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Carmarthenshire County Council v Y (2017) EWFC 36

[2017] EWFC 36

01/08/2017

Barristers
Alison Grief KC

Court
Family Division

Practice Areas
Public Children Law
Judgment following fact finding in care proceedings.

The issues
This is Mostyn J's judgment on a fact-finding trial concerning whether A had repeatedly raped his daughter, Y, more than 20 years ago, when she was under 16. Y suffered from mental illness and did not participate in the trial.
The judgment highlights the difficulties of fact-finding in relation to events that have occurred many years in the past, and in which the 'complainant' is unable to give evidence.

Factual background
It was an agreed fact that in 1993, when Y was 13, she was on the contraceptive pill and was sexually active [19]. It was also "undisputable" [19] that she was, at that time, in a relationship with W, an adult. Mostyn J observed, at [20], that the "atmosphere in the family home seems to have been one where there were inadequate sexual boundaries".

By the time that Y was 15 she was suffering from very serious behavioural problems [21]. She was self-harming by bodily mutilation, had overdosed on paracetamol, and had attempted suicide by hanging [21]. Mostyn remarked, at [22] that, "[o]n any view life in the family home must have been a dystopic maelstrom, yet both A and C [Y's sister] described it as being entirely unremarkable, almost of domestic felicity, where parenting was normal and appropriate" [22].

By early 1996, Y was self-harming, overdosing, running away from home and roaming the streets. She was admitted to both hospital and a psychiatric unit [23]. At that time, she made the first intimation that her father had behaved inappropriately towards her, saying that he was overly affectionate [23].

On 12 April 1996, Y prepared extensive detailed handwritten accusations against ten men, and a "shadowy, unparticularised accusation against her father" [24]. Social workers did not take the

allegations particularly seriously and the police were not informed [25].

In early May 1996, Y stayed with J on a respite basis for two weeks. She made explicit allegations against her father to J, which were relayed to a social worker [26].

Y's parents came to hear of the allegations and threatened Y with a solicitor if she continued to spread rumours. After this, Y self-harmed with a glass [27].

On 14 May 1996, Y disclosed to LF, a friend of J, who happened to be employed by the local authority, that A had been abusing her since she was four years old and had sexually abused her for the last 2½ years. She alleged group rapes by members of A's family, and said that her parents were aware of this.

After these allegations, the local authority took action. It held an evidence-taking session, which Mostyn J observed "broke virtually every rule set out in the Memorandum of Good Practice for Achieving Best Evidence which derived from the Cleveland Report" [29]. In this session, MB alleged that her father had touched her inappropriately from the age of 8 and had had full sexual intercourse with her from aged 13. She alleged that A had raped her during a visit 11 days earlier.

On 30 May 1996, police arrested A and he was remanded in custody. Y wrote two letters to her father whilst he was in prison. In the first, she told him that she had "retracked" her statement. In the second, she said that she had told social service that she had been lying but that no one would take any notice of her. Y retracted her allegations against A on 19 June 1996.

In 1997, Y wrote a letter in which she said, amongst other things, that she had fallen pregnant, then 16, and had had an abortion. This was known to be untrue. In May 1997, she wrote a document in which she alleged abuse by her father, but gave a completely different version of events to those described by her a year earlier.

Criminal proceedings against A were discontinued, and for various reasons, the allegations against A were not tried in any trial until the fact-finding in these proceedings.

Judgment
Mostyn J began by emphasising the long-standing "common-law consensus" that the best way of assessing the reliability of evidence is through cross-examination [7-17].

The learned judge went on to recite the facts (as set out above).

Mostyn J went on to find, at [42] that:

"[42] In the absence of any oral evidence from Y, and specifically in the absence of the opportunity having been afforded to A and B [Y's mother] to confront Y with her manifold inconsistencies, I cannot be satisfied that it is more

likely than not that A abused Y in the manner alleged. Quite apart form the question of the fairness of the process, there are just too many inconsistencies in the accounts given by Y for any fact-finder to conclude that it is more likely than not that the events happened. It is noteworthy that there is no corroboration for any of the allegations at all. They all derive from y and it is her word alone that determines whether these events occurred. And her word is not to be regarded as reliable…"Mostyn J said that he was not making a finding that the allegations were positively untrue, or that there had been a falsehood.

The learned judge said that although the allegations must be treated as not having happened, he was "wholly unsatisfied at the absence of explanation from A and B for what was going n in that household to have driven Y so dramatically off the rails. Plainly there were bad things happening to a very vulnerable child" [45]. Mostyn J said that it would be "grossly irresponsible" to endorse a care plan whereby Y's child were to be brought up by A and B but noted that, in any event, A and B were not in sufficiently robust health to do so.

Mostyn J said that there was no reason why C could not be considered to be a full time carer for Y's child Z, but said that he was concerned by the "rose-tinted" nature of her evidence [47].

Summary by Eleanor Sibley, barrister, Field Court Chambers

Neutral Citation Number: [2017] EWFC 36
Case No: SA16C01063

IN THE FAMILY COURT

Civil Justice Centre
Caravella House
Quay West, Quay Parade
SWANSEA, SA1 1SP

Date: 30/06/2017

Before :

MR JUSTICE MOSTYN
– –

Between :

Carmarthenshire County Council Applicant
– and –
Y 1st Respondent
– and –
A 1st Intervener
– and –
B 2nd Intervener
– and –
Z – (A Minor –Through her Children's Guardian Anne Williams) 2nd Respondent
– –
– –

Alison Grief QC and Rhian Kirby (instructed by Carmarthenshire CC) for the Applicant
Elizabeth Isaacs QC and Lucy Leader (instructed by Salter Kelly) for the 1st Respondent
James Tillyard QC and Rhys Jones (instructed by Goldstones) for the 1st Intervener
Lorna Meyer QC and Lucy Jones (instructed by Avery Naylor) for the 2nd Intervener
Rhian Jones (instructed by Nicol Denvir Purnell) for the 2nd Respondent

Hearing dates: 7-16 June 2017

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Judgment Approved
This judgment was delivered in private. The judge gives leave for this anonymised version of the judgment to be published. In no report of the case may the identities be revealed of those parties and other persons who have been anonymised. Breach of this direction will amount to a contempt of court.

Mr Justice Mostyn:
1. This is my judgment on a trial of the facts ordered by Her Honour Judge Garland-Thomas on 27 February 2017. The facts in dispute are whether, or not, A repeatedly raped his daughter, Y, more than 20 years ago when she was under 16. It is said that the abuse continued after she turned 16. A strongly denies the accusation. His wife B says that the allegation is impossible to believe, as does Y's sister C. Y herself suffers from mental illness and has not participated in the trial. Her counsel take a neutral stance in relation to the allegations, as does the Guardian. The local authority submits that the accusation is true.

2. In ordering the trial of the facts Her Honour Judge Garland-Thomas must have thought that the disputed issue was both "stark and discrete", the resolution of which would enable the substantive case to be determined both expeditiously and definitively (see Re S (A Child) [2014] EWCA Civ 25 at para 27). For my part, I entirely agree with her decision. In my opinion, the decision in Re S should not be relied on to prevent an early trial of very serious, discrete, allegations such as those with which I am confronted.

3. In preparing this judgment I have borne in mind the wise words of Lord Justice Lewison in Fage UK Ltd & Anor v Chobani UK Ltd [2014] EWCA Civ 5 at para 115:"It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."

Reference may also be made to Re F (Children) [2016] EWCA Civ 546, paras 22 – 23, which is to the same effect.

4. There are myriad background facts which are not disputed and which are not necessary for me to spell out here. They are well known to the parties, and should the matter proceed further then they can be detailed by the advocates to the Court of Appeal. Any reader of this judgment unfamiliar with the background would be helped by reading the judgment of His Honour Deputy Judge John dated 23 September, 2016 when he made an interim care order. This contains a useful summary of the history. For an exhaustively full account of the background reference should be made to the chronology prepared by junior counsel for the local authority, which has left no stone unturned. I am grateful for the preparation of that very useful document.

5. Although I have been confronted with thousands of documents, and heard oral evidence over many days, I am satisfied that I can give my decision relatively shortly without an exhaustive mechanical iteration of the evidence and arguments I have heard. Like Lord Justice Longmore I agree that judgments in this country are quite long enough already (see Aerospace Publishing Ltd v Thames Water Utilities Ltd [2007] EWCA Civ 3 at [70]), without them being extended by reams of recitation of evidence which is

known to everybody and which is largely uncontroversial, or of only marginal relevance. In my opinion there is a lot to be said for judgments reverting to the structure and length of those of the judicial giants of the Victorian-Edwardian era. I have reached a clear view and I have cited the principal aspects of the evidence, as well as the relevant legal principles, in order to justify my decision.

6. As stated, Y has not given oral evidence. She is presently detained in a psychiatric hospital under the Mental Health Act. There is compelling, unchallenged, medical evidence that it would be very harmful for her to give oral evidence in court. A therefore has not had the opportunity of confronting his principal accuser, nor has the court had the opportunity of assessing under cross-examination the reliability of the evidence deriving from her.

7. FPR 22.2(1)(a) provides that the general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved, at the final hearing, by their oral evidence. FPR 22.6(2) in effect removes the right to give oral evidence-in-chief as in all cases a witness (other than a summoned witness) will have been required to provide a witness statement, which will stand as evidence-in-chief. Oral evidence-in-chief now requires the permission of the judge be given. FPR 22.11 provides the right to cross-examine a witness on his or her witness statement. Thus, the general rule is that facts in issue are to be proved by written evidence-in-chief and oral evidence given under cross-examination. Of course, facts may also be proved by hearsay evidence pursuant to the Civil Evidence Act 1998 and FPR 23.2 – 23.5, but the general rule is that oral evidence given under cross-examination is the gold standard.

8. Why is this? It is because it reflects the long-established common-law consensus that the best way of assessing the reliability of evidence is by confronting the witness. In Crawford v Washington (2004) 541 US 36 at 62 Scalia J, when discussing the explicit command to afford cross-examination of witnesses in criminal cases contained within the Sixth Amendment to the U.S. Constitution, stated:

“To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 (“This open examination of witnesses . . . is much more conducive to the clearing up of truth”); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing “beats and bolts out the Truth much better”).”

9. It should not be thought that this consensus or view-point is confined to criminal causes. Thus, in Goldberg v. Kelly (1970) 397 U.S. 254, a case about the entitlement to receive certain federal welfare benefits, Brennan J stated at 269:

“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”

10. Due process has been a core component of the common law since time immemorial, and first received statutory recognition in 1354 (28 Edw III, c3). It is reflected in the USA in the Fifth and Fourteenth Amendments, and in Europe by the terms of Article 6 of the European Convention on Human Rights (even if that numinous phrase was not actually used in its text when it was framed).

11. In civil and family proceedings, very serious allegations may be made. This case is a paradigm example. A man is accused of raping his own daughter over 20 years ago. A similar case was Re J (A Child) [2014] EWCA Civ 875. In private law proceedings about contact the father was accused of sexually

abusing a very vulnerable and damaged female, X, some years earlier. Obviously, if true, this would have a major effect on the contact proceedings. Therefore, a fact-finding hearing was convened. X gave oral evidence by video-link. The local authority, a party to the proceedings, paid for the father to be represented. There was no question of an abusive cross-examination by the father directly of X. X was permitted to give evidence-in-chief. This took some time. The father's counsel cross-examined for an hour until the court day ended. The judge prevented cross-examination continuing the next day. She felt it would be "inhuman" to require X to do so. Thus, the father, largely, and the guardian, completely, were unable to test the reliability of X's evidence.

12. The judge found the allegations made by X to be true.

13. The denial of this basic right to test X's evidence in the crucible of cross-examination was one of the reasons why the Court of Appeal allowed the appeal, and directed that that the findings be set aside and that "the Family Court will therefore make any determination as to A's welfare on the basis that F has not engaged in any sexually inappropriate behaviour with X." (see para 104). At para 107 Gloster LJ stated:

"The allegations being made against him were extremely serious. If established they might well have led to him being deprived of contact with his daughter, to the possibility of criminal proceedings against him, and resulted in an indelible scar to his reputation and character, with potential consequences for his future employment and personal relationships."

And at para 108(c):

"Third, whilst one can readily understand the reasons why the judge terminated X's cross-examination, the consequences of that decision so far as F was concerned were clearly highly significant. In my judgment the judge should, at the very least, have considered whether in those circumstances, where there had been no full or adequate cross-examination of X on behalf of F, it remained possible to reach any fair outcome of the determination of the issue so far as F was concerned."

And at para 109:

"It is obviously important in trials with vulnerable witnesses that the trial process should be carefully and considerately managed in such a way as to enable their evidence to be given in the best way possible and without their being subjected to unnecessary distress. But that should not come at the price of depriving defendants and others, who claim that they have been falsely accused of criminal conduct, of their right to a fair trial in which they participate and a proper opportunity to present their case in accordance with natural justice and Article 6 of the European Convention on Human Rights."

14. Of course, in some circumstances cross-examination will be impossible. For example, the complainant may be dead, or a child. In care proceedings, it is rare to allow any children to give oral evidence under cross-examination, in sharp contrast to criminal proceedings. For an exposition of the historical and current reasons for this see the decision of Lady Hale in Re W (Children) [2010] UKSC 12. In such circumstances the court must do the best it can with hearsay evidence from the complainant, although the reliability of that evidence will, for the reasons given above, be markedly inferior to properly tested testimony.

15. But the reasons given by Lady Hale for confining the cross-examination of children do not apply to capacitous adults, even if they are vulnerable, as the decision in Re J demonstrates. In that case there was an earlier excursion to the Supreme Court – see Re A (A Child) 2012 [UKSC] 60. At para 36 Lady Hale stated:

"If any party wishes to call X to give oral evidence, up to date medical evidence can be obtained to discover whether she is fit to do so. There are many ways in which her evidence could be received without recourse to the normal method of courtroom confrontation. Family proceedings have long been more flexible than other proceedings in this respect. The court has power to receive and act upon hearsay evidence. It is commonplace for children to give their accounts in videotaped conversations with specially trained police officers or social workers. Such arrangements might be extended to other vulnerable witnesses such as X. These could include the facility to have specific questions put to the witness at the request of the parties. If she is too unwell to cope with oral questioning, the court may have to do its best with her recorded allegations, perhaps supplemented with written questions put to her in circumstances approved by Dr W. On the other hand, oral questioning could be arranged in ways which did not involve face to face confrontation. It is not a requirement that the father be able to see her face. It is, to say the least, unlikely that the court would ever allow direct questioning by the father, should he still (other than in this court) be acting in person. The court's only concern in family proceedings is to get at the truth. The object of the procedure is to enable witnesses to give their evidence in the way which best enables the court to assess its reliability. It is certainly not to compound any abuse which may have been suffered."

16. It is implicit in this passage that the reliability of evidence is best assessed by direct oral questioning, and this, of course, reflects the age-old consensus to which I have referred.

17. It should not be thought however that oral evidence under cross-examination is the be all and end all of forensic proof. Far from it. In my recent decision of Lachaux v Lachaux [2017] EWHC 385 (Fam) at paras 35 – 38 I cited and applied the very thoughtful analysis of Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor [2013] EWHC 3560 (Comm) at paras 15 – 22 about the inherent unreliability of testimony based on memory. In para 22 Leggatt J stated:

"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

In my opinion this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context.

18. It is often said that the court should have regard to the overall or inherent probability of occurrence of the event in issue. However, I have difficulty in understanding why the statistical rarity of an event has any material bearing in an evidential assessment of whether that event actually occurred. I agree entirely with the views of Peter Jackson J in this regard in Re BR (Proof of Facts) [2015] EWFC 41 at para 7. I have received no statistical evidence about the incidence of incestuous rape and have received no submissions on it. I shall not take into account the rarity of what is said to have happened in making my judgment.

19. For my purposes, I can begin in 1993 when Y was 13. It is an agreed fact that at that time she was on

the contraceptive pill and was sexually active. Her parents described her as promiscuous. B was reporting C as describing Y as 'easy'. But she was a mere child. She was in a relationship with W. She describes it in terms which are frighteningly abusive. She describes actual as well as statutory rape and being passed around as a virtual sex slave amongst his circle of friends. Whether any of this is true is debatable as, the fact of the contraceptive pill aside, there is no corroboration for any of Y's allegations. However, the fact of the relationship at that young age with W does seem to be indisputable – at one point her father had to go to his house to drag her home.

20. The atmosphere in the family home seems to have been one where there were inadequate sexual boundaries. B describes being sexually assaulted by a relation of her husband. C similarly describes being touched inappropriately by a friend of her father. Y alleges that she was inappropriately touched by another member of her father's family. I agree with Miss Jones, for the Guardian, that the picture is really quite striking – all the female members of this family say that they had been indecently assaulted or inappropriately touched by members of A's family or his friends.

21. But inappropriate sexual behaviour was not the only problem. By the time Y turned 15 she was suffering from very serious behavioural problems. These are all very fully described in letters written by the child psychiatrist Dr J in 1995 which are to be found in Court Bundle 5. By then her half-brother D had moved from petty pilfering within the family home to burglary for which he was imprisoned. Y herself was self-harming by bodily mutilation. She had overdosed on paracetamol and had attempted suicide by hanging. By this stage, Y had been diagnosed as suffering (mildly) from cerebral palsy as well as epilepsy. Her relationship with her mother was described as being highly conflicted and complex; by contrast her relationship with her father was described as being benign.

22. On any view life in the family home must have been a dystopic maelstrom, yet both A and C described it as being entirely unremarkable, almost of domestic felicity, where parenting was normal and appropriate. B was able to show some, but not much, insight into what must have been very profound familial problems. At the beginning of the case Miss Grief QC said that some important questions needed to be answered by the family as to what was going on that has led Y to such a desperate condition, and I record that I received no satisfactory answers.

23. By the early part of 1996 Y was in a dire state. She was self-harming, overdosing, running away from home and roaming the streets. She was admitted to hospital as well as to a specialist psychiatric unit. All this is set out in pitiless detail in the chronology. She made many allegations of abuse by a number of men and the first intimation was made by her at that time that her relationship with her father was not as it should be, although the allegation was exceedingly shadowy. At this stage the allegation seemed to be that her father was overly affectionate.

24. On 1 March, 1996 Y was accommodated with foster parents, PD and CD. She did not live again with her parents until after Z was born many years later.

25. On 12 April, 1996 Y prepared extensive detailed handwritten accusations against 10 men, as well a shadowy unparticularised accusation against her father. She had been asked to make a full disclosure of all the abuse that she had suffered, and this was the product of her work. A striking feature is that the social workers did not, it seems, take any of these allegations particularly seriously. Certainly, the police were not informed.

26. In early May 1996 Y went to stay with J on a respite basis for two weeks, while PD and CD went on holiday. Over the weekend 10 – 12 May, 1996 Y made explicit allegations against her father to J which were relayed to the social worker AMB who recorded them in a memorandum dated 22 May, 1996. That

memorandum also recorded further information purportedly given by J on 15 May, 1996 to the effect that on Sunday 19 May, 1996 (sic) A had had sexual intercourse with Y in the presence of Y's two-year-old niece (the child of her half-brother D). Obviously, the dating is completely wrong and it is surprising that a note made only a few days later could contain such a gross error. At this distance of 21 years neither J nor AMB could make any sense of the discrepancy.

27. These allegations soon gained wider currency and Y's parents got to hear of them. They confronted Y and threatened her with a solicitor if she continued to spread rumours. After this Y inflicted further self-harm to herself with broken glass.

28. On 14 May, 1996, according to a note made by AMB on 20 May, 1996 (that is two days earlier than the note referred to above) Y disclosed to LF, a friend of J, who happened to be a sessional worker employed by the local authority, that A had been abusing her since she was four years old and sexually abusing her for the last 2½ years. The allegation went further and stated that dreadful group rapes by members of A's family had been perpetrated on her and that Y's parents were aware of this. On 22 May, 1996 Y handed the social workers a poem written by her in which she expressly accused her father of abusing her. It is written in an alternate rhyme scheme and the first stanza is: "I feel so confused / it is driving me mad / I have been abused / even by my own dad!"

29. These revelations caused the authority to swing into action. An evidence taking session was set up for 30 May, 1996. Apparently, it lasted 11 hours. The scribe was WPC LC. The appropriate adult for the first half of the session was CD, and for the second half was J. The procedure was unconventional and broke virtually every rule set out in the Memorandum of Good Practice for Achieving Best Evidence which derived from the Cleveland report. Above all, the session was not video recorded. Instead Y, who is plainly a prolific writer, would write down what she wanted to say and then her writings would be transcribed into the interview template by the constable. My copy of the original statement, which runs to 19 pages, is extremely poor as it has been highlighted and re-copied over the years with the result that the more important passages are very difficult to read. However, an agreed transcription was prepared during the hearing. In it, she alleges that her father had touched her inappropriately in and around her vagina from about age 8 and had had full sexual intercourse with her from age 13. She described how 11 days earlier on Sunday 19 May, 1996 she had visited her parents because her niece G was staying. She described how awful was the atmosphere in the house with everyone arguing; how her sister C went out; how her mother either went to bed or went out; and how she was left with G and her father. After watching television for 45 minutes she described how her father forced sexual intercourse on her on the settee, while G was watching. I repeat that this was only five days after her parents had confronted her and threatened her with legal action if she spread any more rumours.

30. Before I turn to the retractions that have been made by Y I jump forward to the following year, 1997, to two important pieces of further writing by her. At some point in that year, when she was 17, Y wrote a letter in which she repeated that she had been abused by her father. She also stated that she had fallen pregnant (but she did not say by whom) and that she had, when aged 16, undergone an abortion. This we know to be totally untrue. Y has never had an abortion. It is important that this hard untruth is exposed, because it does illustrate that reality and fantasy are neighbouring companions so far as Y is concerned. Similarly, in May 1997, that is to say exactly a year after she made her initial allegations, Y wrote a document describing the abuse meted out to her by her father. The problem with this document is that what she describes is completely different to the acts described by her year earlier. She describes, among other things, extreme violence; being threatened with a knife; having objects thrown at her; forced sodomy; and the insertion of inanimate objects into her vagina. These descriptions are not just an elaboration of what she had said a year earlier; it was a completely different story. Again, the inconsistency is stark, and in any semblance of a fair trial the author of those accounts should have been

present to be confronted with them.

31. But these inconsistencies are not the only fatal flaws in the account given by Y. She retracted her story. On 30 May, 1996, immediately following the completion of her statement, the police arrested A. He was remanded in custody, and when in Swansea prison suffered violence at the hands of other prisoners. Y wrote two letters to her father while he was in prison. In the first she wrote that she had "retracked" her statement. She went on to apologise profusely and to say "dad I am not sly, I didn't say what they said I did, as I never even wrote the statement, Monday, AL did". This is a difficult sentence to understand. The retraction itself (T579), made on 19 June, 1996, is written in rather formal language where Y admits to having lied and apologises to all concerned. The second letter to her father when he was in prison explains that she had told social services that she had been lying but no one would take any notice of her. In February 1997, she wrote a letter from Cf to her father after he had been released in which she stated that she had been lying and that she had been trying to tell the staff at Cf that she had been lying.

32. In April 1997 Y made a further very clear, if somewhat formal and stilted, retraction of the allegations. Her script runs over five pages and was sent to the head of social services with a copy being sent to a police officer and to the local MP. In the letter, she confirms that she had lied, and says "I think it is about time my father's name as a sexual abuser was cleared, as he's certainly not". However, it was only in the following month that the highly embroidered and completely new story of sexual abuse by her father, to which I have referred above, was written by Y.

33. By this stage proceedings in the County Court had been commenced to displace A as Y's nearest relative as he was objecting to further treatment for her under the Mental Health Act, and in July 1997 Y wrote two letters to the judge hearing the proceedings (T1046 et seq) from the psychiatric ward in the Cn hospital in which she explicitly says that sexual abuse by her father never took place. In the second letter, she says "it never ever happened, my father's never laid a finger on me". It is true that in this letter she was expressing a strong desire to return home; that, on one hand, might supply a motive for the retraction, but on the other hand it is hard to understand if her father had indeed abused her in the way that she had alleged, why she would want to return home to live with him. It is to be noted that these letters to the judge were written only a couple of months after she had written the florid document referred to above in which she had alleged sexual violence of the most gross nature against her father.

34. That issue was never determined in the displacement proceedings. The criminal proceedings against A were discontinued. Although care proceedings were commenced in respect of Y in January 1997, these were withdrawn in March 1997 without any adjudication of this core issue having been made. Therefore, although there were at least three forensic opportunities for investigation of the allegation which I now, 20 years later, must determine, the chance was not taken.

35. Had a case been heard in 1997 proof or otherwise of the allegation would have depended critically on the oral evidence of Y given her chronic tergiversation in the documents which I have outlined above. The general rule is that contemporary documents are a key source of evidence in determining the truth, but as Mr Justice Leggatt explains, cross-examination will be vital where they are contradictory. What Y would have said then under cross-examination is purely conjectural.

36. Y's life after 1997 is fully detailed in the chronology. It was not explored in the oral evidence. There was an allegation made that A had abused her in 2005, but that was not pursued before me and no finding to that effect is sought. After repeated admissions to various hospitals or other units Y returned to live with her parents in May 2009 together with her new partner who she had met on the unit. In January 2011 Y fell pregnant. In May 2011 Y was discharged from after-care under the Mental Health Act into the

care of her GP. Z was born on 25 October, 2011.

37. The birth of Z caused the local authority to take protective measures in view of the unresolved allegations made many years earlier by Y against her father. They required Y to agree that she would supervise all contact between A and Z. Y is recorded as having said when this agreement was being discussed “do you think I would have self- harmed as bad as I did for 16 years if nothing had happened?”

38. It is perhaps surprising, or at least arguably inconsistent, that the local authority took this step given that they had taken no equivalent step on the birth of any of C’s five children in 2001, 2003, 2006, 2007, and 2008. All of these children, and in particular the younger two who are girls, had spent time alone with their grandfather without any intervention by the local authority, notwithstanding the gravity of the allegations that had been made against him many years earlier by their aunt Y. Although it can be argued that C was less than full and frank in her description of what was going on in the house during the childhoods of her and Y(see below) it cannot be disputed that C is a devoted and thoroughly competent parent to her five children. She told me, as one would expect, that her five children are the most important things for her in the world and that she would not in any circumstances expose them to risk. Therefore, in allowing her five children who have unsupervised contact to their grandfather, it must follow that she authentically does not believe that A has abused Yin the manner alleged or at all.

39. Following the making of this agreement by Y with the local authority, and following representations by her that she would never leave Z alone with her grandfather, the local authority closed its case in respect of Z. The arrangement for accommodation was that although Y had her own place she would spend every day with her parents. It is clear that Y did not comply with her agreement and has allowed Z to spend time with her grandfather unsupervised. However, it is equally clear that no harm has befallen Z. Had Y not suffered her calamitous psychiatric collapse in 2015, which manifested itself in repeated acts of self-mutilation and ligaturing, there is every reason to suppose that the arrangements I have described would be continuing to this day undisturbed.

40. In February 2016 Y was sectioned. She has been in a psychiatric unit ever since and is under close supervision. Her condition is truly pitiful in that she seems to wish to engage in self-harm at almost every opportunity. As I have stated above, the medical evidence is very clear – for her to give evidence or to participate in the proceedings could aggravate her condition considerably. She has been asked by her junior counsel if she wishes to say anything to me through any medium, in writing or on video, but she has shaken her head.

41. One thing is clear. Y has a very strong and appropriate relationship with her daughter. It is fair to assume that Z is the most important person in Y’s life. Y does not lack capacity and has a full insight into her condition. She recognises that her actions are life-threatening. She has expressed the view, somewhat to my surprise, that were anything to happen to her she would prefer Z to be placed with her parents rather than with her sister C. This is almost impossible to reconcile with the allegations that she has made against her father. Her allegations have primarily been against her father but she has also accused her mother of complicity, albeit passively. Similarly, her return to live (largely) with her parents once Z was born is very difficult to square with the accusations of the most serious nature that she has made against both of her parents.

42. In the absence of any oral evidence from Y, and specifically in the absence of the opportunity having been afforded to A and B to confront Y with her manifold inconsistencies, I cannot be satisfied that it is more likely than not that A abused Yin the manner alleged. Quite apart from the question of the fairness of the process there are just too many inconsistencies in the accounts given by Y for any fact-finder to conclude that it is more likely than not that the events happened. It is noteworthy that there is no

corroboration for any of the allegations at all. They all derive from Y and it is her word alone that determines whether these events occurred. And her word is not to be regarded as reliable. I do not need to find whether her allegations were untrue on account of malice or delusion. Indeed, I do not have to even go so far as to find that her allegations are positively untrue. All I need to find, and I do, is that I am not satisfied that they are true which is qualitatively different from fixing someone with a deliberate falsehood.

43. But even if the allegations had the ring of truth about them and were not so shot through with inconsistency, equivocation and conflict, I would still, just as did Lady Justice Gloster, conclude that the requirement of fairness of the process, or of due process of law, must require the dismissal of the charges in circumstances where the accused has not had the opportunity of confronting his accuser in relation to such deadly serious allegations.

44. The decision of the House of Lords in Re B (Children) [2008] UKHL 35 confirms what we all already knew, namely that if an allegation in relation to a past (as opposed to future) fact or event is not proved to a probability of 51% then it is treated as not having happened: see Lord Hoffmann at paragraph 2. The court may feel that there is a not fanciful (im)probability, say 25%, of the event having happened, but that mere suspicion, for that is all it is, entirely falls by the wayside. This is in contradistinction to the court's conjectures about future risks where even a probability appreciably less than 50% is sufficient to carry a case over the statutory threshold. If there is an inconsistency of approach, then that is a legal consequence that we all have to live with. At all events, A and, ex hypothesi, B are entitled to be treated as if the specific alleged events never happened.

45. However, I am wholly unsatisfied at the absence of explanation from A and B for what was going on in that household to have driven Y so dramatically off the rails. Plainly, there were bad things happening to a very vulnerable child. At this distance of time it is not possible to say precisely what or by whom, but the consequence of those bad things is plain to see. It would be grossly irresponsible for the local authority to propose, or for the court to endorse, a plan whereby Z were brought up by A and B. In any event, they are not of an age, or of sufficiently robust health, to bring up boisterous little girl aged nearly 6. A now suffers from Alzheimer's disease (albeit mildly) and B has recently suffered a heart attack.

46. As we have now reached the position where the specific allegations against A are not proven, and are therefore treated as not having happened, there is no reason why C cannot be considered to be a full-time carer for Z. I am concerned by the rose-tinted nature of her evidence – it brought to mind the three monkeys: seeing, hearing and speaking nothing evil. It is difficult to accept that she could have been unaware of problems within the family. However, she was not in a position of parental responsibility, and this put her in an entirely different position to A and B.

47. Miss Isaacs QC was at pains to argue that Y had not placed Z in danger by breaching her agreement with the local authority. Given that I have now found that A is not to be treated as having done what he was suspected to have done, it follows that Y, even though she was the author of the allegations in the first place, cannot be fixed with culpability for exposing Z to risk.

48. That concludes this judgment on the trial of the facts.