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DEALING WITH SEX ABUSE: HOW DOES THE FAMILY COURT ASSESS RISK?

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Warning: *I have edited this lecture to exclude details of the physical facts of the abuse alleged or found in the cases I have cited. Sadly, my work in these cases requires me to tread the path of an abused child's life in order to unpick what has happened to them and by whom. When findings are made it is at the cost of having to delve into the mind and actions of an abuser and that is a very dark place to inhabit, for however short a while. I have received a number of inappropriate comments on social media in response to the circulation of the details of this lecture. I am therefore aware that there are some people who have an interest in this lecture not because they have an honourable desire to learn but to use its contents for child exploitation and to learn strategies to evade responsibility for their acts. There is a web currency in child sex abuse cases and the creation from them of mock biographies of the children who have been abused. I will not permit this lecture to become part of that exchange.*

Current news

The exploitation of the vulnerable by those in a position of power is currently a hot topic of conversation. It is not as if what is happening is new but rather that it is now being exposed.

A role call from the media in recent days:

- 20.2.18: The Rotherham child sexual exploitation scandal: described as the *"biggest child protection scandal in UK history*".[14] On 20.2.18 The Guardian's reporter Josh Halliday reported that the number of victims thought to have been exploited between 1997 and 2013 is now 1,510 children according to National Crime Analysis figures.
- 19.2.18: Ex-football coach Barry Bennell was jailed for 30 years on 50 counts of child sexual abuse by a judge on Monday who called him the *"devil incarnate*." The 64-year-old Bennell, once a scout for Manchester City and Crewe Alexandra, abused 11 boys aged eight to 15 between 1979 and 1990 on an *"industrial scale"*.
- 19.2.18: Dr Matthew Falder, the academic who used encryption and the dark web to evade international investigation for years. The 29-year-old Cambridge graduate was sentenced to 32 years in prison after admitting 137 offences against 46 victims. Three of them attempted to kill themselves after being coerced into sending him explicit images, with Falder being arrested following an international intelligence operation involving security services in the UK, US, Israel and Australia.

And against recent news we have the stain on our society personified by Jimmy Saville and the decades during which he was permitted to abuse scores of children with apparent freedom and immunity.

These stories are about how children and young people have been abused by adults outside of their family: but what of the situation where a child is abused by the very people one would expect to be their protectors and nurturers, their own family? These are the cases I deal with in my work as a child protection silk and this is the area I will be exploring in my lecture tonight. The Family Court has, at the heart of its deliberations, the welfare of the child to consider and a subject child's anonymity is fiercely protected by the court. It is thus to the criminal jurisdiction that I turn to put a name to a victim of child abuse, just to bring home, at the outset of this lecture, what the victims of sex abuse can look like: Poppy Worthington[1]. On 15.1.18, David Roberts, senior coroner for Cumbria, ruled at the conclusion of the inquest at Kendal Coroner's Court that Poppi '*suffered injuries caused by anal penetration'*. In the Family Division of the High Court Mr. Justice Jackson (as he then was) had found that Mr. Worthington sexually assaulted his daughter by anal penetration shortly before her death. Poppi was 13 months old.

Sexual abuse occurs in all sectors of society and by all manner of abusers and to an infinite range of victims:

- It can be by friend to family
- It can be intergenerational: grandfather to son, father to child, mother to child,
- It can be for financial gain
- It can be for perverted pleasure
- It can comprise of one act
- It can comprise of many: physical assault, emotional coercion, threats
- It can be opportunistic, planned, predatory, groomed
- It can be progressive and persistent over the span of a child's life and into adulthood
- It can be a covert act
- It can be made public through the internet
- It can be an act replayed on the web or social media through the distribution of photographs and filming
- The act can outlive the life of the abuser and the victim, circulating in a continual loop on the dark web

The link that joins the acts described above is the abuse of power by one person over a more vulnerable victim: and there can be no one more vulnerable in this situation than a child.

Sexual abuse is always an abuse of power. It can be opportunistic or premeditated; furtive intra-familial abuse or acts shared online. It can be multigenerational and inter-sex: grandmother to grandson; father to daughter; sibling to sibling. The victim may become an abuser. What can break the cycle? What effect do these cases have on the professionals involved? How does the family justice system confront these emotive and complex cases?

Warning: This lecture contains details that some may find distressing.

In this lecture I intend to explore:

- what we mean when we talk of sexual abuse
- how it can come to light
- what guidelines exists to help guide police and social services investigations
- how the Family Court approaches the allegation

[1] Please refer back to my lecture in Season 1 'Crime and Punishment: When legal worlds collide' for details of this case and how is was dealt with my both the criminal and care jurisdictions. https://www.gresham.ac.uk/lectures-and-events/when-legal-worlds-collide

- examples of cases in which fundamental mistakes have been made by investigator with the question why that is still happening

These issues are critically important because when a concern arises that a child may have been a victim of sex abuse and exploitation we owe it to them and their family to get the investigation and the decision right. If we don't, the abused child may be left unprotected or the innocent may be false tarred.

Can we define sexual abuse?

There are many options but perhaps we can take this as starting point given its prominent use in the ground-breaking work done within the Cleveland Inquiry of 1987:

'Sexual abuse is defined as the involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend and to which they are unable to give informed consent or that violate the sexual taboos of family roles'[2]

In other words: it is the use and abuse of children for the sexual gratification of another whether for their own gratification or vicariously for another.

Men and women may not only abuse a child directly, but they may procure the child for abuse by another. The Cleveland investigator could have no ready comprehension of the machine that was to become the internet, yet their definition would cover the provision of sexually abusive images or acts of abuse via the World Wide Web for the gratification of others out-with the family of origin.

Do not think that the suggested definition above is restrictive in any way: the term 'sexual abuse' does not have a limited legal definition. The Children Act 1989 was a forward-thinking act with a far-sighted definition of harm contained within 31 (9)[3]:

Section 31(9) of the Children Act 1989 (as amended by the Adoption and Children Act 2002):

- **Harm** means ill-treatment or impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another;
- **Development** means physical, intellectual, emotional, social or behavioural development;
- **Health** means physical or mental health;
- **Ill-treatment** includes sexual abuse and forms of ill-treatment which are not physical.

Note from this section that the focus of harm is the impact it has on the child.

The criminal jurisdiction looks at alleged past acts to determine the guilt or innocence of the accused.

The family court does not have a hearing to punish or exonerate an alleged abuser (though any person accused of harm will no doubt perceive it in that way). Unlike other jurisdictions, the family court examines past events only to make decisions about what has happened to a child in order to determine what future arrangements for the child are required, i.e. it looks to the past to inform the child's future

How sexual abuse and exploitation can come to light

[2] Schechter and robber as repeated in the Cleveland Inquiry Report Cmnd 412 (1987) p 4

[3] please revert back to last year's lectures where I set out the building blocks of the Children Act and the cases litigated pursuant it: i.e. any harm must be 'significant 'harm and the facts that are alleged to support it must be proven on the balance of probabilities

A finding that a child has been abused may come about from examination of many sources and, most usually, a combination of them:

- what a child has said
- how a child has behaved
- reports of what the child has said or done by other children or adults
- evidence from a school or nursery
- evidence from health professionals
- evidence from police
- evidence from video, photographic or internet imagery
- medical examination
- expert evidence (medical, psychiatric, psychological)

In the family court we refer to looking at a 'broad canvas' of evidence to determine whether a child has suffered harm or not.

What comes to light may be a radical one-off event or allegation or it may arise as a suspicion following a trickle of concerns, no one event in itself seeming to be significant.

What is said to have happened to the child may come through the filter of those who have seen or heard it or think they have or how they then deal with the child concerned: and therein lies a danger.

Despite the fact that the Cleveland Inquiry into child sex abuse happened over 30 years ago, lessons it set out in 1987 still, far too frequently, arise today in courts throughout the land. Anyone seriously interested in this area can have no better starting point than to turn to The Report to learn how serious mistakes can be made, by caring professionals with the best of motives, but who are misguided, and their errors of judgment or practice had a catastrophic effect on the lives of the families affected by them.

Practice and procedure in the Family Court

The Inquiry into child abuse in Cleveland 1987 (1988) *Report of the inquiry into child abuse in Cleveland 1987*[4]

This report, prepared by Judge Elizabeth Butler-Sloss after media publicity about a sudden increase in diagnoses of child sexual abuse at Middlesbrough General Hospital in early 1987, revealed both the tensions and the misunderstandings that can arise when child sexual abuse is diagnosed rather than alleged. It received a lot of attention at the time not only for its revelations of the professional tensions that surrounded the increase in diagnoses but also because Judge Butler-Sloss attempted to set down some benchmarks for the diagnosis of child sexual abuse based on the best available expert opinion at the time.

Key points

- There had been an increase in diagnoses of child sexual abuse following the arrival of Dr Marietta Higgs at Middlesbrough General Hospital in January 1987.

[4] Cm 412 London: Her Majesty's Stationery Office 0 10 104122 5

- Some of these diagnoses had identified hitherto unsuspected abuse but most children had been returned to their families.
- Generally, the professionals had been inconsiderate to parents, failed to communicate and failed to undertake any wider assessment of the situation.
- There was a long-standing unresolved tension between the police and social services over the investigation of child sexual abuse.
- There were significant procedural failings in the handling of many of the cases as well as some dubious professional decisions.
- The police were unable to follow up many inquiries, not just because of denial by the children but also because of failures by professionals to provide statements and other forms of corroboration.
- The proper use of Place of Safety Orders at the outset was replaced by the use of Orders not supported by a wider assessment for the improper purposes of denying parental access and *'disclosure work'*.
- This in turn led to huge increases in contested Interim Care Orders and then in wardship proceedings to relieve the burden on the juvenile courts.
- Senior managers were not informed by middle managers of the growing crisis until quite late in the day.
- Though social workers acted in good faith, they should have been more cautious in their interventions.
- While other professionals failed to recognise police requirements, the police also failed to explain these to other professionals or to recognise their requirements.
- Communication between senior managers in the police and social services was ineffective.
- The police surgeon who led the opposition to the diagnoses should have taken more action to resolve the situation.
- Dr Higgs denied responsibility for much of what happened, never gave pause for thought, was unable to understand other points of view, saw opposition as 'denial,' caused unnecessary stress to children and families and failed to take account of resource issues.
- However, Dr Higgs and Dr Wyatt were not always wrong in their diagnoses.
- **Therapy should never be offered on the assumption that abuse has taken place.**
- Stuart Bell MP had overstated the case in relation to the diagnoses and the social services response but some of his complaints about the police being obstructed were justified.
- Social services Court Liaison Officers should have sought legal advice.
- Social workers failed to explain to parents how they could appeal against restrictions on access.
- The use and behaviour of some Guardians *ad Litem* was improper.
- Consent to examinations should be sought explicitly and an explanation given.
- **Do not assume that abuse has taken place and that lack of disclosure is a sign of denial.**
- **The interviews done in Cleveland mostly failed the standards agreed by professionals working in the area of child sexual abuse.**
- Avoid trying to improve systems rather than skills because this can create the illusion that knowledge exists when it does not.
- **All those involved need to improve what they do and how they do it in the interests of the welfare of children.**

This comprehensive review still guides today's investigations: it was a seminal piece of research, investigation and analysis.

My lecture focuses on those aspects of it highlighted in bold above.

A health warning for all that underpins all that follows in this lecture:

Professionals must not assess evidence on the basis that a child must be believed. Of course, what every child says must be listened to and taken seriously, but do not prejudge: keep an open mind.

The Process of Investigation

A court evaluating evidence of alleged sex abuse must do so by a two-stage process as identified in **RE H (A minor): RE K (Minors Child Abuse Evidence) 1989 2FLR 313**

- Is there evidence of sex abuse?
- If so, is there evidence of the identity of the abuser?

Key learning tools:

- The Report of the Inquiry into Child Abuse in Cleveland 1987
- Achieving Best Evidence in Criminal Proceedings (ABE Guidelines) March 2011
- The physical signs of child sexual abuse, an evidence-based review and guidance for best practice, produced by the Royal College of Paediatrics and Child Health. **May 2015**[5]
- HM Government Guidance: keeping Children Safe in Education[6] March 2015 **updated** [7] **6 Sep 2016**
- The Advocates Gateway guidance on interviewing children part Tool kits 6 and 7[8]
- 'What to do if you're worried a child is being abused' (HM Government, March 2015)[9] (replacing previous guidance published in 2006)

The Judicial framework for Decision Making

The judge must decide if the facts in issue have happened or not;

"*There is no room for finding that it might have happened. The law operates a binary system in which the only values are 0 and 1*,"

Per Lord Hoffman in **Re B**[10]

(Declaration of Interest: I appeared in the House of Lords for the interveners CAFCASS)

The binary approach applies to the conclusion to the fact in issue (e.g. did it happen; yes or no?) not the value of individual pieces of evidence (which fall to be assessed in combination with each other).

When carrying out the assessment of evidence regard must be had to the observations of Butler-Sloss P in **Re T [2004] EWCA (Civ) 558 para 33:**

> "*Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the Local Authority has been made out to the appropriate standard of proof.*"

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[5] You might also want to look at Report of the Royal College of Physicians of London on Physical Signs of Sex Abuse in Children (1991)

[6] *https://www.gov.uk/government/publications/keeping-children-safe-in-education--2*

26 Mar 2015 - Statutory **guidance** for schools and colleges on safeguarding **children** and **safer** recruitment.

[7] Keeping Children Safe in Education - September 2016 - Safeguarding ...

https://www.safeguardinginschools.co.uk/new-keeping-children-safe-education-6 Sep 2016 - The **government** has now published the September 2016 version of '**Keeping Children Safe in Education**'

[8] The Advocates Gateway guidance on interviewing children

[9] *https://www.gov.uk/government/publications/what-to-do-if-youre-worried-a-child-is-being-abused--2*...

[10] Re B (Children) [2008]UKHL Civ 282

Similar observations were made by the then President in the Court of Appeal **Re U (Serious Injury: Standard of Proof); Re B [2004] 2 FLR 263:**

*'The judge invariably surveys a wide canvas, including a detailed history of the parents' lives, their relationship and their interaction with professionals. There will be many contributions to this context, family members, neighbours, health records, as well as the observation of professionals such as social workers, health visitors and children's guardian' (*para [26] per Butler-Sloss P).

When considering the *'wide canvas'* of evidence the following section of the speech of Lord Nicholls in **Re H and R (Child Sexual Abuse: Standard of Proof) [1996] 1 FLR 80** @ 101B remains relevant:

> *"I must now put this into perspective by noting, and emphasising, the width of the range of facts which may be relevant when the court is considering the threshold conditions. The range of facts, which may properly be taken into account is infinite.*
>
> *Facts including the history of members of the family, the state of relationships within a family, proposed changes within the membership family, parental attitudes, and omissions which might not reasonably have been expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child, and unsatisfactory parental responses to complaints or allegations. And facts, which are minor or even trivial if considered in isolation, taken together may suffice to satisfy the court of the likelihood of future harm. The court will attach to all the relevant facts the appropriate weight when coming to an overall conclusion on the crucial issue."*

The Evidence the Family Court Considers

The Parents: The evidence of the parents and of any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on their evidence and the impression it forms of them **(see *Re W and another (Non-accidental injury)* [2003] FCR 346).**

Taking the allegations from the child

The courts assessment of the veracity of sexual abuse allegations often stands or falls on the quality of contemporaneous material before it. By the time the matter has come to court for final determination the most valuable information will already have been gathered, often before proceedings were started. The information most closely taken proximate to the allegations is likely to be of the most assistance to the judge because accounts can change over time and external influences can influence what is said as months go by. Memories can lose detail and /or can be created or added to by others.

What the court needs to know can be summarised as:

- What exactly does the child say has occurred?
- What amount of detail has s/he provided unprompted or unelaborated upon by others?

The initial allegation: The court will look at contextual evidence such as:

- To whom did the child first make the allegation?
- How and in what context was the allegations made?
- How has that allegations evolved?
- Is it consistent or not?
- Is there any evidence of rehearsal or coaching?
- What degree of sexual knowledge does the child have?
- What was going on in the child's life when it was said?
- How was their emotional state at the time?
- What response did the child receive?

- What corroborating evidence is there for the child's account?

Note: Hearsay evidence is admissible within family proceedings (See the Children (Admissibility of Hearsay Evidence) Order 1993 and the Civil Evidence Act 1995.

The professional evidence

The investigation: what happened after the allegation?

- When was the matter reported to the authorities (education, social services/ police)?
- By whom?
- Has there been a police investigation: if so, what stage has it reached?
- Has the child been spoken to by a professional? Where are the records?

The court will be looking to see if the child account was influenced by what was said to it before, during or after the allegation: it will want the original notes, scrappy and haphazard as they may be. Accounts change when they are 'perfected'. One wants the source material: **RE J (A Chid) [2014] EWCH Civ 875** is clear about the need to demonstrate good quality evidence of the allegations

Sexualised behaviour?

In Re B EWCH 2010 2435 (FAM), Mr Justice McFarlane (as he then was) observed as follows:

"226. The final addendum report [of Dr Sturge] is an important and useful document. Amongst the points made, the following are of particular note:

a) It is a false belief that inappropriate sexual behaviour suggests prior direct sexual abuse. A much more common antecedent is neglect and poor general boundaries at home around privacy, sexual activities and talk…"

Children in the modern world may have considerable sexual knowledge from legitimate sources (magazines, internet, cable/satellite TV, peers, etc.) and it is no longer possible to assume that sexual knowledge/behaviour is a sign of abuse – it may be, but other sources must be considered. Abnormal sexualised behaviour occurs in association with the more severe forms of abuse. It is more common in very young children. Mutual sexual exploratory behaviours are common in normal children but may be distinguished from abnormal behaviour both by the intensity and frequency with which they occur and the presence of laughter and playfulness.

Medical Evidence of Sexual Abuse?

It is very rare to find forensic evidence which will prove that a child has been sexually abused. Even in that minority of cases where there are abnormalities of the child's genitals or anus it is not always certain that sexual abuse is the cause.

Leeds City Council v YX & ZX (Assessment of Sexual Abuse) 2008 EWHC 802 (FAM) is a Judgment arising from a fact-finding hearing involving allegations of sexual abuse. Holman J reviewed the evidence of all the experts involved. That also involved consideration of the unpublished (at the time) guidance contained in; 'The physical signs of child sexual abuse, an evidence-based review and guidance for best practice,' produced by the Royal College of Paediatrics and Child Health. His Lordship found:

'The medical assessment of physical signs of sexual abuse has a considerably subjective element, and unless there is clearly diagnostic evidence of abuse (e.g. the presence of semen or a foreign body internally) purely medical assessments and opinions should not be allowed to predominate. Even 20 years after the Cleveland Inquiry, I wonder whether its lessons have fully been learned."

These are not often present in cases in which child sex abuse (CSA) has occurred. This is because:

a) Much sexual abuse is of a type that may not lead to anatomical change e.g. fondling, masturbation, oral sex, inter-crural intercourse.
b) CSA victims do not often come to attention within 7 days of the last incident which affects the availability of samples.
c) Some genital changes revert to normal in time e.g. bruising, vaginal enlargement.
d) Studies of the normal anatomy of the anus and genitalia in children have only recently been conducted on any scale. The results tend to suggest that many anatomical features thought to be "diagnostic" of sexual abuse can be found in the normal population.

We now come to the most challenging area of assessment undertaken by the court:

<u>Assessing the Veracity of a Child's Allegation</u>

Where a child makes an allegation of abuse, informing a view about the veracity of that account (or material aspects of it) we look at factors such as this (non-exhaustive) list:

1. The age and degree of maturity of the child in question;
2. Internal consistency of account, and/or inconsistencies of account;
3. Detail, or lack of detail in the account;
4. Opportunity for the acts to have occurred as alleged, and/or lack of opportunity;
5. The possibility that a child may lie about some things, and not about others; the fact that he/she may have lied about A does not mean that he/she has lied about B;
6. Whether the emotional affect/presentation of the child when making the allegations, and the general behaviour of the child at the time of the allegations, is congruent with the allegations themselves;
7. Whether the specific abuse described by the child is likely to be in the direct knowledge or experience of the child of the age in question, and/or whether the descriptions of abuse could be learned otherwise than by direct experience (i.e. internet/social media/media/television);
8. Fluency and coherence of account/narrative, or confusion in the account/narrative;
9. Whether there is, or appears to be, evidence of embellishment or exaggeration in the child's account;
10. The extent to which, if at all, the child's account could be explained by innocent conduct on the part of the adult(s) concerned (i.e. hugs / kisses);
11. Whether there are independently verifiable facts supporting the account; or are the facts not verifiable? Or, more pertinently, are the facts which profess to support the account untrue or unlikely to be true?
12. Whether there is medical evidence, and if so whether this evidence is diagnostic of, consistent with, supportive of, neutral, or does not support, or indeed contradicts the account; it is to be noted that medical evidence may not be available or relevant in relation to some allegations of abuse;
13. Whether, and if so the extent to which, the allegations have been retracted, and if so the circumstances, timing, and context of any such retraction.

<u>Looking at some of these elements a little closer: why are they **potentially** relevant?</u>

<u>Language:</u> Is the child's description consistent with his/her developmental level? Are events described from a child's perspective in a child's language, with its limitations and misunderstandings? Does the account come from their world and words: not an adult?

Spontaneity - Spontaneous allegations have higher validity than those resulting from suggestive or direct questions since children may be anxious to please and suggestible. Interviews should be conducted in a manner, which facilitates *"free recall"*.

Corroboration - where other children are involved, do they repeat the same story?

Amount/quality of detail – is there details specific to the alleged offence (e.g. recognisable and detailed descriptions of adult sexual behaviour) for which the child is unlikely to have any other source of information. Validity increases with other details e.g. body positions and sensations compatible with the offence; recollection of the emotional state of the victim and offender; idiosyncratic and superfluous details, including surprises, such as interruptions. Unusual and traumatizing episodes of abuse might be remembered more clearly than frequently repeated abuse. Long term sexual abuse may be conducted with very little said during the sexual acts. Between episodes the perpetrator and child may ostensibly act as though nothing has happened. In these circumstances the victim may find it difficult to recall a specific occasion, particularly if trying to 'absent themselves' mentally to avoid the distress of participation. Some adolescent is capable of complex and plausible fabrications based upon their own sexual knowledge. They may also be having sexual experiences however as a result of being abused.

The child's emotional state is consistent with recollection of a distressing event - emotional arousal during description of abuse, e.g. trembling, flushing, incontinence, topic related hyperactivity, avoidance, embarrassment, disgust, etc. Children of primary and secondary school age are normally embarrassed when sexual topics are discussed, this may be difficult to distinguish from emotional arousal consistent with abuse. But there is a limit to this: children may show evidence of emotional arousal and topic avoidance which is impossible to distinguish from genuine feelings. And whilst a 'bland' account devoid of emotion might imply it didn't happen, after repeated discussions victims may cease to show emotional distress.

In/consistency: Victims of sexual assault may give a consistent account of their experiences which lends it credibility. But certain inconsistences may, paradoxically, be a feature which increases validity. Inconsistency may be related to threats that have been made should the child disclose abuse, or fears of the consequences disclosure (e.g. imprisonment, family break-up). The victim may first disclose those episodes of abuse about which they feel least ashamed or which are least likely to get people upon whom they are dependent, or afraid, into trouble.

Consistency in the face of challenge – does the child maintain the story when the original allegation is challenged: does the child make corrections of the interviewer's misunderstandings?

Internal consistency – is the same theme revealed through more than one medium e.g. drawings, play, speech, etc.?

Details characteristic of the offence – does the child describe forms of sexual abuse which follow patterns which are known to experts but not generally to the public. For example, the gradual sexualisation of normal intimacy of within family abuse; the grooming of the child and family; the gradual realisation of wrong-doing in young children exposed to chronic abuse; the victim's sense of powerlessness; or feelings of guilt and complicity – the victim may try to pardon the perpetrator's action or cast guilt on herself.

As one can see; for any one rationale to assess credibility against, there may be good reasons for reading it differently. The test upon the judge to 'get it right' is immense.

The Local Authority and the Police: are they Working in Cooperation, not Competition?

If an allegation has been made to a professional, then a referral should have been made to the local authority. In most cases the local authority will commence an s 47 investigation and will work with the police.

Communication is critically important between the two teams. Since 1.1.2014 police and social services have been required to work together under the 2013 Protocol and Good practice model which seeks to coordinate the evidence gathered from both agencies in linked care and criminal proceedings. The 2013 protocol applies to private law proceedings as much as to public law.

The 2013 protocol seeks to anticipate and provide a mechanism for voluntary disclosure by the police/ CPS into the family justice system. If a police investigation is concurrent the police may refuse to disclose material arguing Public Interest Immunity (PII). But the mere fact that a police investigation on-going is not, of itself, a reason for the police to refuse to disclose evidence into the care proceedings. The police have to establish that prejudice would ensue to their investigation if disclosure is directed. If that is the case, none the less, the court should establish a clear timetable for review and provision of the evidence that is being held and incorporate that into the courts time-table to avoid further delay

The Achieving Best Evidence (ABE) Interview

Younger children are unlikely to understand the seriousness of the investigative process or the consequences of allegations they may make. They may not fully understand the concept of truthfulness, they may be misinterpreted, they may be absolutely clear in what happened, or they may be clear about some parts and not others, they may make statements which please important adults. Their "beliefs" are highly dependent upon what they are told by adults. Their evidence can be distorted by poor interview technique e.g. leading, direct and repeated questions. Hence why what a child says should be treated with scrupulous neutrality and should be investigated by professionals on that basis, not on belief.

A critical piece of evidence will be what the child has said in a properly conducted, recorded, interview with a police officer and social worker: this is what happens in an Achieving Best Evidence interview: an 'ABE'.
Four distinct phases are identified:

- establishing rapport,
- asking for a free narrative,
- asking questions,
- closing the interview

Detailed guidance is provided on (inter alia) *"the important ground rules of truth and lies"; "how to elicit and support a free narrative account"; "the strengths and weaknesses of different types of question"; "misleading statements*"; and the way to close and evaluate the interview.

Establishing the purpose of the interview*: "The interviewer should provide an explanation of the outline of the interview appropriate to the child's age and abilities. Typically, the outline will take the form of the interviewer asking the child to give a free narrative account of what they remember and follow this with a few questions in order to clarify what has been said. … It is also important to stress that what the interviewer wants to discuss with the child is their* ***memory of the incident(s) which give rise to the complaint, not the complaint itself (i.e. what the child remembers about the incident, not what they remember telling someone else) ...***

The child should be given every opportunity to raise the issue spontaneously with the minimum of prompting… Again, ***on no account must the explicit allegation be raised directly with the child because this might jeopardize any legal proceedings and could lead to a false allegation."***

Initiating and supporting a free narrative account "*…the child should be asked to provide in their own words an account of the recent event. The* ***free narrative phase is the core of the interview and the most reliable source of accurate information. During this phase, the interviewer's role is that of a facilitator, not an interrogator.*** *Every effort should be made to obtain information from the child that is spontaneous and free from the interviewer's influence. … The child should not at this stage be interrupted to ask for additional details or to clarify ambiguities: This can be done in the questioning phase … Interviewers should be careful to ensure that affirmative responses are not provided throughout the interview and do not*

relate solely to those sections of the interview dealing with allegations … Such prompts should relate only to the child's account and should not include relevant information not so far provided by the child …

It is quite in order for the interviewer to refer to a child by their first or preferred name, but the use of terms of endearment ('dear'. 'Sweetheart'), verbal reinforcement (telling the child they are 'doing really well') and physical contact… Are inappropriate.

… Prompting is quite in order provided it is neutral ('and then what happened?') and does not imply positive evaluation ('right', 'good') (paragraph 2.150.)"

Even where the police aren't involved the principles of the ABE should apply[11] . The Guidelines aren't disciplinary i.e.: if not complied with the interview is not excluded but they provide a framework against which the allegations can be judged for reliability.

Despite the fact that the Guidelines should be at the heart of any professional training for police officers and social workers, the family courts are still faced, repeatedly, of examples where basic mistakes have crept in to this critical interview.

The importance of following the Guidance has been stressed by the courts on many occasions. One example in this Court occurred in ***TW v A City Council [2011] EWCA Civ 17*** (a case which concerned an earlier version of the Guidance) where Sir Nicholas Wall P said:

> *52… the Guidance makes it clear that the interviewer has to keep an open mind and that the object of the exercise is not simply to get the child to repeat on camera what she has said earlier to somebody else. We regret to say that we were left with a clear impression from the interview that the officer was using it purely for what she perceived to be an evidence-gathering exercise and in particular to make LR repeat on camera what she had said to her mother. That, emphatically, is not what ABE interviews are about and we have come to the view that we can place no evidential weight on it.*
>
> The Court of Appeal then went on to consider the significance of the Guidelines:
> *"79… Again, I have some sympathy for officers and social workers entrusted with the difficult task of speaking to children about allegations of this sort. The ABE Guidance is detailed and complex. But those details and complexities are there for a reason. Experience has demonstrated that very great care is required when interviewing children about allegations of abuse. The Guidance has been formulated and refined over the years by those with particular expertise in the field, including specialists with a deep understanding of how children perceive, recall and articulate their experiences. It would be unrealistic to expect perfect in any investigation. But unless the courts require a high standard, miscarriages of justices will occur, and courts will reach unfair and wrong decisions with profound consequences for children and families.'*

Evidence from The Child Directly as a Witness

Re W (Family Proceedings: Evidence) [2010] UKSC 12

There is and should be no presumption that a child should not be able to give direct evidence to the court. The court must balance:

- The advantages the oral evidence will bring to the determination of the issue and
- The damage it may do to the welfare of this or any relevant child

The court must balance the Article 6 Right to a Fair Trial and the Article 8 Right to respect for a private family life. *'The courts principal objective should be achieving a fair trial.'*

[11] Re D (Child Abuse: interviews) [1998]2 FLR 10

There is insufficient time in this lecture to explore the ramifications of this case and how far the Family Division lags behind the Criminal Division in terms of their readiness and ability to take evidence from child witnesses: I have that in mind for my next lecture 'The Child in the Family Court Room: Whose Child is it Anyway?

Child Witnesses in support; **Re R [2015] EWCA Civ 167**

Allegations of sexual abuse of 2 children; oldest child was 14 and separately represented. She filed a statement in care proceedings denying the allegations and saying she wanted to give evidence. The local authority and the 14-year old's court-appointed guardian advised the court that the 14-year-old should not give evidence. The court refused to allow her to do so. The decision was appealed. The CA allowed the appeal:

'*taking the guidance as a whole it seems to me the that the key features that should inform the application of the test in this case are as follows: GR is a mature, intelligent 14 ½ year old girl who, over and above the strain resulting from the situation in which she finds herself, has no additional specific vulnerabilities. She wishes to give evidence and feels sufficiently strongly about it to pursue this appeal. Unusually, far from making allegations as against her father, her evidence is that the allegations made by RR are untrue. She may or may not be telling the truth.'*

The matter was remitted for hearing with the child GR to give evidence.

RE J (Vulnerable Witness: Sexual Abuse: Fact Finding) [2014] EWCA Civ 875

A complex case which went up to the Supreme Court and back again. The Step daughter had made allegations against the step-father. She was deemed a vulnerable witness due to her psychological problems. She could talk normally to people about life in general, but she broke down and exhibited extreme distress whenever talked to about the allegations. Special measure was put in place using a video link during her halting and intermittent evidence[12].

Of interest here was the warning that when there is a particularly strong emotional presentation by the alleged victim. Judges need to '*step back and have a reality check*' by having regard both to the factual content and the other evidence in the case.

Retractions

The fact that an allegation is subsequently retracted does not prevent a judge from accepting that the allegation is in fact true. Children may retract because they are scared, because they want to turn the clock back and go home if they are in care, because they don't want the abuser to get into trouble… or because the initial allegations weren't true.

We come back to the 'broad canvass' again. For whatever reason a retraction is made, its significance has to be considered by the judge: the court does not have a 'stop the clock' approach to the evidence: see this case for an example **RE W (Fact-Finding; hearsay evidence) [2013] EWCA Civ 1374**

When It Goes Wrong

[12] Please see my previous lecture https://www.gresham.ac.uk/lectures-and-events/vulnerbale-clients-and-the-family-justice-system In which I explained what 'special measures' were and how the court can assist vulnerable witnesses to give the best quality evidence to them

There are so many instances of flawed investigations: for reasons given at the outset of this lecture I will not recount the details.

It appears to me that three reoccurring reasons are:

- that the investigators proceed on the basis that 'the child must be believed' and / or
- that they have failed to absorb the reasons why the ABE guidelines have been drawn up
- as a result, they flout them in their dealings with the child and contaminate the quality of the evidence before the court

Common mistakes are:

- the use of untrained and inexperienced interviewers
- failure to approach the interview with an open mind
- use of leading questions
- too many interviews for each child
- interviews conducted at the pace of the adults not the child
- inadequate video or audio recording
- lack of background information and preparation by the interviewer
- introduction of evidence into the interview by the interviewer
- telling the child what another child has said
- reminding the child what they have said
- inappropriate encouragement to tell more when allegations are made 'good girl', 'you're doing really well', etc.

Children may make unreliable allegations as a result of "coaching" or "suggestion" by adults who are in a position of influence over them. This may be deliberate but more commonly is inadvertent and occurs from a combination of suggestive questioning and a child who wishes to please his interviewer or care-taker. Younger children are more vulnerable because of their suggestibility and dependency. Children are more susceptible if tired and hungry, thus lengthy interviews and interviews taken without regard to the child's normal meal times and bedtimes are to be avoided. Interviewers or carers who harbour suspicion of sexual abuse may indicate this to the child by repeated questioning, the child may come to agree and even believe that some form of sexual abuse has taken place even if it has not.

Examples of leading question:

- *Did anything happen then yesterday that made you sad?*
- *Don't be shy. It's very important isn't it that you tell somebody what happened. Yeah? What happened?*
- *What did daddy do to you?*
- *You can tell us what you told mummy*
- *X says you said this*
- *You're doing really well; can you tell us a little more?*

Some case examples of where things have gone wrong:

A London Borough Council v K and Others (2009) EWHC 850 (FAM) Baker J gave guidance to practitioners dealing with complex cases, particularly those where allegations of child sex abuse arose under the heading 'lessons to be learnt'. In cases of complexity a trial judge should be allocated as early as possible to manage the trial, where experts are instructed there must be clarity over what the expert is to do especially where

allegations evolve over time. Medical examinations of the child should be video recorded to avoid the need for repeat examinations.

Wigan BC v M (Veracity Assessments) [2015] EWFC 8 Jackson J (as then) gave a summary of the legal position re veracity experts who have in previous years sought to assist the court on interpretation of an ABE interview: e.g.) by examining nuances of emotion and behaviour, body movements, the use of language and its imagery, vocal inflections, pace and pressure of interview, the child's abilities and any signs of fantasy. Jackson J looked at the value of this 'veracity' assessment and said 'in *my view, cases in which it will be necessary to seek expert evidence of this sort will nowadays be rare. While the decision must rest on the facts of the individual case, judicial awareness of these issues has greatly increased from the Cleveland Enquiry of 1987 and the most recent reiteration of the ABE in 2011… The overall result is that judges have been trained in and are expected to be familiar with an assessment of this kind. The court is only likely to be persuaded that it needs expert evidence if it concludes that its ability to interpret the evidence might otherwise be inadequate.'*

TW v A City Council (2011) EWCA Civ 17 (supra)

RE PG (CHILDREN) (2015) CA (Civ Div.) (Elias LJ, McCombe LJ, Ryder LJ) 29/07/2015

Findings of fact that were in part based upon a social worker's biased reports which had accepted a mother's allegations against a father without proper investigation, and that had failed to give sufficient reasons for what had been accepted and what had been rejected, were set aside.

E (A Child) [2016] EWCA Civ 473[13] Court of Appeal allow appeal against findings of fact made in care proceedings and provide important guidance on:

(i) children giving evidence;

(ii) the weight to be given to defective ABE interviews;

(iii) the approach to representing a child accused of perpetrating abuse; and

(iv) the Article 6 rights of a child who might properly be regarded as either a perpetrator or a victim or both.

Her Honour Judge Watson (sitting as a Deputy High Court Judge) made a number of findings of sexual abuse against a father and his teenage son (A). The judge determined that the abuse was perpetrated against A and three other children.

McFarlane LJ gave the unanimous judgment of the Court of Appeal and criticised the *"process and procedure together with the judge's overall analysis*" under the following headings.

ABE interviews

(i) Phase 1 of the ABE process (where the interviewer establishes a rapport using neutral topics and discusses the 'ground rules' including the distinction between truth and lies) was not undertaken on camera and there is no note of what was said to each child;

(ii) In respect of one of the children the interview was interrupted for an hour following which the child's demeanour was markedly changed (the child having previously been unresponsive);

(iii) Following the ABE interviews the children were subsequently seen at their home by the police officer for a process of fast-track questioning;

[13] http://www.bailii.org/ew/cases/EWCA/Civ/2016/473.html

(iv) The short summary note of what each child may have said during the fast track process was wholly inadequate;

(v) No written record of the ABE process was available from the police;

(vi) The trial judge refused an application for the officer conducting the interviews to give evidence and so the court did not have an account of those matters (including in relation to the potentially significant interruption in one of the interviews);

(vii) The interviewers used leading questions and introduced key elements of the narrative, akin to that behaviour so roundly criticised in TW v A City Council [2011] 1 FLR 1597.

The Court of Appeal concluded that the judge's approach to the many inconsistencies within the children's accounts fell well short of the level of analysis that this evidence required.

The court identified the following three deficiencies in the judge's evaluation as examples:

(i) Although the judge was correct to identify that the inconsistencies between the children's accounts did not demonstrate that they were 'trotting out a script', that observation did not obviate the need for a detailed evaluation of the inconsistencies;

(ii) It was not open to the judge to conclude that each child giving a different account in his or her ABE interview in some manner corroborates the account given by one of the others;

(iii) The judge's "broad brush and superficial approach to the inconsistencies" was carried forward to the findings which include specific allegations which were only made by one of the children on one occasion and were not repeated nor corroborated.

Calling the children to give evidence

The trial judge declined an application for the children to give evidence during the fact-finding process and determined that the issue would be kept under review during the trial.

The Court of Appeal notes that, **in criminal proceedings, about 40,000 children give evidence each year (typically with special measures such as a video link) and that conversely, the Supreme Court's decision in Re W (Children) (Family Proceedings: Evidence) [2010] UKSC 12 "would seem to have gone unheeded in the five or more years since it was given"** such that the previous culture and practice of the family courts has remained largely unchanged with the previous presumption against children giving evidence intact. McFarlane LJ concludes that such a presumption is contrary both to the binding decision of the Supreme Court and Article 6 of the European Convention on Human Rights.

Issues relating to Child A

Child A was assessed as having a 'borderline to low average' ability in most areas of functioning, but with an 'extremely low to low average' ability to process information. During the proceedings A's CAFCASS guardian and his solicitor visited him; the following day HHJ Watson made an order requiring the

guardian to file a statement setting out what had occurred during that visit. The guardian complied with the direction by filing a statement.

The Court of Appeal recorded that the express purpose of the visit was to go through the evidence against him for the purposes of the forthcoming hearing and that he should have been entitled to the same legal professional privilege afforded to all other individuals who undertake communications with their lawyers. At paragraph 91 the judgment notes:

> *"It is obviously important that, in the case of a vulnerable young person, those who are instructed to act on his behalf where he or she is facing serious factual allegations are utterly clear as to their professional responsibilities and astute that their young client's rights are properly acknowledged and protected."*

The judgment criticised the judge for failing to expressly consider A's Article 6 rights when directing a statement from the guardian about A's instructions.

The court was also critical of the procedure whereby A's key worker was present while A's instructions were being taken, and the process by which A (who had learning difficulties) was asked to regard marking 'YES' on a paper drawn up by the guardian as 'indicating there had been sexually inappropriate behaviour involving A'.

In conclusion the Court of Appeal set aside all of the Judge's findings and remitted the case to another judge of the Family Court to consider whether there should be a retrial.

AS v TH (False Allegations of abuse) [2016] EWHC 532 (2016) 3 FCR 327[14]

MacDonald J described the wholesale failure of professionals to follow the advice available to them in case law and statutory guidance when investigating allegations of abuse.

This case concerned an application by the mother of 2 children sought a range of findings that the father had sexually, physically and emotionally abused the children and the mother. There was a 9-day fact finding hearing with evidence given by the children's teachers, therapists, police officers and social workers. The father sought counter findings that the mother had fabricated the allegations. The court did not make any findings sought by the mother and found that the allegations by certain professionals contributed to the difficulties in assessing the evidence. Although this case was a private law case, MacDonald J's judgment on the mistakes made by professionals has far wider relevance. He identified failures by the social worker, police officers and teachers to keep accurate records of what was said by the mother and the children resulting in a disquiet as to what the children had said. A failure by the professional to interview the children in accordance with the ABE guidelines. The questioning of the children by 19 professionals on no fewer than 66 occasions. Therapeutic intervention with the children, including 35 group sessions, on the basis they had been abused, as alleged by the mother, before any findings or criminal convictions.

MacDonald J set out guidance to be followed when allegations of sexual abuse have been made: I have covered these within this lecture and attach the BAILII link in the footnotes so that the judgment can be read in full, as its importance warrants: I repeat parts only here.

[14] http://www.bailii.org/ew/cases/EWHC/Fam/2016/532.html

MacDonald J noted in particular from having heard extensive evidence from those professionals to whom the children made allegations and from those professionals who subsequently assessed the children and/or investigated those allegations that they had, despite clear guidance, referred to the allegations made by the children as *'disclosures':*

"I pause to note that despite the fact that the use of the term "disclosure" to describe a statement or allegation of abuse made by a child has been deprecated since the Cleveland Report due to it precluding the notion that the abuse might not have occurred (see para 12.34(1)), every professional who gave evidence in this case (except the Children's Guardian) used the term "disclosure" to describe what the children had said to them)."

MacDonald J went on to re-affirm the established practice for professionals to whom allegations of abuse have been made:

"(I) Initial Contact with a Child alleging Abuse

35. Where a child makes an allegation of abuse to a professional, the relevant guidance for professionals to whom allegations of abuse are reported makes clear the following principles with respect to the initial contact with the child.

36. In the departmental advice: 'What to do if you're worried a child is being abused' (HM Government, March 2015) (replacing previous guidance published in 2006) states that before referring to children's services or the Police an attempt should be made to establish the basic facts. Within this context, the following is said at [28]:

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

And at [29]:*'If a child reports, following a conversation you have initiated or otherwise, that they are being abused and neglected, you should listen to them, take their allegation seriously, and reassure them that you will take action to keep them safe.'*

37. The statutory guidance Achieving Best Evidence in Criminal Proceedings (March 2011)

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

38. The ABE Guidance goes on to state at [2.6] under the heading 'Initial Contact with Victims and Witnesses' *that a person engaged in early discussion with an alleged victim or witness should, as far as possible, (a) listen, (b) not stop a free recall of events and (c) where it is necessary to ask questions, ask open-ended or specific closed questions rather than forced-choice, leading or multiple questions and ask no more questions than are necessary to take immediate action.*

39. Within this context, having examined the ABE guidance, in Re S (A Child) [2013] EWCA Civ 1254 at [16] the Court of Appeal held that, with respect to initial contact with alleged victims, **discussions about the facts in issue** in respect of an **allegation as distinct from whether and what allegation is being made and against whom,** should be rare and should not be a standard practice.

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

(ii) Proper Recording

41. The requirement that all professionals responsible for child protection make a clear and comprehensive record of what the child says as soon as possible after it has been said and in the terms used by the child has been well established good practice for many years. The Cleveland Report makes clear at paragraph 13.11 that: *'We would emphasise the importance of listening carefully to the initial presentation of information and taking careful notes'*.

42. The ABE Guidance re-emphasises this statement of good practice under the heading 'Initial Contact with Victims and Witnesses' *by making clear that the person speaking with the alleged victim or witness should (a) make a comprehensive note of the discussion, taking care to record the timing, setting and people present as well as what was said by the witness and anybody else present (particularly the actual questions asked of the witness), (b) make a note of the demeanour of the witness and anything else that might be relevant to any subsequent formal interview or the wider investigation and (c) fully record any comments made by the witness or events that might be relevant to the legal process up to the time of the interview.*

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

44. The need for professionals working with children to record, as contemporaneously as possible, what the child has said has been recognised and endorsed by the courts as vital in circumstances where, in determining allegations of sexual abuse, it is necessary for the court to examine in detail and with particular care what the child has said (sometimes on a number of different occasions) and the circumstances in which they said it (D v B and Others (Flawed Sexual Abuse Enquiry) [2006] EWHC 2987 (Fam), [2007] 1 FLR 1295). Within this context, it will also be important that, when recording an allegation, the child's own words are used and that those speaking with the child should avoid summarising the account in the interests of neatness or comprehensibility or recording their interpretation of the account."

MacDonald J also re-emphasised the extensive guidance and procedure for social workers investigating allegations of sexual abuse as set out in the Cleveland Report:

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

ii) It is necessary to assess the family by looking at the parents individually, the parents' relationship, the vulnerability of the child, the child's situation in the family, the family's social situation, their contacts with

extended family etc. as well as considering and recording the family's perspective of events which set the referral in motion (para 13.13);

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

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

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

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

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

This judgment is a 'go to' guide in all cases involving sexual abuse allegations when considering the appropriateness of procedure and compliance.

Wolverhampton City Council v JA & Ors [2017] EWFC 62, Keehan J dealt with a care case which involved allegations of sexual abuse of two young girls[15]. They were aged 13 (X) and 12 (Y) at the time of this judgment. Keehan J found after the 17-day hearing that the girls had been subjected to '*sustained and prolonged sexual abuse*' over a number of years by their father and the two males (YQ and ZK); to physical abuse by their father and their immediate family failed to protect them. There were a variety of allegations against the children's father and two male friends of the mother dating back nearly ten years. There were serious allegations of abuse made by the child against the father and the mother's two other partners. The maternal grandmother and the one of the partners were interveners in the case – the other declined. ABE interviews had been conducted.

[15] I am very grateful to David Burrows for his informative articles which I have borrowed the summary of the case from. His 3 articles embrace areas I do not have time or space to develop in this lecture and I recommend reading them. here they are:

http://www.familylaw.co.uk/news_and_comment/evidence-of-sexual-abuse-in-children-proceedings-pt-1#.WpQxnujFJPY

http://www.familylaw.co.uk/news_and_comment/evidence-of-sexual-abuse-in-children-proceedings-pt-2#.WpQwrujFJPY

http://www.familylaw.co.uk/news_and_comment/evidence-of-sexual-abuse-in-children-proceedings-pt-3#.WpQwsOjFJPY

A series of articles discussing the case of Wolverhampton City Council v JA & Ors [2017] EWFC 62, part 1 deals with the range of general aspects of rules of evidence in care proceedings, part 2 deals with the particular points which arise in relation to children's and ABE evidence and which Keehan J listed at [17] and part 3 deals with the issues of confidentiality and privilege – especially legal professional privilege – which arise from the case.

The father made an application for the child X to give evidence. The Court set down a Re W hearing to decide whether the child should or should not give evidence. The Court directed the Guardian to meet with the child and to provide a report to the Court as to her view as to whether the child should or should not give evidence.

What actually happened was that the Guardian allowed the child's solicitor to take the lead during that visit and that rather than exploring the Re W issues, the child's solicitor actually cross examined the child about the detail of the disclosures, leading her, challenging her, contradicting her. Some of the allegations made were new – not previously made, so it was not only emotionally abusive to the child but contaminated the evidence, and neither the Guardian nor the solicitor made referrals to the social work team about the fresh allegations.

Keehan J concluded that both the father and the mother's other partner had opportunity to abuse the children and not only that but did abuse them as alleged. Furthermore, the mother and the grandmother clearly both knew of the abuse and were unreliable witnesses. The children had been failed by their parents and their grandmother, and in due course a placement for them with their welfare best interest in mind will be determined.

As Keehan J found

> 'AB *conceded her note taking of the interview was not as thorough as it should have been. She readily acknowledged that she should have stopped the questioning as soon as disclosures had been made. She candidly told me that X wanted to talk and because AB believed the children had not been listened to, she was open to let X, and then Y on 6 September, talk. She said she was uneasy at some of the questions the girls were asked by Ms Noel and now realised she should have stopped it.*
>
> *It was immediately obvious from the moment AB stepped into the witness box that she was racked with guilt and remorse. Only a few minutes into her evidence she became distressed and I adjourned for a short period to enable her to compose herself. She readily acknowledged the grave and serious professional errors she had committed in allowing these interviews to progress as they did – most especially in respect of X – and for not terminating them at an early stage.'*
>
> *188. I accept the guardian's errors and professional misjudgement in this case were grave and serious. Nevertheless, I accept her regret and remorse at her actions and omission are entirely genuine and sincere.*

But then read on…

> *'189. I only wish I could make the same observations in respect of Ms Noel: I regret I cannot.*
>
> *Ms Noel has been a solicitor for 11 years. She has been on the Children's Panel for 6 years, but this was the first case of sexual abuse in which she had acted for the children. I do not understand why a solicitor so inexperienced in acting for children should have come to be appointed in as complex and serious case as this one.*
>
> *190. I was moved to comment during the course of Ms Noel's evidence that by her actions during the interview with X she had run a coach and horses through 20 years plus of child abuse inquiries and of the approach to interviewing children in cases of alleged sexual abuse. I see no reason, on reflection, to withdraw those comments.*
>
> *191. At the conclusion of Ms Noel's evidence, in very marked contrast to that of the former children's guardian, I had no sense that Ms Noel had any real appreciation of what she had done or of the extremely serious professional errors she had committed. She appeared to be almost a naïve innocent who had little or no idea of what she had done.*
>
> *203. In conclusion I find that in relation to interview undertaken with X on 30 August 2016:*
>
> *a) She was inappropriately questioned by Ms Noel;*
>
> *b) The interview lasted for a wholly excessive length of time;*

c) The conduct of the interview took no account that X suffered from learning difficulties;

d) She was repeatedly asked leading questions;

e) Frequently leading questions were repeated even after X had answered in the negative to the proposition implicit in the question;

f) There was absolutely no justification for embarking on this sustained questioning of X;

g) The exercise was wholly detrimental to X's welfare and seriously imperilled a police investigation;

h) The conduct of the interview led to a real possibility that X would be led into making false allegations;

I) the conduct of the interview was wholly contrary to the intended purpose of the visit, namely to establish X's wishes and feelings about giving evidence in this fact-finding hearing; and

j) The record keeping of AB and Ms Noel was very poor. Not all questions and answers were recorded or accurately recorded. No reference is made to X's demeanour during the interview or to any perceived change in her demeanour.

Keehan J reminded himself of the law he must have in mind in dealing with evidence in a case like this[16]. Other aspects of rules of evidence crop up throughout the judgment:

i. The burden of proof is on the applicant local authority ([10]; and see e.g. Re Y (Children) (No 3) [2016] EWHC 503 (FAM), [2017] 1 FLR 1103, Sir James Munby P).
ii. The standard of proof is 'the simple balance of probabilities' ([11]; R B (Care Proceedings: Standard of Proof) [2008] UKHL 35, [2008] 2 FLR 141)
iii. In respect of lies, a judge must be aware of R v Lucas [1981] QB 720 ([12]-[14]) as explained by McFarlane LJ in Re H-C (Children) [2016] EWCA Civ 136, [2016] 4 WLR 85 (see [246]).
iv. Findings of fact must be based on evidence or inferences properly drawn from evidence; not on suspicion ([15]).
v. The fact that a respondent fails to establish an alternative case, does not absolve the claimant from their duty to prove their case.
vi. The judge frequently refers to demeanour of the witnesses and the ways in which they gave their evidence (e.g. [124], [222] (referred to above).
vii. Legal professional privilege was not mentioned; but it is implied by the judge's concern with what the court was told by X and Y's solicitor (SN) of SN's interviews with the children.

IN CONCLUSION: TODAY PRACTICES

My parting words: Approach these cases with an open mind. Do not prejudge.

Do not use the term 'disclosure': it implies that someone has something to say. 'Disclosure' has been a decried term since 1987 yet it is still uttered by child protection professionals time and time again in the cases I am in as a QC and hear as a Recorder.

Even on today's Twitter world the word 'disclosure' is being used by the NSPCC in its survey. I would suggest reading two helpful blogger accounts to see why the terminology has raised such serious concerns by lawyers. Perhaps in light of what you have read above, you too might appreciate why:

https://dbfamilylaw.wordpress.com/2018/02/06/listening-to-children-and-disclosure/

http://www.transparencyproject.org.uk/things-children-say-disclosure-allegations-and-why-language-matters/

[16] With acknowledgement again to David Burrows for his summary

'Allegation' is neutral and implies there is an accusation which warrants investigation and adjudication upon. In a recent debate on twitter journalist Louise Tickle came up with a potential solution to the war of words: why not simply say 'the child has said'?

It is deeply troubling the professional mistakes so robustly identified by Keehan J in the Wolverhampton case happened just last year despite advice being in place to avoid them since Cleveland and with ABE Guidelines training being part of the armoury of social workers, lawyers and police. They are regularly updated. They are easy to Read. The have been developed for sound reason. If they are not followed mistakes are made which can fundamentally affect the direction of the investigation and it can tarnish evidence gathered through it. Despite all these safeguards years on year, the same mistakes are being made by professionals who should have the training and knowledge to avoid them.

Final words

These mistakes have consequences because they can contaminate the evidence the court has before it to make decisions about the risk posed to a child. It is simply not acceptable for practice to be so deficient that it puts children at risk or puts parents in jeopardy of unreliable allegations being held against them.

The potential consequences of getting it wrong are serious: the abused may be left unprotected the innocent maybe falsely tarred.

I would like to end this lecture on one positive and one personal note.

The positive end note: at least in the UK we recognise that a child is a child until the age of 18 and that children need protection from being abused by adults.

In France a case came to light this month[17] through The Guardian (full link attached) and an article through The Associated Press reporter which brought to my attention a very serious gulf between our culture and laws re sex abuse that cannot be bridged by the Channel Tunnel. A 29-year-old French man went on trial on Tuesday in a Paris suburb accused of sexually abusing 11-year-old girl in a case that has rekindled debate about France's age of consent.

"*France does not have a legal age under which a minor cannot agree to a sexual relationship – although the country's top court has ruled that children aged five and under cannot consent. Lawyers for the suspect argued that the girl was consenting and aware of what she was doing, while lawyers for the girl have said she was simply too young and confused to resist.*

The girl's family filed a complaint of rape in the town of Montmagny but prosecutors apparently felt the suspect did not use violence or coercion. French law defines rape as sexual penetration committed "by violence, coercion, threat or surprise".

"She was 11 years and 10 months old, so nearly 12 years old," the defense lawyer Marc Goudarzian said Tuesday. "It changes the story. So she is not a child."

His colleague Sandrine Parise-Heideiger went further, saying: "We are not dealing with a sexual predator on a poor little faultless goose. She said as soon as children have "sexual expressiveness and you have an attitude of putting yourself in danger" then "it doesn't necessarily mean the person on the other side is a sexual predator".

[17] https://www.theguardian.com/world/2018/feb/14/french-girl-11-not-a-child-say-lawyers-for-man-29-accused-of-sexual-abuse

The Montmagny case is one of several that have prompted an uproar over France's rules on child sex abusers, which are considered too lax by child rights groups and feminists.

A similar case caused disbelief and outrage. In November a French criminal court in November acquitted a 30-year-old man accused of raping an 11-year-old girl in 2009. The jury in the Paris region of Seine-et-Marne found he had not used violence or coercion'.

President Emmanuel Macron's government has proposed a bill to introduce a minimum legal age for sexual consent. It would include a provision saying that intercourse with children under a certain age is by definition coercive. The proposed minimum age has not yet been decided on, but the cutoff could be between 13 and 15. The bill, a broad-based measure aimed at fighting "sexual and sexist violence", is expected to be presented to the cabinet next month.

The personal end note

The impact on the investigators, lawyers and adjudicators: A personal view; not to be written but spoken, to you the Gresham listeners.

Thank you for your time: I know this lecture will have been hard to listen to for many people

Professor Jo Delahunty QC

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Next lecture: Thursday, 26 April 2018, 6:00PM - 7:00PM Barnard's Hall Inn

'The Child in the Family Court Room: Whose Child is it anyway? What role do children play in the family trial? The case concerns their future: how is their voice heard? What happens if they hold the key to the issues before the court? Should they give evidence, hear evidence? Should they meet the judge deciding their futures? How does the court reduce the risk that the trial experience itself harms the child it is seeking to protect?

In this lecture I will explore whether the family court system is fit for purpose when it comes to dealing with the children at the heart of its deliberations.