FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 52
XA41/18

Lord President
Lord Menzies
Lord Malcolm

OPINION OF LORD CARLOWAY, the LORD PRESIDENT

in the Appeal from the Sheriff Appeal Court

in the Petition of

THE CITY OF EDINBURGH COUNCIL

Petitioners and Respondents

against

GD

Respondent and Appellant

Petitioners and Respondents: JM Scott QC; City of Edinburgh Council
Respondent and Appellant: Aitken; Lisa Rae & Co

1 August 2018

Introduction

[1] This is an appeal against an interlocutor of the Sheriff Appeal Court dated 8 March 2018 which made a Permanence Order under section 80 of the Adoption and Children (Scotland) Act 2007 in respect of a child, namely SD, now aged 4. The Order vested parental rights and responsibilities, under sections 1 and 2 of the Children (Scotland) Act 1995, in the petitioners and extinguished in large part the parental responsibilities and rights of the child's parents, including the respondent and appellant. The Order granted authority for

the child to be adopted and revoked the pre-existing Compulsory Supervision Order. The SAC's interlocutor allowed an appeal against the interlocutor of the sheriff, dated 23 November 2017, refusing to grant the Permanence Order with authority to adopt.

[2] The appeal raises an issue about the proper construction of section 84(5)(c)(ii) of the 2007 Act, whereby, before making a Permanence Order, the court must be satisfied that "the child's residence [with a parent] is, or is likely to be, seriously detrimental to the welfare of the child". In particular, it raises a question about the time at which that test is to be applied. The appeal also concerns, in that context, whether the appropriate inference of serious detriment can be drawn when there has been a "non-accidental" injury to a child, which has been caused by one or other of the parents, but it has not been established which parent was responsible.

[3] The respondent, being the father of the child, changed his position at a late stage in the process before the sheriff. Rather than seeking the return of the child to the care of himself and the mother, with whom he continues to live, he sought to have the sole care of the child on the basis that he would leave the company of the mother. He had, nevertheless, remained (and remains) living with the mother. The appeal raises a further issue of whether, notwithstanding the respondent's stated willingness to care for the child on his own, the Permanence Order should nevertheless be granted.

Legislation

[4] Part 2 of the Adoption and Children (Scotland) Act 2007 concerns the making of Permanence Orders, vesting parental rights and responsibilities in a local authority and, in certain cases, granting authority for the child to be adopted. Section 84 sets out the

"conditions and considerations applicable to [the] making of" Permanence Orders. In particular, it states:

> "...
>
> (3) The court may not make a Permanence Order in respect of a child unless it considers that it would be better for the child that the Order be made than that it should not be made.
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> ...
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> (5) Before making a Permanence Order, the court must –
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> ...
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> (c) be satisfied that –
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> (i) there is no person who has the right ... to have the child living with the person or otherwise to regulate the child's residence, or
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> (ii) where there is such a person, the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child."

[5] Where authority is sought for the child to be adopted, section 80(2)(c) states that certain conditions, specified in section 83, must be met. One of these conditions (s 83(1)(d)) is that:

> "the court considers that it would be better for the child if it were to grant authority for the child to be adopted than if it were not to grant such authority".

Facts

[6] The application for a Permanence Order was lodged in the sheriff court on 1 November 2016. The background was that SD, who is now aged 4, is the son of SA (the original first respondent) and the respondent. SA, who had limited appearances in the sheriff court process and did not appear in the appeal to the Sheriff Appeal Court, is the mother of two other children, namely CX and CY, who are aged respectively 8 and 5. Both of these children have been removed from SA's care as a result of neglect and injury. They have been adopted. The respondent is of Indian ethnic origin and is an overstayer, who is

consequently unable to work. At the time of both the lodging of the application and the proof before the sheriff, he was living with SA in her local authority tenancy. He was financially dependent upon her. SA and the respondent were expecting another child at the time of the proof.

[7] In September 2013, when SA was pregnant with SD, a referral to the petitioners had been made by the community midwife. On 10 December 2013, following a pre-birth child protection case conference, the unborn child's name was placed on the Child Protection Register, given the history of CX and CY and a lack of knowledge of the respondent. A Child Protection Plan was created. SD could be placed in the care of SA and the respondent, provided that a significant package of support and close monitoring was put in place. This occurred on 19 February 2014.

[8] On 22 May 2014, during a routine hospital appointment, small petechiae lateral to the child's right nostril were evident. An x-ray was requested because of the child's irritable mood. He had a fracture to his seventh right rib. In addition, he had three bruises in the vicinity of his right ear and cheek. These injuries were "non-accidental". On 26 May 2014, these facts were communicated to SD's parents. They were unable to explain the injuries. On 24 November 2014, the Children's Hearing identified grounds of referral, in terms of section 67(2)(b) of the Children's Hearing (Scotland) Act 2011. These were referred to the sheriff for proof. On 25 June 2015, the ground, that SD had been the victim of culpable and reckless conduct involving bodily injury, was accepted by both parents and deemed established. The facts, which were also accepted, were that SD had been "handled inappropriately and recklessly whilst in the care of his parents". No-one else had care of SD at the time. By this time the child was in foster care, with his parents exercising contact on a relatively frequent basis.

[9] On 23 July 2015, the respondent assaulted SA, whilst under the influence of alcohol, in the city centre. On 19 August 2015, the Children's Hearing made SD the subject of a Compulsory Supervision Order with a condition that he should remain in foster care, but with supervised contact with his parents twice a week for two hours. The parents meantime continued to deny knowing how SD had suffered his injuries, despite having accepted the ground.

[10] On 1 September 2015, the petitioners decided to remove SD's name from the Child Protection Register and to refer SD to their Adoption and Permanence Panel. The meeting of this Panel was postponed for some months to allow an independent case review by a consultant, namely Sally Wassell, whose report was completed on 5 May 2016. On 4 August 2016, the Panel recommended that the petitioners should apply for a Permanence Order with authority to adopt. The application was made on 1 November 2016.

The sheriff's reasoning

[11] The sheriff found, *inter alia*, that:

> "[12] The onus of establishing that the child's residence with each parent is, or is likely to be, seriously detrimental to the welfare of the child is upon the petitioner and must be proved upon a balance of probabilities.
>
> [13] The evidence does not establish, in relation to each of the parents, that the child's residence with that person is likely to be seriously detrimental to his welfare."

On that basis, he determined that the statutory test, under section 84 of the 2007 Act, had not been met. The application was therefore refused. In reaching his decision the sheriff had regard to certain *dicta* in *West Lothian Council* v *B* 2017 SLT 319, *City of Edinburgh Council* v *RO* [2016] SAC (Civ) 15 and *R* v *Stirling Council* 2016 SLT 689, citing *In Re B (Children) (Sexual Abuse: Standard of Proof)* [2009] 1 AC 11, *In Re S-B (Children) (Care Proceedings: Standard of*

Proof) [2010] 1 AC 678 and *Re J (Children) (Care Proceedings: Threshold Criteria)* [2013] 1 AC 680.

[12] The sheriff heard testimony from some witnesses and had affidavits from others for consideration. He noted that the social worker in charge of the case, namely Sarah Sutherland, had reported that:

> "It would be in [SD's] best interest that the Order be made.
>
> [SD] cannot be raised safely by [SA] and [the respondent] as he was injured while in their care. No explanation has been provided by the parents as to how this happened. *Therefore* he will not be able to return to his parents' care and he will require a substitute family ..." (emphasis added by the sheriff).

The sheriff considered that the use of the word "therefore" amounted to a "non sequitur" and one that was at the heart of the case. He had regard to certain positive aspects of the respondent's contact with SD. These were echoed by the contact supervisor, namely Elizabeth McDonald.

[13] The sheriff was critical of the questions asked of the independent social worker, namely Sally Wassell, who had been asked to review the case. The question posed for her had concerned the appropriateness of the petitioners' actings rather than the child's welfare. The report had concluded that it would not be possible for SD to be returned to his parents in the absence of an explanation for the bruising and the rib fracture. A parenting assessment could not be undertaken because it would require to take as a starting point an exploration of the circumstance of the injuries, when neither parent accepted that they had handled SD inappropriately and recklessly whilst in their care. Concern was expressed about the ability of the parents to meet SD's needs. They minimised the challenges that they could face and the level of support that they would require.

[14] The sheriff was also critical of the questions asked of Dr Katherine Edward, a clinical psychologist who had been jointly instructed by the parties. The sheriff analysed Dr Edward's testimony, which was that the circumstances did not support the respondent being able to offer a safe, secure and appropriate home. He considered that these circumstances fell some way short of establishing that the petitioners had proved that the child's residence with the respondent, about whom positive things had been said, would be seriously detrimental to the child's welfare or that he had suffered harm at the respondent's hands. It had been acknowledged by Dr Edward that there had been no assessment of the respondent as a sole carer. The sheriff took the view that Dr Edward's opinion, that the possibility of safe rehabilitation of the child with his parents was not an option, was premature because there had to be a proper assessment of the respondent as sole carer. The desire to make progress in the case did not "trump the need to cover every base before coming to such a serious decision".

[15] In relation to the respondent's own testimony, the sheriff described him as being an earnest, if somewhat naïve, individual. He was intelligent and realised that something must have happened to SD; albeit that he denied being responsible or knowing who was responsible. He continued:

> "The sticking point so far as the [petitioners are] concerned is that [the respondent] will not give details of what happened to SD, and simply cannot bring himself to believe that SA is a bad mother, or responsible for the harm. He appears to have a blind spot when it comes to the potential culpability of [SA] but his views may be influenced by his dependency on her. He does not have settled status in the UK and is largely reliant on [SA] for money and housing. He is credible in his assertion that he was not responsible for the injuries, but how reliable that denial is cannot be assessed. However, his failure to explain what he might be unable to explain can only lead to a suspicion that he might be hiding something. It does not mean that the petitioner has proved to the required standard facts from which serious detriment to the child's welfare can be predicted."

In due course, the Sheriff Appeal Court were to look closely at the respondent's evidence, noting that he had specifically stated, not simply that he did not know whether SA had caused the injuries, but that she had not done so. In particular, he had said "I have not done it and I know she has not done it also ...". He had answered positively to the question "You do not believe either you or [SA] have done anything wrong?"

[16] The sheriff reasoned as follows:

> "[89] The crux of the matter is that there are unproved allegations of criminal conduct against the parents, based on proven non-accidental injuries that in themselves cannot identify the perpetrator or perpetrators. There was no evidence that the parents were sequestered together day and night; the evidence was to the contrary. Getting the parents to concede that the child must have been the victim of culpable and reckless conduct gets the [petitioners] no further.
>
> [90] A lack of awareness of injuries on the part of a parent who has not been proved to be responsible for or complicit in the injuries may well raise 'very significant child protection and parenting capacity concerns' (Dr Edward ...) but does not prove past events or answer the question as to serious detriment for the future. As Lady Hale put it *In Re J* ...
>
> > '[22] ... a finding of a real possibility that this parent harmed a child does not establish that she did. Only a finding that ... she did ... can be sufficient to found a prediction that because it has happened in the past the same is likely to happen in the future. Care courts need to hear this message loud and clear.'
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> ...
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> [92] Notwithstanding the considerable delay in bringing an application, the court simply did not have the benefit of sufficient evidence as to the circumstances of injury. Nor was there a parenting assessment for the ... respondent alone. It is simply no answer to say that he should have insisted before ...
>
> [93] Ultimately it comes down to whether the [petitioners'] case has been proved to the required standard. The evidence indicates that [SA] has had historic difficulties with childcare, to the extent of having her first two children taken away from her. [The respondent] has been in her thrall to the extent that he was not able to contemplate parenting apart, prior to the proof. Even at proof he was protesting his love for [SA] and saying what a good mother she was. The child came by injuries at a young age that were non-accidentally inflicted by *someone* as he was a helpless infant of some three months at the time. The report of Dr Edward is against this couple coparenting SD. SA did not turn up to argue the point.
>
> [94] However, the law requires that the child's residence with *each* parent be proved by the petitioner to be seriously detrimental to his welfare. [SA] was not

> arguing at proof for sole care. [The respondent] was. He has been criticised for not coming forward earlier with the suggestion that he look after SD alone, but the strong suggestion of that being the only likely possible option was only brought home to him at proof on a report by Dr Edward that was only lodged shortly before the proof. ...".

For these reasons, the absence of an assessment of the respondent as sole carer meant that the application failed at the first hurdle, being the section 84(5)(c)(ii) threshold test. The sheriff went no further.

The Sheriff Appeal Court

[17] The Sheriff Appeal Court focused initially on the time at which the threshold test under section 84(5)(c)(ii) should be met. Having regard to *dicta* in *In Re M (A minor) (Care Orders: Threshold Conditions)* [1994] 2 AC 424, the SAC took the view that the reference to "is ... seriously detrimental" referred to the point at which SD had been removed from the care of his parents and not to the date of the hearing before the sheriff. On that basis the sheriff had erred in considering that the respondent's parenting skills were relevant to whether the threshold test had been met. The test had been met because, at the point at which SD had been taken into care, his residence with the respondent was seriously detrimental for the purposes of the section. That was:

> "[12] ... [T]he inevitable conclusion which the sheriff ought to have reached standing the undisputed evidence that as at that date SD was in the joint care of his mother and [the respondent] and that date was only a few days after the medical view on the injuries had become clear. In other words, it was necessary for the [petitioners] to establish, at least for the purposes of the threshold test, only the fact of the injuries coupled with no satisfactory explanation of their cause. It was unnecessary for the [petitioners] to establish any more facts which might be pertinent to the likelihood of future serious detriment, including that [the respondent] was or was not the perpetrator."

[18] On that basis the appeal had to be allowed. The essence of the threshold test was one of jurisdiction. The "need to cover every base" might be laudable. It was something to take into account in assessing welfare and proportionality under the other provisions of the Act. However:

> "If the sheriff had properly directed himself on the threshold test, it would have been self-evident that a non-accidental injury to a three month old baby while in the care of two people one or both of whom by definition (and concession) must have been the perpetrator or perpetrators means that the threshold of the likelihood of serious detriment has been passed".

The sheriff's statement, that the onus of establishing that the child's residence with each parent is, or is likely to be, seriously detrimental was on the petitioners and had to be proved on the balance of probabilities, was wrong in law. The task was to determine whether there was a real possibility of future serious detriment, rather than whether future detriment had been proved on the balance of probabilities.

[19] The Sheriff Appeal Court reasoned that the sheriff's assessment of the respondent's evidence was flawed. The sheriff had had a responsibility to determine whether the respondent was credible and reliable. The respondent must have known whether he had been the perpetrator. There was no middle ground. Despite the advantage which the sheriff had had in seeing and hearing the respondent, he had been plainly wrong in his assessment of this testimony. His evidence, that he was not the perpetrator but that he did not blame the mother, could not be accepted as credible. Reliability was not the issue. In fact the respondent had given evidence that the mother had not caused the injuries. The SAC continued:

> "The fundamental point is this: assuming that he was not the perpetrator, which for the reasons just given is a major assumption, his unwillingness to blame the mother and, indeed, his willingness to maintain that she did not cause the injuries despite what is admitted before the children's hearing, must logically result in the conclusion that at the date SD was taken into care the child's residence with him *was* seriously

> detrimental to the welfare of the child or at the time of the sheriff's decision *was likely to be* the same. It is a clear inference based upon the established fact of a non-accidental injury to the child while in the sole care of [the respondent] and the mother. Given that conclusion, it inevitably follows that for the purposes of the threshold test it is irrelevant that late in the day he expressed the wish to be SD's sole carer."

[20] Having determined to allow the appeal, the Sheriff Appeal Court re-assessed the evidence to determine what should occur. They reminded themselves that they required to deal separately with the Permanence Order and the authority to adopt (*West Lothian Council* v *B* (*supra*)). In deciding whether to grant the Order, one of the critical conditions was whether it would be better for the child that the Order should be made, than that it should not (s 84(3)). The welfare of the child was the paramount consideration. Added to that was the question of proportionality, or necessity, arising from the European Convention jurisprudence. The SAC noted the positive aspects of contact. They had reservations about the respondent's sincerity in stating that he was prepared to cease living with SA, despite his apparent affection for her and the fact he continued to live with her. They could not accept that it was only on a consideration of Dr Edward's report that the question of seeking sole care of SD should have been contemplated by the respondent. A change in position, in circumstances when the respondent could have contemplated a role as sole carer in advance of proof, was to be deprecated. The SAC did not consider that Sally Wassell's answer, to the essential question about the return of SD to his parents' or to the respondent's sole care in the absence of any explanation for the injuries, would not have been any different, given that any parenting assessment would have to take as its starting point an exploration of the circumstances of the injuries. Dr Edward had taken the same view in stating that consideration of rehabilitation of SD to his parents would not have been possible in the circumstances.

[21] The Sheriff Appeal Court did not set out in full the well-known *dicta* on the necessity test, except to recognise that necessity had been variously described as "a last resort" or "nothing else will do". Suffice it to say, they concluded that the test had been met and that it would be better for SD that authority for him to be adopted be made than that it should not. For these reasons they allowed the appeal and made the Permanence Order with authority to adopt.

Submissions

Respondent and appellant

[22] The respondent submitted that the Sheriff Appeal Court erred in holding that the test in section 84(5)(c)(ii) of the 2007 Act had to be applied at the time of the child's removal from the care of his parents. They had erred in giving "weight" to *In Re M (A child) (Care Order: Threshold conditions)* (*supra*). The court had to assess the risk posed to the child's welfare if the child were to reside with each person. It had to establish, based on findings-in-fact, the nature of any detriment, why that was likely to occur, and why the court was satisfied that the detriment was serious (*West Lothian Council* v *B* (*supra*) at paras 11, 29, 65-66). Carrying out that assessment required more than simply finding that the child had suffered an injury in the past which a parent was unable to explain. Decisions about future likelihood of harm, for the purposes of the threshold test, could not be based merely on allegations or suspicions, but had to be based on findings of fact established on the balance of probabilities. It was necessary to construe the legislation in this way in order to strike a proper balance between the need to safeguard children and the protection of the right to respect family life. The sheriff had not made a decision that it was safe for the child to return home. He had only said that a further assessment of the true viability of

rehabilitation, and of the respondent's parental capacity, was essential. The SAC's reasoning ran contrary to what had been said in *West Lothian Council* v *B* (*supra* at para 29) and with the approach of the court in cases where sheriffs were determining whether grounds under section 67(2)(a) of the Children's Hearing (Scotland) Act 2011 had been established (*M* v *McClafferty* [2008] Fam LR 22).

[23] It was accepted that the Sheriff Appeal Court were correct in holding that the sheriff had erred in deciding that serious detriment required to be proved on the balance of probabilities. All that was required was that there be a real possibility of such detriment. Following *West Lothian Council* v *B* (*supra* at paras 11 and 29), the court required: to consider the background and decide what had been proved; to take the facts and identify the nature of any detriment; and to consider whether that detriment was serious and likely to arise in the sense of it being a real possibility. In circumstances, where the sheriff had concluded that the father was sincere in his intention to separate from the mother, the court had to assess him as an individual. A historical finding that he was one of a pool of potential perpetrators should weigh heavily in that assessment.

[24] The Sheriff Appeal Court erred in concluding that the existence of the injuries, coupled with a lack of explanation, was all that required to be proved. That ignored essential factors, such as: the relative severity of any injury; the care provided to other children in the family; and the relative likelihood of whether the individual was actually the perpetrator. All of these matters would inform a prediction of the likelihood of future harm. The SAC accepted that there may be cases where identification of the person would be critical. This amounted to a rejection of the petitioners' submission that the English cases, notably *Lancashire County Council* v *B* [2000] 2 AC 147, should be followed. The SAC erroneously found that the sheriff had erred in applying welfare considerations at the

threshold stage. In terms of *West Lothian Council* v *B*, such an assessment was essential. The sheriff had said that, in the absence of a proper assessment of the respondent and the care which he would provide as sole carer, it was not possible to carry out the task identified in *West Lothian Council* v *B* (*supra*).

Petitioners

[25] The petitioners replied that it was sufficient, for the purposes of satisfying the threshold test in section 84(5)(c)(ii) of the 2007 Act, to prove that significant and unexplained non-accidental injuries had been inflicted on the child by one or both of his parents; even if it were not possible to prove which parent had inflicted the injuries. The Sheriff Appeal Court had been correct in their assessment of this situation. If they had been entitled to hold that the threshold test had been met, then it is not disputed that they were entitled to make the Permanence Order with authority to adopt. In *West Lothian Council* v *B* (*supra*), the UK Supreme Court had explained that the starting point in relation to the threshold test was to establish the facts. That had been done. Where a child had been seriously injured by one or both parents, neither of whom had explained what had happened, the threshold test will be satisfied whether the test is considered literally, purposively or consequentially and whether the focus is on the part of the test relating to present or future detriment. If the case hinged on future risk, that could be inferred from the past injury by one or both parents and the absence of an explanation. The result was that no preventative steps could be devised to protect the child from future injury.

[26] Considering that the consequences of a decision could assist in giving a preliminary indication as to whether there had been an error of law in the interpretation of legislation (Bennion: *Statutory Interpretation* (7th ed) 302 at para 9.6), as a matter of common sense, this

was a case in which the Sheriff Appeal Court had been correct to reverse the sheriff. The SAC had been correct in their analysis that the essence of the test was jurisdictional, in the sense that, if it had been met, the case came within the ambit of the court to make a Permanence Order, if satisfied that such an Order were required.

[27] The use of the word "is" in section 84(5)(c)(ii) could refer to the time when protective arrangements were initiated, when permanence proceedings were commenced, the date of the court's determination or none of these. It was immaterial which was adopted, although the date of commencement clearly applied. The interpretation favoured by the Sheriff Appeal Court rested on the proposition that the section had been modelled on section 31(2)(a) of the Children Act 1989. In *Re M (A minor) (Care Orders: Threshold Conditions)* (*supra*), it had been taken to refer to the time when protective arrangements had been initiated. It would be consistent with the ratio in that case to hold that the appropriate date to test jurisdiction was when permanence proceedings had been commenced.

[28] The Sheriff Appeal Court had been correct in stating that the sheriff had erred in applying a test of balance of probabilities relative to the prediction of future detriment. The prediction of future harm had to be based on facts which had been proved (*West Lothian Council* v *B* (*supra*) para 19, adopting *In Re J (Children) (Care Proceedings: Threshold Criteria*) (*supra*) at para 84; *Re S-B (Children)* (*supra*) at paras 8 and 9). The petitioners had to prove facts on the balance of probabilities and the court had to determine then whether there was a possibility of serious detriment. Sheriffs were familiar with this task in the context of referrals (*M* v *Children's Reporter* 2015 SLT (Sh Ct) 215 at para 56; *M* v *McClafferty* (*supra*)). The conclusion that the sheriff erred was inevitable and the SAC had to apply the test for themselves.

[29] The legislation did not, as the sheriff appeared to have thought, require identification of the perpetrator of the injury. In so far as the test turned on the likelihood of future harm, it raised a straightforward issue of whether, if the child had suffered detriment in the past, there was a real risk that he would do in the future. The cases in England indicated that the difficulty in identifying who had injured a child was a regular feature (*In Re S-B (Children)* (*supra*) at paras 35-37; *Lancashire County Council* v *B* (*supra*) at 165-166 and *In Re O (Minors) (Care: Preliminary Hearing)* [2004] 1 AC 523 at para 26). The legislation required to be interpreted in a manner that was consistent with the objective of protecting the child (*Lancashire County Council* v *B* ((*supra*) and advancing the child's welfare (*In Re O (Minors) (Care: Preliminary Hearing)* (*supra*)). There were further policy reasons for rejecting the sheriff's construction. A child who was a victim of an offence could be referred to the children's hearing without establishing the perpetrator.

Decision

[30] The Adoption and Children (Scotland) Act 2007 sets out the tests which require to be made before a Permanence Order can be met. The first is the so-called threshold test in sub-section 84(5)(c)(ii). This requires the court to be satisfied that the child's residence with his parent "is, or is likely to be, seriously detrimental to" his welfare. This phraseology has provoked considerable debate over the date of its application. Although the test is said to be one *in limine*, there is no reason for applying it at a point different to that of the general welfare tests in sub-sections 84(3) or 83(1)(d). The obvious time for doing so is at the point at which the sheriff makes a final decision on the Permanence Order and the authority to adopt. *Re M (A Minor) (Care Orders: Threshold Conditions)* [1994] 2 AC 424 is not of material assistance, since it is dealing with a different type of order under different legislation.

Adopting a holistic approach, the sheriff must be satisfied, at the time of his decision on the Permanence Order, that, first, the child's residence with the relevant person "is, or is likely to be, seriously detrimental to" the child's welfare (s 84(5)(c)(ii)). The detriment must, on the facts admitted or proved to the normal civil standard, be a real possibility. Secondly, if that test is passed, the sheriff must determine what is the better option in the interests of the child (ss 84(3) and 83(1)(d).

[31] The Sheriff Appeal Court erred in holding that the sheriff had applied the threshold test at the wrong time. The sheriff was correct to apply it at the time of his decision and not at an earlier point; notably either when the child was removed from his parents' care or the date of the application for a Permanence Order. The SAC's reasoning on the relevance of the respondent's present ability to look after SD, when considering the threshold test, is accordingly wrong in law. That may, in other circumstances, have led to the appeal being allowed and the sheriff's decision restored. In this case, however, there are two problems with this. First, it is agreed that the sheriff's own decision on the threshold test was also flawed in that he understood that serious detriment had to be proved as a matter of probability (ie that it was more likely than not to happen) as distinct from it being established, as a matter of inference from proven fact, only as a real possibility. Secondly, his approach to the circumstances of the "non-accidental" injury is plainly wrong in several respects (*infra*); that of the SAC being, in contrast, generally correct.

[32] When SD was an infant and in the joint care of SA and the respondent, he suffered "non-accidental" injuries of a serious nature (eg a fractured rib). These injuries were caused by the actions of either one or both of the parents. The supporting facts for the original ground of referral were that the child had been "handled inappropriately and recklessly whilst in the care of his parents" and no-one else had the care of the child at the relevant

time. This was accepted fact and not just a real possibility. The sheriff's finding-in-fact that "who caused" the injuries and in what circumstances "remains unknown" is accurate only to the limited extent that it is not known which of the parents was directly involved. The sheriff's note, that there was "unproved allegations of criminal conduct against the parents, based on proven non-accidental injuries" that cannot identify the perpetrators, is inaccurate in so far as it fails to recognise that the culpable and reckless conduct was that of one or other or both of the parents. It is, but need not be, a legitimate inference that there is a real possibility of serious detriment where it is proved, as it has been here, that an infant has suffered serious detriment whilst in the care of one or other or both parents. In the absence of an acceptable explanation for these injuries by either parent, it is an almost inevitable conclusion that, where both parents are living together, a return of a child to that residence is, or is likely to be, seriously detrimental to the child's welfare. The fact that the sheriff failed to establish which parent caused the injuries is of minimal significance to the threshold issue in these circumstances. On the proven facts, where the child is being returned to exactly the same environment in which he had suffered injury, there must be, in the absence of a material alteration in circumstances, a real possibility of present or future serious detriment (see *In re J (Children) (Care Proceedings: Threshold Criteria)* [2013] 1 AC 680, Lady Hale at para 15).

[33] In this case, the situation now is the same as existed at the time of the injuries. The real possibility persists. In this context, it is not necessary to contemplate the situation where one parent is now living apart from one of the possible perpetrators of the child's injuries. That is not, and has never been, the position. It is not necessary either to postulate a situation in which a possibly innocent party is involved; such as when one person's exculpatory explanation is accepted. In this case, either the respondent was himself

responsible for the injuries or he has demonstrated his irresponsibility in denying the culpability of the child's mother, with whom he continues to reside; thus placing any child living in the family at real risk of serious detriment. In that state of circumstances, and given that it is not disputed that the sheriff made an error of law in stating that the serious detriment, which is a prediction to be assessed on the basis of proven fact, itself required to be proved on a balance of probabilities, the SAC were bound to allow the appeal on the threshold test, to re-assess the matter and reach their own conclusions on the second question of whether the remaining tests in sub-sections 84(3) and 83(1)(d) were met, *viz*. whether it would be better for the child that the orders be made.

[34] The Sheriff Appeal Court's determination on the threshold aspect requires the substitution of the sheriff's findings-in-fact and law [12] and [13] (and subsequent re-numbering of the remaining findings-in-fact and law) with: "There was and is a real possibility that the child's residence with either parent would be seriously detrimental to the welfare of the child." For the avoidance of doubt, in the sheriff's finding-in-fact [23], the following should be added between "injuries" and "who": "These injuries were caused when the child was handled inappropriately and recklessly whilst in the sole care of his parents. Beyond that [w]".

[35] In the new equation, of whether or not it would be better to grant the Permanence Order and authority to adopt, there is a legal assumption, deriving especially from Article 8 of the European Convention on Human Rights (see also at common law: *Sanderson* v *McManus* 1997 SC (HL) 55), that a child is best brought up in family by and with his parents, or at least one of them, and that an order which alters that situation should only be made when it is "necessary" as a last resort ("nothing else will do"). The only way in which that principle can be reconciled with the potentially conflicting consideration, that the welfare of

the child is paramount, is to proceed on the basis that, where a child's welfare is better protected by a Permanence Order, that order must be deemed necessary in the interests of that child (*In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, Lord Neuberger at paras 76-77). The legal assumption will, however, be an important component in the assessment of whether or not it is better that the orders be made.

[36] The sheriff's approach amounts to a postponement of a decision pending a parental assessment of the respondent by the petitioners. Quite apart from the significant delay which would then ensue, pending an assessment and a new petition process, there are two problems with this. First, the petitioners have already determined that this cannot be done by them; standing the respondent's position on the "non-accidental" injury. Secondly, it was for the court to make that assessment based upon the evidence before it and not to delegate it to the petitioners. As the Sheriff Appeal Court commented, it was also for the sheriff to assess the credibility and reliability of the respondent on the issue of the child's injuries. Had the sheriff accepted the respondent's denial, the issues, which have now arisen, would not have posed the same problems. He did not do so because, he said, he was unable to gauge the reliability of the respondent's denial. It was the sheriff's duty to make a decision on whether he accepted the respondent's testimony on this central issue. After a proof, issues of onus should seldom arise (*Thomas* v *Thomas* 1947 SC (HL) 45, Lord Thankerton at 54, cited in *SSE Generation* v *Hochtief Solutions* [2018] CSIH 26, LP (Carloway) at para [273]). However, this important issue of fact remains unresolved after proof.

[37] Time is of the essence in this type of application. It will normally be important for a final decision to be made in the existing process rather than delayed until some uncertain date in what will thus become an uncertain future for the child. This is especially so where, as in this case, there are suitable adoptive parents who are ready to give this child a stable

and caring upbringing. It would thus have assisted the Sheriff Appeal Court and this court if, when deciding the case purely on the threshold issue, the sheriff had, as he ought have, gone on to answer the welfare question (see *Hogan* v *Highland Council* 1995 SC 1, LJC (Ross) at 2). His observation, that a decision to refuse the application on the threshold test avoids the necessity of making findings on the welfare issue, is wrong in law. Had he addressed the welfare issue, the appellate courts would have been able to proceed on findings-in-fact made by the sheriff related to that question, as posed by sub-sections 84(3) and 83(1)(d).

[38] As matters stand, therefore, the Sheriff Appeal Court have erred in selecting the date for the application of the threshold test. The sheriff has erred in the identification of the correct test and in plainly wrongly assessing the significance of the "non-accidental" injury which was caused when the child was in the custody of one or other of his parents. The SAC's analysis of that matter was correct and the threshold test has been met. The problem which then arises is that the sheriff has made no findings-in-fact relative to the welfare issue; notably the respondent's intentions, circumstances or abilities. There are references to certain matters in the sheriff's note, such as that the respondent "seemed sincere" when saying that he would "if necessary take sole care of his son and follow social work guidance", but these are not translated into fact.

[39] The only material findings-in-fact made by the sheriff and relating to the respondent's position is that he does not have leave to remain in the United Kingdom. He is unable to work. He has no recourse to public funds. He is mainly dependent upon SA for financial assistance and housing. At present the reality is, as the Sheriff Appeal Court has correctly held, that this child's welfare will not be served by residing with the respondent, who remains living with SA and upon whom he is dependent. If the Permanence Order is

not made, the Compulsory Supervision Order will remain in place for the foreseeable future. That is not to say that a Permanence Order must be made.

[40] The Sheriff Appeal Court were equally critical of the sheriff in not addressing the welfare issue. They considered whether they should remit the case for him to do so, but rejected that idea given that he had already reached a decision on the merits of the case. The SAC considered that the only practical option was to assess the evidence, as narrated by the sheriff or contained in admitted material; albeit through "the prism of the sheriff's judgment". It is impossible to fault that reasoning. In analysing the option of returning SD to the respondent, the SAC would have agreed with the sheriff on the need for a parental assessment of the respondent, but for his position on the injuries. They accepted the uncontradicted evidence of Sally Wassell and Dr Edwards that no such assessment could be carried out. This then was the state of the evidence. It effectively precluded a return of the child to respondent's care and, for the reasons given by the SAC, meant that it would be better for the Permanence Order to be made. The SAC had regard to the "last resort" and "nothing else will do" *dicta* and concluded that the necessity test for the grant of an adoption order had been made out.

[41] The question which remains is whether the Sheriff Appeal Court erred in their determination of the welfare issue. Since the sheriff made no relevant findings, this is not a case in which any advantage which he enjoyed in hearing and seeing the witnesses arises. The SAC have applied the correct tests on this issue. They have taken into account all the relevant circumstances in arriving at a pragmatic solution which will safeguard and promote the child's welfare. The appeal must be refused. However, it remains important that there are findings-in-fact on both the threshold and the welfare issues. The sheriff's findings-in-fact and findings-in-fact and law require to be re-instated (they were effectively

deleted by the SAC interlocutor) as modified by this opinion. In addition, the following require to be added:

[42] Findings-in-fact:

> "[44] It is not realistic for the child to return to the care of both parents. SA has a history of being incapable of taking care of her children. She has decided not to oppose the application.
>
> [45] The child gets on well with the respondent during contact. He enjoys contact. He has developed well, is settled and happy most of the time in contact.
>
> [46] It is not possible to carry out a separate parenting assessment of the respondent, given his position on the unexplained 'non-accidental' injuries. The respondent is aware of who the perpetrator is, but refuses to say.
>
> [47] It is not possible for the child to return safely to the respondent's care in the absence of an explanation for the injuries. There is no prospect of the respondent changing his position.
>
> [48] Suitable adoptive parents have been found. Their ethnicity mirrors that of the child's parents. They will offer the child a stable and loving family unit. The child's current foster placement is not a long term option."

[43] Findings-in-fact and law:

> "[15] It would be better that a Permanence Order be made than it should not be made. The making of the Order will safeguard and promote the child's welfare.
>
> [16] The making of the Permanence Order with authority to adopt is necessary as a last resort in the interests of the child. Nothing else will do. It is better that the authority to adopt is granted than not.
>
> [17] Parental consent should be dispensed with under section 83(1)(c)(iii) as the parents are unable to discharge their responsibilities and exercise their rights (other than contact with the respondent) satisfactorily and are likely to be unable to do so in terms of section 83(3)(b) and (c). The child is likely to be placed for adoption."

The reasons for those findings-in-fact, which are derived from the SAC's Opinion, are themselves contained in that Opinion.

[44] Consequently, this court should refuse the appeal and adhere to the Sheriff Appeal Court's interlocutor of 8 March 2018 with the appropriate findings-in-fact and findings-in-

fact and law added to the sheriff's interlocutor of 23 November 2017 and with the remaining findings-of-fact and findings-in-fact and law re-instated.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 52
XA41/18

Lord President
Lord Menzies
Lord Malcolm

OPINION OF LORD MENZIES

in the Appeal from the Sheriff Appeal Court

in the Petition of

THE CITY OF EDINBURGH COUNCIL

Petitioners and Respondents

against

GD

Respondent and Appellant

Petitioners and Respondents: JM Scott QC; City of Edinburgh Council
Respondent and Appellant: Aitken; Lisa Rae & Co

1 August 2018

[45] For the reasons given by your Lordship in the chair, with which I am in complete agreement, I consider that this appeal should be refused. I make the following brief observations merely to emphasise aspects of your Lordship's opinion.

[46] The threshold test should be applied at the time of the sheriff's decision, and not at an earlier date. I see no justification in section 84(5)(c)(ii) of the 2007 Act, nor in the Act read as a whole, for applying it at an earlier time.

[47] In the present case, I find the position of the father (the respondent & appellant) in relation to the "non-accidental" injuries sustained by SD to be of considerable importance. There may be cases in which assessment of one parent as a sole carer is appropriate and necessary, but this is not one of them. It was accepted by both parents that the child had been handled inappropriately and recklessly whilst in the care of his parents and that no one else had care of SD at the relevant time. The father denied that he was himself responsible for the injuries to the child, and the sheriff observed that he was credible in this regard, but that (perhaps surprisingly) the sheriff could not assess how reliable that denial was. However, the father gave evidence that the mother had not caused the injuries. I am in complete agreement with the approach taken by the Sheriff Appeal Court on this point, as set out at paragraph [19] of your Lordship's opinion.

[48] Finally, I agree wholeheartedly with the point which your Lordship makes at paragraph [37] that time is of the essence in this type of application. This is an aspect of the duty to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration. It does not mean, of course, that the court should rush to a hasty or ill-considered judgment – the issues in cases such as this are clearly important, and sometimes difficult. However, the court should have proper regard to the desirability of reaching a final decision with suitable expedition. It is the duty of the court to reach a decision on difficult issues, including issues of credibility and reliability. Wherever possible, a determination should be made which avoids postponement of the final decision, and possibly the raising of fresh proceedings. Postponement of a decision, or the need for lengthy further procedure, will seldom be consistent with promoting the welfare of the child.

[49] There is nothing further that I can usefully add.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 52
XA41/18

Lord President
Lord Menzies
Lord Malcolm

OPINION OF LORD MALCOLM

in the appeal from the Sheriff Appeal Court

in the petition of

THE CITY OF EDINBURGH COUNCIL

Petitioners and Respondents

against

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Respondent and Appellant

Petitioners and Respondents: JM Scott QC; City of Edinburgh Council
Respondent and Appellant: Aitken; Lisa Rae & Co

1 August 2018

[50] This appeal presents an example of the dilemma posed by what has been termed "a pool of possible perpetrators" – here consisting of the child's parents. (Sometimes others, such as a childminder, are involved.) It was proved that the child had been harmed by at least one of his parents, but not by which. The dilemma arises from the tension between two important principles. First, the law is jealous of the need to protect family life. The state should only remove parental rights, such as the right to live with one's child, when a

sufficiently serious concern is supported by proven facts, not mere suspicions and allegations (*West Lothian Council* v *B* 2017 SC (UKSC) 67). The second principle is that, in general terms, the welfare of the child is the paramount consideration.

[51] There is no necessary conflict between these two principles. The law recognises that it is best for a child to be raised by his natural parents, even if the care provided is less than ideal and he would, in a certain sense, be better off elsewhere. That said, where there are grounds for serious concerns and no action is taken, if subsequently those concerns prove to be well-founded with tragic results, recriminations abound and social workers and others are blamed for not safeguarding the child. It is understandable that agencies with the responsibility of protecting children and promoting their welfare will, on occasion, adopt a cautious approach. Equally it is to be expected that parents, if conscious that they have come to the authority's attention, will be fearful of risk-averse agencies intervening before there is sufficient hard evidence to justify such a course of action.

[52] The problems are exacerbated if, once preventative action is taken, the subsequent procedures are protracted. Here SD was injured when he was three months old and immediate steps were taken. He is now four years old. In the meantime he has been looked after by three sets of foster carers, and were the proposed adoption to go ahead he would be placed with yet another family. Even now the sheriff requires more information, with the child continuing to be the subject of compulsory measures under a supervision order. Many will think that this child should be given the certainty and stability of life with the identified and apparently well-suited adoptive parents, whose agonies over what is happening can only be imagined.

[53] The Scottish Parliament has set a test which must be met before the court can consider making an order of the kind sought by the petitioners. Unless the local authority

proves the facts necessary to pass this test, the court does not have power to proceed further. This is the mechanism whereby the legislature prevents undue and unjustified interference in family life. The test is set out in section 84(5)(c) of the Adoption and Children (Scotland) Act 2007:

> "Before making a permanence order, the court must –
>
> (c) be satisfied that –
>
> (i) there is no person who has the right mentioned in subsection (1)(a) of section 2 of the 1995 Act to have the child living with the person or otherwise to regulate the child's residence, or
>
> (ii) where there is such a person, the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child."

[54] It is now established that this is a purely factual question. Where the test involves a prediction as to the future, the prediction must be based upon proven facts, that is proven on a balance of probabilities, not mere suspicions or allegations. However, if the court is asking itself whether residence with a parent is likely to be seriously detrimental to a child's welfare, it is sufficient if the established facts point to a real possibility of such detriment, in the sense of one which cannot sensibly be ignored having regard to the nature and gravity of the harm feared (*In re J (Children) (Care Proceedings: Threshold Criteria)* [2013] 1 AC 680, the judgment of Baroness Hale of Richmond at paragraph 15).

[55] On numerous occasions judges have grappled with the application of the relevant statutory test to cases involving pools of possible perpetrators. The problems presented are not so acute if the pool consists of the child's parents and they remain together. If a child was culpably and badly injured while in their care, to return the child to them raises obvious concerns notwithstanding that the identity of the perpetrator cannot be established. But

what if circumstances have changed materially, for example if they have separated and are now living apart? Suppose the father insists that he did not injure the child. Furthermore, on the face of it he is well placed to look after him. Apart from the previous incident, there are no substantial concerns as to his ability to care for the child. Can the test in section 84(5)(c)(ii) be passed simply on the basis that the child has suffered serious harm in the past while in his care? Alternatively can it be met on the basis that to return the child to his care is likely to cause the child serious detriment? With regard to this latter question, on one view it might be said that the answer is yes because there is a real possibility that he injured the child in the past; but this appears to conflict with the case law which requires predictions as to the future to be based upon proven facts. Is the inability to prove who caused the harm an insuperable obstacle to crossing the statutory threshold unless other factors pointing to harm to the child come into play?

[56] The sheriff was exercised by the evidence of the father given at the proof to the effect that if necessary he would offer to be the child's sole carer and accept social work guidance. The sheriff considered that in this he seemed to be sincere. The sheriff expressed his thinking at paragraphs 92 – 97:

> "[92] Notwithstanding the considerable delay in bringing an application, the court simply did not have the benefit of sufficient evidence as to the circumstances of injury. Nor was there a parenting assessment for the second respondent alone. It is simply no answer to say that he should have insisted before. Nor, indeed, was there sufficient evidence to exclude kinship care overseas. It is not, in my view, enough to simply leave that to the initiative of family overseas. They are clearly of some means and standing as GD was able to study in the United Kingdom, but that does not mean that they necessarily know their way around the Scottish child protection regime. The fact that there is a well matched couple willing to take the child on, who may well do a better job with less social work input, is not in itself a reason to take the very severe step of interfering to such an extent with SD's family life. That is the point already made, as expressed by Lord Drummond Young in *R* v *Stirling Council*, that: 'It is, emphatically, not enough to show that a child would benefit from being brought up elsewhere'.

[93] Ultimately it comes down to whether the petitioner's case has been proved to the required standard. The evidence indicates that the first respondent has had historic difficulties with childcare, to the extent of having her first two children taken away from her. The second respondent has been in her thrall to the extent that he was not able to contemplate parenting apart, prior to the proof. Even at proof he was protesting his love for the first respondent and saying what a good mother she was. The child came by injuries at a young age that were non-accidentally inflicted by *someone* as he was a helpless infant of some three months at the time. The report of (the psychologist) is against this couple coparenting SD. (The mother, SA,) did not turn up to argue the point.

[94] However, the law requires that the child's resident with *each* parent be proved by the petitioner to be seriously detrimental to his welfare. The first respondent was not arguing at proof for sole care. The second respondent was. He has been criticised for not coming forward earlier with the suggestion that he look after SD alone, but the strong suggestion of that being the only likely possible option was only brought home to him at proof on a report ... that was only lodged shortly before proof. He was insistent at proof that he would if necessary take sole care of his son and follow social work guidance. In that he seemed sincere. He has not been assessed as sole carer, which would be a difficult assessment given his residence and work status, eligibility for benefits, the potential dual nationality of SD, and the possibility of returning home to his own parents as he also mentioned. In my view, (the psychologist's) careful answer that the evidence was not there that he could offer a safe, secure and appropriate home falls some way short of establishing that the petitioner has proved that the child's residence with this father, about whom many positive things were said, would be seriously detrimental to his welfare or that he had suffered harm at his hands.

[95] (The psychologist) acknowledged that there had not been an assessment of the second respondent as sole carer. A 'continuous assessment' is not good enough, especially when it is quite clear that there is a preferred outcome on the part of the petitioner. (Her) conclusion that a permanence order with authority to adopt is the best solution '... as the possibility of safe rehabilitation ... to his parents is not an option for him' is premature as there is not enough evidence to justify it as yet. There requires to be a proper assessment of the second respondent as sole carer. The result of that assessment may or may not be to his liking, but a desire to make progress after years of delay does not trump the need to cover every base before coming to such a serious decision. Meantime, the child will remain subject to a CSO and in the care of foster carers.

[96] The child's racial origin and culture and linguistic background are of importance and the couple identified as potential adopters are a good match.

[97] As the application falls at the first hurdle, under the s.84(5)(c)(ii) threshold test, it is not necessary to make further findings in respect of the earlier subsections of s.84."

[57] It is not difficult to discern considerable sympathy on the sheriff's part for the father, and much less so for the mother. However he did not identify her as responsible for the injuries to SD. The Sheriff Appeal Court (SAC) was critical of the sheriff's failure to make further findings under the rest of section 84. This put the court in a difficulty once it overturned his ruling on the section 84(5)(c)(ii) test. It proceeded to make the findings for itself, doing the best it could on what could be taken from all that had been said by the sheriff. The further findings made by the SAC are not the subject of challenge in the appeal to this court. The father's appeal simply requests reinstatement of the sheriff's decision that the test was not satisfied. If the appeal fails, the permanence order will stand.

Case law

[58] It is helpful to consider how matters have developed in England and Wales, where there have been several decisions concerning "uncertain perpetrator" cases, not least because some of the case law was in the minds of both the sheriff and the SAC, and it may have influenced the terms of the 2007 Act. It can be noted that south of the border the threshold test is in different terms. Section 31 of the Children Act 1989 provides:

> "*Care and supervision orders*
>
> (1) On the application of any local authority or authorised person, the court may make an order – (a) placing the child with respect to whom the application is made in the care of a designated local authority; or (b) putting him under the supervision of a designated local authority.
> (2) A court may only make a care order or supervision order if it is satisfied – (a) that the child concerned is suffering, or is likely to suffer, significant harm; and (b) that the harm, or likelihood of harm, is attributable to – (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or (ii) the child's being beyond parental control."

The Scottish test (quoted earlier) focuses on the parent whose right to live with the child is being removed. It must be shown that residence with the parent "is, or is likely to be, seriously detrimental to the welfare of the child." The English test concerns the harm or risk of harm to the child arising from the care given to him or likely to be given to him if the order is not made.

[59] Whatever differences there may be, there is one similarity which was significant for the SAC. Both tests employ alternatives, the first based on what has been described as a "present tense test" (in Scotland: residence with the parent is ... seriously detrimental; in England and Wales: the child concerned is suffering ... significant harm ... attributable to ... the care given to the child). The other alternative turns on whether serious detriment/significant harm is likely to happen (in Scotland if the child lives with the parent: in England and Wales if the order is not made). The SAC held that the use of the present tense "is" in the Scottish legislation refers to the situation when the child was removed from his parents. At first sight this is an odd construction of the statutory language. On the other hand, if, as contended for by the father, it is intended to refer to the state of affairs at the time of the court's determination, it is hard to imagine cases where at that time the child will be living with the parent or parents concerned. Furthermore, it may be suggested that if the father's interpretation is correct and the focus is on the circumstances at the date of the court's decision, the present tense alternative adds nothing to an assessment based on a prediction as to the future.

In re M

[60] If it is to be assumed that there was a purpose behind the inclusion of the present tense alternative, what was it? The SAC answered this question by reference to a decision of

the House of Lords in an English case – *In re M (A minor) (Care Orders: Threshold Conditions)* [1994] 2 AC 424. The facts of the case can be summarised as follows. The father of a four month old boy brutally murdered the child's mother in his and his older half-siblings' presence. The boy was sent to live with a foster mother while his half-siblings were placed with Mrs W, a cousin of his mother. The father was convicted and sentenced to serve a life sentence with an order for deportation to Nigeria upon his release. A judge dismissed Mrs W's application for a residence order and, on the application of the father and the child's guardian *ad litem*, granted the local authority a care order under section 31 of the 1989 Act in respect of the child. The Court of Appeal allowed Mrs W's challenge to this order. It held that the threshold test for a care order had not been met in that arrangements had been made to safeguard the child and there were no future risks. The use of the present tense in the first alternative in the threshold test meant that the harm must be being suffered when the court was making its decision. That was "clear from the language used". It was not enough that something happened in the past. It was still open to the court to consider whether the child was likely to suffer significant harm of the relevant kind – however in the circumstances there was no proper basis for upholding either limb of the threshold test. Mrs W could provide a satisfactory and safe family home for the child.

[61] The father appealed this decision with leave of the House of Lords. Lord Mackay of Clashfern LC delivered the leading speech. He was satisfied that the relevant date with respect to which the court must be satisfied is the date at which the local authority initiated the procedure for protection under the Act. At page 433 his Lordship said this:

> "There is nothing in section 31(2) which in my opinion requires that the conditions to be satisfied are disassociated from the time of the making of the application by the local authority. I would conclude that the natural construction of the conditions in section 31(2) is that where, at the time the application is to be disposed of, there are in place arrangements for the protection of the child by the local authority on an

> interim basis which protection has been continuously in place for some time, the relevant date with respect to which the court must be satisfied is the date at which the local authority initiated the procedure for protection under the Act from which these arrangements followed. If after a local authority had initiated protective arrangements the need for these had terminated, because the child's welfare had been satisfactorily provided for otherwise, in any subsequent proceedings, it would not be possible to found jurisdiction on the situation at the time of initiation of these arrangements. It is permissible only to look back from the date of disposal to the date of initiation of protection as a result of which local authority arrangements had been continuously in place thereafter to the date of disposal.
>
> It has to be borne in mind that this in no way precludes the court from taking account at the date of the hearing of all relevant circumstances. The conditions in subsection (2) are in the nature of conditions conferring jurisdiction upon the court to consider whether or not a care order or supervision order should be made. Conditions of that kind would in my view normally have to be satisfied at the date on which the order was first applied for. It would in my opinion be odd if the jurisdiction of the court to make an order depended on how long the court took before it finally disposed of the case."

[62] Their Lordships restored the care order made by the trial judge, recognising that this would not require disturbance of the child's care by Mrs W. Lord Templeman described the appeal as "an illustration of the tyranny of language and the importance of ascertaining and giving effect to the intentions of Parliament by construing a statute in accordance with the spirit rather than the letter of the Act." He noted that the Court of Appeal's "preoccupation with the present tense" meant that if a child is rescued by a local authority a care order cannot be made unless future harm can be predicted. The requirements were introduced to prevent local authorities from undue interference with parental rights and responsibilities. However if at the date of the application the child is suffering harm or is likely to suffer harm, the court has jurisdiction. The court can refuse an order if there has been a material change in circumstances. (It is clear that the assumption is that the application will be more or less contemporaneous with intervention – the procedures differing sharply from those in Scotland.) His Lordship continued to the effect that at the date of the decision the court

must weigh up all the circumstances and decide how best to safeguard the welfare of the chid. Thus in England and Wales, if the threshold is crossed at the time of the application, either because a child is suffering significant harm or is likely to so suffer in the future, the way is open for the court to make an order based on the welfare of the child having regard to all the relevant circumstances at the time of its decision.

[63] The particular feature of *Re M* was that neither parent was in a position to look after the child, either now or in the future. The mother was dead and the father was serving a life sentence for her murder after which he would be deported to Nigeria. The child was being well cared for at the time of the hearing, and there was a real issue as to whether a care order in favour of the local authority was required. The concern was that the Court of Appeal's approach prevented the issue being addressed because of the temporary measures taken to safeguard the child. Lord Nolan emphasised that in respect of both the threshold test and the substantive merits of the application the court is not confined to the state of affairs at the time of the hearing. The relevant considerations will encompass the past, the present, and, so far as possible, the prospects for the future. "The focal point of the inquiry must be the situation which resulted in the temporary measures being taken, and which has led to the application for a care or supervision order" (page 441).

[64] The problem in *Re M* would not arise if the same circumstances were subjected to the Scottish threshold test. The mother was dead and clearly residence with the father would be seriously detrimental to the child's welfare. Any other approach in *Re M* would have resulted in an outcome which, when passing the 1989 Act, Parliament could not have intended. So far as the Scottish Act is concerned, can the legislature have intended that if the parents have separated, and on the face of it both appear to be able to care for the child, an inability to identify which parent caused serious harm to the child in the past has the result

that the court cannot apply its mind to the various factors which come into play when deciding whether to make a permanence order, not least promotion of the welfare of the child as the paramount consideration? An understandable concern is that a wholly innocent parent may be deprived of the child simply because of harm inflicted, perhaps years earlier, by an ex-partner. A contrary view is that if a child suffers serious harm when in their joint care, neither parent can reasonably complain of undue state interference if in due course a court is required to determine whether a permanence order should be made. It will often be difficult if not impossible to identify which carer's denial of responsibility is false, and it can be noticed that compulsory measures of care under section 67 of the Children's Hearings (Scotland) Act 2011 do not require grounds which identify the perpetrator, for example if a schedule 1 offence has been committed in respect of the child.

Lancashire County Council* v *B

[65] The decision in *Re M* has allowed the courts in England and Wales to hold that the threshold test is met in cases similar to the present where there is a small pool of possible perpetrators of serious harm to a child. In *Lancashire County Council and another* v *B and another* [2000] 2 AC 147 it is recorded that an experienced family judge talked of the most difficult decision he had been required to make. His anxiety arose from what he referred to in his judgment as:

> "the obvious dilemma in human terms. If the 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."

The judge dismissed the applications but made an *interim* care order pending an appeal. In the Court of Appeal Walker LJ quoted certain extrajudicial observations of Lord Mackay of Clashfern LC delivered while the Children Bill was before Parliament:

> "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 or the child being beyond parental control, 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."

His Lordship noted that the terms of section 31(2) had caused many difficulties. He quoted a judge who had expressed hope that courts would not subject the legislation to "a strict legal analysis" when a certain course is clearly required for the protection of the child.

[66] The circumstances in *Lancashire County Council* can be summarised as follows. Significant injuries were inflicted on a child either by one of her parents or by a childminder, who herself had a child. Orders were sought in respect of both children. The judge having dismissed the applications, the local authority appealed to the Court of Appeal which upheld the appeal in respect of the child who had been harmed, but dismissed it in respect of the child of the childminder. The only relevant threshold condition regarding her child was the risk of harm – she never having been harmed in the past. It had not been proved that her mother had damaged the other child. There was no question of her ever being exposed to the parents of the other child. The mere suspicion that her mother had abused another child was not enough to satisfy the threshold test.

[67] A different conclusion was required in respect of the parents of the child who had been injured. Given the decision in *Re M*, satisfaction of the threshold conditions turned on the "attributable" criterion in section 31(2)(b)(i) and its application to the proven facts. Contrary to the wording of the trial judge, care orders were not made "against parents" but

"for the benefit and protection of children" (page 156B). The attributability test "lets out the case of a child who, despite proper parental care, suffers a serious but genuinely accidental injury" (157B). "It would be inconsistent with the purposive construction of the Act, which the House of Lords has more than once stated to be the proper approach, to require the harm which a child is actually suffering to be proved to be due to a failure of care by one or more identified individuals before the court can make a care order" (157G). Where it is obvious that harm is caused by a lack of proper care, apportionment of responsibility as between various carers is both "imponderable and irrelevant".

[68] The result was that the judge had interpreted the language of the threshold conditions too narrowly. He should have found that they were satisfied and gone on to consider the welfare issues when the possibility of future risk to the child would have to be examined. At that hearing her welfare would be the paramount consideration. It was recognised that this outcome might be regarded by the parents as unjust if the true culprit was the childminder.

[69] The child's parents appealed with leave of the Appeal Committee of the House of Lords, relying upon the inability of the local authority to prove that either of them was responsible for their child's injuries. It was stressed that unjustified intervention can be as harmful to a child as unjustified non-intervention. For the local authority and for the guardian it was emphasised that the statutory object is the protection of children. The harm was caused by someone charged with the care of the child, so the minimum conditions for the investigation and determination of the merits of the requested order were met. It was not necessary to identify the perpetrator. (There was no appeal against the dismissal of the application in respect of the childminder's child, but the application of the threshold

conditions in the context of an unharmed child was considered in a subsequent case to be discussed below.)

[70] In the House the leading speech was delivered by Lord Nicholls of Birkenhead. He considered that the appeal was another illustration of Lord Templeman's "tyranny of language". His Lordship noted that it was a case concerning the present harm test ("is suffering ... significant harm") (164B). It had been urged on the House that the state should only remove a child from parental care when it was clear that the parent was responsible for the harm suffered by the child. This was regarded as a "forceful argument, up to a point." It would mean that the child would be beyond protection, beyond even a supervision order, unless the perpetrator could be identified. His Lordship could not believe that Parliament intended such a "dangerously irresponsible" result (165G). The circumstances of the case were far from exceptional. After a non-accidental injury to a child, the court will often be unable to discover precisely what happened. The appellants' contention would mean that "the court is powerless to make even a supervision order if the judge is unable to penetrate the fog of denials, evasions, lies and half-truths which all too often descends in court at fact-finding hearings." (166A)

[71] As already noted, in Scotland the provisions in the 2011 Act would allow protective arrangements in such circumstances, but his Lordship was not limiting his remarks to such forms of child protection. A particular problem, which Parliament had not foreseen, was where the pool of possible perpetrators included a third party such as a childminder. The problem would not have arisen if the "pool" consisted of only the parents. Lord Nicholls interpreted the legislation in the manner which best gave effect to the purpose it was meant to achieve, even though it meant that the "attributable" condition was met when it was no more than a possibility that the parents were responsible for inflicting the injuries which the

child had undoubtedly suffered. It was recognised that this meant that "wholly innocent" parents who had provided good care for their child could face the possibility of losing their child, with all the pain and distress which that would involve (166G). This would be a possibility, but by no means a certainty. When deciding as to what order, if any, to make:

> "judges will keep firmly in mind that the parents have not been shown to be responsible for the child's injuries ... But, so far as the threshold conditions are concerned, the factor which seems to me to outweigh all others is the prospect that an unidentified, and unidentifiable, carer may inflict further injury on a child he or she has already severely damaged" (167A-B).

This interpretation of the statute was compliant with article 8 of ECHR in that it was no more than was reasonably necessary to pursue the legitimate aim of protecting the child from further injury (168C).

[72] Lord Clyde observed (169B) that section 31(2) did not point to the necessity of identifying the individual who caused or would be likely to cause harm to the child. The present appellant relies upon this as a distinguishing feature of the Scottish threshold test. For Lord Clyde it was important that the provision simply defined the jurisdiction of the court to entertain an application. He considered that it was:

> "reasonable to allow a degree of latitude in the scope of the jurisdictional provision, leaving the critical question of whether the circumstances require the making of an order to a detailed assessment of the welfare of the child. The definition of the occasions on which the court may entertain an application for a care order or a supervision order may usefully be wider than the definition of the circumstances in which the court will take the actual step of handing over the upbringing of the child to a local authority or requiring some supervision of the child's continued care. Even if the court has jurisdiction to make an order it by no means follows that an order will be made" (170B-D).

[73] The discussion so far illustrates that if the present case arose south of the border, the court would have jurisdiction to consider the local authority's application on its merits and in line with the welfare of the child as the paramount consideration simply because the child

had been seriously injured when in the parents' care, and this even though it was not possible to identify the responsible party. Do the terms of section 84(5)(c)(ii) require a different result? If the father's approach to the statutory provision is correct, and if parents have separated, the court would have to ask itself whether it can be satisfied in respect of each parent that residence with that parent is, or is likely to be, seriously detrimental to the welfare of the child. If the only cloud is the suspicion that one or other harmed the child in the past, how can a positive answer be given in respect of either parent? In *West Lothian Council* v *B* it was reaffirmed that the court can only make decisions as to future likelihood of harm based on findings in fact established on the balance of probabilities. The submission was that this decision requires the court, if faced with the hypothesised circumstances, and unless other factors intervene, to refuse a permanence order in respect of either or both parents. Counsel for the appellant was at pains to emphasise that the sheriff was not ordering that the child should be returned to his father. He was simply requiring a parenting assessment carried out of the father as sole carer. The SAC's answer was to construe the present tense alternative in much the same way as the English courts.

In re O

[74] South of the border the courts continued to grapple with problems arising from "uncertain perpetrators". In *In re O and another (Minors) (Care: Preliminary Hearing)* [2004] 1 AC 523 the question posed at first stage fact-finding preliminary hearings in two separate applications was whether the threshold conditions could be applied when there was uncertainty as to which parent was responsible for significant harm to a child in the past. As with the present case, the complication of a third party in the pool of possible perpetrators was absent. The Court of Appeal decided that the mother of a child had to be treated as if

she had not caused any significant harm. It was accepted on her behalf that this went too far, but it was submitted before the House of Lords that a mere suspicion of perpetration is insufficient to establish risk. Paramountcy does not operate to permit risk evaluation on the basis of unproven fact. Parents should not be at risk of losing their children on the basis of suspicions. To do so would amount to an unjustified interference in their right to family life. One cannot proceed on the basis that each primary carer presents a risk of significant harm to the child.

[75] For the local authority it was submitted that each of the parents was as likely to have caused the harm as the other, which meant that the children were at risk from each parent. Protection is of paramount importance. Either parent may have been responsible, and the question is always whether a child can be safely rehabilitated. Where there is a closed group of potential perpetrators, each member must be regarded as a risk. The consequences for a child of a finding which incorrectly names one party as a sole perpetrator are potentially catastrophic. The court cannot assess the parents on the basis that neither is a risk when it is known that one of them injured a child. Were it otherwise parents will be encouraged to stay silent or mislead the court as to what happened. Local authorities and experts should be able to make assessments of risk and form plans for the future on the basis that there is a known risk.

[76] The respective submissions neatly encapsulate the dilemma facing local authorities, social workers, experts and the courts in cases of this kind. Again Lord Nicholls delivered the leading speech. By way of introductory observations he noted that whether or not an event happened in the past is a question of proof. It either happened or it did not happen. As for a future forecast, the future has not happened, and human conduct is never certain.

> "The legal context may permit, or require, the decision-maker to take into account a real possibility that a past event occurred, or even a mere possibility. Rationality does not require that only past events established on a balance of probabilities can be taken into account. Or the context may require otherwise. The range of matters the decision-maker may take into account when carrying out this exercise depends upon the context. This, again, is a question of legal policy, not logic." (paragraph 13)

In the context of an assessment of future risk of harm to a child, it was necessary to consider the language and purpose of the relevant statutory provision in play in order to decide whether, for reasons of legal policy, there should be any limitation on the matters which can be taken into account (paragraph 18). His Lordship rehearsed the decision taken in *Lancashire County Council* and noted that it meant that the threshold can be crossed when the perpetrator is unknown. The House now had to consider some of the practical implications arising from this at the welfare stage, bearing in mind that crossing the threshold is not a reason for making a care order. In deciding upon the best interests of a child, he considered it axiomatic that the court will have regard to all the circumstances of the case, bounded only by the need for them to be relevant. At paragraph 24 Lord Nicholls quoted Lord MacDermott in *J* v *C* [1970] AC 668 at 710-711 in the context of a provision in the Guardianship of Infants Act 1925 which required the court to regard the welfare of the infant "as the first and paramount consideration".

> "I think they connote the process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood."

His Lordship considered that in principle the same approach was equally applicable under section 1 of the 1989 Act.

[77] It might be objected that the current appeal is only concerned with the threshold conditions, not the welfare stage, but this would be to take too narrow an approach to the statutory provisions. The factors relevant to section 84(5)(c)(ii), such as harm suffered by the

child when in the care of his parents, will, if the test is met, be carried forward to the welfare stage. So, particularly if the SAC erred in deciding that the present tense alternative can cover past events, this discussion is relevant to the likelihood limb of the threshold test, and also to any subsequent welfare stage. The basic issue in "uncertain perpetrator" cases is the use which can be made of what is known about a significant episode or episodes of harm in the past when deciding upon whether a proposed intervention should be entertained by the court, and then what further use can be made of it when deciding upon the ultimate disposal. If the courts in England and Wales are not prevented from entertaining an application for a care order and then making one when the perpetrator of the key harm involved is unknown, it is appropriate to consider whether the position is different under the terms of the 2007 Act. It can be noted that, unlike south of the border, the only statutory reference to the child having been harmed or being likely to suffer harm in the future is set out in section 84(5)(c)(ii) of the Act (though a similar issue can arise in respect of dispensing with a parent's consent to an adoption order). In England and Wales it is included in a separate welfare checklist.

[78] Reverting to the decision in *Re O*, on the key issue Lord Nicholls was clear. If a judge finds that a child has suffered significant physical harm at the hands of his parents but is unable to say which, it would be "grotesque" if at the welfare stage the court required to proceed on the footing that neither parent represents a risk.

> "That would be a self-defeating interpretation of the legislation. It would mean that, in 'uncertain perpetrator' cases, the court decides that the threshold criteria are satisfied but then lacks the ability to proceed in a sensible way in the best interests of the child. The preferable interpretation of the legislation is that in such cases the court is able to proceed at the welfare stage on the footing that each of the possible perpetrators is, indeed, just that: a possible perpetrator. ... this approach accords with the basic principle that in considering the requirements of the child's welfare the court will have regard to all the circumstances of the case." (paragraph 28)

To dilute the assessment to one whereby each parent had simply failed to protect the child from harm, but was not a proven perpetrator, would not be satisfactory, and furthermore circumstances may have changed, for example the carers may have separated. At paragraphs 34/35 his Lordship continued:

> "I wholly understand that parents are apprehensive that, if each of them is labelled a possible perpetrator, social workers and others may all too readily rule out the prospect of rehabilitation with either of them because the child would be 'at risk' with either of them. As already noted, failure to protect is one thing, perpetration is another. A parent fears that, once the possibility that he or she was a perpetrator is brought into the scales, cautious social workers will let that factor outweigh all others. I understand this concern. Whether it is well-founded, generally or in particular cases, is an altogether different matter. Whether well-founded or not, the way ahead cannot be for cases to proceed on an artificial footing."

[79] If this approach is adopted in relation to the second limb of the Scottish threshold conditions (residence with a parent "is likely to be severely detrimental to the welfare of the child") even in cases where the parents have separated, it would not be necessary to agonise over the present tense alternative. And if the assessment is carried out in the context of a preliminary jurisdictional test, there may be potential benefits and a possible solution to the present problem. That said it would not be easy to reconcile this approach with *West Lothian Council* and other decisions stressing the need for proven facts, though perhaps not impossible in that it is known that the child suffered harm when in the parents' joint care.

In re S-B

[80] The above represents the state of the law south of the border at the time of the 2007 Act. However the case law continued. Having discussed the problem in the context of the welfare stage, the Supreme Court returned to the English threshold criteria in *In re S-B (Children) (Care Proceedings: Standard of Proof)* [2010] 1 AC 678 (a decision of seven justices).

[81] The case concerned a child W. When W was born, his mother lived on her own. W was immediately removed from her because her first child J was non-accidentally injured when four weeks old when living with the mother and his father. It was not possible to identify who was responsible for the injuries. The parents separated before W's birth. J's father did not have parental responsibility for W. W was removed from his mother because of the perceived risk that she would harm him. The view was taken that, because there was a real possibility that she had harmed J, there was a real possibility that she would harm W. The Court of Appeal dismissed an appeal against the order.

[82] The judgment of the Supreme Court was delivered by Baroness Hale. It was affirmed that a perpetrator could be identified only after proof on a balance of probabilities. While it was desirable if it could be done, a judge need not strain to identify the perpetrator. "It is not a necessary ingredient of the threshold criteria" (paragraph 35). Even if identification cannot be proved, it remains important to name those in the pool of possible perpetrators. It should include anyone in respect of whom there is a real possibility that they were responsible for the harm. When deciding how best to protect the child, the judge will have to consider the strength of that possibility. In most cases, if a parent was not a perpetrator, there was a failure to protect the child from the responsible person. In many cases there will be risks over and above that of physical injury. The trial judge had misdirected herself as to the standard of proof. It was not open to her to find the threshold crossed in relation to W on the basis that there was a real possibility that the mother had injured J.

> "That, as already explained, is not a permissible approach to a finding of likelihood of future harm. ... a prediction of future harm has to be based upon findings of actual fact made on the balance of probabilities. It is only once those facts have been found that the degree of likelihood of future events becomes the 'real possibility' test adopted in *In re H*." (paragraph 49)

The case was remitted for a rehearing before a different judge.

In re J

[83] It is plain that local authorities and others continued to have concerns and experience difficulties with regard to their child protection duties. These difficulties led to the final case in this review of the jurisprudence in England and Wales, namely *In Re J (Children) (Care Proceedings: Threshold Criteria)* [2013] 1 AC 680. Although the full circumstances were more complicated, by the time the case reached the Supreme Court it was deliberately focused on a single issue, so that authoritative guidance could be provided. The facts can be summarised as follows. In March 2004 a three week old baby died of asphyxia caused by obstruction of her airways. She had 17 fractures of her ribs, all caused more than a week before she died. There was bruising on her face, shoulder and arm. She had untreated nappy rash. It was a clear case of serious physical abuse, however it could not be ascertained whether the mother, the father or both were responsible. Subsequently they had another child and care proceedings were immediately instigated. Neither parent admitted responsibility in respect of the harm done to the dead child, and both exonerated the other. The trial judge said that singling out a likely perpetrator did not help the colluding couple "because it must be debateable as to which is worse, to inflict this injury or to protect the person responsible." Their child, S, was made the subject of a care order.

[84] A year later the parents separated. The mother moved from south Wales to north-east England and began a relationship with a new partner, who had sole care of his two children. The mother moved into their family home, and in due course she had her third child. DNA testing showed that her estranged former partner was the father of this child. However the child was brought up in the new family home with the new partner and his

two children. The mother having moved to a different part of the country, it took time for the social services there to learn the history concerning the dead child. On 3 March 2011 a child protection plan was put into effect and this became the relevant date for the threshold criteria in respect of care proceedings issued with regard to all three children. By then the new couple had been living together for some three years and had become husband and wife. Their first child was born in December 2011. The proceedings turned solely on the findings made by the trial judge in 2006 in respect of the care order made in respect of the mother's second child.

[85] A preliminary issue was raised as to whether those findings could support a threshold finding in relation to the new family. A judge concluded that the answer was no. As a result the *interim* protective measures ceased and the mother returned to live with her husband and the four children. The local authority appealed to the Court of Appeal. The judge's ruling was upheld. It was noted that none of the cases previously considered by the House of Lords directly focused on the second limb of the threshold test in cases where an uncertain perpetrator is a member of a different household from that in which past injuries took place. Lord Judge CJ noted that the original trial judge who sanctioned removal of the mother's second child made broad-based findings in support of a conclusion that neither the mother nor her former partner was fit to be entrusted with the care of their second child. However the argument before the judge who made the finding under challenge was not based upon the broad findings of fact made on the earlier occasion. It was confined to the physical injuries suffered by the dead child. Lord Judge continued:

> "Dealing with it starkly, Judge Hallam was asked to ignore any potential culpability in the mother arising from her failure to protect (that child) from violent assault which, by a process of elimination could only mean, violent assault perpetrated by the father. In other words some of the crucial strands in Judge Masterman's decision that the second child should be removed from the care of his mother were to be

> ignored. This was artificial, and deliberately so. However it means that the case involving the future of the mother's new family will be decided on the basis that there was a real possibility, but no more, that she personally caused (that child's) injuries." (paragraph 138 of the Court of Appeal's decision)

[86] Lord Judge was troubled by what he described as "the creation of an artificial set of hypothetical (because incomplete) facts to enable a point of law of concern to local authorities ... to be examined in this court, and ultimately in the Supreme Court." That concern remained when the case came before seven justices of the Supreme Court, nonetheless the question of law was answered to the following effect. Baroness Hale stated (paragraph 44):

> "Reasonable suspicion is a sufficient basis for the authorities to investigate and even to take interim protective measures, but it cannot be a sufficient basis for the long-term intervention, frequently involving permanent placement outside the family, which is entailed in a care order."

Subsequently (paragraph 46) her Ladyship said:

> "It is clear, however, that the threshold was designed to be more precise than the previous wardship criterion and to focus upon what was seen as the key objective justification for state interference – that the child was suffering or likely to suffer harm."

And at paragraph 49:

> "A real possibility that something has happened in the past is not enough to predict that it will happen in the future. It may be the fact that a judge has found that there is a real possibility that something has happened. But that is not sufficient for this purpose. A finding of a real possibility that a child has suffered harm does not establish that he has. A finding of a real possibility that the harm which a child has suffered is 'non-accidental' does not establish that it was. A finding of a real possibility that this parent harmed a child does not establish that she did. Only a finding that he has, it was, or she did, as the case may be, can be sufficient to found a prediction that because it has happened in the past the same is likely to happen in the future. Care courts need to hear this message loud and clear."

[87] Her Ladyship noted that it was a fact that a previous child had been killed while in the same household as the mother.

> "No one has ever suggested that that fact should be ignored. Such a fact normally comes associated with innumerable other facts which may be relevant to the prediction of future harm to another child. ... Then, of course, those facts must be set alongside other facts. ... Hence I agree entirely with McFarlane LJ when he said that *In Re S-B* is not authority for the proposition that 'if you cannot identify the past perpetrator, you cannot establish future likelihood'. There may, or may not, be a multitude of established facts from which such a likelihood can be established. There is no substitute for a careful, individualised assessment of where those facts take one. But *In Re S-B* is authority for the proposition that a real possibility that this parent has harmed a child in the past is not, by itself, sufficient to establish the likelihood that she will cause harm to another child in the future." (paragraphs 52-54)

[88] There was a disagreement among the justices as to whether, although consignment to a pool of perpetrators could not alone constitute a factual foundation for a prediction of likely significant harm, it could, if weighed together with other relevant facts, figure as part of the requisite factual foundation. This will be discussed below. In the judgment of Lord Reed (with which Lord Clarke and Lord Carnwath agreed) his Lordship lamented the unfortunate complications which had arisen when judges attempted to answer a "simple question" – is the court satisfied that there is a serious risk of significant harm in the future? Nevertheless it was too late to reconsider the decision in *In Re H* which had been followed in two later decisions at the highest level (paragraph 93). Subsequently (paragraph 95) it was noted that an inability to identify a perpetrator of past harm:

> "does not cause any difficulty in circumstances where all the possible perpetrators of the past harm are also responsible for the future care of the child in question: where for example a child is living with X and Y, proof that either X or Y previously harmed another child may provide a basis for inferring that either X or Y might harm the child in question, and that there is therefore a real possibility of that child's being harmed. The court cannot on the other hand draw such an inference, following *Lancashire County Council* and *In Re S-B*, where it is proved that either X or Y harmed another child but it is only X who is now responsible for the care of the child in question. In other words, where the person who harmed a child cannot be identified, the threshold cannot be met in relation to another child solely on the basis that a possible perpetrator of the harm is involved in the care of that child unless all possible perpetrators are so involved. In substance, as it appears to me, the court is saying that, as a matter of law, a real possibility that X harmed another child in the

> past is not by itself a basis upon which the court can properly be satisfied that there is a likelihood that X will harm the child in question in the future."

[89] His Lordship was discussing a situation where "the child in question" is not the child who was harmed in the past. It will be remembered that south of the border, given the decision in *Re M*, the threshold can be crossed if the application involves a child who was harmed, or was at risk of harm, in the past. Towards the end of his judgment Lord Reed expressed the view that the outcome in the case was not compelled by the terms of article 8 of ECHR. Section 31(2) merely opened the way to the possibility that an order may be made, which would only occur after careful consideration of the case, bearing in mind the requirement that an order is only to be made if the making of it would be better for the child than no order at all.

> "In practice, in the great majority of cases where a child has been harmed by one of its primary carers but it has not been possible to identify which of them was responsible, and only one of them is now responsible for the care of another child, it will be possible to establish facts on the basis of which a prognosis as to the future risk of harm can be made. The case at hand would itself appear to have been such a case, if the evidence before the court had not been deliberately restricted." (paragraph 98)

West Lothian Council* v *B

[90] The last case to mention is a recent Scottish appeal in the Supreme Court, namely *West Lothian Council* v *B* 2017 SC (UKSC) 67. A local authority applied for a permanence order in relation to a child that had been in care since birth. Both parents opposed the application. The claim was that the child's residence with them was likely to be seriously detrimental to her welfare. There were concerns as to the relationship between the parents, in particular relating to criminal charges brought in England against the father, subsequently dropped; an allegation that he had expressed a desire to sleep with the

mother's daughter from a previous relationship; and certain threats said to have been made by him to social workers and support workers. There were also anxieties as to the capabilities of the parents to care for the child as they both had learning difficulties. This was not a case of proven harm in the past, but rather of the likelihood of harm if the child was to live with the parents. A permanence order with authority to adopt was granted by the Lord Ordinary. The Inner House refused a reclaiming motion, except in relation to the grant of authority to adopt, which had not been defended by the authority. Permission to appeal to the Supreme Court was granted.

[91] The judgment was delivered by Lord Reed with whom the other justices agreed. His Lordship took the opportunity to make a number of general observations as to the statutory framework, the relevant case law and the court's function both generally and in the application of the threshold test. It was confirmed that section 84(5)(c) lays down a factual threshold test. In the circumstances of the case it had been necessary for the court to be satisfied in relation to each of the parents, that the child's residence with that person was likely to be seriously detrimental to her welfare. The welfare provision in section 84(4) plays no part in this exercise. Guidance can be taken from decisions concerned with the "similar judicial function in relation to the corresponding threshold test in England and Wales" (paragraph 19). In a case where the application is based upon reasonable suspicions or beliefs, it is the task of the court to decide whether those suspicions are well-founded. The court finds what the facts are, and makes predictions based upon the facts. A conclusion that harm is likely must be based on findings of fact established on a balance of probabilities. If the burden of proof is not met, the alleged fact is treated as not having occurred. It is for the court to decide where the truth lies.

[92] Having supported these observations by reference to the jurisprudence from south of the border, at paragraph 25 Lord Reed said that "the considerations which led to these conclusions in the English cases are equally applicable to the Scottish legislation." Furthermore, the threshold test requires not simply detriment, but that residence with the parent is "seriously" detrimental. Society must be willing to tolerate diverse standards of parenting. Finally, in relation to the application of the legislation, his Lordship observed that it is important that the court's reasoning demonstrates a correct application of the legislation. It is of interest to note that, amongst other things, the case concerned the lack of a parenting assessment of the father, which was of relevance since the onus of proof lay on the authority (paragraph 57). The decision of the Supreme Court and its reasoning provides a salutary reminder that allegations of criminal and other serious misconduct must be proven.

The sheriff's decision

[93] The key question is whether the sheriff erred in his conclusion that the petitioners failed to prove the facts necessary to pass the test in section 84(5)(c)(ii) (see the opening remarks in paragraph 92 where he mentioned insufficient evidence as to the injuries, the lack of a parenting assessment of the father alone, and a failure to exclude kinship care overseas). In overturning the decision, the SAC relied on a perceived error of law on his part in respect of the application of the test. Reverting to the sheriff's opinion, it is clear that he was heavily influenced by the decision in *West Lothian Council*. It caused him to look for proof that it was likely that the father would harm the child in the future. The petitioners had not proved that he had damaged his child in the past, and, particularly in the absence of a parenting assessment, there was no other factual basis for the necessary finding. He cited

paragraphs 22/23 in *West Lothian Council* and the reference to the insufficiency of a conclusion that there was a real possibility that a parent had harmed a child – such facts had to be established upon a balance of probabilities.

[94] It is clear that the sheriff was not impressed by the general approach of the petitioners, nor by their invitation to the experts to support the reasonableness of its actions. In short the petitioners considered that it was sufficient for them simply to prove an unexplained non-accidental injury occurring to the child when he was in the care of both parents. In the sheriff's view the experts were not asked to address the correct issues. For example, there were no formal parenting or risk assessments. There was an *a priori* assumption on the part of the authority that the unexplained injuries necessarily meant that the child could not be returned to either parent and that no further assessment was needed.

[95] The sheriff accepted that well-suited adoptive parents had been identified, thus a safe and stable life for the child was "tantalisingly close". However this did not absolve the petitioners of the need to prove that the child could not be returned to his father without serious detriment, or the likelihood of such, to his welfare. The father's offer to co-operate with the agencies had simply been rejected. While he would need "substantial support" (paragraphs 37/38), the severance of the family ties required "proper evaluation and evidence" (paragraph 66).

[96] It was recorded that a number of witnesses made positive remarks about the father. The sheriff appeared to be impressed by him as a witness and as an individual. He was credible in his denial of responsibility for the injuries (and it can be remembered that the mother had lost the care of her other children). The father was determined to keep his son and he presented as a better parent than the mother. He was "sincere" in his offer to be a sole carer and to follow social work guidance (paragraph 94). The "sticking point" was his

blind spot when it came to the potential culpability of the mother (paragraph 78). Crucially the sheriff did not make a finding that on the balance of probabilities the mother was the culprit, though standing the father's position, and without her evidence, it might have been difficult to do so. The father could be hiding something, but that did not mean that the petitioners had shown that he could not be safely entrusted with the care of his son. According to Baroness Hale it needed to be heard "loud and clear" that a real possibility that a parent had harmed a child did not allow a prediction that it was likely to happen again (*Re J* paragraph 22).

[97] Ultimately the sheriff took the view that the threshold for state interference in respect of the father's right to live with or regulate the residence of his son had not been crossed. All that could be pointed to was the fact of culpable non-accidental injuries when the child was three months old and in the joint care of his parents, one of whom was responsible for what happened. The result was that the child would remain subject to a compulsory supervision order and placed with foster carers.

The decision of the SAC

[98] The focus of the appeal to the SAC was that the true question is whether there is a real possibility of injury to the child if returned to either or both of his parents. *Re J* concerned an application of the terms of the 1989 Act in respect of children who had not been injured. The better comparator was the *Lancashire County Council* case. The 2007 Act should be interpreted in like manner. The SAC was referred to the decision in *Re M,* which, having regard to the present tense "is" in the Scottish test, was said to support the construction that it was designed to cater for children in respect of whom residence with the parent is seriously detrimental at the point of the child's removal into care. The SAC agreed

with that submission. The test was simply "a jurisdiction point" (paragraph 11). As a result the sheriff erred in thinking that the father's parenting skills were relevant to the criteria in the statutory provision. The threshold had been crossed at the point when the child was taken into care in circumstances of an unexplained non-accidental injury. In the view of the SAC, at that date residence with the father "is" seriously detrimental to his welfare for the purposes of section 84(5)(c)(ii) (paragraph 12). That was the "inevitable conclusion".

[99] This was sufficient to allow the appeal, but the SAC also addressed the second limb of the test, namely that living with the father "is likely to be seriously detrimental to the welfare of the child". It was submitted that the sheriff's approach conflated the need to ascertain facts on a balance of probabilities with the predictive exercise of a real possibility of serious detriment in the future. It was enough to prove that the pool of possible perpetrators consisted of the child's parents. In any event the sheriff's approach was irrational, and he had failed to take account of relevant evidence.

[100] The SAC held that the sheriff's focus on the absence of a parenting assessment would be relevant at the point of the welfare and proportionality test under other provisions of the Act, but not to the threshold test. If the sheriff had properly directed himself it would have been "self-evident" that a non-accidental injury to a three month old baby while in the parents' care, when one or both of whom must have been responsible, meant that there was a likelihood of serious detriment in the future in terms of the second limb of the test. The matter which gave the sheriff concern would then have come into play at the second welfare stage. The first stage was met if there was a real possibility of future serious detriment. The sheriff required this to be proved on a balance of probabilities, but this applied only to proof of the facts upon which the risk assessment was made (*Re H*). Were it otherwise the court

would be unable to intervene when it was known that one of the parents had injured the child (*Lancashire County Council* and *Re S-B* at paragraph 35).

[101] The SAC criticised various passages in the sheriff's discussion of the evidence. He had a duty to decide whether the father, who had a stake in a particular version of events, was truthful and reliable. Absent a conclusion on reliability, his observations about credibility were meaningless. The father must know who injured the child, yet he would not say. The sheriff was plainly wrong in his assessment of the father's evidence about the perpetrator. It was "at best contradictory, at worst disingenuous". Despite his denial, he was insistent that the mother, with whom he was still living, did not injure his son. For over three years he had maintained that he wanted the child returned to their joint care (paragraphs 22/23). The SAC stated:

> "The fundamental point is this: assuming that he was not the perpetrator, which for the reasons just given is a major assumption, his unwillingness to blame the mother and, indeed, his willingness to maintain that she did not cause the injuries despite what is admitted before the children's hearing, must logically result in the conclusion that at the date SD was taken into care the child's residence with him *was* seriously detrimental to the welfare of the child or at the time of the sheriff's decision *was likely to be* the same. It is a clear inference based upon the established fact of a non-accidental injury to the child while in the sole care of GD and the mother. Given that conclusion, it inevitably follows that for the purposes of the threshold test it is irrelevant that late in the day he expressed the wish to be SD's sole carer."

Although the petitioners' position had been vindicated, there was criticism of the decision to peril the case on the proposition that the test would be met merely by the fact of non-accidental injuries to SD coupled with the lack of explanation by the parents and the continued denial by the father of fault. The sheriff's task would have been easier if there had been medical evidence as to when the rib fracture occurred and whether it would have been noticeable to a parent who had not caused it (paragraph 27).

[102] Having overturned the sheriff on his conclusion as to section 84(5)(c)(ii), the SAC moved on to the welfare stage. It did consider the possibility of a remit to the sheriff on this, but further delay had to be avoided. In this context the point which caused the SAC most difficulty was the question of the father as a sole carer. "The arguments for or against it are not clear cut" (paragraph 34). The SAC had reservations as to the sincerity of the father's statement that, despite his affection for her, he was prepared to leave the mother. The explanation that his late change of front was prompted by the psychologist's report, which itself had come late in the day, was not believed. The possibility of sole care should have been advanced much earlier.

[103] Nonetheless, these factors and the others discussed at paragraph 34 of the judgment, were not in themselves of sufficient strength to outweigh those in favour of a parenting assessment based on the father caring for the child alone. For the SAC the real problem and the "most troubling aspect of this case" were the injuries to the child and the father's position on them (paragraph 35). It can be observed that, in the result, even on the SAC's preferred approach, the key issue remained the injuries to SD and the father's refusal or inability to explain them. The dilemma posed by the uncertainties as to the circumstances of the injuries had not gone away.

[104] The SAC accepted that the independent expert was asked the wrong question, but if she had been directed properly she would still have said that it was not possible for the child to return to the father in the absence of any explanation for the injuries. She said that any parenting assessment would start with an exploration of the circumstances of the injuries. The psychologist took the same view. She said that either the father was the perpetrator or he was unaware of the serious injuries. Either scenario raised serious child protection and parenting capacity concerns. What would be needed would be an acceptance

that the injuries occurred, and a sustained commitment to improving all aspects of parenting to ensure that it would not happen again. This remained her position even in the context of the father as a sole carer. At paragraph 37 the SAC quoted a passage from the evidence of the jointly instructed psychologist:

> "The difficulty with regard to the injuries is I understand that both parents have said that they do not know how these injuries occurred. Both myself and (the independent expert) had the same experience of speaking with (the father) and his partner in relation to the injuries and found that their acceptance that the injuries had happened and therefore their ability to consider what they may need to change in their parenting and to empathise with the experiences (the child) must have had, their ability to do that was extremely low and that would cause concern about their ability to safeguard him in the future."

[105] Plainly the sheriff was not persuaded that further assessment was pointless, however for the SAC the evidence of both experts was compelling. It followed that there was nothing to be gained by refusing the application or by continuing it for a parenting assessment to be carried out. There was no evidence of a likely change of heart by the father which might open the door for such an exercise. Without a change of circumstances "a permanence order should be made which would safeguard and promote the child's welfare throughout his childhood". As a result the child would come out of the children's hearing system, but would still have the protection afforded by the local authority's social workers. Suitable adoptive parents had been identified who will offer the child a stable and loving family unit. He was presently thriving in his foster placement, but such was not a long term option. The "necessity" test was met and it would be better for authority to adopt to be granted, than for it not to be granted. Regarding the terms of section 83(3)(b) and (c), the court was satisfied that the parents' consent should be dispensed with on the basis that they are both unable satisfactorily to discharge their parental responsibilities and exercise their parental rights (except regarding contact) and are likely to be unable to do so for the future, all for the same

reasons as those underpinning and justifying the permanence order. The court was satisfied as to all the section 14 conditions, including the need to safeguard and promote the welfare of the child as the paramount consideration.

[106] The SAC's approach was that it did not matter that there remained uncertainty as to whether the father bore responsibility for the injuries to his son. A permanence order could be made (a) because of the injuries, and (b) the father's failure to explain the circumstances, which, it was said, meant that assessment of him would achieve nothing. The overall welfare of the child required that the permanence order be granted. Built into this was the earlier finding that the test in section 84(5)(c)(ii) had been satisfied either on the basis of the circumstances at the time of the child's removal into care, or because future serious detriment was likely if he was returned to the father's care. The sheriff never reached the welfare stage in that, for him, in the absence of further assessment the purely factual test set out in the subsection had not been met. In particular he was not persuaded that he could make the necessary finding in the absence of proof that the father had harmed his son.

[107] Finally, the SAC noted that recently the parents had another child, who is in the care system. This was not a relevant factor for the purposes of the appeal. A remit to the sheriff to explore this development would cause yet more delay and would have an uncertain outcome, all of which might be detrimental to SD's welfare. There was the safeguard that any adoption petition requires the order of a sheriff. The SAC made an order for indirect contact twice a year for both parents.

[108] Before leaving the judgments in the courts below it can be noted that the SAC criticised the sheriff's statement that:

> "The onus of establishing that the child's residence with each parent is, or is likely to be, seriously detrimental to the welfare of the child is upon the petitioner and must be proved upon a balance of probabilities". (finding in fact and law 12)

As expressed, this observation is open to criticism, but when viewed in the context of the sheriff's careful discussion of the law, it can be seen as a shorthand conflation of the correct proposition that the test can only be met if based on facts which have been established on a balance of probabilities; see for example paragraph 13(7) and the discussion of *Re J* at paragraph 15. However, even if the sheriff is to be regarded as having misdirected himself, it was not material to his reasoning and decision. He correctly focussed on whether the petitioners had proven facts and circumstances which would allow a positive finding to be made. For the sheriff "the crux of the matter" (paragraph 89) was the unproven allegations of criminal conduct against the parents. It matters not whether this lack of proof arises in terms of proof of facts which are sufficient to establish a real possibility of serious detriment in the future, or in the context of proof of serious detriment in the future on a balance of probabilities. The real issue (discussed below) is whether the Scottish courts should or should not follow the decisions in *Re H* and *Re J*.

Discussion resumed

[109] This appeal raises important questions as to the interpretation of section 84(5)(c)(ii) and related provisions of the 2007 Act, and as to how they are to be applied in "uncertain perpetrator" cases. This would appear to be the first time the Inner House has been asked to address these matters, though clearly it is well-trodden ground south of the border. The first point to make is that the Scottish legislation must be considered on its own terms and in the context of child protection legislation and systems generally in Scotland. Much can be gained from a consideration of the jurisprudence in England and Wales, however the materially different statutory provisions and procedures should be kept in mind. For

example, there is no equivalent of the children's hearing system, with the court requiring to make an order, even if just a supervision order, at an early stage. In addition it seems clear that the split hearing approach in England and Wales, though not envisaged in the 1989 Act, played a part in the importance given to the identification and resolution of a preliminary jurisdictional issue by the first stage fact-finding judge. (It is understood that single hearings are now the norm in England and Wales.)

[110] The Adoption Policy Review Group prepared a report making recommendations which led to the 2007 Act. It is evident from the Scottish Parliament stage 2 debate that the wording of the Act was based upon these recommendations. At paragraph 5.25 of the report the group said:

> "A new permanence order should only be granted where the court is satisfied that the child cannot reside with a person who has parental responsibilities and parental rights because:
>
> - there is no one with parental responsibilities or parental rights; or
> - residence with any of the persons who have parental responsibilities or rights is likely to be seriously detrimental to the child's health or development."

The group considered that a "high test" was required to justify the making of an order the minimum effect of which would be to remove the right to have the child live with them, or to regulate the child's residence, from the birth parents of a child.

[111] As originally drafted the bill contained no such test. This was identified in the stage 1 committee report to the Scottish Parliament. It had been observed by the Law Society of Scotland and others that the bill did not specify the grounds upon which a permanence order could be sought. The bill stated that the court should not make a permanence order unless that would be better for the child and there was a reference to the need to safeguard and promote the welfare of the child as the paramount consideration. However the committee was concerned:

> "that the grounds for making a permanence order are not sufficiently clear. One possible solution could be to amend section 84(5) to read: 'It is necessary in the interests of safeguarding or promoting of the child's health, development and welfare, that the order be made.'"

[112] The bill was then amended in line with its terms as subsequently enacted. It would appear that at no stage was there any explanation for the introduction of the present tense "is" along with the reference to likelihood of serious detriment. At the stage 2 debate the amendment was said to have been prompted by the group's recommendations. Counsel for the appellant submitted that all of this is inconsistent with interpreting this part of the legislation as referring to the past as opposed to the circumstances at the date of the court's determination.

[113] It is of interest that the concern was to identify the grounds upon which a permanence order could be made. The Current Law Statutes annotator observed "Subsection 5(c) can be considered as the 'grounds' for a permanence order". There is no suggestion of a preliminary jurisdictional test of the kind discussed in the English cases. That said, satisfaction of the criteria in section 84(5)(c), while a necessary pre-requisite, is not in itself sufficient for the grant of a permanence order; see the rest of section 84.

[114] When considering whether to present an application for a permanence order a local authority requires to reach a view as to whether it can establish all that is required to persuade the court. It will be immediately apparent that, whatever else, the authority will have to meet the test in section 84(5)(c). If there is a person with parental rights, the authority will assess all the relevant facts and circumstances available to it and decide whether in any application to the court it can satisfy subsection (c)(ii). It seems likely that in most cases the child will not be living with either parent, so no doubt, as in the present case, the emphasis will be on persuading the court that if the child is returned to either or both

parents, this will be, or is likely to be, seriously detrimental to the child's welfare. In a case such as the present, the foundation of the application will be a concern that since one or both of the parents has seriously injured the child in the past, this may happen again in the future. If the injured child died, the concern may relate to what might happen to siblings. If the parents have separated and one of them has set up house with a new family, it will be necessary to satisfy a sheriff that the new family is at risk of serious harm from that parent. No doubt there are a number of other possibilities of varying complication.

[115] After a contested application, the sheriff will be well advised to apply his mind at an early stage in his reasoning to the section 84(5)(c)(ii) issue. It raises a question of fact which needs to be decided upon the evidence. The evidence must go beyond mere suspicions or allegations that harm has been inflicted in the past. The onus of proof rests on the petitioning authority. The issue will be resolved one way or the other on all the evidence led before the sheriff, including that regarding past and present events. The focus is not simply on what happened in the past. It would make little sense to leave out of account material changes of circumstances since protective arrangements were taken, for example that in the meantime the parents had separated, perhaps because it was clear that one of them injured the child; or that an alcoholic is now teetotal; or that a parent has been convicted and sentenced to imprisonment in respect of the serious abuse of a child.

[116] The sheriff will make such findings as have been established upon a balance of probabilities, and then apply his mind to the statutory test. An authority might well have acted responsibly and in accordance with its duty in taking protective action when doubts and suspicions emerged and then putting an application for a permanence order before the court; but respect for family life requires the court to base its decision upon proven facts, not forgetting that serious detriment is required.

[117] In a case such as the present, the court then encounters the problem discussed at length by judges south of the border – what to do when something bad has happened in the past, but the responsible person cannot be identified? Leaving that aside for the moment, there is nothing in the Scottish legislation which suggests that when considering section 84(5)(c)(ii) the court should focus only on the position as at the date of the removal of the child from the parents' care. In Scotland that removal can be and is done without any identification of a guilty party, the present case being a good example. The court requires to decide whether to make an order which from that day onwards will remove from each parent the parental right to live with the child. Amongst other things, at that time, the judge must "be satisfied that" the child's residence with each parent "is, or is likely to be, seriously detrimental to the welfare of the child." If the answer is no or not proven, then a necessary condition of making a permanence order is not satisfied, and without more ado the application must be refused. In that sense it is a threshold issue in that unless met, nothing else arises. And it has been authoritatively decided (*West Lothian Council*) that it is a pure issue of fact to be uninfluenced by the paramountcy of the welfare of the child as provided for in section 84(4). It is more difficult to identify this as a jurisdictional issue. It is not treated as a preliminary issue to be decided in advance, and it is not so presented in the legislation. Indeed it comes at the very end of the various statutory tests. It is of course a vitally important provision. It is the key safeguard against undue state interference in family life, and, as the cases show, it can raise exceptionally difficult issues.

[118] Judges south of the border have been faced with a dilemma which does not arise in our courts. If a child has been badly damaged by one of the parents, and it is held that the test in section 31(2) of the 1989 Act is not met because it has not been possible to identify the responsible party, the application must be refused with the possibility, perhaps the

likelihood, that the child will be returned to a parent or parents who may present a very real risk to him. Understandably some judges have strained not to do that. Others have said that, in what is at root a difficult balancing exercise between child protection and respect for family life, sometimes that risk must be run. In Scotland our child protection system means that usually this dilemma will not arise. Thus in the present case, the refusal of the application does not mean return of the child to either parent. Counsel for the appellant was at pains to stress that the sheriff's refusal of the application did not have that effect. Nonetheless, and notwithstanding the differences in certain procedures north of the border, so far as the test in section 84(5)(c)(ii) is concerned it remains important to analyse and assess the impact of uncertainty as to the perpetrator of harm to a child.

[119] As already noted, the SAC's decision was heavily influenced by the decision of the House of Lords in *Re M*, which has already been summarised. The outcome in that case was that if the court could determine that at the date when protective arrangements were made, a child concerned in the application was suffering or was likely to suffer significant harm attributable to the care given to him falling below a reasonable standard, the court had jurisdiction and could move on to the welfare stage, which would include, but need not be ruled by, a consideration of any harm which the child had suffered or was at risk of suffering, all in terms of section 1(3)(e) of the 1989 Act. At that stage the welfare of the child is the paramount consideration. None of this precluded the court from taking account of all relevant considerations at the date of the hearing, but it avoided the consequence of the Court of Appeal's construction of section 31(2), which would have meant that, despite circumstances which clearly justified the need for *interim* protective measures, as a result of their efficacy the court could make no order, not even a supervision order.

[120] The problem which caused difficulties in *Re M* would not arise under the Scottish legislation. The wording of the two tests is materially different. In Scotland the focus is on the ability of each parent to provide safe and adequate care for the child or children concerned; in England and Wales the question is, if no order is made will the child or children suffer significant harm now or in the future? If the conditions in section 31(2) had been interpreted as conditions which had to be met having regard to the circumstances at the date of the court's decision, Parliament's clear intentions would have been thwarted, and the courts would be subject to "the tyranny of language". No such tyranny arises under the 2007 Act.

[121] While not involving an uncertain perpetrator, *Re M* did, at least for a while, provide the courts south of the border with a solution to the problems posed by such cases. Where one or other of joint carers fell below the required standard, with a child suffering significant harm as a result, section 31(2) was satisfied even if the responsible party could not be identified. Thus the way was open for the court to make a supervision or care order if and in so far as the circumstances at the date of the hearing justified it. The proven fact that the child had suffered significant harm while in their joint care meant that an order did not infringe the parents' right to respect for their family life. The steps that were taken were no more than was reasonably necessary to pursue the legitimate aim of protecting the children from further injury (*Lancashire County Council* v *B*, Lord Nicholls at page 168C). The dilemma posed by "uncertain perpetrator" cases was resolved in a manner which favoured child protection, though subsequently the case law moved in the direction of respect for family life.

[122] The wording of the English test as interpreted in *Re M* facilitated the above solution. At no stage was it necessary to focus upon each parent and assess the risk of him or her

harming the child. It was enough that harm had occurred while in their joint care. To proceed in any other way would be "dangerously irresponsible" (Lord Nicholls in *Lancashire County Council* at page 165G) in circumstances which, sadly, were far from exceptional. Parliament had not foreseen such cases, but it was necessary to interpret the attributability part of section 31(2) in a broad manner, even if it meant that a wholly innocent parent, or even parents, were at risk of losing their child, all in order to ensure that an unidentified and unidentifiable carer did not cause further injury to a child which he or she had already seriously damaged.

[123] The question arises as to whether the Scottish legislation allows a similar approach. To what extent, if at all, is it prevented by the now well-established proposition that the court cannot make a prediction of future harm based upon mere suspicions? For example, if the parents have separated, must an application for a permanence order be refused because each is tainted only by a cloud of suspicion, not by proof of responsibility? In such circumstances, and in the absence of other adverse factors, can a Scottish court nonetheless make a positive finding that residence with each parent "is, or is likely to be, seriously detrimental to the child's welfare", bearing in mind that it would appear that a real possibility of such harm is sufficient to meet this test? In *Re O* it was acceptable for the judge, when deciding on where the best interests of the child lay, to proceed upon the basis that each parent was a possible perpetrator. Can the same apply in Scotland under the terms of the 2007 Act?

[124] In essence the SAC proceeded upon this basis. Until the father explained the circumstances of the injury, he could not be entrusted with the care of his son. However, it is for the petitioning authority to prove its case, not for a parent to rebut what is no more than an allegation. For the sheriff, this was the rock upon which the application foundered.

The petitioners had pinned their colours to one mast – the unexplained injury while the child was in his parents' joint care. The sheriff required more, at least where the father was offering, he considered genuinely, to leave the mother and look after the child on his own and subject to social work monitoring and support. It is worth repeating that so long as the parents remain together and propose joint care of the child, the position is more straightforward in that the child would be returned to the same dangerous position as before. It was the father's "sincere" offer to look after his son on his own which exercised the sheriff. Whatever doubts might arise, plainly the sheriff did not take the view that the proposal was unrealistic.

[125] It might be thought that the key to resolving the problem is to focus on the proven fact of an unexplained non-accidental injury to a baby in his parents' care, and conclude that this alone justifies a prediction that there is a real possibility that either parent will harm the child again. That would give the court power to make an order which it considered to be consistent with the child's best interests, albeit, as with Lord Nicholls in *Lancashire County Council*, one would have to recognise that child protection concerns were justifying the possibility that an innocent parent might lose the right to live with his child. If the parents choose not to co-operate (or "come clean"), it will often be the case that the local authority and the court will be unable to identify whether the child was harmed by the mother, the father, or both of them. In such cases it might be seen as a short step to say that, unless circumstances show otherwise, if the child is returned to the care of either of them there is a real possibility of further significant harm.

[126] The sheriff felt constrained by the authorities to take a different path. It was necessary for the petitioning authority to explore other possible avenues before it could be held that the requested order can be made. The SAC favoured the view that the court could

visit upon the father the consequences of his failure to explain what had happened and his apparent refusal to reconcile the clear inconsistencies in his account. It was critical of the stance taken by the father. On the other hand the sheriff, who in fairness saw and heard him, was more sympathetic. On the evidence he was not prepared to make an order dependent upon the proposition that the child could not be safely reunited with his father on the basis of his sole care. The question might be asked (and will be addressed below) whether, whatever the law might be, it is open to an appeal court to overturn that decision.

[127] Reverting to the question asked above concerning a real possibility of future harm when the identity of the perpetrator of past harm is unknown, in *Re S-B* the Supreme Court considered that, while the threshold had been crossed simply on the basis of a finding of proven harm, it remained necessary to identify the pool of possible perpetrators in order to identify the risks to the child and the steps needed to protect him. A person could be placed in the pool on the basis that there was a real possibility that he was responsible for the harm. Baroness Hale asked whether the object of the threshold criteria involved limiting intervention to those cases "where the person whose rights are to be interfered with bears some responsibility for the harm?" (paragraph 20). Her Ladyship referred to the Court of Appeal's unchallenged decision in *Lancashire County Council* that the threshold had not been crossed in respect of the childminder's child since he had not been harmed at all.

> "The only basis for suggesting that there was any likelihood of harm to him was the possibility that his mother had harmed the other child and that had not been proved: *In re H* [1996] AC 563 applied. The local authority did not appeal against this." (paragraph 23)

[128] Baroness Hale noted that *Re O* concerned the more common problem where the child had been harmed at the hands of one of his parents, but the court could not determine which. In that decision it was said that it would be "grotesque" to proceed on the basis that

the child was not at risk from either of them. Her Ladyship continued by quoting her own observations in *Re B* [2009] 1 AC 11 paragraph 61 to the effect that once harm or likelihood of harm is established, the court, when deciding which outcome is best for the child, cannot shut its eyes to the undoubted harm suffered in the past simply because it does not know who was responsible. In her Ladyship's view (with which six other justices agreed) the real answer to the problems posed were a proper approach to the standard of proof (balance of probabilities) and ensuring that the same judge heard the whole case (as opposed to split proofs). At the end of her judgment (paragraph 49) and on the basis of the decision in *Re H*, her Ladyship ruled out making a prediction of a real possibility of future harm by a mother to her child W on the basis of a real possibility that she had injured her child J in the past. This *obiter* observation caused much concern (see *In re F (Interim Care Order)* [2011] 2 FLR 856) and on the face of it excludes the potential solution to the current issue mentioned earlier.

[129] *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 was a 3-2 decision in the House of Lords. It is not without its critics; see for example Hemmingway and Williams, 1997 (volume 27) Family Law 740. The question was whether unproven allegations of sexual abuse by R upon a child justified care orders made in respect of three younger children. The judge had only a suspicion that the abuse had occurred, therefore he dismissed the application on the basis that the test in section 31(2)(a) had not been made out. An appeal was refused in the Court of Appeal. This decision was upheld in the House of Lords (Lord Browne-Wilkinson and Lord Lloyd of Berwick dissenting). The majority held that, for the purposes of a prediction if a care order was not made, it was sufficient if there was a real possibility of sexual harm in the future; that the burden of proving a relevant fact on the balance of probabilities rested upon the applicant; that the judge had rejected the only

evidence alleged which gave rise to the care order proceedings, namely that R had abused the elder child; and that the threshold conditions had to be founded upon a factual basis, not suspicions.

[130] Dissenting from the majority view, Lord Browne-Wilkinson said at page 572G-H:

> "The combined effect of a number of factors which suggest that a state of affairs, though not proved to exist, may well exist is the normal basis for the assessment of future risk. To be satisfied of the existence of a risk does not require proof of the occurrence of past historical events but proof of facts which are relevant to the making of a prognosis."

His Lordship cited the example of air raid warnings sounded on the basis of unconfirmed sightings of approaching aircraft which might be enemy bombers. He noted that child abuse, particularly sex abuse, is particularly difficult to prove. If legal proof was required, the court would be powerless to intervene to protect children when grave suspicions remain.

[131] In delivering the majority opinion, Lord Nicholls of Birkenhead said that the court could make a care order only if satisfied that the child is already suffering significant harm or is likely to suffer such harm in the future. In this way Parliament had balanced the different interests involved. The statutory reference to "likely" in "likely to suffer significant harm" meant likely in the sense of a real risk that should not be ignored having regard to the nature and gravity of the harm feared in the particular case (page 585F). (This formulation has been repeated with approval in subsequent decisions.) The first limb of the threshold conditions predicated an existing state of affairs at the time of the application for the order, or if earlier, at the time temporary protective arrangements were put in place (*Re M*). That limb is decided by proof of facts on a balance of probabilities. The same approach applies to the question whether to predict a real possibility of significant harm under the second limb. In the case before the House the first limb could not be applicable to the younger children

who had never been harmed. In the Court of Appeal the majority view was that where the risk of harm depended upon the truth of disputed allegations, unless the court determined that they were true, it could not be satisfied that the children were likely to suffer harm if the order was not made. The dissenting view (Kennedy LJ) was that unproven allegations of misconduct can justify a view that there is a real possibility of harm in the future. (In the present case it can be remembered that the harm is proven, but not the identity of the perpetrator.)

[132] Lord Nicholls stated that there must be a foundation of proven fact before a court can conclude that there is a real possibility that a child will suffer harm in the future. The statutory provision, unlike that regarding *interim* measures, "spoke the language of proof, not suspicion" (page 590H). If an application under the first limb based on the parents' alleged maltreatment of the child fails on a lack of proof of maltreatment, a remaining suspicion would not satisfy the second limb of the test. Were it otherwise the burden of proof would be reversed. Where the one and only relevant fact is not proved, the application must fail.

[133] His Lordship was conscious of the difficulties confronting social workers. He noted that sometimes, whatever they do, they cannot do right. He was also aware of the difficulties facing judges when there is conflicting testimony on serious allegations. Sometimes judges are left deeply anxious at the end of a case. There may be an understandable inclination to "play safe" in the interests of the child.

> "These are among the difficulties and considerations Parliament addressed in the Children Act 1989 when deciding how, to use the fashionable terminology, the balance should be struck between the various interests. As I read the Act, Parliament decided that the threshold for a care order should be that the child is suffering significant harm, or there is a real possibility that he will do so. In the latter regard the threshold is comparatively low. Therein lies the protection for children. But, as I read the Act, Parliament also decided that proof of the relevant facts is needed if this

> threshold is to be surmounted. Before the section 1 welfare test and the welfare 'checklist' can be applied, the threshold has to be crossed. Therein lies the protection for parents. They are not to be at risk of having their child taken from them and removed into the care of the local authority on the basis only of suspicions, whether of the judge or of the local authority or anyone else. A conclusion that the child is suffering or is likely to suffer harm must be based on facts, not just suspicion." (page 592G-H)

[134] Returning to the issue in the present appeal, would a finding that a child had been badly injured when in his parents' care amount to no more than "a suspicion" that he might be injured again if returned to his father's sole care? Having regard to the sheriff's judgment it is clear that it was proven that the child suffered serious non-accidental injuries of a culpable and reckless nature at the hands of one or both of his parents. It was also established that neither parent accepts responsibility, nor do they blame the other. Neither parent has provided a satisfactory explanation of the circumstances, and, as the SAC observed, there are obvious difficulties in reconciling all aspects of the father's evidence. As a result of all of this it has not been possible to go beyond the finding that the child was injured by one or both of his parents. What was Parliament's intention in relation to such cases in so far as it can be gleaned from the relevant statutory provisions in the 2007 Act?

[135] In the context of the English legislation in *Re H* Lord Lloyd of Berwick, when dissenting, summarised his views at page 582G-H:

> "(1) 'Likely' in section 31(2)(a) means that there is a serious risk or real possibility that the child will suffer significant harm. (2) Where it is claimed that the child has suffered or is suffering significant harm the standard of proof is the simple balance of probabilities, no matter how serious the underlying allegation. (3) Where it is claimed that the child is likely to suffer significant harm, the simple one-stage approach suffices. The question is whether, on all the evidence, the court considers that there is a real possibility of the child's suffering significant harm in the future. If so, the threshold criterion is satisfied. The court does not have to be satisfied on the balance of probabilities that the child has in fact suffered significant harm in the past, whether by sexual abuse or otherwise, even where the allegation of abuse is the foundation of the local authority's case for a care order."

This thinking would open the way for a similar broad approach to the Scottish test; however, as mentioned, it was not shared by the majority of the court. That said, there is no doubt that SD suffered serious harm. Does the fact that it cannot be proved that the father was responsible prevent removal of his parental right to live with the child? Whether it was intended or not, it is important to consider the different wording of the tests on either side of the border. In Scotland it concentrates on harm caused by or likely to be caused by residence with a parent whose rights are to be removed. In England and Wales attention is on the harm caused by or the likelihood of harm attributable to a lack of proper care if an order is not made. Given the Scottish focus on each parent, even if the SAC was correct in its approach to the present tense alternative and the applicability of the approach set out in *Re M*, the dilemma discussed above, based upon the inability to identify the perpetrator, would still arise. This would be true whichever limb of the Scottish test one was applying. The fundamental question of law raised in the present appeal is whether a lack of proof that a father harmed the child prevents an order being made. This was the focus of the appeal to the SAC. In cases of the present kind the dilemma will always arise in one shape or form where the application and the proven facts do not go beyond proof that a child suffered unexplained serious abuse at the hands of one or both of his parents. There are similarities between the issue in the present appeal and that which caused a division in their Lordships' House in *Re H*. But is it correct that the better comparators are *Lancashire County Council* and *Re O*?

[136] The UK Supreme Court returned to these matters in *Re J*. Matters were engineered in such a way as to force the Supreme Court to give guidance on the single issue presented to it. The court reaffirmed that a prediction of future harm must be based upon facts proven on a balance of probabilities. A real possibility that a mother had killed her first child could

not, by itself, justify a prediction of future harm to a child by that person. Since that possibility was the sole ground relied upon by the local authority, the ruling that the threshold was not crossed would stand. Both Lord Wilson and Lord Reed observed that it might be different if the possible perpetrators are the parents and they are putting themselves forward as joint carers for an unharmed child. Furthermore some justices stressed that in most cases the relevant facts will go well beyond the single issue relied upon by the authority.

[137] In the present case the father has proposed that he look after the child on his own. It is not a case of the kind postulated by Lord Wilson and Lord Reed. *In re J* dealt with children who had never been harmed. The present appeal concerns a child who has been harmed. Does that make a difference? In principle the answer should be no, but in practice it may cause greater scrutiny to be given to all the relevant facts and circumstances before reaching a conclusion that the statutory test is not met and the application must be refused.

Decision

[138] It is now necessary to draw the various strands together and reach some conclusions on the issues raised by this appeal. The first is whether the SAC's interpretation of section 84(5)(c)(ii) is correct. For the reasons given above, the answer is no. Both parts of the test, including the present tense first limb, should be addressed on the basis of all the relevant information before the court at the time of its decision. The test is not met simply by reference to the circumstances at the time when a child was removed from the parents' care. If the test is met, the court will then require to consider the issues set out in the rest of section 84 of the 2007 Act, including the paramountcy of the welfare of the child, when deciding whether to grant a permanence order.

[139] The SAC did go on to address the likelihood aspect of the test, and held that it was "self-evident" that a non-accidental injury to a three month old baby while in his parents' care, when one or both of them must have been responsible, meant that there is a likelihood of serious detriment in the future. Given the terms of the narrative above, it will be apparent that this is not correct. It follows that the SAC's decision cannot stand.

[140] It would not be appropriate simply to leave matters there. There are a number of worrying features of the case, not least that at the date of the proof the father was still living with the mother, and that this remains the case today. Given that he is an overstayer and his immigration status is precarious, he is dependent upon the mother both financially and for somewhere to live. In addition there are obvious inconsistencies in the father's account, all as discussed in the SAC's decision. His offer to be a sole carer for his son came late in the day, and there must be reservations as to its practicality. It is not clear that his offer can be carried through. Assuming that the child is returned to his care it is far from certain that the authority will ever be satisfied that the risks of future harm from one or both of the child's parents can be minimised to a satisfactory extent. This is not a case where there has been a clean break and one parent is no longer in a position to cause harm to the child. Judges have made it plain that if the parents are to remain as a family unit, any uncertainty as to whether the child was harmed by the mother, the father or both is less important. It is a concern that the father was ever willing to countenance the child returning to their joint care when, on his account, his son must have been harmed by his partner. And of course, looming over all of this remains the possibility that he was responsible for the injuries to his son, or at best failed in a duty to protect him either before or after the injuries occurred.

[141] In short, and ideally after a considered assessment, a powerful submission could have been presented to the sheriff that notwithstanding the uncertainty over the

circumstances of the unexplained injuries, when they are taken along with other factors, such as those mentioned above, there is sufficient to allow the court to conclude that further significant harm is likely – in the sense of a real possibility – even on the basis of the father as a sole carer. However, as in *Re J*, the authority simply relied upon the unexplained injuries sustained in the past, and, standing the case law, not least *Re J* and *West Lothian Council* v *B*, it is understandable that the sheriff took the view that this alone was not enough to satisfy the test, and that a formal risk and parenting assessment would be required before he was prepared to countenance an order removing the parental rights concerned. (It should not be forgotten that the child also has a real interest in continued family life with his father, recently born sibling, and extended family.)

[142] Having decided that it could set aside the sheriff's decision, the SAC did reflect upon the above matters. It came to the view that they did not outweigh the factors in favour of requiring a parenting assessment on the assumption of the father caring for the child alone. The SAC's decision on the merits of the application was based on what it described as "the most troubling aspect of this case", namely the injuries to the child and the lack of any explanation for them. So, in effect, the SAC agreed with the petitioners that the irresistible key fact was the unexplained harm to SD, and that it mattered not that the perpetrator was unknown.

[143] Necessarily the SAC was doing the best it could on the written information before it. However the sheriff had the benefit of seeing and hearing all the witnesses. Many of his comments were favourable so far as the father is concerned. In my view, his ultimate conclusion was open to him upon the evidence. The SAC disagreed on the basis of a perceived material error in his approach to the statutory provisions. In the circumstances, and in the absence of any other material error of law on the sheriff's part (see above

paragraph [108]), the question becomes: "is there a good and sufficient reason for this court to interfere with what was, if not a pure question of fact, at least an evaluation based upon the facts?" The authority submits that the child cannot be returned to his father, essentially on the basis that any other outcome would be "grotesque", as per the language in *Lancashire County Council*, and therefore plainly wrong. Given the child protection purposes underpinning this part of the 2007 Act, any question of giving priority to respect for family life would, it is said, be irresponsible. The court was urged not to follow *Re J*, in that it concerned children who had never been harmed. It is important to remember that, given the approach taken to the threshold test set down in section 31(2) when the application involves a previously injured child, in England and Wales the problem necessarily occurs only in the context of as yet unharmed children, see Lord Wilson at paragraphs 65/66 of *Re J*. On the view taken above as to the equivalent Scottish legislation, this essentially arbitrary distinction does not arise. If a distinction was drawn between harmed and unharmed children, and the decision in *Re M* was applied to the Scottish test, different considerations would arise. However the decision in *Re M* was not taken in the context of an uncertain perpetrator, and it was designed to deal with a particular problem relating to the wording of the test south of the border. It would make little sense to differentiate between a case involving a child who had been injured and one concerning the sibling of a child who did not survive. In both the same fundamental issues must be addressed. The submission that *Re J* can be distinguished is not correct.

[144] In respect of a question described by Lord Wilson (*Re J* paragraph 59) as "one of the most vexed issues in the public law relating to children" it will rarely be possible to identify obviously right and wrong answers. That said the general direction of the most recent case law is clear. For present purposes the key decision is *Re J*. The UK Supreme Court was

forced to make a difficult choice between child protection and respect for family life. While there were differences of emphasis, all seven justices placed greater weight upon the latter. Lord Wilson (paragraph 69) said that "at last" the court had the opportunity to decide, once and for all, the question as to the relevance or otherwise to the threshold of a carer's presence in a pool of perpetrators. In the present case, given the father's offer and the narrow focus of the petitioners' application, and even on the SAC's approach, this question is at the heart of the matter. No doubt the petitioners were taken by surprise by his late change of position, but this does not elide the need for its implications to be considered and assessed. It remains a fact that either the father or mother, or both, caused serious harm to their son, but is it a relevant fact for the purpose of a prediction of future serious harm by the father given that he is now put forward as a sole carer? Lord Wilson said no, and furthermore that it never can be. "The harm and the person's responsibility for it are the two planks on which any conclusion about likelihood must rest and they are equally sturdy". That was "logical", and child protection should not trump logic. Proof of the key facts "is a bulwark against too ready an interference with family life on the part of the state" (paragraphs 74/75).

[145] Lords Wilson and Sumption disagreed with the other justices upon whether consignment to a pool of perpetrators could, along with other relevant facts, for example culpable failure to protect a child; failure to call for medical attention; lies designed to hide the identity of the perpetrator, amount to a relevant fact. It could provoke a need for further inquiry, which might enable the court to make relevant findings. However, if on its own its value is zero, that value is not changed by proof of facts which are relevant. On this point Lords Wilson and Sumption were in the minority. Lord Hope stated that the "golden rule" is that a prediction of future harm must be based on facts proved on a balance of

probabilities (paragraph 84). However, a finding that X is in the pool of perpetrators in combination with other facts and circumstances concerning his attitude and behaviour might help to show that the threshold is crossed (a view which is reflected in the sheriff's decision). That said, presence in the pool cannot "on its own" be treated as a finding of fact that X caused or contributed to the injuries (paragraphs 87/88).

[146] The sheriff did not make any findings which, along with the father's inclusion in the pool of possible perpetrators, persuaded him that the test in section 84(5)(c)(ii) was met. The SAC made certain adverse comments about the father, but essentially rested its decision upon him being in the pool and having failed to explain what happened. There having been no error in the approach of the sheriff, if this court were to review the evidence and form its own view it would be stepping outside the proper jurisdiction of an appellate court in a case of this nature. In *Re B (Appeal)* [2013] 2 FLR 1075 (UKSC) Lord Wilson observed that when reviewing a trial judge's determination of a child case an appellate court needs to factor the advantages which the judge had over it in appraising the case. His Lordship said:

> "The function of the family judge in a child case transcends the need to decide issues of fact; and so his (or her) advantage over the appellate court transcends the conventional advantage of the fact finder who has seen and heard the witnesses of fact. In a child case the judge develops a face to face, bench to witness box, acquaintanceship with each of the candidates for the care of the child. Throughout their evidence his function is to ask himself not just 'is this true?' or 'is this sincere?' but 'what does this evidence tell me about any future parenting of the child by this witness?' and, in a public law case, when always hoping to be able to answer his question negatively, to ask 'are the local authority's concerns about the future parenting of the child by this witness justified?'." (paragraph 42)

[147] Lord Wilson stressed the difficulty of mounting a successful appeal against a judge's decision about the future arrangements for a child. In all save the most straightforward cases, there is no means of demonstrating that one answer is clearly right and another clearly wrong. In cases concerning the welfare of children an appellate court will be

reluctant to interfere with the judge's decision. Lord Neuberger applied these restraints not simply to appeals on questions of fact, but also to evaluations based upon facts – see paragraphs 58/60. This area of the law was examined in detail by the Inner House in *Anderson* v *Imrie* [2018] CSIH 14:

> "Where there has been no apparent error, and a decision reached which was available on the evidence to a judge acting properly and reasonably, then, everything else being equal, an appellate court should not attempt to form its own view, but should defer to the various advantages of the trial judge and recognise that he was in a better position to decide upon the correct outcome." (paragraph 111 in my own opinion)

[148] It can be recognised that a wholly different approach might be taken to the Scottish legislation, uninfluenced by the jurisprudence in England and Wales based on the 1989 Act. One might view section 84 as a composite whole which envisages a one stage test carried out on all the evidence. Section 84(5)(c)(ii) would not be treated as a self-contained purely factual test which required to be met before the other subsections, including the "welfare paramountcy" consideration, came into play. This would make it easier for a Scottish court to favour the dissenting views in *Re H* and the child protection orientated sentiments expressed in *Lancashire County Council* and *Re O* when pondering on the relevance of proven past harm to a child at the hands of one or both parents to the question – is there a real possibility that in the future one of them will harm that child or another child? It might also be more in line with international obligations concerning children, such as article 9 of the United Nations Declaration on the Rights of the Child 1989. Whatever attractions this might have, in that that often it will not be possible to identify a perpetrator or perpetrators, it cannot be reconciled with the recent authoritative discussion in *West Lothian Council* v *B*; a decision which understandably was influential in the sheriff's decision.

[149] The overall conclusion is that, while recognising that, if faced with the evidence before the sheriff, a different view might have been taken by some judges, there is no good or sufficient basis upon which this court can conclude that the sheriff's decision was wrong, in the sense that it was not available to him if properly directing himself as to the law and the relevant considerations. Once it was decided that the father's offer to look after SD on his own was genuine and merited serious consideration (the sheriff said he was "determined to keep his child" – paragraph 79), and unless the court was prepared to depart from the overall approach laid down in *Re H* and *Re J*, it is understandable that the sheriff felt constrained by the narrow basis on which the application was presented, and thus obliged to refuse it. In essence, the missing evidence was a risk assessment of the father. The need for such was prompted by the fact that SD was injured while in his care, demonstrating that, though not determinative, that circumstance is a relevant consideration (as per the majority view in *Re J*).

[150] I would uphold the appeal from the decision of the SAC and quash the permanence order. Given the need to make progress so far as SD's future is concerned, I would then remit the application to the sheriff for exploration with the parties of the implications of this decision, including whether the petitioners are prepared to address and lay before the sheriff evidence on the various matters identified by him as lacking in the petitioners' case (see paragraphs 92 and 99 of his judgment). It would also be appropriate to take into account the recent birth of SD's sibling, as mentioned at paragraph 43 of the SAC's judgment. It follows from the above that I would not quash paragraph 2 of the SAC's interlocutor; the overall effect being that the application for a permanence order would as yet be neither granted nor refused, and the whole matter remitted to the sheriff for further procedure.