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Public Law Case Law Updates

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August 2025

This judgment may serve as a valuable precedent in both public and private child law proceedings where a child has tested positive for a sexually transmitted infection. While the possibility of fomite transmission has not been categorically excluded as "impossible," this case emphasises the exceptionally high evidential threshold required to attribute such infections in children to means other than child sexual abuse.

Local Authority v A & Anor [2025] EWFC 240

Introduction [1 – 4]

Mr. Justice Peel hands down judgment on a fact-finding hearing in public law proceedings, remitted for rehearing by the Court of Appeal. This judgment concerned two children, a girl ("F") aged 8 ½ and a boy ("B") aged 7 ½.

This case predominantly regards F, then aged 6, being diagnosed with gonorrhoea. In the first instance, the local authority (LA) commenced care proceedings for both children (the brother then being aged 5). Interim care orders (ICOs) were granted, but both children remained in their grandmother's care. To reach the threshold criteria (s.31(2) of the Children Act 1989), the LA sought findings of sexual abuse, emotional harm, poor mental health of the mother, parental drug and alcohol misuse, domestic violence, and criminality on the part of the children's father. All findings were accepted by the parties save from the sexual abuse. This then proceeded to a fact-finding hearing. This concluded with HH Judge Greensmith finding that the child had contacted the infection as a result of fomite transmission, caused by X who was carrying the infection knowingly and at a time it was contagious.

This judgment acquitted both the mother and the maternal uncle of sexual abuse.

The Court of Appeal concluded that the judge erred in his approach to both the evidence and law and remitted the case for a rehearing to Mr. Justice Peel.

The subsequent judgment was published in recognition of the critical factors that must be prioritized in child sexual abuse cases, particularly when considering expert evidence and the broader context of such cases.

Threshold criteria [5 -11]

For the purposes of this summary, I will restrict my focus to the findings sought by the LA concerning the child sexual abuse, although the original judgment also addresses the other accepted findings pertinent to the threshold criteria.

The additional findings sought by the LA were:

i. F was infected with vaginal Gonorrhoea through transmission by contact between her vagina with the penis, vagina, mouth and/or anus of an infected person, such contact requiring intimate exposure of the respective mucus membranes.
ii. F was infected with ocular Gonorrhoea through transmission by either:
   a. Contact between her eye and the discharge from the penis or vagina of an infected person;
   b. Autoinfection due to F having already contracted vaginal Gonorrhoea.
iii. By virtue of [the above], F has suffered significant sexual harm.
iv. The perpetrator of that sexual harm was either M or the uncle.

During F having the infection, she was residing with B at their grandmother's house, who was not infected and was therefore excluded as a potential perpetrator. F's partner also tested negative, and thus, is ruled out.

The father is excluded as a possible source of transmission due to being incarcerated at the relevant time.

The Local Authority (LA) asserts that both the mother and the uncle were infected with gonorrhoea around the time in question and were in contact with F. As such, both are considered potential perpetrators. However, the mother and uncle deny that they transmitted the infection to F through sexual means. They suggest that if F was indeed infected (which they dispute, citing concerns regarding the testing process), the infection was more likely acquired through fomite transmission rather than abuse.

The Guardian, in closing submissions, urged the court to accept expert evidence that F's gonorrhoea resulted from abusive sexual contact. The Guardian contends that, based on the available evidence, the only two individuals with the ability and opportunity to infect F were the mother and the uncle, and it is not possible to distinguish between the two in terms of responsibility for the infection.

Witnesses [12 – 15]

Mr. Justice Peel heard oral evidence from:

- Dr Rothburn
- The maternal grandmother
- Dr Ghaly
- The uncle

The mother did file witness statements but failed to attend court to give oral evidence. Although she indicated to her lawyers an intention to attend after an order at the pretrial review included a warning that the court may draw adverse inferences if she does not attend, she appeared at her solicitors' office the day before the hearing under the influence of drugs and therefore was deemed unfit to provide instructions. Despite being advised to stop using drugs and attend court, she failed to appear and was not cross-examined on critical matters. No adjournment application was made, and it is noted that she has not provided instructions since 18 September 2023.

Mr Justice Peel notes that although her non-attendance does not result in adverse inferences being drawn, it also does not imply that he simply accepts her written (untested) evidence:

> *"Putting it another way, I do not conclude by reason of her non-attendance that she perpetrated sexual abuse on F, but nor do I simply accept, by reason of her written statements, that she did not".*

The father did not attend and did not provide his counsel with any instructions.

The uncle was assisted by an intermediary.

Background [16 – 32]

The mother (25 years old) has a history of substance and alcohol misuse coupled with poor mental health. The parents of F met in 2014. F's father (now 31) was involved with drugs, alcohol and crime. The relationship was affected by significant domestic abuse, resulting in social services becoming involved, and following F's birth (in 2016), a child protection plan was put in place. Social services remained involved upon the birth of B, in 2018. In 2021 the parent's relationship ceased. The mother continued to misuse drugs, funded by prostitution and theft. The father, having been sentenced in August 2020 for battery, was sentenced again in January 2023 to two years imprisonment for a Class A drug offence.

In May 2023, the mother had unprotected sex with a man (G), and again in June 2023 with a man (H). In May 2023, the uncle (now 24) had unprotected sex with three women (J, K and L).

On 5 May 2023, the mother left the children with the maternal grandmother, as she was unable to care for them because of her alcohol and substance misuse. Hereinafter, the grandmother became the children's primary carer. The uncle (then 21) also lived in the grandmother's house; he carries a history of mental health problems and drug use. Subsequently, the mother visited the children once or twice a week, and during oral evidence, it became apparent she spent at least one night there (before F's gonorrhoea diagnosis).

In May 2023, the uncle noticed green discharge from his penis, notifying the grandmother about this. He attended a sexual health clinic and received a text message dated 25 May 2023 confirming a positive diagnosis for gonorrhoea and chlamydia. He again, notified the grandmother. The uncle testified that he ceased having sex for about a week and continued thereafter having unprotected sex with partners.

In early June 2023, the grandmother found F's eye looking swollen, red, itchy and that pus was oozing out. The grandmother assumed it was conjunctivitis; however, it turned out to be gonorrhoea. The expert evidence alludes to it being likely the infection started about two weeks prior. On 4 June 2023, the grandmother phoned the NHS helpline and took F to a clinic. F was referred to hospital, where they undertook eye swabs along with intravenous antibiotic treatment. F was then discharged on 7 June 2023.

The right eye swab tested positive for gonorrhoea (scanty) on 8 June 2025, which resulted in a referral to the LA. F (together with her mother and grandmother) returned for a vulval swab, swabs on both eyes and a urine test on 9 June 2023. Of which the eye tests were negative, the vulval swab

"weakly positive" and the urine test "equivocal". This resulted in the grandmother's immediate insistence of the uncle leaving the property, with the children remaining in her care.

On 9 and 12 June 2023 three tests, namely a throat, urine and perianal sample were taken from B, all being negative. As part of a medical examination on B (also on 12 June 2023), an injury to his foreskin was found to which there are not suggestions of abuse.

A medical examination of F was attempted twice, on 12 June 2023 and 13 July 2023, which were both unsuccessful due to her distress. However, part of her labia was visually examined, and no injuries were found.

On 14 June 2023, mother tested positive for gonorrhoea (by throat and vulva swabs), albeit being asymptomatic up to that point. It is not possible to know when she became infected. The grandmother and her partner tested negative. On 3 August 2023, mother tested negative for gonorrhoea.

The LA started care proceedings on 23 June 2023, resulting in ICOs for both children to remain with the grandmother, upon the condition that no other person than her and her partner lived in the property. The parents and children (through their guardian) were joined as respondents, and the uncle as an intervener.

The grandmother and children had to move home, due to the community becoming aware of the ongoing proceedings involving sexual abuse, resulting in them not being safe in the property.

Since, the mother lead the same lifestyle and has reported to the police on 27 May 2023 that the uncle had assaulted her, although no charges ensued. Hair strand testing of the mother showed high levels of drug use. The uncle's lifestyle also continued, and on 23 March 2024 he described himself as a user of "crack…Ket, cocaine, magic (MDMA)". He has been involved in arguments and physical altercations with the mother. He faces rape charges for an alleged rape of his former partner, alongside drug possession and theft, on 23 March 2024, with a trial set for October 2025.

The expert evidence [33 – 35]

Dr Rothburn's evidence summarised:

i. Most strains of Neisseria Gonorrhoea (NG) have similar susceptibility / resistance antibiotic profiles and are indistinguishable, so it does not help determine the source or route of infection.
ii. Many cases of gonorrhoea are asymptomatic, so it is impossible to pinpoint when or how someone became infected.
iii. Gonorrhoea is spread through sexual contact (penis, vagina, mouth, anus). Ejaculation is not required for transmission.
iv. Gonorrhoea in the eye could result from touching an infected genital area, then touching the eye, or vice versa (though less likely).
v. NG survives poorly outside the human body in dry conditions. It needs moisture to survive on inanimate objects (e.g., towels). Transfer can occur through hand contamination (autoinoculation), but this is rare. NG does not survive long on skin, and hand hygiene reduces its likelihood of survival.
vi. Transmission from contaminated surfaces: It is theoretically possible for NG to be transmitted if a toilet seat, towel, or other surface is contaminated and then touched by an

individual who does not wash their hands, transferring the bacteria to mucous membranes like the vagina or eyes. However, such cases are rare and unlikely.

vii. There are no reliable studies on fomite transmission, with available research mostly consisting of individual case studies with limited context or outdated data.

viii. NG and chlamydia trachomatis are different species of bacteria. It is possible for someone to transmit gonorrhoea but not chlamydia (or vice versa) depending on bacterial load and the host's susceptibility.

ix. The term "weakly positive" for F's vulva swab reflects the quantity of germs after treatment for her eye. A positive result is still considered a positive result, regardless of strength.

x. The samples taken from F on 9 June 2023 were tested using Nucleic Acid Amplification Test (NAAT). Although only one lab report was provided, Dr. Rothburn confirmed that the procedure involves performing the test twice with different methods, so he trusted the results.

xi. Swab procedure on 9 June 2023: F's vulval swab was taken by her mother, as F was distressed. Although not the ideal method, it was supervised by clinicians. Dr. Rothburn believed contamination by the mother (who later tested positive for gonorrhoea) was highly unlikely, and a false negative was a greater risk than a false positive. He rejected concerns about the reliability of the test due to these circumstances.

Dr Ghaly's evidence summarised:

i. Gonorrhoea is caused by the Gram-negative bacterium, Neisseria gonorrhoeae (NG), affecting mucous membranes of the urethra, cervix, rectum, pharynx, and conjunctiva.

ii. Transmission occurs through direct contact of infected secretions with mucous membranes. Likely routes in this case include sexual contact or, for a woman, vulval contamination (less likely) or oral sex. Eye inoculation would require discharge in the eye or oral sex.

iii. A positive culture for NG in a child with no prior sexual activity strongly suggests sexual abuse. Nonsexual transmission in children is considered highly unlikely and unsupported by convincing data.

iv. Gonorrhoea in a child (genital, rectal, oral, or ophthalmologic) after the newborn period but before puberty should strongly raise suspicion of sexual abuse and sexually transmitted disease may be the only physical evidence of abuse.

v. Unlikely in this case, given the child's age and absence of evidence that the mother had the infection during birth or any eye infection in the child shortly after delivery.

vi. NG cannot survive long outside the human body, needing moisture to persist. Transmission through inanimate objects like towels, toilet seats, or bed linens is uncommon (and not supported in literature), though not entirely ruled out.

vii. The mere presence of NG on surfaces does not equal transmission. If NG could easily transfer through nonsexual means, the other children would likely have been infected, which did not occur.

viii. Studies showing live NG on inanimate objects have not demonstrated that it can be transmitted to humans. Failed attempts to culture NG from surfaces suggest nonviable organisms. Nonsexual transmission is extremely unlikely, though theoretically possible.

ix. The lack of genital injury does not rule out gonorrhoea from sexual contact, as "the majority of cases of child sexual abuse show no injuries".

x. It is plausible for a child to contract gonorrhoea without also contracting chlamydia.

xi. Gonorrhoea typically incubates for 3 days to 2 weeks. A person can be asymptomatic and still transmit the disease. F was asymptomatic in her genital area but may have become symptomatic without treatment.

xii. For NG to be transmitted to F's genital area non-sexually, her legs would need to be abducted, and her labia separated, which would be painful for a child. This scenario is anatomically difficult and unlikely, as children typically only touch their genital areas externally.

xiii. Autoinoculation is highly unlikely. NG transmission from an inanimate object to F's finger, then to her genital area, is considered virtually impossible. No known cases of this type of transmission exist.

xiv. The laboratory decides the testing method, and the positive result is clinically important. Dr. Ghaly had no reason to doubt the NAAT tests, despite the lack of detailed testing procedures.

xv. Although not ideal (since F was uncooperative), the swab was taken by the mother under clinician supervision on 9 June 2023. Dr. Ghaly believed that contamination from the mother (who later tested positive for gonorrhoea) was highly unlikely. He dismissed concerns about a false positive, noting the far greater risk of a false negative.

xvi. "Equivocal" on the urine test does not indicate a positive result, but the antibiotics given to F for her eye infection could have affected the result. "Weakly positive" for the vulval infection has limited clinical significance, as a positive result is what matters.

xvii. It is possible for F to transfer the infection from her genital area to her eye, but reverse transmission (from eye to genital area) is highly unlikely.

xviii. NG infects the genital mucous membranes; it can spread to other areas of the genitalia.

xix. The 2024 edition of The Purple Book "Physical Signs of Child Sexual Abuse", para 10.1.3; confirms that accidental transmission (via fomite or auto-inoculation) has not been robustly substantiated and attempts to culture NG from surfaces where STIs have been detected have failed, supporting that nonsexual transmission is extremely unlikely.

In summary, both medical experts agreed that it is highly unlikely that gonorrhoea is spread through fomite transmission, therefore agreeing that sexual contact is the most probable cause of F's infection.

The evidence of the witnesses [36 – 42]

The mother

- The mother set out her written evidence in which she denies sexually abusing the children. She also noted that she believes she contracted the infection from either "G" or "H" in May or June 2023.
- The mother also set out that she had seen the children twice since they had been in their grandmother's care, between early 2023 and the issuing of the care proceedings on 23 June 2023. The grandmother's evidence contradicts this; saying that the mother came to her house once or twice a week and stayed overnight in the children's room on one occasion.
- The mother did not attend to give live evidence and could therefore not be questioned on other relevant matters such as her sexual partners, symptoms or how she handled the relevant vulval swab on 9 June 2023. These are significant gaps in her evidence.

The maternal grandmother

- The grandmother in her written and oral evidence said that the children came to stay on 5 May 2023, sharing a room together. The grandmother shared a room with her partner, and the uncle had a separate room.
- The uncle would regularly go away and return days later; there was always another adult around the house.
- The children had their own (clean) towels, as did the adults. The uncle would leave his towel on the floor to be cleaned. Everyone in the house shared one hand towel in the bathroom. She would clean all the towels every day.
- The children would share the same bath water at bath time, and the bathroom would often be hot and steamy, especially in June 2023. The bathroom door would usually be left open for ventilation purposes, clearing the steam within 5 minutes.
- From 5 May 2023 the mother came to the house once or twice a week. Again, an adult would always be present alongside her. She also stated in court the mother stayed overnight on one occasion, sleeping on the children's bedroom floor. This was a surprise as it did not appear in any of the legal papers. After inviting further questions from other counsel, the grandmother stated she was sure the mother stayed overnight between 5 May and 4 June, as the mother was sleeping rough on the streets, but was not sure at the end, doubting her ability to recall. There is some support from the social worker file not which suggests the mother stayed for more than one night, however the mother did of course not enter the witness box to be questioned about this.
- The uncle told her in May that green discharge was emerging from his penis. He told her when he tested positive, but she could not remember the exact date. She was however confident this was before early June when F had her eye symptoms.
- Neither of the children disclosed anything regarding inappropriate contact with an adult.
- She was present when the samples were taken on 9 June 2023. Her recollection (unlike the record in the medical notes) was that the mother tried and failed to take a swab, but one of the clinicians succeeded.

The uncle

In his written evidence the uncle stated:

- He was sure that it was a Wednesday in June when he first noticed the green discharge emerging from his penis, symptoms that later turned out to be gonorrhoea. This would most likely be Wednesday 31 May.
- He made an appointment for a walk-in test, and got tested on 3 June, where he tested positive for gonorrhoea and chlamydia. He stated he also saw discharge and swelling that day in F's eye.
- The police examination of the uncle's phone shows that he received text messages from the clinic on and after 25 May 2023. Thus, the texts suggested he attended the clinic a day or two before 25 May 2023, differing a week from what he said in his written statement. HHJ Greensmith said this was unsatisfactory, but that he there was an innocent explanation for this discrepancy. The Court of Appeal disagreed and said the discrepancy may well be malicious. During the rehearing, lead counsel for the LA stated that they do not however, intend to explore the discrepancy.
- The uncle recalled having sex with J the week before noticing symptoms, J had a test and tested positive. A week before that he had sex with K, who tested negative. The uncle

therefore believes he contracted gonorrhoea from J but cannot explain how he contracted chlamydia. Orally, the uncle stated he had unprotected sex after his diagnosis but did not provide a good explanation as to why.

- While residing at the grandmothers in May/June 2023, it was the grandmother who did all the caring, including bathing and bedtime. The uncle was out a lot, at work or with friends, with limited involvement of the children.
- He agreed that towels for both the children and adults were washed after each shower. He would take the towel to the washing machine or leave it on the floor. The children always had clean towels. In court he also stated he never saw F pick up or touch his towel.
- When going to the toilet, he would not wash his hands, although the discharge continued for one week.
- In writing he stated that F's gonorrhoea was possibly caused by the mother, or one of the people she associated with. Orally however, he said he said he was sure the mother did not cause it.
- Overall, the court concluded that his evidence was clear, but not entirely satisfactory regarding the continuation of unprotected sex after his diagnosis or the differing versions of the mother's responsibility.

Y (maternal grandmother's partner)

- Y provided only a written statement in which he said that the uncle was at the house about 3-4 days per week during the relevant timeframe.

The law

Although practitioners will be familiar with the following legal principles, I have written them out for the benefit of understanding the case in its entirety:

- The burden of proof lies with the LA; the parents are not required to disprove a case.
- The standard of proof is on the balance of probabilities - Re B (Care Proceedings: Standard of Proof) [2008] UKHL 35.
- Fact findings must be based on evidence, not suspicion or speculation - per Munby LJ at paragraph 26 of Re A [2011] EWCA Civ 12.
- The inherent probability or improbability of an event is a matter to be considered when deciding whether, on balance, the event occurred but does not either lower or raise the standard of proof - Re B (supra) and Re BR (Proof of Facts) [2015] EWFC 41.
- It does not follow that once all other possibilities are rejected, whatever remains must be the truth - Rhesa Shipping SA v Edmunds, The Popi M [1985] 1 WLR 948 per Lord Brandon at 955G.
- The LA must prove not just the primary facts, but also the causal link between any facts found and the risks alleged - Re A [2016] 1 FLR 1 and Re L-W [2019] 2 FLR 278.
- The decision as to the facts in issue being proven to the required standard must be based on all the available evidence. The court looks at the broad canvas of the evidence provided, before making findings on the balance of probabilities (found above). Each piece of evidence must be viewed in light of the other evidence. As stated by Dame Elizabeth Butler-Sloss P at para 33 of Re T [2004] 2 FLR 838:

"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."

- Appropriate attention must be paid to the opinion of medical experts, but those opinions need to be considered in the context of all the other evidence - A County Council v KD and L [2005] 1 FLR 851.

The judge remains the decision maker, not the expert. The expert evidence is to be considered along with the wider picture. The judge can make findings which are contrary to the unanimity of the wider medical evidence - Lancashire v D and E [2008] EWHC 832 (Fam).

- The possibility of unknown cause must be borne in mind - Re R (Care Proceedings: Causation) [2011] EWHC 1715 (Fam). Today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark - Re U (Serious Injury: Standard of Proof): Re B [2004] 2 FLR 263 at paragraph 23. Scientific certainties of a past age are often proved conclusively wrong by later generations - per Mostyn J in A County Council v M and F [2012] 2 FLR 939 at paragraph 251. Today's orthodoxy may become tomorrow's outdated learning: R v Holdsworth [2008] EWCA Crim 971 at paragraph 57.
- Evidence of parents and carers (as well as the uncle in the instant case) is of the utmost importance, the court should form a clear assessment of their credibility and reliability. The court is likely to place considerable reliability and weight on the evidence and the impression it forms of them - Re W and another (non-accidental injury) [2003] FCR 346.
- This was followed by a Lucas direction: a witness may say false things during an investigation and/or a hearing for many reasons, such as shame, misplaced loyalty, confusion, panic, fear and distress - R v Lucas [1981] QB 720.
- There may be many reasons for discrepancies. Peter Jackson J (as he was) said in Lancashire County Council v M and F [2014] EWHC 3 (Fam) at para 9:

  "To these matters I would only add that in cases where repeated accounts are given of events surrounding injury and death, the court must think carefully about the significance or otherwise of any reported discrepancies. They may arise for a number of reasons. One possibility is of course that they are lies designed to hide culpability. Another is that they are lies told for other reasons. Further possibilities include faulty recollection or confusion at times of stress or when the importance of accuracy is not fully appreciated, or there may be inaccuracy or mistake in the record keeping or recollection of the person hearing or relaying the account. The possible effects of delay and repeated questioning upon memory should also be considered, as should the effect on one person of hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be unnatural – a process that might inelegantly be described as "story-creep" may occur without any necessary inference of bad faith."

- On assessing the pool of perpetrators jurisprudence, King LJ said, in Re A (Children) (Pool of Perpetrators) [2022] EWCA Civ 1348:

"13. In Re B (Children: Uncertain Perpetrator) [2019] EWCA Civ 575, [2019] 2 FLR 211 ("Re B: 2019"), Peter Jackson LJ clarified the proper approach in respect of uncertain perpetrator cases and the concept of a pool of perpetrators.

14. At paragraph [46], he "state[s] the obvious" by highlighting that the concept does not arise either where the allegation can be proved to the civil standard against an individual in the normal way, or where only one person could possibly be responsible.

15. Peter Jackson LJ went on at paragraph [48] to emphasise that the concept of a pool of perpetrators does not alter the general rule as to the burden of proof and that it is for the local authority to show, in respect of any potential perpetrator, that there is a real possibility that that person had inflicted the relevant harm before they are placed in the pool.

16. Having emphasised these parameters, Peter Jackson LJ at paragraph [49] ("paragraph [49]") went on to set out the proper approach to be applied in every case: "[49]….The court should first consider whether there is a 'list' of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so: Re D (Children) [2009] EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is should A or B or C be placed into the 'pool'."

And later:

33. "The evaluation of the facts which will enable a court to identify the perpetrator of an inflicted injury to a child will be determined on the simple balance of probabilities and nothing more. Having considered the matter afresh in the light of Elisabeth Laing LJ's observation, I am of the view that to go further and to add that the courts should not "strain" to make such a finding is an unnecessary and potentially unhelpful gloss which has outlived its usefulness, and which was directed at a different issue as set out in paragraph [24] above.

34. I suggest, therefore, that in future cases judges should no longer direct themselves on the necessity of avoiding "straining to identify a perpetrator". The unvarnished test is clear: following a consideration of all the available evidence and applying the simple balance of probabilities, a judge either can, or cannot, identify a perpetrator. If he or she cannot do so, then, in accordance with Re B (2019), he or she should consider whether there is a real possibility that each individual on the list inflicted the injury in question."

- The Court of Appeal (in Re C [2022] EWCA Civ 584) considered the issue of Adverse inference from a party's silence or failure to give evidence. The court was referred to the observations of Brooke LJ in Wiszniewski v Greater Manchester Health Authority [1988] PIQR 324 in summarising the correct approach to the drawing of inferences from a failure to attend or give evidence:

"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

- In Re C Lord Justice Baker referred to the following at para 27:

"I turn finally to the argument about adverse inference. The summary of the principles in Wiszniewski is consistent with observations in earlier authorities, including that of Lord Lowry in the House of Lords decision of R v IRC and another, ex p T.C Coombs and Co [1991] 2 AC 283 at page 300 F to H:

"In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

But as Holman J observed in *Re U (Care Proceedings: Criminal Conviction: Refusal to Give Evidence) [2006] EWHC 372 (Fam)*, [2006] 2 FLR 690 at paragraph 30, in a passage approved by this Court recently in *Re T and J (children); A mother v A Local Authority and others[2020] EWCA Civ 1344*, Lord Lowry's observation does

"no more than describe and illustrate the very broad discretion of the court to draw adverse inferences, which must be exercised in a very fact-specific context."

Analysis [58 – 77]

The judgment is set out different to the usual linear form, although all the evidence is considered, it will initially consider the medical evidence, and then how this interacts in the context of all the other evidence in the case.

During cross examination it was suggested by the uncle (and supported by the mother) that vulval swabs conducted on 9 June were unreliable. However, the medical evidence provided by Dr Rothburn is satisfactory in proving on the balance of probabilities that the tests accurately recorded F's gonorrhoea infection.

It was also accepted that the clinical report of the laboratory conducted F's test was accurate and reliable.

It was not accepted that F's vulval swab was contaminated by the mother when she conducted the swab on 9 June 2023, nor that it was relevant if F was infected in the urethral region rather than the vaginal region, this being seen as merely academic as the mechanism of infection (opening the labia to inoculate a mucous membrane) would be these same. The experts also raised that the only possible issue arising from a faulty swab would be the risk of a false negative, rather than a false positive. Therefore, agreeing with the experts that the vulval swab did not undermine their conclusions.

The argument of a "weak" positive test is insignificant, as it remains a positive test.

Looking at the above, it was concluded F's testing did establish gonorrhoea in the vulval area at the relevant time, with no cause to think it was unreliable.

It was found that the overall evidence indicates, that on the balance of probabilities, F was infected with gonorrhoea by way of sexual abuse and not fomite transfer through a towel or toilet seat. Dr Ghaly's evidence being that although in theory the NG bacterium might survive on a hot, moist, inanimate surface, it would still have to be inoculated, and there is no evidence to support this.

This was also supported by the scantiness of reliable research on the possibility of a child's vulval area being infected by way of fomite transfer. Although the experts accepted this meant it cannot be ruled out, the evidence and research do not support it to be ruled in.

The expert evidence also explained that for F to be infected, there would have to be inoculation on to her labia minora, the first mucous membrane inside the vulval area, or another mucous membrane further inside, such as the vestibule area or the vaginal opening. This would mean her labia majora (not a mucous membrane) having to be expanded, as to enable to mucous membrane of the person transmitting to infect the labia minora (this is a mucous membrane). This would have been extremely painful and distressing for F. This anatomical mechanism could not have been conducted by F herself.

The possibility of fomite transfer was broken down, that in any event, it would have had to occur in the following way:

1. The surface hosting the NG bacterium would have had to be moist, and hot for it to survive. For example, a towel used by an infected person.
2. It then would have had to survive there for a period of time and be touched by F for it to transfer to, for example her finger.
3. Finally, F would have had to use her finger to inoculate the NG bacterium onto her mucous membrane in the vaginal area soon afterwards.

This was found to be improbable for the following reasons:

i. Towels were cleaned daily and kept separate for use for the uncle and the children. The uncle testified stating that he never saw F touch or pick up one of the towels, and that he never used the towels to wipe discharge from his penis. It did not seem like F was coming into regular contact with towels or toilet seats which had been shortly used before by the uncle.
ii. The expert evidence shows that it is highly unlikely for the NG bacterium to survive on a towel, toilet seat or other inanimate surface, or person's finger. Although the moist

conditions must have assisted, it being June at the time of 'possible' fomite transfer, this would still be highly unlikely.

iii. The evidence is scarce to point that the NG bacterium could be cultured at these stages, even if the conditions in the house would have supported the germ to survive on an inanimate surface, then infecting a third party, would also expectedly infect B. More widely, it would increase the instances of gonorrhoea in children and adults.

iv. Finally, the germ, would have had to be self-inserted by F, beyond her labia majora, to inoculate the labia minora. Both experts stating this is highly unlikely due to the sensitivity of that area.

An alternative theory suggested that F first got an eye infection (possibly from a towel), then transferred the bacteria to her genitals by touching her infected eye and then her genital area. This theory, supported by the mother and uncle, claimed the lack of vulval symptoms supported this sequence. However, this was rejected as highly unlikely. It raised unresolved issues about how the eye was infected, whether the bacteria could survive transfer via the finger, and whether F could have infected the mucous membrane herself. Experts agreed this was only theoretical and not a probable explanation.

Although noted that the mother and uncle were not required to prove an innocent explanation. However, based on the evidence, the most probable cause of F's vulval infection was direct mucous membrane contact, not transfer via objects like towels or toilet seats. This means the infection was likely sexually transmitted, with F's genital area being in contact with another person's penis, vagina, or mouth, and the infection then spreading within the vulval area.

It was not accepted that F's eye infection resulted from sexual contact. The expert evidence suggested that F touched an infected external genital area (not internal mucous membranes) and then probably transferred the bacteria to her eye. The local authority (LA) suggested the eye infection was caused either by sexual contact or by the same. However, it being ruled in the threshold hearing, both innocent and abusive explanations cannot be left open, the LA must prove its case. Since the evidence supports self-transfer (autoinoculation) as the more probable cause, that explanation was accepted.

It was considered that F did not have physical marks suggestive of injury, albeit all parties accept this does not exclude sexual abuse. Also noted was the lack of disclosure of F against the mother or uncle, however, this of course does not exclude the possibility of it occurring.

The most probable explanation is that F, in May 2023, was most likely sexually abused by either the mother and/or the uncle. Thereby rejecting that F's infection being due to an innocent explanation.

The mother tested positive for gonorrhoea on 14 June 2023. While she argues there is no direct evidence she was infected between 5 May and early June, it was pointed out that her failure to attend court meant she could not be questioned about symptoms or sexual partners. Experts confirmed that gonorrhoea can be asymptomatic. The mother's lifestyle involved drug use, prostitution, and unstable relationships. Though she claimed to have visited the house only twice in that period, the grandmother's evidence, showed she came once or twice a week and stayed overnight at least once in the children's bedroom.

Although adverse inferences from her failure to attend were not drawn, due to recognising her drug dependency and inability to participate, the local authority also did not press for such inferences. However, her absence meant she could not be cross-examined or her evidence tested. The local authority presented a strong case, supported by expert evidence, that the infection was sexually transmitted. With the mother not present to respond, the court could only rely on the limited available evidence in her case.

It was found that the uncle's gonorrhoea symptoms and diagnosis occurred within the timeframe when F could have been infected. Allegations against him, such as a 2024 rape claim and a 2015 indecent exposure, were not considered, as no findings were sought or proven. However, the court did find that the uncle's lifestyle in May 2023 was chaotic and lacking boundaries. His decision to continue having unprotected sex after being diagnosed with gonorrhoea and chlamydia showed a clear disregard for the health of others. Additionally, there was an unexplained inconsistency between his written claim that the mother may have infected F and his oral evidence, where he said the opposite.

It was found that both the mother and uncle had the opportunity to sexually infect F during May 2023, the likely period of transmission. The uncle stayed at the house several days a week and spent time with the children, even if another adult was present. The mother visited and stayed overnight at least once in the children's room. Both tested positive for gonorrhoea and could possibly have been infected during that timeframe. They each had access to F and lived chaotic, boundaryless lives. It was also satisfied that both were, at times, incapacitated due to drug or alcohol use, evidenced by the uncle's admission in a police interview that he was "bladdered" and unable to recall recent drug use, and descriptions of the mother's state as "her head has gone" by the uncle and grandmother.

It was concluded that sexual contact with F did occur, likely in May 2023, but it was not carried out jointly by both the mother and uncle. There is no evidence of a conspiracy or joint action. The court could not determine exactly when or how the abuse happened, but found that one of them transmitted gonorrhoea to F. However, it was not possible to identify which of them was responsible. Although male perpetrators are more common statistically (as per Dr Ghaly's evidence), this did not carry much weight here, especially given the mother's failure to attend. Without her testimony, it would be unfair to make a specific finding against either individual. Finally, it was found that both the mother and the uncle fall within the pool of possible perpetrators but could not determine, on the balance of probabilities, who committed the abuse.

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