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WV17C00282

IN THE FAMILY COURT
SITTING AT BIRMINGHAM

Birmingham Civil Justice Centre
Bull Street
Birmingham

Date: 01/05/2019

Before:

THE HONOURABLE MR JUSTICE MACDONALD

Re P
(Sexual Abuse:
Finding of Fact
Hearing)

Mr Richard Hadley and **Ms Louise Higgins** (instructed by **A Local Authority**) for the **Local Authority**

Family One

Ms Lorna Meyer QC and **Ms Orla Grant** (instructed by **Thornes Solicitors**) for **NV** by her Litigation Friend the Official Solicitor
Mr Andrew Bagchi QC and **Ms Param Kaur Bains** (instructed by **Enoch Evans**) **for JD**
Ms Frances Judd QC and **Miss Kristina Brown** (**instructed by Baches**) for **the Children**

Family Two

Mr James Tillyard QC and **Ms Justine Lattimer** (instructed by **Wright Solicitors**) for **KV** by her Litigation Friend the Official Solicitor
Mr Jeremy Weston QC and **Mr Mark Cooper** (instructed by **Waldrons**) for **MR**
Ms Kathryn Taylor and **Mr Timothy Bowe** (instructed by **Talbots Solicitors**) for **the Children**

Family Three

Ms Elizabeth Isaacs QC and **Ms Tracy Lakin** (instructed by **Brendan Fleming**) for **AMB**
Mr Andrew Neaves (instructed by **Duncan Lewis**) for **MZ**
Mr James Picken and **Ms Annabel Hamilton** (instructed by **Anthony Collins**) **for the Children**

Family Four

Mr Dorian Day and **Mr Nicholas Brown** (instructed by **Gangar Solicitors**) for **TA**
Mr John Vater QC and **Mr Christopher Watson** (instructed by **DN Solicitors**) for **DA**
Mr Matthew Maynard (instructed by **McDonald Kerrigan LLP**) **for LA**
Mr Ricky Seal (instructed by **Carvill Johnson**) **for MA**
Ms Jane Cross QC and **Ms Victoria Clifford (**instructed by **Glaiysers) for SA**

Family Five

Ms Sarah Morgan QC and **Ms Kirsty Gallacher** (instructed by **Family Law Solicitors**) for **NF**
The Father did not appear and was not represented
Mr Michael Lohmus (instructed by **Rees Page**) for **the Children**

Family Six

Mr Frank Feehan QC and Ms Naomi Hobbs (instructed by **Fountain Solicitors**) **for AO**
The Father did not appear and was not represented
Ms Frances Judd QC and Miss Kristina Brown (instructed by **Baches**) for **the Children**

Interveners

Ms Ruth Henke QC and Mr Basharat Hussain (instructed by **CBTC Solicitors**) for **PG** by her Litigation Friend the Official Solicitor
Ms Jane Crowley QC and Ms Elisabeth Richards (instructed by **McDonald Kerrigan LLP**) for **DV** by his Litigation Friend the Official Solicitor
Ms Elizabeth McGrath QC and Ms Evelyn Bugeja (instructed by **Smith Dawson**) for **SV**
Mr Aidan Vine QC and Mr Greg Rogers (instructed by **Sharretts**) for **LV**
Ms Julia Cheetham QC and Ms Julie Slater (instructed by **DMP Solicitors**) for **PF**
Ms Vanessa Meachin QC and Mr Stephen Abberley (instructed by **Carvers**) for **GQ**

Hearing dates:
24 April 2018 to 18 July 2018 and 19 November 2018 to 21 December 2018
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
.....

MR JUSTICE MACDONALD

The following is an extract of a judgment delivered at the conclusion of a fact finding hearing. **The judgment is being published in this form in circumstances where criminal proceedings remain pending.** The judgment was delivered in private and the Judge has given permission for this extract of the anonymised version of the judgment to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

A. INTRODUCTION

1. Institutional memory may be defined as the collective knowledge and learned experience of a group. If the group in question is not static over time, as human society is not, then the relevant collective knowledge and learned experience must be passed on from generation to generation if the group is to continue to benefit from its accumulated institutional memory. In this case, to the detriment of the children who are the subject of these complex proceedings, it has become apparent that in the now thirty-two years that have passed since the publication by Dame Elizabeth Butler-Sloss in 1987 of the Cleveland Enquiry Report, much of the accumulated institutional memory of how to deal in an assiduously open minded, procedurally fair and forensically rigorous way with allegations of child sexual abuse has been lost, at least to the majority of those professionals and police officers involved in this case.

2. As noted in *Hershman & McFarlane: Children Law & Practice* at [3086], a finding on the balance of probabilities that a child has been subjected to sexual abuse, and if so by whom, may be made as a result of direct evidence from the child, reported evidence of what the child has said or demonstrated, the direct evidence of adults, admissions by adults, expert psychological or psychiatric evidence, or expert medical evidence and diagnosis. In most cases, any finding will be based upon a combination of more than one source of evidence.

3. Cases of alleged child sexual abuse create *particularly* acute forensic difficulties for the family courts charged with determining whether sexual abuse has occurred and, if so, who has perpetrated that abuse. As Ms Crowley QC and Ms Richards submit, within this context, the determination of those questions is one of the more difficult of the many challenging tasks given to these courts. McFarlane LJ (as he then was) observed in *Re A (A Child)(Vulnerable Witness: Fact Finding)* [2015] 1 FLR 1152 at [72], that no case of alleged sexual abuse where there is an absence of any probative medical or other direct physical evidence to support a finding can be regarded as straightforward.

4. Sexual abuse is defined, in the most recent version of the statutory guidance *Working Together to Safeguard Children* (HM Government July 2018), as follows:

> "Involves forcing or enticing a child or young person to take part in sexual activities, not necessarily involving a high level of violence, whether or not the child is aware of what is happening. The activities may involve physical contact, including assault by penetration (for example, rape or oral sex) or non-penetrative acts such as masturbation, kissing, rubbing and touching outside of clothing. They may also include non-contact activities, such as involving children in looking at, or in the production of, sexual images, watching sexual activities, encouraging children to behave in sexually inappropriate ways, or grooming a child in preparation for abuse. Sexual abuse can take place online, and technology can be used to facilitate offline abuse. Sexual abuse is not solely perpetrated by adult males. Women can also commit acts of sexual abuse, as can other children."

5. Where sexual abuse has occurred, it is not commonly witnessed by an independent third party. Beyond issues of social stigma, perpetrating adults are often reluctant to make admissions in the context of family proceedings in circumstances where they face, or may face, criminal prosecution. The alleged victims of sexual abuse are often vulnerable children with other difficulties that can affect the credibility of their allegations, which allegations often emerge a considerable time after the alleged abuse has taken place, and therefore long after any physical evidence that may have existed has disappeared. The allegations may emerge in a piecemeal fashion, with children often not reporting events in a linear history, reporting them in a partial way and revisiting topics more than once. Such children may, whether by reason of their age, or the impact of the alleged sexual abuse or other difficulties, be idiosyncratic, inconsistent or unreliable historians. The age, psychological state and/or views of the child may mean, as in this case, that the court does not hear their accounts challenged forensically in cross examination and, accordingly, is deprived of one of the key forensic tools for testing the truth of a disputed account before the law. The child may suffer from psychological sequalae that may or may not be the product of sexual abuse but which, in any event, makes the assessment of their reliability even more difficult. It is not unknown for children to lie about having experienced sexual abuse or to fabricate allegations of the same.

6. More generally, human memory is not a single, simple system. What is remembered of an experience by a child or young person will not be a complete picture akin to a photograph or CCTV recording and will vary depending on the age at which the experience took place. What an adult may consider to be a key element of a remembered experience, and therefore key to assessing the reliability of the memory, may not be significant from a child's perspective. The physiological processes involved in the encoding, storage and retrieval of memories are susceptible to internal and external influences. Within this context, children's accounts can be affected by their level of functioning, their emotional state and their levels of suggestibility. It is also possible for a child to "remember" an event that has not in fact occurred, or which has not occurred precisely in the way remembered. The child's recollection of past experiences can be influenced by the process of questioning the child. I deal with this issue in detail at paragraphs [571] to [587] below.

7. This means that, within the context of other already considerable forensic challenges, and of *particular* significance in this case for reasons that will become apparent, the ill-considered reaction of well-meaning adults to children making allegations of sexual abuse, or a failure by professionals to apply rigorously long-established guidance and good practice in dealing with such allegations, can have a deleterious, and sometimes fatal impact on the reliability of the allegations when they come to be considered by the court. In cases of alleged sexual abuse, there is a significant forensic tension between the need to provide understanding, support and care for children who may have been sexually abused, where the presence of a supportive non-abusing adult who listens without judgment and takes seriously what the child is saying is essential to that child's current and future wellbeing, and the requirements of the legal process for establishing the truth or otherwise of those allegations in a court of law. That difficult forensic tension falls to be addressed in this jurisdiction by the careful, rigorous and diligent application of comprehensive statutory guidance and good practice principles born out of long experience. The gravity of the consequences of a failure to apply with rigor these clear and long-established principles when

dealing with allegations of sexual abuse was set out with pellucid clarity by Wall J (as he then was) in *B v B (Child Abuse: Contact)* [1994] 2 F.L.R. 713, in which he observed that:

> "… by muddying the waters it frequently renders impossible the task of the court in deciding whether or not there has been abuse. Thus it may not be possible to make a finding against an alleged perpetrator who is in truth guilty".

8. Finally, the possibility of much easier access to pornographic material on social media and the Internet means that concepts such as age appropriate sexual knowledge, and conclusions as to the source of detailed knowledge of specific sexual acts must be treated with far greater care than in the past. Medical evidence in cases of alleged child sexual abuse is rarely definitive and very often non-specific, ambiguous, equivocal or, on occasion, controversial. Within this context, experienced medical professionals and experts in the field may reasonably reach different conclusions on a given physical presentation. Research and practice as between jurisdictions may differ in this regard.

9. The consequences of the court reaching the wrong conclusion in respect of an allegation of child sexual abuse include a child being returned to a position of danger or, conversely, a child being deprived of a family that is, in fact, perfectly safe. In the circumstances, when determining whether sexual abuse has taken place and, if so, who is responsible for perpetrating that abuse, it is vital that the court remain acutely conscious of the forensic difficulties outlined above. As Holman J observed in *Leeds City Council v YX & ZX (Assessment of Sexual Abuse)* 2008 EWHC 802 (Fam) the task of the court in cases of this nature is not so much akin to putting together a single jigsaw puzzle in which all the pieces are present, but rather:

> "If the jigsaw metaphor is helpful at all, then, in my view, it is important to think of a pile of jigsaw pieces in which pieces from more than one jigsaw have been muddled up. There may be pieces which, on examination, do not fit the jigsaw under construction at all, but which require to be discarded or placed on one side."

10. Within this difficult and challenging forensic context, in this matter I am concerned with the fact-finding stage of proceedings under Part IV of the Children Act 1989 dealing with the welfare of fourteen children from six families. In the context of these proceedings, the common factor linking all six families is a criminal investigation [...] into allegations of serial intra-familial and inter-familial child sexual abuse. In total, four of the subject children in these proceedings have, between them, made over two hundred discrete allegations of sexual abuse against some forty-seven adults.

[...] [The court proceeded to provide a brief summary of the circumstances of the case]

21. Finally, by way of introduction, it is necessary to highlight an issue of terminology that has, once again, arisen in this case (see *AS v TH (False Allegations of Abuse)* [2016] EWHC 532 (Fam) at [33]). Despite the fact that the use of the term 'disclosure' to describe a statement or allegation of sexual abuse made by a child has been deprecated since the publication of the Cleveland Report in 1987 (see Paragraph 12.34(1) of that report), due to it precluding the notion that the abuse might *not* have

> occurred, nearly every professional who gave evidence in this case, including the investigating police officers, used the term 'disclosure' to describe what the children had said [...], or to describe what they understood the children to have said to others. Within this context, where a witness has used the word 'disclosure' that word is used in this judgment when quoting passages of documentary or oral evidence from that witness. Otherwise, this judgment uses the term 'allegation'. Before too much approbation is heaped on those witnesses, I note that both Government guidance and publications from the NSPCC now use the word 'disclosure' even when speaking of matters that have not yet been the subject of proof to the requisite standard. Finally, I pause to note that very few of the professionals, police officers and allocated social workers who gave evidence in this case had heard of the Cleveland Enquiry, much less were aware of its recommendations, and the guidance and good practice it underpins. This is a topic that, unfortunately, I must return to at several points during this judgment.

B. SUMMARY

[...] [The court proceeded to set out a summary of its decision in the case]

C. PARTIES AND INTERVENERS

25. Before turning to the background to, and evidence in this matter, it is important not only to identify the parties and interveners, but also to identify the vulnerabilities and needs of some of those parties and interveners in circumstances where four adults before the court lack capacity to litigate and have the services of the Official Solicitor and of intermediaries, and three adults before the courts are vulnerable and have the services of intermediaries. Those vulnerabilities and needs the court has borne closely in mind throughout the course of these proceedings, both at the case management stage, and during this fact-finding hearing when considering the weight that can properly be attached to that evidence the court has heard. Within this context, before detailing the parties and the interveners, and any vulnerabilities under which they labour, it is important to recite the following points of general principle that the court has applied to this issue.

26. Where a party to care proceedings is a protected party or a vulnerable person, the court must take steps to ensure that that party can participate effectively in the decisions that affect his or her life and to ensure that there are no barriers to justice within the proceedings themselves (see the guidance set out in the decision of the Family Division of the High Court of Justice in Northern Ireland in *Re G and A (Care Order: Freeing Order: Parents with a Learning Disability)* [2006] NI Fam 8, at [5] cited by Sir James Munby P in *Re D (Adoption) (No 3)* [2017] 1 FLR 237 and see *Re D (Non-Availability of Legal Aid) (No 2)* [2015] 1 FLR 1247 and President's Guidance: Family Proceedings: Parents with a Learning Disability [2018] Fam Law 596).

27. In seeking to ensure that the parties and interveners in this case who lack capacity, or who are vulnerable, could participate effectively in, and give evidence effectively during the proceedings, the court has sought to give effect to FPR 2010 r 1.1(2)(c) (the requirement to ensure that all parties are on an equal footing) and, as I have noted above, FPR 2010 Part 3A (Vulnerable Persons: Participation in Proceedings and Giving Evidence). In addition, the court has had regard to the guidance set out in 'Advocates' Gateway' (Council of the Inns of Court, 2016). Within this context, at the case

management stage, each of those parties and interveners who it was submitted lacked capacity or was vulnerable was made the subject of a psychological assessment. Where a party was confirmed to lack capacity, or to have other vulnerabilities that affected their ability to participate in, and to give evidence in the proceedings, an intermediary assessment was also conducted. Where recommended by those assessments, the protected or vulnerable party or intervener in question has (a) been provided with the services of an intermediary at court to assist them to participate effectively in the proceedings and (b) the court has conducted one or more grounds rules hearings to identify the special measures and/or participation directions required to ensure the vulnerable party or intervener could give their evidence effectively.

28. [...] Prior to their giving oral evidence, and in addition to taking the oath, each respondent and intervener was given a warning in the terms suggested by s 98 of the Children Act 1989 in circumstances where each remains under criminal investigation (see *Re EC (Disclosure of Material)* [1996] 2 FLR 725). Given the relative complexity of the warning with respect to the issue of self-incrimination that arises out of that section, the wording of the warning was adapted to ensure it was comprehensible to the protected and vulnerable parties. Each of those parties' intermediaries assisted the court in ensuring that both the oath and the warning given pursuant to s 98 of the Children Act 1989 was understood.

29. In this case, as I have noted above, the court directed the use of a separate room linked by video link to the main courtrooms, in which separate room the protected or vulnerable parties and interveners could give their evidence in the presence of myself, their intermediary, their counsel and cross-examining counsel only. The special measures adopted for those parties and interveners who were protected or vulnerable included the pre-preparation of questions in cross examination to allow for input and guidance from the relevant intermediary (no party or intervener was given advanced notice of any question), guidance from the intermediary on the use of language by the lawyers and the court, regular breaks, familiarisation with the room, an introductory meeting with the judge and the placing of limitations on the number of counsel cross examining and on the duration of cross examination. During the hearing, the court has received regular written reports from the intermediaries assisting the protected or vulnerable parties and interveners to ensure the continued efficacy of the special measures adopted.

30. Mr Vater and Mr Watson [...] made several representations during the hearing concerning the need to recognise what they submitted was the risk of a forensic imbalance developing between those parties who have the benefit of special measures and those who do not. It is indeed important that the court acknowledges that the adoption of special measures does, of necessity, have an impact on the traditional format of the forensic court process. I accept that the adoption of special measures can operate to alter somewhat the forensic paradigm within the court room. For example, where the vulnerabilities of a party mandate careful adherence to a series of pre-prepared questions that an intermediary has confirmed accord with the party's level of understanding, it is the case that the resulting cross examination can appear less forensically agile.

31. However, against this (and in addition to the foregoing difficulty being capable of resolution by an application to the judge to put further pre-prepared questions) FPR r 3A acknowledges the appropriateness of the adoption of such special measures where

necessary to ensure, as far as possible, that a protected party or vulnerable party is put on an equal footing with other parties when it comes to giving complete, coherent and accurate evidence in answer to the questions put to the witness. This position has been recognised by the Court of Appeal in *R v Lubemba; R v JP* [2014] EWCA Crim 2064, in which the Criminal Division of the Court of Appeal considered this point and observed as follows at [45] in the context of criminal proceedings:

> "It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round. They cannot insist upon any supposed right "to put one's case" or previous inconsistent statements to a vulnerable witness. If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness (see for example paragraph 3E.4 of the Criminal Practice Directions)."

32. Within this context, where special measures were adopted for a respondent or intervener giving evidence in these proceedings, they were adopted because the court had determined them to be necessary to discharge the obligations imposed upon it by FPR r 3A and PD 3AA. FPR r 3A and PD 3AA recognise that protected parties, or parties who are otherwise vulnerable, have characteristics potentially prejudicial to their participation in the judicial process that litigants who are not protected parties, or otherwise vulnerable do not. These characteristics must be acknowledged and accounted for if the protected or vulnerable party is to benefit fully from the cardinal principle of equal treatment for all before a court of law.

[...] [The court proceeded to detail the parties to the proceedings and their relevant circumstances]

D. WIDER BACKGROUND AND SUMMARY OF SOURCES OF EVIDENCE

[...] [The court proceeded to detail the background to the matter and the sources of evidence relied on by the local authority]

Electronic Devices

200. During [the criminal investigation], the police have seized, and interrogated electronic devices owned by the respondents, interveners and children. The sheer volume of material that this produced presented a challenge within the context of these proceedings. It was important for both the local authority and the respondents and interveners to have disclosure of electronic evidence relevant to the issues before the court, and to any inculpatory or exculpatory material located on the electronic devices. Against this however, to have permitted the disclosure into these proceedings of the entirety of the material downloaded from the electronic devices (said at one point to amount to hundreds of thousands of pages) would have resulted in unacceptable delay and a volume of disclosure wholly disproportionate to the issues before the court.

201. Within this context, and in order to balance appropriately the competing needs of fairness and proportionality, with respect to the digital evidence I directed that the

parties proceed on the basis of the approach used in large fraud trials in the Crown Court (see the Gross Review of Disclosure in Criminal Proceedings paras 155-159 and the Attorney General's Guidelines on Disclosure at paras 50 to 52 and the Annex entitled Supplementary Guidelines on Digitally Stored Material). In the circumstances, the method used in this case to deal with the large volume of electronic material involved the police first downloading the seized devices (in so far as it was possible to do so) to create a database. The material in that database was then reviewed by a police officer (who remained subject at all times to a duty to highlight material that may assist the defence) and a 'Triage Report' prepared detailing any relevant material, which report was then disclosed to the parties in these proceedings. The respondents and interveners were at that stage able, if so advised, to propose further 'Keyword' searches of the database, with any 'hits' following that keyword search also being disclosed into these proceedings. The entire database for each device remained available for inspection as a safeguard. In the event, following the disclosure of the initial 'Triage Reports', no party requested a further 'Keyword' search. I evaluate below the limited amount of electronic material relevant to the issues this court is required to determine.

E. SUMARY OF MEDICAL EVIDENCE

[...] [The court proceeded to summarise the medical evidence relied on by the local authority in the proceedings]

F. FINDINGS SOUGHT

[...] [The court set out the findings sought by the local authority]

G. THE LAW

239. I turn next to the legal principles that are applicable in deciding whether, on the evidence summarised above and evaluated below, the local authority has proved its case to the requisite standard of proof. With respect to the legal principles and guidance *specific* to the evaluation of the individual sources of evidence in this case, I set those out at the outset of the discussion and evaluation sections for each of those sources of evidence.

Context

240. Before turning to the foundational legal principles that govern the court's determination, it is important to articulate the following matters, in the context of which the legal principles that follow must be applied. I have borne carefully in mind these matters when evaluating the evidence before the court:

    i) Cases of alleged sexual abuse, and of alleged sexual abuse involving the number and extent of the allegations seen here, are highly emotive and can and do give rise to strong feelings and robustly expressed views and opinions. Notwithstanding the emotive subject matter however, the task of this court is to take an entirely dispassionate approach to the process of determining whether on the relevant and admissible evidence available to the court the facts alleged by the local authority are established on the balance of probability (see *Re A (A Child) (Vulnerable Witness: Fact Finding)* at [77]).

ii) Within this context, and where the court is, at this stage of the proceedings, concerned with the dispassionate determination of issues of fact, the court must resist the siren call of what has been termed the "the child protection imperative" (see *Oldham MBC v GW and PW* [2007] 2 FLR 597 at [97]). The need for caution in this regard in the context of cases of alleged sexual abuse was articulated eloquently by Hughes LJ (as he then was) in *Re B (Allegation of Sexual Abuse: Child's Evidence)* [2006] 2 FLR 1071 at [43] when he observed that:

> "...the fact that one is in a family case sailing under the comforting colours of child protection is not a reason to afford to unsatisfactory evidence a weight greater than it can properly bear. That is in nobody's interests, least of all the child's."

The fact that the allegations with which this court is concerned relate to alleged sexual abuse of children is not a reason to relax the forensic rigor the court brings to bear when deciding disputed issues of fact, nor the rules of evidence that apply to that exercise.

iii) Finally, a decision by the court to make no findings, or only some of the findings sought by the local authority does not constitute a 'failed' or 'unsuccessful' outcome. As Baroness Hale observed in *Re S-B* [2010] 1 FLR 1161 at [19]:

> "We should no more expect every case which a local authority brings to court to result in an order than we should expect every prosecution brought by the CPS to result in a conviction. The standard of proof may be different, but the roles of the social workers and the prosecutors are similar. They bring to court those cases where there is a good case to answer. It is for the court to decide whether the case is made out. If every child protection case were to result in an order, it would mean either that local authorities were not bringing enough cases to court or that the courts were not subjecting those cases to a sufficiently rigorous scrutiny."

That observation applies with equal force to these proceedings notwithstanding their unprecedented scale and cost to the public purse. If the quality of the evidence, or the absence thereof, demands it, the fact that a long and expensive hearing results in no or limited findings is as much a valid result as one in which all findings were found proved to the requisite standard.

Burden of Proof

241. In cases of alleged sexual abuse, at the fact-finding stage the court must determine two questions of fact. First, having regard to the evidence, did sexual abuse take place? If so, having regard to the evidence, who perpetrated that sexual abuse (see *Re H (Minors); Re K (Minors)(Child Abuse: Evidence)* [1989] 2 FLR 313 and *Re H and R (Child Sexual Abuse: Standard of Proof)* [1995] 1 FLR 643).

242. The burden of proving a fact is on the party asserting that fact. There is no burden on the respondent party to prove the contrary. As Mr Vater and Mr Watson rightly point

out, the fact that the complainant children have made allegations of sexual abuse does not create a rebuttable presumption that the allegations are likely to be true. An allegation is only an allegation, and the burden remains on the local authority to prove that the allegations made by the children are established to the requisite standard of proof.

243. A failure to find a fact proved on the balance of probabilities does not equate, without more, to a finding that the allegation is false (see *Re M (Children)* [2013] EWCA Civ 388 at [17]). Having heard and considered the evidence it is open to the court to conclude that the evidence leaves it unsure whether it is more probable than not that the event occurred and, accordingly, that the party who has the burden of proving that the event occurred has failed to discharge that burden (see *The Popi M, Rhesa Shipping Co SA v Edmunds, Rhesa Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948). The Supreme Court has made clear that, whilst not routine, this outcome is permissible in cases relating to children. In *Re B (Care Proceedings: Standard of Proof)* [2008] 2 FLR 141 at [32] Baroness Hale stated that:

> "In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."

244. Within this context, I note that in the Court of Appeal made clear in *Re A (A Child)(No 2)* [2011] EWCA Civ 12 at [29] that in a case where there is much suspicion and speculation on some matters, as well as satisfactory proof on others, it would be not merely artificial but potentially misleading for the judge to suppress all reference to the one while giving appropriate prominence to the other. In *Re A (A Child)(No 2)* Munby LJ (as he then was) observed as follows in this context:

> "…notwithstanding the 'binary system' explained by the House of Lords in *In re B (Children)* [2008] UKHL 35, [2009] 1 AC 11, para [2] (Lord Hoffmann) and para [32] (Baroness Hale), it may be relevant at the subsequent 'welfare' hearing to know, and thus for the judge as part of his fact-finding to record, whether a particular matter was not found proved because the judge was satisfied as a matter of fact that it did not happen or whether it was not found proved (and therefore in law is deemed not to have happened) because the party making the assertion failed to establish it to the relevant standard of proof but in circumstances where there is nonetheless continuing suspicion. It is of course a cardinal principle that at the 'welfare' or 'disposal' stage, as at any preceding fact-finding hearing, the court must act on facts, not on suspicions or doubts; for unproven allegations are no more than that: see the analysis by Baroness Hale in *In re B (Children)*, following and declining to overrule what Butler-Sloss LJ had said in *In re M and R (Minors) (Abuse: Expert Evidence)* [1996] 4 All ER 239, page 246, and the obiter dicta of Lord Nicholls of Birkenhead in *In re O and another (Minors) (Care: Preliminary Hearing), In re B (A Minor)*,

> [2003] UKHL 18, [2004] 1 AC 523, para [38]. But this is not, of itself, a reason for excluding from the fact-finding judgment material of the kind to which Ms Crowley takes objection."

245. Finally, with respect to the burden of proof, it follows from the principles set out above that there is no obligation on a respondent to provide, much less to prove, an alternative explanation for the allegations made. Further, where a respondent party *does* seek to assert and prove an alternative explanation for a given course of conduct but does not prove that alternative explanation, that failure does not, of itself, establish the local authority's case, which must still be proved to the requisite standard (see *The Popi M, Rhesa Shipping Co SA v Edmunds, Rhesa Shipping Co SA v Fenton Insurance Co Ltd* at 955-6).

246. Further, and in this context, great care should be taken before deciding that an obviously unsatisfactory explanation provided and pursued by a respondent, or the failure to provide and pursue an explanation for a given allegation, is evidence of culpability. A blameless person may cast around for all manner of explanations simply as a means of seeking to understand the situation in which they find themselves but in respect of which they have no culpable knowledge. Likewise, the failure by a person to provide any explanation at all may be indicative of culpability where the situation in question would ordinarily admit of one, but it may also be indicative of no more than bare ignorance borne out of innocence.

Standard of Proof

247. To prove the fact asserted that fact must be established on the balance of probabilities. Any findings of fact must be based on admissible evidence, including those inferences that can properly be drawn from the evidence, and not on suspicion or speculation (see *Re A (A Child, Fact Finding Hearing, Speculation)* [2011] EWCA Civ 12 and *Re A* [2015] EWFC 11 at [8]). In *R v Kilbourne* [1973] AC 729 at 756 Lord Simon of Glaisdale observed that "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof…relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable." Within this context, in *Re A* at [9] Sir James Munby, P stated as follows:

> "…the local authority, if its case is challenged on some factual point, must adduce proper evidence to establish what it seeks to prove. Much material to be found in local authority case records or social work chronologies is hearsay, often second-or third-hand hearsay. Hearsay evidence is, of course, admissible in family proceedings. But, and as the present case so vividly demonstrates, a local authority which is unwilling or unable to produce the witnesses who can speak of such matters first-hand, may find itself in great, or indeed insuperable, difficulties if a parent not merely puts the matter in issue but goes into the witness-box to deny it.

248. The decision on whether the facts in issue have been proved to the requisite standard of proof must be based on *all* of the available relevant and admissible evidence including that from the alleged perpetrator and family members (see *Re I-A (Allegations of Sexual Abuse)* [2012] 2 FLR 837) and the wider context of social, emotional, ethical and moral factors (see *A County Council v A Mother, A Father and*

X, Y and Z [2005] EWHC 31 (Fam) at [44]). This will include any expert evidence but will not be limited to that evidence. The opinions of the medical experts will need to be considered in the context of all the other evidence.

249. The role of the court is, accordingly, to consider the evidence in its totality and to make findings on the balance of probabilities accordingly. This means that, in accordance with the foregoing general principles, when assessing whether allegations of sexual abuse are proved to the requisite standard, the court must consider each piece of evidence in the context of all of the other evidence (*Re T* [2004] 2 FLR 838 at [33]). Overall, as noted by Holman J in *Leeds City Council v YX & ZX (Assessment of Sexual Abuse)* 2008 EWHC 802 (Fam) [143] (another case in which Professor Heger was instructed as an expert in the physical signs of sexual abuse (see paras [82] to [92])) in the context of cases of alleged sexual abuse:

> "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."

250. Several additional points fall to be made with respect to the foregoing principles. First, within this context, the evidence of the parents, carers and family members is of utmost importance and it is essential that the court forms a clear assessment of their credibility and reliability. The court is likely to place considerable reliability and weight on the evidence and impression it forms of them (see *Gestmin SGPS SA v Credit Suise (UK) Ltd Anor* [2013] EWHC 3560 (Comm) at [15] to [21] and *Lancashire County Council v M and F* [2014] EWHC 3 (Fam)).

251. With respect to the evidence of, and impression the court forms of the parents, it is however important to bear in mind the observations of Macur LJ in *Re M (Children)* [2013] EWCA Civ 1147 at [11] and [12], noting that:

> "Any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behaviour in the witness box and to expressly indicate that they have done so".

252. Within this context, the need for care with witness demeanour as indicative of credibility was further highlighted by the Court of Appeal in *Sri Lanka v. the Secretary of State for the Home Department* [2018] EWCA Civ 1391. Observing that it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth, and noting research demonstrating that people cannot make effective use of demeanour in deciding whether to believe a witness and some evidence that the observation of demeanour diminishes rather than enhances the accuracy of credibility judgments, Leggat LJ stated as follows at [40] and [41]:

> "[40] This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral

> evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.
>
> [41] No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the way it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts."

253. In *Sri Lanka v. the Secretary of State for the Home Department* Leggatt LJ makes a clear distinction between the appearance and behaviour of the witness and the content of their evidence. Within this context, as to credibility generally, the authors of Phipson on Evidence note as follows at [12-36]:

> "The credibility of a witness depends on his knowledge of the facts, his intelligence, his disinterestedness, his integrity, his veracity. Proportionate to these is the degree of credit his testimony deserves from the court or jury. Amongst the more obvious matters affecting the weight of a witness's evidence may be classed his means of knowledge, opportunities of observation, reasons for recollection or belief, experience, powers of memory and perception, and any special circumstances affecting his competency to speak to the particular case—all of which may be inquired into either in direct examination to enhance, or in cross-examination to impeach the value of his testimony."

254. Within this context, the court's impression of a parent, and its assessment of the credibility and reliability of that parent, should coalesce around matters such as the internal consistency of their evidence, its logicality and plausibility, details given or not given and the consistency of their evidence when measured against other sources of evidence (including evidence of what the witness has said on other occasions) and other known or probable facts. The credibility and reliability of that parent should not be assessed simply by reference to, as it was termed historically, 'the cut of their jib'. This of course operates in both directions. It is as problematic to rely on an impression that a witness has an 'honest' tone or manner as it is to rely on an impression that the tone or manner of a witness appears 'dishonest'. I note in the foregoing context that the ABE Guidance at [3.89] stipulates that "In evaluating an

account, interviewers should not rely upon cues from the witness's behaviour as guides to the reliability or otherwise of their statements."

255. In the foregoing circumstances, it is likewise important to note the observations of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suise (UK) Ltd Anor* [2013] EWHC 3560 (Comm) at [15] to [21] and, in the context of public law children proceedings, of Peter Jackson J (as he then was) in *Lancashire County Council v M and F* [2014] EWHC 3 (Fam) that:

> "To these matters I would only add that in cases where repeated accounts are given of events surrounding injury and death, the court must think carefully about the significance or otherwise of any reported discrepancies. They may arise for a number of reasons. One possibility is of course that they are lies designed to hide culpability. Another is that they are lies told for other reasons. Further possibilities include faulty recollection or confusion at times of stress or when the importance of accuracy is not fully appreciated, or there may be inaccuracy or mistake in the record keeping or recollection of the person hearing or relaying the account. The possible effects of delay and repeated questioning upon memory should also be considered, as should the effect on one person of hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be unnatural – a process that might inelegantly be described as "*story-creep*" may occur without any necessary inference of bad faith."

256. The second point to make within the context of the cardinal principles concerning standard of proof is that, with respect to the principles governing medical evidence of physical signs of sexual abuse (with which principles I shall deal with in much greater detail below), it is important to recall the caution articulated by Holman J in the same passage at [143] in *Leeds City Council v YX & ZX (Assessment of Sexual Abuse)* as follows:

> "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."

257. Third, the evidence that in its totality the court is required to consider when determining whether the standard of proof has been met is sometimes referred to as "the wide canvas" (see *Re U (Serious Injury: Standard of Proof)* [2005] Fam 134 at [26]) or "the broad canvas". With respect to the "broad canvass", that concept is *not* an excuse for forensic laxity. Consistent with the authorities I have already cited, the broad canvas that the court is required to survey in cases of this nature must be one that is woven only from fibres comprised of relevant and admissible evidence. Any other approach risks the concept of the "broad canvas" becoming a short cut to findings based on impermissible assumption, conjecture and prejudice, rather than on relevant and admissible evidence and the inferences that can properly be drawn from the same.

258. Finally, with respect to the standard of proof, determining whether a fact is proved on the balance of probabilities, the inherent probability or improbability of an event remains a matter to be considered when weighing the probabilities and deciding whether, on balance, the event occurred. As has been observed by the Supreme Court, common sense, not law, requires that in deciding this question regard should be had, to whatever extent appropriate, to inherent probabilities (*Re B (Care Proceedings: Standard of Proof)* at [15]).

Hearsay Evidence

259. In family proceedings, evidence given in connection with the welfare of a child is admissible notwithstanding any rule relating to the law of hearsay (see the Children (Admissibility of Hearsay Evidence) Order 1993). The weight to be attached to a piece of hearsay evidence is a question for the court to decide (*Re W (Fact Finding: Hearsay Evidence)* [2014] 2 FLR 703). Within this context, a serious unsworn allegation may be accepted by the court provided it is evaluated against testimony on oath (*Re H (Change of Care Plan)* [1998] 1 FLR 193). It is very important to bear in mind at all times that the court is required to treat hearsay evidence anxiously and consider carefully the extent to which it can properly be relied upon (see *R v B County Council ex parte P* [1991] 1 WLR 221).

260. In this case, these principles are thrown into particularly sharp relief in circumstances where *none* of the children who have made allegations of sexual abuse have given oral evidence at this hearing and been cross-examined on behalf of those against whom they level those allegations. Mr Bagchi and Ms Bains, citing the American jurist John Henry Wigmore, who observed that "Cross-examination is the greatest legal engine ever invented for the discovery of truth", remind the court that oral evidence given under cross-examination reflects the long-established common-law consensus that the best way of assessing the reliability of evidence is by confronting the witness (see *Carmarthenshire County Council v Y & Others* [2017] EWFC 36 at [8] per Mostyn J). Within this context, I remind myself that the Court of Appeal has made clear that where the evidence of a child stands only as hearsay, the court weighing up the evidence must consider the fact that it was not subject to cross-examination (*Re W* [2010] 1 FLR 1485). I make clear that I have done so.

261. In circumstances where, in this case, the allegations are comprised of hearsay evidence from children concerning (at least in respect of the children) events which are alleged to have occurred some years prior to the allegations being made, I also remind myself that a court considering the hearsay evidence of a child must consider not only what the child has said, but also the circumstances in which it was said (*R v B County Council, ex parte P* [1991] 1 FLR 470) and, again, that it has long been recognised that care must be taken not to focus attention on statements made by the child at the expense of other evidence (1997 Handbook of Best Practice in Children Act Cases).

Truth and Lies

262. The court must bear in mind that a witness may tell lies during an investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear and distress. The fact that a witness has lied about some matters does not mean that he or she has lied about everything (*R v Lucas* [1982] QB 720). It is also important, in cases where one or more of the respondents has significant cognitive difficulties, that before considering the application of the principle in *R v Lucas* the court satisfies itself that the statement that is said to be a lie is not, in fact, merely the result of confusion or misunderstanding.

263. Within the context of family proceedings, the Court of Appeal has made clear that the application of the principle articulated in *R v Lucas* in family cases should go beyond the court merely reminding itself of the broad principle. In *Re H-C (Children)* [2016] 4 WLR 85 McFarlane LJ (as he then was) stated as follows:

> "[100] One highly important aspect of the Lucas decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the 'lie' is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in Lucas, where the relevant conditions are satisfied the lie is "capable of amounting to a corroboration". In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of *R v Middleton* [2001] Crim.L.R. 251. In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt."

264. The four relevant conditions that must be satisfied before a lie is capable of amounting to corroboration are set out by Lord Lane CJ in *R v Lucas* as follows:

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

265. Where the court is satisfied that a lie is capable of amounting to corroboration of an allegation having regard to the four conditions set out in *R v Lucas*, in determining whether the allegation is proved, the court must weigh that lie against any evidence that points away from the allegation being made out (*H v City and Council of Swansea and Others* [2011] EWCA Civ 195).

266. Within the foregoing context, it would seem plain that the court is also required to consider the final principles set out in *R v Lucas*, that people may lie for many reasons, when considering any lies told by the complainant children in this case. In the same way that one or more lies told by an adult should not result in conclusion

that that adult is lying about everything, nor should one or more lies by a child necessarily result in the entirety of that child's evidence being rejected as unreliable. As with adults, children may lie for a variety of reasons, including shame, misplaced loyalty, panic, fear and distress but also to avoid negative consequences, to obtain reward, to protect self-esteem, to maintain a relationship or to conform to norms or conventions. In the circumstances, when considering the import of a lie told by a child the court should also remind itself that children also lie for many reasons and the fact that the child has lied about some matters does not mean that he or she has lied about everything.

Corroboration

267. In a case in which the testimony of children, with its limitations as discussed above, is central, it is also important to note the following further points with respect to the question of corroboration. In *Lillie and others v Newcastle CC* at [363] Eady J noted, in the context of a case in which he was required to determine allegations of sexual abuse made by multiple children in the context of a libel action, that where there is credible evidence of abuse with respect to one child, the court can look to any comparably credible evidence relating to another child for corroboration of the former. However, Eady J was also careful to make clear at [367] that with respect to the question of corroboration:

> "I must focus upon the essential principle. Evidence about what A has done to B may be admissible and probative of what A has done to C. The value of such evidence, however, depends upon its independence. If there is a significant risk of contamination undermining that independence, the relevance and value may be correspondingly diminished. It is necessary to be wary in cases where a risk of contamination arises (which is real, as opposed to fanciful) because of the investigation process itself."

268. Within this context, when considering whether there is evidence that corroborates the allegations made by a given subject child, the court will look to see whether that evidence has the *character* of corroborating evidence, before considering the extent to which that evidence corroborates that which it is said to. In the context of a case of alleged child sexual abuse by multiple children, in *Lillie and others v Newcastle CC* from [368] to [370] Eady J gave the following example of the application of this approach:

> "[368] For example, where a social services department investigates allegations of sexual abuse, whether from the recent or distant past, its inquiries may prompt complainants who would not have come forward of their own accord. It was made clear in *Ananthanarayanan* that a jury may well need to be given a specific direction in such cases to meet the problem. It would not suffice merely to direct the jury that they need to be sure that there has been no conspiracy to give false evidence; they would need to be sure also that there had been no influence from hearing of the allegations made by other people or by suggestions from some other person. In this case, the Claimants contend that there was a substantial risk of contamination throughout the investigation. Indeed, the Review Team were expressly warned by Constable Helen Foster of the specific risks in this case. Miss Page submits that it was pervasive.

> [369] She did not submit that this rendered the evidence inadmissible but asks me to bear it very much in mind wherever it may be suggested that the evidence of one child or parent should be treated as corroborative of another's. Here there are various "pervasive" problems. There was a risk of contamination through social services asking questions or suggesting that questions be asked; through parents speaking to children or to other parents; through children speaking to other children; through police or social services interviewers suggesting concepts or events to children; through Dr San Lazaro suggesting that questions be asked, or passing on between parents or children negative messages about the Claimants, or about behaviours or phobias to watch out for.
>
> [370] It is also important to remember that if a witness's evidence is incredible it should be rejected. It cannot be given credibility through corroboration: see the remarks of Lord Hailsham in *Kilbourne* [1975] AC 746. The principle is one of common sense and therefore just as significant in the context of civil litigation.
>
> [371] Thus, if I am doubtful about an allegation in relation to Child X, because of a risk of contamination or for any other reason, I should assess it on its own merits. If I find Child X's evidence persuasive, then I can take into account corroborative evidence from Child Y provided I keep a sharp lookout for risks of contamination of the kinds I have identified."

269. Finally, in relation to corroboration, as a general rule of evidence, the court may act on the testimony of a single witness even where there is no other evidence which corroborates it (see *Phipson on Evidence* at [14-01]). Where, in a civil case, such testimony is unimpeached the court should act on it (see *Morrow v Morrow* [1914] 2 IR 183). Within this context, whilst not directly applicable in these proceedings (and again ever mindful of the observation of McFarlane LJ (as he then was) in *Re R (Children)* that it is fundamentally wrong for the Family Court to be drawn into an analysis of factual evidence in proceedings relating to the welfare of children based upon criminal law principles and concepts), I also note that s 34(2) of the Criminal Justice Act 1988 abrogated the rule that required the court to give a jury a warning about convicting the accused on the uncorroborated evidence of a child, and that s 32 of the Criminal Justice and Public Order Act 1994 abrogated the rule which previously required juries to be given a warning (and magistrates to warn themselves) about the dangers of relying on uncorroborated evidence in a case of alleged sexual offences. The court does however, retain a discretion in such cases to give warnings in respect of witnesses (see *R v Makanjuola* [1995] 1 WLR 1348). A warning will be given where there is an evidential basis for suggesting that the evidence of the witness may be unreliable, for example an admission by a witness of a previous lie or the giving by a witness of other evidence that is clearly unreliable (see *R v Makanjuola*). The focus is on the individual witness, avoiding invoking stereotypes or broad generalisations.

The Overall Approach

270. Within the foregoing context, with respect to the legal principles applicable to the highly complex fact-finding exercise concerning allegations of sexual abuse in which this court is engaged, in the recent decision of *Re A (Children)* [2018] EWCA Civ

1718, the Court of Appeal once again emphasised the *overarching* importance, when determining whether or not the case has been proved to the requisite standard, of the court standing back from the case to consider the whole picture and ask itself the ultimate question of whether that which is alleged is more likely than not to be true. In *Re A*, Lady Justice King cited the following passage from the judgment of Lord Justice Toulson (as he then was) in *Nulty Deceased v Milton Keynes Borough Council* [2013] 1 WLR 1183:

> "[34] A case based on circumstantial evidence depends for its cogency on the combination of relevant circumstances and the likelihood or unlikelihood of coincidence. A party advancing it argues that the circumstances can only or most probably be accounted for by the explanation which it suggests. Consideration of such a case necessarily involves looking at the whole picture, including what gaps there are in the evidence, whether the individual factors relied upon are in themselves properly established, what factors may point away from the suggested explanation and what other explanation might fit the circumstances. As Lord Mance observed in Datec *Electronics Holdings Limited v UPS limited* [2007] UKHL 23, [2007] 1 WLR 1325, at 48 and 50, there is an inherent risk that a systematic consideration of the possibilities could become a process of elimination "leading to no more than a conclusion regarding the least unlikely cause of loss", which was the fault identified in *The Popi M*. So at the end of any such systematic analysis, the court has to stand back and ask itself the ultimate question whether it is satisfied that the suggested explanation is more likely than not to be true. The elimination of other possibilities as more implausible may well lead to that conclusion, but that will be a conclusion of fact: there is no rule of law that it must do so. I do not read any of the statements in any of the other authorities to which we were referred as intending to suggest otherwise.
>
> [35] The civil "balance of probability" test means no less and no more than that the court must be satisfied on rational and objective grounds that the case for believing that the suggested means of causation occurred is stronger than the case for not so believing. In the USA the usual formulation of this standard is a "preponderance of the evidence". In the British Commonwealth the generally favoured term is a "balance of probability". They mean the same. Sometimes the "balance of probability" standard is expressed mathematically as "50 + % probability", but this can carry with it a danger of pseudomathematics, as the argument in this case demonstrated. When judging whether a case for believing that an event was caused in a particular way is stronger than the case for not so believing, the process is not scientific (although it may obviously include evaluation of scientific evidence) and to express the probability of some event having happened in percentage terms is illusory.
>
> [36] Mr Rigney submitted that balance of probability means a probability greater than 50%. If there is a closed list of possibilities, and if one possibility is more likely than the other, by definition that has a greater probability than 50%. If there is a closed list of more than two possibilities,

> the court should ascribe a probability factor to them individually in order to determine whether one had a probability figure greater than 50%.
>
> [37] I would reject that approach. It is not only over-formulaic but it is intrinsically unsound. The chances of something happening in the future may be expressed in terms of percentage. Epidemiological evidence may enable doctors to say that on average smokers increase their risk of lung cancer by X%. But you cannot properly say that there is a 25 per cent chance that something has happened: *Hotson v East Berkshire Health Authority* [1987] AC 750. Either it has or it has not. In deciding a question of past fact the court will, of course, give the answer which it believes is more likely to be (more probably) the right answer than the wrong answer, but it arrives at its conclusion by considering on an overall assessment of the evidence (i.e. on a preponderance of the evidence) whether the case for believing that the suggested event happened is more compelling than the case for not reaching that belief (which is not necessarily the same as believing positively that it did not happen)".

271. Finally, in relation to the overall approach, in circumstances where this case involves a *very* large number of allegations against a large number of people, it is important in this case to recall, as Eady J did in *Lillie and others v Newcastle CC*, the cautionary words of Lord Hewart CJ in *Bailey* [1924] 2 KB 300 at 305 regarding the approach required in cases in which the court is faced with determining a very large number of allegations:

> "The risk, the danger, the logical fallacy is indeed quite manifest to those who are in the habit of thinking about such matters. It is so easy to derive from a series of unsatisfactory accusations, if there are enough of them, an accusation which at least appears satisfactory. It is so easy to collect from a mass of ingredients, not one of which is sufficient, a totality which will appear to contain what is missing. That of course is only another way of saying that when a person is dealing with a considerable mass of facts, in particular if those facts are of such a nature as to invite reprobation, nothing is easier than confusion of mind; and, therefore, if such charges are to be brought in a mass, it becomes essential that the method upon which guilt is to be ascertained should be stated with punctilious exactness".

272. The totalising approach must be avoided if the court is to steer safely clear of capitulating to suspicion and the beguiling adage that there is 'no smoke without fire'. Within this context and with, I hope, punctilious exactitude, I make clear that I have in this case evaluated each child's allegations of sexual abuse separately against the applicable standard of proof on the available relevant and admissible evidence, but without prejudice to the possibility that the evidence in respect of one child will serve to corroborate credible evidence in respect of another child having regard to my observations regarding corroboration set out above (see *Lillie and others v Newcastle CC* at [336]).

H. DISCUSSION

[...] [The court proceeded to set out the analysis underpinning the court's decision]

Evaluation and Discussion of Children's Allegations

570. The *Children Act Advisory Committee Handbook of Best Practice in Children Act Cases* 1997 notes that any investigation into child sexual abuse that focuses attention on the statements of the child runs the risk of producing a false result if what the child says is unreliable or if the child's primary caretaker is unreliable. Within this context, it is well recognised that it is important, forensically, in a case of alleged sexual abuse, to examine the first point in time at which a child gives an account or accounts of alleged sexual abuse, the precise circumstances in which the account or accounts arose and how those were treated subsequently by those to whom they were made. It is therefore necessary, as I have noted, to consider not only what each of the children has said but also, and importantly, the circumstances in which they said it.

571. Before turning to the factors that are said to support the reliability and credibility of the allegations made by [the children], and those that are said to undermine the reliability and credibility of those allegations, I deal first with the principles which govern the proper response to children who make allegations of sexual abuse, within the context of which principles I must proceed to analyse the allegations made by the children in this case.

Good Practice with Respect to Handling Allegations of Sexual Abuse

572. The proper practice to be applied when handling allegations of sexual abuse by children is articulated fully in extensive guidance and case law, which I summarised in *AS v TH (False Allegations of Sexual Abuse)* [2016] EWHC532 (Fam) at [33] to [52]. Given the manifest omissions in the application of that guidance and case law that are apparent in this case, it is convenient to set those matters out again in this section of the judgment. However, before coming to that summary of the relevant principles and, again, given the issues that have arisen with respect to the treatment of the children's allegations in this case, it is necessary to articulate *why* it is so vital that the good practice developed over many years is applied with rigor. Regrettably, it appears from this case that the *rationale* for applying the proper approach is still not clear, or has been lost, to many professionals and others who are responsible for safeguarding and promoting the welfare of children. The following observations apply *both* in the context of allegations made to carers, teachers and others *and* to the proper conduct of ABE interviews by the police.

573. The courts have long stipulated, and continue to demand, that *very great* care is taken when dealing with allegations of sexual abuse made by children, both in the initial phases and at the ABE interview stage (see for example *Re E* [2017] 1 FLR 1675 at [45]). This conclusion has been drawn from long experience and having regard to the results of a body of research into the way a child registers, processes and recalls memories, and the way in which a child may respond to figures perceived by the child to be in authority when questioned about such memories. In *Lillie and others v Newcastle CC*, Eady J observed as follows at [407]:

> "It is of course elementary that one should put to one side any notion that an unwillingness to place reliance on a child's evidence of sexual abuse necessarily imputes bad faith to the child, its parents or any other interrogator. What the research has thrown into stark relief is quite simply

> that very young children do not appear to have the same clear boundaries between fact and fantasy as that which adults have learned to draw"

In *Re B (Allegation of Sexual Abuse: Child's evidence)* Hughes LJ (as he then was), alluding to past public enquiries that have demonstrated the point both starkly and repeatedly, stated at [34] that:

> "…Painful past experience has taught that the greatest care needs to be taken if the risk of obtaining unreliable evidence is to be minimised. Children are often poor historians. They are likely to view interviewers as authority figures. Many are suggestible. Many more wish to please. They do not express themselves clearly or in adult terms, so that what they say can easily be misinterpreted if the listeners are not scrupulous to avoid jumping to conclusions. They may not have understood what was said or done to them or in their presence."

574. Within the foregoing context, in their written closing submissions (which submissions on this point were endorsed by the other adult respondents and interveners in the case), Mr Vater and Mr Watson [...] caution the court to:

> "…keep firmly in mind (unlike many of the professionals in this case) the very significant developments in our understanding of the 'reliability' of allegations made by children over the last 30 years. In parallel with that development has been increased understanding and acknowledgment of the wide range of internal and external influences that can distort and undermine the reliability of child complainants. It is a fact that children's accurate memories can be wholly usurped by a wide range of external and internal factors, such as suggestive questioning or confirmatory bias. The Court must keep firmly in mind the work of, for example, Professors Ceci and Bruck (Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony (1995 – American Psychological Association)). That research has revealed not only the danger that children's memories may be completely usurped, but that children finding themselves in such circumstances may embellish or overlay a general theme with apparently convincing detail that can be very difficult to detect, even by the most expert assessor."

575. The courts have recognised this developing psychological research into the nature of memory in other contexts. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 QB, a commercial case, Leggatt J (as he then was) dealt with these issues at [15] to [22] and observed as follows at [15] to [17]:

> "[16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that

> the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> [17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory)."

576. Caution is, of course, required. As Eady J noted in *Lillie and others v Newcastle CC* at [402] (in a case in which Professor Bruck gave evidence), in circumstances where research into the reliability of children's recollections is ongoing, and where that research has given rise to differing opinions on the correct interpretation of the data:

> "A mere lawyer has to approach such matters with care, conscious that nothing is certain, and to pay close regard to the evidence in the specific case or cases, without being drawn into taking sides on the more general debate."

In addition, no application was made in this case for the provision of expert evidence on this issue within the context of the facts of this case.

577. That said, and considering the authorities set out above, the Report of the Inquiry into child abuse in Cleveland 1987 Cm 412 and Report of the Inquiry into the Removal of Children from Orkney in February 1991 among others and the contents of the current ABE Guidance, I am satisfied that this court can take judicial notice of the following matters:

i) Children, and especially young children, are suggestible.

ii) Memory is prone to error and easily influenced by the environment in which recall is invited.

iii) Memories can be confabulated from imagined experiences, it is possible to induce false memories and children can speak sincerely and emotionally about events that did not in fact occur.

iv) Allegations made by children may emerge in a piecemeal fashion, with children often not reporting events in a linear history, reporting them in a partial way and revisiting topics.

v) The wider circumstances of the child's life may influence, explain or colour what the child is saying.

vi) Factors affecting when a child says something will include their capacity to understand their world and their role within it, requiring caution when interpreting children's references to behaviour or parts of the body through the prism of adult learning or reading.

vii) Accounts given by children are susceptible to influence by leading or otherwise suggestive questions, repetition, pressure, threats, negative stereotyping and encouragement, reward or praise.

viii) Accounts given by children are susceptible to influence as the result of bias or preconceived ideas on the part of the interlocutor.

ix) Accounts given by children are susceptible to contamination by the statements of others, which contamination may influence a child's responses.

x) Children may embellish or overlay a general theme with apparently convincing detail which can appear highly credible and be very difficult to detect, even for those who are experienced in dealing with children.

xi) Delay between an event recounted and the allegation made with respect to that event may influence the accuracy of the account given.

xii) Within this context, the way, and the stage at which a child is asked questions / interviewed will have a profound effect on the accuracy of the child's testimony.

578. Within the context of the proposition that accounts given by children are susceptible to influence as the result of bias or preconceived ideas on the part of the interlocutor, a particular issue that has arisen in this case is that of the practice of "believing the child" as complainant, in circumstances where the foster carers, a number of the police officers and the majority of the professionals who gave evidence before the court made clear that they had, to varying degrees, proceeded on the basis that the children who made allegations were telling the truth and were, accordingly, to be believed.

579. Once again, notwithstanding the approach taken by foster carers, police officers and professionals in this case, the manifest dangers inherent in enquiries proceeding from the position that "the child is to be believed" has been clear for many years and, as such, the following propositions apply to both professionals and the police. In 1987 the Cleveland Enquiry made plain at [13.22] that:

> "Throughout the phase of the initial assessment and preliminary decision-making, social workers should be conscious of the fact that the presumption that abuse has taken place can have damaging repercussions for the child and the family. Equally an abnormally low level of alertness to the possibility of child sexual abuse may deter children from subsequently trusting adults sufficiently to reveal the fact of abuse to them."

In 1991, the Orkney Enquiry at [15.22] and [15.23] again emphasised the difficulty with proceeding from the starting point that the 'child must be believed':

> "[15.22] "It is recommended as matter for guidance that all those involved in investigating allegations of child sexual abuse must keep an open mind and not fall into the trap of confusing the taking of what a child says seriously with believing what the child has said.
>
> [15.23] The preservation of an open mind requires a concentration in listening with care to what a child says, absorbing all that is said and weighing the child's words objectively. A mind coloured by suspicion or a mind already moving towards a diagnosis can readily undervalue or ignore material that does not fit with the preconceived picture. Similarly material which does appear to fit may be over emphasised and highlighted in such a way as to distort the child's further account of the situation ... as much care should be given to assessing a denial as examining an allegation ... Where allegations are made by a child regarding sexual abuse those allegations should be treated seriously, they should not necessarily be accepted as true but should be examined and tested by whatever means are available before they are used for the basis of action."

580. The Handbook of Best Practice in Children Act Cases 1997 also makes clear that it is vital to approach a child abuse investigation with an open mind. The need to keep an open mind rather than to simply believe from the outset what the child is saying has likewise been emphasised by the courts. In *A City Council v T* [2011] EWCA Civ 17 at [23], commenting on the contents of the ABE Guidance, Wall LJ (as he then was) stated:

> "Much of the original Cleveland learning is retained and reiterated. Thus, to take two early examples; the need for "thorough planning" is set out at the very beginning of the chapter, alongside an emphasis on the requirement for the interviewer to keep an open mind as to what may or may not have happened to the child, and not to seek only to elicit "details that will prove a hypothesis about the child's experience(s) constructed on the bases of the initial information"

581. With respect to the position of 'belief' of the alleged victim within the specific context of a police investigation, I have been referred to *An Independent Review of the Metropolitan police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence*, completed in 2016 by Sir Richard Henriques. Whilst concerned primarily with adult complainants in cases of alleged historic sexual abuse, the report notes that, as at the date of the report, the stated policy of the College of Policing, articulated in a letter dated 18 march 2016, was "At the point when someone makes an allegation of crime, *the police should believe the account given* and a crime report should be completed" (emphasis added). The obligation to believe a complainant appears to have had its origins in a Special Notice from 2002 concerning rape investigations, thereafter appearing in an HMIC report in 2014 and in 2015 in Home Office rules governing the recording of crime statistics. The primary motivation for the policy appears to have been a desire to address the evidence that a fear of disbelief or being blamed for what had happened was a barrier to complainants coming forward and reporting crime, especially alleged sexual

offences. The Henriques report observed as follows with respect to the effect of the policy:

> "The police officer taking a statement from a complainant has a unique opportunity to assess the complainant's veracity. The effect of requiring a police officer, in such a position, to believe a complainant reverses the burden of proof. It also restricts the officer's ability to test the complainant's evidence"

And

> "Any process that imposes an artificial state of mind upon an investigator is, necessarily, a flawed process. An investigator, in any reputable system of justice, must be impartial. The imposed 'obligation to believe' removes that impartiality."

And:

> "Since a complainant may or may not be telling the truth, the present policy causes those not telling the truth to be artificially believed and, thus, liars and fantasists, and those genuinely mistaken, are given a free run both unquestioned and unchallenged. The obligation to believe at the outset can and does obstruct the asking or relevant or probing questions designed to elicit the truth. The asking of such questions can be achieved in a sympathetic, kindly and professional manner. Criminal investigation should include the process of investigating from the outset and not waiting for some evidence to the contrary to turn up."

582. Within the foregoing context, the Henriques report made the following clear recommendation:

> "The instruction to 'believe' a 'victim's' account should cease. It should be the duty of an officer interviewing a complainant to investigate the facts objectively and impartially and with an open mind from the outset of the investigation. At no stage must an officer show any form of disbelief and every effort must be made to facilitate the giving of a detailed account in a non-confrontational manner."

583. It is not entirely clear from the information available to this court to what extent a policy of automatically believing accounts given by complainants remained formally in force at the time the police commenced [the criminal investigation]. However, in her oral evidence [the investigating officer], in response to a question asked by the Court, stated that the police force maintained a "believe the victim policy", under which policy she operated during [the criminal investigation]. Further, I have had sight of recommendations contained in a document entitled *Review into the Terminology "Victim/Complainant" and Believing Victims at the time of Reporting* compiled by Assistant Commissioner Beckley for the College of Policing in February 2018. That report recommended that the relevant Home Office crime recording rules should remove the words "The intention that victims are believed" and substitute them with the words "The intention is that victims can be confident they will be listened to and their crime taken seriously" and that the College of Policing should

make amendments to reflect this change. It would appear however, that this recommendation has not yet been adopted. The April 2018 version of Home Office Counting Rules for Recorded Crime states in National Crime Recording Standard 1 that "The Standard directs a victim focused approach to crime recording. The intention is that victims are believed and benefit from statutory entitlements under the Code of Practice for Victims of Crime (CPVC)." Within this context, the relevant Standards make repeated reference to "the presumption is that the victim reports should be believed".

584. Once again, [...], it is important to understand *why* the cardinal principle of the need to retain an open mind when considering allegations of sexual abuse has such a long pedigree. Mr Bagchi and Ms Bains have drawn the court's attention to a paper by Ceci and others entitled *Children's Suggestibility Research: Things to know before interviewing a child* (Anuario de Psicología Jurídica 25 (2015) 3-12) in which Ceci and his fellow authors highlight the operation of "confirmation bias" in the context of allegations made by children, being a tendency, identified in the research, for a person to be biased towards information that confirms their own personal beliefs. In the paper the authors note, in the context of research by Bruck amongst others, as follows with respect to the potential consequences of confirmation bias when interviewing children:

> "A persons' established beliefs are often difficult to change and resist contradictory evidence (Ross, Lepper & Hubbard, 1975). This phenomenon, referred to as "confirmation bias", can have especially detrimental effects when working with child witnesses. If an interviewer enters a room, prepared to question a child, and brings along pre-established beliefs about the case or the accuracy and credibility of the child, the interviewer may unintentionally put disproportional weight on some statements the child makes while ignoring others. If the interviewer's initial suspicions are incorrect, this could create a false report. Confirmation bias is potentially a problem for all people who may interact with a child witness, even professionals in the field of forensics, human development and social science. In fact, experts tend to be more confident in their evaluations of witnesses than others, despite not necessarily being more skilled at distinguishing accurate from inaccurate statements (DePaulo et al., 2003; Wessel, Drevland, Eilertsen, & Magnussen, 2006)."

585. The existence of confirmation bias is what underpins the oft repeated guidance for those investigating allegations of child sexual abuse to keep an *open mind* and is, fundamentally, what makes proceeding from a starting point of "the child must be believed" so problematic, indeed dangerous, forensically. The dangers of confirmation bias in the context of proceedings concerning children were recognised by Wall LJ (as he then was) in *A City Council v T* at [23] when, echoing paragraph [13.22] of the Cleveland Report, His Lordship emphasised:

> "...the requirement for the interviewer to keep an open mind as to what may or may not have happened to the child, and not to seek only to elicit 'details that will prove a hypothesis about the child's experience(s) constructed on the bases of the initial information.'"

586. This gives rise to the question of *how* interviewers and others maintain an open mind in the face of allegations made by children. This question is particularly acute for foster or other adult carers who may not have received training or adequate training with respect to dealing with allegations of abuse made by children. Whilst the statement in the first edition of Working Together to Safeguard Children (HM Government July 2006) that "a child's ability to cope with the experience of sexual abuse, once recognised or disclosed, is strengthened by the support of a non-abusive adult carer who believes the child, helps the child understand the abuse, and is able to offer help and protection" has been excised from later editions, Standard 4.3 of the Fostering Services: National Minimum Standards still requires that "Foster carers make positive relationships with children, generate a culture of openness and trust and are aware of and alert to any signs or symptoms that might indicate a child is at risk of harm."

587. Within this context and having regard to the matters set out in the foregoing paragraphs, the proper approach is likely to be one that combines listening to the child and taking them seriously whilst taking care not to prejudge the issue, an approach of neutrality but not indifference, coupled with the rigorous application of the guidance to which I now turn. In moving to the stage of investigation, it will also be useful for professionals and police officers to reflect on Willingham's definition of critical thinking in '*Critical Thinking: Why Is It So Hard to Teach?*' (Willingham, D. T. (2007) American Educator, 31, 8-19) which describes the required approach as:

> "…seeing both sides of an issue, being open to new evidence that disconfirms your ideas, reasoning dispassionately, demanding that claims be backed by evidence, deducing and inferring conclusions from available facts..."

588. As I have noted, I summarised the statutory and good practice guidance that is designed to mitigate the impact of the difficulties identified above in *AS v TH, BC, NC, SH (by their Children's Guardian)* at [33] to [52]. Within the context of this case, the salient points can be recapitulated as follows.

Initial Contact with a Child Alleging Abuse

589. The departmental advice What to do if you're worried a child is being abused (HM Government, March 2015) (replacing previous guidance published in 2006) states that before referring to children's services or the police an attempt should be made to establish the basic facts. The Guidance makes clear to readers at [25] that "it will be the role of social workers and the police to investigate cases and make a judgement on whether there should be a statutory intervention and/or a criminal investigation". Within this context, the following is said at [28]:

> "The signs of child abuse might not always be obvious and a child might not tell anyone what is happening to them. You should therefore question behaviours if something seems unusual and try to speak to the child, alone, if appropriate, to seek further information"

And at [29]:

> "If a child reports, following a conversation you have initiated or otherwise, that they are being abused and neglected, you should listen to them, take their allegation seriously, and reassure them that you will take action to keep them safe."

590. In *Re SR* [2018] EWCA Civ 2738 the Court of Appeal made clear that the principles set out in the statutory guidance Achieving Best Evidence in Criminal Proceedings (March 2011) (the ABE Guidelines) are relevant to *all* investigations which include interviews of alleged victims of abuse, whether or not the interviews purport to have been conducted under the guidance. Within this context, the ABE Guidance covers interactions between the child and others *prior* to any ABE interview and recognises at [2.4] that the need to consider a video recorded interview in respect of the allegations may not be immediately apparent to professionals involved prior to the police being informed. Within this context, with respect to the proper response of the person to whom the allegations are made, the ABE Guidelines state at [2.5] that:

> "Any initial questioning should be intended to elicit a brief account of what is alleged to have taken place; a more detailed account should not be pursued at this stage but should be left until the formal interview takes place. Such a brief account should include where and when the alleged incident took place and who was involved or otherwise present."

591. The ABE Guidance goes on to state at [2.6] under the heading 'Initial Contact with Victims and Witnesses' that a person engaged in early discussion with an alleged victim or witness following an allegation should, as far as possible, (a) listen, (b) not stop a free recall of events and (c) where it is necessary to ask questions, ask open-ended or specific closed questions rather than forced-choice, leading or multiple questions and ask no more questions than are necessary to take immediate action. Within this context, and in the context of an examination of the ABE guidance, in *Re S (A Child)* [2013] EWCA Civ 1254 at [16] the Court of Appeal held that, with respect to initial contact with alleged victims, discussions about the facts in issue in respect of an allegation, as distinct from whether and what allegation is being made and against whom, should be rare and should not be a standard practice.

592. When social workers are speaking to children who have made allegations they must be very careful to consider the purpose of the exchange and whether it is being conducted with a view to taking proceedings to protect the child or for separate therapeutic purposes where the restrictions upon prompting would not apply but the interview would not be for the purposes of court proceedings (*Re D (Child Abuse: Interviews)* [1998] 2 FLR 10).

593. In *Re SR* the Court of Appeal reiterated that a failure to comply with the ABE Guidance will often have a decisive effect on the weight to be attached to the evidence obtained. With respect to *initial accounts* the difficulties may be exacerbated in circumstances where in any event, as the Court of Appeal has also emphasised in *Re D and Others (Child Abuse: Investigation Procedure)* [1995] 3 FCR 581, an "allegation which has not been videoed will inevitably carry less weight because the court cannot assess the allegation itself" and that given "their lack of expertise an alleged disclosure to a foster parent is less likely to carry significant weight in a court than is a statement by a child to an experienced and skilled interviewer".

Record Keeping

594. The second key component of good practice with respect to accounts of sexual abuse given by children is effective record keeping. The Cleveland Report makes clear at paragraph 13.11 that: "We would emphasise the importance of listening carefully to the initial presentation of information and taking careful notes". Within this context, the requirement that all professionals responsible for child protection make a clear and comprehensive record of what the child says as soon as possible after it has been said, and in the terms used by the child has been well established good practice for many years.

595. Where the person to whom the initial account is given is not a professional, there remain obvious advantages if the account is recorded having regard to this principle. Once again, the ABE Guidelines are relevant to all investigations which include interviews of alleged victims of abuse, whether the exchanges purport to have been conducted under the guidance (*Re SR*). The ABE Guidance re-emphasises the statement of good practice contained in the Cleveland Report under the heading 'Initial Contact with Victims and Witnesses' by making clear that the person speaking with the alleged victim or witness should (emphasis added):

    i) make a comprehensive note of the discussion, taking care to record the timing, setting and people present as well as what was said by the witness and anybody else present (*particularly the actual questions asked of the witness*);

    ii) make a note of the demeanour of the witness and anything else that might be relevant to any subsequent formal interview or the wider investigation; and

    iii) fully record any comments made by the witness or events that might be relevant to the legal process up to the time of the interview.

596. The need for those working with children to record, as contemporaneously as possible, what the child has said has been recognised and endorsed by the courts as vital in circumstances where, in determining allegations of sexual abuse, it is necessary for the court to examine in detail and with particular care what the child has said (sometimes on a number of different occasions) and the circumstances in which they said it (*D v B and Others (Flawed Sexual Abuse Enquiry)* [2007] 1 FLR 1295). Within this context, it will also be important that, when recording an allegation, the child's own words are used and that those speaking with the child should avoid summarising the account in the interests of neatness or comprehensibility or recording their interpretation of the account.

597. In particular, the courts have emphasised the need for records of conversations with the alleged victim of sexual abuse to include a full note of the *questions* as well as the answers (I pause to note that this requirement is thrown into even sharper relief when one accounts for the need to examine the presence of confirmation bias on the part of the interlocutor for the reasons set out above). In *Re B (Allegation of Sexual Abuse: Child's evidence)* at [37] Hughes LJ (as he then was) observed as follows when commenting on an interview undertaken of a child by a police officer and social worker who were not properly prepared notwithstanding the likelihood of allegations, which allegations should have been anticipated and during which only what the child was said was noted down:

> "37. None of this should have happened. In the case of S, unlike her siblings, there was clear reason to think that she might well have something to say and certainly there might be questions which needed to be asked of her. It would have been much more sensible to record all conversations with her. To proceed without recording was to court the risk that what would happen was what did; that is to say that S would produce information, that it would be undesirable to stop her, but that the professionals were not ready to deal with it. If there was to be any possibility of such an unrecorded discussion ensuing, the absolute irreducible minimum was that a full note be taken of questions as well as answers. There were also other lesser, but important, respects in which this discussion failed to comply with the ABE guidelines. There was, for example, no truth and lies discussion."

598. The need for effective record keeping in the context of allegations of child sexual abuse extends to schools. The departmental advice entitled What to do if you're worried a child is being abused (HM Government, March 2015) makes clear at [26] that professionals should record in writing all concerns and discussions about a child's welfare, the decisions made and the reasons for those decisions". The statutory Guidance Keeping Children Safe in Education (HM Government, July 2015) makes clear at [19] that poor practice in relation to safeguarding children includes poor record keeping.

Social Work Intervention and Assessment

599. As I noted in *AS v TH (False Allegations of Abuse)*, the Cleveland Report provides extensive guidance on proper social work practice in the context of allegations of sexual abuse. The salient points are as follows (emphasis added):

i) Whatever the nature of presentation, whether the response is immediate, prompt or deferred, the response should be planned and conducted with professional skill. Children's best interests are rarely served by precipitate action. Initial action in securing the widest possible information about the child's circumstances and family background is an essential pre-requisite to careful judgment and purposeful intervention" (para 13.9);

ii) It is necessary to assess the family by looking at the parents individually, the parents' relationship, the vulnerability of the child, the child's situation in the family, the family's social situation, their contacts with extended family etc. as well as considering and recording the family's perspective of events which set the referral in motion (para 13.13);

iii) The principle aim of the social worker's contact with the family at this stage should be to compile a social history, obtaining as comprehensive a picture of relationships and pattern of family life as possible. The quality of the marital relationship and parental skills should be carefully assessed (para 13.19);

iv) Social workers should seek a broadly based assessment of the child. An outline of the child's social development together with information about the important relationships in the child's life is vital information. Where a child is attending playgroup, childminders or school it will be helpful to record the views of those responsible for the child's day to day care (para 13.23);

v) Intervention should proceed as part of a planned and co-ordinated activity between agencies. Children and families should not be subject to multiple examinations and interviews simply because agencies and their staff have failed to plan their work together (para 13.10);

vi) The social worker will need to establish a clear understanding with the police about how their respective roles are to be co-ordinated (para 13.12);

vii) Throughout the phase of the initial assessment and preliminary decision making, social workers should be conscious of the fact that the presumption that abuse has taken place can have damaging repercussions for the child and the family. Equally, an abnormally low level of alertness to the possibility of child sexual abuse may deter children from subsequently trusting adults sufficiently to reveal the fact of abuse to them (para 13.22).

Summary

600. Having regard to the matters set out in this section of the judgment, in evaluating the weight that can be attached to the allegations made by [named children] [...] and in summary, the court must consider the extent to which the following principles have been adhered to:

i) Having regard to research into the manner in which a child registers, processes and recalls experiences from memory and the factors that may influence that recollection, and to long experience that emphasises the high level of caution that needs to be applied if the risk of obtaining unreliable evidence is to be minimised, very great care must be taken by adults when speaking to children who have made allegations of sexual abuse, and when analysing and assessing the weight to be given to statements by those children.

ii) Adults speaking to children who have made allegations of sexual abuse must always be careful to keep an open mind with respect to the allegations made and to guard against the development of bias or preconceived ideas. The child should be listened to and taken seriously whilst care is taken not to prejudge the issue.

iii) Adults speaking to a child who is alleging sexual abuse should not stop free recall of events.

iv) Adults speaking to a child who is alleging sexual abuse should ask no more questions than are necessary in the circumstances to take immediate action.

v) Where it is necessary to ask questions, adults speaking to a child who is alleging sexual abuse should, as far as possible in the circumstances, ask only open-ended or specific closed questions, rather than forced-choice, leading or multiple questions.

vi) Any initial questioning by adults speaking to a child who is alleging sexual abuse should be intended to elicit a brief account of what is alleged (where and when the alleged incident took place and who was involved or otherwise

present). A more detailed account should *not* be pursued and should be left to the ABE interview.

vii) As soon as possible thereafter the adult must make a comprehensive record of the conversation, which record should detail (a) the timing, setting and people present, (b) a full note of what the child said in the words used by the child (avoiding summaries of the account in the interests of neatness or comprehensibility and recordings of the adult's interpretation of the account), (c) a full note of the actual *questions* asked (if any) and (d) what was said by anybody else present. The record should also record the demeanour of the child and anything else that might be relevant.

viii) The adult should continue to record any comments made by the witness or events that might be relevant to the legal process up to the time of the ABE interview.

601. It is important to emphasise that in evaluating the extent to which those charged with, or finding themselves receiving allegations from children, have complied with these principles the court does not expect *perfection* and it would be unrealistic to do so. As Mr Vater and Mr Watson remind the court, complete adherence to 'guidelines' does not mean that an allegation is true; wholesale failure to adhere to 'guidelines' does not mean that an allegation is false. In the paper provided to the court by Mr Bagchi and Ms Bains, *Children's Suggestibility Research: Things to know before interviewing a child* (Anuario de Psicología Jurídica 25 (2015) 3-12) Ceci and his co-authors make clear that it is important not to discount a child's testimony merely because that child has been exposed to suggestive questioning. The Court must consider a whole range of factors.

602. As I made clear in *Re AS v TH (False Allegations of Abuse)*, failures by professionals in the investigation of allegations of abuse, and the fact that those failures must be taken into consideration when considering the weight that can be attached to the various strands of evidence, does not of itself preclude the possibility that those allegations are true. There will, in any system that relies on human agency, inevitably be occasions on which there are omissions and errors in the application of good practice. As noted by Baker LJ in *Y and E (Children)(Sexual Abuse Allegations)* [2019] EWCA Civ 206 the ABE Guidance is extremely detailed and often very challenging for police officers and social workers to follow. Within this context, it is thus important to note that, as the Court of Appeal made clear in *Re B (Allegation of Sexual Abuse: Child's evidence)* at [40] that:

> "There is no question of this evidence being inadmissible for failure to comply with the ABE guidelines, and that has not been suggested in argument for either parent. In a family case evidence of this kind falls to be assessed, however unsatisfactory its origin. To hold otherwise would be to invest the guidelines with the status of the law of evidence and it would invite the question: which failures have the consequence of inadmissibility? Clearly some failures to follow the guidelines will reduce, but by no means eliminate, the value of the evidence. Others may reduce the value almost to vanishing point."

603. However, the standard expected by the court remains a high one. As Ms Morgan and Ms Gallacher recognised in their closing submissions, whilst there can be a sense sometimes that lawyers are only too keen to examine the detail of the breach of this rule or that, and that it is in the Court arena that those breaches of guidance, rules and good practice fall to be examined, it is outside the court arena that they have their effect for good if followed and the reverse if not. Within this context, as Baker J (as he then was) noted in *Re W, Re F* [2015] EWCA Civ 1300 (and recently reiterated in *Re SR (A Child)* [2018] EWCA Civ 2738):

> "I have sympathy for officers and social workers entrusted with the difficult task of speaking to children about allegations of this sort. The ABE Guidance is detailed and complex. But those details and complexities are there for a reason. Experience has demonstrated that very great care is required when interviewing children about allegations of abuse. The Guidance has been formulated and refined over the years by those with particular expertise in the field, including specialists with a deep understanding of how children perceive, recall and articulate their experiences. It would be unrealistic to expect perfection in any investigation. But unless the courts require a high standard, miscarriages of justice will occur and the courts will reach unfair and wrong decisions with profound consequences for children and families."

604. The relevant question for the court is whether any omissions or errors made are *forensically* significant. As Baker LJ further noted in *Y and E (Children)(Sexual Abuse Allegations)* "the judge (or the jury in criminal cases) has to assess the extent to which those failures undermine the reliability of the evidence". Do the omissions or errors in good practice undermine the credibility of what is being said? Did they act, inadvertently or deliberately, to put words into the child's mouth by suggesting the answer to a given question? Did they inadvertently or deliberately encourage the child to exaggerate for reward? Did they cause the recorded account to be inaccurate or unreliable? Did they act to assume an outcome? Did they fail to take account of the needs of the child such as to make what the child has said unreliable? This is not an exhaustive list.

[...] [The court proceeded to apply the foregoing principles to the evidence in the case]

ABE Guidance

853. In determining the validity of the criticisms made of the ABE process itself, and the weight to be attached to the accounts given in the ABE interviews by the children, the principles and guidance summarised below must be borne in mind by this court. Before turning to them, it is important to note at the outset that, as with the allegations made to the foster carers and to the learning mentor, the task of evaluating the credibility and reliability of the ABE interviews is one for the court. In A London Borough Council v K & others [2010] EWHC 850 Baker J (as he then was) observed as follows in respect of the use of expert assessments of reliability:

> "Sixthly, this case has, to my mind, demonstrated that veracity or validity assessments have a limited role to play in family proceedings. They are, so far as I am aware, unused in criminal proceedings in this country, and I see

> strong arguments for imposing restrictions on their use in family cases as well. As recognised by those who have devised criterion-based content analysis, and as acknowledged by Dr De Jong in evidence, statement validity analysis is not designed to be used in a forensic context. There is a risk that its alleged scientific formulation will give it an over-elevated status. Furthermore, there is a danger that some courts, faced with these difficult decisions, will subconsciously defer to the apparent expert. That danger has been recognised in a number of cases in which the courts have emphasised the discrete roles of the expert and the court. In the case of the veracity expert, the danger is particularly acute. The ultimate judge of veracity, i.e. where the truth lies, is the judge and the judge alone. He cannot delegate that decision to any expert. I acknowledge that a child psychiatrist such as Dr De Jong may be able to point out some features of a child's account that add or detract from authenticity, as she has done in this case. But, in my experience, many of these features should be obvious to judges in any event. No expert, however experienced and however well briefed about the case, will be in a position to say where the truth lies. Only the judge sees and hears all the evidence."

854. Within this context, the Court's assessment of the ABE interviews will be informed by the need for caution regarding children's recollection that I set out above when considering good practice with respect to the handling of initial allegations of child sexual abuse, which need for caution constitutes one of the fundamental rationales for the ABE Guidance (see Re B (Allegation of Sexual Abuse: Child's Evidence) at [34-35] and the ABE Guidance at [2.162]). Namely, once again:

> i) Children, and especially young children, are suggestible.
>
> ii) Memory is prone to error and easily influenced by the environment in which recall is invited.
>
> iii) Memories can be confabulated from imagined experiences, it is possible to induce false memories and children can speak sincerely and emotionally about events that did not in fact occur.
>
> iv) Allegations made by children may emerge in a piecemeal fashion, with children often not reporting events in a linear history, reporting them in a partial way and revisiting topics.
>
> v) The wider circumstances of the child's life may influence, explain or colour what the child is saying.
>
> vi) Factors affecting when a child says something will include their capacity to understand their world and their role within it, requiring caution when interpreting children's references to behaviour or parts of the body through the prism of adult learning or reading.
>
> vii) Accounts given by children are susceptible to influence by leading or otherwise suggestive questions, repetition, pressure, threats, negative stereotyping and encouragement, reward or praise.

viii) Accounts given by children are susceptible to influence as the result of bias or preconceived ideas on the part of the interviewer.

ix) Accounts given by children are susceptible to contamination by the statements of others, which contamination may influence a child's responses.

x) Children may embellish or overlay a general theme with apparently convincing detail which can appear highly credible and be very difficult to detect, even for those who are experienced in dealing with children.

xi) Delay between an event recounted and the allegation made with respect to that event may influence the accuracy of the account given.

xii) Within this context, the way, and the stage at which a child is interviewed will have a profound effect on the accuracy of the child's testimony.

855. Police interviews with children should be conducted in accordance with the ABE Guidelines to which I have already referred. In Re A (A Child) (Vulnerable Witness: Fact Finding) 1 FLR 1152 per McFarlane LJ (as he then was), referring to the decision in Re B (Allegation of Sexual Abuse: Child's Evidence), made clear that "the need for a well conducted ABE interview is considered, at the very least, to be a priority (or to use Hughes LJ's words, 'of the first importance') when conducting an effective evaluation of allegations." In Re S (A Child) [2013] EWCA Civ 1254 Ryder LJ confirmed that the guidance set out in the Cleveland Report at paragraph 12.34 with respect to interviewing children also remains good practice.

856. The ABE Guidance is advisory rather than a legally enforceable code. However, significant departures from the good practice advocated in it will likely result in reduced (or in extreme cases no) weight being attached to the interview by the courts. Within this context guidance from the Children Act Advisory Committee concerning the Memorandum of Good Practice, which preceded the ABE Guidelines, made clear that:

> "Any joint child abuse interview conducted by police and social services must follow the memorandum of good practice. Otherwise, not only is the resulting interview of no forensic value, but it may impede or contaminate any further assessment of the child ordered by the court."

The Court of Appeal has on repeated occasions allowed appeals against findings of child sexual abuse where there has been a failure (i) to undertake proper preparation, (ii) to note carefully the preparatory work undertaken with a child. (iii) to understand the background to allegations being made; (iv) to abide by rules as to questioning; (v) to follow guidance as to being open-minded and (vi) to engage in repeated interviews (see for example TW v A City Council [2011] 1 FLR 1597; Re W v Re F (Children) [2015] EWCA Civ 1300 and Re E (A Child) (Evidence) [2017] 1 FLR 1675).

857. The purpose of the ABE interview goal is to provide the child with an opportunity to give an accurate and reliable account in a way that is fair, in the child's interests and acceptable to the court. The ABE interview is emphatically not a vehicle for

encouraging a child to simply repeat allegations made to others (which approach risks falling into the traps set out at Paragraph [X] above). In TW v A City Council Wall LJ (as he then was) observed as follows in this context:

> "…we are left with the clear impression from the interview that the officer was using it purely for what she perceived to be an evidence gathering exercise and in particular to make MR repeat on camera what she had said to her mother. That is emphatically not what an ABE interview is about and we have come to the view that we can place no evidential weight on it."

[...]

859. As with the analysis of initial allegations, it is important to note that where there has been a failure to follow the interviewing guidelines, the court is not compelled to disregard altogether the evidence obtained in interview but may rely on it together with other independent material to form a conclusion (Re B (Allegations of Sexual Abuse: Child's Evidence) [2006] 2 FLR 1071). However, where the court finds that no evidential weight can be attached to the interviews the court may only rely on the content of those interviews where it has comprehensively reviewed all the other evidence (TW v A City Council [2011] 1 FLR 1597).

860. Where it is alleged that the principles set out in the ABE guidance have been breached, the court is required to engage with a thorough analysis of the process to evaluate whether any of the allegations the child has made to the police can be relied upon (see Re E (A Child). That analysis must consider all of the evidence in the case. As Wall LJ made clear in TW v A City Council at [53]:

> "[I]t is not sufficient for a judge to rely primarily on the fact that the child is able, when being interviewed, in a thoroughly unsatisfactory manner and contrary to the Guidance, to make a number of inculpatory statements. A clear analysis of all the evidence is required and the child's interview must be assessed in that context"

Within this context, the court must acknowledge and carefully analyse significant departures from good or acceptable practice and must consider whether any flaws in the ABE process identified are so fundamental as to render the interview unreliable or to diminish its weight (see Re E (A Child) [2017] 1 FLR 1675). It is to this task which I now turn having regard to the criticisms levelled at the ABE interviews by the respondents.

[...] [The court proceeded to apply the foregoing principles to the evidence in the case]

Evaluation and Discussion of Medical Evidence

Preliminary Observations

948. In the absence of semen, blood, foreign objects or, in the case of a female child, pregnancy, medical evidence with respect to the physical signs of sexual abuse is almost never diagnostic, very often non-specific, ambiguous or equivocal and, on occasion, controversial. The position is complicated further by the fact that 'normal' in the context of the anal and genital anatomy of children is not a single, fixed point but

rather a spectrum. As McFarlane LJ (as he then was) observed in his foreword to the RCPCH guidance The Physical Signs of Sexual Abuse 2015:

> "Clinical evaluation of the signs, which may themselves be minute or hard to detect, and the need to differentiate between variations in the range of normality, possible accidental explanations or compatibility with child sexual abuse is a professional task of a high order of both difficulty and importance."

949. Within this context, the Cleveland Report noted at [11.30] that "In considering generally physical signs on a suspicion of sexual abuse, we endorse the observation in Some Principles of Good Practice: 'Abnormal physical signs are rarely unequivocally diagnostic with the exception of the presence of semen or blood of a different group to that of the child.'" In 1988 the pre-cursor to the current RCPCH Guidance, entitled Diagnosis of Child Sexual Abuse: Guidance for Doctors, noted at [2.3] that "The medical aspects are only one element in the diagnostic process" and at [12.20] that it cannot be emphasized too strongly that no physical sign can at the present time be regarded as being uniquely diagnostic of child sexual abuse." In 1991 The Physical signs of sexual abuse in children reiterated at [2.3] that "The single most important feature is a statement by the child. Detailed medical and forensic evidence may support this statement, as may a psychological assessment of the child or the confession by a perpetrator. Physical signs alone are on rare occasions sufficient to make the diagnosis." The Handbook of Best Practice in Children Act Cases 1997 notes that there is often a tension between a positive clinical finding of sexual abuse, and judicial findings that sexual abuse has not occurred and that, within contested cases, clinical methods will inevitably be subjected to scrutiny.

950. The most up to date version of The Physical Signs of Child Sexual Abuse – An evidence-based review and guidance for best practice was published by the RCPCH in May 2015, to which this court has been referred extensively during this hearing. That publication too, emphasises the challenges that remain in establishing whether a child has been sexually abused and the significance of anogenital signs when they are found. It further emphasises at [1.1.2] that medical evidence is but one part of the evidential picture:

> "The recognition of child sexual abuse has been likened to completing a jigsaw whereby the individual pieces of information need to be put together before the full picture can emerge. It is important to consider all physical findings together with other important clinical information, including the history, the context of the child's or young person's behaviour and demeanour, and statements made by the child to professionals, in order to make a diagnosis. The medical assessment will contribute to the whole picture which includes the multi-agency assessment."

And, within this context at [3.1.14] that:

> "The anogenital findings must always be interpreted in the broad context of a detailed medical, social and family assessment and the child's behaviour and demeanour."

951. Within the foregoing context, when evaluating the medical evidence in this case, it is once again useful to recall the caution articulated by Holman J at [143] in Leeds City Council v YX & ZX (Assessment of Sexual Abuse) as follows:

> "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."

[...] [The court proceeded to apply the foregoing principles to the evidence in the case]

Risk Factors and Inherent Probabilities

Risk Factors

1049. In *Re BR* [2015] EWFC 41 Peter Jackson J (as he then was) set out at [18] a summary of those factors drawn from information from the NSPCC, the Common Assessment Framework and the Patient UK Guidance for Health Professionals prepared by counsel for the child and said to represent risk factors for child abuse and protective factors against child abuse. Those factors listed as indicating risk are said to be physical or mental disability in children that may increase caregiver burden, social isolation of families, parents' lack of understanding of children's needs and child development, parents' history of domestic abuse, history of physical or sexual abuse (as a child), past physical or sexual abuse of a child, poverty and other socioeconomic disadvantage, family disorganization, dissolution, and violence, including intimate partner violence, lack of family cohesion, substance abuse in family, parental immaturity, single or non-biological parents, poor parent-child relationships and negative interactions, parental thoughts and emotions supporting maltreatment behaviours, parental stress and distress, including depression or other mental health conditions and community violence. Those facts considered to be protective were said to be a supportive family environment, nurturing parenting skills, stable family relationships, household rules and monitoring of the child, adequate parental finances, adequate housing, access to health care and social services, caring adults who can serve as role models or mentors and community support. As Peter Jackson J made clear at [19]:

> "[19] In itself, the presence or absence of a particular factor proves nothing. Children can of course be well cared for in disadvantaged homes and abused in otherwise fortunate ones. As emphasised above, each case turns on its facts. The above analysis may nonetheless provide a helpful framework within which the evidence can be assessed and the facts established."

1050. In circumstances where this case involves, with respect to some but not all of the families, a number of factors said to constitute risk factors for child abuse (including alleged and admitted parental history of being sexually abused, alleged and admitted domestic violence, alleged and admitted substance abuse, alleged past physical or sexual abuse of a child, poverty and other socioeconomic disadvantage and alleged poor parent-child relationships and negative interactions) and, again with respect to

some but not all of the families, a number of protective factors (including stable family relationships, household rules and monitoring of the child, adequate parental finances, adequate housing, access to health care and social services) I raised the issue of the role of the presence of risk factors and protective factors in the court's evaluation with counsel during the course of closing submissions.

1051. On behalf of the Official Solicitor, Ms Meyer and Ms Grant submitted that for the court to take account of the presence of matters said to constitute risk factors for sexual abuse and protective factors against sexual abuse when determining the issues of fact before it would be to permit broad correlations based on general statistics to drive case specific conclusions as to inherent probability or improbability, which is not a permissible jump for the court to make. In contrast, Mr Hadley and Ms Higgins on behalf of the local authority submitted that risk and protective factors are properly to be weighed in the balance when considering the inherent probability or improbability of a particular event, especially when the court has been enjoined in reaching its findings of fact to consider the wide canvass of evidence, including the wider context of social, emotional, ethical and moral factors (see *A County Council v A Mother, A Father and X, Y and Z* [2005] EWHC 31 (Fam) at [44], *Re U (A Child)* [2004] Fam 134 at [26] and *Re H and Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 at 591).

1052. As Peter Jackson J made clear in *Re BR* at [7] the answer in a given case is not to be found in the inherent probabilities but in the evidence, and it is when analysing the evidence that the court takes account of the probabilities. Further, in considering the proposition that certain risk factors may increase the likelihood that the child abuse alleged has taken place, the court must bear in mind that risk requires quantification before significant evidential weight, let alone determinative evidential weight, could be attached to a given risk. Within this context, by themselves, the presence or absence of risk factors for abuse proves nothing. [...]

1053. However, whilst considerable caution must be exercised where a given risk factor has not been formally quantified (again, in particular an alleged and admitted parental history of being sexually abused), I am satisfied that if in a case of alleged sexual abuse the court finds on the evidence, to the requisite standard of proof, that a relevant risk factor is present (for example, a parent has extensive substance abuse issues and lax sexual boundaries) the court is entitled, to the extent that the court sees fit in the particular circumstances of the case, to take account of such matters when evaluating the probability that the parent committed the sexual abuse alleged. Such an approach is consistent with the authorities cited in the foregoing paragraphs. Within this context, as Mr Vater and Mr Watson point out in their written closing submissions, an allegation that is inherently improbable in relation to one alleged perpetrator might be less inherently improbable in relation to another. To utilise the same example, it is more improbable that a tee-total parent with well demonstrated sexual boundaries would sexually abuse his or her child than a father or mother who drinks to excess or takes drugs and who has a history of demonstrating a lack of control or inhibition or lax sexual boundaries.

[...] [The court proceeded to apply the foregoing principles to the evidence in the case]

Inherent Probabilities

1056. As I noted in the section of this judgment dealing with the cardinal legal principles governing the courts determination in this case, the court is entitled, when determining whether a fact is proved on the balance of probabilities, to have regard to the inherent probability or improbability when weighing the probabilities and deciding whether, on balance, the event occurred (*Re B (Care Proceedings: Standard of Proof)* at [15]). In *BR* [2015] EWFC 41 at [7] the court observed,

> "The court takes account of any inherent probability or improbability of an event having occurred as part of a natural process of reasoning. But the fact that an event is a very common one does not lower the standard of probability to which it must be proved. Nor does the fact that an event is very uncommon raise the standard of proof that must be satisfied before it can be said to have occurred"

And

> "Similarly, the frequency or infrequency with which an event generally occurs cannot divert attention from the question of whether it actually occurred… in this and every case, the answer is not to be found in the inherent probabilities but in the evidence, and it is when analysing the evidence that the court takes account of the probabilities."

1057. Within this context, the court is permitted in this case, when weighing the probabilities and deciding whether, on balance, the allegations took place, to consider, for example, that serial sexual abuse by multiple family members on the same occasion at events held, essentially, in public and specifically organised for that purpose is inherently unlikely and that unlikelihood is a stronger characteristic feature of such an allegation than it is a characteristic feature of an allegation that a child has been on a limited number of occasions sexually abused by one person in circumstances designed to hide such abuse.

1058. However, the court must also acknowledge that, very sadly and to our collective shame, we live in a world where children are abused by multiple persons and at events organised to perpetrate such abuse. We also live in a world where children are sexually abused by multiple adults but by not one member of their families. Within this context, whilst the court can have regard to any inherent probability or improbability of the events alleged in this case having occurred as part of a natural process of reasoning, the *essential* question for the court remains whether, on the evidence before it, the events which are alleged *in this case* to have occurred are proved on the balance of probabilities. I conclude by stating my answers to that question.

I. CONCLUSIONS

[...] [The court proceeded to set out its findings of fact on the evidence in the proceedings]

J. CLOSING REMARKS

1238. In *Wigan BC v M and Eight others (Sexual Abuse: Fact-Finding)* [2015] EWFC 6, Mr Justice Peter Jackson (as he then was) observed as follows regarding those who perpetrate sexual abuse:

> "The perpetrators of sexual abuse are inadequate individuals who control weaker people, often children, for their own gratification. Their behaviour is always an abuse of power and usually a breach of trust. They destroy families and blight childhoods. They create dread in their victims by convincing them that the consequences of speaking out will be worse than the consequences of silence. They create guilt in their victims by persuading them that they have somehow willingly participated in their own abuse. They burden their victims with secrets. They poison normal relationships, trade on feelings of affection, drive a wedge between their victims and others, and make family and friends take sides. They count on the failure or inability of responsible adults, both relatives and professionals, to protect and support the victims. Faced with exposure, they commonly turn on their victims, try to assassinate their characters, and get others to do the same. Most often, their selfishness is so deep-rooted that they ignore other people's feelings and are only capable of feeling pity for themselves."

1239. Within this context, which renders the investigation of child sexual abuse a complex task requiring specialist knowledge and careful execution, the duty on the police and on professionals to deal competently with allegations of sexual abuse in strict accordance with the applicable law and principles of good practice is a heavy one. [...]

1240. [...] As I noted in the opening paragraph of *AS v TH (False Allegations of Sexual Abuse)*, and as I am forced to note again in the context of the matters set out in this judgment, in *Re E (A Minor)(Child Abuse: Evidence)* [1991] 1 FLR 420 at 447H Scott- Baker J observed:

> "It is disappointing that, despite the passage of time since the Cleveland report, several witnesses had either not read the report at all or, if they had, they ignored its conclusions in many respects. Permeating the whole case is the underlying theme of 'the child must be believed'. Of course what any child says must be listened to and taken seriously, but the professionals must be very careful not to prejudge the issue".

1241. As I further noted in *AS v TH (False Allegations of Sexual Abuse)*, seventeen years later Holman J felt compelled to make similar observations in the case of *Leeds City Council v YX & ZX (Assessment of Sexual Abuse)* at [143] as follows:

> "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…Even 20 years after the Cleveland Inquiry, I wonder whether its lessons have fully been learned."

1242. In this case, very few of the police officers or the social workers who were asked had heard of the Cleveland Enquiry, much less were aware of its cardinal recommendations [...].

1243. [...]

1244. In their written closing submissions, Ms Morgan and Ms Gallacher noted that it is "startling in 2018 to be making a submission about an approach to allegations of sexual abuse which seems to belong in the time before the Report of the Cleveland Inquiry". Within this context, they make the following further submission:

> "... if, a professional generation or more on from what went so badly wrong in Cleveland, investigations with this extent of professional involvement, have departed from what had been understood to be the lessons learned, then there may be the need for a reminder."

1245. In circumstances where there is a wealth of guidance for professionals and the police, it is not appropriate for this court to reinvent the wheel or burden those tasked with dealing with this fraught area with further detailed instructions. [...] That said, it does appear that the following "lessons" bear repeating as the foundation of rigorous forensic investigation by professionals and police of allegations of child sexual abuse. I venture to suggest that *whenever* a referral is received in a case that raises allegations of sexual abuse the social worker or police officer allocated to the case should, *before* they do anything else, pause and remind themselves of the following checklist of ten cardinal principles:

i) The investigation of child sexual abuse is a demanding, complex and sensitive task and should be undertaken by those who have received the requisite training.

ii) Very great professional care is required when dealing with allegations of child sexual abuse, both in the initial phases and at the ABE interview stage.

iii) Whatever the nature of the child's presentation, and whether the response is immediate, prompt or deferred, the response of professionals and the police must be planned. Children's best interests are rarely served by precipitate action.

iv) The primary principles governing, and the procedures for the investigation and assessment of alleged child sexual abuse are those set out in *Achieving Best Evidence 2011* and *Working Together 2018* and must be followed in *all* cases.

v) Any investigation into child sexual abuse that focuses attention on the statements of the child runs the risk of producing a false result if what the child says is unreliable, or if the child's primary caretaker is unreliable.

vi) All interactions with a child who is making or appears to be making an allegation of child sexual abuse have the potential to influence that child's memory.

vii) Accounts given by children are susceptible to influence as the result of bias or preconceived ideas on the part of professionals and police. Those speaking to children who have made allegations of sexual abuse *must* keep an open mind with respect to the allegations made and *must* guard against the development of bias or preconceived ideas. A professional who loses their objectivity ceases, by definition, to act professionally.

viii) Questioning the child should ordinarily be left to a formal ABE interview. *If* any initial questioning is necessary, it should be limited to eliciting a brief account of what is alleged to have taken place; a more detailed account should not be pursued at that stage.

ix) Anything the child says must be recorded in a note that must detail (a) the timing, setting and people present, (b) what the child says in the words used by the *child* (avoiding summaries of the account in the interests of neatness or comprehensibility and avoiding recordings of the adult's interpretation of what the child said), (c) a full note of the actual *questions* asked (if any) and (d) what was said by anybody else present.

x) Overall, the proper methodology is one that combines listening to the child and taking them seriously with an open-minded approach that takes account of both sides of the story, is open to new evidence that disconfirms original ideas, that reasons dispassionately, that demands that claims be backed by evidence and that deduces and infers conclusions only from available facts.

1246. [...].

1247. It is the expectation of the courts, and the collective expectation of society as expressed through the laws passed by a democratically elected Parliament, that allegations of child sexual abuse will be investigated in an assiduously open minded, procedurally fair and forensically rigorous way. A focus which accords from the outset primacy to the allegation is antithetic to that end. Where the law requires, and will continue to require, proof to a defined standard, derived from admissible evidence, *before* making findings or pronouncing guilt, such an approach also does a manifest disservice to those who have experienced the pernicious tragedy of sexual abuse, as well as undermining more widely the principle of due process that is a bulwark of a fair and just society.

1248. In his foreword to the RCPCH guidance *The Physical Signs of Sexual Abuse* 2015, McFarlane LJ (as he then was) further observed that:

> "The ability of a society to acknowledge and begin to understand unpalatable truths about how life is lived by some of its members is a sign of maturity that only comes with time and as a result of a long road carefully travelled".

Over some three decades innumerable people have worked hard to set reliable signposts on that long road as its course and extent has been carefully mapped, often through bitter experience. Whilst sexual abuse is a complex and seemingly intractable issue in society, the key to ensuring an assiduously open minded, procedurally fair and forensically rigorous approach to its investigation is deceptively

simple. Namely, to follow those hard-won signposts. Once again, there is no need to reinvent the wheel. What is required, what has always been required, is for social workers, the police and other professionals working with children to be trained in, and to *apply* diligently the *existing* long-established and readily available comprehensive guidance. Only in that way will investigations into allegations of child sexual abuse benefit from professionals and police officers who see both sides of the issue, who are open to new evidence that disconfirms their original ideas, who reason dispassionately, who demand that claims be backed by evidence and who deduce and infer conclusions from available facts.

1249. That is my judgment.