

SAMPLE NEWSLETTER

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THE CHILDREN ACT 1989 IN ACTION

SECTION 47 INVESTIGATION: RESPONSIBLE LOCAL AUTHORITY

A child, **A**, aged 8, lived with his mother in local authority area **X**, having staying contact with his father and step-mother who live in local authority area **Y**.

While **A** was staying with his father in **Y** that local authority received a referral from the step-mother which amounted to an allegation that the child had suffered sexual abuse at the hands of his mother. Upon being informed of that allegation, the mother initially agreed to her son remaining with his father in **Y** for the immediate future.

The issue immediately arose as to whether receiving this information from the step-mother triggered a duty upon **Y** to investigate under **section 47**. **Section 47(1)(b)** provides –

*‘Where a local authority – have reasonable cause to suspect that a child who **lives**, or **is found**, in their area is suffering, or is likely to suffer, significant harm, the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child’s welfare.’ (Emphasis added)*

In **Re S (Sexual Abuse Allegation: Local Authority Response) [2001] 2 FLR 776**, Scott Baker J (at **para 36**) said that the words *‘reasonable cause to suspect’* is a low threshold triggering the local authority’s duty under **section 47**. Accordingly, it appears that the information received by **Y** from **A**’s step-mother was sufficient to engage **section 47**.

Whether **Y** were under that duty depends upon **A**, on the date the step-mother’s referral was received, being a child *‘who lives’* or *‘is found’* in that local authority’s area. Unlike the duty to accommodate a child in need who requires accommodation on account of one of the conditions within **section 20(1)** being met in respect of him - which is engaged simply by the child’s physical presence in their area - the duty under **section 47** is in respect of children living or found within a local authority’s area.

None of the authorities decided by reference to **section 47** addresses this issue directly; however, in **Gogay v Hertfordshire County Council [2001] 1 FLR 280** Hale LJ (at **para 27**) said,

*“It is immediately apparent that **section 47** is principally directed towards the investigation of the circumstances of children living at home or who have been removed from home in an emergency.”*

Although these comments suggest that the duty under **section 47** is engaged in respect of children who are (or were before their removal) living at home in the area of the local authority upon which the **section 47** duty falls, this writer suggests that those comments can be confined to a child **who lives** in the local authority’s area and do not address the alternative triggering condition – i.e. that the child **is found** in the local authority’s area.

A person (or object) can be ‘found’ as a result of a search or purely by chance; in **A**’s case, it appears that **Y** were unaware of his presence in their area before they were contacted by his step-mother. Accordingly, on that day **Y** discovered the whereabouts (in their area) of a child whose presence in their area was not previously known to them. Put another way, as a result of the step-mother’s allegation, **Y** came across the child by chance and without any conscious effort on their part.

If the wording in **section 47** was *‘is found to be, in their area’*, this would result in mere presence being sufficient. Because the words *‘to be’* are absent, this perhaps supports the argument that the words *‘is found’*

require some conscious act of ‘finding’ having been taken by the local authority (or some other body such as the police) which results in the child’s presence being discovered.

On balance, however, it is suggested that, interpreting the word **found** literally, a child’s presence which is discovered by chance and without any conscious effort by the local authority suffices to engage the duty under **section 47** where that presence is discovered as a result of the local authority receiving information which causes them to suspect that the child is suffering, or is likely to suffer, significant harm.

Accordingly, when, upon receiving the step-mother’s referral, **Y** liaised with the **Y** police and arranging for a paediatric examination and video interview of the child that local authority correctly assumed responsibility for setting the **section 47** investigation in motion.

Liaison between Y and X

Y contacted **X** six days after the initial referral and **Y**’s records state that **X** agreed on that date to allocate a social worker to undertake their part of the **section 47** investigation. **Y** also records a formal request having been made by **Y** to **X** to carry out the **section 47** investigation and to allocate a social worker for this purpose, **Y** understanding that from this date case responsibility passed to **X**. Against this, it appears that **X** were of the view that **Y** should be responsible for the **section 47** investigation as the disclosure was made in the area of **Y** at a time when **A** was temporarily resident in **Y**.

Section 47(12) provides –

‘Where a local authority are making enquiries under this section with respect to a child who appears to them to be ordinarily resident within the area of another authority, they shall consult that other authority, who may undertake the necessary enquiries in their place.’

Co-operation between local authorities is reinforced by **section 47(9),(10),(11)(a)** which provides that where a local authority are conducting enquiries under **section 47** it shall be the duty of any local authority to assist them with those enquiries (in particular by providing relevant information and advice) if called upon by the investigating authority to do so, unless it would not be reasonable in all the circumstances of the case to do so.

It appears that when **Y** contacted **X**, **A** remained ordinarily resident in the area of **X**. Further, when **Y** contacted **X** on that date and, (assuming **Y**’s records are accurate in this regard), **X** agreed to allocate a social worker to undertake their part of the **section 47** investigation, **Y** (within the meaning of **section 47(12)**) consulted with **X** which in turn agreed to undertake the necessary enquiries, or at least part of them.

Alternatively, if **Y** remained as the investigating local authority, they called upon **X** to assist them (within the meaning of **section 47(9)**), which **X** were, in the circumstances, duty bound to do.

Notwithstanding their response (as recorded by **Y**) to the request from that local authority, **X** did not allocate a social worker for the purposes of the **section 47** investigation until 22 days later and then only for the purpose of dealing with the issue of contact between **A** and his mother. Assuming the above analysis of the respective duties of the local authorities is correct, it appears that, by failing to allocate a social worker, **X** failed to respond with sufficient urgency to either (i) their acceptance of responsibility to conduct the **section 47** investigation [**section 47(12)**] or (ii) the call for assistance made under **section 47(9)**.

The implications of a direction for a section 37 investigation made in the private law proceedings issued by A’s mother

Complicating matters further, the day after **Y** contacted **X** (ie 7 days after the initial referral from the step-mother), **A**’s mother applied for a residence order in respect of her son. Seven days following the issuing of that application, a court sitting in the area of **X** directed that local authority to undertake a **section 37** investigation, the local authority responsible for undertaking a **section 37** investigation being the authority in whose area the child concerned is ordinarily resident – **section 37(5)(a)**.

Although there are similarities between investigations under **section 37** and **section 47** (under both the investigating local authority must consider whether an order should be applied for in respect of the child – **section 37(2)(a)**; **section 47(3)(a)**), there are a number of important differences.

- (a) The former is directed by a court seized of private law proceedings whereas the latter is not.
- (b) An investigation under **section 47(1)(b)** is triggered when the local authority have **reasonable cause to suspect** that a child is suffering or is likely to suffer significant harm. Under **section 37(1)**, the investigation is directed where **it appears to the court that it may be appropriate for a care order or supervision order to be made with respect to [the child]**.

Following **Re S (Sexual Abuse Allegation: Local Authority Response) [2001] 2 FLR 776** [see above], it appears that the **section 47(1)(b)** threshold is lower than that under **section 37(1)**.

- (c) A court making a **section 37** direction may at the same time make an interim care order or interim supervision order – **section 38(1)(b)**.

From the above, it appears that in the context of **A's** case, the **section 47** investigation was overtaken by the **section 37** investigation directed to be undertaken by **X** only 14 days after the initial referral from **A's** step mother. Although there is no requirement under **section 37** for another local authority to assist the investigating authority with their enquiries, **Y** nonetheless agreed to continue to play a role in the wider investigation and assessment of the child's family.

A DIGEST OF AND UPDATE ON RECENT DECISIONS & OTHER MATERIAL

PATERNITY The Blood Tests (Evidence of Paternity) Regulations 2008 SI 972. These regulations came into force on **25.04.2008** and apply in relation to directions given by courts under the **Family Law Reform Act 1969 section 20(1)**. They amend the **Blood Tests (Evidence of Paternity) Regulations 1971** to bring the terminology into line with that used by the **Mental Capacity Act 2005**, in addition to the following changes; references to regulation numbers are to the amended **1971 Regulations**. (a) **Reg 6(2)** The exception that a photograph is not required for a subject under the age of 12 months is removed. (b) **Reg 6(8)** Samples are required to be sent in tamper proof containers. (c) **Reg 12(1)** The sampler's fee is increased from **£27.50** to **£37.90**. (d) **Reg 8A(1)** A body is eligible for accreditation if it is accredited to the relevant standard by a body that is a signatory to the International Laboratory Accreditation Cooperation Recognised Regional Cooperation Board.

FEES IN PUBLIC CHILDREN ACT PROCEEDINGS The Family Proceedings Fees Order 2008 SI 1054 [High Court & County Court]; The Magistrates' Courts Fees Order 2008 SI 1052 [FPC] These orders introduce as from **1.5.2008** a **£150** fee on an application for an **Emergency Protection Order** and the following incremental fees on an application under **section 31**:- (a) **£2,225** on application; (b) **£700** if an **Issues Resolution Hearing** or **PHR** is listed (if the court lists more than one IRH or PHR, the fee is payable only once); (c) **£1,900** if a **Final Hearing** is listed.

If a final order is made at a **Case Management Conference**, **£500** of the initial **£2,225** is refunded. Further, the **£700** and **£1,900** fees will be refunded if that hearing is cancelled (eg because a final order is made at an earlier hearing), the application is withdrawn or the hearing is no longer needed. A refund will not be given if the IRH, PHR or final hearing is adjourned to a later date or to a date to be fixed.

No fee is payable in relation to any IRH, PHR or final hearing listed to be heard between **1.5.2008 – 14.5.2008**.

The fee on an application for a **Placement Order** under the **ACA 2002** is **£400**. All the above fees relate to applications in respect of one or more children, only one fee being payable. If a local authority apply initially for an EPO, followed by an application for a care order and a placement order and the case goes to a final hearing, the total fees paid will be **£5,375**.

PUBLIC CHILDREN ACT PROCEEDINGS: PRESERVING THE ANONYMITY OF THE LOCAL AUTHORITY *Re B; X Council v B* [2008] 1 FLR 482 Munby J **HELD** that the correct approach to the issue of whether a local authority should continue to be anonymised is whether there is some proper basis for continuing the local authority's anonymity. In such a case, the local authority's fear of criticism – however justified that fear may be and however unjustified the criticism – is not of itself a justification for affording the local authority anonymity – at **paras 15 & 18**.

DISCLOSURE OF MATERIAL TO EXPERTS *Re S (A Child)* **Court of Appeal 5.3.2008** The Court of Appeal **HELD** that a local authority should not have disclosed to an expert witness in care proceedings allegations of previous sexual misbehaviour made against the child's father and warned that experts should not be burdened with the task of reading through unnecessary or peripheral documentation that might distract their attention from the essential task at hand. However, there was no reason why that expert should not be provided with details of the father's acquittal in relation to two prosecuted incidents of sexual misbehaviour.

REMOVAL OF A CHILD FROM THE MOTHER'S CARE UNDER AN INTERIM CARE ORDER: IMMINENT RISK OF SERIOUS HARM *Re L (A Child)* [2007] EWHC 3404 (Fam) A local authority, supported by the Children's Guardian (who, in the opinion of Ryder J had taken "*an absolute view about the mother to the point of being dogmatic*" – at **para 17**) sought the removal of a child from her mother under an ICO. The local authority advanced the argument that the mother maintained a covert, continuing relationship with the child's father, despite it being the mother's case that she had separated from him and needed support to maintain this. The local authority's interim case was based almost in its entirety upon the probability that the mother's relationship with the father would continue. There was no dispute that the father posed a risk of harm to the child.

During an initial assessment, the mother had demonstrated that she could provide an acceptable level of practical care for her child; that assessment had not addressed the issue of the mother's continuing relationship with the father. A report suggested that the mother should be allowed a second residential assessment, away from the father, to demonstrate her ability to cope with the child as a single parent; this proposed assessment was opposed by the local authority and the Children's Guardian.

In the opinion of Ryder J, if the child were to be removed from the mother under an ICO before she was given an opportunity to undergo the proposed second residential assessment, this would effectively determine the final outcome of the proceedings. While he acknowledged that ultimately the local authority and Children's Guardian may be right in their pessimistic opinion about the mothers' ability to separate from the father, in His Lordship's opinion "*that is a matter for the final hearing or issues resolution opportunity when all of the evidence will be available to the court.*" (At **para 14**)

In, inter alia, **(a)** making an ICO; **(b)** declining to approve the child's removal from the mother under an ICO upon the local authority undertaking not to do so without bringing the matter before the court and **(c)** directing under **section 38(6)** that the mother and child be placed in a residential unit for a period of up to 3 months to assess her ability to separate from the father and thereby to provide emotionally for the child, Ryder J commented (at **paras 9/10**) on what he saw as the confusion in the local authority's mind as to the **section 38(2)** 'threshold' for the making of an ICO (which was satisfied in this case) and removal of the child under such an order.

"It has been the Local Authority's assumption and, in my judgment, that of the guardian, that all that needs to be demonstrated is that an interim threshold exists for the Local Authority to succeed in persuading the Court that [the child] should be removed. That is explicit in the documentation filed before this court including the Local Authority's statement of facts. That is a profound error of perception that regrettably on the facts of this case amounts also to an error of law. Nowhere is there a recognition that removal is a separate consideration from the existence of the interim threshold or the need for an interim order.

*Even more stark is the failure to acknowledge the need to consider on the alleged facts of this case whether: (a) there is an imminent risk of really serious harm i.e. whether the risk to [the child's] safety demands immediate separation (per Thorpe LJ in *Re H (a child) (Interim Care Order)* [2003] 1FCR*

350); and (b) if not, the question whether mother is able to provide good enough long term care should be a matter for the Court to decide at a final hearing not to be litigated at an interim hearing which effectively pre judges the full and profound trial of the Local Authority's case and the parents' response to the same thereby usurping or substituting for the function of the final hearing or issues resolution processes: *Re G (minors) (Interim Care Order) [1993] 2 FLR 839 at 845 CA and Re H (Supra) at paragraph 38.*"

ACA 2002 SECTION 84: PARENTAL RESPONSIBILITY TO FACILITATE A CHILD'S REMOVAL FROM THE JURISDICTION FOR THE PURPOSE OF ADOPTION ABROAD *Re G (A Child)(No. 2) [2008] EWCA Civ 105_2* As a sequel to the report of this case in *Newsletter Vol. XXI p.126*, the local authority and guardian approached the American Adoption Agency [AAA] which responded by way of a letter. The letter informed the court that provided an order was made under **section 84(1)** and provided all the requisite English procedures had been complied with, the child would be authorized to enter Illinois and, subject to post-placement supervision and a favourable 'investigative' report by the AAA, a final adoption order was likely to be made.

In the President's judgment, the terms of this letter sufficed to satisfy the requirements of the **AFER 2005 reg. 10(b)(iv)**.

The Court of Appeal was also concerned about the effect of reg 10(c) which provides 'in the case of a child placed by an adoption agency the prospective adopter has confirmed in writing to the adoption agency that he will accompany the child on taking him out of the United Kingdom and entering the country or territory where the adoption is to be effected, or in the case of a couple, the agency and relevant foreign authority have confirmed that it is necessary for only one of them to do so.'

The AAA informed the Court that neither it nor the Illinois State Authorities had a view on whether both **Mr & Mrs C** (the applicants) should accompany the child to the USA or **Mrs C** alone. Accordingly, although the Court of Appeal considered it preferable for both applicants to accompany the child, the court was content to leave that decision to the good sense of the couple.

Having so decided, the Court of Appeal dismissed the mother's appeal against the order made under **section 84(1)** in the applicants' favour.

SPECIAL GUARDIANSHIP ALLOWANCE: PAYMENT BY LOCAL AUTHORITY TO SPECIAL GUARDIAN R (on the application of B) v Lewisham LBC & MB [2008] EWHC 738 (Admin) A child, **M**, was placed with her maternal grandmother by the local authority under an ICO, the child's mother being unable to care for **M** on account of her drug and alcohol abuse. The grandmother provided **M** (who has medical, sleeping and developmental problems) with an extremely high level of care and at the final hearing in the care proceedings it was agreed between all parties that **M** should remain placed with her grandmother under a Special Guardianship Order.

As a local authority foster carer the grandmother was paid the full kinship allowance of **£141.38** per week; she also receives income support and other state benefits. The local authority offered to pay her **£114.61** per week as a special guardian, made up of a basic allowance of **£82.27** plus 15% to reflect the high level of physical care required by **M** and **£20.00** for taxis. These figures were calculated in line with the local authority's Special Guardianship Allowance Scheme which allied the special guardianship allowance to the local authority's adoption allowance.

The grandmother, supported by the Children's Guardian, considered that the local authority were offering insufficient financial support and argued that it was wrong for the local authority to have linked the special guardianship allowance to the adoption allowance. The local authority did not agree. As Black J commented (at **para 11**),

"It would have been open to the grandmother to withdraw her application for special guardianship at that stage in the light of the financial provision proposed by the local authority with the result that M would have remained in the care of the local authority. Given the quality of the care offered by the

grandmother, in all probability M would have continued to be placed with her as a kinship placement and, assuming the grandmother received at least the full kinship allowance, the family would have been significantly better off. She did not take this course. She recognised that it was in M's best interests for her to become her special guardian and decided to invite the court to make a special guardianship order and then to commence judicial review proceedings in relation to the financial issues. Accordingly, on 8 November 2006, District Judge Crichton made a special guardianship order on the express understanding that the grandmother would commence these proceedings for judicial review in relation to the issue of financial support."

The law and guidance The Special Guardianship Regulations 2005 reg 6 sets out the circumstances in which financial support is payable to a special guardian or prospective special guardian, the purpose of such payments being (a) facilitating arrangements for a person to become a SG of a child where the LA considers such arrangement to be beneficial to the child's welfare; or (b) to support the continuation of such arrangements after a SGO is made. The conditions for paying financial support are, inter alia, (a) where the LA considers it is necessary to ensure that the SG or PSG can look after the child; (b) where the LA considers that the child needs special care which requires a greater expenditure of resources than would otherwise be the case because of the child's illness, disability, emotional or behavioural difficulties or the consequences of his past abuse or neglect. Reg 13 then sets out the financial considerations the local authority must take into account.

Special Guardianship Guidance issued by the Department for Education and Skills provides, at para 65, *'In determining the amount of any ongoing financial support, the local authority should have regard to the amount of fostering allowance which would have been payable if the child were fostered. The local authority's core allowance plus any enhancement that would be payable in respect of the particular child, will make up the maximum payment the local authority could consider paying the family. Any means test carried out as appropriate to the circumstances would use this maximum payment as a base.'*

As Black J pointed out (at para 20), in **R v Islington LBC ex parte Rixon [1997-8] 1 CCLR 119**, Sedley J (at 123) said that local authorities are required by the **Local Authority Social Services Act 1970 section 7** [which provides that 'local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State.'] *"to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course."* Accordingly, whilst the Guidance does not have the force of statute, it should be complied with unless circumstances indicate exceptional reasons justifying a variation.

The decision In finding the local authority's Special Guardianship Allowance Scheme to be unlawful and quashing it, Black J HELD,

1 The local authority were wrong to link the SGO allowance to the Adoption allowance.

*"It seems to me that it is likely that those giving the Guidance intended that the local authority's fostering allowances would serve as a ranging shot for the local authority's consideration of what their special guardianship provision should be or at least be held firmly in mind when fixing that provision. That is the natural import of the first sentence of **paragraph 65** and it is an interpretation which allows the paragraph as a whole to have an integrity which is completely missing on the local authority's interpretation. One must be careful not to construe the Guidance as if it were a statute but it should, in my judgment, be viewed as if the first sentence of **paragraph 65** were the introduction, making it clear that fostering allowances were relevant, which the second sentence refines by reference to the fostering core allowance.*

*Whilst I accept that the Guidance does not have statutory force, the local authority had a duty substantially to follow it unless there was good reason to do differently. Nothing that they have argued in these proceedings comes close to justifying a radical departure. It would appear that in reality they have failed to understand the central importance that **paragraph 65** gives to the amount paid by way of fostering allowances and they cannot therefore have had regard to those allowances in the way in which they were required by that paragraph to do. They made, instead, a rigid link with adoption allowances which was not in accordance with the Guidance. It follows that their resulting scheme is unlawful."* (At paras 47 & 54)

2 The SGO allowance should not discriminate against a Special Guardian

*“.....putting it at its lowest, a local authority is not free, in my view, to devise a scheme which fails to do what is required by **regulation 6** or which dictates that some types of placement for a child carry a significant financial disadvantage in comparison with others or, worse, would impose such a financial strain on a carer that they would be forced to choose another type of placement. This local authority’s scheme does this in relation to the grandmother and for that reason and in the light of the local authority’s failure to have proper regard to the regulations and Guidance is unlawful and must be quashed.” (At para 57)*

SEXUAL ABUSE: STANDARD OF PROOF: SUBJECTIVITY OF MEDICAL ASSESSMENTS OF PHYSICAL SIGNS Leeds City Council v YX & ZX (Assessment of Sexual Abuse) [2008] EWHC 802 (Fam) The background to Holman J’s decision is taken from a note in **Family Law Week**.

‘The child at the centre of the proceedings was **A**, the daughter of **YX** and **ZX**. There had never been any concerns raised about the family, which also contained an elder brother of **A**, **B**. Indeed all the evidence pointed to a stable and close family. The proceedings were set in motion after the parents took **A** to hospital after they had discovered blood while washing **A**’s underwear. An examination followed and, at the parents’ request, further consultations were arranged as the possibility of sexual abuse had been raised. Other examinations followed, including colposcopy, which eventually led to the removal of the children to the maternal grandparents following second opinion from another paediatrician.

In the hearings that followed there was a series of medical reports and a finding that the second opinion was not sufficiently independent because of the close work related relationship of the second and first experts. This led to a third examination from another expert. Finally, the parents successfully applied to get further expert opinion from Professor Heger from the US and her evidence led to further expert opinion from dermatologists.

In his judgment Holman J reviews the evidence of all the experts involved. That also involved consideration of the unpublished (at the time of the hearing) guidance contained in ‘**The physical signs of child sexual abuse, an evidence based review and guidance for best practice**’ produced by the Royal College of Paediatrics and Child Health. These new guidelines had the result of making two of the experts more cautious about their diagnosis of sexual abuse from the physical signs presented; although throughout Professor Heger stated that the physical signs were entirely normal and not indicative of abuse. It was her evidence that led to the instruction of the dermatologists who postulated that the bleeding could be caused by eczema from which **A** suffered. As part of his inquiry Holman J also spoke to **A**, who had consistently denied that any abuse had taken place, and he did factor this conversation into his conclusions.’

Holman J’s decision

*“These are care proceedings brought by the local authority. They depend entirely upon proof that **A** has indeed been sexually abused in some way. The burden of proof is upon the local authority. The standard of proof is the civil standard of the balance of probability. I am quite clear that the local authority have not discharged that burden. I am not satisfied that it is more probable than not that **A** has been sexually abused. That conclusion is sufficient to dispose of the case.*

*However, I have given prolonged, anxious and very careful consideration to whether I can and should go further and make a positive finding that **A** has not been sexually abused and, if so, with what degree of probability or certainty. I can of course only do so if, after due consideration, that is the true state of my mind. The difficulty lies in being positive about a negative. Since there are ‘worrying’ features about the case, it is impossible to eliminate all doubt. However, viewing every aspect of the case as a whole, I do feel sure, and so find, that **A** has not been sexually interfered with or abused at all.”*

At the end of his judgment, Holman J (at **para 143**) stressed the importance of including every aspect of the case in any assessment of whether the alleged abuse has occurred.

“I wish only to stress the very great importance of including in any assessment every aspect of a case. Very important indeed is the account of the child, considered, of course, in an age appropriate way. An express denial is no less an account than is a positive account of abuse. It is also, in my opinion, very important to take fully into account the account and demeanour of the parents, and an assessment of the family circumstances and general quality of the parenting. The medical assessment of physical signs of sexual abuse has a considerably subjective element, and unless there is clearly diagnostic evidence of abuse (e.g. the presence of semen or a foreign body internally) purely medical assessments and opinions should not be allowed to predominate. Even 20 years after the Cleveland Inquiry, I wonder whether its lessons have fully been learned.”

SECTION 31(2): PERMISSIBLE FINDINGS: STANDARD OF PROOF: RE H & R TO BE ‘REVISITED’ IN THE HOUSE OF LORDS

A County Council v B & Others [2007] EWHC 2395 (Fam) - Schedule A (as amended in the revised Schedule A [2007] EWHC 2688 (Fam); [2008] EWCA Civ 282 (Court of Appeal)

In the High Court, Charles J conducted a finding of fact hearing over 30 days, 25 of those days given to oral evidence and 5 to submissions. His Lordship heard the oral evidence of approximately 20 witnesses.

An issue which was critically fought during the trial was whether **R**, the 15 year old stepdaughter and adopted daughter of **Mr B**, had been sexually abused by him. The authority central to Charles J’s determination of this issue was the House of Lords’ decision in **Re H & R [1996] 1 FLR 80** which makes clear that for the court to find that the alleged harm had occurred (and that the **section 31(2)** threshold was reached in this regard – in **A County Council v B** that **R** had been sexually abused by **B**) the evidence had to be of sufficient cogency for the court to be satisfied (and find) that it was more likely than not that the sexual abuse as described by **R** had taken place. Put another way, the court had to find that the harm was a ‘probability’ and not a mere ‘real possibility’, even if that ‘real possibility’ was one which could not sensibly be ignored.

Re H & R also makes clear that once the alleged harm has been established to the requisite standard of proof, the court can then proceed to find a likelihood of harm (ie in respect of another child in the household) on the basis of there being a real possibility that cannot sensibly be ignored. What cannot be done is to move to a ‘real possibility’ without first finding the probability of the alleged actual harm having occurred.

Having heard the evidence and assessing that evidence by reference to the principles stated in **Re H & R**, Charles J concluded (at **para 28 to Schedule A**),

*“(i) I cannot make a properly founded and reasoned conclusion that it is more likely than not that **R** was sexually abused by **Mr B** as she alleges or substantially as she alleges, and thus that she is telling the truth, (ii) I cannot make a properly founded and reasoned conclusion that it is more likely than not that **R** was not sexually abused by **Mr B**, and thus that **Mr B** is telling the truth, (iii) my answer to the question which of the above two possibilities (and thus which of **Mr B** and **R** is telling the truth) is more likely would be a guess because I cannot even answer that question by attributing and giving weight to the competing arguments on a properly founded and reasoned basis, (iv) on an approach founded on evidence and reasoning, and not on suspicion and/or concern, I am unable to conclude that there is no real possibility that **Mr B** sexually abused **R** as (or substantially as) she asserts or in some other way and I have therefore concluded that there is a real possibility that he did, and (v) I have concluded that if **Mr B** was sexually abusing **R** in the persistent way she alleges it is more likely than not that **Mrs B** either (a) knew that this was happening and did nothing about it, or (b) saw and heard things that would have indicated to any reasonable adult that **R** was being sexually abused by **Mr B**, or that there was a very serious prospect that this was the case and did nothing about it, apart from after **April 2006** making threats to accuse **Mr B** of such abuse.”*

In the words of Thorpe LJ in the Court of Appeal (at **para 3**),

“These conclusions resulted from the judge’s assessment of most if not all family members as being unreliable witnesses, and his difficulties were compounded by a family tradition of raising allegations

and counter-allegations that had no firm foundation in fact. So, what was to be done with the essential preparations for a welfare hearing? The judge was very troubled by the position in which he found himself...”

So troubled was Charles J that he invited high level assistance from the Bar and at a 5 day hearing he heard submissions from leading counsel. In a judgment delivered following that hearing, Charles J referred to the ‘fog’ analogy used by Lord Nicholls in **Lancashire County Council v B [2000] 1 FLR 583 at 588H – 589C** and concluded that the ‘fog’,

“...exists both in cases where (a) the position is that if harm was inflicted the perpetrator is clear and thus the issue is whether the harm was inflicted, and (b) the position is that inflicted harm is clear or established to the appropriate standard and the outstanding issue is as to who inflicted it. In my view in both of these types of case the court may not be able to penetrate that fog with sufficient clarity to decide the relevant issue, and thus what happened, to the civil standard.

For demonstration purposes only, because in my view a mathematical or 51/49 approach does not properly reflect the task facing the court, the factors in the evidence taken as a whole could show that there was a 40% chance that there had been inflicted harm or abuse and a 35% chance that there had not (or vice versa). In percentage terms that means that: (a) on a real possibility test or approach neither result can be excluded, and (b) the final 25% remains to be attributed.

That attribution involves a further consideration and weighing of a range of diverse factors and the court may not be in a position to penetrate the uncertainties with sufficient clarity to reach an attribution that means that a conclusion that it is more likely than not (51/49) that harm or abuse has, or has not, been inflicted. In that sense the unattributed portion, or the unpenetrated fog, results in a draw. Further as I have said in my view an answer to the question which of the two choices is more likely will not necessarily give sufficient clarity to say whether one of them is more likely than not to be the truth.” (At paras 21-23 to Schedule A)

Put another way, the court is left with a ‘real possibility’ but not a ‘probability’.

The central issue The central question identified by Charles J was what the position is if the court, applying the evidential approach set out in **Re H & R** cannot reach a finding of fact that harm has been inflicted on a child but is of the view that there is a real possibility that it was. The consequences of His Lordship’s findings set out above were of particular importance at the next stage of the proceedings and the instructions given to two experts who, following the finding of fact hearing, were to carry out assessments of, inter alia, **Mr B**. Given the absence of a positive finding against **Mr B**, Charles J concluded that the letter of instruction to those experts should be in the following terms –

“...you will have seen from the summary set out in the paragraphs above that one of the central issues in the case was whether [R] has been sexually abused by [Mr B]. You will also have seen that Mr Justice Charles was not able to find to the required standard of proof (more likely than not) that [R] was so sexually abused, or that she was not.

Although the judge concluded that there was a real possibility that [R] was so abused, your assessment must proceed (in line with guidance from the case-law) on the basis that [R] was not sexually abused by [Mr B], and therefore (and in any event and in respect of all aspects of your assessment) there is no risk that either:

(i) a child in the care of [Mr B] will be sexually abused by him, or (ii) [Mrs B] will do nothing effective to prevent a child in her care who she knows is being sexually abused, or who she ought to appreciate is being sexually abused, from suffering that abuse.

You are not therefore being asked to assess whether such risks exist and must proceed on the basis that they do not.

However, part of the background, and relevant as such, is the fact that [R] has made her allegations of sexual abuse and they have not been proved, or found to be false, to the required standard (more likely than not).

If the court had been able to determine that issue to that standard you would have been asked and required to carry out your investigation on the basis that finding was a definite fact which determined which of [R] and [Mr B] was telling the truth. The inability of the court to make one of those mirror findings to that standard has the limited effect that when you are considering the impact of [R's] allegations of sexual abuse against [Mr B] as unproved allegations, and no more than that, you can take into account that it has not been established which of them is more likely than not to be telling the truth about those allegations. This means that in this limited context the existing case law does not require you to proceed on the basis that it is either [Mr B] or [R] who is necessarily telling the truth or lying about those allegations. Rather you should recognise in this limited context that it could be either of them who is telling the truth about those allegations.

For the avoidance of doubt it is stressed that:

(i) You should not make any attempt to determine whether it is more likely that it is [R] or [Mr B] who is telling the truth about those allegations. (ii) You must not consider, assess, reach or seek to reach views on, that credibility issue and thus on whether or not such sexual abuse took place. (iii) Your assessment must proceed on the basis as set out above namely that [R] was not sexually abused by [Mr B] and therefore (and in any event and in all aspects of your assessment) there is no risk that a child in the care of [Mr B] will be sexually abused by him, or that [Mrs B] will do nothing effective to prevent a child in her care who she knows is being sexually abused, or who she ought to appreciate is being sexually abused, from suffering that abuse.” (At para 41 to Charles J’s judgment)

According to Thorpe LJ in the Court of Appeal (at para 6) Charles J,

“...was very unhappy with the obvious complexity and internal contradiction within the letter of instruction, and he considered whether difficulties experienced by him and by other judges of the division did not justify a reconsideration of the basic principles established in **H and R** in the light of subsequent development in **O and N [2003] 1 FLR 1169**; despite the fact that the House in **O and N** had, in an obiter passage, approved a decision in this court -- the decision in **M and R [1996] 2 FLR 195**-- which constitutes an additional impediment, to the course that the judge instinctively would have preferred to take.”

The underlying problem In the words of Charles J (at paras 31-36),

“To my mind this is in large measure based on the tensions between the powerful reasons for (a) setting the jurisdictional test or trigger for intervention by a public authority in the lives of a child and its family at an appropriately high level, and (b) taking an appropriate approach to risk management to prevent harm to a child by one or more of its primary carers.

It will immediately be appreciated that the solutions to this underlying problem have the potential for creating tragic results to members of a family. If a child is removed from the care of a parent, or both parents, on the basis of a finding or allegation of inflicted harm and that finding or allegation is wrong tragically all members of the family suffer harm. If a child is not so removed and then suffers harm (by for example being killed or sexually abused) then tragically that child and indeed its family suffer harm.

It is therefore clear that when allegations that serious harm has been inflicted on a child by a parent or carer are raised difficult legal and policy questions arise that are of general importance and public interest.

In my view generally when a risk and its management are being considered, whether in the context of a risk of harm to a child in its day to day life or any other type of risk, the severity of the possible consequence if preventative measures are not taken is an important factor. As a result preventative

measures are more likely to be taken if the harm or risk in question would be very serious (e.g. death, serious injury or sexual abuse) on the basis that the seriousness of the possible consequences means that the risk of them occurring cannot in all the relevant circumstances sensibly or safely be ignored.

Also generally the existence of a risk is assessed and, in the light of that assessment, managed without there being any finding by a court and the relevant decision maker acts on his view of all the circumstances including relevant allegations.

*There is therefore tension between (a) the approach laid down and taken in **Re H & R** to the making of findings of fact in respect of serious allegations of inflicted harm, and (b) a general approach to risk management. This is because in reaching a finding on inflicted harm to the civil standard a factor to be taken into account is the point that the more serious the allegation the less likely it is to have occurred. So, in the context of care proceedings (and thus the interference in the lives of a family by a public authority pursuant to a care or supervision order) when, on the approach of the majority in **Re H & R**, a risk of serious future harm (a likelihood of serious future harm) can only be based on establishing that it is more likely than not that such harm has been inflicted by a carer in the past, the seriousness of the allegation is a factor against the making of the relevant finding to give jurisdiction to take protective measures against the risk of such alleged harm being inflicted again. Whereas, and in contrast, it seems to me that generally in terms of risk management (and indeed in an application of the tests under the **Children Act** relating to interim orders) the seriousness of the consequences of alleged harm recurring is a factor in favour of taking protective measures and preventative measures are taken and required without proof to the civil standard of the alleged inflicted harm.”*

The result in this case was (Charles J at **para 39**), “...one which means that the relevant law and policy provides that in this case the court, the local authority and those involved in the assessments of the family would have to consider the placement and future care of the three children on the basis that **Mr B** did not, with the knowledge of **Mrs B**, seriously and persistently sexually abuse **R** and thus on the basis that the risk that **Mr B** with the knowledge of **Mrs B** did seriously and persistently sexually abuse **R** can (or must), in all the circumstances, safely and sensibly be ignored.”

The correct approach to be taken in determining whether a person should be exonerated of inflicting significant harm Charles J at **para 96** to **Schedule A**.

“On the law as it stands, it seems to me that:

(i) a positive finding of exoneration, like a finding that harm has been inflicted, has to be based on the civil test, namely more likely than not,

(ii) in a case such as this, where there is a stark choice, a finding of exoneration is the same as one that the alleged abuse did not take place and is thus a mirror image of a finding that it did,

(iii) if such a finding is made, then the consequences of the legal policy set out in **paragraph 10** of the speech of Lord Nicholls in **Re O & N** apply to it with the results that the real possibility that the conclusion may be wrong (which is inherent in the test) is ignored and the finding made "on the more likely than not" test is treated as a definite fact, because it is treated as something that definitely happened or did not happen,

(iv) this has the result that assessments, and decisions by the court and the local authority, proceed on the basis that it is a definite fact that the person exonerated did not act as alleged (and therefore in this case that **Mr B** did not sexually abuse **R**, that **Mr B's** denial of **R's** allegations are true, and that her allegations are untrue), and

(v) this is the mirror image of the position if a finding was made that it was more likely than not that **Mr B** had sexually abused **R** as she alleges. Then the court and the local authority would proceed on the basis that it is a definite fact that such sexual abuse took place, that **R's** allegations are true and that **Mr B's** denials are untrue.

*In a case where there is potentially more than one perpetrator a finding exonerating a person of inflicting harm would often have two stages. The first would identify the pool of possible perpetrators and the second would involve the issue whether the actual perpetrator can be identified from the pool. At the first stage the test to be applied is the ‘real possibility test’, at the second the test is the ‘more likely than not test’. As I have indicated... , if it can be said that it is not a real possibility that **A** inflicted harm on **B** that conclusion would clearly found one that it is more likely than not that **A** did not do so. So, at the first stage, a finding excluding a person from the pool, on the basis that there is no real possibility that he or she inflicted the relevant harm is also a finding that exonerates that person. Following the identification of the pool the court goes on to see whether a finding can be made that it is more likely than not that a person (or persons) within the pool did not inflict the relevant harm. If it can, any such person is excluded from the pool and exonerated. When the pool is reduced to two, or always comprised only two, a finding that it is more likely than not that one of them inflicted the relevant harm is the mirror image of a finding that it is more likely than not that the other did not. So one is found to be the perpetrator and one is exonerated, applying the ‘more likely than not test’.*

In a case such as this one where, if the alleged harm was inflicted there is only one possible perpetrator, it may be that an examination of the evidence finds a conclusion that there is no real possibility that that harm was inflicted. Such a conclusion would exonerate the person accused of inflicting the harm because the finding that the harm was not inflicted would be based on (or alternatively he or she would have satisfied a) higher test than the ‘more likely than not test’. When, as in this case, such a finding cannot be made and both the allegation and the denial are therefore real possibilities a finding that the harm was inflicted or, its mirror image that it was not and therefore the person accused is exonerated, is based on the more likely than not test.

*As I have explained, in my view, an inability to find that it is more likely than not that the alleged inflicted harm occurred does not equate to a finding that it is more likely than not that it did not occur, and vice versa. To reach a conclusion on a stark choice between two real possibilities that one of them is more likely than not to be correct, the court has to be able (on the evidential approach set out in **Re H and R**) to penetrate with sufficient clarity, the competing factors and the relevant uncertainties to reach that ‘more likely than not’ finding. Sometimes it will be able to do this and therefore reach a conclusion based on that test that a person inflicted harm, or that the person alleged to have inflicted harm did not do so, and therefore should be exonerated. Sometimes, as is the position in this case in respect of the allegations of sexual abuse made by **R** against **Mr B**, it will not.”*

Permission to appeal to the House of Lords Given the very difficult and important issues raised by this case, Thorpe LJ was “...perfectly satisfied that this is a case in which, most unusually, it would be proper for this court to grant permission for the appeal to the House [of Lords].”