Case No: B4/2013/2165

Neutral Citation Number: [2014] EWCA Civ 875
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT, FAMILY DIVISION
Mrs Justice Pauffley
GU08P00833

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2014

Before :

LORD JUSTICE MCFARLANE
LADY JUSTICE GLOSTER
LORD JUSTICE BRIGGS

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Re J (A child)

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Ms Kate Branigan QC and Miss Alev Giz (instructed by Fisher Meredith) for the **Appellant**
Mr Paul Storey QC and Ms Camille Habboo (instructed by Blackfords LLP) for the **Second Respondent**
Miss Sarah Morgan QC (instructed by Russell-Cooke Solicitors) for the **Second Intervenor**
The first respondent appeared in person

The First Intervener was represented by Mr Mark Twomey but excused attendance

Hearing date: 28 March 2014
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Judgment**Lord Justice McFarlane :**

1. In October 2009 a young woman, known in these proceedings as X, who was then aged 17 years, made sexual allegations of a most serious kind against a man who is the father of a young girl, A, born 5th June 2002, and who was therefore aged just 7 years at the time. A's parents had separated and her father was by then living in Australia. X originally made her allegations of sexual abuse to teachers at her school and to staff at the national charity where she volunteered, they then passed the allegations on to the local social services; the allegations were, however, made on the strict basis that X did not wish any person outside the social services to be told of the detail of the allegations or of her identity. The course of events which then followed the making of these allegations and X's stipulation of conditions led to court proceedings before a High Court judge of the

Family Division and then, in turn, consideration on appeal by this court (*Re X* [2012] EWCA Civ 1084) and by the Supreme Court (*Re A (A Child)* 2012 UKSC 60).

2. In this judgment, in common with the judgment under appeal, I will refer to A's father as 'F' and A's mother as 'M' (she is also referred to in direct quotations from the evidence as X's aunt).

3. The circumstances which justified consideration on appeal, and the conclusion of the appeal process, are fully described in the reported judgments and do not require elaboration here. The outcome was that the local authority were required to disclose the detail of X's allegations and her identity in these private law proceedings. It thereby became known to the parties to the proceedings, namely A's parents and her children's guardian, that X was A's mother's niece and the substance of the allegations was that A's father had sexually abused X frequently over the course of a number of years. F staunchly denied the allegations. M retained an open mind but wished for the allegations to be properly assessed by the court. The task of conducting that assessment fell to Mrs Justice Pauffley. At the conclusion of an oral hearing, which spanned some 8 days, to determine the truth or otherwise of X's complaints, so that in due course consideration could be given to whether A and her father should be permitted to resume a normal and unrestricted relationship with one another, Pauffley J concluded that she was in "no doubt as to the outcome" and had "no hesitation in deciding that X's claims against F are fundamentally true". F now brings the present appeal against that conclusion.

4. Having thus set the scene, it is necessary now to descend to further detail to describe the substance of X's allegations and the particular vulnerabilities which X has which caused extreme difficulty for the court in obtaining and evaluating any evidence from her in the course of the hearing.

X's allegations

5. At no time did X, who is now aged 21, provide a narrative statement of her allegations. Neither was there an Achieving Best Evidence ['ABE' – *Achieving Best Evidence in Criminal Proceedings* (March 2011)] interview, which would have been conducted by professionals and video recorded. The content of what X alleges therefore arises from the records made by a number of key individuals who heard her make the allegations. As the judge describes, there are layers of material, with X's initial claims, her subsequent retractions and then further disclosures all occurring within two narrow time frames in October/November of 2009 and then in February 2010. The most significant allegations were described in statements made by some 7 witnesses, each of whom gave oral evidence before the judge. They were: X's then headmistress, "HM" (who was also the child protection officer at the school), her pastoral deputy head "PDH", the head of sixth form "HSF", two members of a national charity for which X carried out voluntary work "CW1" and "CW2", a local authority social worker and a police officer. In

addition the court had information which X herself was able to supply during the two days when she was at court and giving evidence, albeit, as I will explain, by a process which was halting and intermittent.

6. The judge describes the key matters mentioned by X in October 2009 when she first revealed to PDH at her school what she claimed had happened to her as follows:

> • When she was 8 years old, F had had an affair and she had told her aunt (M) who did not believe her.
>
> • As a result, her uncle was punishing her.
>
> • He had taken her clothes off, licked, touched and had sex with her.
>
> • He had also videoed her.
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> • X said the punishment was until she felt pain.
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> • It was, she said, a "deal" between her and her uncle because she had done wrong.
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> • Her uncle and aunt had divorced and he had gone back to Australia. When he came back to England, he collected her from school in a hire car. She hated the smell; he would take her to a quiet location and would have sex with her.
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> • During the summer between year 7 and year 8, she said she had missed two periods and taken tablets in an attempted overdose because she was concerned she might be pregnant. X said she had done a test which was positive and if it had been right, she had been the "murderer" of a foetus. She had not told "him" as she had been scared.
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> • X said her uncle did not come back so much. "It's quicker now." "No messing about, he just gets on with it."
>
> • She said he had not been able to find her during the summer of 2009 because she was in (an identified foreign country).
>
> • She said, "Don't really do that much talking, he does the talking."
>
> • When X was reminded that the information she had supplied would have to be passed on, she said, "I deserve to be punished ... Must suffer the consequences."
>
> • She had then said, "None of it was true. I lied." She was not willing to sign anything. A little later she said, "I lied because I was bored."

7. Over the next few days there was a series of discussions between X and several of her teachers. On 5th October 2009, after a further conversation in which X had said sometimes it happened more than others and often at short notice when F is back in England, a referral was made to the police and social services. On the following day a police and social worker visited X at school, but she was too distressed to say anything about her allegations.

8. On 8th October 2009 X made a series of significant documented allegations to CW1 and, later on that day, to the organisation's deputy child protection and vulnerable adults officer in the presence of CW1. On the following day 9th October, X was seen, again at school, by the social worker and, during a long conversation in which X was told about the processes and also told that she would not be forced to do anything, X stated that everything that she had told her teachers was true.

9. On 5th November, at a meeting with the social worker and a police officer, X repeated much of the material contained within her earlier discussions at school and with CW1. With respect to this conversation, the judge recalls the following specific element:

> "She also said she had hurt someone deliberately; she had told her aunt that she had walked in on her uncle who was with another woman when she was 8 years old. Her aunt had been upset. X also said that she was still seeing her uncle, though her parents did not know. He had her mobile phone number and tells her "where and when"."

10. In late January and early February 2010 X spoke about being worried about her cousin, A, and indicated that her abuser was A's father.

X's evidence – associated problems

11. X has a range of physical symptoms, amounting to significant physical disability, and a range of psychological difficulties. No apparent physical or medical cause can be found for some of X's physical symptoms, which are therefore considered to be either due to, or at least substantially exacerbated by, her psychological difficulties.

12. During her judgment in the Supreme Court, Baroness Hale gave this summary of the medical and psychiatric evidence that had been seen for the purposes of the appeal:

13. The salient points are as follows:

'(i) X has a long history of repeated presentations with medically unexplained

symptoms beginning in early childhood.
(ii) There appears to be a close temporal relationship between X's reported experiences of abuse and her presentation with episodes of medically unexplained symptoms.
(iii) Most recently, X has experienced episodes of physical illness which have at times been life-threatening. It is the opinion of a number of medical professionals caring for her that psychological factors are, at the very least, exacerbating her symptoms. X has received medical treatment for her condition which has had a number of damaging side-effects and there has been a significant deterioration in her health.
(iv) There does appear to be a pattern of worsening illness which coincides with the increasing pressures arising from the "legal issues".
(v) X feels that her initial disclosure put in motion a chain of events which has left her feeling distrustful and lacking confidence in processes that should have been protective of her. It is her perception that, despite reassurances about confidentiality, it has at times been breached. She was also led to believe that she would not be required to speak of the allegations again and the present situation has undermined her confidence in the system.
(vi) In answer to the specific questions:
(a) The psychological/psychiatric implications for or effects upon X regarding the disclosure of social services records to the parties:
"It is my opinion that disclosure of the social services records regarding X to other parties would be potentially detrimental to her health. As above, she appears to manifest psychological distress in physical terms both through medically unexplained symptoms and through the well recognised exacerbating effect of stress on a particular medical disorder. Her physical health has deteriorated considerably recently and, at times, has deteriorated to the point of being life-threatening. There is therefore a significant risk that exposure to further psychological stress (such as that which would inevitably result from disclosure) would put her at risk of further episodes of illness. It would also be working against the current therapeutic strategy of trying to help minimise stress and engage with psychological therapy."
(b) The psychological/psychiatric implications for or effects upon X of being summoned to court to give oral evidence about the allegations documented in the said records:
"My opinion on this is as above. Being summoned to court is one step further than disclosure and would inevitably be immensely stressful and therefore carry the same risk of deterioration in her physical (and mental) health."
(c) X's capacity with appropriate support to participate in the court proceedings including making a statement and attending court to give evidence:
"I believe that X has the capacity to participate in court proceedings. However, it should be noted that various professionals at different times have commented on the difficulty of interviewing her in relation to the alleged abuse. My own experience of exploring these issues with her is that many of my questions were met with silence; she was clearly very uncomfortable and distressed and seemed unable to respond. When I asked her about appearing in court she responded 'I can't'."
(d) X's understanding of the measures which might be put in place to protect her as a

vulnerable witness:
"When asked about her understanding of these, X told me that she understood that she could provide evidence via video link. However, she said that this would be a traumatic prospect for her as she understood that the alleged abuser would be able to see her face and she could not cope with this. As above, I also think that her perception that processes so far have, to some extent, let her down means that she does not feel confident in any of the reassurances provided."'

14. Prior to the hearing before Pauffley J, a comprehensive evaluation had been prepared of X's current position and, in particular, her potential to take part in the court process. The evaluation was undertaken by Dr B, who is a Reader and Honorary Consultant in Forensic Psychiatry. Having reviewed all of the relevant medical records and following an assessment interview with X, Dr B advised:

> "Her presentation is unusually complex and cannot be easily encapsulated into an unequivocal formulation. It is particularly difficult to ascertain the extent to which physical or psychological factors may be responsible; the notes reveal the extent to which that has been difficult for clinicians actually caring for her, despite considerable effort to elucidate precisely this. What is clear is that the frequency and gravity of her presentation with breathing difficulties, in particular, appears disproportionate to any identifiable respiratory pathology. Equally, investigation of her limb weakness revealed both discrepancies between neurological testing and her clinical picture as well as essentially normal relevant investigations. In so far as the physical condition is accounted for by psychological mechanisms it is equally hard to be certain whether or not symptoms have been consciously generated or whether they are truly an unconscious response to intra-psychic conflicts that are impossible to resolve in conscious thought."

15. In the light of the advice of Dr B, X gave evidence in the proceedings over a video link. Throughout she was supported by a trained registered intermediary who sat in the video room with her. It was planned that X would give oral evidence over the course of the Monday and the Wednesday during the first week of the hearing. However, for much of the morning of the first day X felt unable to contemplate answering questions and required discussion with and encouragement from her legal team assisted by the intermediary. Her evidence in chief, which was punctuated by breaks to enable X to re-gather her confidence, occupied the remainder of the first day and much of her second day in the witness box. Frustratingly, the first day of evidence coincided with what the judge described as "quite appalling noise disturbance" coming from road-works outside the video room window.

16. During the morning of the second day a further difficulty occurred. One of the clear

ground rules established for the giving of X's evidence was that at no time should F see X on the television screen. F failed to abide by this ground rule and, on being spotted by the judge craning forward to see X, the evidence was abruptly curtailed. The effect of this event upon X is described by the judge as being "considerable" and that "thereafter, progress was painfully slow". In the event the judge decided that F should leave the court room. However, by that stage X had become distraught and had locked herself in the lavatories in the court building and was refusing to come out. The court therefore adjourned for the rest of the morning hoping that X's testimony could be resumed after lunch. X's evidence in chief then continued until shortly before 3.30 p.m. Thereafter, following a short break, counsel on behalf of F cross-examined for something short of one hour. At 4.25 p.m. the judge concluded the process for the day and also concluded that "it would have been inhuman to have required X to return for a third day". Cross-examination on behalf of F was thereby cut short and ended at that point. There was also no cross-examination on behalf of the guardian.

Difficulties with F's representation

17. F, who is resident in Australia, did not qualify for legal aid under the ordinary legal aid provisions. It was plainly important, if not essential, for any questioning by F to be undertaken by an advocate on his behalf, rather than directly by him, of X and X's mother when they gave evidence. The judge therefore records efforts that she and others made to achieve some level of legal representation for F. The Legal Aid Agency assisted by entertaining an application under the Exceptional Cases Funding scheme. However, although the application was successful on the merits, F failed to obtain public funding through this channel as, because he was living with his own father, the paternal grandfather's means were taken into account, thereby ruling legal aid out.

18. The judge therefore took the unusual course of inviting the local authority to underwrite the cost of an advocate for F. The local authority agreed to do so and to fund the cost of representation for 3 days over the course of the evidence of X and her mother.

19. A further difficulty then presented itself. Counsel instructed on that basis to represent F attended court on the first day of the hearing having obviously spent a large part of the previous weekend, at short notice, reading the papers. However it became apparent to that barrister that at some stage much earlier in the proceedings she had been instructed to appear for the local authority and, after consultation with the Bar Council, that barrister was advised in unequivocal terms that she could not continue to act for F. That barrister was therefore replaced at extremely short notice, and on the second day of X's evidence, by Miss Giz who took on the role of representing F in those circumstances.

The position of the parties at first instance

20. At the conclusion of the hearing F remained adamant in his denials. The mother, however, stated that now she had heard the evidence most of her questions had been answered so that she now very clearly believed that X had indeed been sexually abused by F. On behalf of X, it was stressed that X herself sought no findings, but her legal team submitted on her behalf that the judge should and could accept as essentially truthful the central core of her evidence. The local authority did not seek any specific findings. Mr Paul Storey QC and Ms Camille Habboo on behalf of the children's guardian undertook what the judge described as a "the truly impartial, inquisitorial role required of them in the most committed and dutiful fashion". They prepared closing submissions which comprised an analysis of the various parts of the evidence which would support the makings of findings and then, in more or less equal measure, those which did not.

The judge's conclusions

21. Pauffley J set out her conclusions at paragraph 69 of the judgment and thereafter in paragraphs 70 to 140 she set out the "critical considerations" that had impelled her to find as she had done. Paragraph 69 is therefore important and it is in these terms:

> "69. At the end of this lengthy hearing, I find myself in no doubt as to the outcome. I have no hesitation in deciding that X's claims against F are fundamentally true; that however he began his despicable behaviour he did indeed inflict the most serious kind of sexual, emotional and psychological abuse upon her over a period of about 10 years; and that, even now, he continues to exert some form of sinister controlling influence so that X cannot freely speak about what has happened. Indeed, one of the most perturbing elements of all centres upon the extent to which X's free will would appear to have been overborne insofar as relating the narrative of what F has done. In similar vein, I am particularly troubled by X's view which is that she bears at least some responsibility for what was done to her.
>
> 70. I turn now to consider the various critical considerations which have impelled me to find as I have and to reject the F's vehement denials, entirely accepting as I do that no one feature here, on its own, is diagnostic of sexual abuse. The exercise for me is, as it would always be, a matter of weighing a whole range of factors. Some may assist more than others in arriving at an overall conclusion and it is to those that I now turn."

22. The judge then structured her summary of the critical considerations under the following 14 headings:

a) The initial revelations - the hearsay evidence

b) X's affect - as reported by others in relation to complaints made in 2009 and 2010

c) X's presentation at this hearing

d) The extraordinary nature, in part, of what is alleged

e) X's evidence – voluntarily given – constancy – devoid of ambiguity

f) X's character

g) Motivation – the potential for a false allegation – why name F?

h) The emotional costs to X of participating

i) Detail surrounding the allegations – parts corroborated by F?

j) Inconsistencies – the "trigger event"

k) Opportunity

l) Retractions

m) X's troubled childhood

n) F's denials – presentation as a witness.

23. The judgment sets out the detail that underpins each of these topics. The judge's judgment is published on Bailii with neutral citation [2013] EWHC 2124 (Fam) and is in the public domain. I do not therefore propose to quote extensively from it, rather my purpose is to highlight those matters which appear to be particularly significant in the context of this appeal.

24. The first matter of note, and it is a matter which may, indeed, be of pivotal significance in the final analysis, is that the list is, indeed, a list of considerations which had

"impelled" the judge to find as she did. They are all factors in favour of a finding. In the context of the appeal Ms Kate Branigan QC, on behalf of F, submits that the judicial evaluation does not contain consideration of other factors which might support a conclusion to the contrary. A contrast is drawn between the approach of the judge and, it is suggested, the more balanced analysis in the closing submissions made by counsel on behalf of the children's guardian.

25. Turning to specifics, and under the heading "*X's affect*", the judge describes various ways in which those who spoke to X in 2009 and 2010 describe her as being very emotional and at times withdrawn, quiet and difficult to engage during the various conversations in which she came to make these allegations. At other times, during the same conversation, X was able to present and interact normally when discussing ordinary subjects, only turning to be distressed, inhibited and troubled when describing the allegations of abuse. The judge considered that this factor "was an indicator which powerfully supports the likelihood that the accounts of abuse are true," drawing attention to the "emotional congruence" between her demeanour as described and the subject matter under discussion.

26. Under the related heading of "*X's presentation at this hearing*" the judge went on to describe X's presentation during her evidence in striking terms:

> "I should say at once that I have never before witnessed anyone of any age demonstrate such emotional turmoil and distress whilst participating in a court hearing. If one phrase encapsulates the whole experience, it is that watching and listening to X was harrowing in the extreme."

27. That observation, coupled with the detailed description that the judge gives in the ensuing paragraphs, is a matter to which I give the greatest regard. This court frequently, and rightly, reminds itself of the substantial premium that must attach to the analysis of a trial judge who has had the experience, not available to those who sit on appeal, of observing the key witnesses give their testimony live at the court hearing. When the judge in question is a tribunal of the experience and standing of the judge in the present case, the level of respect and the premium that attaches to her observations must be of the highest order.

28. It is plain that this aspect of the case, and her experience of X giving oral evidence, was, for Pauffley J a particularly important factor in her analysis. At paragraph 88 the judge concludes this point by saying:

> "X's emotional arousal when confronting questions about child sexual abuse is a substantial factor which tends to validate her allegations. There was no hint or indication that her reactions were anything other than genuine. Indeed, it appeared to me she

> had no real ability to control them still less manufacture a performance. What I witnessed, I am quite sure, was utterly authentic."

29. That section of the judgment, therefore, may also be a pivotal point in the case around which the outcome of this appeal may turn.

30. In paragraphs 89 to 92 the judge lists "*the extraordinary nature, in part, of what is alleged*". She describes parts of the account given by X as being "so curious" and "only partially understood". There is reference to there being "the deal" and to X being punished because she "deserved to be punished". X spoke of a "mistake" but was unable to explain further going on to say "I should never have said it, I know that. I don't want to talk about this. I don't want to talk about the mistake which wasn't my mistake". She considered that there was a "line" over which she may have strayed and then stated "it's not just that I'm not allowed to say, I can't even think about it. It's as if I'm about to explode. It's just that one thing".

31. For the judge, despite the fact that there were aspects of X's account which were impossible for an outsider to comprehend fully, these aspects of the case, paradoxically, increased the validity of her allegations. Pausing there, whilst accepting that one consequence of these inexplicable elements of X's testimony might be to increase their validity, that cannot be the only potential conclusion that may arise. Opaque, partly explained and difficult to understand allegations may also be regarded as ground upon which it is impossible to form a clear conclusion. However, any alternative analysis of this aspect of the evidence is not mentioned by the judge in her judgment.

32. Under the heading "*X's evidence*" the judge moved on to consider the "content and constancy of X's evidence". The judge records how X came voluntarily to give evidence and did not require a witness summons. The following observation is then made:

> "Though wrestling with so many of the questions asked of her, she never wavered. As she confirmed early on, she did tell her teachers what she was recorded as having said on 1st October 2009 and 'yes, it was true.'"

33. The judge's conclusion on this point was that "there was no ambiguity or lack of clarity as to what X alleged and against whom".

34. It is important to flag up at this stage that this short passage in the judgment relating to "content and constancy" fails to engage with the apparent lack of consistency relating to the very first matter that X is recorded to have said to her teachers on 1st October 2009,

which was that she had told her aunt about the discovery of F having had an affair and it was as a result of this that F was punishing her. That account, which Mr Storey, on behalf of the Guardian, submitted to the judge was the "trigger event" for what X said then followed, was not constant within her evidence and was, in fact, withdrawn by her when giving oral evidence at the hearing. At paragraph 118 the judge records the point in this way:

> "In evidence, X said she could not be '100% sure' if she had told her teachers her uncle had had an affair. She went on, 'I did not say that directly to them. No, I did not tell them I'd told my aunt about the affair. It was about what would happen if I did tell my aunt, not that I did. I told them what I was told would happen."

35. This point is plainly important both because of X's apparent retraction and because the "aunt", M in these proceedings, is clear that X never told her anything of the sort at the time.

36. This seemingly important contradiction within X's evidence is not, however, referred to by the judge when dealing with "content and constancy" and the judge's acceptance that constancy is established by X saying that what she told her teachers on 1st October 2009 was true, fails to engage with this point upon which X did not accept that the account recorded by the teachers was true.

37. With respect to "*Motivation*" and "*The emotional cost of X participating*" in the proceedings, the judge makes a number of sound and clear observations to the effect that the physical, emotional and psychological impact upon X of participating in the proceedings, and also in the very many stages necessary to get to that point, could not be overstated. Her motivation was that she wished to take action to protect the child who is the subject of these proceedings, A. In addition X made a powerful point by simply saying "why on earth would I make it up?".

38. The next two sections of the judgment dealing with "*Detail…corroborated by F?*" and "*Inconsistencies – the 'trigger event'*" are important and require recounting in some detail at this stage. The judge's analysis of detail possibly corroborated by F commences at paragraph 110 in the following terms:

> "One of Mr Storey's pointers against the making of findings is that the allegations of abuse are vague. He suggests there is a lack of sensory or contextual detail, an absence of specificity around timing, location and as to what actually happened in terms of abuse. In relation to those assertions, I remind myself of the enormous problems encountered by X in saying as much as she did and her evidence as to the prohibitions to which she is subject in giving small pieces of information lest they might be put

> together. Those matters described in detail within the psychiatric reports, added to by X in evidence, seem to me to provide a complete answer as to why, generally, there is a lack of detail."

39. The reference to "the prohibitions" referred to within the psychiatric reports would seem to be a reference to something X had said to Dr B, a consultant forensic psychiatrist, who assessed X in early 2013 with a view to advising the court upon the process of X giving oral evidence. X told Dr B that "saying it or writing it down" is not something "I am allowed to do". She agreed with Dr B's suggestion that something bad would happen to her or to someone else were she to break this prohibition. When asked whether the prohibition (apparently the Doctor's word) came from her abuser, X is recorded as saying "I made a promise, you don't break promises".

40. In this context, during her summary of X's oral evidence, the judge records this point as follows:

> "I asked her if she was having trouble in answering because of 'the promise' as mentioned by her to Dr B. X replied, 'Yes, that was the reason… you weren't allowed to talk about something …. Lots of little things, put them together, then that's just as bad as if I said it in the first place. Can't go any further.'"

41. The various pointers to which Mr Storey apparently made reference, and which are recorded in the opening sentences of paragraph 110 (see my paragraph 35 above), are important. Such pointers frequently provide the baseline for analysis of allegations of sexual abuse. The judge apparently accepts that this contextual detail is absent in the present case, but she regards the "promise" that X claims to have made to her abuser as explaining why she does not provide such detail as part of any account. Yet, X did make the core allegation of having been sexually abused.

42. The judgment does not contain any further analysis of X's "promise" and the consequent "prohibition" and there is no analysis of how it is that X comes to breach the prohibition by making her macro-allegation of abuse, yet nevertheless felt constrained to hold back on giving any detail of what took place.

43. On the issue of aspects of X's testimony that may be corroborated by F, the judge states, at paragraph 111 that "there is though some extremely significant, almost peripheral, material linking F to X and in ways that maybe would not have been expected." Thereafter an account is given firstly of X explaining that any mobile telephone number on which she has communicated with F has changed a number of times and she simply replies to any text message from him by responding to the number that he was using at any particular time. That account is plainly compatible with F's account given in a written witness statement in mid-2013 to the effect that, since he left the UK in 2013, he

has used "pay as you go" SIM cards and "my phone number has changed several times". The judge describes how, in evidence, F sought to row back from this apparent coincidence between his account and that given by X. The judge gives more detail, but it is plain that the judge was entitled to be unimpressed with F's evidence on this point and conclude that he was lying. Whilst the judge does not rely upon this "lie" as directly establishing F as the perpetrator of sexual abuse, she does, however, rightly identify this as being an important aspect of the evidence in which F's account corroborates a matter of detail given by X on the topic of there being a continuing communication between them over the years that he had been in Australia; an assertion that he flatly denied.

44. That, however, is the only aspect of the evidence that the judge cites in the context of corroboration provided by F. The only other matter mentioned under this heading is at paragraph 114 where the judge describes how, on 28th January 2010, X said to one of the charity workers that she had had an argument with F over the question of whether or not she, X, should go to university. F denies this conversation. His case is that there had been no contact of any kind between him and X for more than six years from about August or September 2003 to February 2010. F does, however, accept that around February 2010 (i.e. contemporaneously with X's conversation with the charity worker on 28th January 2010) F dropped his daughter, A, off at X's family home after contact and, according to F's evidence, X and her sister had been on the driveway and had ignored him.

45. Having recited this sequence of events at paragraph 114, the judge does not explain the manner in which F's acceptance that he had been in the vicinity of X in early 2010, but had no conversation with her, corroborates X's account as to a conversation about going to university. During the hearing in this court counsel were unable to take this matter any further.

46. As I have already indicated, the evidence about the "trigger event" is of importance. I will therefore reproduce the entirety of the judge's analysis of this point at paragraphs 116 to 119:

> "116. I turn then to consider what has been described by Mr Storey as the 'trigger event'. It is the rationale provided by X at the outset as to why her uncle began to abuse her. Her accounts included information which directly impinged upon M, in that X maintained she'd told her about the affair. Mr Storey points out that this aspect of what X had alleged to her teachers, the police and social services cannot be true. M's position statements and evidence do not support X's accounts either in relation to being told of any infidelity or that F would regularly 'babysit' X and her sister.
>
> 117. M confirmed in evidence that X had never told her about any affair. Asked by F to confirm that he had never supervised the three children, M said she could recall an occasion shortly after A's birth when she and her sister had gone

shopping to Tesco's leaving the children with him. At that point, F became emotionally aroused, saying to M, "You're a liar and you're stitching me up… You're stitching me up!"

118. In evidence, X said she could not be "100% sure" if she had told her teachers her uncle had had an affair. She went on, "I did not say that directly to them. No, I did not tell them I'd told my aunt about the affair. It was about what would happen if I did tell my aunt, not that I did. I told them what I was told would happen." Asked whether she had lied about her sister and her being 'babysat' by F, X said she was not sure she would have used that term but "No, (she) wasn't lying about it. 'Supervised' would be a better word than 'babysat.'"

119. So what is to be made of this aspect of the case? Because some parts of what X is recorded as having said cannot be verified as true, would it be safe to reject the entirety of her account? I do not believe it would and for these reasons – it's by no means uncommon for aspects of what a complainant has alleged to be demonstrated as inaccurate or just plain wrong. It is rare for every last detail to be verifiable in all respects. More important than the minutiae of what has been described is the overall impression created by the extant material taken together with an assessment of the oral evidence. The memory of the complainant may be faulty when relating events which occurred many years previously. X at 17 ½ was giving a description of the situation as it had unfolded almost 10 years previously. It may have been troublesome for her to differentiate between what F had told her about the consequences of telling her aunt and what she herself did."

47. This important section of the judgment, and in particular paragraph 119, plainly requires further consideration in the light of the various submissions made on appeal which I shall summarise in due course.

48. In the final sections of the judgment the judge concluded that there was ample opportunity for F to have been in contact with X in the way that she alleges. The judge is, for sound reasons that are stated, untroubled by the retraction of the allegations that X made shortly after she had initially made them. And the judge excludes difficulties within X's childhood as being an explanation for the making of these allegations.

49. Under the heading "*F's denials – presentation as a witness*" the judge refers back to accounts that she has given earlier in the judgment of the highly emotional manner in which F came to deny these allegations in the course of his evidence. The judge, however, states that she had no hesitation in rejecting these denials and holding that his protestations of innocence were lies.

50. The judge's analysis under the 14 headings that I have now summarised supported her ultimate conclusion which was that she had no hesitation in deciding that X's claims against F were fundamentally true. F seeks to overturn that conclusion within these

appeal proceedings and I therefore now turn to the arguments that were deployed before us in the course of the appeal hearing.

Appeal: the submissions of parties

51. The main focus of the appellant's criticism of the judge's judgment relates to substance. Ms Branigan, for F, submits that the judge's balancing exercise was fatally flawed and that, in particular:

    a) An unjustified degree of weight was given to X's evidence;

    b) There was no process of balancing the factors either for or against the making of a finding;

    c) There was no proper analysis of the core allegations.

52. Subsidiary to the main thrust of her submissions, Ms Branigan also questions the fairness of the trial procedure within which F's ability to cross-examine X was severely curtailed and he was in fact excluded from the court room from the middle of the morning for the remainder of the second day of her evidence, yet he was required to present his closing submissions as a litigant in person.

53. Ms Branigan accepts that a trial judge must form his or her own impression of the key witnesses and that the judge's assessment of the witnesses will play an important part in the ultimate analysis; however, she submits that, in the present case, the impact of the witness's demeanour must be tempered by the fact that additional sources of information which would enable the court to assess the witness's reliability, are simply absent from the present case. Those sources are:

    i) an ABE interview;

    ii) a narrative statement of evidence;

    iii) an effective process of cross-examination.

54. The appellant submits that, in a judgment following a case where the source material is unsatisfactory and the oral process has been necessarily compromised with the result that the key witness has not been cross-examined to any effect either by the alleged perpetrator or, in this case on behalf of the child, the resulting judgment has to engage

with these deficits and indicate the judicial approach that is to be taken. Ms Branigan, correctly, observes that these deficits are simply not mentioned by the judge in her judgment.

55. Ms Branigan understandably focuses upon the judge's treatment of "the trigger event" at paragraphs 116 to 119. She submits that X's explanation of seeing F engaged in sexual activity, then telling her aunt about this and then, as a consequence, herself becoming a victim of sexual assault as a "punishment", is the core rationale given by X in 2009 and 2010 for all that was to follow. The judge finds (paragraph 15) that X did indeed give this account to her teachers on 1st October 2009. Ms Branigan submits that it is simply not tenable for a judge to minimise this core point as the text at paragraph 119 of the judgment purports to do.

56. More generally, the appellant seeks to attack the structure of the judgment in which the judge announced her firm conclusion at paragraph 69 before moving on to consider the various critical considerations which had impelled her to find as she did. Although the judge commences this exercise by indicating that it is a matter of "weighing a whole range of factors," Ms Branigan submits that the text that follows is in fact a list of all the points that the judge considers support her finding, without any weight being given to factors that might point in a different direction.

57. If the appeal is successful, Ms Branigan submits that the outcome should be either for the Court of Appeal to set aside the finding and rule out a re-hearing, or for the matter to be completely re-heard before a different tribunal.

58. Before leaving the appellant's case, I would wish to record my sincere appreciation to Ms Branigan, Miss Giz and Ms Sherrington of Fisher Meredith who have undertaken the substantial burden of presenting this appeal on a Pro Bono basis.

59. On behalf of X, Miss Sarah Morgan QC, who appeared below, stressed that X does not make allegations and does not seek findings within these proceedings. Throughout X has been assiduous to avoid saying that F has done anything wrong.

60. Miss Morgan rightly stressed both the great experience of Pauffley J as a family judge and the emotional turmoil and distress exhibited by X whilst giving her evidence which the judge described as being of a level that she had never witnessed before from any person of any age. Miss Morgan submitted, and I readily accept, that the transcript of X's evidence gives no real impression of the quality of her presentation over the video link. She told the court, and again I accept this, that this case was one that would stay in the minds of all of the professionals who had been in the court room "for decades".

61. Miss Morgan stressed that, in particular, as a result of the detailed and balanced submissions made by Mr Storey, all of the points, both for and against a finding, were plainly in the judge's mind and it cannot be fatal for the judge not to have rehearsed every single matter within the compass of her judgment.

62. On the question of what should happen if the appeal were to succeed, Miss Morgan rightly observed that there must come a time when the court process itself becomes abusive to X. She found it difficult to contemplate circumstances in which it would be in X's best interests, with all her vulnerabilities, to be put, once again, through the process of giving evidence. This is particularly so in the light of the final comments of the judge at the conclusion of the judgment stressing that the proceedings were now at an end, so far as X is concerned, and X should be allowed to begin a new chapter in her life hereafter. Miss Morgan accepted that it is open to this court to say "enough is enough" and bring the whole process to a close even if the finding of fact has been set aside. Although accepting that it was open to the court to do so, she did not, given X's position, make a positive submission that the court should take that course.

63. As she has done throughout this process, M appeared before us as a litigant in person. Once again I was greatly impressed by the clarity and good sense of the observations that she made to the court.

64. Given that M is clear that X never reported to her that she had discovered an affair between F and another person, M's analysis of this "trigger event" is of importance. Firstly she was struck by, and reassured by, the fact that X did not accept this part of her original complaint as being true when she gave her evidence on oath. It is M's view that something else must have happened and that X is just not going to say what that is with the result that, initially, she made up the story of the affair as a cover-up. That said, M appreciates the importance of the point, and agreed that the judge had dealt with this matter in an unsatisfactory manner at paragraph 119 of her judgment.

65. Having now sat through the first instance hearing M believes X's core complaint and she considers that F undoubtedly lied under oath in some of the evidence that he gave.

66. In terms of the outcome of the appeal M reported that X's health has deteriorated as a result, she believes, of the inability of the system to draw a line under the process and tell X that it is truly at an end. From X's perspective, every time she has trusted the system to protect her, it has, seemingly, let her down. In M's view for this whole process to be re-opened and "dragged up again" would be for X an appalling breach of the judge's assurance that the process was at an end. If, however, the appeal is allowed but there is to be no re-hearing then M is very worried about how her daughter can be protected. M believes the allegations, yet there would be no finding. She regards this as an intolerable outcome leaving her, and particularly her daughter, between a rock and a hard place.

67. On behalf of the children's guardian Mr Paul Storey QC and Ms Camille Haboo have, through their submissions, continued to provide the court with assistance which is of the highest quality. At the stage of the conclusion of their written submissions they retained a neutral position as to the outcome of the appeal. Their helpful oral submissions included the following points:

a) In a case where there is no direct physical evidence or other clear "diagnostic" proof of sexual abuse, the process of judicial evaluation requires great subtlety;

b) There was an inevitable imbalance in the court process as a result of the inability of any party to cross-examine X;

c) There was a need for the judge, who obviously found X to be a very impressive witness, to exercise caution in relying upon such an impression where the full process of ordinary forensic evaluation has not been seen through;

d) Where, as here, the process of cross-examination has been halted, it is incumbent upon a judge to explain the approach that she has adopted to that factor in her overall evaluation. That is especially the case where the alleged perpetrator is a litigant in person for much of the hearing;

e) The fact that F was a litigant in person meant that he had no one to call him to give evidence in chief, he had to undertake his own closing submissions and was therefore much more on display before the judge than would be the case if he were represented.

68. Mr Storey confirmed the prominent position held by the "trigger event" in the analysis that the guardian's team had offered to the judge; it was, he said, "the top of our list." He went on to explain to this court that X's apparent change of account on this key point relates directly to any analysis of her demeanour and gives rise to the rhetorical question "if the 'trigger event' is untrue, then what is the difficulty that X has in answering questions?".

Discussion

(a) The approach on appeal

69. It is well established that the Court of Appeal will, rightly, exercise the greatest restraint before contemplating overturning a finding of fact made at first instance. There are many

possible citations from decisions of the higher courts in support of this basic, but crucial, description of the appellate approach; but one example is provided by the words of Lord Hoffmann in *Piglowska v Piglowska* [1999] 1 WLR 1360 at page 1372:

> 'First the appellant court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc v Medeva plc* [1997] RPC 1:
>
> > "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."
>
> The second point follows from the first. The exigencies of daily courtroom life are such that reasons for judgment will always be capable of having been better expressed.'

(b) The particular approach to this appeal

70. In the present case the need for such appellate caution is enhanced for two reasons. Firstly there are few judges of greater experience than Pauffley J both in the field of child law but, more particularly, in the context of conducting a sensitive fact finding exercise. Secondly, as I readily accept, it was the manner in which X gave her oral evidence, as much as what she may or may not have said, that was so impressive and telling in the judge's analysis. Miss Morgan underlined this point in the submission that she made to us. A transcript of the words used will not come close to capturing the experience of watching and listening to X which the judge described as "harrowing in the extreme". In the light of these two most important factors, this court should only intervene to set aside the judge's finding if there are very clear grounds for concluding that, unfortunately, a substantial error or errors occurred either during the process of the hearing or, more particularly, within the judicial analysis.

71. Inevitably when hearing an appeal of this nature the court is drawn to the agenda set by

the appellant which seeks to highlight perceived weaknesses in the judgment with the result that all submissions, both against and in support of the judge's determination, deal with those very points. In conducting my own analysis I have, I hope, stepped back from that more narrow focus and contemplated the strong factors in the case which support the conclusion to which Pauffley J arrived. In this context obviously the judge's assessment of X's demeanour is at the forefront but it is supported by the judge's conclusion that X had no apparent motive for saying these things other than to stand up for and seek to protect her cousin A, for whom she feels true affection. On the other side of the case the judge concluded that F had plainly lied on at least one important matter, which related to his mobile telephone. More generally the judge was unimpressed by F's highly emotional demeanour throughout the hearing. Thirdly the judge concluded that F had ample opportunity to arrange encounters with X, in the manner alleged by her, when he was over here. In this regard the judge's conclusion is, in my analysis, strongly supported by the exercise that M describes conducting in which she prepared her own chronology including details of X's medical history, the family's movements and interactions with X's family prior to her separation with F and, thereafter, the dates and times of F's visits to the UK. This exercise, M reports, certainly confirmed for her that the opportunities were there, and the timings were consistent with X's allegations as well as her medical history.

72. These various major factors in the case are rightly to be considered as providing clear support for the finding that the judge went on to make. I bear them fully in mind as I now turn to the aspects of the case that, I am afraid, I find more troubling.

(c) The absence of an ABE interview and/or narrative account

73. No case of alleged sexual abuse, where there is an absence of any probative medical or other direct physical evidence to support a finding, can be regarded as straightforward. In the present case where X was rightly regarded as an extremely troubled individual, whose various physical ailments were considered to have a psychological origin, and who could only give an outline account of these serious allegations, the need for care and caution in assessing her testimony was, in my view, at the extreme end of the spectrum.

74. The absence of an ABE interview in the process of investigating an allegation of sexual abuse does not rule out consideration of any other evidence there may be of what a complainant has said or now says. In *Re B (Allegation of Sexual Abuse: Child's Evidence)* [2006] EWCA Civ 773; [2006] 2 FLR 1071 the Court of Appeal dismissed a father's appeal against findings of sexual abuse despite it being common ground that the gathering and recording of the child's complaints had failed to accord with the ABE guidelines. Hughes LJ (as he then was) giving the lead judgment, with which Latham and Carnwath LJJ agreed, said this:

> '[34] …. Painful past experience has taught that the greatest care needs to be taken if the risk of obtaining unreliable evidence is to be minimised. Children are often poor historians. They are likely to view interviewers as authority figures. Many are suggestible. Many more wish to please. They do not express themselves clearly or in adult terms, so that what they say can easily be misinterpreted if the listeners are not scrupulous to avoid jumping to conclusions. They may not have understood what was said or done to them or in their presence.
>
> [35] For these and many other reasons it is of the first importance that the child be given the maximum possible opportunity to recall freely, uninhibited by questions, what they are able to say, and equally it is vital that a careful note is taken of what they say and also of any questions which are asked. All this and many other similar propositions, most of them of simple common sense, are set out in nationally agreed guidelines entitled *Achieving Best Evidence in Criminal Proceedings* …'

Later, having described the evidence in the particular case, which fell well short of being ABE compliant, Hughes LJ continued:

> '[40] There is no question of this evidence being inadmissible for failure to comply with the ABE guidelines, and that has not been suggested in argument for either parent. In a family case evidence of this kind falls to be assessed, however unsatisfactory its origin. To hold otherwise would be to invest the guidelines with the status of the law of evidence and it would invite the question: which failures have the consequence of inadmissibility? Clearly some failures to follow the guidelines will reduce, but by no means eliminate, the value of the evidence. Others may reduce the value almost to vanishing point.
>
> …
>
> [42] … The purpose of the ABE guidelines is not disciplinary; it is to present the court and for that matter the parents with the most reliable evidence which can be obtained. In every case the judge cannot avoid the task of weighing up the evidence, warts and all, and deciding whether or not it has any value or none. Everything will depend on the facts of the case. …'

75. In an area where the need for a well conducted ABE interview is considered, at the very least, to be a priority (or to use Hughes LJ's words, 'of the first importance') when conducting an effective evaluation of allegations, the absence of an ABE compliant process has to be a matter of note for the judge faced with the difficult task of assessing such material as is available. I therefore regard the fact that the judge does not mention the absence of an ABE interview, let alone bring that absence into her evaluation, to be a significant omission from the judgment. The same point, to a lesser extent, applies

where the complainant has been unable to prepare, or to give in oral form, a narrative account of the abusive experiences about which she complains.

(d) X's emotional presentation

76. The task for the judge, at every stage, is to identify material upon which she either can or cannot rely in answering the ultimate question of whether or not a particular factual allegation is proved on the balance of probability. Identifying and testing the reliability of the various evidential components is therefore of the essence of the judicial task. In the present case the core account is that recorded as being given to the teachers and other professionals in 2009-2010. X's oral evidence accepted that that account was essentially correct, although, it is important to note, she challenged the accuracy of it with respect to whether or not she had told her aunt about discovering that F was having an affair. Beyond that core account, however, there was, effectively, no further evidence save for X's demeanour when talking about these matters, the finding that F had the opportunity to meet with X and the finding that F lied in connection with his mobile 'phone.

77. As I have acknowledged, the experience of observing the emotional content of X's presentation over the video-link, and the congruence of those emotions to the subject matter of F's alleged activities with her (in contrast to her demeanour when talking of other more mundane matters), was plainly a powerful factor for the judge in her evaluation of the essential truth of the allegations. Nothing that I now say is intended to hold that judges should ignore the emotional content of a witness' testimony; on the contrary such matters are plainly an essential component in the evaluation of key oral evidence. Where, however, significant weight is to be placed upon a witness' apparent emotional affect, there is a pressing need for the judge, having rightly acknowledged the importance of that factor, nevertheless to step back and conduct a reality check by having regard both to the factual content of the evidence and to the other evidence in the case. Strong emotional presentation may otherwise have a disproportionately powerful effect, one way or the other, on the otherwise dispassionate process of determining whether or not a particular fact is established on the balance of probability.

(f) Placing the emotional presentation within the overall evidential jigsaw

78. In assessing the factual determination undertaken by Pauffley J in the present case, having noted, and fully accepted, the judge's description of the extreme nature of X's emotional turmoil and distress, which she regarded as a 'substantial factor' tending to validate the allegations, it is then necessary to identify how the judge has measured that strong positive factor against the other evidence in the case. To adopt a phrase first coined by Bracewell J many years ago, it is necessary to determine how X's strong emotional affect was placed within the overall evidential jigsaw.

79. In my view the various detailed pointers highlighted by Mr Storey in his closing submission to the judge as to the absence of any sensory or contextual detail, absence of specifics around timing and location, together with the absence of detail as to the alleged abuse itself, were all important matters. The judge deals with them very shortly at paragraph 110 and effectively does not engage with the substance of the points being made. The judge concludes that the 'prohibitions' described by X 'provide a complete answer as to why, generally, there is a lack of detail'. With respect, I do not consider that it was open to the judge to arrive at such a firm, psychologically sophisticated, conclusion in the absence of any expert opinion in support of it and/or without further analysing how it could be that X was in some way prohibited from giving details whereas she did not feel prohibited, in the same way, from making the global allegation of abuse itself.

80. In the opening stages of her judgment, the judge, at paragraph 4, considered that the enormous difficulty that X apparently had in giving her oral evidence arose 'for extremely unusual, only partially explained reasons'. Later, in the section at paragraphs 89 to 92, focus is brought to 'the extraordinary nature, in part, of what is alleged', with X's account described as being 'so curious', 'only partially understood' and 'impossible for an outsider to fully comprehend'.

81. Those descriptions of the complexity of X's evidence are plainly well chosen. But, where a judge considers a complainant's evidence to be extremely unusual, and can only partially understand the reasons for it, it is all the more necessary to deploy caution before holding, as the judge did at paragraph 110, that the "prohibitions", which themselves were only explained in shadowy terms, could, on the balance of probabilities, provide a complete answer to the lack of any detail as to this young woman's many abusive encounters with F.

82. In addition, where expert evidence establishes, as did the evidence of Dr B to which I have referred, that the possible psychological causation for X's various physical symptoms was not properly understood, and may or may not be consciously generated, great caution would, to my mind, be required before concluding that what X was saying was a reliable foundation for a finding of fact.

(g) The 'trigger event'

83. A further matter that, to my eyes, plainly needed to be met head-on in the judicial evaluation was X's evidence concerning the 'trigger event'. This was not a matter of passing detail; it was a core theme which ran through the entirety of X's account. X had told her teachers in October 2009 and a social worker in November 2009 that she had reported to M that she had seen F in a sexual encounter with a woman. As a result F was punishing her. His sexual abuse of X was that punishment. The sexual abuse took place because of the 'deal' that she said that she had with F because she had done wrong. The

wrong that she had done was to tell M that she had seen F with another woman. M, however, was plain that X had never made any such report to her. In her oral evidence X said she did not tell her teachers that she had told M about the affair; she had told them what *would* happen if she did tell M.

84. This aspect of X's testimony would appear to be the only element within her account which directly impacts upon a specific matter covered in the evidence of a witness other than F. The witness is M and she is clear that X made no such report. X herself no longer states that she did report the alleged encounter to M.

85. Given the prominence of the 'trigger event' in X's original account, M's evidence and X's retraction called for very careful analysis by the judge. Despite the great respect that I have for the judge, I am afraid that I am driven to conclude that her analysis of this point at paragraph 119 simply fails to engage with its importance and seeks to explain it away as if it were a matter of only minor significance. The description of this key point as being 'some parts of what X is recorded as having said' and the characterisation of M's denial and X's retraction by the phrase 'cannot be verified as true' fail to attribute the necessary weight to the issue, and fail to record the evidential position correctly. Rather than being a matter that could not be 'verified as true', the judge found that X did say this to the teachers and that it was untrue.

86. Moving on in paragraph 119 the judge, rightly, describes the not uncommon position in any case where aspects of what a complainant has alleged are seen to be inaccurate or plain wrong and that it is rare for every last detail to be verifiable in all respects. But again, that description fails to engage with the central importance of this 'trigger event', which is now denied, to the whole of X's narrative; it is not an 'aspect' or 'every last detail' of her account, it is the very reason that she had given for the start of her abusive relationship with F.

87. In the final two sentences of paragraph 119 the judge does move away from more general observations to state:

> 'The memory of the complainant may be faulty when relating events which occurred many years previously. X at 17½ was giving a description of the situation as it had unfolded almost 10 years previously. It may have been troublesome for her to differentiate between what F had told her about the consequences of telling her aunt and what she herself did.'

Such observations may have some validity, but they are not the only explanations for the state of the evidence on this point and they fail to take account of the fact that, not only did X report to her teachers and, later, to the social worker that she had made this report to M, she also, when speaking to the social worker, stated that she had hurt someone

deliberately and that her aunt had been upset.

88. For the reasons that I have now given, I consider that Mr Storey was justified in putting this aspect of the evidence at the top of his list of concerns about X's evidence and that, most regrettably, the judge failed to engage to the necessary degree with the issues that it raised. As a result within the evidential analysis this element, which can only have played against making a finding, was given no, or disproportionately low, weight.

(h) Vulnerable Witness: difficulties within the forensic process

89. In the course of the lead judgment in the Supreme Court, with which each of the other Justices agreed, Baroness Hale contemplated the range of options that might be available in order for the court to receive evidence from X:

> '[36] It does not follow, however, that X will have to give evidence in person in these proceedings. … there would be a number of options available to resolve matters. If any party wishes to call X to give oral evidence, up-to-date medical evidence can be obtained to discover whether she is fit to do so. There are many ways in which her evidence could be received without recourse to the normal method of courtroom confrontation. Family proceedings have long been more flexible than other proceedings in this respect. The court has power to receive and act upon hearsay evidence. It is commonplace for children to give their accounts in videotaped conversations with specially trained police officers or social workers. Such arrangements might be extended to other vulnerable witnesses such as X. These could include the facility to have specific questions put to the witness at the request of the parties. If she is too unwell to cope with oral questioning, the court may have to do its best with her recorded allegations, perhaps supplemented by written questions put to her in circumstances approved by Dr W. On the other hand, oral questioning could be arranged in ways which did not involve face-to-face confrontation. It is not a requirement that the father be able to see her face. It is, to say the least, unlikely that the court would ever allow direct questioning by the father, should he still (other than in this court) be acting in person. The court's only concern in family proceedings is to get to the truth. The object of the procedure is to enable witnesses to give their evidence in the way which best enables the court to assess its reliability. It is certainly not to compound any abuse which may have been suffered.'

90. As I have described, Pauffley J, following the Supreme Court's guidance, undertook an assessment of X's ability to give evidence and, based upon the medical advice received, established a process designed to support X and to limit her direct exposure to the courtroom through use of a video-link. As Baroness Hale makes clear, such a process, which falls short of the normal method of courtroom confrontation, is permissible in order to assist the court in arriving at findings and to enable witnesses to give their

evidence in the way which best enables the court to assess its reliability.

91. Despite the very valuable support given to X by NM, a registered intermediary, who was described by Pauffley J as extremely impressive, it is clear that X found the process of discussing these matters to be highly distressing. As I have explained, her evidence was halting, truncated by the need for breaks and, in the end, concluded in the early stages of questioning on behalf of F.

92. Within this appeal, no criticism has been made of the sequence of decisions which led to the choice of these particular arrangements, as opposed to other less direct methods, for the court to receive evidence from X. As Baroness Hale explains, in any case there will be a scale of options, running from no fresh input from the witness into the proceedings, through written answers, video-recorded questioning by trained professionals or live questioning over a video-link, to full involvement via oral evidence given in the normal forensic setting. The aim, again as Baroness Hale says, is to enable witnesses to give their evidence in the way which best enables the court to assess its reliability. It must be a given that the best way to assess reliability, if the witness can tolerate the process, is by exposure to the full forensic process in which oral testimony is tested through examination in chief and cross-examination. Just as the sliding scale of practical arrangements rises from 'no fresh involvement' to 'the full forensic process', there will be a corresponding scale in which the degree to which a court may be able to rely upon the resulting evidence will increase the nearer the process comes to normality. In each case, where a vulnerable witness requires protection from the effects of the full process, it will be necessary for the court to determine where on the scale the bespoke arrangements for that witness should sit with a view to maximising the potential reliability of the resulting evidence, but at the same time providing adequate protection for the particular vulnerabilities of that witness.

93. Where special measures have been deployed it is, however, necessary for the judge who is evaluating the resulting evidence to assess the degree, if any, to which the process may have affected the ability of the court to rely upon the witness' evidence. Where, for example, the witness has simply been unable to play any active part, the court will be required to fall back upon hearsay records of what has been said outside the court context on earlier occasions and without any challenge through questioning.

94. In the present case it is clear that even the process of X giving evidence in chief encountered a range of difficulties, some entirely outside the court's control, which made progress painfully slow and, at times, came to a halt. Cross-examination was very limited and was, for good reason, brought to a premature conclusion. Despite these difficulties, which the judge describes in full, the judgment does not contain any evaluation of the impact that this compromised process had upon the court's ability to rely upon the factual allegations that X made within her evidence as a whole. This was a case where, partly as a result of the limitations on her ability to give evidence in the normal court process and partly because of the difficulty in fully understanding what she

was explaining, the court only experienced X's account 'through a glass darkly' because of the number of filters (both psychological and forensic) in place between X and the judge. In assessing the reliability of X's account it was, in my view, necessary to acknowledge these difficulties and give them appropriate weight within the overall analysis.

(i) Corroboration

95. As I have explained, Pauffley J held that the coincidence between X's account of F changing the phone number that he used to contact her and F's initial witness statement was extremely significant evidence which linked F to X. Not only was, on the judge's finding, this link established but, as she found, F went on to lie about it in the course of his oral evidence. These findings are not challenged, and could not be challenged, in the context of this appeal.

96. The judge did not, expressly, use the finding that F had lied in this respect as direct proof of culpability in the matter of sexual abuse. She did not, therefore, need to give herself a *Lucas* warning [*R v Lucas* [1981] QB 720], prudent though it may have been to do so.

97. The coincidence of evidence concerning F's mobile phone numbers was the only factor in the evidence that was identified as corroborating X's account in any material particular. It went, as the judge acknowledged, to a matter which was 'almost peripheral'. In the circumstances, in addition to noting this point in support of X's account, it was, in my view, incumbent upon the judge to acknowledge that X's allegations were otherwise not corroborated at all (and that, on the one point at which her original account impacted upon a witness other than F, it was shown to be untrue). The failure to acknowledge this state of affairs can only detract from the overall validity of the judicial assessment of the evidence.

Conclusion

98. It is with the heaviest of hearts that I now contemplate the conclusion that must inevitably flow from the serious detriments that I have identified in the fact finding analysis conducted by Pauffley J in this case. My reluctance arises primarily from consideration of what must follow from a decision to allow this appeal, thereby setting aside the judge's finding of sexual abuse. I have also, at every turn, been acutely aware of Pauffley J's enormous experience of conducting these exquisitely difficult cases.

99. Despite giving every possible allowance for the factors that I have identified which either support the judge's finding, or properly caution against the appellate court from interfering with that finding, for the reasons that I have given, the judge's determination cannot be upheld. In summary the factors that have led me to this view, taken together,

are:

a) The only evidence of sexual abuse came from X's accounts given in 2009/10, as confirmed by her to be true during oral evidence. No other evidence directly supported or corroborated X's allegation of sexual abuse. The evidence around the 'trigger event' established that, in at least one central respect, X's accounts in 2009/10 were not reliable. Whilst the unsupported testimony of a single complainant is plainly capable of establishing proof of what is alleged, where, as here, there were a number of factors that detracted, or may have detracted, from the degree to which reliance could be placed on X's testimony, a finding of fact should only be made after those factors have been given express consideration and due weight in the judicial analysis.

b) X's emotional presentation in 2009/10 and over the video-link was a relevant factor, but the weight given to the emotional presentation was unjustified and was disproportionate in the absence of a corresponding analysis of the detail of what she was actually saying together by undertaking a process, similar to that presented on behalf of the guardian, of balancing the factors either for or against the making of a finding.

c) Once it was established that the 'trigger event' of X informing M had never occurred, despite being reported by X on a number of occasions in 2009/10, it was necessary to conduct a full appraisal of the impact of that highly material change in X's account.

d) The judge's conclusion that the 'prohibitions' went so far as to provide a 'complete answer' to the lack in X's account of any of the detail identified by Mr Storey was a conclusion that was unsupported by any expert evidence and was not open to the judge. This is particularly as the 'prohibitions' themselves were shadowy and only partially understood.

e) In the light of the expert evidence concerning the difficulty encountered in determining a psychological link to X's physical symptoms, and, particularly where some of those symptoms may be consciously generated, great caution was needed before concluding that X's account provided a reliable foundation for the finding of fact.

f) The judicial analysis should have included assessment of the impact of the lack of any ABE interview and/or narrative statement in 2009/10.

g) The judicial analysis should have included assessment of the impact of

the, necessarily, limited forensic process around X's oral evidence.

100. In the circumstances, the appeal must be allowed and the judge's findings of fact set aside.

101. Finally, there is a need to determine whether a re-trial of the issue of sexual abuse should now take place. For my part, and in the light of the material to which this court has now been exposed in full detail, and even allowing the fullest justifiable weight to X's demeanour, I do not consider that a finding of fact against F was open to the court on the evidence as a whole.

102. It seems highly unlikely that X will be able to engage to a greater extent in the forensic process than she did before Pauffley J; indeed powerful submissions were made by Miss Morgan and by M to the effect that it would be abusive and/or untenable to expect X to take part in a further hearing.

103. In the circumstances, and whilst fully accepting that this leaves A, M, and indeed F, in the very difficult situation that M so clearly described, I consider that no greater clarity is likely to be obtained by a retrial and that this court should therefore now put a stop to the evaluation of X's 2009/10 allegations within these proceedings.

104. As a result, the private law proceedings relating to A must now proceed on the basis that there is no finding of fact against F (arising from X's allegations). The Family Court will therefore make any determination as to A's welfare on the basis that F has not engaged in any sexually inappropriate behaviour with X.

Lady Justice Gloster 105. I agree. For the reasons which McFarlane LJ has given, the substance, nature and quality of the evidence given by X did not entitle the judge to conclude that F had engaged in sexually in appropriate conduct with X.

106. However I should also add that I accept Ms Branigan's submission (as referred to at paragraph 52 above) that the trial procedure, so far as F was concerned, was unfair to him.

107. The allegations being made against him were extremely serious. If established they might well have led to him being deprived of contact with his daughter, to the possibility of criminal proceedings against him, and resulted in an indelible scar to his reputation and character, with potential consequences for his future employment and personal relationships.

108. Whatever the difficulties surrounding X's position as a witness, F was nonetheless entitled

to a fair trial of these allegations. For the following reasons, in my judgment he did not receive one:

a) First, there was no equality of arms. For various reasons, he received no legal aid, and the only legal representation which the local authority agreed to fund was a barrister solely for the anticipated 3 days of cross-examination of X and her mother (see paragraphs 17 and 18 above). This might be thought to have been designed more in order to protect X from direct cross-examination by F, than for the purpose of assisting F in the presentation of his case.

b) Second, because of the conflict of interest problem (see paragraph 19 above) his counsel was instructed on absurdly short notice for what was, necessarily, going to be an extremely difficult cross-examination.

c) Third, whilst one can readily understand the reasons why the judge terminated X's cross-examination, the consequences of that decision so far as F was concerned were clearly highly significant. In my judgment the judge should, at the very least, have considered whether in those circumstances, where there had been no full or adequate cross-examination of X on behalf of F, it remained possible to reach any fair outcome of the determination of the issue so far as F was concerned.

d) Finally, F's exclusion from the court room when X was being cross-examined, meant that it was extremely difficult for him, when he came to make his final submissions, to know what X's evidence had been. I find it difficult to understand how he was expected to have successfully deployed what his counsel may have told him about X's evidence in his own final submissions as a litigant in person. Whatever the perceived egregiousness of F's conduct in "craning his neck" to see X on the screen, I cannot believe that practical arrangements could not have been made which would have enabled him to remain in the court-room but nonetheless would have prevented him from repeating his attempts to see X on screen. To exclude a litigant in person from the courtroom in such circumstances was a very serious step.

109. It is obviously important in trials with vulnerable witnesses that the trial process should be carefully and considerately managed in such a way as to enable their evidence to be given in the best way possible and without their being subjected to unnecessary distress. But that should not come at the price of depriving defendants and others, who claim that they have been falsely accused of criminal conduct, of their right to a fair trial in which they participate and a proper opportunity to present their case in accordance with natural justice and Article 6 of the European Convention on Human Rights.

110. It does not surprise me that, in the light of the history of this litigation, F has on occasions, as set out in paragraphs 133-136 of the judge's judgment, expressed his dissatisfaction with the court process in strong, emotional terms. That should not, in my view, have been relied upon by the judge (as it apparently it was at paragraphs 133-137 of her judgment) as a basis for reaching adverse findings as to F's credibility. It is not difficult to see, given the long history of this matter and the actual and potential personal consequences for F, why he might have found it difficult to refrain from making comments of this sort, or might have behaved in an inappropriate manner in what no doubt he perceived to be a hostile court environment.

111. Whilst I consider that the trial process was unfair to F, it is not necessary in the light of the Court's main conclusion in relation to the inadequacy of the evidence upon which the judge based her conclusions, to consider whether this ground alone would have sufficed as a reason for allowing this appeal.

112. Accordingly I too would allow this appeal and direct that there be no re-trial of X's allegations against F.

Lord Justice Briggs113. I agree with both judgments.

114.My preparation for the hearing of this appeal left me in no doubt that the advantages enjoyed by this very experienced judge in having seen and heard both X and F would make it difficult indeed for this court to depart from her firmly expressed conclusion that X's account of grave sexual abuse by F was to be believed. But the combined effect of the factors set out in detail in my Lord's judgment have led me, with no less caution and reluctance than him, to the clear conclusion that her finding cannot be allowed to stand.

115.The main factors which have driven me to that conclusion are first, the almost complete failure of the planned cross-examination of X (however understandable the reasons why it had to be cut short), secondly the fact that on the important element of her account which might have been corroborated by M, it was in fact contradicted and finally, the lack of balance in the judge's appraisal of the many factors which needed to be taken into account in the weighing of X's evidence.

116.I would also therefore allow the appeal and, for the reasons given by my Lord, direct that there be no re-trial of X's allegations against F.