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1 Garden Court

How is the court retaining a sense of context in fact finding hearings when examining suspicions, speculations, "guilt by association" and lies?

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- How is the court retaining a sense of context in fact finding hearings when examining suspicions, speculations, "guilt by association" and lies?

- So, what is the point of a fact finding hearing?
- And who is it for?

- Most obviously the Court making the decision; the children on the receiving end of the decisions made.

- But What About Others ?
- What about the non-perpetrating parent? I didn't hurt the baby but I know she would never do anything to harm a hair on his head. There must be another medical explanation.

- What about where the criminal trial produces an acquittals or its not 'in the public interest' to prosecute?
- Well the Jury acquitted me and that should be an end of it; No one believed her at the criminal trial/ my criminal brief took her apart

- What about the wider family members in the non-recent inter familial sexual abuse cases ? Of course he can stay with granddad he's devoted to them and always willing to help at bath time and that stuff with my cousin on the space hopper in the 70s is just gossip. And anyway that was a different time...

- Perhaps a little more unusually the wider public?
Where there has been a [false] particular narrative in the public domain; the ‘secret’ courts stole our children; ‘expert’ evidence from America ‘proved’ that these weren’t inflicted injuries but now it’s too late

Facts Suspicions Speculation and Risk

- Radicalisation and terrorism cases
- Non recent sexual abuse cases
- Fabricated/ abnormal illness behaviour cases
- Post acquittal / fact finding where a criminal investigation doesn't result in prosecution

Radicalisation Cases

Re X (No 3) [2015] EWHC 3651

- A case in which the President declined to find that that is what was the parents were doing and the Local Authority failed to make out its case.

So what if it's not going to Syria?

- Thinking about going to Syria - is that enough?
- Support for Humanitarian aid?
- What about delivering Humanitarian aid?
- Taking your children with you to do it?

- Going to the same mosque
- Watching hate preachers online
- What about watching ultra-orthodox - but not banned hate preachers - sermons online

A Local Authority v HB (Alleged Risk of Radicalisation and Abduction) [2017] 1437

- “In these difficult and emotive cases, suspicion perhaps finds an easier foothold than in other cases concerning harm to children”

- “Whilst the Police have provided disclosure in this case (save for certain material that was the subject of a successful public interest immunity application), she does not know whether further relevant information is held by other security agencies or whether other investigations may be continuing”

Re C, D and E (Radicalisation: Fact Finding) [2016]
EWHC 3087 (Fam)

- ☼ “The court must not guess, or infer what the evidence might be, or have been.”

Guilt by Association

- The Mother/ Father is part of a family network of ISIS sympathisers/ paedophiles [delete as applicable]
- The cases which cant be reported - because of the 'association' and so the finding on the 'guilt by association' points is also going unreported

A Local Authority v HB (Alleged Risk of Radicalisation and Abduction) [2017] 1437

- "A is the sister of B, B is an extremist, therefore A is a member of a family network of extremists"

- Asserting that the mother is a member of a family that has another member who has become radicalised or entertains extreme beliefs is not sufficient to establish to the requisite standard the finding
- Such an approach does indeed, to put it colloquially, risk descending into 'guilt by association'

*London Borough Tower Hamlets v B [2016] EWHC
1707*

Non Recent Sex Abuse Cases

- Non Recent sexual abuse cases are very often a question of building up a body of evidence by putting together what start out as whispers and suspicions and allegations cascading down the generations.

- Reported at the appellate stage only *Re A and Re B Children* [2016] EWCA Civ 1101

- Disclosure of otherwise confidential therapeutic documents
- Arrangements for calling and special measures for receiving evidence from vulnerable witnesses years after the event

- Evaluation individual pieces of evidence both separately and against the wider canvass of the other evidence
- Making sense of, and evaluating fairly the evidence of the witness who was the abused child 30 years ago and became the abusing father

- The child/young person labelled as a perpetrator when he more readily might be called the victim
- Forthcoming will be a decision of a circuit judge sitting s9 which will address some of those issues but on a smaller scale

Carmarthenshire County Council v Y [2017] EWFC 36

- Mostyn J spent time reiterating the importance of testing evidence in fact finding hearings, specifically by cross-examination.

- US Supreme Court Justice, Scalia J in *Crawford v Washington* (2004) 541 US 36: “to ensure reliability of evidence [the sixth amendment] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination



Fabricated And Factitious Illness Cases

H (A Child), Re (Interim Care Order : Fact Finding)
[2017] EWHC 518

☼ ‘Again, in order that the point is not lost in the detail of the judgment the harm caused to H by his parents, protracted over many years, exposed him to significant harm at the most serious end of the spectrum, ultimately risking his life’.

- *Re E (a Child) (Application to withdraw Proceedings, Grounds for Emergency Removal of a Child)* [2013] EWHC 2400
- “This case has demonstrated the vital need to check the sources of information that form the foundation of decisions being made relating to child protection... The fact that a piece of information has been repeated many times does not enhance its reliability”

Post Acquittal Re-Hearing and Public Interest

- Re X (A Child) (No 3) [2016] EWHC 2755
- Munby P a revisiting of a Fact Finding hearing
- On the eve of the re-hearing of the case, the birth parents notified the court that they wished to withdraw from the re-hearing, and that they did not seek to challenge the findings of fact – nor did they wish to give evidence.

- Munby P asked himself two “fundamental questions ... (1) Is there solid advantage in the proposed re-hearing proceeding as planned? (2) Can I be reasonably confident that the proposed re-hearing will involve a sufficiently robust, fair and valid process capable of delivering the truth?” (para 25)

- “The first question could be answered ‘yes’ it was in “the best interest of X and the public interest that the re-hearing proceed so that the truth, whatever it turns out to be, can be ascertained, finally and definitely, in the light of all the evidence now available” (para 27)

- The second question “The fact is that, because of everything which has happened in this most unusual litigation, we are in a very good position to know what the birth parents' case is and how it would, in all probability, be deployed before me were they to remain participating fully in the re-hearing. So I am reasonably confident that the essential fairness and validity of the process will not be compromised by their absence, just as I am reasonably confident that, even if they play no part in it at all, the process will be able to find out the truth for X and for the public”



Lies

- *R v Lucas* [1981] QB 720, [1981] 3 WLR 120, [1981] 2 ALL ER 1008)
- In particular 724 F, G, H
- The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from the family.

A Local Authority v K, D, L [2005] EWHC 144 (Fam) at para 26

☼ “Further, I of course recognise that witnesses can believe that their evidence contains a correct account of relevant events, but be mistaken because, for example, they misrepresented the relevant events at the time or because they have over time convinced themselves of the account they now give.”

Re H-C [2016] EWCA Civ 136, Mcfarlane LJ

● “A judicial self-direction ... plainly sensible and good practice.”

- “One highly important aspect of the Lucas decision ... to be borne fully in mind by family judges... the "lie" is never taken, of itself, as direct proof of guilt”

- I have taken the opportunity to refer to *R v Lucas* in the hope that a reminder of the relevant approach taken in the criminal jurisdiction will be of assistance generally in family cases

Re Y (Children) (No 3) [2016] EWHC 503.

☼ “Insofar as they were telling lies, why were they doing so? The answer is that I do not know, but it is, in my judgment, a distinct possibility that lying behind the lies was a combination of fear, well-founded or not, as to the inferences that might (would) be drawn if they once admitted having travelled to Reyhanli and then even further east and a feeling that, having come up with a story, however improbable, it was better to stick to it.”

Re X (Children) (No 3) [2015] EWHC 3651

- “i) The mother is a proven liar. The mother has not, in the past, been frank and honest either with the local authority, the guardian or the court and I not satisfied that she is being now.”
- “I am unable to accept her as being either a reliable or indeed a truthful witness.”

- “The fact that the mother has failed to persuade me of the truth of her case ... does not, as I have already explained, absolve the local authority of the requirement that it prove its case ... I must be careful to remember the Lucas point when I come to consider the inferences I can properly draw from the fact, to the extent I have found as a fact that the mother has lied. The fact, to the extent it is a fact, that the mother has in the past told, and is still telling, lies, does not of itself mean that the local authority has proved its case.”

A Local Authority v T and Others [2016] EWFC 30 –
Russell J

- “I remind myself of the words of Lord Justice Munby (as he then was) has said in *Re A (A child) (Fact Finding Hearing: Speculation)* [2011] EWCA Civ. 12: “It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation”



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