

IN THE FAMILY COURT AT WEST LONDON

West London Family Court,
Gloucester House, 4 Dukes Green Avenue
Feltham, TW14 0LR

Date: 17/04/2018

Before :

HIS HONOUR JUDGE WILLANS

Between :

LONDON BOROUGH OF BRENT

Applicant

- and -

(1) X

Respondent

(2) Y

(3) C (a child by his Children's Guardian)

Ms Judith Charlton for the Applicant
Ms Jane Drew for the First Respondent
Ms Susannah Johnson for the Second Respondent
Mr John Vassallo for the Third Respondent

Hearing dates: 9-17 April 2018

JUDGMENT

His Honour Judge Willans:

Introductory Points

1. In the early hours of 31 May 2017, the Metropolitan Police were called to the house shared by X and Y together with X's son, Z, and the couple's daughter C. On attendance it was alleged by X that Y had sexually assaulted C.
2. I have conducted a fact-finding hearing to ascertain whether such misconduct took place or not. The LA seek findings that Y did sexually assault his daughter and that X has failed to protect her. Whilst X supports the LA's allegations against Y she denies she has failed to protect C. Y denies he has sexually assaulted C in any way.
3. I have heard oral evidence from the following witnesses in this order:
 - a. PC (Metropolitan Police)
 - b. MH (allocated social worker)
 - c. AR (London Ambulance Service)
 - d. Z
 - e. CG (Consultant Paediatrician)
 - f. X, and;
 - g. Y

In addition to the above I have considered the papers contained within the electronic bundle and the written and oral submissions from the representatives for each party. AB and the Child's Guardian also attended short parts of the final hearing, but did not give evidence.

Legal Principles

4. Prior to submissions I made reference to the authority of Re D¹. I noted it encapsulated the key principles underlying a correct approach to fact finding. I have considered that case and as such I am able to summarise as follows:
 - a. The burden of proving matters in dispute falls upon the party making the allegation. For the purposes of this hearing that is the LA.
 - b. The standard of proof is the balance of probabilities, i.e. more likely than not.
 - c. If this standard is reached then I will treat the fact as established and all future decisions relating to C will proceed on that finding. If the standard is not reached then I will disregard the allegation completely. In doing so I operate a binary approach which cannot accommodate what might have happened.
 - d. My findings are of fact and must be based on evidence or inferences that can be properly drawn from the evidence not suspicion or speculation.
 - e. I must take into account all the evidence and each piece of evidence in the context of all the other evidence, I should not compartmentalise the

¹ Per Roberts J. at [2017] EWHC 3075 (Fam)

evidence but must carry out an overview of the totality of the evidence in order to come to a conclusion.

- f. Medical evidence must be considered in the context of all the other evidence. My role is distinct from that of the expert. I have to weigh up that evidence against all of the other evidence and I may reach a conclusion at variance with the expert although I should take care to set out clearly why I have departed from such opinion. In considering the expert evidence I should ensure the expert properly confines him/herself to the bounds of their own expertise.
- g. The evidence of parents is of the utmost importance. I must form a clear assessment of each parent's credibility and reliability given the considerable weight that is likely to be placed upon their respective evidence.
- h. In assessing any witness who I have found to be untruthful I must be careful to bear in mind that a witness may lie for many reasons and that the fact that a witness has lied about some matters does not mean he or she has lied about everything.
- i. In cases where this is a disputed aetiology there has to be factored into the case a consideration as to whether there is an unknown cause. The Court must guard against assuming there is always a ready explanation for all circumstances. The Court has to also bear in mind that current orthodoxy of thinking can be subsequently shown to be incorrect.
- j. Returning to the question of credibility I remind myself that this demands an assessment beyond simple demeanour. Demeanour may reflect the current state of thinking of the witness as to the truth yet as time passes memories can become fainter and the imagination more active. As a result contemporaneous documents are always of the utmost importance.
- k. These circumstances of this case have been considered at two previous criminal trials. Consequently I must consider carefully the significance or otherwise of reported discrepancies. These may arise for a number of reasons such as faulty recollection or confusion. The effect of delay and repeated questioning upon the memory also has to be taken into account. As memory fades a desire to iron out wrinkles may not be unnatural and may not justify an inference of bad faith.
- l. Finally, when seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators, is whether there is a likelihood or a real possibility that he or she was the perpetrator. In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injuries to be identified both in the public interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judge should not strain to do so.

The Background to this Hearing

5. I note the contents of the social work chronology² which sets out a range of concerns dating back to 2011. In doing so I am conscious that much of this relates to X's relationship with Z's father and the surrounding issue of domestic violence.
6. The parent's both derive from AA. As I understand matters it is unclear as to exactly when Y entered the country. He is at this time an illegal immigrant and has no legal right to work. He is obliged to regularly sign on.
7. I understand X came to this country in 2000 and that shortly afterwards Z was born. She was at that time married to Z's father but it would appear they may have subsequently divorced. There was violence in their relationship including a period in 2012 when he was imprisoned for assaulting her. On his case³ he was still in a relationship with X after A was born but they separated shortly thereafter. I am not required to determine the exact date of separation.
8. The evidence I received suggested the relationship between X and Y was somewhat on-off with it would appear at least two separations. On the evidence it appears they had some form of limited relationship in around 2012 before separating. It seems the last separation occurred at around the time when X fell pregnant with A. The evidence suggests X chose to register Z's father as being C's father rather than Y. There is little evidential dispute that this was due to her marital status at the time. On the evidence I received it appears likely Y was not immediately aware of his daughter's birth and only came to be aware of it some time later.
9. Moving on the evidence suggests that he resumed a relationship with X when C was aged about 2 years of age, and thus in about 2016. From that point through until 31 May 2017 they remained in a relationship with Y mostly sharing X's home with the children.
10. Both parents' generally described the relationship in positive terms through this period. I will return to this below. Certainly, I am unaware of any significant issues coming to the attention of the police, social services or other agencies. During this period it is clear that Y was employed albeit unofficially in the light of the restriction upon his right to work.
11. X has some significant medical issues⁴ in addition to which she has mild-moderate learning difficulties⁵. She has difficulty understanding sophisticated words and long or grammatically complex sentences. Her speech can be difficult to understand because some English speech sounds are missing or

² **C8-13**

³ He filed a statement at an initial stage in the proceedings when Z was subject to the application. Z has subsequently been discharged due to his age and his father plays no role in the case.

⁴ See chronology entry at **C11** to which should be added that X suffered a stroke in about 2002

⁵ See intermediary report at **G355**

replaced with other sounds. Her speech is ‘telegrammatic’ in that she leaves out less important words⁶.

12. Y also has language issues (and both parents gave evidence through an interpreter). He has physical difficulties being blind in one eye as a result of issues arising in AA.
13. Both parents appeared to agree that they each shared in the care of C. They both agreed Z played only a limited role, babysitting when neither parent was available (irregularly) but not providing more personal care for C. The property they live in is a relatively small flat with a living room; kitchen; bathroom and two bedrooms. They shared their bedroom with C who slept in her own cot⁷. As to the sharing out of their own responsibility for C both agreed that each of them cared for C, having sole care of her and providing personal care (nappy changing and the like). This was not a relationship in which X was the sole carer albeit it might be the case that she provided more care being available when Y was working. Indeed Y emphasised his role in caring for C and it was clear from his evidence that he considered himself a careful and sensitive parent.
14. At the time of the precipitating incident C was aged approaching 3 ½ years. She was developmentally somewhat behind expectations but this may reflect the fact that she was born significantly premature. The evidence since that date suggests she is making progress in closing the gap. At that time she was not in nappies during the day but was using nappies or ‘pull-ups’ at night and when she had a day-time nap. In between these periods she was learning her toileting skills with some errors but was making progress. Overnight there were occasions when she soiled her nappy. I was told by Y that her sleep might be interrupted when she was calling for her dummy or when thirsty.
15. In the period prior to the precipitating event there are no reports of significant events or accidents likely to have caused harm to the child. There is some parental reporting or common-place conditions such as nappy rash but little beyond that. Neither parent directly records any incident as a result of which C expressed pain or cried out on being hurt whilst within their direct care.

The Events Central to this Fact Find

16. The 31 May 2017 was a Wednesday. This was the Whitsun half term and Z was on school holiday preparing (I believe) for upcoming exams. Whilst he was often working it was agreed that Y did not work in the 2 weeks preceding the weekend of 27-28 May 2017. The reason for this is not agreed but does not matter for the purposes of this judgment. It is agreed a fridge-freezer was delivered on Saturday 27 May but was not installed (by Y) until Sunday 28 May. There is a dispute as to whether Y was at home (or working on Saturday 27 May and Monday 29 May 2017). There is no dispute he was not working on 28 May 2017 and that he signed in for immigration purposes on Tuesday 30 May 2017.

⁶ **G359** §3.3-3.4

⁷ See the police photographs of the property commencing at **H380**

17. There is a further dispute between the parents as to whether X attended hospital (with Y) late on Friday 26 May 2017 returning home in the early hours of the next day. Y suggests this actually occurred two weeks earlier on 12 May 2017.
18. It is not in dispute that Y returned home on 31 May 2017 with shopping and that the parents spent the evening together with A going to bed at around 9pm. It appears agreed Z spent most of the evening in his room playing on his games console. The parents were drinking and there is a suggestion of cannabis consumption. At some point in the early hours of 31 May 2017 X went to the toilet and Y left for the parties' bedroom. It is agreed he did not tell X he was going to bed. What followed is very much in dispute albeit it is agreed that by 3.13am on that day the police had been called to attend the property. The totality of evidence suggests Y left for the bedroom not very much before the commencement of the emergency call.

X's Account

19. X tells me that although they drank alcohol that night this was very much out of character and indeed she had agreed with Y they would not drink. She had a history of problematic alcohol consumption and was wishing to put this behind her. She denies smoking any cannabis that evening. The evening was largely uneventful and the relationship was happy and in a good place. Sometime early in the morning she went to the bathroom and when she returned Y had left the room. She went looking for him and could not initially find him. She then went to the bedroom and opened the door causing light to fall into the room from the hallway. In front of her she saw Y holding C close to her cot. She had neither her pyjama bottoms or nappy on and was naked from the waist down. Y's lower clothing was around his feet and he was naked from the waist down. When he became aware of her he quickly turned putting C back into the cot. He encouraged X out of the room and turned the light off when she put it on.
20. When she asked him what he was doing he was evasive and wouldn't answer. She became increasingly upset and this turned into a verbal confrontation with her shouting at Y and accusing him of abusing C. At around this time the confrontation was becoming louder and Z left his room to see what was happening. He heard his mother accuse Y of having sex with his sister. At about this time X sought to call the police but the call did not get through. Then Z called the police but there was a tussle over the phone. Ultimately the call was successful and the police attended.
21. On the arrival of the police (and subsequently) X gave further details of matters causing her concern all of which preceded the evening. I will return to these below.

Y's Account

22. Y also gave an account of a largely uneventful evening. His account was of buying alcohol at the request of X and being somewhat concerned about this.

He agrees they spent the night together and drunk alcohol. He also says they shared a cannabis joint. The combination of both made him tired and when X left the room for the toilet asking him to tidy, he decided to go to bed instead. He went to the bedroom lay on the bed and fell asleep. He was awoken by X pushing and shouting at him. He got up. It wasn't initially clear what was going on but at some point he became aware of what he was being accused of. This simply had not happened. He agrees there was shouting and that point a disagreement over the phone. He says he was scratched by X in this tussle and at some point his lower clothing fell down and he replaced it with a towel. He agrees Z was present and involved in the telephone call. The police came, he was spoken to and arrested.

23. The clothing referred to above is known as a **[removed]** and is in the form of a looped piece of material into which the wearer climbs. Having done this the wearer then pleats the loose length and folds it over (in the form one would with a towel when leaving a bath) thus creating a tight waistband.

Z's account

24. Z told me he had his headphones on whilst playing his games console. He was listening to the game whilst talking to a friend online. He heard the shouting and went to see what was happening. He confirmed what his mother was saying and his role in making the police call.
25. C's age and developmental state mean that she has given no direct account of the events of this night.

Subsequent Information

26. As a result of the allegations C was removed and examined that day by a paediatrician in the presence of X. The findings form a significant part of the case against Y.
27. In her examination CG identifies two matters of concern as follows:
- a. A linear bruise on the left side of the vestibule at the 12 – 3 o'clock section of the vestibule.
 - b. A superficial notch at the 6 o'clock point on C's hymen. In this context superficial means less than 50% of the tissue width

CG explained that the vestibule and hymen are part of the child's genitalia. They are found in a protected area being protected by both labia majora and minora. They are not visible without manipulation and not likely subject to direct trauma. The hymen is tissue surrounding entry to the vagina. The vestibule is an area of tissue inside the labia minora to the side of the vaginal entrance. These matters are demonstrated in a diagram produced by the witness⁸.

⁸ See diagram at **G112**

28. Initially, indeed at the subsequent criminal trials, CG observed that the superficial notch might be either traumatic in origin or an in-born variant (a physical anomaly). However following consideration of further evidence from AB of a physical examination in June 2017 in which the notch appeared to have repaired, CG concluded that this was indeed a traumatic injury and could no longer be considered in-born.
29. As a result of the allegation Y was arrested and remanded in custody. In November 2017 and February 2018 he faced criminal trial and was acquitted of all charges raised against him. As a consequence I have considerable disclosure from the criminal proceedings relating to the investigation; interviewing process and trial itself (by way of transcripts).
30. The essential evidential components in the case are as to:
- a. The events of 30/31 May 2017 as described by the parents' and by Z
 - b. The reporting of the allegation: the 999 call and the attendance of the police and ambulance crew (I have transcript recordings of the call and I have been able to read transcripts of and watch the majority of the Police Body Camera recording)
 - c. The consequent medical examination
 - d. The consequent interview process (both of Y) and by way of ABE of X and Z
 - e. Subsequent concerns raised by X relating to the period prior to 31 May 2017
 - f. The transcript of the trial process x 2.

My impression of the witnesses

31. The evidence of PC; MH; and AR was largely uncontroversial and there was little by way of real challenge. I found them each to be appropriately professional and helpful witnesses.
32. Z gave evidence behind a screen. Again he was subject to only limited challenge⁹ and I found no reason to doubt his honesty or integrity. He was willing to accept responsibility for harming Y and was able to make clear that at first he thought his mother must be wrong about the allegation (although later believing her when he saw how emotional she was). I consider I can rely on his evidence.
33. CG was probed as to her findings and questioned as to the failure to clearly record the examination fully. I agree she was a little sensitive as to the latter questioning and indeed I note some sensitivity within the transcript of the criminal proceedings. However as to the substance of her evidence she was a clear and straightforward witness. She answered all questions put and did not seek to evade an answer. I did not sense any dogmatism or bias in her approach. Indeed when she felt this was being suggested it was made clear this was not the suggestion.

⁹ As to whether it was him or his mother who had scratched Y

34. X was a more problematic witness. There is within the documents grounds for approaching her evidence with caution. She has some level of communication difficulty and expresses herself in a manner which is often difficult to follow. She is emotionally entwined with the case and I judge genuinely believes that Y has abused her daughter. This may have the tendency to shape her evidence. Having said that I noted her ability to explain the positive qualities of the relationship prior to the events in question. There were aspects to her evidence that remained somewhat confused and I bear this in mind. I also bear in mind the point made as to her wrongly citing Z's father as father to A. I do though think this is of limited relevance and is easily explained by cultural forces within her community. It does not fundamentally undermine her as a witness. I have borne in mind the observations made as to her evidence by the parties in their submissions. Overall whilst I approach her evidence with care I do not consider she has been discredited to the extent that I should be cautious in accepting what she has had to say.
35. Y is equally problematic. He has a lot at stake in this case and this will have a tendency to impact on his evidence. There is within the information contained within this judgment evidence that he has allowed his interest to shape the evidence he has given: see his working arrangements. As with the mother his answers were not always direct and he often sought to build his answer from first principles rather than directly responding. I was left with the sense that I should be careful in considering his evidence.

The Evidence I Heard

36. I do not intend to set out in detail the evidence I have heard. Much of the evidence was uncontroversial and for a hearing of this length (4 days of evidence) the actual time taken on examination was relatively short. I do not intend to make any comment on the evidence of the police or ambulance man. MH did give evidence as to reports from the school and foster carer as to sexualised behaviour. She made clear the advice given was that this was normal behaviour. I was left with the sense the foster carer whilst experienced might be overly concerned as to whether these actions had a sinister cause.
37. Z gave a clear account of what took place and of the strong emotions being expressed by his mother. He had never seen her like that before. Y and X had a good relationship. He didn't believe what his mum was saying until he saw how upset she was. There was a struggle over the phone and he thought he had probably scratched Y as a result. At the time he first saw Y he was still wearing his [removed].
38. In the case of the parents' there was only limited movement from their starting points.
39. X stood by her case as to what she had seen on the night in question and as to the suspicions she harboured arising out of the same. She made it clear it was Y who was proposing drinking on that occasion and that she had not been wanting to drink. She was sure the fridge was delivered on the Saturday and that Y had

been there. She had gone to hospital the previous night. She gave a consistent account of what she saw when she entered the room and expressed a growing discomfort / concern when Y was unable or unwilling to explain what he had been doing. She explained the circumstances in which she had left for the police station before then going on to the medical examination. She commented on having herself seen redness in the area of the genitals. However she also gave evidence that the redness was her number one concern and that this was shown to her by CG when conducting the examination thus suggesting this is a reference to the bruise.

40. Y also gave a consistent account as to the events of the night. However his evidence as to his movements that weekend were closely examined and he was compelled to revise his understanding in reference to the events of Sunday (being at home rather than at work). He was clear X visited the hospital on the weekend two weekends previous. He was asked as to why X had given the account she had but was unable to explain why she had made the report. He told me the [removed] came off during the struggle over the phone. He told me that whilst there had been previous arguments in which he had been asked to leave on those occasions X had not been acting as she was this evening. He was clear X was insistent on the drink being purchased for the evening. He spoke of being a careful parent when cleaning the child. He agreed that care was shared between himself and X with Z playing only a limited role.

My Analysis of the Evidence and Findings

What were Y's Working Arrangements over the Relevant Period?

41. It is very important for me to immediately note that this does not raise anything close to an alibi to the allegations under consideration. All parties agree that Y places himself at home during the relevant time for sufficient periods to enable him the opportunity to commit the acts of which complaint are made.
42. The centrality of this point is to credibility alone. For the Applicant it is said that this goes to the credibility of Y and the Applicant suggest he has modified his evidence untruthfully in an attempt to distance himself from the property. For Y it is said this goes to X's credibility and recollection generally.
43. The issue in short is as to whether Y is correct when he says he worked on Saturday 27 May sleeping out overnight and returning on Sunday and on Monday 29 May 2017?
44. I have considered all the evidence with care (written and oral). On balance of probability I prefer the evidence of X as to the whereabouts of Y. However, I repeat this has had only peripheral impact on the central fact-finding determination.
45. I have reached this conclusion having regard to the following matters:
- a. On this issue the evidence of Y has been inconsistent from start to finish. He has varied from claiming to have been at home that weekend from

Sunday to signing on that Tuesday¹⁰. At the second criminal trial Y claimed to have been working on Sunday and Monday (staying out overnight between the two days)¹¹. In his statement evidence specifically directed to this point¹² he repeated this account. However in his evidence before me he corrected this and agreed he had not worked on Sunday 28 May and was at home to fit the fridge/freezer. I have not been impressed by Y's basis for being able to correct his account as having arisen out of the opportunity to view his phone having been released from custody. Prior to that time he modified his account and gave such evidence on oath without recourse to his phone. Being as generous as one can this amounted to hazarding a guess but confirming it as true without hesitation and thus taking a chance as to the truth. This is wholly unsatisfactory. I have received nothing in the form of corroborative evidence to now fix this account as being correct and I am left wondering why I should place any greater confidence on the current account than was placed on the previous (incorrect) accounts.

- b. In contrast X has been consistent about the events of the weekend. Her account is supported in my judgment by being tethered to surrounding circumstances both agreed (the delivery of the fridge/freezer) and disputed (the suggested visit to the hospital). Notwithstanding the concerns I have as to her general evidence these features enhance the likelihood of the account being correctly timed and not misplaced within the timeline. On balance I favour her account of having visited the hospital on Friday 26 May. This is a balanced decision as the evidence is very limited. I have reflected on the photograph of the purported hospital details from Friday 13 May¹³ however this photograph does not in fact date the hospital visit and there is evidence within the criminal trial which suggests the conversation with X's mother leading to this information was closer in time to the eventful weekend¹⁴.

46. I have on balance concluded that Y was at home that weekend and was present when the fridge/freezer was delivered. This makes sense if the pair had visited the hospital the previous night as it would be likely X was resting and such a visit would have likely impacted on Y's ability to go straight to work. On balance I find he was at home on Monday as per his original evidence to the Criminal Court.
47. As to whether there are any underlying reasons for him to give an incorrect account, I will return to this below.

Where was Y positioned when X entered the Bedroom?

48. This is a dispute of greater potential significance.
49. Again on balance I prefer the evidence of X to Y.

¹⁰ **H134**

¹¹ **H371-3**

¹² **C65**

¹³ Provided with submissions

¹⁴ See **H101** 'the last 12 days prior to the 31 May'; **H102** 'the conversation was not the Friday coming but the Friday before that'

50. I do so having regard to the following features:
- a. The most significant feature is the inherent implausibility of Y's account against the internal consistency of X's account.
 - b. I find the relationship to have been a largely positive relationship which may have had times of disagreement was viewed by both Y and X as a loving and good relationship. In reaching this conclusion I rely upon the consistent evidence of Y within his Criminal Trials and upon the evidence of X and Z before me. My finding is that this was not a relationship under any particular strain at the time of the events.
 - c. More particularly I find there was no argument on the evening of 30/31 May 2017 and that the parties had enjoyed a happy evening. Their separation in the early hours was not in the context of any argument or falling out. On the evidence I accept it was not unusual for Y to retire to bed prior to X
 - d. In this context it is difficult to accept Y's case of X's sudden and forceful interruption of his sleep. It is even harder to understand the basis upon which X would have had cause to translate this into the account she gave. It seems unlikely in the extreme that she would then be emotionally stating that she had seen her daughter abused or give the detail she did. This is not a finding as to the truth of her concerns but as to the truth of her factual account.
 - e. It simply makes no sense and is highly unlikely that she would have acted in this way.
 - f. In reaching this finding I have borne in mind inconsistencies in her account¹⁵ but in my judgment the account she has given has been largely consistent in its major elements. I bear in mind that she is far from being a sophisticated witness yet has maintained this account without waver throughout three trials. I also bear in mind her level of emotion as evidenced by the police body cameras. In my assessment her emotions appear genuine and do not have the appearance of being acted out for the police.
 - g. I have considered Y's account with care. However it simply does not fit with the surrounding circumstances. It is striking that no real sense of Y's current account is contemporaneously recorded whether in the body camera footage or otherwise. It is clear when taken together that Y was aware of the thrust of what was being alleged at the time. A key question is as to why he did not impart the information that he had been woken from his sleep. I cannot find a satisfactory answer to that question within the evidence.
51. I have therefore accepted the essential account given by X. In reaching this conclusion I have not expressed any view as to the reality of what was actually happening or as to whether there may be an innocent reason for Y to be giving a false account of the incident. I will return to this point below.

¹⁵ See particularly the position in which the child was seen – varying between being horizontal in her father's arms to in some way with her legs around him

Did the Child Suffer an Injury?

52. I consider this point as Y does question the correctness of the medical reporting.
53. In my judgment such a challenge is unmaintainable.
54. Having considered the evidence of CG I am clear C suffered two traumatic events. She suffered a linear bruise to her vestibule and a superficial notch to her hymen.
55. In reaching this conclusion I bear in mind that this is the untested evidence of a highly qualified paediatrician experienced in the regular examination of children for the purpose of investigations of this type.
56. I also bear in mind that her conclusions were reached in an examination conducted with an experienced colleague and that they agreed as to their findings made. Furthermore, the findings were subject to overview by the London Wide Panel and remained sound¹⁶.
57. The central challenge to the finding would appear to be the failure to clearly capture the bruise on the DVD used during the examination. I accept the expert's evidence in this regard that this does not undermine the essential findings made. There are many obvious reasons why a DVD may lose focus. The question is whether the expert lost focus. There is nothing to suggest she did.
58. I therefore find there to be strong evidence in support of both trauma.

The Dating of the Trauma

59. The evidence of the expert was as to real difficulty in accurately dating trauma of this sort. The dating of bruising is an acknowledged area of real uncertainty and this is complicated by the rapid speed at which tissue damage in this area can resolve.
60. The evidence of the expert as to timing was really based around the best practice of early examination to ensure appropriate findings. Her evidence is as to an examination taking place with 24 hours but where possible no later than 72 hours. This is not to say an injury cannot be present after this period but the prospects of evidencing it are substantially reduced.
61. However, she was able to distinguish between the bruise as an acute (recent injury) and the notch as a healing injury. Her evidence was that this indicated the trauma were experienced at different points in time by C and as such relate to two separate events. This evidence was unchallenged and I accept it as being correct.

¹⁶ In this regard I note a concern as to hymen width was removed on panel review

62. As a result on balance it is likely the bruise was occasioned by an incident in the 72 hour period preceding the police attendance (and therefore between Sunday – Tuesday) whereas the notch was suffered at some point prior to this injury (but not necessarily at a point distant in time).

The Likely cause of the Trauma

63. Within the final hearing and within the Criminal Trial process various possibilities had been considered as likely or possible causes of the trauma. These included:
- a. Infection
 - b. Self-Infliction
 - c. Poor Cleaning Practice
 - d. Accident
 - e. Non-accidental Injury
64. The expert acknowledged that whilst some of the options were possible at a theoretical level they were highly unlikely to have caused the trauma.
65. Dealing with self-infliction the expert described how the area in question is highly sensitive and that whilst a child may out of curiosity probe the area it would be highly unlikely they would do so with the force required to cause trauma or indeed the trauma identified given the likely pain attendant upon such a level of probing. It is noteworthy that neither parent gave any evidence of the child acting in such a fashion whilst at home (during the relevant period or indeed at all) or of demonstrating any level of pain that might have been consistent with such self-infliction (during the relevant period or at all).
66. Dealing with infection the expert was clear that there was no evidence of surrounding infection or irritation at the time of her examination. Later swabs confirmed this to be correct. As such there was no evidence to support a biological explanation or of present irritation that may have caused the child to scratch or bother the area. I bear in mind the evidence of X that there was some nappy rash in the period shortly before the events. However, on balance I prefer the clinical evidence in this regard at the relevant point in time. I do so having regard to the focused nature of the clinical examination and the concerns I have as to X's detailed recollection on such point. It is relevant to bear in mind that by this time C was not in nappies full-time. It is also relevant to bear in mind that nappy rash irritation would not by necessity extend beyond the superficial parts of the genitalia.
67. As to poor cleaning practice this was thought by the expert to be an equally unlikely cause. This was possible but it would be unlikely that a parent cleaning the area would cause such harm. The prospects being lessened given the fact of two unrelated trauma. The evidence of the parents was of no incident that might suggest this as a cause and Y was clear that he was able to competently and carefully clean the child without incident.

68. Turning to accidental injury the expert recognised that such damage could be caused by an accident but considered there would be a likelihood of surrounding tissue trauma, whereas there was none evident. One might see such trauma with a saddle injury but one would expect bruising in the surrounding tissue and not isolated to the identified points of trauma. Furthermore, no account was given in the case of this 3-year old of having suffered such an accident. The possibility of an injury on the bars of the cot was raised but discounted by the expert.
69. Ultimately the expert concluded the most likely cause of the trauma was two episodes of non-accidental injury with the likely cause being an object or body part pressed against (vestibule) or penetrating the area (hymen).
70. Neither parent gave account of an incident or set of circumstances which might explain the trauma. The nature of their cases was to probe with the expert possibilities, all of which were discounted as likely.
71. I have reached the conclusion that the trauma was caused non-accidentally in the manner suggested at by the expert. I have done do on balance of probabilities having regard to the following:
 - a. The clear evidence of the expert as to likely cause. Having considered all the options put to her CG was able to conclude that non-accidental injury was the most likely cause and that all other options were unlikely (at a low level of possibility).
 - b. The substantial discounting of alternative potential causes by the expert taken together with the absence of an account which might fit any of the other explanations.
 - c. The fact that although cause may be unknown the expert in this case has in fact considered a range of the most likely alternative explanations for the trauma and has been able to confidently discount the same. The trauma in this case is by no means complex (being bruised and torn tissue) and is nowhere near the complex medical basis found in cases of shaking or the like. Nonetheless alternative theoretical possibilities have been considered. In my judgment there is in fact little room for the unknown cause approach. I am left with no lingering concern as to an unrecognised cause.
 - d. In reaching this conclusion I have placed weight upon the likely separate occurrence of the two trauma. In my judgment this makes it more rather than less likely a non-accidental event. To have suffered two accidents within short succession is unlikely particularly when there is no parental evidence of one accident being experienced. Equally to have two incidents of poor cleaning technique would appear very unlikely particularly as one would experience heightened care after a first incident.
 - e. Given the location of the trauma; the fact of multiple occasions of trauma and the likely cause of the trauma (pressing/penetration) there is a high likelihood the injury was sustained as a result of sexually related assault. There really is little other explanation for such a trauma.

72. I have therefore concluded on balance that the trauma identified were occasioned in the days preceding the incident; was non-accidental in nature and likely to have a sexually related motive.

Perpetrator

73. The hearing has focused on Y as potential perpetrator. As a matter of reality there could on the evidence only be three potential candidates in any event: Y; X or Z. No other third parties would appear to have had contact with A over the relevant period such as to enable them to have occasioned the trauma to her.
74. The proceedings have focused on Y as perpetrator. A positive finding is sought against Y and no finding is sought as to a pool of perpetrators.
75. For his part Y disputes C has suffered any injury of such a nature. He has made clear he does not believe that Z or X would have caused such a non-accidental injury to A.
76. However, part of my duty is to ascertain whether I can on balance of probability identify the likely perpetrator of the trauma. As set out above I have a responsibility to examine the evidence with care to attempt such a clear finding but I should not strain to do so.
77. It is important to bear in mind that no evidence was led to suggest Z or X as likely candidate and Z received no protection by way of representation.
78. Having heard all the evidence I consider that whilst this strategy may have come with some risk it has been shown to be a merited approach. Having heard the evidence I consider it does point to Y as being the likely perpetrator of the trauma and on balance it is unlikely either Z or X caused either or both injuries.
79. In reaching this conclusion I have brought into focus all the evidence in the case and I note the following conclusions which I have reached:
- a. In my judgment there is evidence which carries only limited weight and does not materially add to my finding. In this respect I have particular regard to the following:
 - i. The evidence of X of concerns as to the way Y was looking at the child prior to the events of that night and his suggestion that she remain undressed within the house after bathing. On my assessment these are not probative as to Y as perpetrator but are more likely a combination of natural behaviour in a household together with retrospective reasoning on the part of X. There simply is no evidential basis for drawing any conclusion from her feeling that he was looking at the child in a strange way. On balance it is highly likely this is X now trying to make sense of what has happened and drawing inappropriate conclusions from surrounding circumstances. Equally the evidence of remaining undressed following bathing is just as capable of being a natural

attitude as having any sexual motive. I can draw little support from this

- ii. The evidence of reports from the foster carer and school as to sexualised behaviour carries somewhat more weight being objective evidence and being unchallenged. However, I must bear in mind that many children demonstrate curiosity about both their own bodies and that of other children and that this is not of itself evidence of traumatic abuse. Of course, children who have suffered abuse may demonstrate concerning sexualised actions. In my judgment this behaviour cannot easily be attributed as being the likely impact of sexual abuse. Certainly on its own it would far short of proving abuse.
- b. What is far more cogent is the medical evidence taken together with my acceptance of the evidence from X as to what she saw on the night in question. It is highly unlikely that X would coincidentally allege abuse only to see those concerns subsequently confirmed by medical examination shortly thereafter. It is far more likely that the two are related. In my judgment the two parts are mutually corroborative. I have considered with care the possible circumstances in which the two events may arise in tandem. I have considered the following possibilities:
- i. That the two are wholly coincidental with X making up her account and A then being found to have suffered trauma. For the reasons given above this is highly unlikely and would be an extreme coincidence.
 - ii. The other argued alternative is that the two are related. What X saw was part of the abuse process and the child was subsequently found to have suffered trauma. What X saw, however poorly articulated, was the actions of a perpetrator. For reasons given above this is contention fits logically and seamlessly.
 - iii. A further (uncanvassed alternative) would be that X had some knowledge of the trauma and sought to pass the blame onto Y by making up the account. Under this possibility the issue of coincidence would disappear because the two would not be truly coincidental. The knowledge would have caused the allegation in reverse. I consider this to be highly unlikely for the following reasons:
 - 1. It suggests X caused the injuries deliberately and without sexual motive so as to give grounds for Y to be blamed: i.e. the injuries were staged for this effect. This suggestion was not made and is highly unlikely in my judgment. There would be no need to stage such a scenario to remove Y, after all the evidence suggests X had been able to ask Y to leave before without difficulty. Secondly, it would be a high-risk strategy that might place suspicion on X or Z. Thirdly there is no evidence to suggest X would act in such a manner towards her daughter. Fourth, it is doubtful X would have had the

- sophistication to create such a scenario so as to create suspicion of Y.
2. An alternative would be that X became aware that C had suffered trauma at the hands of another and created the account she did to shift blame to Y. The difficulty for me with such a suggestion would be my strong doubt that X would have been aware of any meaningful trauma but for the medical examination. I do not consider it likely X would have noted or understood the significance of the notch on normal cleaning or other inspection and there are good grounds for believing it would have gone un-noted altogether but for her call to the police.
- c. The most likely explanation by far and on balance is that the report made and the injuries noted have some essential relationship. This is not to say the bruise was caused on this occasion (I cannot safely conclude as such) but that the event was one which had an overarching sexual aspect and it was this which genuinely and correctly concerned X. I have previously stopped short of examining this feature, I now return to this point and note the following features:
- i. In support of my conclusion I note the presence of several factors which support this conclusion. I accept the account of X of the [removed] being around Y's feet. Having heard the evidence I have concluded that this garment is held stably in place and whilst it can be loosened accidentally this would not have likely happened simply by removing the child from the cot. There is therefore no good reason for the [removed] to be in such a position.
 - ii. There is no good explanation for C to be out of her nappy and lower pyjamas. I accept the evidence of X that she replaced the nappy after the event and that it was not soiled;
 - iii. I bear in mind the evidence of X, which I accept, of the immediate response of Y when he noted her presence. I accept he turned quickly to deposit C back in the cot and in doing so made no effort to replace the nappy or cloth her.
 - iv. I reflect on these matters bearing in mind that Y has given no explanation of why they came to pass. I do bear in mind the *Lucas* direction but I struggle to see how this can significantly assist Y. In the circumstances which I find there may of course have been an explanation. It may have been said that a nappy needed changing or that C was unsettled and needed to be comforted. I accept a father may do this undressed if awoken at night. That in itself is not suspicious. However here Y gave no explanation despite being asked. There was no reason to lie if a valid explanation existed. What is the feature Y was seeking to hide by lying to X? I struggle to identify what this might have been in the context of his relationship with the child in which he regularly cleaned and cared for her. If his [removed] had

accidentally fallen down then it would have been the easiest matter to explain.

- v. I am also left wondering about his actions in returning the child quickly to the cot without re-dressing her. This does not fit with any innocent explanation for removing her from the cot.
 - vi. In summary there are a conflation of circumstances which support the finding that C's removal from the cot was not for innocent reasons on the night in question. In my judgment Y's wholesale denial of what is said to have happened has arisen not out of innocent confusion or other cause but out of a need to avoid addressing exactly what he was doing with C when X came into the room.
 - vii. In my judgment the emotions of the parties thereafter are relevant. It is relevant (as I accept) that X was in an emotional state unlike any previously witnessed by her son and that the argument was very much out of his experience of the couple. This is strongly supportive of a growing distress on the part of X as Y was unable/unwilling to explain what he had been doing. It is wholly inconsistent with the account given by Y. Less easy to determine is the emotions of Y but it is at least noteworthy that he was not protesting his innocence or pointing out what he said had happened. Instead he was crying and in an emotional state equally consistent with an awareness of the seriousness of the allegations he was facing.
- d. I have also born in mind the competing evidence as to Y's presence over the weekend. In the course of her evidence X told me that Y had been caring for C on the Saturday as she was resting after the hospital but she had heard her scream and the child had come running to her. Y denies being at home on that day. It may of course be that Y is seeking to distance himself as he knows something occurred over the course of that weekend. It may be he is simply confused and wrong in his recollection and that nothing flows from such error. On balance it is noteworthy that Y has been so willing to change his account and I have been left with a sense that he has done so deliberately to distance himself from the property that weekend.
- e. In reaching these conclusions I have born in mind that Y has no previous convictions or cautions or such a nature and that for these purposes he is a man of good character. However I bear in mind that this is a matter to be taken into account but is not determinative of the allegation.

80. Based upon my findings I make the following threshold findings:

- a. On 31 May 2017 C had a linear red bruise on the vestibule in the 12 to 3 o'clock position
- b. This was caused by a sexual trauma namely a finger or object being pushed against this aspect of the vestibule

- c. Injuries to this part of the body heal quickly and it is likely this was occasioned within the 72 hours prior to the medical examination on 31 May 2017
 - d. On 31 May 2017 C had a traumatic superficial notch to the hymen in the 6 o'clock position
 - e. This was likely caused by way of a sexual assault and by likely penetration by body part or object
 - f. The timing of this trauma predates the injury to the vestibule and as such there were two separate trauma found each of which would have been occasioned independently of other
 - g. On 31 May 2017 Y was found naked from the waist down holding C whose nappy/pyjamas bottoms had been removed
 - h. The likely perpetrator of the above matters is Y
81. I do not make more widespread findings of sexual assault as the evidence does not warrant the same and in the light of my findings as to semen below.

Failure to Protect

82. I have approached this issue with care for the following reasons:
- a. Having heard X give evidence; read the transcript of her previous evidence to the criminal court and considered the other contemporaneous documentation I have some reservation as to the confidence that can be applied to the manner in which she expresses herself. I have also born in mind the intermediary report.
 - b. I also bear in mind the emotional circumstances of the night and the potential for contemporaneous reporting to be confused, e.g. see the initial report (corrected quickly) of having seen C penetrated
 - c. I also consider there is a high level of after the event reasoning with X now viewing all sorts of matters through the prism of what she now understands. This has the tendency to iron out uncertainties and leave an impression of clarity and certainty which in reality did not exist at the relevant time.
83. Having carried out my assessment there are aspects of the case which I consider should not carry the weight now ascribed to them. I consider the evidence as to odd looks; the child running to the mother with a finger to her lips; the father looking at the child from behind when naked and the father suggesting not to dress the child are all now being viewed with the benefit of hindsight. Each is now seen as suspicious (whether or not it justified suspicion) but on balance did not at the time come anywhere near supplying a cogent basis for taking protective steps whatever they might have been.
84. A distinction however needs to be drawn as to the suggestion of X that she smelt semen on the clothes/nappy of the child. This is fundamentally different form of allegation. At face value it provided serious grounds for concern and protection. At face value it is difficult to see how a properly protective parent would note this circumstance but take no further meaningful action.

85. I have therefore given greater consideration to this aspect.
86. By the time of the hearing before me X was couching this issue in the context of significant uncertainty. She told me she smelt semen but thought the smell might be coming from her (having engaged in sexual activity with Y). This of course is a plausible explanation.
87. Initially¹⁷ she spoke as follows:

No tonight I seen many times. But I'm not sure I was like suspicious I see I know my daughter always changing her nappy hold her hand I think maybe...maybe I'm crazy maybe I am bad...I just think I smell...I smell man I don't know what you call it

The smell was confirmed as being the smell of semen. This was repeated in the ABE interview as being a regular impression on the child's clothing¹⁸. In her second interview X made clear she did not smell this on the child but on the clothing¹⁹. It is also right to note that she continued to say this in the context of uncertainty and feeling she might be mad.

88. During the criminal trial X dealt with this subject timing her noticing it perhaps two weeks before the key incident and associating it with white marking²⁰. At one point X appears to make clear that she did not know what to think until these events when it made sense²¹. She made clear she knew it was semen but when asked why she did not call the police she said:

*Believe me, I should do that a long time ago, but I don't know what to think. I think I'm getting mad, **maybe it's me**. I don't know what to think that time. I should do that a long time ago, but I couldn't...I can't. I got. I don't know what to do. I don't know what to say...I didn't see my own eyes²² [emphasis mine]*

89. An uncontested aspect of the evidence is that X did act promptly on 31 May 2017 in circumstances where perhaps the objective evidence might have seemed less clear.
90. Having spent some time considering this aspect of the case I have reached a finely balanced decision that this allegation is not made out to the necessary standard. I reached this conclusion having regard to the following:
- a. X's evidence is surrounded by confusion and a level of uncertainty arising out of the manner in which she structures her evidence.
 - b. This is added to by my strong sense that she has difficulties in perceiving / expressing time periods. The evidence as to whether these matters were weeks or a year before the incident is an example. At the time of the

¹⁷ G207

¹⁸ G234

¹⁹ G335

²⁰ H88-9

²¹ H89B

²² H91-92

incident she appeared to agree to the suspicions being for a year but in interview it was maybe two weeks.

- c. There is also a high level of after the event reasoning which is understandable given what she came to be told about the trauma. But that leaves me considering there to be a real risk that she has allowed her mind to wrongly jump to conclusions which are not warranted on the evidence, e.g. the evidence as to the looks.
- d. As to the semen itself there is in fact no objective evidence of semen being present and there is at least a possibility of other bodily fluid such as vaginal discharge confusing the assessment.
- e. My strong sense is that the point about semen only fell into place in the mind of X on the evening of the events in question. Prior to that date she had understandably viewed it as being possibly her own smell (see above).
- f. In reaching these conclusions I cannot help but have regard to the manner in which she acted on 31 May 2017. This demonstrated no hesitancy in acting when she felt she had clear grounds for doing so.

91. On balance I have not found this allegation proven.

92. I consider there should now be a short adjournment for the parties to reflect on the conclusions I have reached. Steps will need to be taken to recommence the assessments and to consider what more must now be done to allow this case to proceed through to conclusion.

His Honour Judge Willans