Neutral Citation Number: [2019] EWCA Civ 2302

Case No: LV18C00366

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT PRESTON
HHJ Baker
LV18C00366

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2019

Before :

LORD JUSTICE HENDERSON
and
LORD JUSTICE BAKER

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF D (A CHILD) (FACT-FINDING APPEAL)

Between :

M	**Appellant**
- and -	
X BOROUGH COUNCIL (1) **Y (2)** **D'S FATHER (3)** **D (by her children's guardian) (4)**	**Respondent**

- -
- -

Nicholas Goodwin QC and Danish Ameen (instructed by **Poole Alcock**) for the **Appellant**
Simon Crabtree (instructed by **Local Authority Solicitor**) for the **First Respondent**
Karl Rowley QC and Shaun Spencer (instructed by **Hogans**) for the **Second Respondent**
Christopher McWatters (instructed by **Broudie Jackson Canter**) for the **Third Respondent**
Lisa Edmunds (instructed by **Berkson Family Law**) for the **Fourth Respondent, by her children's guardian**

Hearing date: 21 November 2019

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Approved Judgment

This judgment was delivered in public but it is ordered that in any published version of the judgment no person other than the advocates or the solicitors

instructing them and other persons named in this version of the judgment shall be identified by name or location and that in particular the anonymity of the child and members of her family must be strictly preserved.

LORD JUSTICE BAKER :

1. This is an appeal by a mother against the decision of HH Judge Baker on 25 May 2019 in care proceedings concerning her daughter, hereafter referred to as D, that she had suffered an abusive anal injury inflicted by an unidentified male and that her mother knows both who the individual is and that he was responsible for the injury.

2. At an earlier hearing in July 2018, the judge had found that the threshold criteria in s.31 of the Children Act 1989 were satisfied and made a care order approving the local authority's plan that D be placed in long-term foster care. On that occasion, the judge made a number of findings about the mother's care of D, including that through a succession of relationships with violent men she had exposed D to a risk of physical and emotional harm. So far as the anal injury was concerned, the judge found at the first hearing that it had been perpetrated by the mother's partner, hereafter referred to as Y. Subsequently, Y obtained further evidence and successfully applied to the judge for a rehearing of the allegation that he had inflicted the injury. It was at the conclusion of this further hearing that the judge made the finding against which the mother now appeals.

Background

3. D's parents started a relationship in 2013. The father had extensive convictions for violent behaviour and during the relationship was physically abusive to the mother. D was born in November 2014. Following an attack on the mother in 2015, the father was convicted of an offence of wounding and received a 16-month sentence of imprisonment. In January 2017, the father violently attacked the mother again, on this occasion in front of D. As a result of this assault, the mother sustained injuries to her abdomen and a laceration to her liver. Under the father's influence, however, she initially told medical staff that her injuries had been suffered in a road traffic accident. Subsequently the father admitted the assault and was again convicted and imprisoned.

4. Following this incident, the mother and D moved away to a different area, and the mother had a brief relationship with another man, S, who also had convictions for offences of violence. That relationship ended when S was sent to prison, and the mother and D returned to their home area. In October 2017, the mother started a relationship with another man, Y. He also had convictions for offences of violence, although there have been no allegations that he has been violent towards the mother. The mother and Y did not live together, but Y was a frequent visitor. It was later alleged that on occasions they had sexual intercourse in D's presence.

5. On Monday 22 January 2018, D, then aged three years two months, started attending a new nursery. On the first day, she was taken to the nursery by her mother and Y. Four days later, on Friday 26 January, D attended the nursery for the second time. On that occasion, she was taken to the nursery by her mother alone. It was the evidence of her mother and Y that Y had not been present at the mother's home on the Thursday night and Friday morning. During the morning on 26 January, a conversation took place between D and L, a member of the nursery staff. L subsequently made the following note of the conversation:

> "D came out of the toilet and came over to me. D said … my bum's sore. I asked does she need it wiping. D started to get

> upset and said I can't tell you the man will kill me. D put her hand on her face and said I can't tell you. I asked why her bum was sore D's said the man did it, it was bleeding he killed me because it had blood in it so he killed me. I told D it was okay she said it's better now the lady made it better and walked away. At that point I walked straight to the office and reported it to [the manager]."

6. Another record of the conversation, on a form held by the Multi-Agency Safeguarding Hub ("MASH"), reads as follows:

> "D disclosed to staff that she had a stomach ache all day. Staff prompted to go to the toilet. 16.10 pm – D came out of the toilet and said she had a sore bum. Staff have asked her whether she has wiped properly and whether she needed some help. D said; 'It was the man. He made my bum sore and he made it bleed. If I tell you he will kill me.' D would not let staff look at her bottom and said she was fine. Staff advised that D has only been out of nappies one week and moved to [the local town] two weeks ago. On only second session at [the nursery]. Spoke with staff member L who advised mum's details. Staff member L advised mum did bring D to nursery today with a male who she advised was Y."

7. It was later established that this record was incorrect in at least two respects. First, there was no record at the nursery of any staff member asking to look at D's bottom. Secondly, Y had not accompanied the mother and D to the nursery on 26 January, although he had done so on D's first day earlier in the week. It is now accepted by all parties that there is no evidence that the mother was accompanied by a man when she brought D to the nursery that morning.

8. Later that afternoon, D was seen at the nursery by a social worker and two police officers. A typed record of the conversation was prepared by one of the police officers. He recorded that D had been initially shy but quickly became chatty, speaking to the social worker about a toy baby she was holding. In the note, the officer commented that D seemed to be avoiding the social worker's questioning by talking about the baby. The record continued:

> "Is your bum sore? D shook her head to say no.
>
> Remember what happened? 'It's better' at this point she pointed to her hip and said 'here'.
>
> What made it sore? 'It's better' 'the man did it and kill me'
>
> Which man? 'The police man and they took me away and I was crying and mummy was crying.'
>
> As further questions were asked, D again ignored them and talked about the baby.

> D had not been told that I was a police officer.
>
> What happened to your bum? It's better
>
> When happened? It's better
>
> Is it bleeding? No
>
> D then went off topic again saying 'the man killed me this morning … he took my orange juice away'
>
> Where? 'My mum's house and on my skateboard. This morning'
>
> Who's the man? 'the police man' (of note D had not been told that I was a policeman)
>
> What's his name? 'Just the police man'
>
> Describe the man? 'Big man, green face, took my gloves off and took my top off and took my baby away'
>
> Are you sore now? D shook her head
>
> Is it bleeding? Again she shook her head
>
> Told mum? No the man killed me
>
> D then made the following unprompted comments 'I went to the shop with Y and the man kicked me'
>
> Which man? The green man then the blue man
>
> D then showed us her hand and said it was scratched, she was asked how she got scratched and she said 'because the man killed me.'"

9. In the first judgment, the judge observed that "it's fair to say, at the very least, that she does not relate anything that could be safely interpreted as a repeat of what L [the nursery worker] had reported."

10. In the light of this conversation, and D's age, it was decided that she should not undergo a recorded interview under the Achieving Best Evidence procedure.

11. The following day, D underwent a medical examination conducted by Dr Eleanor Thornton, forensic physician and general practitioner. She found an anal laceration at the 5 o'clock position, with no signs of healing. Genital examination was normal. There was a minor abrasion of the left wrist and bruises on the left thigh and the right shin which the doctor concluded could be attributable to everyday activities. In her report, Dr Thornton made the following observations about the anal injury:

> "Lacerations may show signs of recent injury, such as moist or dry blood, or signs of healing such as scabs or granulation tissue. Anal lacerations can be caused by penetration of the anus, or by passage to the anus of a hard, constipated stool …. Other causes of anal lacerations, such as constipation with the passage of hard constipated stools, bowel and skin disorders, should always be considered. In the context of an alleged anal assault, with no other causative factors, the presence of an anal laceration provides strong corroborative evidence …. D's mother gave no history of constipation, or any bowel or skin disease. I consider the presence of the anal laceration to be strongly supportive of recent anal trauma such as anal penetration."

12. On 1 February 2018, five days after the medical examination, D was spoken to at home by the social worker who had seen her at the nursery, on this occasion with another social work colleague. In a statement signed six days later and filed in the family proceedings, the social worker recorded her conversation with D as follows:

> "Q: Do you remember being sore?
>
> A: Yes.
>
> Q: What happened?
>
> A: The man.
>
> Q: Which man?
>
> A: The green man.
>
> Q: What happened?
>
> A: He killed me. Hurt me and killed me.
>
> Q: When?
>
> A: Two seconds ago.
>
> Q: Which man?
>
> A: The blue man. Just hurt me and killed me.
>
> Q: What did he do?
>
> A: Just hurt me all the time.
>
> Q: Who was there?
>
> A: The man.
>
> Q: Anyone else?

A: No. He rocked me.

Q: Do you know who the man is?

A: What man? My mummy killed me.

Q: Your mummy?

A: No. I do aeroplane.

Q: Does mummy know the man?

A: Yes. Two seconds ago. Mummy knows it all the time. I do aeroplane.

Q: Can you show us what the man did?

A: He hurt me on my back.

Q: What did he do? Can you show us?

Q: What did he look like?

A: A green monkey.

Q: Have you seen the man before?

A: Two seconds ago.

Q: Where?

A: Over the hill.

Q: D, who lives here?

A: Y.

Q: Who else?

A: S [the name of the mother's previous partner], he's naughty.

Q: Why?

A: Because he's shaking. He'd take me away from my Mummy.

Q: What does S do?

A: Just kiss.

Q: Who?

A: Two seconds ago.

Q: Who does he kiss?

A: Mummy.

Q: What does Y do?

A: He kiss too.

Q: Who does he kiss?

A: Cars. And M [a man's name].

Q: Who is M?

A: He just be here all the time.

Q: Who is M?

A: M be here all the time. He kissed me.

Q: When?

A: Two seconds ago.

Q: Does mummy know M?

A: Yes. She loves Y.

Q: Does she know M?

A: Yes, and not Y.

Q: Where did M kiss you?

A: Just my bum.

Q: Your bum?

A: And again."

13. When the mother was asked about the men referred to by D in this conversation as S and M, she initially denied knowing any men by those names. Subsequently, she admitted that she had been in a relationship with a man called S and that there was a man called M in her family, but she had had no contact with him for four years. It is accepted by the mother that she initially did not tell the truth about these two men.

14. On 6 February 2018, the local authority filed an application for a care order. On the following day, after a contested hearing, D was made the subject of an interim care order and placed in foster care. In the course of the proceedings, the mother filed a statement in which she said that the child had suffered from diarrhoea over the weekend before the incident. She also said that D had fallen in the bath on 25 January 2018 but that she had not noticed any marks on her bottom, nor any blood. D had

been playing with a number of toys in the bath. It was alleged that D had told her grandmother that she had fallen on a Peppa Pig toy.

15. An expert report was obtained from Dr Alistair Irvine, forensic physician. He agreed with Dr Thornton's view that the anal laceration was strongly supportive of recent anal trauma such as penetration, adding "particularly in view of 3-year-old D's disclosure". He also stated: "It is also clear, in my opinion, that there is no merit in the mother's claim that the anal laceration could have occurred when D fell onto her buttocks in the bath". He concluded:

> "It is a finding that is consistent with some form of penetrative anal trauma with overstretching and tearing of the skin and mucous membranes at the 5 o'clock position of the anal margin. The fact that the laceration was showing no evidence of healing was consistent with it having been recent and, as such, likely to have occurred possibly within 24 hours of Dr Thornton's examination, and certainly it is not an injury that is likely to be attributable to episodes of diarrhoea from which D suffered the previous weekend. Therefore, overall, the medical evidence in this case does, in my opinion, provide strong support for the allegations of D probably having been sexually assaulted, in particular with some form of anal penetrative trauma having been sustained."

16. Following this report, Dr Irvine was asked some supplementary questions. In particular, he was provided with photographs of some of the toys that were in the bath when D was alleged to have fallen onto her bottom and asked whether such a mechanism was a likely explanation for the laceration. He responded:

> "Although such penetrative trauma could have been an adult finger, or fingers, it would be difficult to refute the possibility that other appropriate objects or implements could have produced overstretching and tearing, but in many respects it is significantly less likely that falling onto an object or implement would have resulted in the anal tear alone …. But in reality, if D had fallen heavily onto an object or implements such as one of the toys, and even if it had been capable of penetrating into the anus and produce overstretching, I would also have anticipated other evidence of blunt trauma to the surrounding tissues in the form of possible abrasions and bruises to the buttocks, and within the natal cleft area, as a result of the forceful blunt trauma that would be associated with such a fall. There is no suggestion, within Dr Thornton's report and examination, of any associated bruising or abrasions having been present, and it remains my opinion that it is highly unlikely that this injury occurred as a result of an accidental fall onto an object or implement."

17. In its "threshold document" in support of the application, the local authority referred to the history of abusive relationships between the mother and a number of men including D's father. It asserted that the mother was unable or unwilling to prioritise

D's best interests over her own relationship needs and had put D at risk of physical harm throughout her short life. The local authority also alleged the mother had caused D emotional harm through (a) the lack of stability in her life; (b) allowing her to witness domestic violence; (c) failing to consider her trauma after witnessing her father assaulting her mother, and (d) allowing her to witness inappropriate sexual behaviour. In addition, in respect of D's anal injury, the local authority alleged that (a) the injury was likely to have occurred between 24 and 26 January 2018; (b) it occurred while D was in her mother's care; (c) the mother knows or ought to know how it occurred; (d) it was either caused by the mother or she failed to protect D from sustaining it, and either (e) the injury was caused by Y, or (f) an unknown person caused the injury and the mother knows the identity of the unknown person but has chosen not to reveal it.

18. The first hearing took place before Judge Baker over eight days in July 2018. The judge heard evidence from 16 witnesses, including L, the nursery worker, the social worker and police officers who spoke to D after the incident, Dr Thornton, Dr Irvine, the mother and Y. In his judgment, having summarised the law and before dealing with the anal injury, the judge considered the evidence about the other allegations and made findings broadly in accordance with the local authority's threshold document. Those matters do not feature in this appeal and it is unnecessary for us to consider them further.

19. Turning to the anal injury, the judge started by considering the expert medical evidence which he noted to be broadly consistent and which he accepted. He then considered the statements made by D on 26 January and 1 February. He took into account the fact that

> "the memory of children of three or younger … is understood to be partial and fragmented, that is to say that issues such as timing, environment and indeed ability to recall matters can be severely compromised by a number of different influences, and, indeed, the way they remember things and the way they refer to things is significantly different to that of adults."

He also took into account the fact that a child of D's age "is capable of having an imagination". Looking at the conversations between D and the social worker and police officers, he concluded that it was impossible to interpret them as revealing anything other than a confused picture.

20. On the other hand, the judge felt able to attach weight to the initial conversation between D and the nursery worker, L. He noted that what D was recorded as saying was a "spontaneous utterance on her part". There was no suggestion that it was prompted by a specific or leading question. He continued:

> "98. I note that in relating something where on the face of it the words appear to be associated with a distressing event that L records D's presentation as being upset and covering her face, so there is a consistency and parity in the presentation that D is recorded to have displayed and [the] nature of the incident it appears she is reporting.

> 99. What I have found most striking about that initial account is its relationship to what was found on the medical examination. There are elements of it that are difficult to understand, but there are also elements of it that I find it difficult to imagine a child making up uttering by chance. Of course that relates not only to the fact that she refers to bleeding, which we know from the medical experts is a possible consequence of receiving an anal tear, and the comment that relates to the man killing her and her relating that she can't tell L because 'the man will kill me', as she put it. Again, in the context of something having happened that was untoward, in which another adult was involved, that comment makes sense. It is difficult in the context of the whole of D's comments to L to imagine a circumstance in which a three year old could fabricate attaching [sic] being killed because of something that had happened that had caused her to bleed and complaining that her bottom was sore by unfortunate coincidence.
>
> 100. Then, of course, there is the relationship of that which D said to what was found specifically on the medical examination, which was an injury entirely consistent with penetration by either a body part or an object sufficiently large to cause an anal laceration.
>
> 101. So the internal (by 'internal' I mean the internal consistency within the statements themselves) and external consistency between what D is reported to have said and the medical evidence subsequently found is quite striking."

21. The judge then considered evidence about the fall in the bath but concluded that it was a relatively inconsequential incident which had only taken on significance subsequently when family members were looking for possible explanations. He stated that he did not believe D's grandmother's account of D saying that she had fallen on a Peppa Pig toy, and concluded that the grandmother had fabricated the story to exculpate the mother. He also discounted the possibility of constipation as an explanation, noting that the mother had not reported D suffering from that condition.

22. The judge then turned to the evidence of the mother and Y. He observed (at paragraph 120):

> "Putting it bluntly if I believe mum, but perhaps more importantly if I believe Y when he denies being responsible for D's injury, then that is the end of the matter, whatever the evidence says, and if I was of the view that ultimately they, on the balance of probabilities, were telling me the truth about what had happened to D in the previous 24 to 48 hours, which is the most of the timescale that I can realistically possibly be considering, that would also be the end of the matter."

23. The judge, however, did not believe the evidence of the mother and Y that Y had not been present at the home on the Thursday night and Friday morning. He noted what he described as "a very clear pattern" in the telephone records which indicated when they communicated with each other. As the judge observed, when they were together they did not need to phone each other. From this evidence, the judge inferred that Y had been present at the home overnight between Thursday and Friday. He accepted that Y left for work on the Friday morning before the mother took D to nursery. The judge said that he was unable to believe the mother about Y's absence from the home because he was "convinced that the answers she was giving were motivated by her need to protect her relationship with Y".

24. In reaching his conclusions, the judge stated first:

> "I am driven by the combination of the expert evidence and the relationship between that medical evidence and what D said to L, and by the coincidence of the two and the lack of evidence supporting the alternative interpretations of that injury – I am driven to the conclusion that, on the balance of probabilities, that injury was caused as a result of some adverse penetrative event that was in itself an assault by a male on D."

The judge concluded that there was "no reason and there is no evidence to suggest" that the mother was the perpetrator. He found that Y was in the pool of possible perpetrators and, having considered the other individuals mentioned by D, concluded that "at this moment in time there is no one else in the pool of perpetrators". He then expressed his conclusion as to the perpetrator in these terms (at paragraphs 130-1 of his judgment):

> "130. I have considered in coming to that conclusion whether there is any evidence – any evidence – on which I could conclude that there is some other male who sneaked into the nursery and did something inappropriate to D …. There is simply no evidence to substantiate that as a possibility. I cannot in all conscience come to the conclusion that there is a real possibility that that has happened.
>
> 131. For those reasons it is my conclusion that Y is responsible, on the balance of probabilities, for the injury to D in that he penetrated her anally with an object or body part."

25. Having considered the options for D's future care, the judge proceeded to make a care order on the basis of the local authority's care plan for a long-term foster placement with members of her family.

26. On 16 October 2018, the mother gave birth to her second child, a boy, hereafter referred to as S. His father is Y. The local authority started care proceedings. S has been placed in foster care under an interim care order. He remains in that placement and decisions about his future are awaiting the outcome of these proceedings concerning his older sister.

27. Meanwhile both parents had filed notices of appeal against the judgment of 24 July. In support of his appeal, Y sought to rely on fresh evidence which he asserted demonstrated that he was not present at the home in the period when the injury was said to have been inflicted. Peter Jackson LJ refused permission to appeal on both applications. In respect of the fresh evidence, he observed that, if any application was appropriate, it would be an application to the trial judge for a reopening of his finding about Y's whereabouts at the time D sustained the injury so that the trial judge could assess whether the further evidence provided solid grounds for a reopening.

28. On 21 December 2018, Y filed an application in the family court for the reopening of the finding that he had inflicted the injury on D. The principal evidence upon which he sought to rely was evidence from the police in the form of Automatic Number Plate Recognition (ANPR) data which he claimed demonstrated that he was not present at the mother's home in the period when the injury was sustained.

29. On 14 March 2019, Judge Baker considered that application, applying the principles in *Re ZZ and Others* [2014] EWFC 9 which prescribes a three-stage approach to such applications. At the first stage, the court considers whether it will permit any reconsideration. As Sir James Munby, President, observed in *Re ZZ* at paragraph 33:

> "One does not get beyond the first stage unless there is some real reason to believe that the earlier findings require revisiting. Mere speculation and hope are not enough. There must be solid grounds for challenge."

At the second stage, the court considers the extent of the forensic investigation and evidence to be adduced during the rehearing. The third stage is the rehearing itself.

30. Judge Baker concluded that the first stage was satisfied because the ANPR evidence provided solid grounds for reopening part of the findings made in the July 2018 judgment. As for the second stage, he delineated the extent of the investigation as being confined to "the question of perpetration and to any and all findings dependent on that finding". Directions were given for the listing of the rehearing over three days in May 2019. During the rehearing, the judge heard oral evidence from Y and the mother. Judgment was reserved and delivered on 23 May.

31. At an early point in his judgment, the judge made a number of further observations about the ambit of the rehearing. He endorsed the assertion made on behalf of Y that permission had not been given for the reopening of a number of other findings made in the first judgment, in particular (1) that D had sustained an anal laceration caused by an adverse penetrative event, (2) that the injury was inflicted in the previous 24 to 48 hours prior to the examination in the hospital on 27 January 2018, (3) that the assault was perpetrated by a male, and (4) that Y did not bring D to the nursery with the mother on 26 January 2018. The judge continued with these observations:

> "16. What neither Mr Spencer [counsel for Y] nor Mr Ameen [counsel for the mother], who … appeared … for the first time at this hearing, would not [sic] have been aware of, were the observations I had made on a number of previous occasions, directed most pertinently to those acting on behalf of the mother. As was confirmed by Ms Edmunds [counsel for the

guardian], who has had the advantage of appearing at every hearing in this matter since and including the original final hearing, at previous hearings I had highlighted the limited nature of the application made by Y i.e. that it was limited to identification of him as perpetrator of the injury. I have previously highlighted that there was no application before me to re-open evidence in relation to the nature or cause of the injury (i.e. that it was a penetrative injury resulting from an assault on D). I have previously pointed out to those representing the mother that careful consideration needed to be given on their part to any application on the mother's behalf having considered any actual or asserted interrelationship between what Y sought and the wider findings I had made about the injury. No such application has ever been forthcoming.

17. I mention the above point because of an observation made by Mr Ameen in his position statement prepared for the commencement of this hearing ….

> 'However, it is only right that the following point is made on behalf of the mother: if the court is satisfied that Y did not cause the injury to D, the court is bound to reconsider the finding that the injury was caused by some adverse penetrative event that was in itself an assault by a male on D.'

18. That paragraph gave rise to some lengthy preliminary discussion, not least because the proposed witnesses at this hearing did not include hearing from the experts as to the cause of the injury nor other ancillary witnesses relevant to the issue.

19. Further, I observed that whilst there is of course an interrelationship between causation and perpetration, in the sense that (a) the court must survey and consider the wider canvas before reaching factual conclusions and (b) there remains the possibility that the totality of the evidence leads to the conclusion (bearing in mind the burden and standard of proof) that there was no possible perpetrator [sic]. However, the logical process for determining findings involves consideration of whether there has been an inflicted injury and thereafter consideration of who perpetrated such an injury. That is the process I set out and evaluated in the context of both the medical evidence and the child's statements in my original judgment …. Nothing in this application or the fresh evidence provided by Y sheds additional light upon either the medical evidence or the child's statements and no application before the court establishes any challenge or grounds for reconsidering the findings [in the first judgment].

> 20. Such an approach [is] of course the inevitable corollary of the case law relating to the standard of proof. As set out by the Supreme Court in *Re S-B (Children)* [2010] 1 FLR 1161 by way of an analogous example (see para 12) - it may be unlikely that any person looking after a baby would take him by the wrist and swing him against a wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what happened, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied. Likewise, in cases where there is a potential 'pool' of perpetrators, consideration of who in the pool was responsible once the court has determined there is an inflicted injury can only be undertaken once it *has* been determined that there is an inflicted injury. A logical two-stage process is dictated by such an analysis, subject of course to an overview of all the evidence.
>
> 21. In summary therefore, during those preliminary discussions I opined that the rehearing amounted to a determination as to 'who was responsible?' and not 'was there an inflicted injury?' Having given the matter further thought, I remain of that view that such an approach is correct subject to the caveat that having considered the issue of perpetration (the 're-opened' issue) I must of course once again look at the circumstances as a whole, considering carefully the entire canvas of the case and testing whether there are any grounds on which to reach a different conclusion as to causation."

32. The judge set out some relevant points of law, including citations from the judgment of Peter Jackson LJ in *Re B (Children: Uncertain Perpetrators)* [2019] EWCA Civ 575 and a number of authorities on the issue of credibility. He then considered the fresh evidence about Y's movements over 25 to 26 January 2018. He reminded himself that, in the original hearing, he had concluded from the telephone records that there was a pattern when the mother and Y were known to be together that text and phone communication was minimal; that there was very little evidence of communication on the evening of 25 January; that he had therefore concluded on the balance of probabilities that they had spent the night together and had therefore lied about his whereabouts during the relevant period. At the rehearing, all parties agreed that the ANPR evidence established that Y did not spend the night at the mother's home. There was, however, a period of 2 ½ hours in the early evening of 25 January when the APNR evidence demonstrated that Y's car had been in the mother's home town and travelling on a route consistent with his visiting her home. It had always been Y's case that on that afternoon he had taken his car to a car wash in the town where the vehicle had received a full valet service, a process which took about 2 to 3 hours. The car wash is about 10 or 15 minutes' walk from the mother's home, but it was Y's evidence that he did not visit her while the car was being cleaned. He said that he did not want to leave his car with the keys unattended while it was at the car wash. The judge noted that in cross-examination he was unable to account for the fact

that he did not send any text messages to the mother during the time he said he was at the car wash, something which the judge described as unusual "given they were apart and when apart the records show they often text or telephone each other regularly". The judge also noted that there was no other evidence to confirm his attendance at the car wash, because he had paid in cash.

33. The judge noted that the mother's evidence at the rehearing with respect to the events of that evening was "in similar terms and indeed entirely consistent with the evidence she gave during the first final hearing". She denied having seen any other man that night or the following morning. She said that she had been on her own with D. She said that she did not believe that D had been abused; that her view was that, when D referred to "the man" when speaking to the nursery staff worker, she had been referring to things that had happened to her in the past when the mother had been in abusive relationships; and that she no longer believed that the injury was caused by the fall in the bath but rather considered it to be the result of constipation. The mother agreed that she had previously lied to protect partners, but denied lying to protect Y or any other unidentified person.

34. In submissions at the end of the rehearing, the local authority's primary position was that the court should uphold its previous finding that Y was the perpetrator. Counsel made a number of points in support of the submission, including that there was no evidence of any other man having contact with D, that there was no evidence that Y actually went to the car wash, and that his assertion that he would wait for about two hours while the car was being valeted on a cold January night when he was only a few minutes away from the mother's home lacked credibility. In the alternative, the local authority submitted that, if Y was not the perpetrator, the mother's history of dishonesty, lack of insight and failure to protect a child, coupled with the evidence of an abusive injury and the child's statements, led to the inference that there must be an alternative perpetrator about whom the mother had not been honest.

35. In setting out his conclusions, the judge started in these terms:

> "60. Ultimately, the first and primary question I must answer is – has the local authority satisfied me on the balance of probabilities that Y was responsible for the injury to D? I have come to the conclusion that they have not."

The judge then set out the reasons for his decision.

> "… The most compelling circumstantial evidence against Y is the fact of the injury itself in the context of there being no other identified potential perpetrator. Whilst that of course changes relative probabilities and evaluation when considering perpetration in the sense that moves towards the conclusion that 'someone must have done it' … that underlying factual conclusion must be weighed against both the *lack* of direct evidence against him and the evidence that positively suggests that he was not the perpetrator of the injury. In that regard I have considered carefully the following matters:

> (1) There are no matters relating to his past life or personal circumstances at the time that provide a background of or any indication towards a sexual interest in children or a propensity to physically abuse or harm children;
>
> (2) There have been no factors identified in his life at the relevant time that indicate the existence of disinhibiting influences (drugs, alcohol, stress or mental health issues);
>
> (3) There is no evidence, either direct or by inference, indicating an individual who has unmet sexual needs;
>
> (4) The child did not name him ….
>
> (5) The child did not subsequently say anything negative about Y (in fact, mildly the opposite) ….
>
> (6) The timescales relevant to when Y *could* have inflicted the injury to D are at the very cusp of the window of opportunity provided by the medical evidence."

The judge then set out in some detail his evaluation of Y's credibility. He noted that Y had demonstrated that, in all regards save one, his whereabouts were exactly as he said they were from the outset and that in the light of the ANPR evidence the inferences drawn at the earlier hearing from the text and telephone communication were wrong. He concluded that the evidence on which it was said Y should nevertheless be disbelieved was the pattern of text and phone communication during the period when Y said he was at the car wash (a pattern which had been shown to be unreliable) and assertions about what it was most probable he would do while having his car valeted a short distance away from the mother's house. The judge took into account the fact that Y had lied about other matters but concluded:

> "In terms of my own assessment of Y, in the absence of evidence of deception that could be corroborative of perpetration and evaluating all those factors that I am able to perceive from the manner and demeanour of his evidence, I do not find that he is lying to me when he says he did not visit the mother's home on 25 January."

36. At this point in his judgment, the judge returned to the question of causation saying:

> "61. … I consider it appropriate to consider whether my conclusions regarding Y have a material effect upon my conclusion that D has been the victim of an inflicted injury. No new evidence has been presented in that regard but looking at the wider canvas it seems to me that I must, in my view, consider whether such a conclusion gives rise to a need to reassess my original and unchallenged finding that the child has sustained an injury caused by penetration.

> 62. During evidence in this hearing the mother indicated that she still did not consider the injury to be inflicted and instead proffered a combination of constipation and D's past experience. The issue of constipation as a differential diagnosis was considered at length during the first hearing. There was no evidence the child was constipated. Likewise, my conclusions about the internal consistency contained within the child's statement in nursery … and the external consistency between the child's words and the injury discovered on medical examination remain in my view entirely valid and significantly indicative of the injury being inflicted. Those consistencies go beyond any real likelihood the child has coincidentally transposed her own observations (there being no previous suggestion that in the past D herself has been significantly physically injured by the mother's previous partners) to herself in a way that notably coincides with the injury she had received.
>
> 63. I remain entirely satisfied, to the appropriate standard, that the findings summarised … above remain extant."

37. In reaching his final conclusion about the perpetrator of the injury which he had found had been inflicted, the judge noted that at the first hearing there had been no "pool of perpetrators" beyond the suggestion that the injury might have been inflicted at the nursery, which he had rejected at the first hearing and continued to reject now. This had led to the conclusion at the first hearing that there was no "pool" beyond Y. The judge looked at the basis upon which that conclusion had relied, and observed (at paragraph 66):

> "Now that it has been established beyond doubt that Y was not present on the evening (after about 7pm), night or morning of 25 and 26 January and I have determined that Y was not, on the balance of probabilities, present at the mother's home after he left for work on the morning of 25 January, the evidence that constructs any 'pool' relies entirely on the evidence of the … mother."

The judge observed that, in consequence, the matter had a considerably different factual matrix to that considered by this court in ***Re B (Children: Uncertain Perpetrator)***, supra. He therefore turned to consider the local authority's alternative case.

38. It is appropriate for me to set out his conclusions on this issue in full:

> "70. In reaching my conclusions in that regard I have considered, inter alia, the following matters:
>
> (a) A consequence of my finding regarding Y's presence or lack of it on 25 January also leads to the conclusion that in regard to Y's presence the mother's evidence

was credible – contrary to my finding in the original hearing.

(b) There is no *direct* evidence of another male being present in the relevant time period.

(c) The mother denies the presence of any other person and has consistently done so, at the same time she has maintained a consistent account of events leading to the discovery of the injury.

(d) In respect of D's father's assault on her, which took place in the presence of the child, she went to great lengths to conceal it and fabricate an alternative explanation ….

(e) The mother lied about continuing contact with D's father ….

(f) The mother has in the past acted in ways that have not been in the interest of her daughter, prioritising herself over her daughter's needs and welfare ….

(g) The child has an anal injury which was inflicted.

(h) The child has identified that a man has caused that injury.

(i) The injury was not caused by Y.

(j) When the child subsequently mentioned the name of males about whom she had adverse memories, the mother initially erroneously denied knowledge of such individuals ….

71. As with Y, likewise with the mother – I have had the advantage of seeing her not only give evidence twice but also in the context of attendance at many hearings. I have to say I was no more convinced of her honesty now than I was in the first hearing, despite giving as much weight as I can to the fact that she was telling the truth about Y's whereabouts on 25 January [2018]. When she asserted during this hearing that she now accepted my earlier threshold findings I was left in no doubt that her concession was tactical and not an honest proclamation of insight or acceptance. It was my assessment of the first hearing and it is my assessment in this hearing that the mother says what she considers to be in her interests as opposed to any objective or even subjective truth.

72. I am, on … the balance of probabilities, satisfied that the mother has not told the truth about the period of time she purports to have been on her own with the child on 25 and/or

> 26 January [2018]. I am satisfied that the presence of injury, the child's comments and my inability to rely on the mother's account, especially where that account clashes with her own self interest, enable me to draw the inference that D came into contact with an unidentified male at some point prior to her attendance at nursery and that the mother knows the truth, at the very least, of whom that individual is and that the individual was responsible for the injury to D.
>
> 73. I would emphasise that my conclusion is not solely based upon the logic of 'someone must have done it'. I have considered carefully whether in fact taken as a whole I must reach a different conclusion as to the cause of the injury (see above). I have also considered carefully the proposition that had I been able to believe the mother when she asserts that D did not come into contact with any other male in the relevant time period but still be of the view that D's injury was an inflicted injury I would be left with finding that there was an 'unknown event' that caused the injury. I am entirely intellectually comfortable with that possible outcome – the court does not always know the answer to every question – and have been careful to consider it in my deliberations."

39. The mother applied to the judge for permission to appeal. On 12 June, that application was refused. The mother then filed a notice of appeal to this court. On 27 July 2019, Peter Jackson LJ granted permission to appeal against the order of 23 May.

Submissions

40. The notice of appeal to this court on behalf of the mother contained five grounds of appeal. In oral submissions before the court, Mr Nicholas Goodwin QC (who did not appear at first instance) and Mr Danish Ameen focused their argument on two of those grounds.

41. First, it was submitted that the judge was wrong not to adjourn the case in order that the question of inflicted injury could be re-opened in full. They acknowledged that this submission faced the difficulty that no formal application was made to the judge on behalf of the mother to reopen the question of causation. They submitted, however, that, when confronted with Y's new evidence, the judge should have of his own motion adjourned the case to permit further challenge to the paediatric evidence. They contended that, without this, the court deprived itself of the best opportunity to reconsider whether the injury was inflicted at all.

42. Mr Goodwin and Mr Ameen submitted that this difficulty was compounded by the judge's decision to compartmentalise the issues of causation (i.e. whether the injury was inflicted) and perpetration. By adopting what Mr Goodwin described as a sequential approach, the judge deprived himself of the opportunity to draw into his evaluation of whether the injury was inflicted an analysis of the likelihood that the only named perpetrator was responsible. It was submitted that this flaw in the judge's approach was not remedied by his closing observations at the end of the judgment at paragraph 73. Where, as here, perpetration was only pleaded against a single

individual and the supportive evidence proved it to be flawed, the resulting absence of evidence that anyone inflicted injury should have led the judge to question whether it was inflicted at all.

43. Secondly, it was contended that, once the only person thought to have caused injury was exonerated, the judge was wrong not to reconsider the integrity of the child's comments at nursery. It was pointed out that both medical experts considered the child's account at nursery to be an important part of the background. It was submitted to this court, however, that the probative value of the child's statements was, at the very least, debatable. In oral submissions to this court, Mr Goodwin identified a number of features in the notes of D's initial conversation with the nursery worker which rendered it unreliable as evidence about how she sustained her injury, or who, if anyone, was responsible for inflicting it. There was no specific information about the mechanism or timing, or who was present when the injury was sustained. The child spoke about being "killed". Mr Goodwin also relied on the fact that D did not mention her mother in this conversation. He submitted that it was unlikely that D would refer to her mother as "the lady".

44. Mr Goodwin and Mr Ameen relied on the fact that D did not undergo an ABE interview because of the poor quality of the pre-interview assessment. Mr Goodwin took the court through the subsequent conversations between D and professionals, as cited above, to demonstrate that her accounts were confused. He submitted that no weight could fairly be attached to any statements made by D during her conversation with the social worker in the presence of the police officers. They were simply too incoherent. He cited in particular the various references to a policeman, a green man and a blue man, the visit to the shop, the skateboard, and the account of being kicked. He pointed out that D did not repeat any part of the account recorded as having been given to the nursery worker. It was submitted that this confusion undermined the forensic value of the original account. If the child had made very clear allegations, the judge might have been on firmer ground in declining to reopen the question of inflicted injury. The poor overall quality of the child's accounts, however, should have led the judge to re-evaluate that question once Y was able to produce evidence supporting his innocence.

45. The further grounds advanced on behalf of the mother were, to my mind, of secondary importance. It was submitted that, at various points in both judgments, the judge wrongly considered whether the injury had been caused by someone within a pool of perpetrators when the case advanced on behalf the local authority was only against a single individual. It was further submitted that, having found that the mother's originally discredited account of Y's absence was, in fact, true, the judge attached insufficient weight to her enhanced credibility when considering whether she had nonetheless lied about the presence of an unidentified third party. Finally, it was contended that the judge attached insufficient weight to the absence of any evidence that a third party had had any access to D during the timescales for the injury.

46. On behalf of the local authority, Mr Simon Crabtree stressed that at no stage before the judge was it proposed by anyone that the case should be reopened as to whether D had sustained an injury and, if so, the mechanism of injury. The focus was, rather, on the limited application made on behalf of Y. No application was made for a full rehearing and no fresh evidence was put forward as to causation of injury. Nothing occurred at the rehearing in May 2019 to displace the findings as to causation made

by the judge in July 2018 after considering 1500 pages of evidence and hearing from over 16 live witnesses. Those findings were made after what the local authority described as the widest possible survey of the canvas of all the evidence before him. Although the focus at the rehearing was on Y's culpability for the injury, the judge made a point of saying that he had looked at the wider canvas in the light of the change to his finding on that issue.

47. It was submitted on behalf of the local authority that the criticism advanced by the appellant that the judge was wrong not to reconsider the integrity of the child's comments at nursery once Y had been exonerated was unsound. It is contended that the extensive evaluation of the child's comments in the first judgment did not depend on the identification of Y as the perpetrator of the injuries. It is asserted that all that was gleaned from that exercise was that the perpetrator was a man.

48. As for what I have described as the secondary grounds advanced by the appellant mother, the local authority contended that none of them had any merit. Contrary to the mother's assertion, it was submitted that the judge expressly considered whether her credibility was enhanced as a result of Y's exoneration. As for the arguments advanced on her behalf that the judge attached insufficient weight to the lack of evidence of the presence of any third party in the home, the local authority submitted that the judge was mindful of the absence of direct evidence, but ultimately simply did not believe the mother's account. Finally, it was submitted that it was incorrect to assert that the local authority only advanced a case against Y. The schedule of findings at the first hearing included an alternative allegation that an unknown person had inflicted the injury and that the mother had concealed his identity. It was submitted that it was only in the light of how the evidence unfolded at the July 2018 hearing that the local authority and guardian advanced the case against Y alone. In any event, the way in which a local authority puts its case in care proceedings does not curtail the findings open to the judge at the conclusion of the hearing.

49. On behalf of the guardian, Ms Lisa Edmunds, in opposing the appeal, described the case as complex, evolving and evidentially fluid. She pointed out that the judge had dealt with all hearings concerning the relevant issues and submitted that this court should be slow to interfere with his conclusions unless his reasoning was so wrong as to be unsafe. Both judgments were sound and logically coherent. The judge's navigation of all the evidence, which he assessed and reassessed, allowed him to draw appropriate inferences linked to his assessment of the mother's credibility which resulted in the findings made.

50. As to the mother's contention that the judge was wrong not to adjourn the case to allow the question of inflicted injury to be reopened in full, the guardian contended that this argument fell into two parts: (1) whether the judge can properly be criticised for doing something he was not asked to do, and (2) whether his process for determining findings was the correct approach. As to the first, it was submitted that it was disingenuous to assert that the judge was wrong not to adjourn when no such application was ever made. As to the second, it is submitted that the judge could not have been more alive to the issue whether, if the scope of the rehearing was limited to identifying the perpetrator and Y was successful in setting aside the finding against him, the outcome would create a real risk of further adverse findings against the mother. It was further submitted that, despite the absence of any application, the judge did consider this point as part of the process of reassessing all the evidence. He was

aware that the mother had abandoned the contention that the injury was sustained when the child fell in the bath, and instead was arguing that it was a result of constipation. On this point, the issue had been fully explored at the earlier hearing and it was submitted that nothing that occurred at the rehearing with regard to the identification of the perpetrator which dislodged or contaminated that finding. Ms Edmunds relied on the statements in the judgment where the judge could be seen to be "checking in" with himself whether, in the interest of justice, he was duty-bound to reopen the other findings. It was submitted that the mere fact that he undertook this exercise demonstrated that a proportionate, fair and considered approach was deployed. Critical to his ultimate finding was his fundamental assessment that he did not believe the mother.

51. Ms Edmunds submitted that there was no merit in the mother's argument that the judge was wrong not to reconsider the integrity of the child's comments once Y had been exonerated. There was no correlation between his exoneration and the comments made by the child. One was not conditional on the other. It was within the judge's discretion to conclude that Y's exoneration did not invalidate his conclusions about the child's comments.

52. On the other grounds of appeal, Ms Edmunds submitted that it was not open to this court to act as a "remote arbitrator" on the credibility of the mother's evidence and that the judge was entitled to reach his conclusions on that aspect. Although there was no direct evidence of a third party having access to the child, the judge was entitled to reach his findings having regard to the mother's history of dishonesty, lack of insight, and failure to protect her child on other occasions, coupled with the clear evidence of the injury corroborative of abuse and the child's statements.

53. On behalf of the intervener, Y, Mr Karl Rowley QC (who did not appear at first instance) and Mr Shaun Spencer make two preliminary submissions. First, they stressed that no party was expressly seeking to disturb the judge's finding exonerating Y. Secondly, Y did not actively seek or support the finding ultimately made by the judge that an unknown man was responsible for inflicting the injury and that the mother was concealing his identity. In those circumstances, Mr Rowley and Mr Spencer confined their submissions to identifying the three options open to the court in the event that the appeal were to succeed, namely:

(1) quash the finding of sexual abuse *in toto*;

(2) quash the findings against the mother in respect of knowledge of the fact of sexual abuse and the identity of the individual, and substitute a finding that D was sexually abused by an unidentified male in unknown circumstances, or

(3) set the findings concerning sexual abuse aside in their entirety and remit the matter for rehearing by another judge.

54. It was submitted on behalf of Y that there were problems with all three options. First, although the s.31(2) threshold criteria were satisfied with regard to both children by the other findings made against the mother in respect of her history of abusive relationships, so that it would be open to the judge to make final orders on the basis of those findings alone, it was acknowledged that this option would be unlikely to

commend itself to this court. The risk of harm which the mother would present to a child in circumstances where she has condoned, or concealed knowledge of, sexual abuse is of a substantially different nature to that arising out of a history of domestic abuse. Furthermore, since in those circumstances there would be no reason for the welfare decision to be allocated to a different judge, this approach would have the significant complication of fixing the judge with a factual matrix contrary to his own evaluation of the evidence.

55. The second option would have the merit of retaining Y's exoneration alongside the finding that abuse had occurred. Again, however, it was acknowledged that this approach was unlikely to commend itself to this court. It was conceded that the extent to which an appellate court may feel able to limit or substitute such findings is likely to be very much more circumscribed. In addition, the potential problem for the judge at the final hearing would be arguably even more pronounced in such circumstances.

56. It was acknowledged that no such difficulties arose if the matter were to be remitted to a different judge for a rehearing of the sexual abuse allegation. It was submitted, however, that, were such course to be adopted, the logical corollary of the positions now adopted by the other parties – none of whom were actively seeking to disturb the finding exonerating Y – should be that this court, in remitting the matter, should confirm that no finding against Y would be sought by any party at the rehearing. The gravamen of the mother's appeal has been that the finding of sexual abuse by an unknown person known to the mother is wrong, rather than any suggestion that Y was responsible. It has always been her position that he was nowhere near the child in the relevant period. It was submitted on Y's behalf that, given the devastation the proceedings have wrought on Y, it would be unconscionable for him to be dragged once more into litigation concerning an act which the evidence demonstrates he cannot have committed and which no party now alleges he did commit.

57. In oral argument, Mr Rowley rightly submitted that the judge had carefully considered the fresh evidence in reaching his conclusion that Y should be exonerated. He fairly conceded, however, that there was force in Mr Goodwin's principal arguments, observing in particular that the statements made by D were shot through with difficulties. It was difficult to place significant weight on anything she had said.

Discussion and conclusion

58. This is a difficult and worrying case. I was struck by Ms Edmunds' description of it - complex, evolving and evidentially fluid. The judge approached his task with great diligence and care and set out his conclusions in a conspicuously thorough and articulate judgment. I am acutely aware of the importance of the principle that the assessment of evidence, and the apportionment of weight to be attached to each piece of evidence, are matters for the judge at first instance and that an appeal court must not interfere with findings of fact by trial judges unless there are compelling reasons for doing so. I have, however, reached a clear conclusion that the judge's approach to the decision-making process was flawed and that, as a result, his findings cannot stand.

59. The crucial error in my judgment was his decision to confine the ambit of the rehearing to the question of "perpetrator" when the fresh evidence which was adduced to support the argument that Y did not have an opportunity to injure the child was

relevant not only to the identification of a possible perpetrator but also whether the injuries had been inflicted at all. I realise that this may appear a harsh judgment on my part given that no party invited the judge to reopen the issue of causation. But the fact that no party asked him to do so did not absolve the judge from the responsibility of deciding the ambit of the rehearing. These were not adversarial proceedings.

60. In paragraph 19 of his second judgment, the judge recognised that there was an interrelationship between causation and perpetration, but adopted what he described as the "logical process" of, first, determining whether there had been an inflicted injury and, "thereafter", identifying the perpetrator. He observed that nothing in the fresh evidence shed additional light on the medical evidence or the child's statements. In my judgment, however, he should have considered whether the fresh evidence affected the weight to be attached to those other parts of the evidence. By failing to do so, he was compartmentalising his analysis into a consideration of (1) whether there was an inflicted injury and, if so (2) who was the perpetrator.

61. It is trite law that, when considering cases of suspected child abuse, the court "invariably surveys a wide canvas" as per Dame Elizabeth Butler-Sloss, P, in *Re U, Re B (Serious Injury: Standard of Proof)* [2004]EWCA Civ 567 and must consider each piece of evidence in the context of all the other evidence. As Dame Elizabeth observed in *Re T* [2004] EWCA Civ.558:

> "Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and exercise an overview of the totality of the evidence in order to come to the conclusion of whether the case put forward by the local authority has been made out to the appropriate standard of proof."

62. It is true that at various points in his second judgment the judge reminded himself of the need to consider the wider canvas and the totality of the evidence. Looking at the judgment as a whole, however, it is plain that he restricted the scope of the rehearing to the issue of perpetration and did not conduct any substantive review of the impact of the fresh evidence on the issue of causation.

63. The importance of not restricting the forensic process in this way was explained in two judgments of Charles J. In *A County Council v K D & L* [2005] EWHC 144 (Fam) at paragraph 49, Charles J observed:

> "In a case where the medical evidence is to the effect that the likely cause is non-accidental and thus human agency, a court can reach a finding on the totality of the evidence either (a) that on the balance of probability an injury has a natural cause, or is not a non-accidental injury, or (b) that a local authority has not established the existence of the threshold to the civil standard of proof … The other side of the coin is that in a case where the medical evidence is that in a case where the medical evidence is that there is nothing diagnostic of a non-accidental injury or human agency and the clinical observations of the child, although consistent with non-accidental injury or human

> agency, of the type asserted is more usually associated with accidental injury or infection, a court can reach a finding on the totality of the evidence that, on the balance of probability there has been a non-accidental injury or human agency as asserted and the threshold is established."

In a later case, *Lancashire County Council v D and E* [2010] 2 FLR 196, Charles J dismissed an application for a care order having considered the totality of the evidence, notwithstanding the opinion of the medical experts that it was most likely that the child had been the victim of an inflicted head injury. He outlined the approach to be followed in these terms:

> "35. A natural progression of reasoning is to consider first what injuries there are, then to consider whether they were inflicted, and thus the range of possible causes. Those steps are not conducted by reference only to the medical opinion, albeit that there may often be no other relevant evidence as to the existence of injuries and consequent illness. Causation is different because as to that an important factor is the consideration of how, when and by whom an injury could have been inflicted becomes a necessary part of the analysis To take an easy example: if a well-reasoned medical analysis leads to a conclusion that a child's airways were blocked at a particular time, but it can be shown from a video, or third party personal surveillance, that no one did or could have blocked the child's airways during that period, that conclusion has to be revisited ….
>
> 36. The exercise of identifying a perpetrator, or the pool of perpetrators, forms part of the exercise of considering whether there was an inflicted injury. In my view, it is important to remember this because it removes or reduces an approach which considers the overall question from the standpoint that someone with the opportunity to injure a child has to show that he or she did not do so …. The correct position is that a medical view as to the most likely cause of injuries is that that cause is established as a real possibility that has to be considered, in all the circumstances of the case, together with the other possibilities, in determining whether a child was the victim of an inflicted injury.
>
> 37. If the assertions of the parents with the opportunity to injure a child that they did not do so are true, a medical conclusion that the most likely cause is inflicted injury would be wrong …."

64. In support of his approach in the present case, Judge Baker referred to the decision of the Supreme Court in *Re S-B* [2009] UKSC 17. The passage he cited (from the judgment of Baroness Hale of Richmond giving the judgment of the court) is in fact a quotation from Lady Hale's earlier judgment when sitting in the House of Lords in *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35 (paragraph

73). *Re B* is the decision which established conclusively that the standard of proof in care proceedings is the balance of probabilities. In its decision, the House of Lords departed from an earlier formulation (in the speech of Lord Nicholls of Birkenhead in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563) that "the more improbable the event the stronger must be the evidence that it did occur" and that "the more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it". The full passage from Lady Hale's judgment in *Re B* is as follows:

> "70. … the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.
>
> 71. As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.
>
> 72. As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.
>
> 73. In the context of care proceedings, this point applies with particular force to the identification of the perpetrator. It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of

> the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied."

65. Thus the point made by Lady Hale in the passage referred to by the judge in this case was that, in cases where the medical evidence establishes conclusively that a child has sustained non-accidental injuries, someone looking after the child must have been responsible and the inherent improbability of the event has no relevance in deciding who that was. She was *not* saying that, where the medical evidence taken on its own would lead to a finding, on a balance of probabilities, that a child has sustained non-accidental injuries, the improbability of someone having inflicted those injuries has no relevance in establishing whether or not the injuries were in fact inflicted non-accidentally. It is important to note that Lady Hale in ***Re B*** did not say that the improbability of an event is irrelevant. On the contrary, as she said at paragraph 70, the inherent probabilities *are* a factor to be taken into account, where relevant, in deciding where the truth lies.

66. Where there are various possible causes of an injury, medical evidence considered in isolation may suggest that the injury was inflicted. But if the other evidence demonstrates that it is improbable that any person could have inflicted the injury, the assessment of the totality of the evidence may lead to the conclusion that, on a balance of probabilities, the injury was not inflicted.

67. The key factors behind the judge's findings in this case were the medical evidence, the child's statement at nursery, the accounts given by the mother and Y, and the judge's assessment of their credibility. When fresh evidence was produced which directly affected his assessment of some of those factors – the accounts given by, and the credibility of, the mother and Y – the judge should, in my judgment, have then carried out a full reassessment of all of the relevant evidence, because the forensic exercise cannot be compartmentalised into causation on the one hand and perpetration on the other. This is demonstrated by the fact that, in identifying factors that led to the ultimate findings against the mother in his second judgment, the judge included the statement by the child which suggested that a man had caused the injury. The child's statement at the nursery was therefore one of the matters relied on by the judge in reaching his conclusions as to causation in the first judgment and as to perpetrator in the second.

68. I also accept the submission by Mr Goodwin and Mr Ameen that the judge was wrong not to reconsider the integrity of the child's comments at nursery. At the point in his second judgment when he briefly returned to the question of causation, the judge referred again to what he described as the "internal consistency contained within the child's statement in nursery" and the perceived consistencies between the child's words and the injury. Looking at the totality of the evidence, however, those perceived consistencies are required by the judge's findings to carry a weight in the balancing exercise which they cannot reasonably bear.

69. I have set out above in full detail the records of the various conversations involving D on 26 January 2018 and the following days. In assessing the reliability of any individual statement by the child, it was incumbent on the judge to consider the totality of the evidence, including the totality of the child's recorded statements. In my judgment, in the light of the inconsistent and confusing accounts given by the

child, it would be wrong to attach any significant weight to any individual comment she made during those conversations.

70. It is of particular importance that, when they spoke to D in the nursery shortly after her initial conversation with L, the police and social worker quickly realised that it would not be appropriate to interview the child under the Achieving Best Evidence guidance because of her age and the incoherence of what she was saying. The rationale of the Achieving Best Evidence procedure is well understood. In *Re B (Allegation of Sexual Abuse: Child's evidence* [2006] EWCA Civ 773, [2006] 2 FLR 1071, Hughes LJ (as he then was) observed:

> "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 *Re W, Re F* [2015] EWCA Civ 1300 at para 79, I said:

> "The ABE Guidance is detailed and complex. But those details and complexities are there for a reason. Experience has demonstrated that very great care is required when interviewing children about allegations of abuse. The Guidance has been formulated and refined over the years by those with particular expertise in the field, including specialists with a deep understanding of how children perceive, recall and articulate their experiences. It would be unrealistic to expect perfection in any investigation. But unless the courts require a high standard, miscarriages of justice will occur and the courts will reach unfair and wrong decisions with profound consequences for children and families."

That case concerned interviews with a child which had been intended to comply with the ABE guidelines but which fell short in a number of respects. In this case, the police and social workers concluded at an early stage that, in the light of the child's age, and the lack of a coherent account in her initial conversation with professionals, it would not be appropriate to conduct an ABE interview at all.

71. The only statement made by D on which the judge attached any weight was the short conversation with the nursery worker who is, of course, untrained in ABE interviews and was not conducting the conversation in accordance with the guidelines. I am not for one moment criticising the nursery worker. On the contrary, she acted entirely properly in telling her manager what had been said and in making a note of the conversation. My observation about the weight to be attached to what the child said is not based on any suggestion that L did anything wrong but rather on the totality of the evidence about statements made by D on 26 January and subsequently. In addition, I accept Mr Goodwin's submission that there were a number of features about the notes of D's initial conversation with the nursery worker which undermined the reliability of the child's statements during that conversation as evidence of how she sustained the injury and, if it was inflicted, the identity of the perpetrator.

72. It is also significant that the child's statement to the nursery worker had at least some impact on the medical evidence given to the court. As noted above, Dr Irvine expressed the view in his initial report that the anal laceration was strongly supportive of recent anal trauma such as penetration, adding "particularly in view of 3-year-old D's disclosure". It is concerning to read a professional using the word "disclosure" in this fashion. For over 30 years since the Cleveland report in 1987, this has been recognised as an inappropriate use of language that judges have urged professionals to avoid.

73. If one disregards the child's statements in her initial conversation with the nursery worker, an important element in the judge's findings against the mother falls away. This underlines the importance of conducting a full rehearing of the evidence as to causation as well as perpetration. I have not overlooked the fact that the judge was careful to remind himself in both judgments that in reaching his decision he had to consider the totality of the evidence. To that end, at one point in the second judgment, he carried out what might be called a cross-check to see if his conclusion that Y was not the perpetrator affected his original finding that the injury was inflicted. I have looked carefully to see whether this was sufficient but concluded that it was not. In my judgment, once the judge had decided that the fresh evidence produced by Y as to his whereabouts in the relevant period of 25 to 26 January provided solid grounds for a review of his findings, the right course was to conduct a full rehearing of the fact-finding exercise. Notwithstanding the judge's warnings to himself about the importance of having regard to the totality of the evidence, I conclude that the ambit of the rehearing was too narrow for this court to be satisfied that justice was done. To be fair to the judge, it is plain from the lengthy passages of the judgment which I have quoted above that he was aware of the dangers. With the great benefit of hindsight available to this court, however, I consider that, despite the careful warnings the judge gave to himself, the approach which he adopted to the rehearing has resulted in an outcome which is unsafe.

74. Having reached the clear conclusion that the appeal should be allowed on the principal grounds advanced by Mr Goodwin and Mr Ameen at the hearing, it is unnecessary to consider the arguments about the other grounds of appeal which featured prominently in the written submissions but which are of secondary importance.

75. What course should this court now take? Mr Rowley's careful and lucid analysis of the options has been of great assistance, but ultimately and ironically it has led me to

conclude that the only fair course is the one his client is most anxious to avoid. There must be a full rehearing of the fact-finding hearing before another judge. All of the issues, including the medical evidence and the evidence about Y's whereabouts during the relevant period, must be reconsidered.

76. It was for that reason that at the conclusion of the hearing we indicated that the appeal would be allowed and the matter remitted to the Family Division Liaison Judge, MacDonald J, for a case management hearing to determine allocation. I recognise that this will involve a further delay before decisions can be taken about the future care of D and her brother S. I am confident that MacDonald J will do whatever he can to ensure that the rehearing takes place as soon as possible.

77. In conclusion, I wish to acknowledge again the great care with which Judge Baker carried out his task in this case. Reluctantly, however, I have reached the conclusion that the appeal must be allowed for the reasons set out above.

LORD JUSTICE HENDERSON

78. I agree.