Articles

Re-litigation in family cases: the emerging law and practice

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This is the second of two articles considering the re-litigation of fact-finding hearings in the family courts. We consider the current and emerging law and the various practices and procedures apparent in such cases. There is particular consideration of the sometimes vexed question of the burden of proof in re-litigation and the difficulties inherent in distinguishing between the varying roles of medics, depending on whether they are treating, previously-used expert, or newly-instructed expert. This article can be read alongside our article specifically considering the *Sutton LBC v Gray and Butler* case published in November [2012] Fam Law 1344.

Estoppel in family cases: a historical perspective

In the dying days of the pre-Children Act 1989 regime of care orders, the then President, Sir Stephen Brown, had cause to consider a case in the Court of Appeal (*B v Derbyshire County Council* [1992] 1 FLR 538). Magistrates had just heard a case which had been before the youth court 20 months earlier. At the first hearing the justices had dismissed an application for a supervision order for a boy, judging there to be no prima facie case to answer. At the second hearing, again an application in respect of the boy, they acceded to the stepmother's argument that the doctrine of res judicata applied to care proceedings brought under s 1 of the Children and Young Persons Act 1969, so as to prevent them from hearing the evidence which had been adduced in the earlier proceedings. On the local authority's appeal, the President did not think the doctrine applicable to that case: there had been no specific finding of fact made at the earlier hearing. Lamenting that the justices had yielded to the stepmother's solicitor's 'stirring submission', he predicted that things would be different under the new legislation:

> 'On 14 October 1991 the Children Act 1989 is going to become effective and, when that takes place, I very much hope that the adversarial approach to care proceedings will disappear to a very large extent. What has happened in this case is symptomatic of the adversarial approach, where technical points are taken in order to secure a particular result. What will become more apparent from 14th October 1991 is that what the court is concerned with is the whole welfare of the child and that its task is to investigate, in an inquisitorial manner if necessary, the interests of the child.'

Though that prediction as to the end of an adversarial approach to care proceedings rings now – 20 years later – with proleptic irony, the question as to the place of estoppel in family proceedings had been raised and the hare was sent a-coursing. Waite J, sitting with the President, thought:

> 'The Latin rubric res judicata pro veritate habetur is particularly liable, therefore, to find itself at odds, in child care cases, with the homelier English principle that "circumstances may alter cases".'

What, though, would the position be when there had been a finding of fact? Would a later court be bound by it? Ward J in *K v P (Children Act Proceedings: Estoppel)* [1995] 1 FLR 248, considered the situation in a contact and residence dispute. Magistrates

had previously heard evidence and declined to make findings of sexual abuse by the father; they made a residence order to the mother and a contact order to the father. On the breakdown of the latter, the judge had to decide whether he was bound by the earlier finding (or rather the absence of it).

He considered the doctrine of estoppel per rem judicatam and noted that it is founded on two particular considerations of public policy. The first is that it is 'the important principle of certainty of decision', that it is wrong for many obvious reasons for the same matter to be litigated twice. The second is that it is wrong in principle for a litigant to be vexed twice with having to defend the same complaint being made against him. However, strong as the force of these principles may be, 'there is . . . always in a case of this kind a countervailing public policy and public interest, that is that children should be protected.' Thus Ward J considered:

> 'The rules relating to estoppel appear to me in this instance to be rules which form part of the law of evidence rather than the substantive law. The rules of evidence are tools for the use of the court to determine the truth, having regard to the overwhelming public policy principles I have already elaborated on, but the tools of the rules of evidence are there to be applied or to be set on one side as may, in the overwhelming public importance of getting to the truth, be dictated. […] This in essence is no more than another example of the need to place welfare paramount.'

Perhaps, recognising that adopting this purposive rather than a legalistic or procedural approach would do nothing to help practitioners to predict or to advise, Ward J summarised his conclusions in this way:

> '(1) Estoppel per rem judicatam is a valuable rule of evidence to contain disputes within a proper compass. It is a tool which the Family Division should not be slow to use where it is appropriate.
> (2) Because of the overwhelming interest to ascertain the facts and the truth of allegations which impinge on the checklist factors the court has an overriding duty to the child to get to the truth and, if necessary, to refuse to be bound by a rule of estoppel.
> (3) The court should be slow to permit the re-litigation of these questions, for it is time-consuming and wasteful of costs.
> (4) The overwhelming justification for setting aside the rule must be to do justice.'

In the case in question, the judge refused to hold himself bound by the finding and in the exercise of his discretion decided 'to admit all the evidence and to look at the whole case'.

In a rather strange case, *Re S, S and A (Care Proceedings: Issue Estoppel)* [1995] 2 FLR 244, in which *K v P* (decided 6 months earlier) was neither cited nor mentioned in argument, Wilson J (in what are strictly obiter observations) indicated that the doctrine of issue estoppel should be imported into children cases in circumstances in which a finding has been made in earlier proceedings – to the appropriate standard of proof – against a particular party; that party would not be able to challenge the finding in later proceedings. This represented an extension of the classical rules of issue estoppel as there was a shedding of the conventional requirement that the parties in both proceedings should be the same: if the finding, for example, were against a father, it would not matter that the local authorities, mothers and/or children in the two different cases were different.

The applicability of the doctrine of estoppel to children's cases was then exhaustively considered by the Court of Appeal in June 1995 (*Re S (Discharge of Care Order)* [1995] 2 FLR 639). A judge found that children had been sexually abused by the mother's friend and that the mother had known of this at the time. Care orders were made. Evidence and findings at subsequent trials in respect of other children cast doubt on some of the evidence on which the judge had relied in making his findings against the mother, so she sought permission to appeal out of time. The rationale for seeking permission to appeal was that it was asserted on behalf of the mother that a judge hearing any

discharge application would have no jurisdiction to disturb the findings reached by the judge at the threshold stage of the care proceedings. The counter-argument put by the local authority and by the Official Solicitor was:

> '[T]hat estoppel per rem judicatam has no place in family proceedings and that that if effect is to be given to the underlying purpose of the Children Act – namely that the regime which it created for resolving private and public law disputes concerning children should operate flexibly so as to preserve for the court at all times a range of options from which the one most favourable to the current best interests of the child can be selected – the Act must be construed in a sense which will reserve to the court at every stage power to review (and even in extreme cases to disregard) findings reached at earlier stages of the family history in the light of the evidence available, and the circumstances obtaining, at the time of the current hearing.'

This latter exposition was accepted by Waite LJ. Dismissing the application for permission to appeal out of time, he considered instead that the court, when considering s 1(3)(e) of the Act (the 'harm suffered or likely' provision of the welfare checklist) in the context of a discharge application, would have clear jurisdiction to revisit earlier findings made by other tribunals:

> 'In the great majority of discharge applications the court is likely to be concerned with evidence of recent harm and appraisal of current risk, in which conclusions reached by an earlier tribunal as to past harm or past risk would be of marginal relevance and historical interest only. There are liable nevertheless to be instances in which the interest which every child has in seeing that justice is done to the claims of a natural parent will require the court hearing a discharge application to question, in the light of the evidence before it, not merely the

> relevance but also the soundness of antecedent findings reached by an earlier tribunal.'

This was not intended to be a carte blanche to the unrepentant and dissatisfied litigant. Waite LJ added a number of significant provisos to the otherwise permissive effect of his dictum:

> 'Such instances are bound, in the nature of things, to be extremely rare. The willingness of the family jurisdiction to relax the ordinary rules of issue estoppel, and (at the appellate stage) the constraints of *Ladd v Marshall* [1954] 1 WLR 1489 upon the admission of new evidence, does not originate from laxity or benevolence but from recognition that where children are concerned there is liable to be an infinite variety of circumstance whose proper consideration in the best interests of the child is not to be trammelled by the arbitrary imposition of procedural rules. That is a policy whose sole purpose, however, is to preserve flexibility to deal with unusual circumstances. In the general run of cases the family courts (including the Court of Appeal when it is dealing with applications in the family jurisdiction) will be every bit as alert as courts in other jurisdictions to see to it that no one is allowed to litigate afresh issues that have already been determined. The maxim 'sit finis litis' is, as a general rule, rigorously enforced in children cases, where the statutory objective of an early determination of questions concerning the upbringing of a child expressed in s 1(2) of the Children Act is treated as requiring that such determination shall not only be swift but final.'

Crucially, the decision-making process is discretionary:

> '[T]he judge trying that application would have complete discretion as to whether, and if so to what extent, the issues decided by Judge Lewis Bowen should be examined afresh in the light of the new evidence.'

This, of course, means that the quality and thoroughness of the preparation of such an application is of absolute importance.

The doctrine received what is perhaps its authoritative analysis when Hale J decided the case of *Re B (Children Act Proceedings) (Issue Estoppel)* [1997] 1 FLR 285 in November 1996. Summarising the earlier authorities, the judge expressed herself thus:

> 'It seems to me that the weight of Court of Appeal authority is against the existence of any strict rule of issue estoppel which is binding upon any of the parties in children's cases. At the same time, the court undoubtedly has a discretion as to how the inquiry before it is to be conducted. This means that it may on occasions decline to allow a full hearing of the evidence on certain matters even if the strict rules of issue estoppel would not cover them. Although some might consider this approach to be a typical example of the lack of rigour which some critics discern in the family jurisdiction, it seems to me to encompass both the flexibility which is essential in children's cases and the increased control exercised by the court rather than the parties which is already a feature of the court's more inquisitorial role in children's cases …'

In the event that a party sought to challenge findings made against him in earlier proceedings, the judge would, according to Hale J, want to know not only what the findings were, but on what evidence they were based. In deciding 'whether or not to allow any issue of fact to be tried afresh', the tribunal would bear in mind a number of factors including:

(1) Public policy reasons:
   (a) resources: the public interest in there being an end to litigation;
   (b) delay: being likely to be prejudicial to any child's welfare;
   (c) truth: a child's interests are unlikely to be served by reliance on erroneous determinations of fact;
   (d) fairness: the court's discretion, like the rules of estoppel themselves, 'must be applied so as to work justice, not injustice'.
(2) The importance of the findings. If bound to affect the outcome, the court may be more willing to consider a rehearing than if of lesser or peripheral significance.

(3) Prospects of success. Is there any reason to think that a rehearing will result in any different finding than that of the earlier trial? In particular:
  (a) whether the previous findings followed a full hearing in which the person concerned took part and the evidence was tested;
  (b) if so, whether there is any ground upon which the accuracy of the previous finding could have been attacked at the time, and why there was no appeal; and
  (c) whether there is new evidence or information casting doubt upon the accuracy of the original findings.

So in answer to the preliminary question for the court, 'Is this father bound by previous findings that he has abused two other children?' the answer was 'not necessarily'. It was for the trial judge to decide how the local authority's assertion of the fact of the abuse was to be proved, no doubt considering in the process 'whether there appears to be some real reason to cast doubt upon the earlier findings'. Accepting that this conclusion makes it difficult for practitioners to give firm advice to their clients, Hale J indicated that this 'is simply an example of the development of the "different concept from estoppel" which was forecast by Diplock LJ in *Thoday v Thoday* [1964] P 181'.

Estoppel in family proceedings: conclusions

From the above, the following principles can be derived:

(1) There is no strict rule of estoppel per rem judicatam in Children Act 1989 cases. To the extent that the doctrine is applicable it is as a flexible rule of evidence rather than as a substantive legal plea in bar.
(2) There are strong reasons militating against the re-litigation of facts which have already been the subject of definitive adjudication.
(3) A trial judge will retain a wide discretion as to whether and when to allow a party to seek to relitigate – whether by continued denial or continued assertion of – any particular fact in the current proceedings.
(4) The factors set out by Hale J in *Re B* continue to be applicable and should be addressed in any argument (whether for or against the proposed reopening).
(5) Of particular importance in assessing whether the 'fairness' or 'justice' argument is made out are the three 'prospects of success' reasons:
  (a) Did the party seeking to relitigate play a full part in the previous proceedings?
  (b) Is there new evidence (or, of course, medical or other research or expertise)?
  (c) Was an appeal possible at the time? If so, why was it not proceeded with? (These questions are sometimes more difficult to discern in practice than they are to set out. Often it will be a new legal team acting in subsequent proceedings, unable to take responsibility for advice given at the time of the original proceedings. Further, the simple fact that a finding is wrongly or unfairly made does not of itself found a jurisdiction in the Court of Appeal to entertain correcting it: see, for just one example of this, *Re B and H (Children)* [2009] EWCA Civ 228. Or what if, for example, findings of sexual abuse (wrongly made) were accompanied by other strong threshold findings (rightly made), leading to care orders? The absence of an appeal, and even the fact of an unsuccessful appeal, will often not be of determinative import.)

'New evidence' and 'new science' cases

Perhaps the most obvious reason for a party seeking to relitigate earlier findings of fact (or the non-making of such findings) is the acquisition or advent of new evidence. There are of course any number of ways in which this scenario is likely to arise. The reported cases give a good flavour of some of these and of the various tests which have been applied by the higher courts in resolving the question as to whether or not to allow the re-litigation of a particular fact.

First, there are those cases in which the new evidence surfaces in time for it to be factored into the decision-making process

at first instance for the subject children. The Court of Appeal in *Re M and MC (Care: Issues of Fact: Drawing of Orders)* [2003] 1 FLR 461 considered a case in which a mother confessed to having caused injuries which the trial judge had attributed at the fact-finding hearing to one or other of the adult parties. Although the confession came between fact-finding and welfare hearings, the trial judge considered that he could have no confidence in earlier statements of either of the adults and declined to reopen the matter by having another fact-finding hearing (as was at that stage contended for). Thorpe LJ reminded himself that care proceedings and the investigations into child abuse which permeate them, 'often lead to results that are bitterly resented and rejected by the adults who are criticised and condemned. There is a tendency for their reaction to be immoderate and often manipulative', so 'plainly trial judges have to be firm in not permitting the court's important duty to investigate and establish past fact to be derailed or diverted by what may be simply strategic manoeuvring in response.'

The trial judge had been right not to allow the fact-finding process 'to be torn up as though it had never happened simply because one of the adults had subsequently made a statement shifting position'. But that course was one of two extremes. The other was to 'reject the development absolutely and treat the previous finding of fact as incapable of being revisited.' This would be equally wrong. Instead Thorpe LJ favoured a course not, in fact, put at the time to the trial judge:

> 'There is, between these two extremes, an obvious middle way, and that is to conduct the disposal hearing in such a way as to adopt the process of preliminary hearing as the foundation, and then to make such adjustments as are necessary to reflect subsequent developments rigorously tested through the process of examination-in-chief and cross-examination.'

Although the trial judge suspected the mother's latest statement to be of no greater worth than her previous four, it was his view that 'no complete conclusion can be reached without affording the mother the opportunity of explaining herself in the witness-box and answering as best she can the local authority's response, namely, that the fifth statement is contradicted by or is inconsistent with, the medical evidence.'

In the rather more recent case of *A Local Authority v C, D and A and B* [2012] EWHC 1975 (Fam) Theis J heard a finding of fact hearing in which she declined to make findings that a child had been sexually abused; this was due in large part to the demonstrable failure by two paediatricians to follow the relevant guidance in relation to the conduct of intimate examinations of children. A few months later a further hearing took place at which both the balance of the threshold allegations and the welfare questions were considered. In the face of opposition from local authority and children's guardian, the judge directed a rehabilitation plan, intended to result a couple of months later in a full and final reunification with the parents. In the meantime, the child in question, and due to unrelated concerns, was further medically examined, including this time a properly conducted intimate examination, the conclusions of which supported there having been sexual abuse as originally alleged and dating back to that time.

The judge – apparently without argument to the contrary from the parents' representatives – proceeded to hear from the examining medic as well as from the two original paediatricians and from various other witnesses in relation to other newly discovered factual matters predating the original finding of fact hearing. She revised her findings based both on the medical evidence and on her reappraisal of the parents' credibility and ability to maintain a deception: the 'non-finding' was substituted with a finding that the father had indeed sexually abused the child; the case took a different course accordingly. The judge described her task thus:

> 'The central issue is whether my conclusions that the injuries to A were unexplained can stand or whether, in the light of the fresh information, the re-evaluation of the relevant evidence drives the court to reach a different conclusion.
>
> Having stood back and considered all the evidence, not only that which is before the court in this hearing but also the evidence before the court in

February 2011, the detailed judgment and findings I made in February 2011 and the written submissions I have received in this hearing I have reached the very clear conclusion against that wide canvas that my finding . . . cannot stand.'

The gap between the original findings and the receipt of further evidence causing them to be changed was some 15 months. It was not argued in that case either that the passage of time served to diminish the quality of judicial recollection of or ability to assess evidence of over a year before, or that there should be either no rehearing or a full rehearing before a new tribunal.

The new evidence in *Re K (Non-Accidental Injuries: New Evidence)* [2004] EWCA Civ 1181, [2005] 1 FLR 285 did not come, as in *Re M and MC* and in *A Local Authority v C, D and A and B* during adjourned care proceedings, it came after final care orders and freeing orders had been made. Nor was the evidence new to the person who sought to rely on it: it was an appeal by the mother based on the fact that she had eventually found herself able to come forward with allegations of serious domestic abuse against her by her husband and his mother – her two fellow members of the 'pool of possible perpetrators'. She sought relief by appealing against the final care and freeing orders; this was allowed, interim care orders being substituted and the case being remitted in relation to 'the perpetrator issue' to a judge at first instance. The rationale of the Court of Appeal was this:

(1) As a general principle it is in the public interest for those who cause serious non-accidental injuries to children to be identified.
(2) It is in the public interest that children have the right to know, as they grow into adulthood, the truth about who injured them in their childhood.
(3) The fact that freeing orders had been made ought not artificially to thwart the mother's otherwise reasonable claim.
(4) The test applied was whether the mother's application had satisfied the court (in this case the Court of Appeal, but of equal applicability to a tribunal of first instance) that the new evidence 'might reasonably lead, on a rehearing, to a finding that the mother can be excluded as a possible perpetrator.'
(5) The risk of harm inherent in the delay was outweighed by the possibility that the children could be reunited with their mother, 'a very important consideration in the welfare equation'.
(6) The facts that the mother knew the 'new evidence' even at the point of the original trial, and that a strict application of *Ladd v Marshall* [1954] 1 WLR 1489 would have disqualified the appeal, were brushed aside by the Court of Appeal ('we agree . . . that the mother is entitled to invite the court to make full allowance for the cultural context in which she was placed'). (Though see *Webster v Norfolk County Council* [2009] EWCA Civ 59, [2009] 1 FLR 1378 at para [180] for a rather differently nuanced approach to the same case by the same judge!).

The second type of case is that in which the application to re-litigate earlier findings due to new evidence comes long after the original findings, and often in relation to subsequent children born to a person found to be an actual or possible perpetrator of harm to a child. In a case which had already attracted a deal of publicity in the press, Hedley J dealt with a very late application for earlier findings to be reconsidered in *F and L v A Local Authority and A* [2009] EWHC 140 (Fam), [2009] 2 FLR 1312. The father had previously been found to be one of two possible perpetrators of non-accidental head injuries to a baby. He had a new baby, to a new mother. In the face of vehement denials of responsibility and uncooperative behaviour, the child was removed and a final care order and a placement order were made.

Before the conclusion of the adoption proceedings, the parents obtained a medical report from Dr Waney Squier suggesting natural causes, and recommending an opinion be obtained from an experienced paediatric neurosurgeon. Dr Squier subsequently discarded her original hypothesis, developing another, based on a different natural cause. The parents, relying on Dr Squier, sought a stay of the adoption proceedings and a residence order. Hedley J heard evidence from Dr Squier and from Dr Neil Stoodley, the expert instructed by

the local authority to respond. He 'arrived at a clear conclusion' that he 'should reject the evidence of Dr Squier', finding that 'on the central issue . . . both that she is wrong and that Dr Stoodley, on a clear balance of probabilities is right.'

This seems uncontroversial and accords with the pattern taken in other cases. What singles the case out is the way in which the learned judge dealt with the question of the burden of proof. He was, of course, not able to factor the new evidence into the previous evidence to consider whether the local authority was still able to discharge its burden as he had not been the trial judge in the original proceedings. Rather, he considered that the original finding 'stands until displaced. The burden is now on the father on the same balance of probability to show that the original finding was wrong', later describing this as the parents bearing 'the evidential burden of proof'.

This case is sometimes wrongly used to suggest that the burden of proof in a case of re-litigation of previously made findings will inevitably fall on the party seeking to establish their having been incorrectly made. It is not authority for that proposition. The father was not represented during the hearing, though he was assisted by a McKenzie friend, and it appears that the question of the burden of proof was not argued, but rather it was judicially decreed. Clearly the procedure adopted, ie the hearing of limited but highly specific and relevant evidence and the making of findings based on this, cannot be faulted, it representing a pragmatic, bespoke, cost-effective but fair response to a difficult issue being pursued by desperate parents. Whether it was an evidential burden only (again unarguable on the facts of this particular case), or a legal burden of proof which fell on the parents is not readily identifiable: it may be that this question finds its way to the higher courts in other cases.

The Court of Appeal in *Re I (Care Proceedings: Fact Finding Hearing)* [2010] EWCA Civ 319, [2010] 2 FLR 1462 considered an appeal by a mother against the refusal of a trial judge to allow the reopening of a factual investigation into injuries sustained by a child now adopted during proceedings relating to a later-born sibling. The mother had been found to have been an equally likely perpetrator as the childminder at the point of the first trial. New medical evidence widened the possible window of opportunity for the infliction of the injury, precipitating the mother not being prosecuted for having inflicted the injury. The judge's refusal had been based on (a) the inevitable delay, and (b) there being no possibility that the mother would be excluded as a possible perpetrator. The Court of Appeal upheld this, indicating:

> 'It is inevitable that in the exercise of the discretion the judge must evaluate what would be the high point for the applicant, were the elaborate and expensive process of retrial ordained. Look at this how you will, the best outcome that the mother could have hoped for had there been an elaborate reinvestigation . . . would have been that all injuries rested on the same foot: namely that either the mother or Mr T was responsible.'

This case is sometimes cited as authority for the proposition that the application of a party seeking to re-litigate must be adjudged taking that party's case 'at its highest'; this is not, of course, an accurate summary if it is intended to deprive the court hearing the application of the opportunity to subject the new evidence to some degree of critical scrutiny.

The case of *Sutton LBC v Gray, Butler et al* [2012] EWHC 2604 (Fam) and [2012] EWHC 2763 (Fam), [2013] 1 FLR forthcoming, is fully described in our article devoted to that case at November [2012] Fam Law 1344. The trial judge, who 5 years before had made findings that the father, Ben Butler, had abusively caused the 'triad' of head injuries to his baby daughter, allowed the case to be transferred to the High Court, to a different judge, and for a full rehearing. There had, since his findings, been an acquittal in the Court of Appeal, precipitated in large part by the acquisition of new expert medical evidence which no reasonable jury could have ignored; by the time of the criminal appeal there was more expert evidence suggesting the father's innocence. Notwithstanding that other experts stood by their opinions that the injuries were inflicted, the trial judge (rightly) declined the invitation from the local authority to carry out a 'paper exercise' analysis of the evidence, or to hear

discrete parts of the evidence (as, for example, had been appropriate in the rather simpler case of *F and L v A Local Authority and A*). With the passage of so much time, and with the complexity of the issues and the evidence, a full rehearing was necessary.

The justification for the rehearing, then, came from the ongoing chain of events post-dating the fact-finding hearing: Dr Anslow presented evidence to the criminal trial which came after the finding of fact hearing; this relied on new and developing scientific research into the incidence of birth-related subdural haematomata; this led the Court of Appeal (Criminal Division) to quash the conviction; this in turn both established the need for the rehearing (ie existing findings remaining after acquittal) and the reasoning of Moses LJ in the judgment provided further foundation for arguing for its appropriateness. The rehearing took place before Hogg J, in whose judgment it is clear that in a full rehearing, the burden of re-proving falls on the local authority to the same simple standard of the balance of probabilities as it had done during the first hearing.

Interesting about the case is the fact that the re-litigation technically ran in two different sets of proceedings in parallel. The application to re-litigate was made in new care proceedings brought in relation to a new child and in which case the local authority sought to rely on the old findings; it was also made in contact applications brought by both parents in relation to the child who had been subject to the initial care proceedings. Happily she had not been adopted but placed with family members, with the consequence that when Hogg J found that the injuries were not abusively caused, not only could the new child, but also the older child, return to the care of the parents.

Not so lucky were Mr and Mrs Webster. Their well-publicised campaign to effect the return of their children to their care culminated in a visit to the Court of Appeal, reported as *Webster v Norfolk County Council and the Children* [2009] EWCA Civ 59, [2009] 1 FLR 1378, seeking to set aside adoption orders made 3 years earlier in relation to three of their children. The application was based on their having obtained new expert evidence suggesting that the fractures sustained by the child whose injuries precipitated the original proceedings had a natural cause arising out of scurvy or iron deficiency rather than an abusive aetiology. They were too late. Reasons of public policy weighed against setting aside adoption orders in these circumstances. The fourth child – who was born in time to benefit from the new evidence – was living with the parents, proceedings having been discontinued. Thus the application for permission to appeal against the adoption orders was refused as having no real prospect of success, and, as Wall LJ put it:

> 'If, as I believe to be the case, the adoption orders cannot be set aside there is, in my judgment, no point in permitting a re-opening of [the original] judgments. I appreciate that from Mr and Mrs Webster's point of view this is unsatisfactory, since they will not have had the opportunity to clear their names. But this court has to ask the question: what would be the point of re-opening the proceedings? Brandon is living at home with them. The proceedings in relation to him have long been discontinued. The proceedings in relation to A, B and C have resulted in adoption orders which cannot be set aside. There is, accordingly, no further role for the court to play.'

The most recent example of a sensible and proportionate approach to reopening a case in light of possibly developing scientific understanding was that of McFarlane LJ hearing an application for permission to appeal against a refusal to allow the re-litigation of findings: *Re A (A Child)* [2012] EWCA Civ 1477. Findings had been made in July 2010 that the fractures and other injuries sustained by a baby had been abusively inflicted by one or other parent. In June 2012 the parents applied to the trial judge to reopen the whole fact-finding process. The judge gave careful consideration to this application, refused it, and instead made the placement order sought by the local authority.

The case came before McFarlane LJ as an ex parte oral application for permission to appeal. He was presented by counsel with partial documentation and an argument that an established vitamin D deficiency passed in utero from mother to

baby may have weakened bones rendering them liable to fracture but that the deficiency may have been remedied by the fact of formula milk feeding post-natally. (The submissions relied both at first instance and at this hearing on assertions that the *Al Alas and Wray* case and the scientific developments it spoke of justified the re-litigation sought.)

McFarlane LJ adjourned the case to an inter partes hearing. In doing so he also gave permission to the parents to instruct an expert of their choice. They chose Professor Stephen Nussey, a professor of endocrinology and consultant endocrinologist; he was also an expert in the *Al Alas and Wray* case. Professor Nussey's report came back with the settled opinion that no medical condition accounted for the injuries. Although the parents sought further adjournment at the inter partes hearing in order to instruct afresh a paediatric radiologist based in the USA and to reinstruct the original experts from the care proceedings, the report from Professor Nussey provided more than enough justification to refuse the application for permission to appeal. The judicious instruction of a single expert avoided the need for a far more expensive process which would have injected yet more delay into the decision-making for a young child.

Re-litigation of facts founding criminal conviction

There are many occasions when a person's previous criminal convictions are relied on against him in Children Act 1989 proceedings. In such cases, the provisions of the Civil Evidence Act 1968 apply. Section 11 provides:

> '(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or of a service offence (anywhere) shall . . . be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.
>
> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or of a service offence –
>
> (a) he shall be taken to have committed that offence unless the contrary is proved; and
>
> (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.'

Sir Patrick Russell, in the case of *McCauley v Vine* [1999] 1 WLR 1977, although the case concerned a very different area of law, stated:

> 'The closing words of that section "unless the contrary is proved" provide, in my judgment, the clearest possible mandate to a defendant in a road traffic accident case to attack his earlier conviction provided he has some good cause for so doing and can discharge the burden of proof to a civil standard that the section imposes upon him.'

The same approach must presumably pertain in Children Act proceedings. It is suggested that the process described above, allotting to the trial judge a fair degree of discretion in the determination of the manner in which such an issue would be litigated would apply equally to the case of a party disputing the facts founding a criminal conviction. Certainly it would not be true to suggest (as one occasionally hears in the family courts) that a party can in no circumstances 'go behind' an unappealed criminal conviction.

Practice in cases of re-litigation

Which proceedings?

This will depend. As we have considered above, findings can be reconsidered during the course of the same proceedings in which they were made, in subsequent proceedings in relation to that child, (including a discharge application or an application to revoke a placement order or to defend an adoption application), or in proceedings in relation to a subsequent child. As is clear from *Re S* (above), there is no need to 'correct' the original finding within the original proceedings, it can simply be revisited and adapted as necessary in subsequent proceedings.

However it is clear – affront to an innate sense of justice though it might seem – that there must be real and justiciable questions in relation to a child to whose welfare the re-litigation is directly relevant. The *Webster* reasoning thwarts the suggestion that there can be a 'freestanding' application in old proceedings. By extrapolation, even if there are ongoing proceedings, the application to re-litigate must have a direct relevance to the issues before the court in order to be successful.

Which judge?

Where possible and practicable the application should be before the original trial judge. In the *Butler* case, it was the judge who, 5 years before, had made the findings to whom the application to reopen was made. But that judge was already hearing care proceedings in relation to the sibling of the original subject child, in which proceedings the application to reopen was made. Having made the decision that a full reopening was necessary, the trial judge took little persuasion to transfer the case to a new judge to conduct the re-litigation. This must be right, especially when the period of time between the original findings and the new litigation is sufficient to cast doubt on whether the judicial memory of the original evidence could fairly be relied on.

Clearly if the application is made in the same proceedings as those in which the findings had originally been made, the original judge should be the tribunal to whom the application is made: the finding in question is – unless full re-litigation is directed – a part-heard matter. If, however, the question arises in new proceedings, there is no particular requirement that the original trial judge should hear the application to re-litigate, still less any subsequent retrial. In such cases, common-sense and pragmatic considerations will prevail.

Nature of rehearing

The cases establish that there is a spectrum, from a full rehearing on the one hand, to the consideration of limited new evidence and its being factored into the original process on the other. The considerations which will dictate where on the continuum any particular case lies are too numerous to try to set out fully. Clearly what will be important are:

(a) the reasons for the re-litigation;
(b) the nature of the challenge to the original findings;
(c) relevant to both (a) and (b), whether advances in the understanding of the relevant medical or other science form the basis of the need to re-litigate;
(d) the interval between the original findings and the re-litigation;
(e) whether the original case is proceeding before the original judge or a new one; and
(f) all other relevant factors: delay, the overriding objective, the importance to the child and to the case of the particular finding or its absence, cost, court time, fairness, the perception of fairness etc.

Burden of proof

This is a moot point. In any full retrial, especially if it is before a new judge, the burden of proof will fall on the party seeking to (re-)establish the findings, usually the local authority in care proceedings. This is the clear view taken by Hogg J in *Butler*. It accords entirely with the authors' experience of the approach taken in a similar reopened fact-finding hearing which was heard by McFarlane J (as he then was). If it is a full re-trial of an issue, then it clearly falls on the party asserting to bear the burden of (re-)proving. The difficulty comes where something less than a full re-trial is undertaken. It seems clear, at least implicitly, from the reasoning

of Theis J in *A Local Authority v C, D, A and B* that when factoring new evidence into a previously concluded fact-finding process, the learned judge was considering whether the local authority had – given the presence and effect of the new evidence – discharged the burden it had not previously satisfied of proving the truth of its allegations.

In a case such as *F and L v A Local Authority and A*, however, when a parent seeks to rely on new evidence to overturn a previous finding, and that evidence is admitted and tested but without full reconsideration of all of the original evidence, then what is the judge in law doing? Is he considering the new evidence in order to decide whether the local authority continues to be able to discharge the burden of proving the fact in question, or is he considering whether the parent can prove on the balance of probabilities that the original finding was wrongly made? In many cases the need to decide this question won't arise. In *F and L*, the judge was able to make a clear finding on the balance of probabilities without resorting to reliance simply on the burden of proof. In a case in which the allocation of the burden may be decisive, however, the law is not currently clear. That the current authors take a different view to that expounded by Hedley J is obvious from the foregoing; this may be a question for determination by the higher courts when it next arises.

The full retrial: expert evidence

Overarching expert

Both the *Butler* case and the unreported case referred to above involved the wholesale re-litigation of a complex question which had been the subject of an original very substantial trial. The *Butler* case revolved round an allegation of shaking a baby, leading to serious injuries; the other case involved allegations of repeated sexual abuse of children. In both cases, the original trials had lasted for weeks, had involved leading and junior counsel, and had exhaustively considered voluminous evidence. Also important is that both cases resulted in a judgment at first instance which was not susceptible of appeal: the findings made were within the trial judges' respective discretions; the judgments had not been appealed. It was new developments which indicated the need to look again at the original findings: in *Butler*, the new science and new medical opinions, and in the sex case the fact that a child complainant of sexual abuse, on leaving local authority care as a young adult, retracted his allegations against his father.

In both cases, although lengthy ('eye-wateringly expensive' to quote one of the judges) retrials took place, it was the instruction of fresh expert evidence which in the final analysis allowed the new judges to disentangle the almost Gordian morass of varying opinions and contradictory evidence. In the brain injury case, Dr Anslow's involvement during the criminal trial and appeal paved the way for Professor Fleming, a consultant paediatrician with relevant specialist interests, to provide an overview of exquisite expertise, distilling each expert's opinion to its irreducible essence, putting each in context with the others, and preserving a professional modesty in relation to the status of doctors and the tendency sometimes towards arrogance, which instilled immediate and well-placed confidence.

In the sex abuse case, a world-renowned child and adolescent psychiatrist pored over the original source material and the fresh accounts and provided an overview derived from the likely experiences and reactions of the relevant children and in so doing unlocked the door for decade-old findings of repeated buggery to be set aside, freeing a man with new children from the burden of those false findings. In an era in which expert evidence is ever harder to obtain, we suggest that it is a false economy – especially when a miscarriage of justice may pertain – not to contemplate the instruction of a true expert, a leader in the relevant field, to help the judge in what must be among the most difficult cerebral challenges required of the modern family judiciary.

New experts – old experts – treating medics

In the first trial of a difficult medical case, the question of the differing roles of the treating medic as opposed to the jointly instructed expert is often – even though there is case-law on point – tricky in practice. At the retrial, the question

becomes immeasurably more so. In the *Butler* case there were well over 30 medics who had a claim to the moniker 'expert'. While almost all were potentially available to give evidence, this would have led to an unwieldy, disproportionately lengthy and largely repetitious trial.

The approach taken, and which we suggest is of wider application, was to undertake a comprehensive and critical analysis of what each witness could bring to the case. Where there had previously been expert disagreement, then fresh expert instruction was necessary. This having been undertaken, it was possible to agree to excise some of the earlier experts. Treating medics can often bring clinical evidence and impressions to the case in a way which informs the experts; in a case, however, which is being relitigated years after the precipitating illness, this is less so, as reliable memories will long have faded away. Equally in many cases the treating medic can claim expertise broadly equivalent to the jointly instructed expert; this may be less so when the case involves very difficult and contentious medical questions and in which the newly instructed experts were handpicked because of their national or international status.

The focus throughout should be on (a) close analysis and never losing sight of the clinical picture, and (b) feeding this to the top tier of experts in the case in order that its relevance can be picked over. Achieving (a) may in some cases suggest the calling of treating medics; in other cases, especially those heard years after the event, it will tend instead towards ensuring that the legal team knows the medical notes inside out (remembering not to rely on or delegate this function to any other person or witness).

Afterthought

Central to any attempt to re-litigate a previous finding is an assertion made by one party or other that a previous finding is inaccurate. There will always be parents who cannot or will not accept the truth of what has been done to a child, who will disseminate, deceive and protest. Equally, though, there will always be parents who fall victim to incorrect findings being made. We operate in a system where the standard of proof is – for good reason – fairly low; we use medical experts who can do no more than advise courts in the context of our wholly imperfect and ever-advancing understanding of medicine. The corollary of these two facts is that there will be miscarriages of justice. Rather than adopting a protectionist approach, a refusal to contemplate that anyone should be allowed to 'go behind' earlier findings, the system should be open to examination of cases in which it is said that findings have previously been erroneously made. This examination should be rigorous, but open-minded: it should weed out the cases in which there is no realistic argument (anecdotally there has been a flurry of such cases in the aftermath of the publicity of *Al-Alas*); yet it should welcome reconsideration of the cases in which there is a real possibility that the system has previously got it wrong. No other approach will serve to safeguard the affected children's interests.

The law as it stands allows this flexibility. And it is perhaps unique to the family justice system that such a wide discretion, with such vague rules of operation, can be seen as a virtue rather than as a weakness. When a case needs full re-litigation, then regardless of the cost, this must be done openly and comprehensively. Such cases are the self-contained, paradigmatic counter-argument to the current suggestion that costs can be cut, court time saved, experts abandoned and justice still be done. There are certainly many care cases which could be heard more quickly than they are; there are equally many expert reports commissioned in the Family Division which add very little to the cases in which they are directed. But practitioners and the judiciary should not lose sight of the fact that the truly complicated case, especially if it involves the possibility of identifying and correcting a significant miscarriage of justice, will require real investment of time, money and expertise.

The table below is a summary of the relevant case-law in respect of estoppel and re-litigation in family proceedings.

Estoppel and re-litigation in family proceedings: case-law

Case	Facts	Outcome
B v Derbyshire County Council [1992] 1 FLR 30 July 1991 CA: Sir Stephen Brown P and Waite J	Before CA 1989, in care proceedings brought under CYPA 1969, an earlier court had ruled that there was 'no case to answer'; 20 months later justices in fresh proceedings considered the LA to be bound by the doctrine of res judicata and absent new evidence declined to make an order. LA appealed by way of case stated: Was the doctrine of res judicata applicable to care proceedings brought under s 1 of CYPA 1969?	'The Latin rubric res judicata pro veritate habetur is particularly liable . . . to find itself at odds, in child care cases, with the homelier English principle that "circumstances may alter cases".'
K v P (Children Act Proceedings: Estoppel) [1995] 1 FLR 248 13 June 1994 HC: Ward J	Justices made a residence order to M, declining, having heard the evidence, to make the findings of sexual abuse against F sought by M. On the breakdown of the contact to F, was the court entitled to consider again whether the abuse had taken place as originally alleged, or was M estopped from re-making the assertion?	Ward J refused to hold himself 'bound by the finding', deciding in his discretion 'to admit all the evidence and to look at the whole case'. This despite the fact that 'estoppel per rem judicatam is a valuable rule of evidence to contain disputes . . . which the Family Division should not be slow to use where it is appropriate.' 'The overwhelming justification for setting aside the rule must be to do justice.'
Re S, S and A (Care Proceedings: Issue Estoppel) [1995] 2 FLR 244 12 January 1995 HC: Wilson J	Care proceedings were brought under CYPA 1969 in relation to the children of F's first family, based on, inter alia, his alleged sexual abuse of them. Care proceedings under CA 1989 in which F played no part were brought in relation to the children of his second family; findings were made against him that he had abused the children of the first family. In relation to the children of his third family, the LA sought to rely on the earlier findings.	The findings in the second proceedings re the children of the first family were not 'necessary' to the judge's decision and were made based on reading written evidence, not on tested oral evidence. Thus no estoppel was raised and the allegations would all be litigated within the current proceedings. Obiter: the doctrine of issue estoppel should be imported into children cases to a limited extent.
Re S (Discharge of Care Order) [1995] 2 FLR 639 27 June 1995 CA: Waite and Schiemann LJJ	J found that M's children had been sexually abused by her friend and that she had known of it. Care orders made. Subsequent care proceedings in relation to the children of co-defendants' children cast doubt on whether M had known of the abuse. M applied for permission to appeal out of time.	Application for permission to appeal refused because appropriate application would be to discharge the care orders. The judge hearing such an application would not necessarily be bound by the earlier threshold findings; (s)he could review the findings when considering s 1(3)(e) CA 1989 (any harm suffered or likely to be suffered). The judge would 'have complete discretion' as to whether and if so to what extent the findings should be re-examined in the light of new evidence. (Such instances are 'bound […] to be extremely rare'.)
Re B (Children Act Proceedings) (Issue Estoppel) [1997] 1 FLR 285 1 November 1996 HC: Hale J	J made findings in care proceedings relating to children A and B that F had sexually abused them; in care proceedings re children C and D, involving the same F but a different M, brought the following year, was F bound by the earlier findings?	Answer: 'not necessarily'! There is no strict rule of issue estoppel binding on the parties in children's cases. But the court has discretion as to how the inquiry before it is to be conducted, and so may decline to allow a full hearing of the evidence on certain matters. (This case remains the locus classicus and sets out a number of helpful principles to assist in considering each such case.)

Case	Facts	Outcome
Re M and MC (Care: Issues of Fact: Drawing of Orders) [2003] 1 FLR 461 12 March 2002 CA: Thorpe LJ and Neuberger J	During Stage 1 of care proceedings, J made findings that one or other parent had caused injuries to child. M then confessed to SW that she had caused them. J declined to reopen the matter. Appeal to CA.	Reopening allowed. There are two extremes: to 'tear up' the earlier process, or to reject the development completely. Between the two is the possibility (appropriate in this case) of adopting the conclusions of the preliminary hearing, but making any necessary adjustments after rigorous testing of new evidence during the welfare hearing.
Re K (Non-Accidental Injuries: New Evidence) [2005] 1 FLR 285, [2004] EWCA Civ 1181 27 August 2004 CA: Wall and Neuberger LJJ	J unable to determine which of M, F and PGM had abusively shaken a baby, who, together with a subsequently born sibling was made subject of final care and freeing orders. M later made serious allegations against F and PGM tending (if true) to suggest her innocence in relation to the injuries. She appealed against the care orders and freeing orders.	Appeal allowed. Final orders set aside. ICOs reinstated. Case remitted in relation to 'the perpetrator issue' to a judge at first instance. '[Counsel] have satisfied us that the mother's evidence might reasonably lead, on a rehearing, to a finding that the mother can be excluded as a possible perpetrator . . . [I]t is sufficient for [her] to establish a reasonable prospect …'
F and L v A Local Authority and A [2009] EWHC 140 (Fam), [2009] 2 FLR 1312 30 January 2009 HC: Hedley J	F found to be one of two possible perpetrators of NAHI to baby; F had new baby with another M. Baby removed, and final CO and PO made; J relied on the findings of the original judge, at this stage 'unchallenged by medical evidence'. Before the conclusion of the adoption proceedings, Ps obtained further expert evidence from a consultant neuropathologist, casting doubt on the original findings. The adoption proceedings were heard in the High Court; the parents were unrepresented.	Hedley J heard the evidence of both the Ps' new expert and the expert instructed by the LA rebutting this. J 'arrived at the clear conclusion' that he should reject the Ps' expert's evidence and that 'on a clear balance of probabilities she is wrong and [the LA expert] right'. Re burden of proof, J said that the original 'finding stands until displaced. The burden is now on the father on the same balance of probability to show that the original finding was wrong', and that the parents 'bore the evidential burden of proof'. (NB It cannot be argued that these elements of the judgment apply generally to re-litigation cases; some commentary wrongly seeks to assert this extrapolation.)
Re I (Care Proceedings: Fact Finding Hearing) [2010] EWCA Civ 319, [2010] 2 FLR 1462 17 February 2010 CA: Thorpe, Arden and Pitchford LJJ	M's first child suffered serious injuries. She and childminder held in care proceedings to have been equally possible perpetrators. CO made; child adopted. Expert in later criminal proceedings indicated the injuries could have been 48 hours old, so M not prosecuted for GBH (though PG to neglect). M's second child removed at birth. M sought to re-open the factual investigation into the injuries to child 1 (though not to disturb the care or adoption orders). J refused because (a) delay, and (b) no possibility that M would be excluded as possible perpetrator. CO and PO made. M appealed against refusal to reopen factual investigation.	Appeal dismissed. 'It is inevitable that in the exercise of the discretion the judge must evaluate what would be the high point for the applicant were the elaborate and expensive process of retrial ordained.' Here, the best possible outcome would have been no change, ie either M or the childminder was responsible. (NB This case is often cited to assert that the case of a party seeking to relitigate must be taken 'at its highest', ie without critical analysis of the nature of the fresh evidence: the case does not provide support for this argument.)

Case	Facts	Outcome
A Local Authority v C, D and A and B [2012] EWHC 1975 (Fam) 1 June 2012 HC: Theis J	At conclusion of fact-finding, Theis J declined to find that child had been sexually abused, in part due to failures by examining paediatricians to abide by guidelines. During the court-ordered rehabilitation the child was further examined establishing unchallenged evidence consistent with penetrative abuse dating back to the original injuries; it also transpired that the parents had lied about other significant matters during the Stage 1 hearing.	Further evidence heard in relation both to the new medical findings and the parents' dishonesty with the court and social services in other respects. Findings made that the original injuries had been caused by sexual abuse perpetrated by the father.
Sutton v Gray, Butler Et Al [2012] EWHC 2604 (Fam) and 2763 (Fam), [2013] 1 FLR forthcoming 12 October 2012 HC: Hogg J	In January 2008, J found F to have inflicted significant injuries on his child who was not returned to the parents' care. Father convicted in Crown Court but acquitted on appeal. In light of medical evidence not available to the care J, application made to relitigate facts both re later born child and in contact applications made by both parents re first child.	Original trial J heard application and gave permission for full rehearing, transferring case to the High Court and a new J. After a full and lengthy rehearing, at which the burden of re-proving the allegations was agreed to fall on the LA, the findings were not remade; rather there was an innocent explanation for the child's original injuries.
Re A (A Child) [2012] EWCA Civ 1477 1 November 2012 CA: McFarlane LJ	In July 2010 J found a baby's fractures and other injuries to have been abusively inflicted by one or other parent. In June 2012, the Ps applied to the same J to reopen the fact-finding, purporting to rely heavily on the judgment of *Al Alas and Wray* and the science re vitamin D and rickets described in it. J refused. Ex parte application made for permission to appeal.	On ex parte application, McFarlane LJ adjourned the application for permission and gave leave to Ps to instruct the expert of their choice, an eminent consultant endocrinologist. By the time of the inter partes hearing the expert had reported; no support for the Vit D theory was given. The Ps applied for further adjournment to reinstruct all original experts and instruct a foreign paediatric radiologist. Application dismissed.

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