then they must clearly explain the justification for those redactions... The redactions appear to have been made entirely by rote, for example removing all third party names, including that of doctors and hospitals that were obviously disclosable. No thought was given to the justification for the specific redactions.”

Miscellaneous Issues to Consider

Redaction

In future cases it was suggested that a failure *to “consider whether each redaction is justified”*, leading to unnecessary hearings and expense, would lead to costs orders against the Police.

Experts

Where the proceedings concern alleged serious injury to a child, it is possible that the same medical experts will be instructed by the police and in the family proceedings. There are differences in the duties of experts instructed by the police in a criminal investigation and by the court in family proceedings (per Keehan J. *LB Hammersmith and Fulham v G* [2024] EWHC 220)

Miscellaneous Issues to Consider

Experts

There are a number of points to consider in such a situation, including:

- Is the police expert to be instructed / jointly instructed under Part 25?
- Will the expert accept such an instruction / do the Police and / or CPS agree?
- How is the confidentiality of documents to be maintained?
- How is the confidentiality of any experts' meeting to be maintained?
- From a criminal perspective the prosecution will be concerned if there is a risk that experts may have seen and been influenced by privileged material.

Miscellaneous Issues to Consider

Delay

Ordinarily the requirement to conclude proceedings within 26 weeks will mean that care proceedings will precede any criminal trial.

The fact that a parent who is a defendant in criminal proceedings has not yet filed a defence statement is not a reason for the Family Court to delay requiring him to provide a response to threshold and/ or a narrative statement. It was inappropriate for criminal solicitors to advise their client not to comply with the direction given in care proceedings (*A Local Authority v DG and ors* [2014] EWHC 63, [2014] 2 FLR 713).

Erm.... That's it for now...



Questions??