**Note on the Law relevant to Fact Finding Hearings**

**What constitutes a threshold finding?**

1. It is for the local authority to prove that there is a link between the facts upon which it relies and its case on threshold. The local authority must demonstrate why certain facts, if proved, lead to the conclusion that *‘the child has suffered or is at the risk of suffering significant harm’ of the type asserted by the local authority.*
2. A threshold finding must be unusual, at least something more than commonplace human failure or inadequacy. Per Baroness Hale in *In the matter of B (A Child) (FC)* [2013] UKSC 33 at paragraphs 179 to 182.

**The burden and standard of proof**

1. The Threshold is established by proving facts which establish the child is suffering significant harm and that the harm is attributable to the care given not being what it would be reasonable to expect a parent to give to him. In respect of the task of determining whether the ‘facts’ have been proven the following points must be borne in mind as referred to in the guidance given by Baker J (as he then was) in **Re L and M (Children) [2013] EWHC 1569 (Fam)** confirmed by the President of the Family Division in **In the Matter of X (Children) (No 3) [2015] EWHC** 3651 at paragraph 20.

*‘First, the burden of proof lies at all times with the local authority.
Secondly, the standard of proof is the balance of probabilities.
Third, findings of fact in these cases must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation.
Fourthly, when considering cases of suspected child abuse the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. The court invariably surveys a wide canvas. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof.
Fifthly, whilst appropriate attention must be paid to the opinion of experts, those opinions need to be considered in the context of all the other evidence. It is important to remember that the roles of the court and the expert are distinct and it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence. It is the judge who makes the final decision.
Sixth, the court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others.
Seventh, the evidence of the parents and any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability.
Eighth, it is common for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear and distress, and the fact that a witness has lied about some matters does not mean that he or she has lied about everything (see*R v Lucas*[1981] QB 720)."*

1. The burden of proof is on the Local Authority. It is for the Local Authority to satisfy the court, on the balance of probabilities, that it has made out its case in relation to disputed facts. The parents have to prove nothing and the court must be careful to ensure that it does not reverse the burden of proof. As Mostyn J said in **Lancashire v R [2013] EWHC 3064** (Fam), ‘*there is no pseudo-burden upon a parent to come up with alternative explanations’* [paragraph 8(vi)]. Having heard all the evidence it is open to the court to conclude that the evidence leaves it unsure whether it is more probable than not that the event occurred and accordingly, that party who has the burden of proving that event has occurred has failed to discharge the burden – **The Popi M, Rhesa Shipping Co SA v Edmunds, Rhesa Shiping Co SA v Fenton Insurance Co Ltd [1985] 1 WLR 948.** The fact that the local authority relies on the lack of a satisfactory explanation for the injuries does not amount to a reversal of the burden of proof – **Re M-B (Children) 2015 EWCA Civ 1027, [2015] All ER (D) 135.**
2. In **Re BR (Proof of Facts)** **[2015] EWFC 41**, Jackson J had the judgment of HHJ Bellamy in **Re FM (A Child: fractures: bone density) [2015] EWFC B26** cited to him in the absence of a memorable event by the carers and said the following:

“15. *Since this passage has been cited to me, and may be cited elsewhere, I will say something about it. It would of course be wrong to apply a hard and fast rule that the carer of a young child who suffers an injury must invariably be able to explain when and how it happened if they are not to be found responsible for it. This would indeed be to reverse the burden of proof. However, if the judge’s observations are understood to mean that account should not be taken, to whatever extent is appropriate in the individual case, of the lack of a history of injury from the carer of a young child, then I respectfully consider that they go too far.*

*16. Doctors, social workers and courts are in my view fully entitled to take into account the nature of the history given by a carer. The absence of any history of a memorable event where such a history might be expected in the individual case may be very significant. Perpetrators of child abuse often seek to cover up what they have done. The reason why paediatricians may refer to the lack of a history is because individual and collective clinical experience teaches them that it is one of a number of indicators of how the injury may have occurred. Medical and other professionals are entitled to rely upon such knowledge and experience in forming an opinion about the likely response of the individual child to the particular injury, and the court should not deter them from doing so. The weight that is then given to any such opinion is of course a matter for the judge.*

*On the issue of probability, in the same case:*

 *[7] […] (4) Similarly, the frequency or infrequency with which an event generally occurs cannot divert attention from the question of whether it actually occurred. As Mr Rowley QC and Ms Bannon felicitously observe:*

*"Improbable events occur all the time. Probability itself is a weak prognosticator of occurrence in any given case. Unlikely, even highly unlikely things, do happen. Somebody wins the lottery most weeks; children are struck by lightning. The individual probability of any given person enjoying or suffering either fate is extremely low.”*

*I agree. It is exceptionally unusual for a baby to sustain so many fractures, but this baby did. The inherent improbability of a devoted parent inflicting such widespread, serious injuries is high, but then so is the inherent improbability of this being the first example of an as yet undiscovered medical condition. Clearly, in this and every case, the answer is not to be found in the inherent probabilities but in the evidence, and it is when analysing the evidence that the court takes account of the probabilities”.*

6. The standard to which the Local Authority must satisfy the court is the balance of probabilities. The inherent probability or improbability of an event remains a matter to be taken into account when weighing probabilities and deciding whether, on balance, the event occurred [**Re B (Care Proceedings: Standard of Proof) [2008] UKHL 35** at paragraph 15]. There is no room for a finding by the court that something might have happened. The court may decide that it did or that it did not happen [**Re B** at paragraph 2].

7. The standard of proof does not shift according to the seriousness of the allegation, nor the inherent probability or improbability of an event occurring. See Baroness Hale in *Re B (Children)(Fc)* [[2008] UKHL 35](http://www.bailii.org/uk/cases/UKHL/2008/35.html%22%20%5Co%20%22Link%20to%20BAILII%20version):

“70. *My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold ... is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.”*

**Evidence/Expert Evidence**

8. Findings of fact must be based on evidence, and the inferences that can properly be drawn from the evidence, and not on speculation or suspicion. The decision about whether the facts in issue have been proved to the requisite standard must be based on all of the available evidence and should have regard to the wide context of social, emotional, ethical and moral factors [**A County Council v A Mother, A Father and X, Y and Z [2005] EWHC 31 (Fam)].**

9. Findings of fact must not be based on hypothesis. The Court must avoid speculation, particularly in situations where there is a gap in the evidence. As stated by Munby LJ in ***Re A (Fact finding hearing: Speculation)*** **[2011] EWCA Civ 12 at (26)**

*“It is an elementary proposition that findings of fact are to be based on evidence, including inferences that can be properly drawn from the evidence, and not on suspicion or speculation.”*

10. In ***Re T*** [2004] EWCA Civ 558 Butler-Sloss P (as she then was) said:

*“Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and exercise an overview of the totality of the evidence in order to come to the conclusion of whether the case put forward by the local authority has been made out to the appropriate standard of proof.”*

11. In *Re U (Serious Injury: Standard of Proof): Re B* [[2004] 2 FLR 263](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/2004/567.html)at paragraph 23. Butler-Sloss P said:

*‘…there is a broad measure of agreement as to some of the considerations emphasised by the judgment in R v Cannings that are of direct application in care proceedings. We adopt the following…*

*(i)   The cause of an injury or an episode that cannot be explained scientifically remains equivocal.*

*(ii) Recurrence is not in itself probative.*

*(iii)   caution is necessary in any case where the medical experts disagree, one opinion declining to exclude a reasonable possibility of natural cause.*

*(iv)   The court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour propre is at stake, or the expert who has developed a scientific prejudice.’*

*(v)  The judge in care proceedings must never forget that today’s medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark.’*

12. There is a significant body of case law which deals with the fact that whilst proper attention should be given to the opinion of medical experts, those opinions should be considered against a background of all of the other evidence. In ***A County Council v K, D & L*** [2005] EWHC 144 (Fam) at paras (13) and (44) Charles J stated:

*“... it is important to remember:*

*i) that the roles of the court and the expert are distinct, and*

*ii) it is the court that is in the position to weigh up the expert evidence and gives its findings on the other evidence. The judge must always remember that he or she is the person who makes the final decision.”*

13. In **Sunderland City Council v A and B (Expert or professional Evidence**) [2019] EWHC 3887 Fam at paragraphs 32-36, Mr Justice Williams said:

32. *The court is not limited to considering the expert evidence alone. Rather, it must take account of a wide range of matters which include the expert evidence but also include, for example, its assessment of the credibility of the witnesses and the inferences that can properly be drawn from the evidence. The court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. The court invariably surveys a wide canvas. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to a conclusion.*

*33. Thus, the opinions of medical experts need to be considered in the context of all of the other evidence. While appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. It is important to remember that the roles of the court and the expert are distinct and it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence. It is the judge who makes the final decision. Cases involving an allegation of non-accidental injury often involve a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bringing their own expertise to bear on the problem. The court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others.*

*34. When considering the medical evidence in cases where there is a disputed aetiology giving rise to significant harm, the court must bear in mind, to the extent appropriate in each case, the possibility of the unknown cause [R v Henderson and Butler and Others [2010] EWCA Crim 126 and Re R (Care Proceedings: Causation) [2011] EWHC 1715 (Fam)]. “Today's medical certainty may be discarded by the next generation of experts. Scientific research may throw a light into corners that are at present dark. That affects neither the burden nor the standard of proof. It is simply a factor to be taken into account in deciding whether the causation advanced by the one shouldering the burden of proof is established on the balance of probabilities."*

Mr Justice Williams considered the significance of the evidence of parents/carers and concluded:

*35. The evidence of the parents and of any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them. [Re W and Another (Non-Accidental Injury) [2003] FCR 346]. In assessing the credibility of a witness of fact one must bear in mind that performance in the witness box is only one component of the evaluation of their credibility and care should be taken in evaluating the ‘impression’ a witness makes in particular in interpreting body language. Some people are convincing liars. Others are anxious tellers of the truth. The assessment of credibility must take account of the consistency of a witnesses account internally and over time, its consistency with known facts, how it compares with the evidence of other witnesses, particularly independent witnesses, the character of the witness and how their evidence is given.*

*36. It is always desirable, where possible, for the perpetrator of non-accidental injury to be identified both in the public interest and in the interest of the child. The Court of Appeal has recently considered the law where only two possible perpetrators are identified. In Re B (a child) [2018] EWCA Civ 2127 Lord Justice Peter Jackson said, [19] The proper approach to cases where injury has undoubtedly been inflicted and where there are several possible perpetrators is clear and applies as much to those cases where there are only two possible candidates as to those where there are more. The court first considers whether there is sufficient evidence to identify a perpetrator on the balance of probabilities; if there is not, it goes on to consider in relation to each candidate whether there is a real possibility that they might have caused the injury and excludes those of which this cannot be said: North Yorkshire County Council v SA [2003] EWCA Civ 839, per Dame Elizabeth Butler-Sloss P at [26]. [20] Even where there are only two possible perpetrators, there will be cases where a judge remains genuinely uncertain at the end of a fact-finding hearing and cannot identify the person responsible on the balance of probabilities. The court should not strain to identify a perpetrator in such circumstances: Re D (Care Proceedings: Preliminary Hearing) [2009] EWCA Civ 472 at [12]. [21] However, the correct legal approach is to survey the evidence as a whole as it relates to each individual in order to arrive at a conclusion about whether the allegation has been made out in relation to one or other on a balance of probability. Evidentially, this will involve considering the individuals separately and together, and no doubt comparing the probabilities in respect of each of them. However, in the end the court must still ask itself the right question, which is not "who is the more likely?" but "does the evidence establish that this individual probably caused this injury?" In a case where there are more than two possible perpetrators, there are clear dangers in identifying an individual simply because they are the likeliest candidate, as this could lead to an identification on evidence that fell short of a probability. Although the danger does not arise in this form where there are only two possible perpetrators, the correct question is the same, if only to avoid the risk of an incorrect identification being made by a linear process of exclusion.*

14. The Court is entitled to depart from the opinion of a medical expert, but must have a sound evidential basis upon which to do so; *M-W (A Child) (2010)* [2010] EWCA Civ 12 per Wall LJ:

*39.     I regard the following as trite propositions of law:-*

*(1)     Experts do not decide cases. Judges do. The expert's function is to advise the judge;*

*(2)     The judge is fully entitled to accept or reject expert opinion;*

*(3)     If the judge decides to reject an expert's advice, he or she; (a) must have a sound basis upon which to do so; and (b) must explain why the advice is being rejected.*

*(4)     Similar considerations arise when a judge prefers one expert's evidence to that of another. Judges must explain why they prefer the evidence of A to that of B.*

15. In cases including *Re L (Care: Assessment: Fair Trial) [2002] 2 FLR 730*, and *Lancashire CC v R & W [2013] EWHC 3064 (Fam),* the Court is reminded to carry out a full and thorough examination of the environment in which the child was injured and a careful consideration of alternative causes, remembering that a Court cannot and should not conclude, in the cases of a series of improbable causes, that the least improbable is nonetheless the cause of the event.

**Non-accidental Injury**

16. The term ‘non-accidental’ does not necessarily mean that an injury must have been deliberately or intentionally inflicted in order for there to be an element of wrong that satisfies the s.31 threshold criteria, see Ryder LJ in *S (A Child)* [2014] EWCA Civ 25:

*The term "non-accidental" injury may be a term of art used by clinicians as a shorthand and I make no criticism of its use but it is a "catch-all" for everything that is not an accident. It is also a tautology: the true distinction is between an accident which is unexpected and unintentional and an injury which involves an element of wrong. That element of wrong may involve a lack of care and/or an intent of a greater or lesser degree that may amount to negligence, recklessness or deliberate infliction. While an analysis of that kind may be helpful to distinguish deliberate infliction from, say, negligence, it is unnecessary in any consideration of whether the threshold criteria are satisfied because what the statute requires is something different namely, findings of fact that at least satisfy the significant harm, attributability and the objective standard of care elements of section 31(2)’*

17. In *Re S (Split Hearing)* [2014] 1 FLR 1421, CA, in the context of the requirements of section 31(2) the Court of Appeal has that the held terms ‘non-accidental’ and ‘accidental’ injury are unhelpful, the threshold criteria not being concerned with intent or blame but rather with an objective standard of care.

**Identifying a Perpetrator**

18. Where a Court is satisfied injuries are non-accidental, it should in the first instance identify a perpetrator of injuries if it can do so. If the Court is unable to do this then the Court will move to consider which of the adults with care of the child in the relevant timeframe should fall within a pool of possible perpetrators. Per Peter Jackson LJ in *B (A Child)* [2018] EWCA Civ 2127 at paragraph 21:

*“In what Mr Geekie described as a simple binary case like the present one, the identification of one person as the perpetrator on the balance of probabilities carries the logical corollary that the second person must be excluded. However, the correct legal approach is to survey the evidence as a whole as it relates to each individual in order to arrive at a conclusion about whether the allegation has been made out in relation to one or other on a balance of probability. Evidentially, this will involve considering the individuals separately and together, and no doubt comparing the probabilities in respect of each of them. However, in the end the court must still ask itself the right question, which is not "who is the more likely?" but "does the evidence establish that this individual probably caused this injury?" In a case where there are more than two possible perpetrators, there are clear dangers in identifying an individual simply because they are the likeliest candidate, as this could lead to an identification on evidence that fell short of a probability. Although the danger does not arise in this form where there are only two possible perpetrators, the correct question is the same, if only to avoid the risk of an incorrect identification being made by a linear process of exclusion”.*

1. Whilst the Court should not hesitate to make a finding identifying the perpetrator of an injury if the evidence is sufficient to support such a finding, the court is not obliged to make a finding identifying the perpetrator at all costs – Wall LJ, *Re D (Care Proceedings: Preliminary Hearings)* [[2009] 2 FLR 668](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/2009/472.html):

*[12] … Nothing in Re B, in our judgment, requires the court to identify an individual as the perpetrator of non-accidental injuries to a child, simply because the standard of proof for such an identification is the balance of probabilities.  If such an identification is not possible – because, for example, a judge remains genuinely uncertain at the end of a fact finding hearing, and cannot find on the balance of probabilities that A rather than B caused the injuries to the child, but that neither A nor B can be excluded as a perpetrator - it is the duty of the judge to state that as his or her conclusion. To put the matter another way, judges should not, as a result of the decision in Re B, and the fact that it supersedes Re H, strain to identify the perpetrator of non-accidental injuries to children. If an individual perpetrator can be properly identified on the balance of probabilities, then for the reasons given in Re K it is the judge’s duty to identify him or her. But the judge should not start from the premise that it will only be in an exceptional case that it will not be possible to make such an identification.  There will inevitably be cases - of which this, in our judgment, is one – where the only conclusion which the court can properly reach is that one of the two parents – or both - must have inflicted the injuries, and that neither can be excluded.*

1. *Rhesa Shipping Co SA v Edmond and Another, the Popi M* [1985] 1 WLR 948 and *R v Henderson and Butler, and Others* [2010] EWCA Crim 26) reminds the Court that it *‘must resist the temptation identified by the Court of Appeal in*R v Henderson and Others*[2010] EWCA Crim 1219 to believe that it is always possible to identify the cause of injury to the child.’* (Per Baker J in *Re JS [2012] EWHC 1370 (Fam),* at paragraph 44.

*If the court is not able to identify the perpetrator, on the balance of probabilities, then the court must consider who falls within the pool of possible perpetrators. The approach of the court should be to ask itself* ‘*Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?*’, *North Yorkshire County Council v SA* [[2003] EWCA Civ 839](http://www.bailii.org/ew/cases/EWCA/Civ/2003/839.html) at paragraph 26.

**Pool of Perpetrators**

1. In **B (Children) [2019] EWCA Civ 575:** Jackson LJ on “pool of perpetrators”: a change of language,

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

*50. Likewise, it can be seen that the concept of a pool of perpetrators as a permissible means of satisfying the threshold was forged in cases concerning individuals who were 'carers'.  In Lancashire, the condition was interpreted to include non-parent carers.  It was somewhat widened in North Yorkshire at [26] to include 'people with access to the child' who might have caused injury.  If that was an extension, it was a principled one.  But at all events, the extension does not stretch to "anyone who had even a fleeting contact with the child in circumstances where there was the opportunity to cause injuries": North Yorkshire at [25].  Nor does it extend to harm caused by someone outside the home or family unless it would have been reasonable to expect a parent to have prevented it: S-B at [40].*

*51. It should also be noted that in the leading cases there were two, three or four known individuals from whom any risk to the child must have come.  The position of each individual was then investigated and compared.  That is as it should be.  To assess the likelihood of harm having been caused by A or B or C, one needs as much information as possible about each of them in order to make the decision about which if any of them should be placed in the pool.  So, where there is an imbalance of information about some individuals in comparison to others, particular care may need to be taken to ensure that the imbalance does not distort the assessment of the possibilities.  The same may be said where the list of individuals has been whittled down to a pool of one named individual alongside others who are not similarly identified.  This may be unlikely, but the present case shows that it is not impossible.  Here it must be shown that there genuinely is a pool of perpetrators and not just a pool of one by default.*

*52. Lastly, as part of the court's normal case-management responsibilities it should at the outset of proceedings of this kind ensure (i) that a list of possible perpetrators is created, and (ii) that directions are given for the local authority to gather (either itself or through other agencies) all relevant information about and from those individuals, and (iii) that those against whom allegations are made are given the opportunity to be heard.  By these means some of the complications that can arise in these difficult cases may be avoided.”*

**Lies/Discrepancies**

1. The Court must remember a Lucas direction as regards any lie, or alleged lies, told by a witness; lies do not themselves indicate guilt. Other explanations for why an individual has lied should be considered.
2. Where a witness/party lies about a material issue, the court may consider what conclusions should be drawn from that; *A Council v LG and others* [2014] EWHC 1325 Keehan J at paragraph 64:

*“I, of course, give myself a modified Lucas direction. In so far as the mother has been found to have lied about a material issue, I must ask myself whether there is any reasonable explanation for her untruthfulness or whether there is no such explanation and the only conclusion the court can draw is that she has lied because she is responsible for the injuries sustained by GS and/or LS or she otherwise knows the truth about how these injuries were sustained and has not revealed the same.”*

1. There are many different versions of the ***Lucas*** direction. The importance of the direction is that judges must remind themselves that a lie about one thing does not lead inexorably and inevitably to a conclusion that that person is a liar about the main issues at stake. Baker J (as he then was) in ***Devon County Council v EB*** [2013] EWHC 968 (Fam):

*“...it is not uncommon for witnesses in these cases to tell lies in the course of the investigation and the hearing.  The court must be careful to bear in mind that a witness may lie for various reasons, such as shame, misplaced loyalty, panic, fear, distress and the fact that the witness has lied about some matters does not mean that he or she has lied about everything:  see R v Lucas [1981] QB 720.”*

The Lucas test itself was set out by Lord Lane CJ:

*"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."*

In ***H-C (Children)*** 2016 EWCA Civ 136 Lord Justice McFarlane said:

*100.  One highly important aspect of the Lucas decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the "lie" is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in Lucas, where the relevant conditions are satisfied the lie is "capable of amounting to a corroboration". In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of R v Middleton [2001] Crim.L.R. 251.*

*In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt”.*

25. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear, and distress. The fact that a witness has lied about some matters does not mean that he or she has lied about everything [**R v Lucas [1981] QB 720].** A court must weigh any lies told by a person against any evidence that points away from them having been responsible for harm to a child [**H v City and Council of Swansea and Others [2011] EWCA Civ 195**].

26. The Court should consider how much weight to attach to discrepancies in accounts between witnesses or from one witness at different times. Per Mostyn J in *Lancashire v R* [2013] EWHC 3064 (Fam):

*[8]…*

 *(xi) The assessment of credibility generally involves wider problems than mere “demeanour” which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. With every day that passes the memory becomes fainter and the imagination becomes more active. The human capacity for honestly believing something which bears no relation to what actually happened is unlimited.”*

27. In **Lancashire County Council v The Children [2014] EWFC 3 (Fam**), at paragraph 9 of his judgment, Jackson J (as he then was) said: “*To these matters I would only add that in cases where repeated accounts are given of events surrounding injury and death, the court must think carefully about the significance or otherwise of any reported discrepancies. They may arise for a number of reasons. One possibility is of course that they are lies designed to hide culpability. Another is that they are lies told for other reason. Further possibilities include faulty recollection or confusion at times of stress or when the importance of accuracy is not fully appreciated, or there may be inaccuracy or mistake in the record-keeping or recollection of the person hearing and relaying the accounts. The possible effects of delay and repeated questioning upon memory should also be considered, as should the effect on one-person hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be unnatural - a process that might inelegantly be described as ‘story-creep’ - may occur without any necessary inference of bad faith*.”

**Admissibility**

1. Evidence is admissible notwithstanding its hearsay nature. This includes Local Authority case records or social work chronologies. The court should give it the weight it considers appropriate: Children Act 1989 s.96(3); [**Children (Admissibility of Hearsay Evidence) [1993]; [Re W (Fact Finding: Hearsay Evidence) [2014] 2 FLR 703].**
2. **Section 4 – Civil Evidence Act 1995** - When estimating the weight to be given to hearsay evidence in civil proceedings, the court must have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. Regard may be had, in particular, to the following:

(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

The weight given to the material is a matter of judicial discretion. Unless it was uncontroversial, it had to be regarded with great caution.

**Propensity**

30. The judgment of Peter Jackson LJ in the case of *R v P (Children: Similar Fact Evidence)* [2020] EWCA Civ 1088, and particularly at paragraphs 25 to 26. In cases where evidence of an alleged pattern of behaviour is relied upon to assert that the core allegation is more likely to be true because of the character of the person accused, the Court must be satisfied on the basis of proven facts that propensity has been proven.

**Failure to protect**

31. **In Re J (A Child) [2015] EWCA Civ 222,** the Court of Appeal approved guidance earlier given by Sir James Munby P (as he then was) in **Re A (A Child) [2015] EWFC 11,** 2015 Fam Law 367.

Lord Justice Aikens summarised the Re A principles. Of relevance to the present case he said as follows:

*"56. [v] It is for the local authority to prove that there is the necessary link between the facts upon which it relies and its case on Threshold. The local authority must demonstrate why certain facts, if proved, "justify the conclusion that the child has suffered or is at the risk of suffering significant harm" of the type asserted by the local authority. "The local authority's evidence and submissions must set out the arguments and explain explicitly why it is said that, in the particular case, the conclusion [that the child has suffered or is at risk of suffering significant harm] indeed follows from the facts [proved].*

*[vi] It is vital that local authorities, and, even more importantly, judges, bear in mind that nearly all parents will be imperfect in some way or other. The state will not take away the children of "those who commit crimes, abuse alcohol or drugs or suffer from physical or mental illness or disability, or who espouse antisocial, political or religious beliefs" simply because those facts are established. It must be demonstrated by the local authority, in the first place, that by reason of one or more of those facts, the child has suffered or is at risk of suffering significant harm…"*

32. In *Re L-W (children)* [2019] EWCA Civ 159 the Court of Appeal overturned a finding of failure to protect, where it had not been shown that on the particular facts of that case, the mother should have identified a risk to the child. The Court of Appeal found the evidence of the perpetrator’s behaviour in the home and his two past incidents of aggression did not go anywhere near to supporting a causative link such that the mother ought to have known he presented a risk of physical abuse either to L or her other children. At paragraph 62 of the leading judgment Lady Justice King said:

*62. Failure to protect comes in innumerable guises. It often relates to a mother who has covered up for a partner who has physically or sexually abused her child or, one who has failed to get medical help for her child in order to protect a partner, sometimes with tragic results. It is also a finding made in cases where continuing to live with a person (often in a toxic atmosphere, frequently marked with domestic violence) is having a serious and obvious deleterious effect on the children in the household. The harm, emotional rather than physical, can be equally significant and damaging to a child.*

*63. Such findings where made in respect of a carer, often the mother, are of the utmost importance when it comes to assessments and future welfare considerations. A finding of failing to protect can lead a Court to conclude that the children's best interests will not be served by remaining with, or returning to, the care of that parent, even though that parent may have been wholly exonerated from having caused any physical injuries.*

*64. Any Court conducting a Finding of Fact Hearing should be alert to the danger of such a serious finding becoming 'a bolt on' to the central issue of perpetration or of falling into the trap of assuming too easily that, if a person was living in the same household as the perpetrator, such a finding is almost inevitable. As Aikens LJ observed in Re J, "nearly all parents will be imperfect in some way or another". Many households operate under considerable stress and men go to prison for serious crimes, including crimes of violence, and are allowed to return home by their long-suffering partners upon their release. That does not mean that for that reason alone, that parent has failed to protect her children in allowing her errant partner home, unless, by reason of one of the facts connected with his offending, or some other relevant behaviour on his part, those children are put at risk of suffering significant harm.*

*This professional and realistic approach allowed the Court to focus on what was, in reality, the only live issue, namely; was GL's history of violence sufficient to lead to a finding of failure to protect upon the mother's part?’*

33. In *G-L-T (children)* [2019] EWCA Civ 717, Lady Justice King again gave the leading judgment, granting an appeal against a finding that a father had failed to protect his son in circumstances where findings had been made that a mother had fabricated or directly caused many of a child’s significant illnesses and injuries. Identifying the judge as having fallen into the trap of making this very serious finding as a ‘bolt on’ to the substantive issues in the case, Lady Justice King said, at paragraphs 72 to 74:

*‘I repeat my exhortation for courts and Local Authorities to approach allegations of 'failure to protect' with assiduous care and to keep to the forefront of their collective minds that this is a threshold finding that may have important consequences for subsequent assessments and decisions.*

*Unhappily, the courts will inevitably have before them numerous cases where there has undoubtedly been a failure to protect and there will be, as a consequence, complex welfare issues to consider. There is, however, a danger that significant welfare issues, which need to be teased out and analysed by assessment, are inappropriately elevated to findings of failure to protect capable of satisfying the section 31 criteria.*

*It should not be thought that the absence of a finding of failure to protect against a non-perpetrating parent creates some sort of a presumption or starting point that the child/children in question can or should be returned to the care of the non-perpetrating parent. At the welfare stage, the court's absolute focus (subject to the Convention rights of the parents) is in relation to the welfare interests of the child or children.’*

34. The Court must not make an assumption that a parent living in a household where significant harm to a child occurred must have been able to foresee the risk. Even if a risk is identifiable, it does not follow that the parent could or should have taken steps to protect the child. Even if there is a failure to protect, that failure must be, in the words of section 31, ‘not what it would be reasonable to expect’ from a parent.