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Sexual abuse cases; back to basics, testing evidence, practice and procedure

CAROLINE HARRIS

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Introduction

Let's talk about sex...

We spend a lot of time as public law lawyers talking about sex; as we all know sexual abuse allegations are a regular feature of the cases that we deal with. The approach to be taken in cases where sexual abuse is an allegation to be considered by the court and if not accepted to be considered at a fact finding hearing has been considered in a number of reported cases; often the guidance comes about due to the court being highly critical of one or many professionals involved in those cases. One such case is *AS v TH (False Allegations of Abuse) [2016] EWHC 532 Fam*, and I have used the framework from that case and the guidance given and referred to by MacDonal J as the framework for this lecture as it very helpfully sets out a number of the basic principles to be remembered when deal with case involving allegations of sexual abuse.

In care work we are often become involved before the investigation of allegations of sexual abuse have come to an end and therefore we need to be alive not only to how we would conduct proceedings in court but as to what steps need to be taken outside the courtroom in the collecting of relevant material relating to such allegations and also how that material is to be recorded.

The title of this lecture covers an extensive range of topics and it will not be possible to cover all of them in detail during this lecture and so I had to select certain points to cover. If there were matters you had wished I had covered then, apologies and please contact me if you would like to discuss matters that I have covered or additional ones. General matters to consider in such cases are:

- Connected criminal proceedings: What stage these are at. What if any impact this may have on the timetable. Disclosure. Combined hearings.
- What stage any investigation has reached (Police and Social Services), the next steps and how this impacts on the court timetable.

- How relevant material where sexual abuse allegations have been/should be obtained and recorded.
- Disclosure and orders required.
- Whether a witness should be required to give evidence and if so the approach to be taken – including special measures, ground rules hearings etc.
- What expert evidence should be obtained at this stage and what orders are required.
- Can there be one final hearing or does there need to be a fact finding and a separate final hearing.

Summary of *AS v TH (False Allegations of Abuse)* [2016] EWHC 532 Fam

This is a case which Anna McKenna QC was acting for the first respondent father, so any detailed questions about the facts of that case may be best directed to AM QC. In summary, this case concerned two children and the application by mother for findings in respect of a series of allegations made against the father of one of the children, the court found that none of the allegations were proven and in fact found them to be false. Mr Justice MacDonald, criticised in detail the conduct of a number of the professionals including:

- *The social worker unquestioningly accepting the mother’s account and her failure to make enquiries of the fathers, the extended families, school, doctors or local authorities “was particularly egregious in circumstances where such enquires would have revealed a fundamentally different picture to that being painted by the mother.” [227]*

It is helpful to have this reminder in a case, that although the court and the parties have to act to safe guard if an allegation is true we must not presume that an allegation is true.

- *A failure (by social workers, Detective Constables, Detective Sergeants and teachers) to keep accurate records of what was said by the mother and the children, resulting in accounts of what the children said that were diametrically opposed. [227]*

The duties to record material obtained during the course of an investigation are fundamental, in the case of the police there is a clear strict set of rules that must be followed and failure to do so can result in a criminal case being prevented from proceeding as an abuse of process. Further, such failures can result in criminal proceedings, I have represented a police officer who was facing perverting the course of justice allegations for failures to collect and collate evidence. Knowledge of the *Attorney-General’s Guidelines on disclosure for investigators, prosecutors and defence practitioners and the Criminal Procedure and Investigation Act 1996* (‘CPIA’) can be invaluable when assessing what should be available in cases of sexual abuse allegations and also when addressing whether the investigation has been carried out correctly. When representing a client who faces such an allegation given the criticism in cases of the failures to comply with the rules and the impact that can have on the courts findings we need to be aware of the

- *A repeated failure by numerous professionals to interview the children in accordance with the Achieving Best Evidence Guidelines, in particular repeated questioning of one child in the presence of the other child and their mother, and the repeated use of highly leading questions.*

This is addressed in more detail below, the Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and witnesses and Guidance on Using Special Measures have now been in use since March 2011 and have been updated.

Another very useful source of information and approved guidance with respect to how material should be obtained in allegation of sexual abuse is from the The Advocate’s Gateway Toolkits.

- A failure by agencies to coordinate their intervention: between 11 August 2014 and 29 July 2015, taking the CAMHS intervention into account, the children were questioned by no fewer than nineteen professionals, on twenty occasions for one child and forty-four occasions for the other, with five different police officers interviewing the boys.
- That ahead of any findings or criminal convictions in respect of the allegation, the CAMHS intervention extended to therapeutic intervention for one of the children by three psychiatrists and over 29 group therapy sessions and six sessions for the other on the basis that they had been abused as alleged.

In setting out the legal framework, MacDonald J referred to a number of key sources of guidance to be taken into account in cases involving allegations of sexual abuse this including:

- Key cases law re the correct approach to allegations of sexual abuse (*Re I-A (Allegations of Sexual Abuse)* [2012] 2 FLR 837, *Re H (Minors)*; *Re K (Minors) (Child Abuse: Evidence)* [1989] 2 FLR 313;
- The Report of the Inquiry into Child Abuse in Cleveland 1987 (the ‘Cleveland Report’);
- Achieving Best Evidence in Criminal Proceedings (March 2011) (‘ABE Guidelines’)
- HM Government Guidance: Keeping Children Safe in Education (July 2015) and What to do if you’re worried a child is abused (March 2015).

Basic principals

However, with MacDonald J’s assistance lets firstly get back to basics... these are all set out in the Judgement.

- The burden of proving a fact is on the party asserting that fact.
- To prove the fact asserted that fact must be established on the balance of probabilities.
- The inherent probability or improbability of an event remains a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred.
- As has been observed, “Common sense, not law, requires that in deciding this question regard should be had, to whatever extent appropriate, to inherent probabilities” (*Re B [2008] UKHL 35 at [15]*).
- The decision on whether the facts in issue have been proved to the requisite standard must be based on all of the available evidence and should have regard to the wide context of social, emotional, ethical and moral factors (*A County Council v A Mother, A Father and X, Y and Z* [2005] EWHC 31 (Fam)).
- Where the evidence of a child stands only as hearsay, the court weighing up that evidence has to take into account the fact that it was not subject to cross-examination (*Re W (Children) (Abuse: Oral Evidence)* [2010] 1 FLR 1485).
- If a court concludes that a witness has lied about one matter, it does not follow that he or she has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure (*R v Lucas* [1981] QB 720).
- The court must not evaluate and assess the available evidence in separate compartments. Rather, regard must be had to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward has been made out on the balance of probabilities (*Re T* [2004] 2 FLR 838 at [33]).
- There is no room for a finding by the court that something might have happened. The court may decide that it did or that it did not (*Re B* [2008] UKHL 35 at [2]). However, failure to find a fact proved on the balance of probabilities does not equate without more to a finding that the allegation is false (*Re M (Children)* [2013] EWCA Civ 388).

- In accordance with the foregoing general principles, when assessing whether or not allegations of sexual abuse are proved to the requisite standard, the court should focus on all of the relevant evidence in the case, including that from the alleged perpetrator and family members (see *Re I-A (Allegations of Sexual Abuse)* [2012] 2 FLR 837).
- The court should adopt a two-stage process. First, is there evidence of sexual abuse? If so, is there evidence of the identity of the perpetrator (*Re H (Minors); Re K (Minors)(Child Abuse: Evidence)* [1989] 2 FLR 313 and *Re H and R (Child Sexual Abuse: Standard of Proof)* [1995] 1 FLR 643).
- The Cleveland Report: *The Report of the Inquiry into Child Abuse in Cleveland 1987* (hereafter the Cleveland Report) ‘contains a plethora of salient and important guidance with respect to cases involving allegations of sexual abuse’.
- The case law on the correct approach to allegations of sexual abuse; including *Re I-A (Allegations of Sexual Abuse)* [2012] 2 FLR 837 and *Re H (Minors); Re K (Minors)(Child Abuse: Evidence)* [1989] 2 FLR 313.
- Achieving Best Evidence in Criminal Proceedings (March 2011) (‘ABE Guidelines’).
- HM Government Guidance: Keeping Children Safe in Education (July 2015) and What to do if you’re worried a child is abused (March 2015).

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