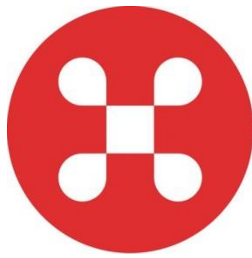

PUBLIC LAW UPDATE – 20 MAY 2019

Kate Spence

Barrister

St John's Buildings

1. The purpose of this update is to provide the reader with an overview of recent cases and a summary of the principles arising out of those cases.

2. The following cases shall be covered within this update:

   (a) Re X and Y (Delay: Professional Conduct of an Expert) [2019] EWHC B9 (Fam);

   (b) Re A (A Child) [2019] EWCA Civ 609;

   (c) Re H-L (Children: Summary Dismissal of Care Proceedings) [2019] EWCA Civ 704;

   (d) Re RP (Appeal Costs) [2019] EWCA Civ 680;

   (e) Re B (Children: Uncertain Perpetrator) [2019] EWCA Civ 575

Re X and Y (Delay: Professional Conduct of an Expert) [2019] EWHC B9 (Fam): HHJ Bellamy

3. The case concerned two children, X (aged 10) and Y (aged 17). Both X and Y had complex physical disabilities and complex learning needs. The central concerns of the local authority were:

   (a) X and Y being given inappropriate food, which created a risk of choking;

   (b) X had surgery on his hip, to avoid a complete displacement, and was discharged to the care of family members (not his parents). The local authority alleged that those relatives failed to follow the recommended post-operative exercises, as a result of which X had a distorted body shape and was experiencing constant pain.

4. Dr Kathryn Ward was instructed to complete an expert medical assessment of X and Y. On 17 July 2018 permission was granted to the parties to jointly instruct Dr Ward in relation to X. On 18 October 2018 permission was granted to instruct Dr Ward in relation to Y.

5. HHJ Bellamy summarised Dr Ward's qualifications and experience in the following way:

   "Dr Kathryn Ward is the Designated Doctor for Safeguarding for Bradford, Airedale, Wharfedale and Craven Clinical Commissioning Groups. Previously, she was a Consultant Paediatrician at Airedale General Hospital and held that post for 32 years. For many years, Dr Ward has regularly been instructed as a medical expert witness in cases proceeding in the Family Court. She has had a distinguished career. As a consultant paediatrician, she is held in high regard…" [para 11].

6. The Judgment goes on to set out a catalogue of delays on Dr Ward's part and a series of promises made by Dr Ward that she was not able to fulfil.

7. In relation to X, the following dates are significant:

   (a) The letter of instruction to Dr Ward was dated 2 August 2018. The letter of instruction made it clear that Dr Ward was expected to examine X for the purpose of preparing her report.

   (b) X's medical records were sent to Dr Ward's home address in October 2018.

(c) The report was due on 30 November 2018. This deadline was not met.

(d) X's solicitor tried to speak with Dr Ward on 4 December 2018 but was not successful.

(e) X's solicitor sent a letter to Dr Ward dated 12 December 2018 requesting an urgent response. No response was received.

(f) X's solicitor tried to speak with Dr Ward again on 20 December 2018. He was not successful.

(g) Dr Ward sent an email to X's solicitor on 2 January 2019 stating that her son had been involved in a serious accident and she had also experienced a bereavement. Dr Ward promised to complete the report at the weekend. She didn't.

(h) X's current GP records were sent to Dr Ward electronically on 7 January 2019. Dr Ward was provided with a password. Dr Ward was informed that the password would expire after 10 days. The password expired.

(i) X's solicitor contacted Dr Ward by email on 14 January 2019 requesting confirmation of when the report will be available.

(j) Dr Ward sent an email to X's solicitor on 15 January 2019 stating that she had been unwell with a protracted illness and made reference to her son's recent accident. Dr Ward stated that she was working on the report and she hoped to have it typed up over the weekend.

(k) X's solicitor contacted the court on 16 January 2019 requesting that the matter be listed for a case management hearing. The court provided a hearing date of 4 February 2019.

(l) On 18 January 2019 a disc containing records from X's previous GP was sent to Dr Ward.

(m) On 31 January 2019 Dr Ward and X's solicitor spoke on the telephone. Dr Ward assured X's solicitor that the report would be completed by the end of the next week. As a consequence, the case management hearing was vacated by agreement and relisted to take place on 21 February 2019. The consent order contained a clear recital that if the report had not been delivered by 20 February 2019, Dr Ward must attend the hearing on 21 February 2019.

(n) X's solicitor spoke to Dr Ward on 5 February 2019 to inform her of the terms of the order.

(o) X's solicitor and Dr Ward spoke on the telephone on 15 February 2019. Dr Ward stated that she was suffering from gastroenteritis but confirmed the report would be ready for 21 February 2019. Dr Ward was aware of the requirement that she must attend the hearing on 21 February 2019 if her report was not delivered.

(p) On 20 February 2019 it became apparent the Dr Ward had not examined X, despite her assurance that the report would be completed by 21 February 2019.

(q) On 21 February 2019 Dr Ward confirmed that she would be able to see X "one day next week".

(r) Dr Ward did not attend the hearing on 21 February 2019.

8. A very similar chronology unfolded in relation to Dr Ward's instruction to assess Y.

9. By the time the case came back before the court the report in relation to X was 6 months overdue and the report in relation to Y was 4 months overdue. The parties reached the conclusion that Dr Ward's instructions should be terminated and HHJ Bellamy agreed.

10. HHJ Bellamy referred to Practice Direction 25B of the Family Procedure Rules and made the following comments:

"It is clear from, in particular, paragraphs 7.1 and 8.1(c) that time is important. As paragraph 7.1 states, 'the needs of the court must be balanced with the needs of the expert whose forensic work is undertaken as an adjunct to his or her main professional duties'. This is qualified, to an extent, by paragraph 8.1(c) which requires confirmation from the expert that he or she 'is available to do the relevant work within the suggested timescale.

If an expert is unable to complete the work within the time proposed by the court then the expert must say so at the time he or she is approached to accept instructions. The parties and the court then have a choice. Either they accept that the preparation of the report will take longer than hoped for and a later filing date must then be set or, alternatively, an approach must be made to another expert. What is not acceptable in the Family Court is the kind of conduct displayed by Dr Ward in this case" [para 44 and 45].

11. HHJ Bellamy also considered the Family Justice Council and Royal College of Paediatrics and Child Health jointly published guidance "*Paediatricians as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations".* The guidance makes clear that the expert must communicate any variation in relation to fees, hours of work, or timeframe without delay. The guidance also reminds experts that they must present and deliver his or her evidence as directed by the court and comply with all relevant court orders and directions.

12. HHJ Bellamy gave the following guidance:

(a) Where an expert finds that they are no longer able to meet a deadline set by the court, the expert should let their instructing solicitor know promptly.

(b) The expert should give reasons for the delay and indicate the new date by which the report can be completed.

(c) An application should then be made to the court to vary the timetable.

(d) Where there are justifiable reasons for adjusting the timetable, it is unlikely that the court will refuse.

(e) Courts and experts must work together in a co-operative and co-ordinated way.

13. HHJ Bellamy stated: *"I am deeply concerned about the way Dr Ward has behaved in this case. It does not meet the standards expected of an expert witness or the expectations of the court in this particular case. It cannot be allowed to pass without comment. That comment should be placed in the public domain"* [para 53].

14. Dr Ward will not be accepting any further instructions in cases before the Family Court.

Re A (Children) [2019] EWCA Civ 609: Moylan LJ, King LJ and Underhill LJ

15. The local authority issued care proceedings in respect of four children. The proceedings concluded with placement orders being made in respect of each child in March 2017. Adoption applications were made in May 2018. The mother applied for leave to oppose the adoption applications. HHJ Wilding dismissed that application. He found that '*each of the children had suffered significant emotional harm as a result of the care given by the parents and that the children would require therapy to address those harms*'.

16. During the care proceedings, HHJ Wilding heard evidence from a psychologist who was of opinion that the mother's parenting of the children was unlikely to change because of her psychological functioning. The psychologist said that the mother would need to engage in therapeutic work, for perhaps 12 to 18 months, to establish whether there was any prospect she might change. At the time of the application hearing, the mother had not undertaken the recommended therapies because she believed therapeutic work was not required.

17. The mother also argued that her circumstances had changed because she could now rely upon assistance being provided by the maternal grandmother (with the agreement of the maternal grandfather). The grandparents lived abroad, and the maternal grandmother was willing to come to the UK for periods of up to six months to assist the mother. HHJ Wilding did not accept this as a change of circumstances because this arrangement matched what the mother had proposed during the care proceedings.

18. HHJ Wilding dismissed the mother's application and found that she had "*no solid grounds*" for seeking leave. HHJ Wilding concluded that any order, other than adoption, would severely impact upon the children's safety and stability and would be likely to cause them "*more significant harm throughout their lives*".

19. The adoption applications were listed for determination on 22 October 2018. At that hearing, counsel instructed by the maternal grandfather appeared and informed the judge that the grandfather was offering to care for the children and sought to be assessed as a potential carer. The judge adjourned the hearing and the matter came back before HHJ Wilding on 13 November 2018.

20. The maternal grandfather had no status in the proceedings. The father of the children informed the judge that he opposed the making of adoption orders. HHJ Wilding therefore decided to treat the father as having made the application for leave to oppose the adoption applications, relying upon a change of circumstances in that the maternal grandfather was putting himself forward to care for the children.

21. In a statement dated 9 November 2018, the maternal grandfather explained that he had been aware of the care proceedings but only realised the severity of the situation when placement orders were made in March 2017. HHJ Wilding was surprised by this stance, given that the maternal grandmother had been involved with the care proceedings.

22. HHJ Wilding concluded that this did not constitute a change of circumstances. Moylan LJ, hearing the appeal, stated *"the judge characterised the change as more of a change in the grandfather's position than a change in circumstances. The judge also inferred that the grandfather would have known that he had the opportunity to offer to care for the children during the course of the care proceedings but had not done so"* [para 25].

23. HHJ Wilding incorrectly stated during the course of his judgment that the welfare of the children was <u>not</u> his paramount consideration. HHJ Wilding also incorrectly summarised the question he was being asked to answer as: *"the question is whether, in all the circumstances of the case, including <u>the father's prospects of success of revocation</u> and the children's interests, leave should be given"* [para 26].

24. Moylan LJ summarised the law applicable to leave to oppose adoption order applications:

 (a) Section 47(5) Adoption and Children Act 2002: A parent may not oppose the making of an adoption order without the court's leave.

 (b) Section 47(7) Adoption and Children Act 2002: The court cannot give leave under subsection (3) or (5) unless satisfied that there <u>has been a change of circumstances since</u> the consent of the parent or guardian was given or, as the case may be, <u>the placement order was made</u>.

 (c) The court must apply a two-stage test: (1) has there been a change of circumstances? (2) if so, should leave be granted taking into account the child's welfare throughout their life as the paramount consideration?

 (d) *Re P (A Child) (Adoption Proceedings)* [2007] 1 WLR 2556:

 "The change in circumstances since the placement order was made must, self-evidently and as a matter of statutory construction, relate to the grant of leave. <u>It must equally be of a nature and degree sufficient, on the facts of the particular case, to open the door to the exercise of the judicial discretion</u> to permit the parents to defend the adoption proceedings."

 "Self-evidently, a change in circumstances can embrace a wide range of different factual situations. Section 47(7) does not relate the change to the circumstances of the parents. The only limiting factor is that <u>it must be a change in circumstances 'since the placement order was made'</u>. Against this background, we do not think that any further definition of the change in circumstances involved is either possible or sensible.

 We do, however, take the view that <u>the test should not be set too high, because, as this case demonstrates, parents in the position of S's parents should not be discouraged either from bettering themselves</u> or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable. We therefore take the view that <u>whether or not there has been a relevant change in circumstances must be a matter of fact to be decided by the good sense and sound judgment of the tribunal hearing the application</u>."

 (e) *Re B-S (Children) (Adoption Order: Leave to Oppose)* [2014] 1 WLR 563: The court explained that, at the second stage, the key factors are '*the parent's ultimate prospect of success if given leave to oppose*' and '*the impact on the child if the parent is, or is not, given leave to oppose*'. The prospect of success relates to the prospect of resisting the making of an adoption order, not the prospect of ultimately having the child restored to the parent's care. The judgment gives the following guidance at [74]:

 "ii) For purposes of exposition and analysis we treat as two separate issues the questions of whether there has been a change in circumstances and whether the parent has solid grounds for seeking leave. Almost invariably, however, they will be intertwined; in many cases the one may very well follow from the other.

iii) Once he or she has got to the point of concluding that there has been a change of circumstances and that the parent has solid grounds for seeking leave, the judge must consider very carefully indeed whether the child's welfare really does necessitate the refusal of leave …

iv) At this, as at all other stages in the adoption process, the judicial evaluation of the child's welfare must take into account all the negatives and the positives, all the pros and cons, of each of the two options, that is, either giving or refusing the parent leave to oppose."

(f) *A and B v Rotherham Metropolitan Borough Council* [2015] 2 FLR 381: The court accepted that there had been a change in circumstances as a consequence of the "*true genetic father*" being identified after the adoption application had been made.

(g) *Re LG (Adoption: Leave to Oppose)* [2016] 1 FLR 607: Leave was granted where parental grandparents were unaware of the care proceedings until after the child had been placed for adoption, in part, because the father had falsely told the social worker that the paternal grandfather had abused him.

25. Moylan J distinguished *A and B v Rotherham* and *Re LG* because in those cases the relatives had been unaware of the care proceedings. The maternal grandfather in the index case was well aware of the care proceedings and he had not been put forward as a carer by any other party, nor had he put himself forward.

26. Moylan J stated:

"…In the present case, it is clear that the maternal grandfather was aware of the care proceedings, in which his wife was significantly involved, and that he could have been put forward as a carer for the children. I accept that, as set out in Re P, the court must not set the test too high. But it is difficult to see how a very late proposal by a known family member in circumstances such as have occurred in this case could or would be a sufficient change in circumstances to come within the provisions of the Act" [para 37].

27. Moylan J concluded that had HHJ Wilding correctly directed himself, the outcome would have been the same. Moylan J stated: *"he would inevitably have determined that the proposed application should be dismissed. It was not based on solid grounds and, in my view, giving leave would clearly be contrary to the interests of the children, applying their welfare needs throughout their respective lives"* [para 40].

Re H-L (Children: Summary Dismissal of Care Proceedings) [2019] EWCA Civ 704 (Jackson LJ, Pattern LJ and Floyd LJ)

28. This case concerned an unusual decision made by HHJ Wicks to summarily dismiss care proceedings brought by a local authority.

29. The subject children were L and N, aged 2 and 6 respectively at the time proceedings began.

30. The care proceedings were triggered when N was examined by a hospital paediatrician and was found to have around 20 bruises, '*including groups of bruises on the face, neck and arms*'. The

paediatrician concluded that these injuries were highly likely to have been caused by forceful grabbing by an adult. There were three people who could be responsible for the injuries: the mother, N's father, and a non-family carer.

31. N stayed overnight with her father on Sunday 13 May 2018. On Monday 14 May 2018 N returned home to her mother, who placed her with a family friend between 9:00am and 3:30pm. When N returned to her mother, she noticed the marks on N's body.

32. The local authority was made aware that the injuries were believed to be caused by an adult grabbing N forcefully. On 14 May 2018 the local authority made the problematic decision to insist that the children move to the care of their respective fathers, despite N's father clearly being a potential perpetrator of the injuries. The local authority had no legal basis upon which to insist that the children be separated from their mother.

33. The local authority did not issue proceedings until 23 August 2018.

34. When the matter eventually came before the court there were numerous hearings, changes of counsel, several changes of social worker, and delays in obtaining a paediatric overview (this was later abandoned due to delay).

35. The parties and the court proceeded on the basis that the interim threshold was crossed.

36. On 16 October 2018 the judge directed that a fact-finding hearing should take place, with a time estimate of 5-7 days.

37. At a hearing on 1 November 2018 a dispute arose regarding the "relevant date" for proving threshold. The local authority suggested that the relevant date was the date of issue. The Guardian and the father submitted that the relevant date was 14 May 2018 (the date the local authority insisted the children move to their respective fathers). Oddly, the father and the Guardian submitted that if the relevant date was 14 May 2018 it was arguable that the threshold was not met since the children had been placed by the local authority with people with parental responsibility. In response the judge stated: *"I cannot think of any better way of expediting proceedings than [if] the court concludes that threshold is not crossed and the application is dismissed".* HHJ Wicks queried how threshold could be crossed when, at the date of issue, Lara (the older sibling) was safely in the care of her father.

38. HHJ Wicks asked for skeleton arguments to be submitted and a hearing was listed for 23 November 2018 to determine the issue.

39. At that hearing, the parties had reached an agreement that the relevant date was 23 August 2018. HHJ Wicks agreed and adopted this as the relevant date. The judge concluded that he did not need to hear evidence in relation to whether threshold was crossed on that date. HHJ Wicks then stated the following:

 "If the proceedings had been issued at, or shortly after, N had been admitted to hospital, the court, it seems to me, could have little difficulty in concluding that, physically and emotionally, N was suffering from significant harm. By 23 August 2018, the date that these proceedings were issued, the bruises had healed and N, this was common ground, suffered no further unexplained injuries. Indeed, the local authority seemed, on balance, to be perfectly content with the care given to N by Mr L and has never sought to remove N from his care…there is nothing in the material, which is

now substantial and runs to the 3 lever arch files, to show that N continues to suffer significant emotional which is attributable to the injuries she sustained in May…

The conclusion that I reach, therefore, on this aspect is that the Local Authority cannot now prove its case that N is suffering or is at risk of suffering harm, on the basis that she is in the care of a potential perpetrator of her injuries…

I entirely accept that if these bruises were proved to be deliberately inflicted, that that would be significant harm, but the time for state intervention in respect of that harm was at the time those injuries were suffered or shortly thereafter, not 3 months later, and that delay, in my judgment is fatal to the Local Authority's case. Overall, therefore, I am driven to the conclusion that, on any view of the evidence, the Local Authority fails to establish that, as at the relevant date, the threshold for making orders under Section 31 of the 1989 Act is crossed. It follows from that that as their application is for care or supervision orders under Section 31, those proceedings must be dismissed".

40. HHJ Wicks went on to suggest that judicial determination of who had caused the injuries could come from private law proceedings, but not in a public law case where the threshold was not crossed.

41. The case went drastically wrong in two ways:

    (a) The local authority delayed issuing proceedings for three months and, in the meantime, had secured alternative placements for the children without having any standing to do so; and

    (b) The court struck the proceedings out at week 15 without investigating how N came by her injuries.

42. The local authority and the Guardian requested permission to appeal and the case came before Jackson LJ (giving the lead judgment), Patten LJ and Floyd LJ on 17 April 2019.

43. Jackson LJ stated:

    "A scenario of this kind would be familiar to any social services department and to any family court. Both agencies are given wide and flexible powers, mainly under the Children Act 1989, that they are under a duty to use to protect children and promote their welfare while at the same time being fair to adults. Both agencies will recognise that a child that has suffered transient injuries may be more seriously injured over time and that other children in the household may face similar risks. They will also recognise that delay and inefficiency will work against the interests of the children and may well be harmful to them" [para 2].

44. Jackson LJ stated a local authority will issue proceedings in this scenario to allow the court to reach a factual conclusion and to make any orders that may then be necessary. The court process *"should in all normal circumstances…be completed within the statutory period of 26 weeks, allowing the children and their families to move on with their lives on the basis of sound plans, built on the best possible understanding of what went wrong and how it might be avoided in the future"* [para 2]. This did not happen in this case.

45. Jackson LJ referred to the case of *Re S-W (Children)* [2015] EWCA Civ 27, which concerned a judge who had without warning made final care orders at a first instance case management hearing. The order was appealed and the following principles arose from that appeal:

(a) *"If all parties consent, or there is otherwise a clear case for it, then a court will make final orders at a CMH but, unless the decision goes by concession or consent, it will only be exceptionally, in unusual circumstances and on rare occasions that this can ever be appropriate"* [King LJ, para 40].

(b) *"Where there remains any significant issue as to threshold, assessment, further assessment or placement, it will not be appropriate to dispose of the case at CMH"* [King LJ, para 41].

(c) *"Quite apart from the fact that such a ruthlessly truncated process as the judge adopted here was fundamentally unprincipled and unfair, it also prevented both the children's guardian and the court doing what the law demanded of them in terms of complying with the requirements of the Children Act 1989 and PD12A"* [Sir James Munby, para 61].

46. Jackson LJ also referred to *Re M (A Minor) (Care Orders: Threshold Conditions)* [1994] 3 WLR 558, which confirmed that the relevant date for assessing threshold conditions is the date the local authority initiated the procedure for protection. In that case Lord Nolan stated:

"Parliament cannot have intended that temporary measures taken to protect the child from immediate harm should prevent the court from regarding the child as one who is suffering, or who is likely to suffer significant harm within the meaning of section 31(2)(a), and should thus disqualify the court from making a more permanent order under the section. The focal point of the inquiry must be the situation which resulted in the temporary measures being taken, and which has led to the application for a care or supervision order".

47. Those authorities are crucial to understand where and how HHJ Wicks went wrong in the present case.

48. The following principles arose from Jackson LJ's judgment:

(a) *"The judge erred in law by failing to recognise that the threshold for intervention was plainly crossed on the basis that at the date of issue of proceedings both children were likely to suffer significant harm arising from the clear evidence about the very worrying injuries to Nina, for which one or other of her parents might, when the evidence was heard, be shown to have been responsible. He was in no position to prejudge that matter and was wrong to do so"* [para 46].

(b) The threshold criteria are to be approached from the perspective of the children, not from the perspective of the parents.

(c) Delay in bringing proceedings cannot of itself be determinative of the threshold.

(d) The fact that injuries are unexplained does not make them irrelevant, but rather raises an unassessed likelihood of future harm and can be described as a "*live risk*".

(e) *Re S-W* (above) remains authoritative guidance.

(f) The judge should have cautioned himself against terminating the proceedings when that course did not have the support of the Guardian, nor any written analysis from her.

(g) Private law proceedings are inappropriate as a surrogate forum of child protection.

(h) <u>The injuries suffered by Nina cried out for investigation and the law, far from preventing it, positively demanded it</u>.

<u>Re RP (Appeal Costs) [2019] EWCA Civ 680: Baker LJ</u>

49. The Court of Appeal considered whether the local authority and the Guardian should be ordered to pay the costs incurred by a foster carer who had successfully appealed against an order to place the child with foster carers in Poland. The child had been in the care of the foster carer (LR) for 14 months. LR had not been a party to the care proceedings. The final care plan of the local authority was for the children to be moved to the care of foster carers in Poland.

50. During the course of the appeal, Baker LJ was critical of the conduct of both the local authority and the Guardian. The Guardian had not provided the judge with any analysis of the value of the child remaining in LR's care.

51. Baker LJ confirmed, that whilst he was critical of the local authority and the Guardian, the grounds for making a costs order were not met.

52. Baker LJ confirmed that the approach to be followed when considering applications for costs is as follows:

53.

(a) *Re S* [2015] UKSC 20: Baroness Hale confirmed that whenever a court has to determine a question relating to the upbringing of a child, the welfare of the child is the court's paramount consideration, and as a result *"in such proceedings there are no adult winners and losers – the only winner should be the child".*

(b) Costs orders should only be made in exceptional circumstances, for example where the conduct of a party has been reprehensible, or the party's stance has been beyond the band of what is reasonable (*Sutton London Borough Council v Davis (No 2)* [1994] 2 FLR 569).

<u>Re B (Children: Uncertain Perpetrator) [2019] EWCA Civ 575: Jackson LJ, Lindblom LJ, King LJ</u>

54. This case concerned four children between the ages of 5 and 12. Three of the children had been found to be infected with gonorrhoea. The children had not made any allegations of abuse. Both parents were tested for gonorrhoea and the results were negative. The father's medical records confirmed that he had not been previously infected or treated for gonorrhoea. Both parents were arrested and interviewed. No charges were brought.

55. The mother and the children lived in a shared housing arrangement. The mother and the four children shared a bedroom. There were also three women, two men, and a 14-year-old boy living in the property. The father, for the most part, lived elsewhere and would come to the property each day to transport the older three children to school.

56. During the fact-finding hearing, there were significant gaps in the evidence. The court was not provided with a complete picture of the living arrangements. The court was also hindered by the fact the other people living in the household had not been questioned in any significant way.

57. The court had access to a report from Dr Ghaly (consultant in genitourinary medicine) who concluded that sexual transmission was the most likely method of infection.

58. The local authority sought a finding that either the father transmitted the infection to the children by having sexual contact with them, or an unknown male has done so. The local authority also sought a finding that either the mother or the father had failed to protect the children.

59. The judge found that the infection had been sexually transmitted.

60. Regarding the identity of the perpetrator, the judge made the following findings:

"…Although I am not able to say definitely that [the father] was responsible for the infection of the children, I am not able to exclude him as there must remain a real possibility of him having caused this infection in some way…[para 81]

Accordingly, I find nothing more than that the father is within a pool of possible perpetrators with other unknown males who may have had access to the children, or at least one of them, including the two young men in the family home" [para 82]

61. The judge did not make a finding that the mother had failed to protect because he "could see no evidence to suggest that the mother knew of the risk or of any need to mitigate such risk".

62. The father appealed against the findings made against him.

63. Jackson LJ summarised the applicable law for 'uncertain perpetrator' cases:

    (a) The starting point is s31(2) Children Act 1989 which contains the threshold conditions for statutory intervention. The court must be satisfied of both subsection (a) – the '*significant harm*' condition – and subsection (b) – the '*attributable*' condition.

    (b) *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563: The burden of proof rests upon the local authority and the standard of proof for past facts is the balance of probabilities. In relation to the likelihood of future harm, the local authority must show a real possibility of such harm. Both past and future harm can only be established on the basis of proven facts.

    (c) *Lancashire County Council v B* [2000] UKHL 16: "care given to the child" can be interpreted to embrace not only the parents, but any of the carers. The local authority in that case was unable to identify whether the injuries were perpetrated by the parents or a childminder, but the threshold criteria were satisfied nonetheless.

    (d) *Re O and N (Minors); Re B (Minors)* [2003] UKHL 18: Past events have to be proved to the requisite standard and if so proved they are treated as having happened. If not so proved they are treated as not having happened. However, it would be "*grotesque*" if the 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*" [para 27]. "*The preferable interpretation of the legislation is that in such cases the court is able to proceed at the welfare stage on the footing that each of the possible perpetrators is, indeed, just that: a possible perpetrator*" [para 28].

(e) *Re G (Care Proceedings: Split Trials)* [2001] 1 FLR 872, 882: "*The fact that a judge cannot always decide means that when one gets to the later hearing, the later hearing has to proceed on the basis that each is a possible perpetrator".*

(f) *North Yorkshire County Council v SA* [2003] EWCA Civ 839: If the perpetrator cannot be identified, the court must consider whether there is a real possibility or likelihood that one or more of a number of people with access to the child might have caused injury to the child. The court must ask – *"is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?"*

(g) *Re S-B (Children)* [2009] 2 FLR 849: the court is conducting a "*whodunnit*" exercise. If the court cannot identify the perpetrator, it must identify a pool.

(h) *Re J (Children)* [2013] UKSC 9: Simply being included in a pool is not sufficient to establish the likelihood that the individual would cause harm to another child in later proceedings. The local authority must prove the facts which give rise to a real possibility of significant harm in the future. Nothing less than a factual foundation would justify interference with Article 8 rights.

64. Jackson LJ, giving the lead judgment, highlighted the following principles:

(a) The concept of the pool does not arise where the relevant allegation can be proved to the civil standard against an individual or individuals. Nor does it arise where only one person could possibly be responsible. There is no such thing as a pool of one.

(b) A decision to place a person within the pool of perpetrators is not a finding of fact in the conventional sense. The person is not a proven perpetrator but a possible perpetrator.

(c) Where there are a number of people who may have caused the harm, it is for the local authority to prove that there is a real possibility that they did. No one can be placed into the pool unless that has been shown.

(d) The court should approach the issue in three stages:

i. Consider whether there is a list of people who had the opportunity to cause the injury;

ii. Consider whether it can identify the actual perpetrator on the balance of probabilities and, if it can, make a finding to that effect;

iii. If it cannot identify the perpetrator to the civil standard of proof it should go on to ask – is there a real likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries? Only if there is should they be placed in the pool.

(e) The pool does not stretch to people who had fleeting contact with the child in circumstances where there was an opportunity to cause injuries.

(f) The position of each person in the pool should be investigated and compared.

(g) Judges should not strain to identify a perpetrator.

(h) An unknown (or unidentified) person could be placed into a pool of perpetrators – for example, if there had been a burglary and the burglar might have injured the child – but such a conclusion would be extremely unusual.

Kate Spence

Barrister

St John's Buildings

20 May 2019

Kate.spence@stjohnsbuildings.co.uk