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The lawyer's guide to a whodunit/whatdunit (AKA a fact finding – legal update)

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Introduction

1. Fact finding hearings in care proceedings most commonly relate to allegations of physical or sexual abuse within the families subject of the proceedings. Whatever the allegations the key questions for the court are ordinarily:
   (a) What happened e.g what inflicted the injury, or how was it caused; and
   (b) If it was inflicted, by who.

2. One of the more recent authorities on the key applicable legal principles in relation to fact finding hearings came from *Baker J in Devon County Council v EB (2013)EWHC B44 (Fam)* at paragraph 53 onwards where he set out the law. He identified 10 important aspects that he said the court should keep in mind during such hearings, as set out and expanded upon below. Paragraphs in bold below are the direct quotes from the judgment.

The Burden and Standard of Proof

3. **<u>First</u>, the burden of proof lies with the Local Authority. It is the Local Authority that brings the proceedings and identifies the findings they invite the court to make. Therefore, the burden of proving the allegations rest with them.**

4. It never hurts always to keep the burden and standard of proof firmly at the forefront of you mind when conducting any fact finding hearing. At a superficial level both are deceptively simple and straightforward, and dare I say it 'trite law.

5. The burden of proof rests on the person making the allegations. In care proceedings it is usually the local authority, upon whom the burden rests to prove the matters pleaded on the balance of probabilities. As Lord Hoffman put it, also in *Re B (Care Proceedings: Standard of Proof)*:

[2] If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

6. The burden then never shifts. There are often cases where there is no explanation as to how an injury occurred, and no memorable or witnessed event which suggests an accidental explanation. In those cases where the medical evidence suggests that it is unlikely for an injury to have been caused accidental, it can be tempting to jump to the conclusion that it must have been inflicted by a parent, absent a reasonable explanation. However, it is precisely in those cases that the court must keep firmly in mind that the burden of proof always remains on the party who makes and brings the allegation. The inability of a parent to explain an event cannot be relied upon to find an event proved. In *Re O (Minors) [2013] EWHC B44 (Fam)* quoting *Re M (Fact Finding: burden of proof) [2013] 2 FLR 874*, the court said:

'As to this point, the Court must guard against the danger of reversing the burden of proof. The burden still remains upon the local authority to prove to the requisite standard that the injuries were non- accidental.'

7. There is no burden shifted to the parents to prove a natural cause for symptoms. In *Lancashire County Council v D and E [2010] 2 FLR 196*, Charles J said:

"[36] The exercise of identifying a perpetrator, or 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. Again, in my view, the approach of the local authority and the guardian, at times, came perilously close to this. The correct position is that a medical view as to the most likely cause of injuries is that that cause is clearly 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 and, therefore, in determining whether such assertions are true or false the decision-maker has to consider all the possibilities and circumstances of the case. On existing authorities, in these proceedings, the truth or otherwise of such an assertion by parents is determined by an application of the civil standard, and if the court concludes that it is more likely than not that either or both of the parents did not injure R by shaking him, then that is thereafter, as a matter of legal policy, treated as fact."

8. The burden of disproving a reasonable explanation put forward by the parents also falls on the local authority, see: *Re S (Children) [2014] EWCA Civ 1447*, and it is pertinent to bear in mind the words of Wilson LJ in *Re W (Children) [2009] EWCA Civ 59*: "an hypothesis in relation to the causation of a child's injuries must not be dismissed only because such causation would be highly unusual".

9. That is not to say that a parent with no explanation for an injury will not perhaps be looked at, at the very least sceptically in many cases. There are situations in which the medical and other evidence points to the fact that the absence of an explanation is of significance. In *Re BR (Proof of Facts) 2015 EWFC 41* Jackson J said: "It would of course be wrong to apply a hard and fast rule that the carer of a young child who suffers an injury must invariably be able to explain when and how it happened if they are not to be found responsible for it. This would indeed be to reverse the burden of proof... Doctors, social workers and courts are in my view fully entitled to take into account the nature of the history given by a carer. The absence of any history of a memorable event where such a history might be expected in the individual case may be very significant. Perpetrators of child abuse often seek to cover up what they have done. The

reason why paediatricians may refer to the lack of a history is because individual and collective clinical experience teaches them that it is one of a number of indicators of how the injury may have occurred. Medical and other professionals are entitled to rely upon such knowledge and experience in forming an opinion about the likely response of the individual child to the particular injury, and the court should not deter them from doing so. The weight that is then given to any such opinion is of course a matter for the judge".

10. **Secondly, the standard of proof is the balance of probabilities,** ***Re B [2008] UKHL 35.*** **If the Local Authority proves on the balance of probabilities that E and/or J have sustained non-accidental injuries inflicted by one of their parents, this court will treat that fact as established and all future decisions concerning their future will be based on that finding. Equally, if the Local Authority fails to prove that E or J was injured by their parents, the court will disregard that application completely. As Lord Hoffman observed in** ***Re B*****:**

    "If a legal rule requires facts to be proved, a judge must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are nought and one."

11. The standard of proof, namely the balance of probabilities was articulated as long ago as 1947, by Denning J in *Miller v Ministry of Pensions [1947] 2 All ER 372*:

    "If the evidence is such that the tribunal can say: "We think it more probable than not", the burden is discharged but, if the probabilities are equal, it is not."

12. Nonetheless, it has been necessary for that test to be re-examined and re-iterated in more recent times. Many will recall the thread of cases which suggested that the more serious the allegations the more cogent the evidence was required to be for findings to be made. It was thought of as a heightened civil standard, more akin to the criminal standard. That was of course put to bed for once and all in Re B (Care Proceedings: Standard of Proof) [2008] UKHL 35, [2008] 2 FLR 141. As Baroness Hale put it:

    [70] My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under s 31(2) or the welfare considerations in s 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.

13. Where an allegation is a serious one, there is no requirement that the evidence be of a special quality. As Jackson J said more recently in *Re BR (supra)* *"the answer is not to be found in the inherent probabilities but in the evidence, and it is when analysing the evidence that the court takes account of probabilities."*

The Evidential Foundation

14. **<u>Third</u>, findings of fact in these cases must be based on evidence. As Lord Justice Munby, as he then was, observed in *Re A (A child) (Fact Finding Hearing: Speculation) [2011] EWCA Civ. 12*: *"It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation"*.**

15. Formulation and analysis of what evidence is required is an essential part of the preparation for any fact finding process. Each party should be asking themselves the following questions:
    - » What are the allegations/findings sought?
    - » What is the evidential foundation for those allegations/findings sought?
    - » Why are those findings being sought – where does it take the case?

16. The following very useful guidance was given by the President *In the matter of A (A Child) [2015] EWFC 11*, as a cross-check for any local authority as to how they are formulating their case. It can also be useful to those representing parents, when a dispute arises as to how threshold may have been pleaded. It came upon the back of what the President saw as a very sorry state of affairs in relation to how the particular case as it had been presented to him, and so he said this:

    > "In the light of the way in which this case has been presented and some of the submissions I have heard, it is important always to bear in mind in these cases, and too often, I fear, they are overlooked, three fundamentally important points. The present case is an object lesson in, almost a textbook example of, how not to embark upon and pursue a care case.
    >
    > The first fundamentally important point relates to the matter of fact-finding and proof. I emphasise, as I have already said, that it is for the local authority to prove, on a balance of probabilities, the facts upon which it seeks to rely. I draw attention to what, in Re A (A Child) (No 2) [2011] EWCA Civ 12, [2011] 1 FCR 141, para 26, I described as:
    >
    > "the elementary proposition that findings of fact must be based on evidence (including inferences that can properly be drawn from the evidence) and not on suspicion or speculation."
    >
    > This carries with it two important practical and procedural consequences.
    >
    > The first is that the local authority, if its case is challenged on some factual point, must adduce proper evidence to establish what it seeks to prove. Much material to be found in local authority case records or social work chronologies is hearsay, often second- or third-hand hearsay. Hearsay evidence is, of course, admissible in family proceedings. But, and as the present case so vividly demonstrates, a local authority which is unwilling or unable to produce the witnesses who can speak of such matters first-hand, may find itself in great, or indeed insuperable, difficulties if a parent not merely puts the matter in issue but goes into the witness-box to deny it. As I remarked in my second View from the President's Chambers, [2013] Fam Law 680:
    >
    > "Of course the court can act on the basis of evidence that is hearsay. But direct evidence from those who can speak to what they have themselves seen and heard is more compelling and less open to cross-examination. Too often far too much time is taken up by cross-examination directed to little more than demonstrating that no-one giving evidence in court is able to speak of their own knowledge, and that all are dependent on the assumed accuracy of what is recorded, sometimes at third or fourth hand, in the local authority's files."
    >
    > It is a common feature of care cases that a local authority asserts that a parent does not admit, recognise or acknowledge something or does not recognise or acknowledge the local authority's concern about something. If the 'thing' is put in issue, the local authority must both prove the 'thing' and establish that it has the significance attributed to it by the local authority.

The second practical and procedural point goes to the formulation of threshold and proposed findings of fact. The schedule of findings in the present case contains, as we shall see, allegations in relation to the father that "he appears to have" lied or colluded, that various people have "stated" or "reported" things, and that "there is an allegation". With all respect to counsel, this form of allegation, which one sees far too often in such documents, is wrong and should never be used. It confuses the crucial distinction, once upon a time, though no longer, spelt out in the rules of pleading and well understood, between an assertion of fact and the evidence needed to prove the assertion. What do the words "he appears to have lied" or "X reports that he did Y" mean? More important, where does it take one? The relevant allegation is not that "he appears to have lied" or "X reports"; the relevant allegation, if there is evidence to support it, is surely that "he lied" or "he did Y".

Failure to understand these principles and to analyse the case accordingly can lead, as here, to the unwelcome realisation that a seemingly impressive case is, in truth, a tottering edifice built on inadequate foundations.

17. **Fourthly, when considering cases of suspected child abuse, the court must take into account all the evidence and furthermore consider each piece of evidence in context of all the other evidence. As Dame Elizabeth Butler-Sloss, President observed in *Re U, Re B 9 (Serious Injuries: Standard of Proof)* [2004] EWCA Civ. 567, the court "invariably surveys a wide canvas". In *Re T* [2004] EWCA Civ. 558, [2004] 2 FLR 838 at paragraph 33 she added:**

> ***"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 the other evidence and to 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."***

18. 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, see: *A County Council v A Mother, A Father and X, Y and Z [2005] EWHC 31 (Fam)*.

19. When considering the 'wide canvas' of evidence the following section of the speech of Lord Nicholls in Re H and R (Child Sexual Abuse: Standard of Proof) [1996] 1 FLR 80 are relevant.

> *"[101B] ...The range of facts which may properly be taken into account is infinite. Facts including the history of members of the family, the state of relationships within a family, proposed changes within the membership family, parental attitudes, and omissions which might not reasonably have been expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child, and unsatisfactory parental responses to complaints or allegations. And facts, which are minor or even trivial if considered in isolation, taken together may suffice to satisfy the court of the likelihood of future harm. The court will attach to all the relevant facts the appropriate weight when coming to an overall conclusion on the crucial issue."*

20. The types of the evidence that may be before the court are numerous; that of parents, experts, and other professionals. The court is obliged to weigh each in the balance before coming to a conclusion on the facts.

Expert Witness

21. **Fifthly, the evidence received in this case, as is invariably the case in proceedings involving allegations of non-accidental injury includes expert evidence from a variety of specialists. Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. In *A County Council v KD & L* [2005] EWHC 144 Fam at paragraphs 39 to 44, Mr Justice Charles observed: "It is important to remember that (1) the roles of the court and the expert are distinct and (2) it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence. The judge must always remember that he or she is the person who makes the final decision." Later in the same judgment, Mr Justice Charles added at paragraph 49:**

> *"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 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, are 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."*

As Mr Justice Ryder observed in *A County Council v A Mother and others* [2005] EWHC Fam. 31: *"A factual decision must be based on all available materials, ie. be judged in context and not just upon medical or scientific materials, no matter how cogent they may in isolation seem to be".*

22. Expert witnesses often provide critical evidence to the court, but it is critical to understand that they are only to provide the court with their opinion, and not to determine the case. In *Re B (Care: Expert Witnesses)[1996] 1 FLR 667*, Ward LJ stated:

> *"The expert advises but the Judge decides. The Judge decides on the evidence. If there is nothing before the court, no facts or no circumstances shown to the court which throw doubt on the expert evidence, then, if that is all with which the court is left, the court must accept it. There is, however, no rule that the Judge suspends judicial belief simply because the evidence is given by an expert."*

23. **Sixth, in assessing the expert evidence, I bear in mind that cases involving an allegation of shaking involve a multidisciplinary analysis of the medical information conducted by a group of specialists, each bringing their own expertise to bear on the problem. The court must be careful to ensure that each expert keeps within the bounds of his or her own expertise and defers where appropriate to the expertise of others: see the observations of Mrs Justice Eleanor King in *Re S* [2009] EWHC 2115 Fam.**

Lay Witnesses

24. **Seventh, the evidence of the parents and any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them: see *Re W and another (Non-accidental Injury)* [2003] FCR 346.**

25. Other evidence can come in the form of ABE interviews. In *Re E (A Child)* [2016] EWCA Civ 473, McFarlane, LJ set out a number of common flaws in ABE good practice and emphasised the need for the court to engage with a thorough analysis of the ABE process in order to evaluate whether any allegations can be relied upon.

Lies

26. **Eighth, it is not uncommon for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for various reasons, such as shame, misplaced loyalty, panic, fear, distress and the fact that the witness has lied about some matters does not mean that he or she has lied about everything: see *R v Lucas* [1981] QB 720.**

27. Often the court is faced with a witness that it may think has lied. It may be that it is a provable or admitted lie, but not necessarily in relation to the central issue that the court has to determine. Most practitioners will be familiar with a Lucas Direction in these circumstances, but it is important to understand the legal analysis that applies to those particular circumstances.

28. McFarlane LJ has had cause last year to set out the importance of the proper application of the Lucas direction in ***Re H-C [2016] EWCA Civ 136***, but before coming to that it is useful to understand the full background and context of what he said.

29. In general terms, 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, and the Court should have regard to the guidance in *R v Lucas* [1981] QB 720, [1981] 3 WLR 120, [1981 2 ALL ER 1008) in particular 724 F, G, H

> *"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly, it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from the family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission from an independent witness. As a matter of good sense it is difficult to see why, subject to the same safeguards, lies proved to have been told in court by a defendant should not equally be capable of providing corroboration."*

30. Whilst the Lucas direction originates in Criminal cases, hence the reference to the Jury in the preceding paragraph, Mr Justice Charles in *A Local Authority v K, D, L [2005] EWHC 144 (fam)* at para 26 considered its applicability to the Family Division.

> *"As appears therefrom, a conclusion that a person is lying or telling the truth about point A does not mean that he is lying or telling the truth about point B. Also, I accept there may be many reasons why a person may not tell the truth to a court concerned with the future upbringing of a child. Further, I of course recognise that witnesses can believe that their evidence contains a correct account of relevant events, but be mistaken because, for example, they misrepresented the relevant events at the time or because they have over time convinced themselves of the account they now give."*

31. To return then to the words of McFarlane LJ in *H-C (Children) (2016) EWCA 136*, he went on to explain the following:

> *"97...A family court, in common with a criminal court, can rely upon a finding that a witness has lied as evidence in support of a primary positive allegation. The well-known authority is the case of R v Lucas (R) [1981] QB 720 in which the Court of Appeal Criminal Division, after stressing that people sometimes tell lies for reasons other than a belief that the lie is necessary to conceal guilt, held that four conditions must be satisfied before a defendant's lie could be seen as supporting the prosecution case as explained in the judgment of the court given by Lord Lane CJ:*

32. *"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness'.*

> *"98. The decision in R v Lucas has been the subject of a number of further decisions of the Court of Appeal Criminal Division over the years, however the core conditions set out by Lord Lane remain authoritative. The approach in R v Lucas is not confined, as it was on the facts of Lucas itself, to a statement made out of court and can apply to a "lie" made in the course of the court proceedings and the approach is not limited solely to evidence concerning accomplices.*
>
> *"99. In the Family Court in an appropriate case a judge will not infrequently directly refer to the authority of R v Lucas in giving a judicial self-direction as to the approach to be taken to an apparent lie. Where the "lie" has a prominent or central relevance to the case such a self-direction is plainly sensible and good practice.*
>
> *"100. One highly important aspect of the Lucas decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the "lie" is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in Lucas, where the relevant conditions are satisfied the lie is "capable of amounting to a corroboration". In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of R v Middleton [2001] Crim. L.R. 251.*

33. **Ninth, as observed by Dame Elizabeth Butler-Sloss President in *Re U, Re B, supra* "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 may throw a light into corners that are at present dark". This principle inter alia was drawn from the decision of the Court of Appeal in the criminal case of *R v Cannings* [2004] EWCA 1 Crim. In that case a mother had been convicted of the murder of two of her children who had simply stopped breathing. The mother's two other children had experienced apparent life-threatening events taking a similar form. The Court of Appeal quashed her convictions. There was no evidence other than the repeated incidents of breathing having ceased and there was serious disagreement between the experts as to the cause of death. There was fresh evidence as to hereditary factors pointing to a possible genetic cause. In those circumstances, the Court of Appeal held that it could not be said that a natural cause could be excluded as a reasonable possible explanation. In the course of his judgment, Lord Justice Judge, as he then was, observed:**

> ***"What may be unexplained today may be perfectly well understood tomorrow. Until then, any tendency to dogmatise should be met with an answering challenge."***

With regard to this latter point, recent case law has emphasised the importance of taking into account to an extent that is appropriate in any given case the possibility of the unknown cause. That was articulated by Lord Justice Moses in *R v Henderson and Butler and others* [2010] EWCA Crim. 126 at paragraph 1:

> ***"Where a prosecution is able, by advancing an array of experts, to identify a non-accidental injury and the defence can identify no alternative cause, it is tempting to conclude that the prosecution has proved its case. Such a temptation must be resisted. In this, as in so many fields of medicine, the evidence may be insufficient to exclude beyond reasonable doubt an unknown cause. As Cannings teaches, even where, on examination of all the evidence, every possible known cause has been excluded, the cause may still remain unknown."***

In *Re R (Care Proceedings: Causation)* [2011] EWHC 1715 Fam. Mr Justice Hedley, who had been part of the constitution of the Court of Appeal in the Henderson case, developed this point further at paragraph 10:

> *"A temptation there described is ever present in family proceedings too and in my judgment should be as firmly resisted there as the courts are required to resist it in criminal law. In other words, there has to be factored into every case which concerns a discrete aetiology giving rise to significant harm a consideration as to whether the cause is unknown. That affects neither the burden nor the standard of proof. It is simply a factor to be taken into account in deciding whether the causation advanced by the one shouldering the burden of proof is established on the balance of probabilities."*

Later in the judgment at paragraph at paragraph 19 Mr Justice Hedley added this observation:

> *"In my judgment a conclusion of unknown aetiology in respect of an infant represents neither a provision of professional nor forensic failure. It simply recognises that we still have much to learn and it also recognises that it is dangerous and wrong to infer non-accidental injury merely from the absence of any other understood mechanism. Maybe it simply represents a general acknowledgement that we are fearfully and wonderfully made."*

34. Finally, when seeking to identify the perpetrators of non-accidental injuries, the test of whether a particular person is in the pool of possible perpetrators is whether there is a likelihood or a real possibility that he or she was the perpetrator: see *North Yorkshire County Council v SA* [2003] 2 FLR 849. In order to make a finding that a particular person was the perpetrator of a non-accidental injury, the court must be satisfied on the balance of probabilities. It is always desirable where possible for the perpetrator of a non-accidental injury to be identified, both for the public interest and in the interests of the child, although, where it is impossible for a judge to find on a balance of probabilities, for example, that parent A rather than parent B caused the injury, then neither can be excluded from the pool and the judge should not strain to do so: see *Re D Children* [2009] 2 FLR 668, *Re SB Children* [2010] 1 FLR 1161.'

The Final Conclusion for any Fact Finding Hearing

35. The task for the Court is thus to:

> *'shake the material through a sieve; it is only by reference to the residue of hard factual averments which the local authority should have sought to identify in their threshold document and which the parents should have been given a full opportunity to challenge, that he [the judge] can, if he finds them established, proceed to hold that the threshold is crossed.' Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563.*

Local Authority assessment of Allegations Outside Fact Finding Hearings

36. Whilst strictly speaking this strays outside the topic which this paper seeks to cover, it adds an interesting post script as to how local authorities should be assessing and analysing allegations / referrals that are made to them, and which bear some analogies to the process which the court undertakes when conducting a fact finding. It is not unusual for a local authority to form the view that a parent has acted protectively when preventing contact with an alleged abuser, without necessarily fully investigating whether there is any real merit in what is being alleged. In fact, however, as the following case makes clear, local authorities have statutory duties which if discharged properly will take into account many of the principles above. The following is a salutary tale.

37. In *Re V (a child) (allegations of sexual abuse)* [2016] EWFC 58 there had been protracted and acrimonious proceedings in private law litigation between the parents in respect of the child who had been born in 2009, which led to share care arrangements. There were subsequent allegations of sexual abuse said to have perpetrated by the father, in respect of which the local authority commenced a s.47 investigation and held a strategy meeting. At the meeting it was recommended that there should be an initial child protection conference, but that never took place. Instead the local authority presented the mother with a written agreement to sign, agreeing not to permit the father any contact with the child, with no limit in time, on pain of the local authority taking 'further action'. The s 47 investigation was concluded in under three weeks, and the final report contained conflicting recommendations that the threshold for the conference had, and had not been, met. Subsequently, the father was interviewed by the police. The father denied the allegations and the police took no further action on the grounds that there was insufficient evidence to prosecute him. The local authority continued a child and families single continuous assessment, which was concluded around three and a half weeks after the allegations of abuse had first been reported. The assessment document recorded that the likelihood of significant harm to the child had been reduced, given both the prohibited steps order which had by then put in place, and the written agreement. Approximately one month later, the local authority closed the case.

38. Several months later, the court made a direction for a s.37report to be prepared by a social worker who had not previously been involved in the matter. The s 37 report found that there was little or no evidence to substantiate the allegations of sexual abuse. Its conclusion was instead that the child had suffered significant harm, which emanated from the acrimonious dispute between M and F, rather than from any form of direct physical, or sexual, abuse.

39. The recorder was critical of the local authority in this way:

> *36. I have every sympathy for and understand only too well the limited resources available to local authorities. Some local authorities, in my experience, display considerable reluctance to become involved in private law disputes and it is possible that there is an instinctive wish to withdraw from meaningful involvement as soon as possible, believing that private law disputes will ultimately be resolved by the courts. Local authorities do, after all, have many children whose welfare they are charged with protecting. However, local authorities have statutory duties and the way in which those duties are carried out have significant and lasting ramifications even if they do not become directly involved in any court proceedings that follow.*
>
> *37. My main criticism of this local authority relates to the lack of balance in fulfilling those statutory duties in this case and decisions that were taken that prevented them from arriving at a balanced view. …*
>
> *38. In any dispute between two parents where an allegation of abuse of any nature is made, instigated or supported by one parent against the other it is, in my view, incumbent upon a local authority receiving a referral to have in mind all the possible risks that may be inherent in any such allegation.*
>
> *39. There is of course the risk that the allegation, whatever its nature, is true. There is the risk that that the allegation is not true. There are also the risks that the allegation is in some way mistaken, mistakenly encouraged or deliberately fabricated.*
>
> *40. There are of course very serious welfare consequences for a child if allegations of, for example, sexual abuse are true. However, there are also serious welfare consequences if the allegations are not true. Those consequences include the possible temporary or permanent cessation of a relationship between a child and a parent. They include the inculcation of false events within a child's memory and belief system. They include one parent portraying a negative and inaccurate view of another parent, with possible long term consequential psychological damage to a child who is led to believe that part of his or her genetic make-up is in some way 'bad' or unworthy.*

41. It strikes me that in circumstances where the backdrop is a dispute between parents, the words of Baroness Hale in Re B [2008] UKHL 35 at [29] should be at the forefront not only of the Court's mind but also of any investigative authority:

"...there are specific risks to which the court must be alive. Allegations of abuse are not being made by a neutral and expert Local Authority which has nothing to gain by making them, but by a parent who is seeking to gain an advantage in the battle against the other parent. This does not mean that they are false but it does increase the risk of misinterpretation, exaggeration or downright fabrication."

42. It is notable that Baroness Hale refers to the local authority as being "neutral and expert". In my view and with respect, in this context it seems to me that 'neutral and expert' implies a professional detachment that is alive to all the risks and weighs all the evidence in a balanced way bearing in mind all the reasonable possibilities. It does not imply an abandonment of a precautionary approach to child protection but acknowledges that 'child protection' encompasses protection for children from mistaken and false allegations as well as those that may be true.

43. It also occurs to me that where local authorities act in a way that purports to restrict the relationship between a parent and a child, under pain of legal action (as in this case, condensed into the written agreement) they must bear in mind that they may be interfering as a public body in a relationship that has, for want of a better term, special status. ...

44. When interfering with such powerful imperatives it, in my view, behoves the local authority to record the situation carefully and accurately, formulating an assessment of the risks on all the evidence reasonably available, even if that assessment still concludes that for the time being the child should not see the accused parent. Simply to say 'the child will not see the alleged perpetrating parent and is therefore safe' and thereafter close the case, is an abrogation of the responsibility placed on local authorities by Parliament.

45. Failure to assess the circumstances properly has far reaching effects, even if the local authority do not themselves initiate protective court proceedings.

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