

Public Law Children

October 2024

Appeal against a fact-finding decision that placed mother and intervenor into the pool of perpetrators based on their lies throughout proceedings. Appeal dismissed.

[Re H \(Children: Uncertain Perpetrator: Lies\) \[2024\] EWCA Civ 1261](#)

Facts

The case related to a fact-finding decision in relation to three children in care proceedings. The youngest child suffered bruising and fractures on at least two occasions. The judge at first instance found the injuries to be inflicted but ultimately excluded the father and oldest child as being responsible. The remaining issue was whether the judge could identify the mother or the intervenor as the perpetrator. Both had opportunity to cause the injuries and told a number of lies during the course of the investigation, including a pretence that they separated in 2023, when in fact their relationship continued until shortly before the hearing in May 2024. The mother's case was that she had not caused the injuries and that, if they were inflicted and not caused by the father or the eldest child, they must have been caused by the intervenor, who denied responsibility. The local authority and the guardian did not seek to identify a particular perpetrator. The judge concluded that on balance she could not make a finding and therefore placed the mother and intervenor in the pool of perpetrators.

The appeal arose on three grounds:

1. The judge's failure to conduct a proper analysis of the identified lies
2. The judge's failure to apply the correct approach, or undertake the analysis necessary to identify the perpetrator
3. The judge's failure to identify the intervenor as perpetrator as being contrary to the weight of the evidence

Judgment

Ground 1: Lies

The judge at first instance copiously self-directed herself to identify the relevance of the mother's lies to the issue of perpetration [p18]. The judge at first instance was obliged to exercise an overview of the totality of the evidence and to survey a wide canvas, including a detailed history of the parties' lives, their relationship and their interaction with professionals. The judge correctly deployed her analysis of the mother's lies at relevant points in the chronology 'in order to make a positive finding, but in part-explanation of why she found herself unable to identify a single perpetrator. Beyond identifying their relevance and significance, and considering the explanations offered by the mother, she was required to do no more' [p19].

As regards the fact-finding exercise, the *Lucas* direction ensures lies are assessed with proportionality. The court's overall view a witness' credibility and reliability naturally contribute to its evaluation of whether it can accept their evidence on the critical issues. If lies have been told, the court will consider what weight, if any, should be given to them, after due consideration for explanations offered.

The Court of Appeal observed at [p22] that the description of good practice at p58(iii) in *Re A, B and C (Children)* [2021] EWCA Civ 451 that the court should seek to identify the basis on which it can be determined that the only explanation for the lies is guilt, draws on a jury direction in the Crown Court Compendium. That jury direction requires that a lie is only capable of supporting other evidence against a defendant if the jury are sure that it was not told for a reason advanced by or on behalf of the defendant, or for some other reason arising from the evidence, which does not point to the defendant's guilt.

Counsel for the mother relied on a literal reading of *Re A, B and C (Children)* that the court is required to exclude a lie from consideration altogether where it cannot be satisfied (to whatever standard) that the only explanation is to conceal guilt [p23]. Peter Jackson LJ disagreed with that submission, stating:

'There will be some cases where the ultimate finding is so critically dependent on the assessment of a particular lie [...] that the court may out of caution wish to direct itself in accordance with Re A, B and C. However, in the normal run of cases, a direction of that austerity is neither necessary nor proportionate. It will be sufficient for the judge to recall that the true significance of a lie must be carefully assessed, for all the well-known reasons [...]. A general exclusionary rule, exclusively directed at lies, would be inconsistent with the duty on the court to consider all the evidence. Once it has done that, its conclusion in an individual case may be that the lie was told to conceal guilt, but that is a conclusion, not a test.'

Ground 2: Uncertain Perpetrator

Two submissions were advanced on behalf of the mother:

1. The parties addressed the judge about *Re B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575 and *Re A (Children) (Pool of Perpetrators)* [2022] EWCA Civ 1348, but she only referenced the former. The latter judgment contains a minor refinement, dispensing with the requirement on judges to strain to make findings.
2. More broadly, the judge did not sufficiently analyse the evidence that pointed for and against each of the two adults as being responsible for the injuries, and that, was significantly lacking

The submissions were rejected. The judge at first instance considered the wide canvas of voluminous evidence, that she did not alight on a particular argument or piece of evidence was unobjectionable. She carried out the essential task which was to consider each individual separately in order to determine whether they could be found on the balance of probabilities, to be the perpetrator.

Practical Consequence

Where a finding is critically dependent on lies, it may be necessary for a judge at fact-finding to direct itself to a stricter evaluation of treatment of lies in accordance with *Re A, B and C*. However, in the majority of cases; this will not be necessary.



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