

**Lecture given on behalf of NYAS by Mr Justice Ryder,  
Family Division Liaison Judge for the Northern Circuit,  
on 8<sup>th</sup> November 2007**

**THE RISK FALLACY**

**A Tale of Two Thresholds**

If a child is removed from a parent on the basis of a finding or allegation that is wrong, a tragedy is caused both to the child and the family. If a child is not so removed and then suffers death or really serious harm, no less a tragedy ensues for all concerned. Consider also the unknown perpetrator cases, such as *Lancashire County Council v B* [2000] AC 147 at 149 E where it was said at first instance:

“[There is an] obvious dilemma in human terms. If the (threshold) criteria are met and orders are made I am exposing one child to the possibility of removal from parents who are no risk and have done no wrong ... if the applications are dismissed then I will undoubtedly be causing one child to be returned to a parent, or parents, one or both of whom are an obvious and serious unassessed risk”.

Despite a number of attempts by the Court of Appeal and the House of Lords to interpret the child protection purpose of the Children Act 1989 in a way that is compatible with the human rights principles that informed its drafting, I am going to suggest that a formula for the determination of the threshold in section 31, the facts in issue and the component elements of welfare in section 1 (3) has eluded their Lordships’ House.

As we approach the introduction of a new and more coherent case management process that is designed to identify the key issues and help to narrow and resolve them within a timetable for the child I believe it is both appropriate and necessary that we also re-examine our risk assessment and decision making process. In particular, I seek to suggest that we need to have a measured and rational debate as to whether in the determination of a likelihood or risk of harm it is always necessary for the court to make findings of fact to the civil standard of proof i.e. on the balance of probabilities.

The origin of the stark dilemma that underpins the jurisprudence of the Children Act 1989 is a legal fiction most recently described by Lord Nicholls of Birkenhead in *Re O & N; Re B* [2003] 1 FLR 1169 at para [10]

“Courts and tribunals constantly have to decide whether an alleged event occurred. The general rule is that if the likelihood that a past event occurred is proved to the requisite standard the law regards that event as definitely having happened. If not, it is treated as not having happened”

There is no sophisticated rationale for this rule nor is the fiction set in stone. As respects different species of decision the law provides different solutions both as to what the decision maker may take into account and to what standard of likelihood a past event must be proved or a future event forecasted. For example, we protect juries

from clearly relevant material that is thought to be more prejudicial than probative and the legal context may permit decision making in accordance with a variety of standards: the Children Act itself is a good example, in the different standards applicable to section 47 investigations, interim care orders and full care orders.

As Lord Nicholls reminds us, the legal context is determined by legal policy, statutory or otherwise. It is accordingly susceptible of change. Furthermore as the policy has been set by the judiciary not Parliament, it is still in the hands of the judiciary to re-consider whether the solution fits the problem.

The problem is how to balance the need to protect families from any disproportionate interference by the state with the imperative to protect children against harm.

Risk management in everyday life usually has regard to the seriousness or severity of the consequence if protective or preventative steps are not taken. Accordingly, such a step is more likely to be taken where the harm or risk of harm would be very serious on the basis that the consequence cannot sensibly or safely be ignored. In social care situations as in other aspects of life, assessments of risk are carried out every day and there are tens of thousands of such assessments each year. With very few exceptions risk assessments do not depend on findings being made by a court, even less so are the assessors expected to come to their conclusions on the basis of their own judgment as to the harm or risk of harm asserted by reference to the civil standard of proof.

The opinion evidence of experts is the consequence of the assessment processes and techniques that they use. It will almost certainly be the case that it is not appropriate to characterise, for example, a paediatric or psychiatric risk assessment as being a conclusion to which the civil standard of proof applies in just the same way that a social care assessment, for example in accordance with the Framework for the Assessment of Children in Need and their Families TSO (2000), is neither based upon nor results in a conclusion on the balance of probabilities: see for example *Re S (Sexual Abuse Allegations: Local Authority Response)* [2001] EWHC Admin 334, [2001] 2 FLR 776 per Scott Baker J. The task of determining facts to a standard of proof is for the court (a principle that was re-iterated in the House of Lords by Lord Hope of Craighead in *Dingley v Chief Constable of Strathclyde Police* (2000) 55 BMLR 1 (9 March 2000)).

As Lord Nicholls remarked at para [18] of *Re O and N* local authorities would be prevented from carrying out effective and timely risk assessments if they could act only on the basis of proven facts.

It can be argued that the core assessment and any specialist assessments that inform it which are likewise not dependent on proof of fact (e.g. a doctor's differential diagnoses and prognoses) are consistent in their method of preparation and analysis with the local authority's duty to investigate under section 47 of the Act. The trigger under section 47 is having reasonable cause to suspect that a child is suffering or is likely to suffer significant harm and accordingly reasonable cause and an assessment that is not dependent upon proven fact are compatible concepts.

I would suggest, however, that the fact that the test is different in section 31 from that in section 47 is hardly a sufficient rationale for the court in contested cases to have to

deconstruct and reconstruct every assessment to examine whether all 22 dimensions and 3 domains of the assessment are well grounded in facts that are susceptible of proof to the civil standard and likewise to unpack every differential diagnosis and prognosis. The fact that we are asked to do so in order to follow the ratio of the majority of the House in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 565 (otherwise known as *Re H & R*) is one explanation for the increasing complexity of hearings in even the most simple of disputes.

In this context it is perplexing that the approach laid down in *Re H & R* to the making of findings about inflicted harm and the establishment of a likelihood of harm tends to work in the opposite way to the general approach to risk management. This is because the approach in *Re H & R* overtly includes the proposition that the more serious the allegation the less likely it is to have occurred, which necessarily militates against a finding being made to a higher standard and correspondingly leads to the child being less well protected.

That proposition is a component of the overall approach to evidence arising out of *Re H & R* which it is perhaps wise to recollect. For the purposes of this discussion there are 8 propositions I wish to highlight:

1. The test to be applied in determining the facts in issue is the civil standard, namely the balance of probabilities which means that a court is satisfied an event occurred if the court considers that on the evidence the account of the event was more likely than not
2. The court is not determining whether there is a real possibility that the relevant event occurred but whether it is more likely than not that it did so
3. Where a serious allegation is in issue the standard of proof is not higher but the court will have in mind as a factor that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability: the more improbable the event the stronger must be the evidence that it did occur.
4. It is perhaps of note that Lord Nicholls recognised the essential contradiction within his own analysis when he said:

“In my view, therefore, the context shows that in section 31(2)(a) likely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case” (*Re H and R* at 585F)

That, with respect to the House, is the key to the resolution of the problem. A key that was reflected in the previous protective practice of the wardship jurisdiction.

5. The likelihood of future abuse is not to be proved on the balance of probabilities: one cannot say as a fact that something in the future will happen: a real possibility will suffice

6. It is settled law that for a real possibility to be established the harm that is feared need not have happened in the past. However, the court must reach its conclusions on the evidence before it, unresolved judicial doubts and suspicions can no more form the basis of a conclusion that the second threshold condition in section 31 (2) (a) (i.e. likelihood) has been established than they can form the basis of a conclusion that the first has been established
7. If the issue before the court concerns the possibility of something happening in the future: a decision by a court on the likelihood of a future happening must be founded on a basis of present facts and the inferences likely to be drawn therefrom
8. The range of facts that may be relevant to the question of the infliction of harm or its likelihood are infinite e.g. relationships, threats, behaviours and so on. 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.

I ought to add that the opinion of an expert is evidence and an expert can express an opinion on an ultimate issue and that provided the court does not lose sight of the fact that the expert advises and the judge decides, the judge can put such weight on the opinion of an expert as he thinks appropriate. A judge who requests an opinion from an expert does so essentially because that expert possesses a skill and expertise that the court does not have and accordingly the court should give reasons for the rejection of that opinion in any conclusion to that effect.

This is not the place for a digression into the impressive overview of evidential jurisprudence that can be found e.g. in *A County Council v K D & L* [2005] 1 FLR 851 and *Re R (Care: Disclosure: Nature of Proceedings)* [2002] 1FLR 755 both per Charles J, but it would probably suffice to say that had one of the legacies of the wardship jurisdiction not been to try and override the law of evidence by reference to the paramountcy principle to achieve a just result (which historically had never been a justification that was permitted to achieve that result) the existing conundrum might never have arisen. Likewise, had the elegant argument put forward by Mr. James Munby QC (as he then was) in *Re H & R* been heeded, a different result might have obtained.

I have touched on wardship practice which I ought to explain for the majority of the audience who will no longer have had that experience. In the wardship jurisdiction and at least up until 1987 it is arguable that the test for determining whether the jurisdiction should be continued, which was the only jurisdictional threshold for the wide and almost unencumbered discretion to be exercised, was whether there was a real possibility of harm. As Purchas LJ observed in *Re F (Minors)* [1988] 2 FLR 123 at 128 B – D:

“I do not think that a probability has to be shown but a real possibility. In that way, the interests of the child will be safeguarded”.

Whether there was a real possibility of a past event having occurred or a future event taking place had to be based on evidence i.e. it could not be speculation or a fanciful possibility but a real possibility was sufficient. However, in *H v H: K v K* [1990] Fam 86 the Court of Appeal disapproved of the application of that standard to the proof of past harm. Croom-Johnson LJ described real possibility as a standard of proof for past harm to be a fallacy. He distinguished *Re F* on its facts and by reference to other contemporaneous authorities that demonstrated that in children cases past harm should be proved to the civil standard. He accepted that on the facts *Re F* was a case about the future and accordingly that the test was correctly described in that context as a real possibility. Butler Sloss LJ went further, justifying her analysis with the phrase “the court can only act on evidence otherwise the judge would be dispensing palm tree justice”. She described the very circumstance later taken up by Lord Nicholls in *Re H & R* where the ultimate issue cannot be proved to the civil standard but a collection of other facts might give rise to a real possibility of harm in the future and if thereby the child is in a potentially abusing situation the judge will take steps to safeguard the child. She was, however, careful to distinguish between evidence and findings.

That left open the question of whether a real possibility as to the future had to be based on facts found to the civil standard even if the ultimate fact of harm in the past could not be proved or evidenced.

It did not of course take long for the evidential approach in *Re H & R* to cause difficulties and for its strict application to be re-considered. By 1999 *Lancashire CC v B* had been heard at first instance and in the Court of Appeal. In order to rid the system of what Lord Nicholls described as the dangerously irresponsible approach (*Lancashire CC v B* @ 165G) of cases being dismissed for want of proof of perpetration to the civil standard their Lordships approved and developed 2 related concepts that were described by Walker LJ (as he then was) in the Court of Appeal decision in the same case, namely:

- a) that responsibility, culpability or blameworthiness are not relevant to the threshold question and
- b) that the causation of harm i.e. the identification of the perpetrator is not a necessary component of the threshold.

By emphasising that the causal connection in the attributability component of the threshold is merely a passive not an active element and that the reasonable standard of parental care necessary for the child is an objective question, Lord Nicholls was able to conclude (@162 C – D) that the absence of a reasonable standard of parental care need not imply that the parents are at fault. Accordingly the construction of ‘care given’ was widened to include any of the shared carers with the inevitable consequence that there may be no more than a possibility that the parents were responsible for inflicting the injury on the child. That has now been extended to the test to be applied to the determination of the size of the pool of possible perpetrators (see *North Yorkshire County Council v SA* [2003] 2 FLR 849).

In 2003 the conjoined appeals in *Re O & N* and *Re B* reached the House. The essential fiction with which we began this discussion was in stark relief. In proceedings where perpetration remained uncertain i.e. there was a real possibility

that either parent could have harmed the child but it could not be proved to the civil standard which; how does the court proceed to assess risk of harm for the purposes of the welfare question in section 1(3)e)?

The threshold was satisfied in accordance with *Lancashire CC v B* and neither parent could be exculpated on cogent evidence proved to the civil standard. There remained a real possibility of perpetration that could not be proved to the civil standard (and therefore just to recollect, that was not a fact that exists in law). Could that be relied upon in the judicial assessment of risk? The answer is provided in the opinion of Lord Nicholls which is, if I may say so, far reaching if taken to its logical conclusion.

In simple terms, the possibility of perpetration is a conclusion on the evidence that is to be taken into consideration when the court considers the welfare question. Lord Nicholls again used strong language in defence of this derogation from the *Re H & R* approach:

“it would be grotesque if such a case had to proceed at the welfare stage on the footing that, because neither parent, considered individually, has been proved to be the perpetrator, therefore the child is not at risk from either of them”.

There was raised before the House the obvious question of logic: if it is right as being in pursuit of the child protection purpose of the legislation to consider unproved perpetrations as a real possibility for the purposes of welfare then why not also carry across equally salient conclusions as to the real possibility of harm? At paragraph [31] Lord Nicholls hints at the argument that it would not be right to exclude from consideration at the welfare hearing *all of the circumstances* (my emphasis) including the possibility of perpetration. As he said, to do otherwise risks distorting the court's assessment. And at paragraph [32] he entreats judges at fact finding hearings to give a judgment on the likelihood of perpetration to assist the assessments by the court and professionals alike.

What then is the logical distinction between a distortion caused by a failure to consider the real possibility of harm and a real possibility of perpetration of harm? The idea that perpetration is irrelevant to welfare because blameworthiness is irrelevant to threshold is not of course sustainable. You only have to consider carers who separate so that the court has to choose between an innocent and guilty parent. Likewise the nature and extent of harm itself.

At paragraphs [37] and [38] of the *Re O & N* Lord Nicholls does not discount consideration of the possibility of harm at the welfare stage. Although a strict application of *Re H & R* would prevent any consideration of harm that has not been proved, what Lord Nicholls suggests is that the court should proceed on the footing that the unproven allegations are that and no more than that. That gives the evidence an equivocal status. It was said that this approach accords with the earlier decision of the Court of Appeal in *Re M & R (Child Abuse: Evidence)* [1996] 2 FLR 195 but all that was said in *Re M & R* was that it would be extraordinary if evidence that was insufficient to satisfy section 31(2)a) should nevertheless be sufficient to satisfy section 1(3)e). And that, with respect, begs the question as *Re M & R* simply followed *Re H & R* and Butler-Sloss LJ was careful to restrict her conclusion to the same example, namely:

“if the court concludes that the evidence is insufficient to prove sexual abuse in the past, and if the fact of sexual abuse in the past is the only basis for asserting risk of sexual abuse in the future then it follows that there is nothing (except suspicion or mere doubt) to show a risk of future sexual abuse” [Re M and R @ 203D].

None of this answers the problem which arises out of the legal fiction that the inability to prove a fact to the civil standard means the fact in question does not exist. In two reported cases the High Court has suggested that Lord Nicholl’s analysis as to the application of a real possibility might be extended to include real possibility of harm. The first was *A County Council v A Mother, A Father and X, Y and Z (Children)* [2005] FLR 129 per Ryder J and the second was the decision of Charles J in *Birmingham City Council v H & S* [2005] EWHC 2885. Neither case was subsequently reported in respect of the welfare hearings because they resolved and the point was not decided on the facts. Further, although I would strongly oppose the fashionable view that the law of evidence can be overridden by mere reference to paramountcy and on another occasion could give ample justification on the authorities for that view, it was Lord Nicholls who set out the legal policy justification for considering all the circumstances at paragraph [24] of the *Re O & N*. There he said:

“This has long been axiomatic in this area of the law. The matters the court may take into account are bounded only by the need for them to be relevant, that is, they must be such that, to a greater or lesser extent, they will assist the court in deciding which course is in the child’s best interests. I can see no reason of legal policy why, in principle, any other limitation should be placed on the matters the judge may take into account when making this decision. If authority is needed for this conclusion I need refer only to the wide, all-embracing language of *Lord MacDermott in J and Another v C and Others* [1970] AC 668, *sub nom J v C* (1969) FLR Rep 360, at 710 – 711 and 383 respectively.”

Let me go back to first principles in order to conclude with a solution. I emphasise there will be other solutions that may be better and that it is in the nature of a lecture that the safety net of applying an idea to the facts in issue is missing. First of all in relation to the legal fiction of proof, one should not forget, most particularly I would suggest in a process that is in part an inquisition not just an Article 6 compliant adversarial trial, that a real possibility on the evidence is something relatively substantial. It is not a mere suspicion or lingering doubt. It is not fanciful. To return to the example of the two perpetrators who have separated after harm is caused: it reflects the fact that there is clear evidence that one or both of them inflicted the serious harm and the court is simply unable to penetrate the fog of accusation and counter accusation to decide who. Not all harms are immediately visible or susceptible of pathognomic diagnosis as distinct from differential diagnosis. To exclude the real possibility of such harm which in reality is what many a differential diagnosis or care assessment concludes is to do a disservice to the child and depart from the intention of Parliament.

Secondly, does that mean that the court should no longer strive to find facts to the civil standard? I would suggest that the many distinguished family judges who have

asserted to the contrary are on balance right. It would be just as grotesque for the court to permit innocent parents as carers of children to be left under the disability that such uncertainty causes which in itself causes harm to the child. Furthermore, it is difficult to argue against the proposition that key issues of fact should be determined wherever possible to the civil standard because that provides the protection against arbitrary interference by the state in family life and clarity as to the factual circumstances with which a child thereafter has to live.

Thirdly and where I depart from Re H & R in relation to fact finding is that I would suggest that it is almost inconceivable that in the circumstance that there is insufficient cogent evidence on the ultimate issue to find facts, that it is possible to construct a logically consistent threshold as to the future risk of the same harm based only on satellite facts proved to the civil standard. A judge after all has available to him all of the conventions of evidence: the ability to find secondary facts and the inferences reasonably to be drawn there from (*Jones v Great Western Railway Company* (1930) 144 LT 194) and to examine the opinion evidence of assessors to see the extent to which the opinion is supported by the evidence (the classic exposition of which is that of Stuart-Smith LJ in *Loveday v Renton* [1990] 1 Med LR 117 @ 125) but if on completion of that exercise, the primary fact in issue cannot be inferred then without anything more on a Re H & R approach a future event is unlikely to be forecasted and the second protective limb of the threshold is rendered of no effect.

That suggests that to be effective the second limb should be satisfied on a different basis namely the likelihood of harm should be a real possibility based on evidence not proven facts. There would then be no need for any illogical distinction to be drawn between likelihood in section 31(2) and risk in section 1(3)e) and real possibilities could be considered by the court. That would bring social work assessments and expert opinions into line with the court's assessment process. That also accords with the approach of Kennedy LJ who dissented in the Court of Appeal in Re H & R and Lords Browne-Wilkinson and Lloyd of Beswick who delivered dissenting opinions in the Judicial Committee. For my part I believe they were right. The key to the solution is Lord Lloyd's description of the fallacy of the majority (@581):

“The likelihood of future harm does not depend on proof that disputed allegations are true. It depends on the evidence. If the evidence in support of the disputed allegations is such as to give rise to a real or substantial risk of significant harm in the future, then the truth of the disputed allegation need not be proved” (and I would add, for the threshold to be satisfied).

We have become transfixed in the headlights of proof to the civil standard. There is nothing wrong with a legal policy of risk being established on the evidence to a different standard. I also agree with the dissenting voices that assessment of the evidence is a one stage process. Many of the problems associated with our fact finding process have been generated out of the erroneous view that the threshold are conditions to be satisfied in the sense of grounds for the care order. If any authority is needed that this is an inappropriate approach it can be found in the judgment of Walker LJ sitting in the Court of Appeal in the Lancashire CC v B @ 149G where he quoted with approval Lord MacKay of Clashfern LC giving the Joe Jackson Memorial Lecture in April 1989 [1989] 139 NLJ 505

“the requirement in the Bill that the court be satisfied that there is significant harm or the likelihood of such harm to the child arising from an absence of reasonable parental care ...is NOT a ground or a reason for making a care or supervision order. Those conditions simply set out the minimum circumstances which the Government considers should always be found to exist before it can ever be justified for a court even to begin to contemplate whether the state should be enabled to intervene compulsorily in family life”

We perhaps should remember that in only 15% of all care proceedings that are issued is there a contested threshold and that in the vast majority of social work cases assessments are relied upon without recourse to the court.

In summary, I am of the view that the following propositions need to be tested on the facts of an appropriate case or cases with a view to the Court of Appeal and their Lordships' House being asked to re-consider the law:

- a) The allegations of fact that give rise to the need to make a welfare assessment i.e. the key issues necessary to satisfy the threshold and inform the plan for the child must be identified in every case.
- b) There should be a progression of reasoning as follows: first the identification of the evidence i.e. the factors in favour of and against the competing conclusions; Second an assessment of the weight i.e. the cogency or quality of that evidence and third a conclusion with explicit reasoning.
- c) The court should strive to reach a conclusion in respect of each key issue on the balance of probabilities but where it cannot it should describe the evidence it relies upon and the judicial inferences it makes and where it comes to a conclusion that a real possibility exists it should say so and that should form not only part of the second limb of the threshold but also part of the section 1(3) risk assessment.
- d) The court process should be a single stage within which two questions are answered, the jurisdictional question and the welfare question: both in the context of an overall rather than a partial or sub-divided review of the evidence and the risk assessment that is required of the court.

There are other good reasons, substantive and procedural for a reconsideration of our process. If out of a review of our approach to evidence we constrain split hearings to single issue cases that can be determined by a judgment on the key issue and the most complex factitious cases where no realistic assessment can take place without the story being re-written by the court then in my view that will be a considerable achievement. In any event I believe a decision as to the need for a split hearing can rarely be taken in early case management. It usually needs the context of assessment evidence that is not generally available until the Issues Resolution Hearing. On an altogether different plane, it is arguable that we need to re-consider Re H & R in the light of the developing Article 2, 3, 6 and 8 jurisprudence so that our decision making process remains Convention compatible.

A more reasoned and global approach to the process of judicial assessment of risk may have the effect of more cases satisfying the threshold for jurisdiction but I would hope that the renewed emphasis of the senior judiciary on whether the harm that is asserted can be regarded as significant and also on the need to show imminent risk of really serious harm before a child is removed under an EPO or ICO will focus minds on the whole process of assessment and protection.

The most recent example of the latter is *Re K and H* [2007] 1 FLR 2043 CA. A good example of the former is the decision of Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 where he said:

“The current legal starting point was that children were best brought up within natural families: it followed that society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent, and that some children would experience disadvantage and harm, while others would flourish in atmospheres of loving security and emotional stability. It was not the provenance of the state to spare children all the consequences of defective parenting: the compulsive powers of the state should only be exercised when the significant harm has been made out”.

If ever there was a good place to stop that is probably it.