Neutral Citation Number: [2019] EWCA Civ 575

Case No: B4/2019/0311

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL FAMILY COURT
HHJ Meston QC
ZC18C00400

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 April 2019

Before :

LADY JUSTICE KING
LORD JUSTICE LINDBLOM
and
LORD JUSTICE PETER JACKSON

- -

B (Children: Uncertain Perpetrator)

- -

Chris Stevenson (instructed by **Avadis & Co Solicitors**) for the **Appellant Father**
Sally Bradley (instructed by **London Borough of Islington**) for the **Respondent Local Authority**
Saiqa Chaudhry (instructed by **Steel and Shamash**) for the **Respondent Mother**
Caroline Budden (instructed by **TV Edwards Solicitors**) for the **Respondent Children through their Guardian**

Hearing date: 26 March 2019

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Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. This appeal raises a question of principle about the proper approach to the identification of a perpetrator in circumstances where children have suffered significant harm as a result of alleged ill-treatment. It is the father's appeal from a conclusion reached in care proceedings by HHJ Meston QC, sitting in the Central Family Court on 24 October 2018. On that date the Judge gave his decision following a three-day hearing earlier in the month. The father sought clarification of the judgment, but this was not received until 18 January 2019. On 7 February, he issued an appellant's notice and on 28 February, Moylan LJ granted permission to appeal.

2. The proceedings concern four children, who I will call Eli (now 12), Zoe (10), Alissa (8) and Maggie (5). The local authority issued the proceedings in June 2018 after the three girls had been found to be infected with gonorrhoea. The conclusion from which the father appeals is contained in paragraphs 81-82 of the judgment:

> "81. … Although I am not able to say definitely that [the father] was responsible for the infection of the children, I am not able to exclude him as there must remain a real possibility of him having caused this infection in some way…
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> 82. Accordingly, I find nothing more than that the father is within a pool of possible perpetrators with other unknown males who may have had access to the children, or at least one of them, including the two young men in the family home."

3. Mr Stevenson for the father, supported by Ms Chaudhry for the mother, argues that the Judge applied the wrong legal test, that the decision is internally inconsistent, that there were significant gaps in the evidence, that proper consideration was not given to such evidence as there was, and that in the end the finding that the father is 'in the pool' was unfair and has no meaningful forensic value for the welfare stage of the proceedings.

4. The local authority and the Guardian filed skeleton arguments in opposition to the appeal but by the time they came to make oral submissions Ms Bradley and Ms Budden, neither of whom appeared below, realistically accepted that the Judge's decision could not be sustained. At the end of the hearing we announced that the appeal would be allowed and that the matter would be remitted for rehearing, with an immediate case management hearing being listed before Theis J as Family Division Liaison Judge. I now give my reasons for concurring in this decision. As there is to be a rehearing at which all options will remain open, I say nothing as to the eventual outcome, beyond registering concern that the children, who have been in foster care since June 2018, have already been awaiting a decision for so long.

Background

5. The family first became known to the London Borough of Islington in 2010 due to concerns raised by hospital staff about the mother's disengaged presentation. At the time they were living in Haringey where in the following year the children were subject to a child protection plan (CPP) under the category of emotional abuse and neglect. The pre-proceedings process began but it ended in late 2012 when the family moved to Islington, where the CPP continued. Concerns about a pattern of avoidance and disengagement with professionals were noted but the CPP ended in 2014.

6. In August 2017, the family was evicted from its home due to rent arrears. They obtained temporary accommodation in Thurrock but were evicted from there in February 2018. Thereafter, Thurrock Council placed the family in further temporary accommodation – 2 days in a hotel, 14 days in a caravan in Southend and 14 days in a caravan in Lincolnshire. In mid-March 2018 the family moved to live with family friends in Brixton, where the mother and four children shared a room. There were also three women, two men and a 14-year-old boy living in the property. There is a dispute over whether the father lived there for the first two days but from then on he appears to have lived elsewhere due to space issues, coming to the property each day to take the older three children to school – they had continued to attend schools in north London.

7. On 15 May 2018, the mother told the father that Maggie had discharge in her underwear. They agreed to keep it under review and on 17 May, the father took Maggie to the doctor. Tests were positive for gonorrhoea. The GP made a referral to social services. On 25 May, the mother took Maggie to the GP for further testing, and samples tested positive for gonorrhoea in the vulva, mouth and anus.

8. On 4 June, the mother and all four children attended an appointment with Dr Harris, consultant community paediatrician. Dr Harris confirmed the diagnosis of gonorrhoea in Maggie and informed the mother of the serious nature of the matter and of concerns as to sexual abuse. The mother said that the children could not have been sexually abused as she looked after them; instead the gonorrhoea must have been acquired from an unclean toilet seat, given they lived in a house with a number of other adults. Dr Harris spoke with the children in the absence of the mother but no disclosure of abuse was made. She noted that the children's answers "appeared genuine, spontaneous and appropriate for children of their age." She examined the three girls and noted a normal genital examination with no signs of hymenal injury, though in Zoe's case discharge was present in the vulva. Dr Harris' conclusion was that in the absence of sexual abuse allegations an evidence-based explanation remained lacking, but she considered that the adults had been severely neglectful.

9. Testing of Zoe and Alissa also gave positive results for gonorrhoea, although it is unclear whether swabs were taken at all sites. Eli tested negatively. Each parent was tested (in the father's case twice) and both tested negatively. The father's GP confirmed that there was no record of his being previously infected or treated.

10. On 5 June 2018, the police exercised their powers of protection in relation to all four children and placed them in foster care, where they remain. Both parents were arrested on suspicion of sexual assault and neglect. Each made prepared statements in interview denying the allegations against them and expressing their shock.

11. On 6 June, the local authority issued proceedings and on 7 June obtained emergency protection orders. Interim care orders were made on 13 June.

12. Dr Ahmos Ghaly, consultant in genitourinary medicine, was jointly instructed. His report stated that:

    (1) "A positive culture for N gonorrhoeae from any site in a child without prior peer sexual activity is strongly suggestive of sexual abuse. The question of whether gonococcal infection in children can be acquired through fomites [objects likely to carry infection] still arises. To date there are no convincing data to support nonsexual mode of transmission in children."

    (2) "It is worthwhile stating that failure to identify an infected perpetrator does not rule out the possibility of sexual abuse, since treatment may render an individual culture negative within hours of therapy. The latter treatment is a simple one dose of antibiotics and the suspect may be treated before being tested."

    (3) "It is possible that one child got infected sexually and transmission to others took place through the infected child if it can be seen that there were intimate sexual contact."

    (4) "Other route such as sharing infected towels, fomites, underwear have not been substantiated and established."

    (5) "The incubation period range from 3 days to 14 days. N gonorrhoea cannot survive outside the body for any significant length of time."

    (6) "It would have been beneficial to obtain/identify all adult contacts who came in touch with the children at the material time and obtain all relevant GUM [genitourinary medicine] medical notes if possible."

    (7) "It therefore follows that it is difficult to establish with any degree of certainty the exact source and causal link of the children's gonorrhoea. However in all the circumstances of the case sexual mode of transmission is more likely."

13. Dr Ghaly also responded to some specific questions of clarification. In particular he was asked whether gonorrhoea could be transmitted from sitting on a toilet seat. His response was "very unlikely." In oral evidence he said that it was likely that the infection occurred earlier in May and that these children had been in contact with "multiple adults" of whom he did not have details or information as to whether they had infection.

14. The four children were interviewed under ABE conditions. While the interviews do not appear to have been particularly skilfully conducted, none of the children made any allegation of sexual abuse.

15. The police investigation did not lead to any further action. The occupants of the south London property were treated as witnesses, not suspects (so no samples were taken from them), and little detailed information was gathered about the circumstances in which the children were living at that address. Nor was any information obtained through the family proceedings, despite the Guardian having clearly flagged up the issue at the outset. She advised that the other occupants of the house should be assessed for sexually transmitted diseases, but this was not carried through.

16. The case put by the local authority was, so far as relevant, that:

(1) "It is extremely unlikely that the infection could have been transmitted by [fomite] …

(2) Either the father transmitted the infection to the children by having sexual contact with them, or an unknown male or unknown male adults have infected the children by having sexual contact with them.

(3) Either the mother has failed to take proper steps to safeguard or protect her children from the sexual abuse perpetrated upon them by their father; or if it is not possible to establish the identity of the perpetrator, both the mother and father have so failed to protect their children from the sexual abuse perpetrated upon them; or either or both the mother and the family have been complicit or have colluded in such sexual abuse as has occurred to their children."

17. The Guardian, despite the patchy state of the evidence, chose to take an active role in the fact-finding process and supported the making of a finding that the father had, or might have, sexually abused the children.

18. In addition to the issue of infection, the local authority's threshold asserted that what it described as the parents' transient lifestyle had led to educational, emotional and developmental harm. Reference was made to low recent school attendance and poor engagement with professionals. However, this aspect of the case was not investigated at the trial, which focused exclusively on the issue of infection. That in my view placed the court at a disadvantage. For example, Ms Budden showed us an isolated reference in the police material to a statement by the father on 22 May that the children were at that time staying for three days of the week in Islington. Neither this piece of information nor information about the wider issues mentioned above, such as when the children were at school and where and with whom they were at other times, seems to have been explored. As a result the court did not apparently gain any real picture of the overall functioning of this family, a picture that was plainly likely to be relevant to its assessment of the issue of infection. It will be a matter for the Family Court as to whether, given the passage of time, a split hearing remains appropriate in this case, but even if it does it should surely encompass all matters.

The Judge's decision

19. The Judge heard evidence from Dr Ghaly, from a police officer (who knew little about the case) and from the parents. He correctly directed himself about:

(1) The burden and standard of proof.

(2) The need to base findings on proper evidence and inferences, and not on suspicion or speculation.

(3) That need to consider expert evidence in the context of all the other evidence.

(4) The importance of the parents' credibility.

(5) The need for cautious assessment of lies: *Lucas*.

(6) The possibility of an unknown cause.

(7) The need to ensure that the burden of proof is not reversed when a carer does not provide an explanation – it is still the local authority's responsibility to prove the allegation to the required standard.

20. There is no complaint about these directions, but it is said that the Judge did not in some respects apply them.

21. As to the identification of perpetrators, the Judge said this:

> "38. Finally, and again of importance in this case, when seeking to identify the perpetrator of non-accidental injuries, if there is not sufficient material positively to identify the perpetrator, the court has to decide whether there is a real possibility or likelihood that one or more of a number of people with access to the child might have caused the injury to the child (*North Yorkshire County Council v SA* [2003] EWCA Civ 839, [2003] 2 FLR 849). The test for exclusion of a possible perpetrator is whether there is no real possibility of the injury having been caused by that person. In the *North Yorkshire County Council* case Thorpe LJ said at para. 44:
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> > "[N]o real possibility allows a review of all relevant facts and circumstances including opportunity."
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> 39. As is well known, it is always desirable, where possible, for the perpetrator to be identified, both in the public interest and in the interests of the child; although where it is impossible for a judge to find on the balance of probabilities, that, for example, Parent A rather than Parent B caused the injury, then neither can be excluded from the pool, and the judge should not strain to do so."

22. Again, there is no complaint about the summary of the *North Yorkshire* decision in the first sentence of paragraph 38. The appropriateness of a "test for exclusion" will be discussed below. Similarly, while the first statement in paragraph 39 is plainly correct, the second requires further consideration.

23. The Judge then remarked upon the state of the evidence:

> "46. As I have already indicated, there are gaps in the evidence because the court does not have a full picture of the living arrangements; and the other people in the household in Brixton have not been questioned in any significant way. And indeed, even if they had been questioned, they certainly could not have been compelled to undergo testing (for whatever that might be worth)."

24. Having considered Dr Ghaly's evidence, the Judge summarised the father's evidence as to routine and sleeping arrangements. He determined that he did not attach any particular weight to his inconsistent statements about whether he had stayed at the south London property on the first two nights in March. He recorded the father's emphatic denials that he had ever had sex with any of the children. He noted his distress and said

that his oral evidence was given "with some dignity and some horrified indignation at the suggestion that he might have been the cause of this infection."

25. The mother's evidence was then briefly summarised. She said that the children were never unsupervised and that their infection was a complete mystery to her. They had never complained about anything happening to them. The accommodation was occupied by eleven people and there was a possibility of the children being exposed to poor hygiene. The Judge said that the mother gave evidence in a way that struck him as "restrained, sensible and realistic."

26. The Judge noted that "no other potentially relevant adults have been tested."

27. The Judge's conclusions are quite briefly expressed, occupying the last page of the 15-page judgment. He began by stating the nature of the problem:

> "76. … By its nature it is a case which inevitably presents considerable difficulties for the court in analysing what has happened and in determining whether or not it has been established that at least one of the children was sexually abused. There is no physical evidence of a penetrative assault. On the one hand the court has the fact of the infection of three young girls with gonorrhoea, and on the other hand the apparently restrained evidence of the parents, in particular that of the father who took [Maggie] to the GP."

28. Turning to the means of transmission:

> "77. … Although the possibility of infection through fomites, such as towels, cannot be completely ruled out, it is clearly regarded by both Dr Ghaly and others with expertise in this area as a remote possibility.
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> 78. There is therefore nothing to say exactly when or exactly how these children contracted gonorrhoea… [but] the range of dates for the period of incubation does give some indefinite guidance as to when it is likely that the infection occurred.
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> 79. There is the further point, which was made clearly on behalf of the Guardian, that it is not possible to say which of the children was the first to contract the infection; and whether the situation was that the child who first contracted the infection somehow passed it on to the others; or alternatively whether each of them separately contracted the infection by transmission from an adult or adults."
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> 80. The court has the strong and authoritative evidence of Dr Ghaly in this case, that for at least one of the children the infection must have been sexually transmitted. Regrettably I consider that is the conclusion which on the balance of probabilities I must reach in the circumstances of this case."

29. The judge then turned to consider the identity of the perpetrator:

> "81. That leads to the second stage of the enquiry, which is to determine the perpetrator of the infection. Although the father had quite limited contact with the children, and on his evidence and that of the mother, he was not staying overnight in the household with the children during the relevant period he did have the opportunity to transmit infection. Therefore, although I am not able to say definitely that he was responsible for the infection of the children, I am not able to exclude him as there must remain a real possibility of him having caused this infection in some way.
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> 82. However, I have reached that conclusion in the context of a situation in which there are remaining gaps in the evidence, and in this case it cannot be said to have been established that there was a finite pool of perpetrators. Accordingly, I find nothing more than that the father is within a pool of possible perpetrators with other unknown males who may have had access to the children, or at least one of them, including the two young men in the family home. I am not able to reach a finding which is any more definite than that because the evidence would not allow such a finding to be made."

30. Finally, in relation to the mother, the Judge concluded:

> "83. That leads to the question of the mother's role and as to whether there was a failure to protect on her part. A finding of failure to protect in this context would require evidence suggesting that the mother knew of the risk posed by the father and of the need to remove or mitigate that risk. I can see no evidence to suggest that the mother knew of the risk or of any need to mitigate such risk. And therefore, I cannot make a finding of failure to protect against her, and I do not find that there is any evidence on which I could properly infer that there has been collusion between the mother and the father. That concludes the judgment."

31. A supplemental judgment was given following a request on behalf of the father for amplification by means of nine questions about the judgment. The Judge made further observations, including these:

> "(1) *Does the court accept the evidence of the mother and the father? In particular does the court accept the father's evidence as to the time he spent with the children…?*
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> I did not wholly accept the evidence of the mother and father. I did not accept the evidence that the father was not left alone with any of the children other than to the extent he accepted… The evidence was that the father came to Brixton every day, at least during term time. In reality there was no reason why he should not have been "left alone with any of the children".

(2) *What is the exact period in which the court says that each child became infected with gonorrhoea?*

It is plainly not possible to state the exact period in which each child became infected with gonorrhoea… It is likely to have been transmitted no more than 14 days [before] the symptoms having first appeared…

…

(4) *Does the court accept that one or more of the children may have infected the other(s) or by poor hygiene, etc?*

Dr Ghaly referred to (i) sexual abuse as the most likely source of infection in pre-pubertal children; (ii) the primary source as one infected individual; and (iii) the possibility of one child having been infected sexually and then transmission to the others occurring through the infected child if there was some intimate contact between them… He described in his oral evidence poor hygiene as "a secondary part of the transmission". This was in the context of possible transmission of existing vaginal infection to the anorectal area due to its close proximity… On that basis the finding of the court was that, on the balance of probabilities, for at least one of the children the infection must have been sexually transmitted.

(5) *On what evidence does the court say that there is a "real possibility that the father has sexually transmitted gonorrhoea to his child(ren)?"*

Applying the test for exclusion of a possible perpetrator, I concluded that, given the evidence of opportunity and the absence of any other feasible explanation, I was unable to conclude that there was no real possibility that the infection was transmitted from the father.

(6) *On what evidential basis has the court concluded that the father was ever infected with gonorrhoea?*

There was no direct evidence that the father was infected with gonorrhoea. However, the evidence from Dr Walsh [whose report the Judge had read] and from Dr Ghaly showed that this was not a conclusive point.

(7) *Is there any evidence, other than opportunity, upon which the court bases its finding that the father is within the pool of possible perpetrators?*

> The fact that three of the children were infected with gonorrhoea; the evidence (most cogently provided by Dr Ghaly) that sexual abuse is the most likely cause of such infection in prepubertal children; the evidence that these children were regularly in the care of the father (at times in the absence of the mother); and the absence of evidence identifying any other incident which, or individual who, could have been responsible for the transmission of the infection to at least one of the children."

The Appeal

32. The grounds of appeal are in substance that the Judge:

    (1) Applied the wrong test for identification of possible perpetrators;

    (2) Drew improper inferences from the evidence and effectively reversed the burden of proof;

    (3) Attached too much weight to the father's opportunity to infect the children;

    (4) Was wrong as a matter of general principle to single out the father when the pool of perpetrators is not finite; and

    (5) Inconsistently found that gonorrhoea was transmitted sexually to the children but also that only one or two of them may have been infected in this way.

33. These arguments were skilfully developed by Mr Stevenson. In summary, he submitted that:

    (1) The Judge misdirected himself at [38], [81] and [3(5)] by asking whether he could exclude father from the pool rather than include him in it, as required by *S-B (Children)* (below) – see Baroness Hale at [43]. He then strained too far to try to identify a perpetrator.

    (2) Paragraph [3(8)] shows that the Judge's conclusion is entirely based upon opportunity and the absence of an alternative explanation. He did not assess the totality of the evidence against the wider canvas: *Re U; Re B (Serious Injuries: Standard of Proof)* [2004] EWCA Civ 567 at [26]. His conclusion ignores the other evidence, including that: the infection was contracted at a time when the father was not living with the children and was only spending limited time with them; any finding that the father abused the children must be based on his having done so in public or on the suspicion he took them to a private place – in respect of which there is no evidence; the lack of any allegation by any of the children; the absence of physical or behavioural signs of sexual abuse; the fact that the father took Maggie to the GP; the father's full cooperation with testing; his negative tests; and the lack of any record of past infection. Nor was there any consideration of the significance of the father's denial of abusing the children or of having been infected himself (which the Judge did not say he disbelieved), nor of the inherent improbability that he would abuse and infect up to three of his children. The process amounted to a reversal of the burden of proof whereby

the father was required to demonstrate that he had never suffered from gonorrhoea and had not abused his children.

(3) The Judge's statement at [3(1)] that he did not wholly accept the parents' evidence that the father was never left alone with the children contradicted the parents' evidence and concerned an issue that was never explored in cross-examination nor mentioned in the original judgment. There were no credibility findings against either parent to support such a statement.

(4) There were significant gaps in the evidence which the Judge fails to reflect in his decision-making. Instead, at [46], he actually questions the value of testing of others in the property. The significance of those gaps is that the Judge was only able to consider and assess the evidence in respect of one individual, leading to the father being singled out by flawed reasoning and against the weight of the evidence.

(5) The most dissatisfying element of the Judge's conclusion is that the pool of possible perpetrators is infinite. In reality, there is nothing that sets the father aside from any other male who may have come into contact with one or more of the children at the appropriate time. The finding will have a serious impact on his further assessment within the care proceedings despite the Judge's attempt at [82] to minimise it.

(6) Further, the Judge's finding is that every male who came into contact with the children at the relevant time is also in the pool, but those who were living in the property were not heard, thus breaching their Article 6 rights.

(7) The expert evidence was that the likely mode of transmission was sexual. However, the Judge found only that at least one of the children had been infected by an adult, leaving open the possibility of inter-sibling sexual transmission or fomite transmission to the others. There is no evidence for the former, while if the latter is possible, fomite transmission may supply the explanation for all the children.

(8) Overall, it was wrong and unnecessary for the court to have concluded that the father is a possible perpetrator. The court should have concluded that if the children had been sexually infected it was not possible to say who had infected them. This court should set aside the finding or remit for rehearing.

34. On behalf of the mother, Ms Chaudhry supported the appeal. She endorsed Mr Stevenson's arguments and emphasised that the Judge was wrong to rule out non-sexual transmission in the light of all of the evidence. But in any case the Judge's supplemental judgment is inconsistent as its logical conclusion is that the other children may have been infected non-sexually.

35. We then heard submissions from Ms Bradley and Ms Budden. They were constrained to acknowledge many of the difficulties identified by the Appellant and, as I have said, they did not in the end oppose the matter being remitted. They accepted the unsatisfactory gaps in the information available to the Judge; in effect, everyone had been waiting for the outcome of a police investigation that turned out not to have happened. They acknowledged that the Judge's conclusion is so imprecise as to raise

real difficulties for the social workers and the Guardian who have to assess and advise on the children's welfare.

36. It should not be thought that in taking this stance, the local authority or the Guardian concede all the arguments that they may wish to make at a rehearing. In particular, Ms Bradley submits that to ask a carer how children could have contracted an infection is a reasonable step that does not reverse the burden of proof. In circumstances of this kind the parents are best placed to identify any potential perpetrators. If their evidence is that the children were always in their care, then it is a reasonable assumption, she says, that they are responsible for any proven harm. Ms Budden says that the judge was right to first consider how the children came by the infection, and then seek to identify the perpetrator. Criticism of the Judge for not addressing the inherent improbability of the father abusing up to three of his children must be rejected. It was improbable that three children of this age should have had gonorrhoea, but once they had it, it ceased to be improbable: see *Re B* (below) at [73]. Ms Budden also drew our attention to aspects of evidence relating to wider concerns about the children's situation.

Uncertain perpetrator cases

37. This case, with its mercifully unusual facts, shows the difficulties that may arise in what are known as 'uncertain perpetrator' cases.

38. The starting point is of course s.31(2) Children Act 1989, which contains the threshold conditions for statutory intervention;

> "31(2) A court may only make a care order or supervision order if it is satisfied—
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> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
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> (b) that the harm, or likelihood of harm, is attributable to—
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> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
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> (ii) the child's being beyond parental control."

39. Before a court can make a care or supervision order, it must be satisfied of both subsection (a) – the 'significant harm' condition – and subsection (b) – the 'attributable' condition. Each of these elements have attracted a great deal of judicial interpretation at the highest level, which I now briefly trace.

40. In the first place, the decision of the House of Lords in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, which concerned the significant harm condition, clearly established the general rule that the burden of proof rests upon the local authority and that the standard of proof of past facts is the balance of probabilities. In relation to the likelihood of future harm, what must be shown is a real possibility of such harm, a possibility that cannot sensibly be ignored, having regard to the nature and

gravity of the feared harm in the particular case. Both past and future harm can only be established on the basis of proven facts. Doubts or suspicions are not enough. These general principles were reaffirmed by the House of Lords in *Re B (Children)* [2008] UKHL 35.

41. Turning then to the attributable condition, in *Lancashire County Council v B* [2000] UKHL 16, the House of Lords considered a case where a baby had been assaulted and the three possible perpetrators were the parents and the childminder. It concluded that, although the local authority was unable to identify which of the carers had been responsible for the injuries, the threshold conditions were satisfied. Lord Nicholls said this:

> "18. … The phrase 'care given to the child' refers primarily to the care given to the child by a parent or parents or other primary carers. That is the norm. The matter stands differently in a case such as the present one, where care is shared and the court is unable to distinguish in a crucial respect between the care given by the parents or primary carers and the care given by other carers. Different considerations from the norm apply in a case of shared caring where the care given by one or other of the carers is proved to have been deficient, with the child suffering harm in consequence, but the court is unable to identify which of the carers provided the deficient care. In such a case, the phrase "care given to the child" is apt to embrace not merely the care given by the parents or other primary carers; it is apt to embrace the care given by any of the carers. Some such meaning has to be given to the phrase if the unacceptable consequences already mentioned are to be avoided. This interpretation achieves that necessary result while, at the same time, encroaching to the minimum extent on the general principles underpinning section 31(2). Parliament seems not to have foreseen this particular problem. The courts must therefore apply the statutory language to the unforeseen situation in the manner which best gives effect to the purposes the legislation was enacted to achieve.
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> 19. I recognise that the effect of this construction is that the attributable condition may be satisfied when there is no more than a possibility that the parents were responsible for inflicting the injuries which the child has undoubtedly suffered. That is a consequence which flows from giving the phrase, in the limited circumstances mentioned above, the wider meaning those circumstances require. I appreciate also that in such circumstances, when the court proceeds to the next stage and considers whether to exercise its discretionary power to make a care order or supervision order, the judge may be faced with a particularly difficult problem. The judge will not know which individual was responsible for inflicting the injuries. The child may suffer harm if left in a situation of risk with his parents. The child may also suffer harm if removed from parental care where, if the truth were known, the parents present no risk. Above all, I recognise that this interpretation of the attributable condition means that parents who may be wholly innocent, and whose care may not have fallen below that of a reasonable parent, will face the possibility of losing their

> child, with all the pain and distress this involves. That is a possibility, once the threshold conditions are satisfied, although by no means a certainty. It by no means follows that because the threshold conditions are satisfied the court will go on to make a care order. And it goes without saying that when considering how to exercise their discretionary powers in this type of case judges will keep firmly in mind that the parents have not been shown to be responsible for the child's injuries.
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> 20. I recognise all these difficulties. This is indeed a most unfortunate situation for everyone involved: the child, the parents, the child-minder, the local authority and the court. But, so far as the threshold conditions are concerned, the factor which seems to me to outweigh all others is the prospect that an unidentified, and unidentifiable, carer may inflict further injury on a child he or she has already severely damaged."

42. The decision in *Lancashire* addressed the position of the parents on one hand and the a third party on the other. A further stage was reached in *Re O and N (Minors); re B (Minors)* [2003] UKHL 18, conjoined cases in which the parents were the only possible perpetrators of injuries to young children. Lord Nicholls noted the general rule that past events had to be proved to the requisite standard and if so proved are treated as having happened and if not so proved are treated as not having happened. He then said this:

> "11. But the general rule does not always apply. Questions of proof of a past event arise in widely varying contexts. Sometimes the law limits the matters the decision maker may take into account. When this occurs, the reason is legal policy, not the requirements of logic."
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> and
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> "27. Here, as a matter of legal policy, the position seems to me straightforward. Quite simply, it would be grotesque if such a case had to proceed at the welfare stage on the footing that, because neither parent, considered individually, has been proved to be the perpetrator, therefore the child is not at risk from either of them. This would be grotesque because it would mean the court would proceed on the footing that neither parent represents a risk even though one or other of them was the perpetrator of the harm in question.
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> 28. That would be a self-defeating interpretation of the legislation. It would mean that, in 'uncertain perpetrator' cases, the court decides that the threshold criteria are satisfied but then lacks the ability to proceed in a sensible way in the best interests of the child. The preferable interpretation of the legislation is that in such cases the court is able to proceed at the welfare stage on the footing that each of the possible perpetrators is, indeed, just that: a possible perpetrator. As Hale LJ said in *re G (Care proceedings: split trials)* [2001] 1 FLR 872, 882:

> "the fact that a judge cannot always decide means that when one gets to the later hearing, the later hearing has to proceed on the basis that each is a possible perpetrator."

This approach accords with the basic principle that in considering the requirements of the child's welfare the court will have regard to all the circumstances of the case.

31. In 'uncertain perpetrator' cases the correct approach must be that the judge conducting the disposal hearing will have regard, to whatever extent is appropriate, to the facts found by the judge at the preliminary hearing. Nowadays the same judge usually conducts both hearings, but this is not always so. When the facts found at the preliminary hearing leave open the possibility that a parent or other carer was a perpetrator of proved harm, it would not be right for that conclusion to be excluded from consideration at the disposal hearing as one of the matters to be taken into account. The importance to be attached to that possibility, as to every feature of the case, necessarily depends on the circumstances. But to exclude that possibility altogether from the matters the judge may consider would risk distorting the court's assessment of where, having regard to all the circumstances, the best interests of the child lie."

43. These decisions were considered by this court in the *North Yorkshire County Council* case (above). There, the possible perpetrators of serious injuries to a small baby were his parents, his nanny and his grandmother. The trial judge had included them all in the pool of perpetrators on the basis that it could not be said that there was no possibility that they had inflicted the injuries. That was held to be the wrong test. Dame Elizabeth Butler-Sloss P. said this:

> "25. In my view the test of no possibility is patently too wide and might encompass anyone who had even a fleeting contact with the child in circumstances in which there was the opportunity to cause injuries.
>
> 26. In these difficult and worrying cases where the court has, as Lord Nicholls has said, to recognise and have regard to the differing interests of the adults and the child, Parliament has provided a two limb threshold which requires to be satisfied before the court has the right to consider the welfare of the child. The first is met in this appeal since the child was injured and suffered significant harm. In relation to the second limb, the attributable condition, it seems to me that the two most likely outcomes in 'uncertain perpetrator' cases are as follows. The first is that there is sufficient evidence for the court positively to identify the perpetrator or perpetrators. Second, if there is not sufficient evidence to make such a finding, the court has to apply the test set out by Lord Nicholls as to whether there is a real possibility or likelihood that one or more of a number of people with access to the child might have caused the injury to the child. For this purpose,

> real possibility and likelihood can be treated as the same test. As Lord Nicholls pointed out in *re O and N (Minors); re B (Minors)* (above) the views and indications that the judge at the first part of a split trial may be able to set out may be of great assistance at the later stage of assessment and the provision of the protection package for the injured child. I would therefore formulate the test set out by Lord Nicholls as, "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?". There may perhaps also be the third possibility that there is no indicator to help the court decide from whom the risk to the child may come, in which eventuality it would be very difficult for the local authority and for the court to assess where the child might be at most risk."

44. The "likelihood or real possibility" test suggested in *Re O and N* and adopted in *North Yorkshire* was decisively approved by the Supreme Court in *Re S-B (Children)* [2009] UKSC 17, a case where injuries must have been caused by one parent or the other. Baroness Hale, describing it as, colloquially, a pure "whodunnit", said this:

> "40. … [If] the judge cannot identify a perpetrator or perpetrators, it is still important to identify the pool of possible perpetrators. Sometimes this will be necessary in order to fulfil the "attributability" criterion. If the harm has been caused by someone outside the home or family, for example at school or in hospital or by a stranger, then it is not attributable to the parental care unless it would have been reasonable to expect a parent to have prevented it. Sometimes it will desirable for the same reasons as those given above. It will help to identify the real risks to the child and the steps needed to protect him. It will help the professionals in working with the family. And it will be of value to the child in the long run.
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> 41. In *North Yorkshire County Council v SA* [2003] EWCA Civ 839, [2003] 2 FLR 849, the child had suffered non-accidental injury on two occasions. Four people had looked after the child during the relevant time for the more recent injury and a large number of people might have been responsible for the older injury. The Court of Appeal held that the judge had been wrong to apply a "no possibility" test when identifying the pool of possible perpetrators. This was far too wide. Dame Elizabeth Butler-Sloss P, at para 26, preferred a test of a "likelihood or real possibility".
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> 42. Miss Susan Grocott QC, for the local authority, has suggested that this is where confusion has crept in, because in *Re H* this test was adopted in relation to the prediction of the likelihood of future harm for the purpose of the threshold criteria. It was not intended as a test for identification of possible perpetrators.
>
> 43. That may be so, but there are real advantages in adopting this approach. The cases are littered with references to a "finding of exculpation" or to "ruling out" a particular person as responsible for

> the harm suffered. This is, as the President indicated, to set the bar far too high. It suggests that parents and other carers are expected to prove their innocence beyond reasonable doubt. If the evidence is not such as to establish responsibility on the balance of probabilities it should nevertheless be such as to establish whether there is a real possibility that a particular person was involved. When looking at how best to protect the child and provide for his future, the judge will have to consider the strength of that possibility as part of the overall circumstances of the case."

45. The last decision to mention, for completeness, is *Re J (Children)* [2013] UKSC 9. In that case the issue was whether the fact that a person was in the pool of perpetrators in one set of care proceedings is sufficient to establish the likelihood that she would cause harm to another child in later proceedings. The Supreme Court held that it is not. Baroness Hale said this:

> "20. … My view remains that the need for the local authority to prove the facts which give rise to a real possibility of significant harm in the future is a bulwark against too ready an interference with family life on the part of the state. And, subject to the caveat that the court received no argument on the impact of article 8 of the European Convention on Human Rights, I incline to the view that nothing less than a factual foundation would justify such grave interference with the rights of the child and the parents thereunder to respect for their family life: see *Olsson v Sweden* (1989) 11 EHRR 259, in which, at paras 67 and 68 (which it has cited with approval on many subsequent occasions), the European Court of Human Rights stressed that a child's removal into care was justified only if it was necessary in a democratic society in the sense that it corresponded to a pressing social need and was based on reasons which were relevant and sufficient."

Analysis

46. Drawing matters together, it can be seen that the concept of a pool of perpetrators seeks to strike a fair balance between the rights of the individual, including those of the child, and the importance of child protection. It is a means of satisfying the attributable threshold condition that only arises where the court is satisfied that there has been significant harm arising from (in shorthand) ill-treatment and where the only 'unknown' is which of a number of persons is responsible. So, to state the obvious, the concept of the pool does not arise at all in the normal run of cases where the relevant allegation can be proved to the civil standard against an individual or individuals in the normal way. Nor does it arise where only one person could possibly be responsible. In that event, the allegation is either proved or it is not. There is no room for a finding of fact on the basis of 'real possibility', still less on the basis of suspicion. There is no such thing as a pool of one.

47. It should also be emphasised that a decision to place a person within the pool of perpetrators is not a finding of fact in the conventional sense. As is made clear in *Lancashire* at [19], *O and N* at [27-28] and *S-B* at [43], the person is not a proven perpetrator but a possible perpetrator. That conclusion is then carried forward to the

welfare stage, when the court will, as was said in *S-B,* "consider the strength of the possibility" that the person was involved as part of the overall circumstances of the case. At the same time it will, as Lord Nicholls put it in *Lancashire*, "keep firmly in mind that the parents have not been shown to be responsible for the child's injuries." In saying this, he recognised that a conclusion of this kind presents the court with a particularly difficult problem. Experience bears this out, particularly where a child has suffered very grave harm from someone within a pool of perpetrators.

48. The concept of the pool of perpetrators should therefore, as was said in *Lancashire*, encroach only to the minimum extent necessary upon the general principles underpinning s.31(2). Centrally, it does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown. This is why it is always misleading to refer to 'exclusion from the pool': see *Re S-B* at [43]. Approaching matters in that way risks, as Baroness Hale said, reversing the burden of proof.

49. To guard against that risk, I would suggest that a change of language may be helpful. The court should first consider whether there is a 'list' of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so: *Re D (Children)* [2009] EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is should A or B or C be placed into the 'pool'.

50. Likewise, it can be seen that the concept of a pool of perpetrators as a permissible means of satisfying the threshold was forged in cases concerning individuals who were 'carers'. In *Lancashire*, the condition was interpreted to include non-parent carers. It was somewhat widened in *North Yorkshire* at [26] to include 'people with access to the child' who might have caused injury. If that was an extension, it was a principled one. But at all events, the extension does not stretch to "anyone who had even a fleeting contact with the child in circumstances where there was the opportunity to cause injuries": *North Yorkshire* at [25]. Nor does it extend to harm caused by someone outside the home or family unless it would have been reasonable to expect a parent to have prevented it: *S-B* at [40].

51. It should also be noted that in the leading cases there were two, three or four known individuals from whom any risk to the child must have come. The position of each individual was then investigated and compared. That is as it should be. To assess the likelihood of harm having been caused by A or B or C, one needs as much information as possible about each of them in order to make the decision about which if any of them should be placed in the pool. So, where there is an imbalance of information about some individuals in comparison to others, particular care may need to be taken to ensure that the imbalance does not distort the assessment of the possibilities. The same may be said where the list of individuals has been whittled down to a pool of one named individual alongside others who are not similarly identified. This may be unlikely, but the present case shows that it is not impossible. Here it must be shown that there genuinely is a pool of perpetrators and not just a pool of one by default.

52. Lastly, as part of the court's normal case-management responsibilities it should at the outset of proceedings of this kind ensure (i) that a list of possible perpetrators is created, and (ii) that directions are given for the local authority to gather (either itself or through other agencies) all relevant information about and from those individuals, and (iii) that those against whom allegations are made are given the opportunity to be heard. By these means some of the complications that can arise in these difficult cases may be avoided.

The present case

53. In the unusual circumstances of this case, the Judge's conclusion contains what are in my view a number of insuperable difficulties.

54. Firstly, the Judge wrongly started from the position, and effectively with the presumption, that the father was in the pool of perpetrators and that the question was whether he should be removed from it. As explained at [48] above, this effectively put the burden on the father to show that there was no real possibility that he had abused his children. That risk was amplified by the Judge's observation that: "where it is impossible for a judge to find on the balance of probabilities, that, for example, Parent A rather than Parent B caused the injury, then neither can be excluded from the pool, and the judge should not strain do so." The reference to 'straining to exclude' is a reversal of the guidance in *Re D (Children)* (above), where Wall LJ, giving the judgment of the court, said:

> "12. If such an identification is not possible – because, for example, a judge remains genuinely uncertain at the end of a fact finding hearing, and cannot find on the balance of probabilities that A rather than B caused the injuries to the child, but that neither A nor B can be excluded as a perpetrator – it is the duty of the judge to state that as his or her conclusion. To put the matter another way, judges should not, as a result of the decision in *Re B*, and the fact that it supersedes *Re H,* strain to identify the perpetrator of non-accidental injuries to children."

The principle is therefore that judges should not strain to identify a perpetrator, not that they should not strain to exclude a person from the pool. It may be that in a case with a pool of only two possible perpetrators, not straining to exclude is the other side of the coin of not straining to identify. But that is not so where there is a larger pool, as in this case. By 'not straining to exclude' the Judge was making the father's task in extricating himself from the pool all the harder.

55. Secondly, the Judge did not require the local authority to make out a positive case before reaching a conclusion in the light of all the circumstances. Rather, he reached his decision on the narrow but important basis that the children had the infection and the father had the opportunity. He had earlier referred to the fact that there were no other signs of abuse, that there was positive though not conclusive evidence that the father himself had never been infected, and that the children had made no allegations, but he did not give any apparent weight to these matters when he came to his decision. Nor, crucially, did he make any adverse finding about the father's credibility. On an issue of this importance, the court must assess a key witness's evidence and, if it is not

accepted, explain why that is. This judgment does not tell the father, who had given ostensibly credible evidence that he had neither had gonorrhoea nor abused his children, why he was apparently disbelieved on both of these matters.

56. Thirdly, the assessment of the evidence was unsatisfactorily constrained by the gaps in the evidence and the artificial decision to focus on the issue of infection without considering other aspects of the asserted threshold. The local authority's case was broad enough to include an allegation against the other occupants of the property (unnamed but easily identifiable), but it did not evidentially pursue that case despite the significance rightly attached to the issue by the Guardian at the outset. Nor, at a stage before the Judge's involvement, did the court arrange to give the other occupants the opportunity to give their accounts. Those accounts might have shed light upon the probabilities one way or another. As it is, two young men have been placed in the pool of perpetrators without having had any involvement in the case. In Article 6 terms, this is presumptively unfair to them. There is also a real concern that the father, by being deprived of the opportunity to make any arguments he would want to make in relation to other possible perpetrators, has inadvertently been placed in a pool of one.

57. Fourthly, I would accept the arguments of Mr Stevenson and Ms Chaudhry that there is a possible unexplained inconsistency between the Judge's acceptance that the initial infection was transmitted sexually and his acceptance that the father may not have infected all the children directly. That conclusion either raises a doubt about the finding of adult sexual transmission or it supposes the possibility of sexualised behaviour between the children, for which there is no direct or indirect evidence. This conundrum, if such it is, is not explained in the main judgment or, in answer to a question, in the supplemental judgment. This bears upon whether the father has or has not been found to be a possible perpetrator of abuse upon all three children, one of whom he was not taking to school, and to a consideration of the likelihood and opportunity of this having happened without detection or complaint. Moreover, if the court had been minded to accept the father's evidence, it might have been open to reviewing any preliminary conclusion it had reached about the method of transmission and whether it had been sexual or not.

58. Fifthly, although Dr Ghaly referred to "adults", the local authority's case and the Judge's conclusion suppose that only men can transmit gonorrhoea; the evidence showed that for physiological reasons it is harder for a woman to do so, but otherwise transmission is not gender-specific. It is therefore not clear why the Judge's conclusion refers to males rather than adults.

59. Sixthly, the Judge included within the pool of perpetrators "other unknown males who may have had access to the children." Not having heard argument on the point, I would not go so far as to say that an unknown (or, more accurately, an unidentified) person could not be placed in the pool of perpetrators – for example, if there had been a burglary at around the relevant time, a burglar who might have injured the child – but such a conclusion would be extremely unusual. In this case, there was no positive evidence to support the real possibility that the infection was transmitted by an unknown person and the Judge does not explain how he had drawn an inference to that effect. As it is, the basis for this open-ended expansion of the pool of perpetrators is unclear, even assuming for the present that it is permissible in principle.

60. Finally, the parties are united in the view that the Judge's threshold finding in this case has a very low forensic value and would be unusually difficult to interpret at the welfare stage. How are social workers and the court to weigh the uncalibrated risk, falling short of a probability, that the father might pose to his four children? One answer is that the law cannot be responsible for all the situations thrown up by life, and that that the court will just have to do its best. However, I do not think that is good enough in this case. As has been observed, the pool of perpetrators is a departure from the norm and every effort must be made to ensure that the departure operates in a principled way. Here, the risk of unfairness has been increased by the failure to investigate. The judge was aware of the gaps in the evidence but he did not give any weight to them.

61. In conclusion, the two fundamental shortcomings in this anxious case are that these very serious allegations did not receive the thorough investigation that was required and that, faced with that unsatisfactory state of affairs, the Judge's analysis fell short in the ways I have identified. The matter must therefore be reheard. Given the passage of time, it is not clear whether the court will be able to gather further direct information about how the children came to be infected, though a wider understanding of the family's overall circumstances may well be useful. But even if the evidence remains incomplete, the court will be able to approach the issues of transmission and perpetration in accordance with the principles set out above.

Lord Justice Lindblom

62. I agree.

Lady Justice King

63. I also agree.