RE H AND R (CHILD SEXUAL ABUSE: STANDARD OF PROOF

Court of Appeal

Sir Stephen Brown P, Kennedy and Millett LJJ

14 December 1994

Care – Local authority applying for care orders for three children based on allegations of sexual abuse of older sister by mother's cohabitee – Judge finding allegations not established – Whether judge should proceed to consider future risk to children when primary allegation not proved – Children Act 1989, s 31

The mother had four children. Two, C and D, aged 16 and 13, were the children of her husband, from whom she was separated. Two, T and M, aged 9 and 2, were the children of the mother's cohabitee. In 1990 C alleged that the cohabitee had sexually abused her, and as a result he was charged with rape but acquitted. The local authority then proceeded with applications for care orders in respect of the three younger children pursuant to s 31 of the Children Act 1989, based on the alleged sexual abuse of C. The judge found that the mother and her cohabitee were lying and expressed considerable suspicion that the alleged abuse had taken place, but held that, as the case depended solely on C's allegations and he was not satisfied on the balance of probabilities proportionate to the gravity of the offence that the allegations were true, he could not proceed to consider whether the children were likely to suffer significant harm in the terms of s 31(2)(a). He therefore dismissed the applications. The local authority, supported by the guardian ad litem, appealed on the ground that even if the judge was not satisfied that abuse had in fact occurred, nevertheless the allegation itself and the judge's suspicion ought to be taken into account so as to fulfill the requirements of s 31.

Held – dismissing the appeal (Kennedy LJ dissenting) – the judge had been right to adopt a two-stage approach, and having fairly weighed up the matter relating to the allegations of sexual abuse and concluded that they had not been established to the requisite standard of proof, ie the balance of probabilities, he had rightly dismissed the applications. It was not open to him on the evidence, since he had rejected the only allegation which gave rise to the applications, to go on to a second stage and consider the likelihood of future harm to the children.

Per curiam: the more serious the allegation, the more cogent the evidence needed for its proof, but in all civil cases, contempt proceedings apart, the only standard of proof is proof on the balance of probabilities.

Statutory provision considered
Children Act 1989, s 31

Cases referred to in judgment
B (Termination of Contact: Paramount Consideration), Re [1993] Fam 301, [1993] 3 WLR 63, [1993] 3 All ER 542, *sub nom B (Minors) (Care: Contact: Local Authority's Plans), Re* [1993] 1 FLR 543, CA
Davies v Taylor [1974] AC 207, [1972] 3 WLR 801, [1972] 3 All ER 836, HL
F (Minors) (Wardship: Jurisdiction), Re [1988] 2 FLR 123, CA
G (No 2) (A Minor) (Child Abuse: Evidence), Re [1988] 1 FLR 314, *sub nom G (A Minor) (Child Abuse: Standard of Proof), Re* [1987] 1 WLR 1461
H (A Minor), Re; K (Minors) (Child Abuse: Evidence), Re [1989] 2 FLR 313, sub nom *H (A Minor), Re; K v K* [1989] 3 WLR 933, [1989] 3 All ER 740, CA

H v H (Minors) (Child Abuse: Evidence) [1990] Fam 86, *sub nom H v H (Child Abuse: Access)* [1989] 1 FLR 212, CA
M (A Minor) (Appeal) (No 2), Re [1994] 1 FLR 59, CA
Newham London Borough Council v AG [1993] 1 FLR 281, CA
P (A Minor) (Care: Evidence), Re [1994] 2 FLR 751, CA
W (Minors) (Sexual Abuse: Standard of Proof), Re [1994] 1 FLR 419, CA

Peter Horrocks for the local authority
James Turner for the mother
Allan Levy QC and *Judith Claxton* for Mr R
Lindsey Kushner QC and *Mhairi McNab* for the guardian ad litem
Mr H did not appear and was not represented

SIR STEPHEN BROWN P:

This is an appeal from the judgment of his Honour Judge Davidson QC, sitting at Nottingham County Court on 23 November 1994. The judge then dismissed applications for care orders, made pursuant to s 31 of the Children Act 1989 by the local authority, in respect of three children, all girls. D was born on 18 August 1981 and is now 13 years of age. T was born on 14 March 1985 and is now 9 years of age. M was born on 15 April 1992 and is 2¾ years of age. The three girls are all the children of the mother, the first respondent. D is the child of her marriage to Mr H, the third respondent. The two younger girls were born to her as a result of her longstanding association with the second respondent, Mr R.

The first respondent, to whom I shall refer as 'the mother' in this judgment, also had a child of her marriage to Mr H, a girl, C, born in June 1978. She is now 16½ years of age, and is 'accommodated' with foster-parents. The mother and Mr H were married in 1979 and they separated in 1982. In 1984 the mother and Mr R commenced living together, and have continued to live together since that date. Although Mr H was made a respondent to the care application in respect of D, he has played no part in these proceedings.

In the early part of 1990 the family came to the notice of the social services department of the local authority, when complaints were made of possible physical abuse by Mr R upon C, which she disclosed in school. Mr R was then described as 'threatening, aggressive and intimidating towards social workers'. However, no detailed investigation appears to have then taken place.

In September 1993 the mother of a friend of C reported to the police that C had told her that Mr R, her mother's cohabitee, had been sexually abusing her. C was interviewed on 22 and 23 September 1993 jointly by a police officer and a social worker. She made a full and detailed statement alleging long-term and regular sexual abuse by Mr R, commencing when she was 7 or 8 years of age. The allegations included touching, masturbation, oral sex and intercourse. She was offered a home by her natural father, who had remarried, but she suddenly changed her plans and returned to live with her mother at the beginning of October 1993. There was an attempted retraction of her complaint on 13 October 1993, when she was taken to the police station by her mother and Mr R, but she very shortly afterwards changed her mind when seen separately by a police officer, and was placed under the protection of the police, and accommodated with foster-parents.

Mr R was subsequently charged with offences of rape of C. He was bailed, a condition being that he should live at the home of his married daughter (he had children by a former marriage) and that he should not have contact with the three girls, the subject of those proceedings, except under the supervision of social workers.

On 4 November 1993 all four girls were placed on the child protection register. On 3 February 1994, following a case conference, a decision was made to apply for care orders in respect of the three younger children. Interim care orders were made, which were followed, in August 1994, by interim supervision orders.

At the beginning of October 1994 Mr R was tried on an indictment containing four counts of rape, and on 4 October 1994 he was acquitted by the jury on all counts after a very short retirement. C was the principal witness for the Crown at his trial. The local authority then proceeded with the applications for care orders in respect of C's three younger sisters, alleging that they must be considered to be at risk, having regard to the alleged persistent and serious sexual abuse of C by Mr R. These applications were considered by his Honour Judge Davidson QC at a hearing which extended over 7 days, and on 23 November 1994 he gave judgment dismissing the applications.

The case as presented by the local authority was upon the sole ground of the alleged sexual abuse of C by Mr R. The judge said:

> 'They are central to the local authority's case because they comprise the only ground for saying that the threshold criteria under the Children Act are met and that the three children with whom I am concerned are at risk. There is nothing else of substances.'

In the course of her evidence to the court the guardian ad litem agreed with this formulation for the case. C gave evidence at the hearing before the judge, and the judge said:

> 'The child's evidence is crucial. She is totally estranged from her mother now. Indeed, the saddest part of her evidence is where she said, "She's not my mum". The reason for this is that she feels that her mother has chosen R against her and does not believe her accusations. She said so in the witness-box in no uncertain terms and became so stressed that she marched out of court in the course of cross-examination in the face of suggestions, which of course had to be put, that she was lying.'

The judge carefully reviewed her evidence and noted what he described as:

> '. . .slight pointers to support C.'

He turned to consider the evidence of the mother and Mr R. He said of the mother:

> 'I cannot regard her as a witness on whom I can rely. . .

> Mr [R]. I have to say that his credibility, too, was disfigured by a number of plain lies and, perhaps more damagingly, by a series of improbabilities which it was impossible to swallow.'

He gave particulars. The judge then said:

> 'His evidence is shot through with truculence and exaggeration. He clashed with everybody in the case.'

The judge continued:

> 'I have seldom been less impressed by a witness. If the second respondent had to prove that there was no sex abuse, the matter would be no contest, but the question is, disbelieving as I do both the mother and the second respondent on a number of important matters, can I reach the conclusion which is appropriate to the local authority's plan for the children? After all, it does not follow that because the two respondents are telling material lies I can be satisfied, nevertheless, that [the child] is telling the truth.'

The judge then turned to consider 'the relevant law'. He said:

> 'At this point, one must consider the relevant law. What finding is it necessary to make to support a conclusion that the threshold criteria are met so as to go on to the second stage and consider making the care orders asked for? Is it sufficient for me to find that there is a real risk that C is telling the truth and may well have been abused or must I go further and be satisfied on the appropriate standard of proof that she has, in fact, been so abused? I have been referred to a number of helpful cases, for example, *Re W (Minors) (Sexual Abuse: Standard of Proof)* [1994] 1 FLR 419 which make it clear to me that only an express finding of sex abuse will suffice to invoke the threshold criteria.
> I next have to consider the appropriate standard of proof, it being conceded that the burden of proof lies on the county council. There are cases which seem to say that the ordinary civil burden of proof applies mathematically, if crudely expressed, at 51%, just tipping the scale, but a strong line of authority suggests otherwise and requires a higher standard of proof albeit one falling short of the criminal standard. This appears to derive from Denning LJ as he then was in *Bater v Bater* [1951] P 35. It was there suggested that the standard of proof should be "commensurate with the seriousness of the charges".'

The judge went on to refer to the judgment of Sheldon J in *Re G (No 2)(A Minor) (Child Abuse: Evidence)* [1988] 1 FLR 314 and he said that that case was approved in later decisions such as Re H (A Minor); Re K (Minors) (Child Abuse: Evidence) [1989] 2 FLR 313, but he added:

> 'The case of *Re W* to which I have referred seems to me a case where the Court of Appeal adopted the same approach. The headnote summarises the decision and I read from p 419H:

> "The more serious the allegation, the more convincing was the evidence that was needed to tip the balance in respect of it. Although it was now settled that in civil proceedings charges of sexual abuse do not require proof beyond reasonable doubt, the standard of proof to be required was nevertheless commensurate with the serious nature of the issues raised. Charges of sexual abuse in civil proceedings must be proved to a standard beyond a mere balance of probability, but not necessarily a standard as demanding as the criminal standard."'

In the course of his judgment in the case of Re W Balcombe LJ said at p 424G:

> '. . .I should first state what I understand to be the appropriate standard of proof relating to such matters.
>
> (1) The burden of proof lies upon the party who asserts that abuse has occurred – in this case the local authority.
> (2) The standard is the balance of probabilities.
> (3) The more serious the allegation the more convincing is the evidence needed to tip the balance in respect of it.'

In fact, that decision of the Court of Appeal was made on 26 November 1993. One month or so earlier in another Division of the Court of Appeal, Waite LJ considered the same question. In *Re M (A Minor) (Appeal) (No 2)* [1994] 1 FLR 59, in relation to an allegation of physical abuse, he said at p 67F:

> 'We are satisfied that the judge correctly directed himself in every material respect and, furthermore, that he correctly applied the tests he set himself. For ourselves, we would express the test as to the standard of proof somewhat differently, although we emphasise that the difference is one of expression only. The local authority and those who supported them had to establish the primary facts of past harm on the balance of probabilities. But the more serious the allegation the more convincing was the evidence needed to tip the balance in respect of it.'

I return to the judgment of his Honour Judge Davidson in this case. Having cited *Re W* (above) the judge said:

> 'I consider myself bound by those cases, of course, so that I must find a higher than ordinary standard of proof although how much higher that standard must be, may, in any given case, be problematical. Here where four or possibly five rapes are alleged on a girl who is then under age by her stepfather who stood in a position of trust, the charges are clearly of the most serious nature.'

He continued:

> 'Let me, with this in mind, consider whether I am so satisfied of the essential truth of C's accusations.'

In the following pages of his judgment he set out the matters which he considered to be in favour of that proposition, and followed this by itemising the contrary considerations, which were urged on behalf of the respondents. It represents a careful analysis of the position.

The judge said:

> 'Bearing in mind all these factors and weighing up all the relevant evidence as I have, I hope, with great care and giving due consideration to counsel's arguments, I find myself in the position that I cannot be sure to the requisite high standard of proof that C's allegations are true. It must follow that the statutory criteria for the making of a care order are not made out. This is far from saying that I am satisfied the child's complaints are untrue. I do not brush them aside as the jury seem to have done. I am, at the least, more than a little suspicious that the second respondent has abused her as she says. If it were relevant, I would be prepared to hold that there is a real possibility that her statement and her evidence are true, nor has the second respondent by his evidence and demeanour, not only throughout the hearing but the whole of this matter, done anything to dispel those suspicions, but this in the circumstances in nihil ad rem.'

The judge then proceeded to dismiss the applications for care orders in respect of the three children.

The appellants submit that the judge misdirected himself first, in relation to the standard of proof, and further, as to the correct approach to the allegations of past sexual abuse of C. It is to be noted, in this case, that there was no evidence that these three children who are the subject of the care applications had themselves been abused. There was no evidence of any kind that any one of them had been the subject of any improper sexual advance. The case, as presented to the judge, depended solely, as he said, upon the allegation that C had been persistently sexually abused and that accordingly, the three younger children should be found to be at risk.

It is submitted that the judge's observation at the conclusion of his judgment:

> 'If it were relevant, I would be prepared to hold that there is a real possibility that her statement and her evidence are true. . .'

indicated a degree of concern sufficient to justify a finding that the threshold criteria of s 31 of the Children Act 1989 had been established. Counsel for the appellant submitted that although it was accepted that the abuse alleged against C should be established on the basis of the balance of probabilities, nevertheless, the allegation and the judge's suspicion ought to be taken into account so as to fulfil the requirement of s 31. This was so even if the judge was not satisfied that abuse had, in fact, occurred. The evidence adduced was such as to raise a serious concern as to the future welfare of the three children.

'In a nutshell', said Mr Horrocks, counsel for the local authority, in opening the appeal:

> 'What is a judge to do when he finds a strong suspicion?'

On behalf of the respondents, and in particular on behalf of the second respondent, Mr Levy QC submitted that there is a two- or, indeed, he would say, a three-stage process involved in considering the provisions of s 31. First of all, he submits there must be a finding in respect of the primary facts giving rise to the application. In this case the only primary facts were the allegations of sexual abuse made by C. That issue must be addressed first of all before consideration is given to the question of future risks to the children, and the steps to be taken to ensure their welfare.

The case of *Re H (A Minor); Re K (Minors) (Child Abuse: Evidence)* decided by the Court of Appeal and reported in [1989] 2 FLR 313 was cited by Mr Levy in support of his submissions. In particular he referred to a passage reported at p 318A in the judgment of Croom-Johnson LJ. Mr Levy submits this encapsulates the correct position. The facts of the case were different from those of the present case, but that fact does not render the passage irrelevant to its consideration in the present appeal.

Croom-Johnson LJ said at p 318A:

> 'The dicta in *Re F (Minors) (Wardship: Jurisdiction)* [1988] 2 FLR 123, CA], however, have led to a submission to us, in *Re H* [that is the first of the combined appeals which were being heard together], that to prove abuse in the past, only a real possibility need be shown, and no more. In *Re K*, Miss Price took issue with that fallacy. She submitted that the onus of proof in all civil cases is on the balance of probabilities and that, if it is not reached, the facts alleged (be they abuse or anything else) have not been proved. If they are proved, the judge must find whatever facts he considers proper, and it is upon those that he must then exercise his discretion. In exercising his discretion he will give effect to the rule that the welfare of the child is paramount, but he will not employ the "paramount" rule in reaching his findings of fact. Having made his findings about the past, he must then consider the future. The future is not susceptible to proof in the same way. All the judge can do is assess the risks of what may happen, and *Re F* is authority that there must be an evidential basis for that. Fanciful risks will not do.'

Croom-Johnson LJ then went on to consider the difficulty of proving what will happen in the future. That case was subsequently specifically approved in *Re M (A Minor) (Appeal) (No 2)* [1994] 1 FLR 59. In Re M the relevant allegation was that the child in question had suffered physical abuse, which gave rise to the crossing, if I may so put it, of the threshold in s 31. At p 67B of the report of his judgment, Waite LJ said:

> 'We now come to the appeal itself. As we have said, Ward J held that the statutory threshold under s 31 had been passed, but that A's best interests required him to give the parents a chance. In regard to s 31, he referred to a decision of this court in *Newham London Borough Council v AG* [1993] 1 FLR 281; in regard to the ascertainment of A's best interest to the decision of this court in *H v H (Minors) (Child Abuse: Evidence)* [1990] Fam 86, [1989] 1 FLR 212. In making findings of primary facts of past harm, the judge directed himself in this way. . .'

Waite LJ then referred to the judgment of Ward J at first instance:

> '"First, that the burden of proof in establishing those facts lies upon the local authority who assert them. Secondly, that the standard is on a balance of probabilities. Thirdly, that, given the seriousness of the nature of the allegation and the personalities and relationships involved, it is to a proportionately higher standard of probability than otherwise for less serious allegations. Fourthly, that in that assessment welfare plays a part."'

Waite LJ then continued:

> 'The judge also reminded himself of the observations of Butler-Sloss LJ in *Re W (Minors) (Wardship: Evidence)* [1990] 1 FLR 203, as to the weight that a judge should give to statements made by children to third parties concerned with their welfare; a matter for his discretion where he must regard the statements with great caution unless they are uncontroversial.'

Then he went on:

> 'We are satisfied that the judge correctly directed himself in every material respect and, furthermore, that he correctly applied the tests he set himself. For ourselves, we would express the test as to the standard of proof somewhat differently, although we emphasise that the difference is one of expression only. The local authority and those who supported them had to establish the primary facts of past harm on the balance of probabilities. But the more serious the allegation the more convincing was the evidence needed to tip the balance in respect of it. Thus the judge was right, in particular, to conclude that he should not find that the belting episode had taken place or that the duodenal haematoma had been caused by either or both of the parents unless the evidence was of a weight appropriate to the seriousness of those allegations.'

It is clear, from those two decisions of this court, that the court considered that evidence of primary fact relating to past events had to be established upon the balance of probabilities proportionate to the gravity of the allegations concerned. Mr Levy relied upon those decisions and the expressions as to the correct approach of Croom-Johnson LJ and Waite LJ to support his submission that in the present case the judge was right to establish first the factual position with regard to the complaints made by C upon the balance of probabilities before proceeding to consider 'future risk' in the terms of s 31, and in the context of the approach which this court indicated should be adopted in the case of *Newham London Borough Council v AG* [1993] 1 FLR 281. That is to say that the future risk of likely harm should be considered on a basis which was not necessarily that of the balance of probabilities. Mr Levy submitted that approach of the judge in this case was right, despite harbouring the suspicions which he acknowledged. The complaints of C had first to be established on the balance of

probabilities. The judge was justified on the evidence in finding that the allegations of abuse had not been established.

Mr Horrocks on behalf of the appellants, and Miss Kushner on behalf of the guardian ad litem, who supports the appellants in this appeal, have both submitted that the judge erred in not assessing a future risk. They submit that he ought to have considered the future risk in the light of the evidence and of his own suspicions. They submit that he should have found that the children were likely to suffer significant harm in the future. They also criticise the judge's formulation of the standard of proof. The judge said:

> 'I find myself in the position that I cannot be sure to the requisite high standard of proof that [the child's] allegations are true.'

Criticism is made of the phrase 'high standard of proof'. However, that has to be read, in my judgment, in the context of the whole of his judgment, and, in particular, in the light of his earlier reference to Re W on which he based his approach.

This was, on any view of the matter, a very difficult case for the judge to try. The behaviour of both the respondents made it particularly difficult. It was a feature of the circumstances leading up to the hearing that the mother herself made serious allegations of improper behaviour against a male social worker, which resulted in her being sentenced to a term of imprisonment at the beginning of October 1994. We are told that she is due to be released on 23 December 1994. Further, the stepfather, quite plainly, deceived the social services in relation to his observance of the conditions of his bail with regard to not seeing the children or attempting to see them except under supervision. There was clearly a very difficult and fraught situation which the social workers had to deal with. However, these matters were not the issues in the hearing before the judge. He had to consider the allegations made by the older child, C, and that he did.

In my judgment, it was clearly open to the judge to decide that issue in the way in which he did. The judge observed:

> 'The social services have made up their minds that she (that is C) is speaking the truth, but then they always believe the complainant and, indeed, might have continued to believe the mother if she had not admitted that her allegation was false.'

That was a reference to the mother's allegation of improper behaviour by a social worker towards her. The judge then said:

> 'Perhaps more significantly, Mrs B, whose son is married to Mr R's daughter, and who is a central family figure, has moved from supporting him to believing [the child]. But, for all this, as I observed during the case, the opinions of others on this matter move me not at all. It is I who have to make the decision.'

Complaint is made, particularly on behalf of the guardian, that he did not take into account the fact that the guardian had serious views about what had happened to C although she had not herself seen C but had

formed opinions, which it is suggested that the judge ought to have taken into account.

However, the judge had to make a finding of the primary facts, which required him to make a finding on the allegations of abuse made by C. This he did, and it is clear from the terms of his judgment that he considered the whole of the evidence dispassionately. The points of analysis, which he set out in his judgment, indicate that he fairly weighed up the matters which related to the allegations of sexual abuse. He came to the conclusion that they had not been established to the requisite standard of proof, that is to say the balance of probabilities. Accordingly, he dismissed the care applications. It was not then open to him on the evidence, since he rejected the only allegation which gave rise to the making of the care order applications, to go on to a second stage and to consider the likelihood of further harm to the children.

In my judgment, the appeal should be dismissed. This was a difficult case before the judge, but he made findings, which were wholly within his province and which he made not shirking the difficulties which were presented to him.

There is, however, a matter which gives rise for concern on my part, and I think on the part of the other members of this court, which relates to D. D is not the natural child of Mr R, and the evidence before the judge, and, indeed, the material before this court, indicates that she has sided with her sister C, and is now estranged from both her mother and the second respondent, Mr R. She has left home. She is presently being temporarily accommodated in the same foster placement as her elder sister, C. There is a finding by the judge, in the course of his judgment, as to an incident relating to D. It is not an allegation of sexual abuse, I hasten to add, but is an episode of violence. It was not relied on by the applicants as a basis for making a care order. The judge said in reference to the second respondent:

> 'He denied ever having hit D, yet [a relative] deposed to an occasion which she speaks of in her statement where clear violence took place between the second respondent and D. The particulars include throwing D to the floor. She amplified that in her evidence. She, like all the others who speak adversely, is said to be lying, yet no real reason could be advanced for the lie. Relations with [those relatives] in general seem to have been friendly at all times. She could have no motive that I can discern for inventing such an incident, and I am satisfied that she is telling the truth about it and that the second respondent is not.'

That matter was not canvassed as a ground for the making of any order in relation to D. It is not open to this court, in my judgment, to proceed upon it at this stage so as to consider whether it might indicate that the s 31 threshold had been established in relation to D. However, in the future the local authority may well wish to consider, in the light of that finding, and, indeed, of the other circumstances which have since developed in relation to D: the fact that she has left home and that she is a 13-year-old child with nobody exercising actual parental responsibility at the present time, whether or not they ought to seek some order in her case in the light of the judgment of this court. Those would be matters for the

local authority to consider for, as has been pointed out under the provisions of s 47 of the Children Act, they have a continuing responsibility for the welfare of children within their area.

However, the court, in my judgment, cannot give any direction about that matter. I would say this, however, that if proceedings are thought to be appropriate in the case of D, it would be appropriate that they should be brought before a High Court judge of the Family Division. Finally, I would like to add this, in relation to the local authority: nothing that I have said should be taken in any way as indicating any criticism of the course which the local authority has taken in this difficult case. They were bound to investigate the complaints made by C. They did so. They took all the necessary procedural steps in accordance with the provisions of the Children Act and placed the matter before the court.

It may well be the case, as I believe has become abundantly clear, that they disagree with the finding of the court, but that is not a matter which can, in any sense, justify criticism of any action that they have taken. It is also right that I should express my grave concern at the appalling behaviour of the two respondents towards the social workers. It must be understood that social workers have a responsibility to the children, and the conflicting interests of those who are involved should not be made a justification for the kind of outrageous behaviour that has undoubtedly occurred in this case. But for the reasons which I have given, I would dismiss this appeal.

KENNEDY LJ:

This case was presented to Judge Davidson on a simple basis. He was invited to find that the eldest child, C, had been sexually abused by her stepfather, the second respondent. From that he was invited to infer that the threshold criteria set out in s 31(2) of the Children Act 1989 were satisfied, in that the three children were, it was contended, likely to suffer significant harm. The judge, therefore, felt constrained to make a finding as to whether sexual abuse had, in fact, occurred. He was not satisfied that it had, but he thought that there was a real risk that it had and said so. He was more than a little suspicious that the second respondent had abused C, as C had said. There was, as he put it:

> '. . . a real possibility that her statement and her evidence are true. . .'

Nevertheless, because he had been unable to make a finding of sexual abuse, he felt unable to give any weight to the evidence of C when making his decision for the purposes of s 31(2). He concluded that the threshold criteria were not satisfied and the applications were therefore dismissed. The judgment is a model of clarity, and it is clear from the judgment that the conclusion was not one which the judge found to be attractive. I have the misfortune to disagree with the judge, and with the other members of this court in that, in my judgment, the conclusion at which Judge Davidson arrived was not one which he was compelled to reach.

I start by reminding myself of what was said by Butler-Sloss LJ in *Re B (Minors) (Care: Contact: Local Authority Plans)* [1993] 1 FLR 543 at p 547, namely that the 1989 Act marks a fresh start in this area of the law, which at least calls into question the value of decisions based on differently worded sections or pre-existing practices. The starting-point now must be

the words of the statute, Part IV of which deals with care and supervision, and the first section in that Part is s 31(1) which gives the court a discretionary power to make a care or supervision order. But s 31(2) provides that the power may only be exercised if the court is satisfied that:

> '(a) the child concerned is suffering, or is likely to suffer, significant harm. . .'

Section 31(2)(a) therefore sets out what have been conveniently referred to as 'threshold criteria'. If the court is satisfied as to the existence of one or other of them it can go on to consider causation (s 31(2)(b)) and the much wider question of whether, in the exercise of its discretion, an order should be made. But it is, to my mind, important to recognise that s 31(2)(a) does only set out threshold criteria, which, if satisfied, permit the court to go on to consider the merits of the application.

If at the time when the local authority intervenes a child is being abused then, no doubt, the applicant will try to demonstrate that the child is suffering significant harm. That is something which, I accept, must be demonstrated on a balance of probabilities, because a finding of fact has to be made in relation to what is going on now, or has gone on in the recent past. But the 1989 Act introduced the possibility of threshold criteria being satisfied if a child is likely to suffer significant harm, and it is already clear that in that context 'likely' does not mean more probable than not, because as Lord Reid said in *Davies v Taylor* [1974] AC 207 at p 212, you cannot prove that a future event will happen, and the law is not so foolish as to suppose that you can. A child can therefore be said to be likely to suffer significant harm if there is acceptable evidence of a real risk that such harm will be sustained (see *Newham London Borough Council v AG* [1993] 1 FLR 281 at p 286).

The evidence probably will relate to past events and the applicant will be inviting the court to infer that because that evidence exists, there is a real risk that the child in question will suffer significant harm. But I, for my part, do not accept that if the evidence relates to alleged misconduct on the part of, for example, a man who is or who is about to become a member of the child's household, that misconduct must itself be proved on a balance of probabilities before the evidence can be used to satisfy the threshold criteria in s 31(2)(a).

The issue is not whether the misconduct occurred, it is whether the child is likely to suffer significant harm, and if the court is persuaded to consider as a separate preliminary issue whether or not misconduct did, in fact, occur, then problems may well arise as they arose in this case. The preliminary issue having been resolved, the court cannot use evidence which it has rejected. It cannot make a second decision on the basis that its first decision may be wrong. It will thus be inhibited from acting to protect a child in circumstances where protection would seem to be needed. For example, a man alleged to have molested two or three younger children in the past may be about to set up home with a woman who has a young child. For a variety of reasons it may not be possible to prove, on a balance of probabilities, any act of molestation in the past, but if there is evidence of past molestation, that is evidence from which, as it seems to me, the court can infer that the young child, whose home is about to be entered, is

likely to suffer significant harm. Of course, the stronger the evidence of past molestation the more ready the court will be to draw the inference that it is being invited to draw, but I do not see why, when considering the issue raised by s 31(2)(a), the evidence should, in effect, be excluded until its weight is such as to demonstrate on a balance of probabilities that some act of molestation did, in fact, occur.

Having arrived at that tentative conclusion by reference only to the words of the statute and the decision of this court in the case of Newham, I turn now to consider whether there is anything in the submissions of counsel, or in the authorities to which our attention has been invited, to indicate that the tentative conclusion is one that cannot be sustained.

Mr Turner for the first respondent and Mr Levy for the second respondent submitted that when applicants intend to rely on past events to show that a child is likely to suffer significant harm they must undertake a two-stage process. Mr Levy described it as a three-stage process, but as his third stage relates only to the exercise of discretion whether or not to make an order, I can ignore it, because that only requires consideration after the threshold criteria are found to exist. The two stages are:

(1) the determination of what has happened in the past, that determination being made on a balance of probabilities;
(2) if stage one yields a relevant conclusion, then, in stage two, the court can evaluate future risks on the basis of past events and other material factors.

As I have already indicated, there is nothing in the wording of the statute which seems to call for a two-stage approach, but it is submitted that support for such an approach can be found in two decided cases, and in the broad purpose of this legislation. The first of the two decisions particularly relied upon is the decision of this court in *Re H (A Minor); Re K (Minors) (Child Abuse: Evidence)* [1989] 2 FLR 313. Both cases under consideration were applications for access by fathers who were alleged to have sexually abused children, in the one case his child and in the other case a niece and nephews. In each case the court found it necessary to determine if abuse had occurred, and one of the questions considered by this court was the standard of proof to be applied. It was in that context that Croom-Johnson LJ said, at p 318, that where a decision falls to be made in relation to past events, it must be on a balance of probabilities. The judgment continues at p 318B:

> 'Having made his findings about the past, he must then consider the future. The future is not susceptible to proof in the same way. All the judge can do is assess the risks of what may happen, and *Re F* is authority that there must be an evidential basis for that. Fanciful risks will not do.'

I would accept that offers some support for a two-stage test if we were considering an application for access under the old law, but we are not, and even under the old law it is clear that there were those who considered that the two-stage test had its limitations, because at p 344F in the same case Stuart-Smith LJ said:

> 'In the type of case with which we are concerned in these appeals there may be insufficient evidence upon which the judge can conclude that the father *has* sexually abused his children, nevertheless there may be sufficient evidence to show that there is a real chance, possibility or probability *that he will do so in the future* if granted access. That must be weighed against the disadvantage to the child of not seeing its father; the balance may come down against any access or unsupervised access. And the judge in the exercise of his discretion will act accordingly.'

What that Lord Justice had in mind, as it seems to me, was a one-stage test, very similar to that which, in my judgment, is now required by s 31(2)(a) of the 1985 Act.

The second decision to which considerable reference has been made is the decision of Douglas Brown J in *Re P (A Minor) (Care: Evidence)* [1994] 2 FLR 751. In that case the local authority applied under the 1989 Act for a care order in respect of a boy whose baby brother had died whilst under parental care. There was a dispute as to whether death was due to non-accidental injury, but as regards the other criticism of parental care of either boy at p 753G the judge accepted a submission made on behalf of the parents and the guardian ad litem which was that unless non-accidental injury was proved to a high standard, there was no factual basis for any finding of likelihood of significant harm. That may have been an appropriate way to look at the matter in the particular circumstances of that case, but it does not persuade me that in the present case the judge was right to adopt a similar two-stage approach to a single threshold criteria.

The broad purpose of the legislation is recognised to be the protection of children, and, as Mr Levy pointed out, that has to be set in context. Parents and families also have to be protected from unwarranted interference by the State and one purpose of the threshold criteria is to strike a balance. Inevitably there will be hard cases, and that I accept, but I see no reason why, in the public interest, I should strain to interpret s 31(2)(a) in such a way as to prevent the court from even considering whether or not to make any formal order in circumstances where there is evidence which an ordinary member of the public would regard as indicative of a real risk that a child will suffer significant harm.

I do recognise that if I am right a local authority will have to assume a heavier burden of proof if it seeks to show that a child is suffering significant harm than it need assume if it seeks to show only that a child is likely to suffer significant harm, but the difference is perhaps more apparent than real, because in the end it is the weight of the evidence which enables the court to decide if either or both of the threshold criteria can be met.

In my judgment, the task of the present court, after it heard all of the evidence, was to consider, in relation to each of the children with whom it was concerned, namely D, T and M, whether the threshold criteria were met. It was not its task to decide whether C had been sexually abused, but, of course, I accept that the stronger the evidence of sexual abuse of C, the easier it would have been to infer a serious risk that each of the others would suffer significant harm. Had the matter been approached in that way, the risk to D would have been evaluated separately from the risk to T

and M, and in the case of D there were, as has been recognised during the course of this appeal, a number of other factors which the judge might have considered it appropriate to take into account. It is unnecessary for me to express a view as to the conclusions which the judge would have reached. Suffice to say, I am far from satisfied that he would have concluded that the threshold criteria were not satisfied in relation to any of the girls, and that is why I would allow this appeal.

MILLETT LJ:

I see no reason to criticise the judge's approach to the evidence or his carefully formulated findings of fact; and although, as the President has indicated, the judge did not, on every occasion, describe the standard of proof which was applicable in the way in which, on reflection, he might wish to have done, I am satisfied that he applied the correct standard, that is to say the balance of probabilities.

The court cannot make a care or supervision order in respect of a child unless:

> '. . .it is satisfied . . . that the child concerned is suffering, or is likely to suffer, significant harm. . .'

That is s 31(2) of the Children Act 1989. This is the so-called 'threshold test' which prescribes and limits the circumstances in which the State can intervene in the affairs of the family in order to protect the children. Two situations are catered for: (i) where the child is currently suffering significant harm; and (ii) where the child is likely to suffer significant harm in the future if the order is not made. In each case the court must be satisfied that the necessary situation exists before it can make an order.

It is clearly established that in the second of the two situations 'likely' does not mean 'probable' or 'more likely than not', but only that there is a real risk that the child will suffer significant harm if the order is not made.

In order to assess the risk to which a child may be exposed if no order is made, the court may be obliged to make findings of fact and to determine the truth of strongly contested allegations. This is not inevitable. The court may be able to conclude that the child will be exposed to an unacceptable degree of risk even if there is no truth in the allegations. But there are also cases of which, in my view, the present is an example where there is no risk at all of harm to the child unless the allegations are true. In such a case, where the risk of harm depends on the truth of disputed allegations, the court must investigate them and determine whether they are true or false. Unless it finds that they are true, it cannot be satisfied that the child is likely to suffer significant harm if the order is not made.

The local authority and the guardian ad litem have submitted that it is sufficient in such a case for the court to find that there is a real possibility that the allegations are true. I cannot accept this. It takes what has to be proved, that is to say a real possibility of harm in the future, and makes that the standard to which it must be proved. There is no warrant for this. There is a considerable weight of judicial authority to the contrary and, in my view, the language of the section points unequivocally against it. The court cannot make an order unless it is satisfied either (i) that the child concerned is suffering significant harm, or (ii) that the child is likely to do so if no order is made. Section 31(2) treats the two factual situations in the

same way. In the first it is plain that the court must be satisfied, on a balance of probabilities, that the child is suffering significant harm. It is not enough for the court to conclude that there is a real possibility that the child may be suffering significant harm. The same test must be applied to the second factual situation. If the likelihood of the child suffering harm in the future depends upon the truth of disputed allegations, the court must investigate the allegations and determine, on the balance of probabilities, whether they are true or false. It is not sufficient that there is a real possibility that the allegations may be true if the probability is that they are not.

That this is the correct test is confirmed by the contrast between the language of s 31(2), which requires the court 'to be satisfied' that the child is suffering, or is likely to suffer, significant harm before it can make a care or supervision order, and the language of s 47 of the Act, which imposes a duty on the local authority to investigate the facts where it 'has reasonable cause to suspect' that a child within its area is suffering, or is likely to suffer, significant harm. If Parliament had wished to create a lower threshold than the balance of probabilities, it would have used the language of s 47.

In an exemplary judgment, for which I would wish to express my own admiration, the judge subjected the evidence to a penetrating analysis and concluded that he was not satisfied on a balance of probabilities that the eldest child had been sexually abused, and consequently that he was not satisfied that the only ground which had been advanced for thinking that the three younger children would be likely to suffer significant harm if no order were made was established. It was a difficult case, and he naturally expressed some misgivings about the situation. He said that he was:

> '. . .far from satisfied that the eldest child's complaints were untrue';

that he was:

> '. . .more than a little suspicious that she had been sexually abused';

and that there was:

> '. . .a real possibility. . .'

that her allegations were true. In my view, he was right to find that these doubts were insufficient to meet the criteria of the statute for the making of a care order.

I cannot, for my part, accept the approach suggested by Kennedy LJ, that a different and lower standard of proof may be appropriate for concluding that there is a likelihood of future harm than would justify a conclusion that the child is currently suffering harm. Of course, there may be situations in which no harm has yet been suffered, and yet there is a real risk that there will be harm in future if no order is made. Such situations are not at all difficult to envisage. But take a situation on which the only ground on which application is made for a care order is that the child is currently being sexually abused, and that it is feared if no care order is made the child will continue to suffer harm. Let it be supposed that no

other ground exists for thinking that there is any likelihood of future harm so that, if the child were not in fact being currently abused, there would be no ground for supposing that the child will suffer any harm in the future. It cannot be right for a judge who finds that the child is probably not being sexually abused, and therefore is probably not suffering significant harm, nevertheless to express himself as satisfied that there is a likelihood that the child will suffer future harm by the continuation of sexual abuse which he has already found has not occurred, merely because he recognises that there is a real possibility that he may be wrong.

Human justice is fallible; evidence given in court is not scientific proof; judges make mistakes. But the risk that the judge has made a mistake in his ascertainment of the facts or in his assessment of the likelihood of future harm is not a mistake against which Parliament has sought to protect children. In the present case I, for my part, have no doubt that the judge was entirely right to adopt the two-stage approach. Indeed, I think he had no alternative. The case was presented to him on the basis that if the eldest child was not being sexually abused there was no ground upon which there could be any risk that the other children would suffer harm in the future.

In the course of his judgment, the judge referred to the headnote in *Re W (Minors) (Sexual Abuse: Standard of Proof)* [1994] 1 FLR 419, where it is stated, inter alia:

> 'Charges of sexual abuse in civil proceedings must be proved to a standard beyond a mere balance of probability, but not necessarily a standard as demanding as the criminal standard.'

That formulation is erroneous and dangerously misleading. It ought not to be repeated. In civil cases, contempt proceedings apart, there is only one standard of proof: proof on the balance of probabilities. It is never necessary to prove facts to a standard beyond the balance of probabilities. The correct formulation is that of Waite LJ in *Re M (A Minor) (Appeal) (No 2)* [1994] 1 FLR 59 and repeated by Balcombe LJ in *Re W* (above):

> '. . .
> (2) The standard [of proof] is the balance of probabilities.
> (3) The more serious the allegation, the more convicing is the evidence needed to tip the balance in respect of it.'

The difference lies in the cogency of the evidence needed to tip the balance, not in the degree to which the balance must be tipped. Despite the judge's reference to the headnote in *Re W* and his own statement that he could not 'be sure to the requisite high standard of proof' that the eldest child's allegations were true, I am, in fact, satisfied that he applied the correct test. I would dismiss this appeal.

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