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Non-accidental injuries – back to basics – trial preparation, the pool of perpetrators, disclosure and selecting experts

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Introduction

1. Cases involving allegations of non-accidental injury are difficult for practitioners and judges. There is, often, a complex mixture of conflicting medical evidence and opinion, an infant, too young to be able to give an account of what may have happened to them and a lack of credible explanation from any of the child's care-givers. Finding a way through can be challenging. These notes aim to highlight the basics of case management where it is alleged that a child has suffered a non-accidental injury.

What is a non-accidental injury?

2. Ryder LJ described a non-accidental injury thus in *Re S (A Child)* [2014] EWCA Civ 25 at paragraph 19:

> *9. The term 'non-accidental injury' may be a term of art used by clinicians as a shorthand and I make no criticism of its use but it is a 'catch-all' for everything that is not an accident. It is also a tautology: the true distinction is between an accident which is unexpected and unintentional and an injury which involves an element of wrong. That element of wrong may involve a lack of care and / or an intent of a greater or lesser degree that may amount to negligence, recklessness or deliberate infliction. While an analysis of that kind may be helpful to distinguish deliberate infliction from, say, negligence, it is unnecessary in any consideration of whether the threshold criteria are satisfied because what the statute requires is something different namely, findings of fact that at least satisfy the significant harm, attributability and objective standard of care elements of section 31(2).*

The first hearing

3. The first hearing likely to be heard urgently, shortly after the allegations of non-accidental injury are made. Parents are in an unenviable position at this hearing: they are likely to be facing the removal of their child/children on an interim basis under an ICO. It is perfectly possible that there will be very limited disclosure at this stage and so they may not have much of an idea of the case against them.

4. There are a number of considerations for those representing parents at this stage:

   (a) **Interim placement** – keep pressure on for viable family/friends to be assessed quickly and get the Guardian to put pressure on the LA if necessary, particularly if they are trying to hide behind timescales for 'standard assessments.'

   - Pressure the court by bringing willing and able family members to court
   - If there is a clear non-perpetrating parent aim to retain care of the child. Consider your case strategy and set the scene for the case as a whole.
   - Is it possible for client to care for the child with assistance/supervision from another family member?

   (b) **Interim contact** – set as high a level as possible for the parent. Get family members assessed as supervisors as early as possible and get other 'alternative carers' attending contact to avoid the risk of then being accused of disinterest by the LA later. Think laterally about contact venues/community based contact. Consider written agreements to regulate contact especially if the child is still in hospital.

   (c) **The first account from the client**

   It is important to ensure that you have a clear, detailed history with a chronology and timeline of events and who had care of the child over the preceding weeks. Impress upon the client the need to be open and frank about any accidental incidents that may have caused injury and get them to demonstrate how and when these took place. Has the client noticed any abnormal behaviour by the child?

   Their statement should give as much positive background information about the parents, family ties, child care experience etc as possible and set out a plan for future care. Are the parents planning to stay together or separate?

   Think about the pool of perpetrators: who cared for the child and when? Look at 'unsupervised' periods of care. Does the client blame anyone or simply identify other carers?

   Ask about any other health issues. Is there a family history that might be relevant? Record in the statement that information is included as 'my solicitor has asked me' so it is apparent this is not just speculative.

5. From the local authority's perspective the priority is likely to be obtaining disclosure. A possible shopping list of disclosure orders to seek includes the following:

   (a) Midwifery records;
   (b) Obstetric records;
   (c) Parents and child's GP records
   (d) Health visitor
   (e) Ambulance audio (of the 999 call) and notes
   (f) Hospital records
   (g) Police disclosure
   (h) Any initial post-mortem report.

6. The earlier the above is sought the better, particularly if it appears likely that there may be criminal proceedings, which may hold up the release of any information held by the police and/or coroner.

The Case Management Hearing

7. The dust will hopefully have settled enough at the CMH to allow wider issues of case management to be addressed. Top of the list is likely to be consideration of the following:
   (a) Does the case need to be transferred to the High Court?
   (b) Is a separate fact-finding hearing necessary?
   (c) Is it necessary to instruct any experts to provide evidence?

Which court?

8. Look at the *Practice Direction: Allocation and Transfer of Proceedings, 3 November 2008*. The most relevant factors for seeking transfer up to the High Court are likely to be:

> *1 there is alleged to be a risk that a child concerned in the proceedings will suffer serious physical or emotional harm in the light of –*
>
> *(a) the death of another child in the family, a parent or any other material person; or*
>
> *(b) the fact that a parent or other material person may have committed a grave crime, for example, murder, manslaughter or rape, in particular where the essential factual framework is in dispute or there are issues over the causation of injuries or a material conflict of expert evidence;*
>
> *2 the application concerns medical treatment for a child which involves a risk to the child's physical or emotional health which goes beyond the normal risks of routine medical treatment.*

9. It should also be noted that the Practice Direction contains the following:

> *5.3 Proceedings will not normally be suitable to be dealt with in the High Court merely because of any of the following–*
>
> *1 intractable problems with regard to contact;*
>
> *2 sexual abuse;*
>
> *3 injury to a child which is neither life-threatening nor permanently disabling;*
>
> *4 routine neglect, even if it spans many years and there is copious documentation;*
>
> *5 temporary or permanent removal to a Hague Convention country;*
>
> *6 standard human rights issues;*
>
> *7 uncertainty as to immigration status;*
>
> *8 the celebrity of the parties;*
>
> *9 the anticipated length of the hearing;*
>
> *10 the quantity of evidence;*
>
> *11 the number of experts;*
>
> *12 the possible availability of a speedier hearing.*

Is a fact-finding hearing necessary?

10. From the beginning of a non-accidental injury case, you need to be alert to identify cases suitable for a split hearing.

11. In cases where there is clear and stark issue, such as physical or sexual abuse a fact-finding hearing is likely to be necessary.

12. It is the duty of the LA and G to give the court assistance in identifying such cases in order to prevent delay and the ill-focused use of scarce expert resources (see *Re S (Care Proceedings: Split Hearing)* [1996] 2 FLR 773 and *President's Guidance: Split Hearings* (May 2010) [2010] 2 FLR 1897.)

13. *Re K (Care Proceedings: Fact Finding)* [2010] EWHC 3342 (Fam), [2011] 2 FLR 199 considered the relevant factors to consider when deciding whether to hold a fact finding hearing to attempt to identify a perpetrator from a pool, where the threshold criteria is met in any event:
    - The view the court would have of the potential perpetrators if there were no fact-finding hearing
    - The identified benefits of such a hearing
    - The identified disadvantages of such a hearing and
    - The prospects of the hearing delivering the clarity sought

14. It is no longer possible to justify split hearings simply so that a social care assessment to be undertaken in light of any findings. In (*Re BK-S (children) (Expert Evidence and Probability)* [2015] EWCA Civ 442, the Court of Appeal held that a split hearing should not have been ordered where the issue was who had perpetrated the harm rather than whether the harm had occurred; a social work assessment of the potential perpetrators might inform the court's findings as to by whom the harm had been perpetrated. It is expected that assessors have to grapple with considering alternative outcomes from a fact finding hearing and reach conclusions in both or multiple scenarios.

15. The fact that all parties may be agreed that there is no needs for a public law order does not end the proceedings: it remains open for the court to consider hearing evidence and making findings of fact if justified on welfare grounds *(A County Council v DP, RS, BS (by the children's guardian)* [2005] EWHC 1593 (Fam), [2005] 2 FLR 1031)

16. Also, if new information comes to light after a finding of fact hearing which may affect the determination of the findings, the correct course if to apply to the trial judge to reconsider the findings, in light of new evidence. The interests of justice and the public interest in a child's right to know the truth about who injured them and why are powerful factors in favour of reopening a fact finding hearing if fresh evidence becomes available (Re K (*Non-Accidental Injuries: Perpetrator: New Evidence*) [2004] EWCA Civ 1181, [2005] 1 FLR 285; *Re A (Fact Finding Hearing: Appeal)* [2012] EWCA Civ 1278; [2013] 1 FLR 771).

17. In *A County Council v DP, RS, BS (by the Children's Guardian)* [2005] EWHC 1593 (Fam), [2005] 2 FLR 1031(also mentioned above) Macfarlane J held that the previous authorities made it plain that, among other factors, the following are likely to be relevant to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:
    - The interests of the child (which are relevant but not paramount)
    - The time that the investigation will take
    - The likely cost to public funds
    - The evidential result
    - The necessity or otherwise of the investigation
    - The relevance of the potential result of the investigation to the future care plans of the child
    - The impact of any fact finding process upon the other parties
    - The prospects of a fair trial on the issue
    - The justice of the case

Experts

18. Rule 25 of the FPR (2010) 25.4(3) (pre-22 April 2014) stated that the court may give permission 'only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings.' This provision was amended by s.13 of the Children and Families Act 2014, which states: 'the court may give permission...only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly' (s.13 (6)).

19. 'When deciding whether to give permission... the court is to have regard in particular to –
    (a) Any impact which giving permission is would be likely to have on the welfare of the children concerned...and the impact on the child of any assessment of them,
    (b) The issues to which the expert evidence would relate,
    (c) The issues with which the examination or other assessment would enable the court to answer,
    (d) What other expert evidence is available (whether obtained before or after the start of proceedings),
    (e) Whether evidence could be given by another person on the matters which the expert would give evidence,
    (f) The impact which giving permission would be likely to have on the timetable for, and duration and conduct of the proceedings,
    (g) The cost of the expert evidence, and
    (h) Any matters prescribed by the FPR.'

20. In *Re TG (Care Proceedings: Case Management: Expert evidence)* [2013] EWCA Civ 5, Munby P said the following:

> 'Whether applying the present test or the new test, the case management judge will have to have regard to all the circumstances of the particular case. The judge will need to consider the nature of the particular expert evidence the admission of which is in issue. The evidence of an expert in one discipline may be of marginal use; the evidence of an expert in another discipline may be crucial. The judge will also need to be sensitive to the forensic context. The argument for an expert in a care case where permanent removal is threatened may be significantly stronger than in a case where the stakes are not so high. We strive to avoid miscarriages of justice, but human justice is inevitably fallible and case management judges need to be alert to the risks.'

21. In reality, where allegations of non-accidental injury have been made, it is highly likely that it will be necessary to obtain expert evidence. Baker J in the case of *Re JS* [2012] EWHC 1370 (Fam) gives a very helpful summary of the law and approach of the court in fact finding hearings and remarks that:

> 'Whilst the courts always have to be vigilant to guard against the proliferation of experts in family proceedings, the court must, in my judgment, always have available to it the necessary expertise to make the right findings in these important and difficult cases.'

22. In this case, dealing with a head injury featuring the 'triad' of intracranial injuries – encephalopathy (defined as the disease of the brain affecting the brain's function), subdural haemorrhage and retinal haemorrhage, Baker J determined that medical evidence from experts from a number of different disciplines was necessary, to interpret often very small signs within the complex structures of the infant brain and surrounding tissue.

23. Typically, these disciplines will include:
    - a paediatric neurologist,
    - a paediatric radiologist,
    - a neurosurgeon,
    - an ophthalmologist,
    - a haematologist and
    - a paediatrician.
    - If the child has died a pathologist and/or a neuropathologist will be required.

24. It is important to come to court at the CMC armed with names, timescales and thought given to the realistic amount of papers they will need to see. Complying with Part 25 of the FPR 2010 is vital (see *Re C (A Child) (Procedural Requirements of a Part 25 Application)* [2015] EWCA Civ 539 for a case in which Part 25 was not complied with and where the decision to order a report from a psychologist was considered 'unlawful'). Ask counsel and other solicitors about experts used in other cases – in several disciplines the same names appear time and again.

25. Are there police interviews they will need to view? What stage is any police investigation at?

26. You will need to be ready to consider the questions for the letter of instruction at this stage.

27. Are there any particular issues that need to be addressed – for example possible hereditary/other disorders or problems that might have a bearing on their opinion?

28. In cases such as these, where there are multiple experts required, it is essential that they are identified and instructed quickly to avoid delay.

29. If possible, try and organise an experts' meeting to narrow down the issues and areas of dispute between multiple experts. However, expert meetings can sometimes confuse rather than clarify, as set out by Parker J in *Re J & R (Children)* [2013] EWHC 4100 (Fam):

> *23. I accept that complex cases sometimes do require experts from several disciplines. But, even though injury cases can be difficult and sometimes require more than one expert, there were too many experts in this case, of overlapping disciplines.*
>
> *24. Perhaps because of the number of experts, expert's meetings (and there were several) seemed to confuse rather than clarify. Focus was lost on the fact that there was an established unexplained clavicle fracture, and that all the experts agreed that the damage to the substance of the brain could not be associated with either of R's underlying conditions.*
>
> *25. The case should not have been set down for a two-stage hearing. There were a number of issues which overlapped between harm or risk of harm and welfare, and the case was not just about a single inflicted injury. Fact finding hearings ought now to be rare, and to take place only in the single issue case, as was originally the case. Once there has been delay it is in any event not acceptable to set down a two-stage hearing.*
>
> *26. I am grateful for counsel's helpful suggestion that in an apparently complex case where the picture remains unclear after an expert's meeting the court could hold an issues resolution hearing to establish the true state of medical agreement and disagreement. It would require only the key medical witnesses. Elucidation would be appropriately led by the judge rather than by cross-examination on behalf of each of the parties. This is likely to be more efficacious than commissioning further reports.*

30. In that case Parker J endorsed the suggestion that in an apparently complex case where the picture remains unclear after an experts' meeting, the court could hold an issues resolution hearing to establish the true state of medical agreement and disagreement. It would require only the key medical witnesses. This proposal was an attempt to narrow down the issues and it was envisaged that this would be judge led rather than by cross-examination on behalf of each of the parties and would be preferable to the commissioning of further reports. This of course relies on the availability of the experts and finding the court time to accommodate this kind of hearing.

31. Make sure that counsel has plenty of time to consider the expert reports when they come in. Organise a conference with the client and counsel to be able to talk through the expert reports in detail. They are often hard to follow, involve complex concepts and terminology and it is important that you have well informed instructions in time for the IRH/PHR so that, in the event that new issues arise, they can be raised in good time and in advance of the experts' meeting. Judges increasingly want to narrow down the scope of cross examination and the number of experts called to give live evidence at fact finding hearings, with additional written questions put to experts instead if possible. Counsel will need to be able to have a good grasp on the client's case to be best placed to deal with this and you need to ensure that the client does not feel that they have been deprived of putting their case at the hearing.

Concurrent care and criminal proceedings

32. A pending criminal trial is not, sufficient reason to delay the care proceedings by itself. The court must balance all the factors involved, taking into account any risk of prejudice to the accused and any risk as far as the child is concerned. The welfare of the child has to take priority over the detriment to a family member facing criminal proceedings (per Butler-Sloss LJ in *Re TB (Care Proceedings: Criminal Trial)* [1995] 2 FLR 801, CA).

33. There are some cases where the care proceedings may need to be the subject of an adjournment pending the outcome of the criminal proceedings. For example, in *Re S (Care Order: Criminal Proceedings)* [1995] 1 FLR 151, CA, Butler-Sloss LJ noted that "In a case as serious as murder it would seem to me that often it would be preferable for the criminal trial to come first and the care proceedings to come second." However, it should be noted that this case pre-dates the current 26-week timetable for care proceedings (but remains cited in *Family Court Practice 2017*).

34. A parties to care proceedings must comply with case management directions in those care proceedings, including directions to file a response to threshold and/or a narrative statement even when they are also the subject of criminal proceedings. Practitioners should not advise a client in criminal proceedings not to comply with an order made in concurrent care proceedings (*A Local Authority v DG and Others* [2014] 2 FLR 713, FD).

35. Clients should also be aware that it is perfectly permissible for there to be a positive finding in care proceedings and an acquittal on the same facts in criminal proceedings *(Re W (Care Order: Sexual Abuse)* [2009] 2 FLR 1106, CA).

36. Delay should be avoided where at all possible and the protocol designed to expedite criminal cases involving child witnesses under the age of 10 years by the Association of Chief Police Officers, the Crown Prosecution Service and HMCTS (*A Protocol Between the Association of Chief Police Officers, the Crown Prosecution Service and Her Majesty's Courts & Tribunals Service to Expedite Cases Involving Witnesses under 10 Years* (19 January 2015)) should be followed.

The fact-finding hearing

1. The schedule of allegations

37. Where the Local Authority have prepared a schedule of findings, it requires good reasons to justify the court going outside those proposed findings and if the court is minded to do so (perhaps something unforeseen arising during oral evidence), the party against whom additional findings may be made may be entitled to an adjournment. This will of course be dependent on the particular facts of the individual case. *(Re G and B (Fact-Finding Hearing)* [2009] EWCA Civ 10, [2009] 1 FLR 1145; *Re C (Care Proceedings: Sexual Abuse)* [2008] EWCA Civ 1331; [2009] 2 FLR 46; see also *Re J-L (Findings of Fact: Schedule of Allegations)* [2012] EWCA Civ 1832, [2013] 1 FLR 1240.)

38. At the end of the hearing, the court should set out exactly the findings it has made in a court order or in a schedule attached to the order. However, it is not necessary for the court to make a finding on every allegation, as set out by Re M *(Allegations of Rape: Fact-Finding Hearing)* [2010] EWCA Civ 1385, [2010] Fam Law 452:

> *12. It is not necessary for a judge to make findings on every issue that is presented to him for determination or makes itself apparent during the hearing. What is required is that he should determine any factual issues that have implications for the decisions that he has to take in relation to the children.*

2. The court's approach to expert evidence

39. A judge is not entitled to reject expert medical findings and opinions which are not contradicted, save in the rare case where such an opinion is not capable of withstanding logical analysis. When assessing the evidence of an expert witness (as opposed to a witness of fact) it is highly unusual for the court to look for other evidence to confirm if the expert's arguments are substantiated. It is the task of the judge to assess conflicting medical evidence and take into account and weigh the expertise and speciality of expert witnesses.

40. In evaluating whether significant harm has occurred and if so who is the perpetrator, the roles of the medical expert and the court are very different. The judge has to look at all the evidence in the case, both medical and non-medical and come to an overall conclusion on the question of significant harm raised in s 31. The judge's task is summarised by Thorpe LJ in *Re B (Non¬ Accidental Injury)* [2002] EWCA Civ 752, [2002] 2 FLR 1133 referred at para 17:

> '*The expert of ultimate referral was there to guide the judge as to the relevant medical and scientific knowledge, inevitably expressing himself in medical language. The judge's function was a very different one. He had to consider the question posed by s 31 of the Children Act 1989 as to whether L was a child suffering or likely to suffer significant harm and whether that harm or likelihood of harm was attributable to the care given to the child, or likely to be given to him, if the order was not made.*'

41. Where a judge accepts that the expert opinion that signs of injury to a child are not just unusual but inexplicable, the judge may only proceed to make a finding of non-accidental injury by setting out clear reasons for such a conclusion – *Re M (Fact-Finding Hearing: Injuries to Skull)* [2012] EWCA Civ 1710, [2013] 2 FLR 322 in which Munby LJ cites the following with approval:

> " Dame Elizabeth Butler-Sloss P said in *In re U (A Child) (Department for Education and Skills intervening), In re B (A Child) (Department for Education and Skills intervening)* [2004] EWCA Civ 567, [2005] Fam 134, para 23:
>
> "... there is a broad measure of agreement as to some of the considerations emphasised by the judgment in R v Cannings that are of direct application in care proceedings. We adopt the following. (i) The cause of an injury or an episode that cannot be explained scientifically remains equivocal. (ii) Recurrence is not in itself probative. (iii) Particular caution is necessary in any case where the medical experts disagree, one opinion declining to exclude a reasonable possibility of natural cause. (iv) The Court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour propre is at

stake, or the expert who has developed a scientific prejudice. (v) The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark."

42. Where there are a number of injuries there are dangers in only addressing each injury separately and not considering if they are inter-related. Where there is no unifying medical hypothesis to explain a constellation of symptoms, it is dangerous and wrong to simply infer non-accidental injury merely upon the absence of any understood mechanism, a conclusion that there was an unknown cause is neither a professional nor a forensic failure. *(Re R (Care Proceedings: Causation)* [2011] EWHC 1715 (Fam), [2011] 2 FLR 1384.)

3. Unknown perpetrators

43. A case in which it is difficult to identify perpetrators pose particular difficulties for the courts, as identified by Baroness Hale in *Re S-B (Children)* [2009] UKSC 17, [2010] 1 FLR 1161:

> ***The "whodunit" problem***
>
> *20. So far the position is plain. But the threshold criteria do not in terms require that the person whose parental responsibility for the child is to be interfered with or even taken away by the order be responsible for the harm which the child has suffered or is likely to suffer in the future. It requires simply that "the harm, or likelihood of harm, is attributable to … the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him". Clearly, the object is to limit intervention to certain kinds of harm – harm which should not happen if a child is being looked after properly. But is it also intended to limit intervention to cases where the person whose rights are to be interfered with bears some responsibility for the harm?*
>
> *21. It cannot have been intended that a parent whose child has been harmed as a result of a lack of proper care in a hospital or at school should be at risk of losing her child. The problem could be approached through the welfare test, because removal from home would not be in the best interests of such a child. However, because of the risk of social engineering, the threshold criteria were meant to screen out those cases where the family should not be put at any risk of intervention. Hence attention has focussed on the attributability criterion. In the case confusingly reported in the Law Reports as Lancashire County Council v B [2000] 2 AC 147, but in the All England Law Reports as Lancashire County Council v A [2000] 2 All ER 97, the House of Lords considered what is meant by "the care given to the child". Does it mean only the care given by the parents or primary carers or does it mean the care given by anyone who plays a part in the child's care? Lord Nicholls, with whom Lord Slynn, Lord Nolan and Lord Hoffmann agreed, found that it referred primarily to the former. But if, as in that case, the care of the child was shared between two households and the judge could not decide which was responsible for the harm suffered by the child, the phrase "is apt to embrace not merely the care given by the parents or other primary carers; it is apt to embrace the care given by any of the carers" (p 166). Thus the criteria were satisfied in respect of a child, A, who had been injured, even though this might have been attributable to the care she had received from her childminder rather than from her parents.*
>
> *22. Lord Clyde put the test in this helpful way, at p 169C, with the same result:*
>
> *"That the harm must be attributable to the care given to the child requires that the harm must be attributable to the acts or omissions of someone who has the care of the child and the acts or omissions must occur in the course of the exercise of that care. To have the care of a child comprises more than being in a position where a duty of care towards the child may exist. It involves the undertaking of the task of looking after the child."*
>
> *23. However, it is worth noting that the Court of Appeal had confirmed that the criteria were not satisfied in respect of the childminder's child, B, because he had not been harmed at all. The only basis for suggesting that there was any likelihood of harm to him was the possibility that his mother had harmed the other child and that had not been proved: Re H applied. The local authority did not appeal against this.*
>
> *24. Re O and another (Minors)(Care: Preliminary Hearing) [2003] UKHL 18, [2004] 1 AC 523 was*

concerned with the more common problem, where the child has been harmed at the hands of one of his parents but the court cannot decide which. The attributability condition was satisfied. Furthermore, when considering the welfare test, the court had to proceed on the basis that the child was at risk. Lord Nicholls, with whom all other members of the Committee agreed, said this, at para 27:

"Quite simply, it would be grotesque if such a case had to proceed at the welfare stage on the footing that, because neither parent, considered individually, has been proved to be the perpetrator, therefore the child is not at risk from either of them. This would be grotesque because it would mean the court would proceed on the footing that neither parent represents a risk even though one or other of them was the perpetrator of the harm in question."

44. Where there has been a finding of harm to a child and a pool of perpetrators has been identified but it has not been possible to actually identify the perpetrator, the court must proceed on the basis that each person in the pool is a possible perpetrator.

45. The test for inclusion in the pool is not set high – it is simply the likelihood or real possibility that they are a perpetrator. Where the court is unable to identify the perpetrator(s) of the harm, the test to be applied is 'is there a likelihood or real possibility that one or more of a number of people with access to the child was the perpetrator or a perpetrator of the inflicted injuries?' *North Yorkshire County Council v SA* [2003] EWCA Civ 839, [2003] 2 FLR 849 confirmed by Baroness Hale sitting in the Supreme Court in *Re S-B (Children)* [2009] UKSC 17, [2010] 1 FLR 1161:

...if the judge cannot identify a perpetrator or perpetrators, it is still important to identify the pool of possible perpetrators. Sometimes this will be necessary in order to fulfil the "attributability" criterion. If the harm has been caused by someone outside the home or family, for example at school or in hospital or by a stranger, then it is not attributable to the parental care unless it would have been reasonable to expect a parent to have prevented it. Sometimes it will desirable for the same reasons as those given above. It will help to identify the real risks to the child and the steps needed to protect him. It will help the professionals in working with the family. And it will be of value to the child in the long run.

41. In North Yorkshire County Council v SA [2003] EWCA Civ 839, [2003] 2 FLR 849, the child had suffered non-accidental injury on two occasions. Four people had looked after the child during the relevant time for the more recent injury and a large number of people might have been responsible for the older injury. The Court of Appeal held that the judge had been wrong to apply a "no possibility" test when identifying the pool of possible perpetrators. This was far too wide. Dame Elizabeth Butler-Sloss P, at para 26, preferred a test of a "likelihood or real possibility".

42. Miss Susan Grocott QC, for the local authority, has suggested that this is where confusion has crept in, because in Re H this test was adopted in relation to the prediction of the likelihood of future harm for the purpose of the threshold criteria. It was not intended as a test for identification of possible perpetrators.

43. That may be so, but there are real advantages in adopting this approach. The cases are littered with references to a "finding of exculpation" or to "ruling out" a particular person as responsible for the harm suffered. This is, as the President indicated, to set the bar far too high. It suggests that parents and other carers are expected to prove their innocence beyond reasonable doubt. If the evidence is not such as to establish responsibility on the balance of probabilities it should nevertheless be such as to establish whether there is a real possibility that a particular person was involved. When looking at how best to protect the child and provide for his future, the judge will have to consider the strength of that possibility as part of the overall circumstances of the case.

46. Judges have been repeatedly advised against going on to amplify their decision by attributing percentages of likelihood as between those who remain in the pool (see for example *Re S-B (Children)* [2009] UKSC 17, [2010] 1 FLR 1161, para 44).

Beyond the fact-finding

47. It is important to be prepared for the next stage in the event that there is a split hearing; consideration needs to be given to lining up possible experts to undertake assessments of risk or a possible perpetrator, in the event that findings are made. Is it likely that the client will accept or reject the court's determination?

48. In the event that allegations are not proven, the House of Lords in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2008] 2 FLR 141 provides a template for inclusion in the instruction of an expert to advise on welfare issues in light of the judgment:

> *'The court has considered the allegations of [type of harm] made against [name(s) of alleged abuser(s)] and has concluded that the court is not satisfied that they are more likely than not to be true. In those circumstances the fact that those allegations were made remains part of the factual matrix of the family history and the ramifications of their having been made may well be relevant to your assessment. However, given that the court was not satisfied that the allegations were true, they cannot form the basis for asserting that there is a current risk of the same type of harm occurring in the future.'*

49. Next steps are also considered by Baroness Hale in *Re S-B (Children)* [2009] UKSC 17, [2010] 1 FLR 1161, who says the following from paragraph 24:

> *Lord Nicholls went on, at para 32, to give the following guidance, on the assumption that the hearing would be split into a "fact-finding" and a "disposal" stage and that each might be heard by a different judge:*
>
> *"… the judge at the disposal hearing will take into account any views expressed by the judge at the preliminary hearing on the likelihood that one carer was or was not the perpetrator, or a perpetrator, of the inflicted injuries. Depending on the circumstances, these views may be of considerable value in deciding the outcome of the application: for instance, whether the child should be rehabilitated with his mother."*
>
> *25. In Re B, Lady Hale commented as follows at para 61:*
>
> *"The decisions in In re H, Lancashire County Council v B [2000] 2 AC 147, and In re O[2004] 1 AC 523 fit together as a coherent whole. The court must first be satisfied that the harm or likelihood of harm exists. Once that is established, . . . ,the court has to decide what outcome will be best for the child. It is very much easier to decide upon a solution if the relative responsibility of the child's carers for the harm which she or another child has suffered can also be established. But the court cannot shut its eyes to the undoubted harm which has been suffered simply because it does not know who was responsible. The real answers to the dilemma posed by those cases lie elsewhere – first, in a proper approach to the standard of proof, and second, in ensuring that the same judge hears the whole case. Split hearings are one thing; split judging is quite another."*
>
> *26. We are told that practice has now changed and that, barring accidents, the same judge does conduct both parts of a split hearing. Nevertheless, the main object of splitting the hearing is to enable facts to be found. If the threshold is not crossed, the case can be dismissed at that stage. If it is crossed, the professionals can base both their assessments and their further work with the family upon the facts found. It is not at all uncommon for parents to become much more open with the professionals when faced with the judge's clear findings based upon what the evidence shows. Hence there should always be a judgment to explain his findings at that stage.*

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