Neutral Citation Number: [2023] EWCA Civ 437

Case Nos: CA-2023-000140
CA-2023-000217

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT YORK
HHJ Mitchell
YO22C50021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2023

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE COULSON
and
LORD JUSTICE BAKER

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A, B AND C (FACT-FINDING: GONORRHOEA)

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June Venters KC and Michael Cahill (instructed by **Tilly, Bailey and Irvine**) for the **First Appellant**
Nicholas Stonor KC and Ruth Phillips (instructed by **Paul J Watson**) for the **Second Appellant**
Frank Feehan KC and Iain Hutchinson (instructed by **Local Authority Solicitor**) for the **First Respondent**
Andrew Fox (instructed by **Jones Myers**) for the **Third, Fourth and Fifth Respondents by their children's guardian**
The Second Respondent was not represented

Hearing date : 7 March 2023

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Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on 26 April 2023.

LORD JUSTICE BAKER :

1. This is an appeal against findings made in care proceedings relating to three girls – A, now aged 7, and her two younger sisters, B and C.

2. At the conclusion of the appeal hearing, we informed the parties that the appeal would be allowed for reasons to be given at a later date and the matter remitted for rehearing by a different judge. This judgment sets out my reasons for agreeing with that decision.

Background

3. The second appellant is the mother of all three children. The second respondent, whom I shall refer to as X, is the father of the two elder children. The first appellant, whom I shall refer to as Y, is the father of the youngest child. Following the breakdown of her marriage to X, the mother started a relationship with Y in February 2020. At the time of the incidents with which we are concerned, the mother, Y and the three children were living together in a house.

4. On Friday 4 February 2022, Y came home for the weekend from work. Over that weekend, the family stayed together in the house, save for a short trip out. On Sunday 6 February, the mother and Y had sexual intercourse in the morning. During the afternoon, the mother took a shower in the course of which she used an item which the family referred to as a "loofah". A and B were in the bathroom when the mother was in the shower. Two hours or so later, A had a bath. In the evening, Y returned to work.

5. On 8 February, the mother started to experience soreness in her vagina. She ordered a swab test online and sent the sample for analysis. On 14 February, A started to show similar symptoms and on 21 February she developed a vaginal discharge. The mother consulted the GP who arranged for A to be tested. On 21 February, the mother's test result was returned showing she was positive for gonorrhoea. On 1 March, A's test revealed that she was also suffering from the infection. At that point the GP made a safeguarding referral to the local authority children's services.

6. On 2 March, the local authority and police conducted a joint visit to the family home. Y agreed to move out of the property. A child protection investigation was started, in the course of which A underwent a medical examination which revealed no physical evidence that she had been sexually abused. For reasons which were not explored during the hearing, but perhaps surprisingly, A was not interviewed formally under the Achieving Best Evidence procedure. She was, however, spoken to by police officers and social workers on several occasions and made no allegations or statements indicating that she had been abused.

7. On 25 March, the local authority started care proceeding in respect of all three children. At a hearing on 22 April, they were made subject to interim care orders. A and B were placed with their father, X. C was placed in foster care. Written reports were obtained from three experts – Dr Ahmos Ghaly, a consultant physician in genitourinary medicine, Dr Louise Teare, a clinical microbiologist, and Dr Kate Ward, a consultant paediatrician. Statements were also filed by the mother and Y. In his statement, Y asserted that he had never suffered from gonorrhoea, an assertion that was seemingly confirmed by his medical records. Later in the proceedings, however, he disclosed that he had had sexual intercourse with another woman on 2 February 2022. He accepted

that, as a result, he had brought the infection into the house and passed it on to the mother when having intercourse with her on 6 February. He had obtained treatment online rather than via his local doctor.

8. A fact-finding hearing listed for eight days started on 15 September 2022. The local authority invited the court to make the following findings:

(1) On 21 February 2022, A was presented at the GP on the basis of having suffered soreness, itching and discharge in the genital area for approximately one week. These were symptoms of the sexually transmitted disease gonorrhoea. A was subsequently tested on 4 March 2022 and received a positive diagnosis as suffering from vaginal and rectal gonorrhoea.

(2) It is not possible to determine the precise time at which A contracted gonorrhoea. The first recorded observation of her symptoms was on 8 February 2022. The incubation period in children is poorly defined but likely to be the same as adults: 3-14 days.

(3) There is no inherent medical or organic cause for the gonorrhoea, the only cause is infection by Gram negative intracellular diplococcus Neisseria gonorrhoeae (gonorrhoea).

(4) A was infected with gonorrhoea through transmission by either:

a. Contact between her vagina and/or anus with the penis, vagina, mouth and/or anus of an infected person. Such contact requiring intimate exposure of the respective mucous membranes.

b. Contamination of her vagina and/or anus by infected genital secretions passed from one mucous membrane to another. Such contamination must be by fresh and direct inoculation.

(5) By virtue of paragraphs 1-4, A has suffered significant sexual harm.

(6) A was infected with gonorrhoea by her mother and/or Y.

(7) By virtue of the sexual harm that A has suffered within the home, B and C were at risk of suffering significant sexual harm.

9. In the event, the hearing had to be adjourned after three days when the father contracted an illness and was not fit to attend. The hearing was ultimately completed between 28 November and 2 December 2022. In the course of the hearing, Dr Ghaly and Dr Teare gave oral evidence, as did the mother and Y.

10. At the conclusion of the hearing, the judge delivered an ex tempore judgment in which she made certain findings which were substantially in line with those set out in the local authority's threshold document. The details of the findings made in the judgment lie at the heart of the appeal and are considered in detail below. Immediately after the judgment was delivered, counsel for the mother raised a point of clarification. An exchange then took place at the end of which the judge indicated she would respond to any requests for clarification and that the time for appealing would not begin to run until after that process had been completed. An order was made recording the findings

and giving further case management directions for a welfare hearing on 13 March 2023. On 14 December 2022, counsel for the local authority sent the judge a document prepared jointly by the advocates containing requests for clarification of her judgment. On 23 December, the judge handed down her response to those requests. As part of this, she made changes to her findings which are central to this appeal and are set out below.

11. Notices of appeal were filed on behalf of the mother on 25 January and the father on 3 February 2023. Permission to appeal was granted on 20 February.

The Judgment under appeal

12. After summarising the background and issues, the judge set out the relevant legal principles by reference to the case law, stating that the burden of proof lay on the local authority and noting that, if she concluded that the local authority had proved on a balance of probabilities that A had suffered harm as alleged, it would then be necessary to determine whether a perpetrator could be identified. At paragraph 17 to 18, she said:

> "17. …. I must initially look at whether it is possible to identify a single perpetrator of the harm that A is said to have suffered, if I find she has suffered that harm …. The unvarnished test is clear. I must consider all of the available evidence and apply the simple balance of probabilities. A judge either can or cannot identify a perpetrator.
>
> 18. If I find that I cannot identify a single perpetrator, then, in accordance with *Re B (Uncertain Perpetrator)* [2019] EWCA Civ 575 I should go on to consider whether there is a real possibility that each individual on the list caused the harm…."

She reminded herself of the importance of surveying the wider canvas, adding that counsel had cautioned her against relying on the expert evidence only without putting it alongside the other evidence.

13. At paragraphs 20 to 27 she set out the case advanced by the mother and Y, identifying points which can be summarised as follows:

(1) It was agreed by the mother and Y that the infection had been brought into the house by Y and that he had infected the mother on 6 February.

(2) They "denied having done anything sexual or any other action" to cause A's infection.

(3) They asserted that A could have become infected by coming into contact with the "loofah" or a towel after the mother had used those items when she took a shower on 6 February.

(4) In the alternative, they suggested that A could have become infected from the toilet seat or some other surface.

(5) It was further argued that that there could be an unknown, unexplained method by which the infection had been transmitted.

(6) "A had made no allegations against anyone, despite professionals' attempts to talk to her about events."

(7) A had "undergone intimate examination and no physical signs of sexual abuse were found on her."

(8) "[The mother and Y] point to the fact that there is a camera in the children's bedroom, and that both of them knew that it would record anyone going into the bedroom, any movement within the bedroom. The mother told the local authority and the police about this early on in the investigation. [They] argue that this makes abusive acts towards A during the night inherently less likely."

(9) "There is no evidence of a sexual interest in children on the part of either of [the mother or Y] contained within the extensive phone records which have been downloaded and examined carefully by the advocates."

(10) There was no opportunity or time during the weekend when Y was alone with A.

14. Next the judge considered the parents' evidence. She set out in detail the mother's account of the events of the weekend of 4 to 6 February. At paragraph 36, she said:

> "I agree with the submission of the local authority that the mother is clearly heavily emotionally invested in the relationship with the father, and that she was persistent in her defence of him, even to the point of accepting that on one view of the incubation period for the gonorrhoeal infection she alone could have been the cause of that infection. She was willing to accept that possibility, thus exonerating the father."

The judge referred to Y's untrue statement earlier in the proceedings that he had never had gonorrhoea, observing that "in those actions … he was actively misleading the court". She then considered the guidance about the treatment of lies in the case law (including *R v Lucas* [1981] OB 720) and said:

> "I have considered this carefully, and have come to the conclusion that I cannot in this case conclude that guilt of abusing A is the only explanation for Y having lied about whether or not he had gonorrhoea. There is clearly an alternative explanation, which is preserving his relationship with the mother, which, as I have said, I am satisfied is very important to him. Therefore, in my view I cannot use his lie about not having gonorrhoea as corroboration in this case. But it remains the case that his credibility is damaged by this admitted dishonesty, not only to the mother but importantly to the court. He cannot be regarded as a wholly honest witness."

15. The judge then considered the expert evidence in considerable detail. For reasons that will become clear, it is unnecessary for me to refer to this part of the judgment in great detail. The judge started by recording the "clear" evidence of Dr Ghaly and Dr Ward that gonorrhoea is a sexually transmitted disease and the evidence of Dr Teare that transmission was

> "normally by inoculation of infected secretions from one mucous membrane to another, directly, for example from the urethra, the opening of the penis, to the vagina … the organism which causes gonorrhoea needs to be immediately in contact with a mucosal surface to survive and replicate …. If the organism … does not find a suitable surface to attach to, it dies."

Regarding the transmission in non-sexual ways, for example via a "fomite" (meaning an object or material likely to carry infection), the judge recorded (at paragraph 51) that Dr Teare had

> "emphasised the fragility of the bacterium…. [B]ecause the organism cannot survive outside the human body for any length of time, any transmission in association with towels or a loofah, an object contaminated with the bacteria in some bodily secretion, would need to be simultaneous."

The judge considered other points made by Dr Teare which, she noted, had made the witness "seriously doubt the possibility of transmission to A from the loofah."

16. At paragraph 56-7, the judge noted:

> "56. …. Dr Teare said that Y on 6 February can only have been in the early stages of his own infection …. She said clearly he was infectious enough to infect the mother, but she suspected that at that early stage of his own infection he would not have been producing sufficient numbers of organisms for onward transmission via a route other than mucosal to mucosal.
>
> 57. It was clear from the experts' evidence, and all parties accept, that when the mother took her shower on 6 February she would not yet herself have been infectious and not been able to infect another person directly herself. The parents' suggestion is that the infection came from the ejaculate from the father, which was inside the mother."

17. After further consideration of the evidence about transmission, the judge concluded (at paragraph 59):

> "So, the experts did not rule out transmission by fomite, but neither of them saw it as likely. Dr Ghaly called it a theoretical possibility and Dr Teare said 'never say never' and the other expression she used was, 'I'm not saying there's no possibility at all.'"

18. Under the heading "Decision", having reminded herself again about the burden of proof, the judge began by stating that she accepted the experts' evidence, saying (paragraph 61):

> "Whilst the experts accepted it was a theoretical possibility that there could be transmission of the infection by the loofah, they

> very clearly limited that to a theory and not a reality. My own view is that the chances of infectious material, being Y's ejaculate, remaining on the loofah and infecting A are tiny…."

The judge then explained her reasons for this conclusion. In short, she did not consider it at all likely that any of the explanations put forward by the mother and Y would account for the infection surviving the mother's body and being transmitted to A.

19. She also discounted the suggestion of an unknown cause.

> "64. …. I accept that medical science is developing all the time, and I acknowledge that it may be that the expert opinions that I have heard about how this infection is passed between people may change in future. But I am dealing with this case on the evidence as it was heard ….
>
> 66. I cannot contemplate what could be the unknown circumstances in the submission that is made on behalf of the parents. Either [Y], or the mother when she became infections herself, would have to be involved in the infection of A, and that involvement would have to be immediate. How could they not know that that had happened? I just do not see how the infection can be passed by an unknown cause."

20. At paragraphs 67 to 69 the judge considered the weight to be attached to the fact that A had made no allegations and displayed no symptoms of abuse:

> "67. [The mother and Y] make valid points about A not having made any allegations to anyone; that she has been spoken to three times by professionals; and that she has been living with her father for months, and not said anything to him. The mother says that A would tell, she thinks A would have told her. A herself told the social worker that if someone touched her inappropriately, she would tell her mum or dad or a teacher. So, I recognise that the fact that she has not said anything is an important piece of evidence.
>
> 68. However, there can be many reasons why a child does not speak about abuse. She has not said anything about how she got infected, which she undoubtedly has been. Something has happened to her. As Dr Ghaly said, this does not pass through the air. I think it would be memorable for her, and I believe that she is choosing, for her own reasons, not to say anything at the moment. She may simply not be ready.
>
> 69. [The mother and Y] also make the point that A has no physical signs of abuse, no injuries or scars were found when she was examined intimately in March. It is rightly acknowledged that this is a neutral piece of evidence, it does not mean that there has been no abuse, nor does it mean there has been abuse. It is neutral."

21. The judge then considered the evidence about the sleeping arrangements and the camera in the children's bedroom and observed:

> "I do not think it is likely that A was abused during the night time. But that leaves the day time."

She continued:

> "73. The parents' evidence about this, although clear and firm, is uncorroborated by anyone else. The mother is, as I have said, very emotionally invested in her relationship with Y. I think he is too, although also willing to deceive her about significant matters, and he has shown himself willing to lie to the court. I cannot simply rely on their evidence of what happened or did not happen that weekend. They both have strong reasons to lie, given the seriousness of what has happened to A, and their wish to remain together as a couple, and get the children back into their care.
>
> 74. I find that I am indeed presented with an impossible situation, as Mr Hutchinson [counsel for the local authority] puts it at paragraph 30 of his submissions. A has contracted gonorrhoea. The expert evidence is that that must be contracted by sexual contact with her vagina or anus by way of intimate exposure of the mucous membranes. I have found that the loofah explanation is not a plausible explanation for the transmission of the infection, nor the towel nor the toilet seat, and I cannot contemplate any unknown means of transmission.
>
> 75. Therefore, I come to the view that despite the parents' evidence about 4 to 6 February, they cannot be telling the truth, because the presence of the gonorrhoea infecting A itself is evidence of abuse. I am satisfied that the local authority has proved, on the balance of probabilities, that A was infected as set out in finding number 4 …."

22. She then addressed the issue of timing and concluded that A had been infected on the weekend of 4 to 6 February. Finally, she set out her conclusion as to the other findings sought by the local authority, including the perpetrator of the abuse:

> "On that basis, both the mother and Y were caring for A at the relevant time. They have not told me the full story of events that weekend. They have not been entirely truthful with the court. A was infected by one or both of them, and as a result of that she suffered serious sexual harm, and B and C were at the time these proceedings started likely to suffer significant sexual harm. Therefore, findings 5, 6 and 7 will be made by the court. The earlier findings, 1, 2, 3, follow on from the expert evidence, which I have accepted, and I think there needs to be some revision about the incubation period, because this document was drafted before the further evidence came in from the experts. So,

that is my judgment. I make the findings as sought by the local authority."

23. In the exchanges between the court and counsel after judgment, Ms Ruth Phillips for the mother raised a point of clarification:

> "Counsel: If your Honour accepts the expert evidence that on the Sunday the mother could not have been infectious because it takes at least two days for the bacteria to colonise, how can it be said that the mother could have infected the child over the course of that weekend?
>
> Judge: In some activity with Y, who was infectious. I mean, nobody has questioned that, but if they were engaged together in sexually abusing the child, and he was infectious, then she is playing a part in A being infected. That is how I understood what that finding meant.
>
> Counsel: So, to be clear, that is based on the fact, which has not been put, that the parents have jointly sexually abused A together?
>
> Judge: I know it does not say "together", but the finding uses the conjunction "and" so the two — infected by both of them, so that would be an act — and you are right, if she was not infectious, it would have to be them acting together.
>
> Counsel: So, to be clear, that is the court's finding in spite of the fact that collective, jointly sexually abusing A was not a case that was put by the local authority to both parents in evidence?
>
> Judge: Well, I understood — Mr Hutchinson will tell me if I have got this wrong. That is what I understood that finding must mean, if they had both abused her, that is what it must mean. They both denied any abuse, so yes, you are right, that specific scenario of the two of them together abusing was not put. You are right about that, but that is what I understood the finding to mean, and they both denied any abusive behaviour, so that encompasses them denying acting together.
>
> Counsel: Very well, I understand that is the position that your Honour takes. It is my position that such a case should have been specifically pleaded and specifically put. It takes the case to a different level entirely if it is the position that it is said both

> parents were in effect conspiring to commit sexual abuse together."

Ms Phillips indicated that she would consider the judgment further. The judge asked Mr Hutchinson whether she had understood finding no.6 correctly. He replied:

> "Finding number 6 was drafted as a pool finding, because at that stage we had not yet had the finding of fact hearing and, as I say in the written submissions, the local authority's analysis of the evidence which the court has now agreed with, that you are unable to identify a perpetrator, and on that basis it is a pool finding. Whether the court was to say it is either the mother or the father is a matter for the court, but it is a pool finding that the local authority seeks, because it cannot assist the court with identifying a perpetrator. I cannot make submissions as to whether it was a joint agency or not because we do not have the evidence to know what took place in that house. So, the local authority seeks no more than a pool finding."

24. Directions were given as to the filing of requests for clarification. On 14 December, Mr Hutchinson submitted a joint list of eight clarification questions, under a covering email in which, with the agreement of other counsel, he made some observations which were cited in part in the judge's response on 23 December. Some of the questions and responses related to the judge's treatment of the expert evidence. In the light of the decision I have reached on the appeal, it is unnecessary to refer to all of those matters. I shall only cite responses to three of the requests for clarification relating to the issue of perpetrator.

25. Under request one, counsel asked:

> "In circumstances where it was not put to either the mother or Y that they had colluded together or lied about their movements during the weekend of 4th - 6th February 2022 what evidence has the court relied upon to make the finding that they have colluded together to give a false picture of that weekend to the court?"

The judge responded:

> "M and Y accept that Y's infection was the source through which A became infected…. I do not accept that she was infected via the loofah or the toilet seat or by an unknown freaky event. It is my view that the account given by M and Y does not provide any way in which A can have become infected and yet she has been. Therefore I conclude that they have not told the full truth about events of the weekend 4-6 February. They have lied about events that weekend.
>
> I have commented in my judgment on M's emotional investment in her relationship with Y. He is, on his own admission, so keen to maintain that relationship that he was prepared to lie to the

> court in order to hide his infidelity and protect the relationship. I rely on that evidence of their closeness and the dependence of M and Y on one another as support for finding that they will protect one another in difficulty. Since they have given exactly the same untruthful account, Y accepting M's account, it is my conclusion that they have decided together on the untrue account they would give."

26. Under request four, counsel invited the judge to clarify the basis on which she had concluded (in paragraph 74, quoted above) that the expert evidence was that transmission "must be via sexual contact". They referred to guidance published by the Royal College of Paediatrics and Child Health (which had been adduced at the hearing) stating "sexual contact is the most likely mode of transmission in pubertal and prepubertal children with gonorrhoea" and cited the opinion of Dr Ghaly that the presence of gonorrhoea in a prepubertal child is "strongly suggestive of sexual abuse" and that sexual abuse "should be strongly considered". The judge responded that, in delivering her ex tempore judgment, she had inadvertently read "must be contracted by sexual contact" from the local authority closing submissions when her own note of what she had intended to say was "most common[ly] by sex[ual] transmission". She apologised "for that serious error". She continued:

> "To be clear, it is not my conclusion that contraction of gonorrhoea must be by sexual contact.
>
> Having discounted the possibility of A having been infected via the loofah, the towel, the toilet seat or an unknown freaky circumstance, and accepting the expert evidence that gonorrhoea is a sexually transmitted disease and that sexual contact is the most likely mode of transmission in pubertal and prepubertal children with gonorrhoea (RCPCH above), I remain satisfied that the LA has proved, on the balance of probabilities, that Y was infected as set out in finding 4 on page A29. The mistake I have made in reading my notes does not alter my view or my finding."

27. Under request eight, counsel reiterated the point raised by Ms Phillips after the judgment:

> "If Your Honour accepts the expert evidence that on the Sunday the mother could not have been infectious because it takes at least two days for the bacteria to colonise, how can it be said that the mother could have infected the child over the course of that weekend?"

The judge responded:

> "I do accept that on the balance of probabilities the mother was not infectious on the Sunday. I have further considered the consequences of this following Miss Phillips' question and I need to revise the findings I said I was making at the end of the judgment. On the basis that A was infected over the weekend 4-

> 6 February and that the mother was not herself infectious that weekend, then the LA has not established on the balance of probabilities that the mother (alone) infected A. But given my findings about the closeness of the parents, the mother's emotional investment in the relationship and her faith in Y, the fact that they were together with the children all weekend with no-one else present and that they have not been wholly truthful about the events of the weekend, I am not satisfied that the LA has established on the balance of probabilities that Y (alone) infected A. I therefore cannot on the balance of probabilities identify a sole perpetrator of the infection of A. I must go on to consider in relation to each of M and Y whether there is a real possibility that they are the perpetrator. For the same reasons as I have given for not finding against Y alone, I do find that there is a real possibility in relation to both M and Y that they infected A acting together; M not herself infectious but involved in the abuse which resulted in infection of A. In addition, I find that there is a real possibility that Y infected A acting alone. I find this in relation to him because he was clearly infectious that weekend, whereas M was not. For the avoidance of doubt, I do not find as a fact on balance of probabilities that Y alone infected A, but that there is real possibility that he did.
>
> Finding 6 therefore is: A was infected with gonorrhoea by Y alone or by Y and her mother."

The appeal

28. The parents put forward the following grounds of appeal:

(1) The court failed to adequately consider the totality of the medical evidence and thereby erred in finding that fomite transmission must be "immediate" and "simultaneous".

(2) The court erred in determining that the basis for concluding the parents' evidence was untruthful as to events over the weekend of 4th to 6th February 2022 was that an infected secretion must pass immediately and simultaneously by fomite.

(3) Both Dr Teare and Dr Ghaly accepted that the mechanism put forward by the mother of transmission via the loofah was a theoretical possibility. The learned judge erred when she found that their evidence was that a theoretical possibility was not a real possibility.

(4) In the court determining that "despite the parents'" evidence they cannot be telling the truth, because the presence of gonorrhoea is in itself evidence of sexual abuse, the court has (i) fallen into error by reversing the burden of proof onto the parents; (ii) failed to adequately consider the wider canvas of evidence and in so doing has attached undue weight to the medical evidence to conclude that A was infected via sexual means.

(5) The court's finding that there was a real possibility that the mother and Y abused A together cannot be sustained as: (i) the suggestion was not explored with either parent in evidence and they were not therefore given an opportunity to comment upon such a serious finding being made against them which is a breach of natural justice; (ii) at the conclusion of the ex tempore judgment the local authority confirmed that it had sought a simple pool finding (i.e. not the parents acting in concert, with agreement to sexually abuse A).

(6) The court erred in finding that an unknown means of transmission must be capable of contemplation in order to for it to be deemed an unknown means of transmission.

(7) Notwithstanding the learned judge's responses to clarifications sought, her reasons for finding that the mother and Y have lied as to their account of the weekend of 4th - 6th February 2022 are inadequate.

29. In written and oral submissions, Ms June Venters KC, leading Mr Michael Cahill for the father, and Mr Nicholas Stonor KC, leading Ms Phillips for the mother, advanced substantially the same arguments. Their submissions in respect of grounds 1, 2, 3, 6 and 7 can be summarised briefly. The judge's conclusion that transmission of gonorrhoea must be "immediate" and "simultaneous" did not reflect the totality of the expert medical evidence, which included statements such as the bacterium "does not survive for long outside the human body" (ground 1). Similarly, the judge erred in concluding that the expert's description of the "loofah" explanation as a "theoretical" possibility meant that it was "a theory and not a reality". In this respect she was again failing to reflect the totality of the medical evidence (ground 3). As a result, the finding that the appellants had lied was unsound because it was based substantially on the judge's overstated assessment of the expert evidence that transmission must be immediate and the "loofah" explanation was "not a reality" (grounds 2 and 7). Similarly, the court's exclusion of the possibility of an unknown cause (in paragraph 66 of the judgment quoted above) was based on the overstated view of the expert evidence that transmission must be immediate (ground 6).

30. In response to these arguments, Mr Frank Feehan KC, leading Mr Iain Hutchinson on behalf of the local authority, and Mr Andrew Fox on behalf of the children's guardian submitted in short that the judge carried out a careful and detailed analysis of the expert evidence, that her conclusions about that evidence and the consequences which flowed from it were within her discretion, and that in those circumstances an appellate court should not interfere.

31. Under ground 4, Ms Venters and Mr Cahill submitted that the judge had approached the matter from the starting point that gonorrhoea is a sexually transmitted infection and that its presence was evidence in and of itself that the child was sexually abused, thereby reversing the burden of proof. Mr Stonor and Ms Phillips focused on paragraphs 74 and 75 of the judgment. As noted above, in response to a request for clarification, the judge had corrected what she described as a "serious error" when she had wrongly said that the expert evidence was that transmission "must be via sexual contact" when she intended to say that the expert evidence was that it is "most commonly via sexual transmission". Mr Stonor and Ms Phillips relied not on this error but rather on the last sentence of paragraph 74 in which the judge said "despite the parents' evidence they cannot be telling the truth because the presence of gonorrhoea is itself evidence of abuse". They submitted that this demonstrated that the judge had been drawn into error

because her perception of the expert evidence was that there was a presumption that the presence of gonorrhoea in itself evidences sexual abuse. It was submitted that this amounted to a reversal of the burden of proof because it required the parents to rebut the presumption by establishing an innocent mode of transmission.

32. It was submitted on behalf of both appellants that this approach was reflected elsewhere – in paragraph 68 of the judgment ("something has happened to her – it does not pass through the air") and later in the response to the first request for clarification ("It is my view that the account given by M and Y does not provide any way in which A can have become infected and yet she has been. Therefore I conclude that they have not told the full truth about events of the weekend 4-6 February. They have lied about events that weekend.") At paragraph 77, the judge had observed that the account given by the mother and Y about the events of the weekend was uncorroborated by anyone else. It was submitted on behalf of the appellants that, as the family had spent the weekend alone, there was no one who could have corroborated their account and it was therefore unfair to identify the lack of corroboration as a reason to reject the parents' account. In attaching this weight to the absence of corroboration, the court was at risk of losing sight of where the burden of proof lay.

33. Further or alternatively under ground 4, it was submitted that, by formulating a presumption that the presence of gonorrhoea is in itself evidence of sexual abuse, the court prevented itself from considering each piece of evidence in the context of all of the other evidence and therefore did not undertake an overview of the totality of the evidence in reaching its conclusion. A proper survey of the wider canvas would have shown that the presence of gonorrhoea was the only evidence of sexual abuse. All the other features pointed the other way.

34. Mr Stonor and Ms Phillips rely in particular on the following features as pointing away from abuse.

(1) A, a verbal child aged 7, had not said that she was abused by anyone. She had been spoken to by a police officer in the presence of a social worker on three occasions and made no allegations.

(2) On the contrary, she had clearly indicated that 'nobody is allowed to see her private parts' and that 'nobody is allowed to touch it'. She had told her interviewers that if anyone did touch her private parts, she would tell the mother, father or her teacher.

(3) There was no physical evidence of abuse. A had exhibited no sexualised behaviour or other behaviours consistent with having been abused.

(4) The mother had a close and loving relationship with all the children. All the evidence about their contact with the mother and Y was positive.

(5) There had been nothing in the examination of the mobile phones of either the mother or Y to indicate a sexual interest in children.

(6) There had been a camera in the children's bedroom. The mother told the investigators about it. The judge accepted the mother's account and concluded as a result that A had not been abused at night. But instead of weighing this evaluation of the evidence into the balance of all of the evidence and leaving open the prospect

that perhaps sexual abuse had not happened at all, the court determined that the abuse happened during the day.

35. In response, Mr Feehan and Mr Hutchinson submitted that the judge had correctly identified the legal principles to be applied, including as to the burden of proof. The judge did not approach from a 'starting point' that gonorrhoea is sexually transmitted but summarised the expert evidence, accepted the expert opinion, and then addressed the appellants' evidence. The structure of the judgment, be it expert evidence then 'broad canvas" or vice-versa, is a matter for personal choice. The real issue for scrutiny on appeal was the substance of the analysis and in this case it was reasonable and justifiable. What the appellant asserted to be a reversal of the burden was, in fact, the process of the court carefully analysing whether the local authority had proved its case.

36. On behalf of the children's guardian, Mr Andrew Fox drew attention to the fact that the judge had stated on more than one occasion in the judgment that the burden of proof lay on the local authority and there was no reason to doubt that this was in her mind at all times. He submitted that a careful reading of the judgment demonstrated that the judge had in fact considered all aspects of the wider canvas relied on by the appellants.

37. Under ground 5, the appellants submitted that, although the threshold document had sought a finding that "A was infected with gonorrhoea by her mother and/or Y", the proposition that the mother and Y acted in concert to abuse A was neither explored in evidence by any of the parties nor raised by the court during the hearing. The local authority case in cross-examination had been: "if it wasn't you, it must have been your partner." None of the parties was invited to address the proposition in submissions. It was only when Ms Phillips raised her question for clarification after judgment that the judge responded that the mother could have infected the child "in some activity with Y, who was infectious". During those exchanges, the judge stated that she understood the local authority to be seeking a finding that the couple had been engaged together in sexually abusing the child and added "Mr Hutchinson will tell me if I have got this wrong." Mr Hutchinson responded that the local authority was seeking "no more than a pool finding".

38. It was the appellants' submission on appeal that the judge's finding was therefore a significant departure from the way the local authority put its case. The judge acknowledged that the "specific scenario of the two of them together abusing" was never put, but said that this was what she understood the finding to mean and "they both denied any abusive behaviour, so that encompasses them denying acting together". It was submitted that a finding that the mother and Y conspired together to abuse A elevated the case to a new level of seriousness and it was simply unfair to depart from the local authority's case so significantly without giving any indication to the parties that this possibility was in the court's mind so as to allow them to respond in evidence or through submissions. It was further submitted that in neither her judgment nor her response to the request for clarification did the judge adequately assess the evidence before making this finding, for example the evidence about the analysis of the mobile phones.

39. On behalf of the local authority, it was submitted that, in a case where all parties were on notice that a finding was sought against the mother and Y, whether individually or together, there was no requirement to put the matter of joint perpetration specifically in cross-examination. The mother and Y both knew what was alleged against them but the

mother persisted in her case that A had not been unsupervised at any serious level on the weekend in question and plainly allied herself in the defence of Y from any findings. No injustice was caused by not having put that potential finding to her in oral evidence only to have her deny it.

Discussion and conclusion

40. The threshold criteria for making a care or supervision order are set out in s.31(2) of the Children Act 1989:

> "A court may only make a care order or supervision order if it is satisfied—
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
>
> (b) that the harm, or likelihood of harm, is attributable to—
>
> (i) 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; or
>
> (ii) the child's being beyond parental control."

In short, as Peter Jackson LJ put it in *Re B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575 at paragraph 39:

> "before a court can make a care or supervision order, it must be satisfied of both subsection (a) – the 'significant harm' condition – and subsection (b) – the 'attributable' condition."

In the present case, there is no dispute that A suffered significant harm. The issue was its attribution.

41. S.31(2) does not require the court to identify a particular person as the perpetrator of significant harm before the threshold criteria are satisfied. What is required is for the local authority to prove on a balance of probabilities that the harm suffered was attributable to "the care given to the child … not being what it would be reasonable to expect a parent to give to [her]". Nevertheless, it is well established that a court should where possible endeavour to identify the perpetrator. The reasons were articulated by Wall LJ in *Re K (Children)* [2004] EWCA Civ 1181:

> "55. As a general proposition we think that it is in the public interest for those who cause serious non-accidental injuries to children to be identified, wherever such identification is possible. It is paradigmatic of such cases that the perpetrator denies responsibility and that those close to or emotionally engaged with the perpetrator likewise deny any knowledge of how the injuries occurred. Any process, which encourages or facilitates frankness, is, accordingly, in our view to be welcomed in principle.

> 56. As a second background proposition, we are also of the view that it is in the public interest that children have the right, as they grow into adulthood, to know the truth about who injured them when they were children, and why. Children who are removed from their parents as a result of non-accidental injuries have in due course to come to terms with the fact that one or both of their parents injured them. This is a heavy burden for any child to bear. In principle, children need to know the truth if the truth can be ascertained."

42. As a result, courts in care proceedings invariably endeavour to identify the perpetrator of injuries to a child. The suggestion expressed in another case that a court in care proceedings should "not strain to identify a perpetrator" has now been disavowed: *Re A (Children) (Pool of Perpetrators)* [2022] EWCA Civ 1348.

43. In order to make a finding that a particular person was the perpetrator of significant harm suffered by a child, the court must be satisfied on a balance of probabilities. But a series of cases has established that, where a finding as to the perpetrator cannot be made, the threshold is nevertheless crossed where there are a number of people who might have caused the harm and the local authority has satisfied the court that in relation to each of them there is a real possibility that they did: see *Lancashire County Council v B* [2000] UKHL 16, *Re O and N (Minors)* [2003] UKHL 18, *North Yorkshire County Council v SA* [2003] EWCA Civ 839, *Re S-B (Children)* [2009] UKSC 17, and *Re B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575.

44. The reason why the law allows the threshold to be crossed in these circumstances was explained by Lord Nicholls of Birkenhead in *Re O and N* at paragraph 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."

45. The rationale was expressed by Peter Jackson LJ in *Re B (Children: Uncertain Perpetrator)* in these terms:

> "46. ….the concept of a pool of perpetrators seeks to strike a fair balance between the rights of the individual, including those of the child, and the importance of child protection. It is a means of satisfying the attributable threshold condition that only arises where the court is satisfied that there has been significant harm arising from (in shorthand) ill-treatment and where the only 'unknown' is which of a number of persons is responsible. So, to state the obvious, the concept of the pool does not arise at all in the normal run of cases where the relevant allegation can be proved to the civil standard against an individual or individuals in the normal way. Nor does it arise where only one person could

> possibly be responsible. In that event, the allegation is either proved or it is not. There is no room for a finding of fact on the basis of 'real possibility', still less on the basis of suspicion. There is no such thing as a pool of one.
>
> 47. It should also be emphasised that a decision to place a person within the pool of perpetrators is not a finding of fact in the conventional sense. As is made clear in *Lancashire* at [19], *O and N* at [27-28] and *S-B* at [43], the person is not a proven perpetrator but a possible perpetrator. That conclusion is then carried forward to the welfare stage, when the court will, as was said in *S-B*, 'consider the strength of the possibility' that the person was involved as part of the overall circumstances of the case."

46. At paragraph 49 of his judgment in *Re B*, Peter Jackson LJ set out the approach which should be followed:

> "The court should first consider whether there is a 'list' of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability … Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a 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 A or B or C be placed into the 'pool'."

47. At paragraph 52, he added this practical guidance:

> "Lastly, as part of the court's normal case-management responsibilities it should at the outset of proceedings of this kind ensure (i) that a list of possible perpetrators is created, and (ii) that directions are given for the local authority to gather (either itself or through other agencies) all relevant information about and from those individuals, and (iii) that those against whom allegations are made are given the opportunity to be heard. By these means some of the complications that can arise in these difficult cases may be avoided."

48. It is unnecessary in this judgment to add to the extensive jurisprudence on uncertain perpetrators. I would, however, make three points which are directly relevant to the outcome of this appeal.

49. First, there are cases where the court considers first the issue whether the harm which the child has suffered was attributable to ill-treatment and only if it concludes that it was does it proceed to the second issue of the identity the perpetrator. There will, however, be cases where it is necessary to consider these issues not sequentially but simultaneously. In other words, it may be necessary to consider the identity of a possible perpetrator of ill-treatment alongside the question whether the harm which the child has suffered was attributable to ill-treatment at all. As Dame Elizabeth Butler-

Sloss P observed in *Re U, Re B (Serious Injuries: Standard of Proof)* [2004] EWCA Civ 567, the court in care proceedings "invariably surveys a wide canvas". The wide canvas includes the identity and character of the child's carers. In *Re T* [2004] EWCA Civ 558 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."

The identity of the potential perpetrators of ill-treatment may be relevant evidence in determining whether the harm suffered by the child was attributable to ill-treatment. In my view this was just such a case.

50. Secondly, although the paradigm example of an uncertain perpetrator case is one in which several potential candidates are identified as the perpetrator, the case law demonstrates that the task in which the court is engaged is to determine whether there is a real possibility that a named person is "the" or "a" perpetrator. It is open to the court to conclude that there is a real possibility that one or more perpetrators abused a child either alone or together. Thus the judge's ultimate conclusion in the present case that A was infected with gonorrhoea by Y alone or by Y and her mother is one which it was open to a court to reach if after a proper inquiry and analysis it was satisfied that there was a real possibility that the child had been infected either by Y alone or by Y and her mother. I consider that such an outcome is permissible for the reasons identified in the case law cited above. Whether it was an outcome which the judge in this case was entitled to come to in the manner she adopted is a different matter to which I return below.

51. The third point is to underscore the seriousness and potential difficulties of an uncertain perpetrator finding. As Peter Jackson LJ stressed in *Re B*, the person is not a proven perpetrator but a possible perpetrator. That conclusion is then carried forward to the welfare stage, when the court will, as was said in *S-B*, 'consider the strength of the possibility' that the person was involved as part of the overall circumstances of the case. In the present case, if the current findings stand, there is a significant possibility that the outcome of the proceedings will be that the three children in respect of whom, save for A's serious infection, there have been no concerns will be separated permanently from their mother. This underlines the necessity for procedural rigour as outlined by Peter Jackson LJ in *Re B.*

52. In the present case, there is no dispute that A suffered significant harm. The question was whether the harm she suffered was attributable to "unreasonable" care given to her by her mother and/or Y. The judge's task was to undertake a comprehensive analysis of the evidence about the cause of A's infection. In doing so, rather than considering the evidence in separate compartments, she was required to "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."

53. To my mind there is considerable force in the appellants' criticism of the judge's conclusion at paragraph 75 of the judgment that "despite the parents' evidence they cannot be telling the truth, because the presence of the gonorrhoea infecting A itself is evidence of abuse". I would not characterise this as a reversal of the burden of proof. But I agree with the appellants' submissions that by that statement the judge seems to have concluded wrongly on the medical evidence that the mere presence of gonorrhoea in the child was determinative and that she did not sufficiently weigh it up against the substantial evidence pointing the other way.

54. Furthermore, the judge considered the evidence about the identity of the perpetrator in a separate compartment after reaching a finding that the child had been abused. In the circumstances of this case, the identity of a possible perpetrator ought to have been considered as part of the analysis as to whether the child had been abused. The requirement to consider these issues together is illustrated by the error which the judge acknowledged she had initially made as to the possible identity of the perpetrator. Her initial conclusions included that there was a real possibility that A had been infected by her mother acting alone. After the challenge by counsel in the exchanges following judgment, the judge "revised the findings" so as to exclude this possibility but include, for the first time, the possibility that A had been infected by Y and the mother acting together. But her conclusion that the pool of perpetrators was different from the pool advanced by the local authority was relevant to the question whether the child had been abused at all.

55. This required the local authority and the court at the outset of the hearing to identify the various possible causes and thereafter the court to assess the evidence for and against each option. If it was considered by the local authority and the court that one possible cause of A's infection was an assault perpetrated by Y and the mother together, it was imperative that this possibility be identified clearly at the outset so that it could be addressed during the evidence and then in submissions. It needed to be considered as part of the overall assessment of the evidence, including the expert evidence about transmission, the evidence of A's statements that she had not been abused, and the evidence about the interrogation of the appellant's mobile phones. The proposition that the child had been abused by Y and the mother together would be likely to require consideration of evidential issues that would not otherwise arise.

56. It is plain from the judgment, the transcript of the exchanges between judge and counsel after judgment, and the response to the request for clarification that this simply did not happen in this case. Although the local authority threshold document sought a finding that "A was infected with gonorrhoea by her mother and/or Y", it was never suggested that she had been infected by the mother and Y acting together. If it had been the local authority's intention to advance that as one possible cause of the infection, it was incumbent on its representatives to say so in express terms.

57. In the course of the appeal hearing, we were provided with copies of the written closing submissions made to the judge. For the local authority, Mr Hutchinson delivered lengthy submissions which focused in detail on the evidence about transmission and made only brief references to the identity of the perpetrator. At the start of the document, he submitted:

> "The LA asserts that on the balance of probabilities and evidence available the Court cannot identify a perpetrator of sexual abuse

> on A and the source of her …gonorrhoea…. The LA invites the Court to find that both the mother and/or Y are placed in the pool of perpetrators."

He returned to the issue at the end of his submissions:

> "The mother and Y are intertwined in the evidence and the mother links her own observations to his actions that week and as a result she cannot be separated from his account, nor within the pool of perpetrators …. The court is unable to differentiate between the mother and Y to find a perpetrator and the LA recommends that the court make a pool finding."

At no point in his closing submissions did Mr Hutchinson address the possibility of a finding that A had been abused by the mother and Y acting together. The local authority's case was simply that both of them were in the pool of perpetrators.

58. It was not suggested to us in the course of the appeal that any question had been addressed to any witness about the possibility that A's infection had been caused as a result of an assault perpetrated by Y and the mother together. The judge acknowledged that the allegation was never put to either Y or the mother. There is no reason to doubt the judge's statement in the exchanges following judgment that this was how she understood the meaning of the finding sought by the local authority. But that does not remedy the consequences of the point not having been properly raised during the hearing.

59. The consequences of this omission are illustrated by a series of reported authorities that were cited to us in argument.

60. In *Re G and B (Fact-Finding Hearing)* [2009] EWCA Civ 10, Wall LJ accepted that a judge "is not required slavishly to adhere to a schedule of proposed findings placed before her by a local authority", but added this warning (at paragraph 16):

> "Where, as here, the local authority had prepared its Schedule of proposed findings with some care, and where the fact finding hearing had itself been the subject of a directions appointment at which the parents had agreed not to apply for various witnesses to attend for cross-examination, it requires very good reasons, in my judgment, for the judge to depart from the schedule of proposed findings. Furthermore, if the judge is, as it were, to go "*off piste*", and to make findings of fact which are not sought by the local authority or not contained in its Schedule, then he or she must be astute to ensure; (a) that any additional or different findings made are securely founded in the evidence; and (b) that the fairness of the fact finding process is not compromised."

I accept that the judge in the present case may not have realised that she was going "off piste" but her conclusion that there was a real possibility that A's infection may have been attributable to an assault perpetrated by Y and her mother acting together was never sought by the local authority nor contained in its schedule of findings. It was never mentioned in the hearing until after judgment. In those circumstances, the

conclusion was not securely founded in the evidence and the fairness of the process was compromised.

61. In *Re W (A Child)* [2016] EWCA Civ 1140, in which findings were made against a professional witness, McFarlane LJ said (at paragraph 95):

> "Where, during the course of a hearing, it becomes clear to the parties and/or the judge that adverse findings of significance outside the known parameters of the case may be made against a party or a witness consideration should be given to the [inter alia] …ensuring that the case in support of such adverse findings is adequately 'put' to the relevant witness(es), if necessary by recalling them to give further evidence…."

In this case, I would characterise the judge's finding that "A was infected with gonorrhoea by Y alone or by Y and her mother" as outside the parameters of the case identified by the local authority. I agree with the appellants that it was a significant departure from the way the local authority put its case. No consideration was given to ensuring that the case in support of such a finding was put to Y and the mother. And as Moylan LJ observed during the hearing, the case needed to be not merely "put" but raised, advanced and articulated.

62. In *Re B (A Child)* [2018] EWCA Civ 2127. Peter Jackson LJ observed (at paragraph 15):

> "It is an elementary feature of a fair hearing that an adverse finding can only be made where the person in question knows of the allegation and the substance of the supporting evidence and has had a reasonable opportunity to respond."

In that case, it was argued that a finding that a mother had been the perpetrator of non-accidental injuries sustained by her child was unfair because no other party was putting an explicit case that she should be identified as the sole perpetrator, and also because she had not been questioned about certain matters that the recorder relied upon in reaching his conclusion; as a result, she was deprived of the opportunity to answer the case against her. Rejecting that submission, Peter Jackson LJ (with whom the other members of the Court agreed) cited passages from the evidence and submissions and concluded (paragraph 25):

> "All this material overwhelmingly contradicts the mother's case that no party was seeking a finding that she was responsible for the injuries. There is no possible way in which she could have considered herself immune from jeopardy…."

In contrast, in the present case I am satisfied that the specific finding that the mother was jointly involved with Y in sexually abusing A was never raised by any party or the court until after judgment. Neither the mother nor Y knew of this allegation. Neither had a reasonable opportunity to respond, either in evidence or argument. In this respect the "features of a fair hearing" were regrettably absent.

63. In *Re L (Fact-finding: Fairness)* [2022] EWCA Civ 169, a father appealed against findings made against him in care proceedings that went beyond those set out in the local authority threshold document, leading to a conclusion that the father had subjected the mother to coercive control. At paragraph 70 of its judgment, this Court said:

> "we start by considering the disparity between the case advanced by the local authority and the recorder's findings. As Snowden LJ observed in the course of the hearing, the greater the extent of the disparity, the greater the need for procedural safeguards."

Having considered the arguments in that case, this Court dismissed the appeal At paragraph 91, we said:

> "we consider that the totality of the evidence before the recorder was plainly sufficient to support the recorder's findings and that no party was unfairly disadvantaged by the process by which the findings were made. It would have been better for the parties to have identified the discrepancy between the local authority's threshold document and the case which [another party] intended to advance, and to have clarified expressly at the outset when the decision was taken to proceed with the fact-finding, that coercive control was potentially to be part of the argument on threshold. But counsel for the mother and [the father] plainly knew that the point was live and had the opportunity to address it whilst the evidence was being taken and in argument. In those circumstances we see no basis upon which this court could properly set aside the findings."

In contrast in the present case, the mother and Y did not know that the possibility that they had jointly abused A was a "live" issue until after judgment had been delivered. They had no opportunity to address it in evidence or submissions. Furthermore, as was observed in *Re L*, "the greater the extent of the disparity, the greater the need for procedural safeguards". The disparity between the case advanced by the local authority and the conclusion as to perpetrator was substantial. I agree with the appellants' submission that a finding that the mother and Y abused A together elevated the case to a new level of seriousness. It is axiomatic that a party against whom findings are sought in care proceedings is entitled to notice of the findings sought, the evidence on which they are based, and a fair opportunity to rebut them. It was imperative that the possible finding that A had been sexually assaulted by Y and the mother acting together be identified fairly and squarely so that the mother and Y had a fair opportunity to address the allegation.

64. For these reasons I concluded that the appeal should be allowed on grounds 4(ii) and 5. The only fair outcome is for the fact-finding hearing to be reheard before another judge to be allocated by the Family Division Liaison Judge. In my view the rehearing should encompass all of the findings sought by the local authority. The whole issue of attributability of A's infection remains in dispute and must be reconsidered.

65. In those circumstances, I consider it would be unnecessary and potentially unhelpful for this Court to reach any decision on the remaining grounds of appeal. As explained above, they all relate, directly or indirectly, to the judge's analysis of the expert

evidence. There is a risk that any comments by this Court about that evidence may unintentionally influence the conduct or outcome of the rehearing. I emphasise that nothing I have said in this judgment should be taken as indicating any view as to the right outcome of the rehearing.

66. Whilst it is not for this Court to prescribe the scope of the rehearing, I record that I was surprised to learn during the appeal hearing that the judge had not been presented with the full evidence of statements made by A in the course of the investigation. At our request, following the hearing we were supplied with copies of the documents put before the judge. They included a social worker's report prepared for the initial child protection conference which contained an abstract from a conversation with the child in which she made the comments recorded in paragraph 67 of the judgment. In addition, we were shown an entry from a police log which recorded: "A and her sibling have not made any disclosures are [sic] 3 attempts by Police and Social Care". For my part, I anticipate that the judge conducting the rehearing would expect to see evidence of what was said by A during those conversations. All statements made by the child should be part of the totality of the evidence on the basis of which the next judge will be asked to make findings.

67. Those were my reasons for joining with my Lords in deciding that the appeal should be allowed. In conclusion, notwithstanding my observations in allowing the appeal, I wish to acknowledge the careful and conscientious manner in which the judge approached her task. The fact that we have allowed this appeal should be seen as another example of what Peter Jackson LJ in *Re B* described as the "complications that can arise in these difficult cases".

LORD JUSTICE COULSON

68. I agree. I only add this. In my experience, the practice in family cases of making oral and written requests to the judge for clarification of matters in his or her judgment can sometimes amount to no more than an illegitimate attempt to reargue the case, or to bamboozle the judge into errors or inconsistencies. But in the present case, the clarification process was not only properly conducted but, for the reasons explained by Baker LJ, it also led to the identification of a number of the critical errors that the judge had made. It was therefore an extremely valuable exercise.

LORD JUSTICE MOYLAN

69. I agree with both judgments.