Re LM (A Child) [2007] EWCA Civ 9

Case No: B4/2007/0048

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Medway County Court
HH Anthony Bradbury (sitting as a Deputy Circuit Judge)
ME06C00060

Royal Courts of Justice
Strand, London, WC2A 2LL

19th January 2007

B e f o r e :

LORD JUSTICE LONGMORE
LADY JUSTICE SMITH
and
LORD JUSTICE WILSON

Between:

L M (A Child, by her Guardian)	**Appellant**
- and -	
Medway Council	**First Respondent**
- and -	
R M	**Second Respondent**
- and -	
Y M	**Third Respondent**

(Transcript of the Handed Down Judgment of
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Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Ms C Nicholes & Ms G Farrington (instructed by Messrs Rootes and Alliott)
for the Appellant child
Mr J Cowen (instructed by Medway Council) for the First Respondent.
Mr G Pulman QC & Mr A Clegg (instructed by Messrs Pearson, Gillingham) for the Second Respondent, Mother.
Mr J Tillyard QC, & Mrs J Wehrle (instructed by Messrs Davis Simmonds & Donaghey, Strood for the Third Respondent, Father.

HTML VERSION OF JUDGMENT

Lady Justice Smith :

1. This is an appeal from the decision of HH Anthony Bradbury sitting as a deputy circuit judge at the Medway County Court in the course of care proceedings relating to L, a girl aged 10 years. On 5th January 2007, the judge made an order that L should attend for the purpose of giving evidence via video link in the care proceedings. L's guardian applied for permission to appeal the decision. Thorpe LJ considered the application on paper and adjourned it into court, on notice to the respondents, with appeal to follow if permission granted. On 10th January, we heard the application, granted permission to appeal but dismissed the appeal. This judgment now provides my reasons for those decisions.

2. The circumstances of the case are unusual. L's parents were married in 1995 in India. It was the father's second marriage. He had been resident in England since the 1970s. L was born in India in 1996. L and her mother remained in India until May 2004 when they came to England for three months and stayed with the father. They came back to England in May 2005 and began to live with the father. L enrolled at a local school. L's first language is Punjabi, although she has been learning English since her first arrival in this country in 2004.

3. In May 2005, concerns arose when the mother made allegations at the school that L had been physically abused by the father when he was drunk. The upshot was that, in June 2005, L was interviewed on video film by a police officer in the presence of a social worker. The interview was conducted in Punjabi. In the course of two interviews, L alleged that the father had abused her physically and sexually; also he had been violent towards the mother. The mother was also interviewed and made similar allegations, effectively confirming what L had said. The father was interviewed and denied any improper behaviour. L was placed on the 'at risk' register.

4. In January 2006, L was interviewed again on video tape about an incident of violence in which it was alleged that the father had broken the mother's finger. The following

month, mother and daughter went to India for 3 months, returning to this country in May. They began to live with the father. Within about 3 days, the mother made a complaint to the police that the father had abused her physically and sexually. L was interviewed again on video tape. She said that there had been physical violence by her father against her mother and herself and that she was afraid of her father. From that time, the Local Authority placed L with foster parents with the mother's consent.

5. In June 2006, the mother retracted her allegations against the father. She said that everything that she had ever said against him had been untrue. Moreover, she had told L to make false allegations against her father. Everything that L had earlier said about her father had been untrue. She was thoroughly ashamed of what she had done; she had made these allegations to put pressure on her husband to give up alcohol and smoking.

6. The Local Authority did not accept the truth of the mother's retraction; they remained concerned about L's safety and welfare. They commenced care proceedings. L was assigned a guardian. Evidence was prepared; the position of the father and mother is united; they both deny that any abuse or misconduct has occurred and contend that it is safe for L to be returned home to live in the family. Evidence from social workers shows that L is not happy at her foster home. She is very closely attached to her mother and wishes to live with her. She is aware that her mother has retracted her allegations against the father. There is evidence that the mother has told L that, if she is asked, she should say that the allegations of sexual abuse were untrue. In July 2006, during a supervisory visit, L repeated the allegations of sexual abuse to a social worker, but it is not clear whether, at that time, L was aware that her mother had retracted the allegations against the father. Since the mother's retraction, no attempt has been made to obtain evidence from L as to whether she spoke the truth at the video interviews. Both her social worker and her guardian have taken the view that it would not be proper for them to canvass those issues with her. Thus, at the commencement of the hearing, nobody knows what L, if asked, would now say about the truth or falsity of her earlier allegations.

7. The first or fact-finding stage of the proceedings began on Wednesday 3rd January 2007. On Friday 5th January, the mother applied to the judge for a witness summons compelling L to give evidence via video link. The father supported it. L's guardian and the Local Authority opposed the application on the ground that it was inappropriate for so young a child to have to give evidence and that in the particular circumstances of this case it would be oppressive upon her if she were required to do so.

8. The judge gave an extempore judgment after hearing submissions. He granted the order requested. We do not have a transcript of what he said, only a combined version of the notes taken by counsel. It is plainly not complete. However, the judge has seen and approved it after making some handwritten amendments. The note is adequate for the purpose of considering the criticisms of the judge's reasoning in this appeal.

9. The judge set out the history much as I have done. In the course of that recitation, he referred to the video films of L's various interviews. He said that he had seen them and that, on the films, L appeared nervous but not distressed.

10. The judge then considered the arguments for and against the making of the order. One of the grounds of the appeal is that, in doing so, he did not analyse the submissions or make clear his view of them. The result, it is alleged, is that it is impossible to see how or why he exercised his discretion as he did.

11. First, the judge referred briefly to the parents' submission that, if L could be cross-examined, the court would have the best possible evidence available. He then observed that he had a discretion whether or not to make the order. He noted that, if there were criminal proceedings, L might be required to give evidence

notwithstanding her young age. He also observed that L's welfare was a relevant and important consideration although it was not the over-riding or paramount consideration. No criticism is made of those aspects of the judgment.

12. The judge then considered the parents' submission that L herself wished to give evidence. L had quite recently written a letter to the judge, in English. However, the judge considered that this letter did not express a desire to give evidence about the facts, only to convey to him her hopes and wishes for the future. The judge considered that that was a very different matter from giving evidence and he considered that she had probably not considered that question at all. The judge did not mention (although we were told that he was aware) that on the day that L wrote her letter to the judge, she had told her guardian that she did not want to be at all involved in the judge's consideration of what had happened in the past. Although the judge did not say so in terms, it seems to me that, even on the basis of what the judge said, he must have rejected the parents' submission that L positively wished to give evidence. It is not clear whether he accepted that she positively did not wish to do so.

13. Next the judge considered the submission that the case was unusual in that serious allegations had been made and retracted by the mother. She herself was saying that she had put the child up to telling lies. The judge accepted that that factor meant that the case was unusual, although he did not appear to be saying that he regarded the circumstances as highly unusual.

14. The judge then referred to the case of *B v Torbay Council,* a decision of Coleridge J, given in Exeter on 21st March 2006 as yet unreported but noted in [2006] Family Law, vol 36, p. 924. The judge said that Coleridge J had referred to the importance of the court always having the best evidence if possible. I will say more about the judge's observations on this case in due course.

15. The judge observed that it was agreed that L's young age was an issue for him to consider. He had been referred to reports of two decisions of the Court of Appeal, *R v B County Council* [1991] 1 FLR 470 and *Re P (Witness Summons)* [1997] 2 FLR 447. *R v B County Council* was concerned with a girl of 17 who had alleged rape by her step-father. In care proceedings in the magistrates' court, the local authority wished to rely on hearsay evidence and refused to issue a witness summons compelling the girl's attendance. An application for judicial review was refused and an appeal from that refusal was dismissed. *Re P* was concerned with the refusal of the judge in care proceedings to order a child of 12 to give oral evidence but instead to rely on her video taped interview. The Court of Appeal upheld that decision. In the instant case, the judge observed that L was younger than the children in any of the three cases he had considered. But, he said, it had been submitted to him that it was appropriate and proper for her to give evidence. He added that 'children do give evidence in criminal courts'. It does not appear to me that the judge was expressing any view as to the validity of the parents' submission that it was proper for her to give evidence notwithstanding her young age.

16. Finally, the parents submitted that the issues were so serious and the consequences to them and to L of a potentially wrong decision based only on video and hearsay evidence were so grave that the judge should avail himself of the opportunity to hear the best evidence. The judge did not pass any comment on that submission.

17. The judge then turned to the arguments advanced by the guardian. The guardian had submitted that to call L would be oppressive - not merely unpleasant but positively oppressive. Our note of the judgment says that the guardian had submitted that L's preparation for giving evidence would be unpleasant and might well be so unpleasant as to be detrimental to her health and wellbeing. The judge recorded that the guardian had formed the view that to give evidence would be detrimental to the child. He made no observation about the validity of that submission.

18. The judge then observed that L knows that her mother very much wants to see her. Although it is not entirely clear, I think that this must be a reference to the guardian's submission that the child was under pressure caused by the mother's retraction and the pressure she had applied to L to withdraw her allegations. The guardian's submission was that L had been put in an intolerable position. The judge said that he accepted that the mother might have told L that she had lied but he said that he was not at all clear to what extent the mother had told L that she should lie about the past complaints. It appears to me that, at the stage of the evidence that had been reached, the judge was not clear as to the extent of any pressure that had been applied to L.

19. The guardian's third submission was that it was not necessary for L to give evidence because there was an abundance of evidence from which the credibility of the mother and father could be tested and the reliability of L's video taped evidence could be assessed. The judge passed no comment on that submission.

20. Next the judge turned to consider the relevant law. He cited a very brief passage from Butler-Sloss LJ's judgment in *R v B County Council* (supra) and observed that the judgment had made it plain that the court should be very cautious in exercising its discretion. It was clear that he understood the thrust of this judgment was that courts should be very cautious before ordering a young child to give evidence. He added, however, that he accepted what she had said, as he must, although he noted that it was a decision of 15 years ago. He did not at that stage say why the age of the decision was relevant.

21. For reasons which will become apparent, it is convenient at this stage to cite a more extensive passage from the judgment of Butler-Sloss LJ than was cited by the judge. Although the crux of the decision was whether the magistrate's decision fell within the bounds of his discretion, the Court of Appeal wished to make some observations of a more general nature as to the appropriateness of issuing a witness summons in respect of a child in care proceedings. At page 476D, Butler-Sloss LJ said that she regarded the use of a witness summons as inappropriate and added:

> " Research has shown the adverse effects upon some children of the requirement to give evidence in cases of sexual abuse. In cases of young children, such harm may well be inferred. (See the Report of the Advisory Group on Video Evidence 1989.) The introduction of the 1990 Order clearly envisages an alternative to oral evidence and cross-examination, and to make it possible for children making allegations of, inter alia, sexual abuse to do so without the additional stress of a court hearing. The philosophy behind the Children Act would be thwarted by the ability of the alleged abuser himself being able to require the attendance of the child at court. A court should be very cautious in requiring the attendance of a child in these cases, reinforced as it must be by considerations as to how to deal with a refusal to give evidence after the issue of the summons.
>
> In my view, (reading s.97 as a whole) if the juvenile court considers at the time of application for a summons that, for reasons of welfare of the child, the child should not be called as a witness, then it would be inappropriate to issue the summons."

22. However, Butler-Sloss LJ was well aware of the difficulties which the absence of the child's evidence might cause to the judge. At page 478A, she cited, with approval, the words of Neill LJ in R*e W (Minors)(Wardship Evidence)* [1990] 1FLR 203 where he said:

> "…hearsay evidence is admissible as a matter of law, but… this evidence and the use to which it is put has to be handled with the greatest care and in such a way that, unless the interests of the child

> make it necessary, the rules of natural justice and the rights of the parents are fully and properly observed."

Butler-Sloss LJ added:

> "A court presented with hearsay evidence has to look at it anxiously and consider carefully the extent to which it can properly be relied upon."

23. Clearly His Honour Anthony Bradbury was right to understand that the Court of Appeal in this case was advising great caution before issuing a witness summons but it was also warning against placing too much reliance on hearsay evidence.

24. The judge then considered *Re P*. He cited a passage from the judgment of Wilson J (as he then was) in which the judge stressed the risk of harm to a child from being questioned in court about sensitive matters such as sexual abuse. He cited a passage from page 454 of the judgment. For reasons which will become apparent I propose to cite a slightly longer passage, including that relied on by the judge. At page 454 E, Wilson J said:

> "For my part, I cannot fault the way in which the judge decided whether to authorise the issue of the summons against N. Still less could it be said that her decision was plainly wrong. It is unusual for a child complainant of sexual abuse to give oral evidence in proceedings under the 1989 Act. For example, it has never happened in my court; nor have I ever been asked to order the attendance of a child complainant. Clearly, when a court is asked to make such an order, it must approach the application on its merits without preconceptions. In principle, the older the child, the more arguable will be the application. Miss Allardice also makes a point of some relevance, namely that N was not a member of her clients' family and so at least her oral evidence would not have been directed against the interests of adults to whom later she would or might have had to be answerable. Nevertheless, courts are increasingly aware of the further grave damage which can be done to a child who has been sexually abused, or indeed a child who has not been sexually abused but for some reason has spoken of being sexually abused (and such a child may well also have been damaged), if she or he is subjected to the trauma of questioning by a stranger whose task is to attack her or his truthfulness in this supremely sensitive area. I would expect that in most cases where the child, whether or not a family member, is of N's age or younger, the court would favour the absence of oral evidence even though the concomitant were to be the weakening, sometimes perhaps the fatal weakening, of the evidence against the adult."

25. His Honour Anthony Bradbury commented that the case gave the clearest warning of the need to be cautious before issuing a witness summons to a child. He did not take note of the clear indication that, in the view of the Court of Appeal, it will only be in a most unusual case that a witness summons will be appropriate to compel a child to give evidence in care proceedings.

26. Finally, the judge referred to the judgment of Coleridge J in *B v Torbay Council* (supra). In that case a boy P who was aged 13 had made allegations of sexual abuse in 2000 as a result of which he and his two siblings had been taken into care. In 2005, at the age of 17, he retracted the allegations, saying that they had always been untrue. The proceedings before Coleridge J, to discharge the care orders against the two siblings, were uncontested. The judge learned that, at the hearing in 2000, the evidence of P had been received on video film and had not been tested in cross-

examination. Against that background, which is somewhat unusual, Coleridge J observed:

> "I conclude this part of the application by saying that this is a salutary lesson to all courts when dealing with these kinds of very serious sexual allegation. However, good the procedures for the interviewing of children may be, they are never more than that, i.e. interviews. They are not evidence which has been tested in court."

27. After considering this passage, HH Anthony Bradbury stated his conclusion from consideration of the authorities which was to be the basis for his decision. He said:

> "It seems to me that the law as to the exercise of this discretion is moving on. If a child can be questioned in a court setting, without damage to the child which is oppressive, then normally, if they are of appropriate age, the child may be questioned."

28. The judge then applied that statement of law to the facts of the case. He considered that, at the age of 10, L is capable of understanding the need to tell the truth and of giving evidence. He referred to her demeanour on the video films; he said that she was nervous but not agitated and not unduly troubled. He accepted that cross examination was different from being interviewed and, from a handwritten amendment to the note, the judge appears to have accepted that the child might be oppressed by cross-examination. However, he said, he drew some comfort from the fact that the L had not been distressed in the interviews.

29. He then said that in the overall exercise of his discretion, he would grant the application. It appears that he had satisfied himself that L could be questioned without 'damage which would be oppressive' and that she was of an appropriate age to be questioned. Therefore, on his understanding of the law, it would be 'normal' for her to be called.

30. Ms Nicholes, for the child's guardian, did not attack the legal basis of the judge's decision. Rather she criticised the exercise of his discretion. She contended that, although the judge had set out the various contentions advanced by the parties, he had not always accurately summarised the submissions and in some cases he had not made it plain what he thought about them. It will be apparent from the passage of this judgment in which I listed the various contentions considered by the judge that I think there is some force in that submission. Sometimes, it is clear what the judge thought of a point; sometimes it is not.

31. Ms Nicholes also submitted that the judge had not carried out any or any adequate balancing exercise before exercising his discretion. She submitted that it is not possible to tell what weight the judge has attached to any particular argument or why one argument outweighed another. When the factors are properly analysed, it is clear that the judge has failed to take some important factors into account and has given too much weight to other factors.

32. In particular, Ms Nicholes submitted that the judge had failed to take account of the potential risk of harm to L from being required to go over and (if her earlier account were true) to relive the abuse. If her earlier accounts were untrue, giving evidence would draw her back into the culture of dishonesty which her mother had created. It is fair to say that the judge did not mention this factor and, as is clear from the passages in *B* and *P* which I have cited, these risks are real and must be taken into account.

33. Ms Nicholes also submitted that the judge had failed properly to consider and give weight to the point which the guardian had made that L's evidence was now tainted by the influence that her mother had applied to her and her evidence would therefore

be of little value. I think that really Miss Nicholes meant that, if L were now to retract her earlier allegations, her evidence would have little force because she was under pressure to retract, either by reason of direct pressure from her mother or the inherent pressure which arose from her understanding that the allegations were standing in the way of her being reunited with her mother. However, it is clear from the judgment that the judge was not sure as to how much actual influence had been applied. It is fair to say that the judge did not refer expressly to any inherent pressure on L. But, in any event, as was pointed out in argument, the value of oral evidence may well go beyond the mere words spoken. It seems to me that the judge might derive considerable help from seeing the way in which L retracts her earlier statements, if she does.

34. Ms Nicholes also submitted that the judge had placed undue reliance on the child's demeanour when being questioned in interview. Ms Nicholes accepted the judge's description of L as 'nervous but not distressed'. However, she submitted that the experience of giving live evidence and being challenged in cross-examination would be quite different. At that time, L and her mother were in tune with each other; now L knows that her mother has retracted. If L holds to her earlier account, she will be cross-examined on behalf of her own mother and it will be put to her that she is lying. If she retracts her earlier account, she will be cross-examined by the local authority on the basis that she has given long interviews alleging abuse by her father. I agree with Ms Nicholes that it is not a good situation for a child of 10 to face. The judge does seem to have accepted that L would or might find this oppressive. Quite what weight he gave to that finding is hard to detect. He appears to have considered that other factors outweighed that disadvantage.

35. In the course of argument before us, it was put to Ms Nicholes that, although he did not clearly articulate the point, the judge appeared to be saying that he really needed L's evidence in order to reach a decision, in what was by common agreement a difficult case. Ms Nicholes accepted that that was so and, later in the submissions, Mr Tillyard QC informed us that the judge had made this plain during the course of submissions even though he had not stressed it in his judgment. Ms Nicholes accepted that the judge's need for the evidence was an important factor. However, she contended that, as against his need, he should have set the limited usefulness of the evidence. Not only would L's evidence be tainted by the mother's interference but it would be of limited value in any event due to L's young age and the fact that she would be asked to remember events which had occurred some time ago, in 2004 and 2005. Ms Nicholes submitted that, in addition to considering his need for the evidence, the judge had to give proper weight to the potential harm and oppression to the child. Giving evidence is always stressful for a child but in the particular circumstances of this case, given that the mother's retraction had put L on the horns of a dilemma, the potential for harm and oppression was much increased. Ms Nicholes submitted that the judge's discretion should have been exercised in the other way.

36. I for my part accept that the judge might have set out the arguments more fully and might have explained in greater detail which factors he regarded as important and which factors determined his decision. That is one reason why we gave permission for this appeal. However, one must remember that this was an extempore judgment, given in the course of a hearing and at the end of a day's work. Maybe it would have been better had he reserved his decision over the weekend but he wanted to give it as soon as possible so that L's preparation for giving evidence could begin. Before giving my opinion as to whether these criticisms of the decision are sufficient to entitle this court to interfere, I wish to deal with the local authority's submissions, which were of a quite different nature.

37. Mr Cowen, for the local authority, submitted that the judge's decision was flawed because he had misdirected himself as to the law. He submitted that the judge had disregarded the clear principles that had been laid down by the Court of Appeal and

had placed too great a reliance on the words of Coleridge J. The judge seemed to think that the words of Butler-Sloss LJ were in some way out of date because they were 15 years old and that, for reasons, which he did not explain, the law had 'moved on'. Mr Cowen submitted that the law had not 'moved on' and that the principles enunciated by Butler-Sloss LJ and Wilson J in the Court of Appeal remained good law.

38. Mr Cowen submitted that, as a result of this error of law, the judge had started from the wrong premise. He had started from the premise that 'normally' it would be appropriate for a child to give oral evidence in care proceedings, if that could be done without damage or oppression. The correct starting point, as explained by Wilson J, was that usually the child would not be required to give evidence; only in exceptional circumstances would a summons be appropriate. This error undermined the exercise of his discretion.

39. Mr Pulman QC for the mother told the court that he believed that, when the judge had referred to the law 'moving on', he had had in mind the fact that child witnesses were now able to give evidence via video link which was far less stressful to them than appearing in court as they used to do. In 1991, at the time of *R v B County Council*, a child would have had to give evidence in court. However, as was pointed out by Wilson LJ, that was not the case by 1997, when he gave judgment in *Re P*.

40. I, for my part, would not describe *R v B County Council* or *Re P* as laying down principles. Rather, in my view, they provide guidance to judges as to how to exercise their discretion in respect of this difficult issue. But it must always be remembered that the task is one of the exercise of discretion. However, that observation does not greatly reduce the validity of Mr Cowen's submission. It seems to me that there is force in the submission that the judge misapplied the Court of Appeal's guidance. Whether he did so because he was impressed by the words of Coleridge J or whether he thought that the advent of the video link had made a significant difference to the process of giving evidence, I know not. In my view, it is clear that the judge started from the premise that *normally* a child will be required to give evidence if that can be done without damage amounting to oppression. That was not in accordance with the guidance of the Court of Appeal, which is that it will be unusual for a child to be called to give evidence.

41. In my judgment, there is no reason to say that the law has moved on since that guidance was given. That guidance was based upon the results of research into the ill-effect on children of giving evidence in cases of abuse. There was no evidence before us and none before the judge to suggest that this research has been invalidated. The mere fact that the child does not now have to stand in the witness box is an advance but it does not seem to me to go to the heart of the problem which is the psychological effect on the child of having to talk about the abuse and having the account challenged as untrue.

42. It may be that the judge was influenced by the words of Coleridge J. But I do not consider that Coleridge J was seeking to disagree with the guidance of the Court of Appeal; he was merely observing that the value of video-taped interviews is limited. Such evidence is not as good as evidence which has been tested orally in cross-examination. He was saying that, if the child P had been called in that case, the falsity of his allegations might have been discovered. He was not saying that children should be ordered to give evidence in care proceedings.

43. In my judgment, His Honour Anthony Bradbury did fall into error in his approach to the exercise of his discretion. He should not, in my view, have started from the premise that normally a child may be called to give evidence if this can be done without damage or oppression. For that reason, it is my view that this Court must exercise its discretion afresh in the instant case.

44. The correct starting point in my view (in accordance with past Court of Appeal guidance) is that it is undesirable that a child should have to give evidence in care proceedings and that particular justification will be required before that course is taken. There will be some cases in which it will be right to make an order. In my view, they will be rare.

45. In considering whether to make an order, the judge will have to balance the need for the evidence in the circumstances of the case against what he assesses to be the potential for harm to the child. In assessing the need for oral evidence in the context of care proceedings, the judge should, in my view, take account of the importance of the evidence to the process of his decision about the child's future. It may be that the child's future cannot be satisfactorily determined without that evidence. In assessing the risk of harm or oppression, the judge should take heed of current research into the effect on children of giving evidence and should not rely only upon his impression of the child, although that will of course be relevant.

46. I turn to consider how the discretion should be exercised in this case. This court is always reluctant to undertake such a task because it is not in as good a position as the judge at first instance. I was particularly concerned that we have not seen the video interviews, as the judge had. Nor have we heard part of the evidence, as the judge had. However, both the guardian and the local authority have invited us to make a decision rather than to remit the case to the judge and we have agreed to do so.

47. In proposing how we should exercise our discretion, I rely on the judge's findings and his reactions to the submissions made so far as they can be detected.

48. The first and most important point, as it seems to me, is that this is a most unusual case. L made allegations which were essentially the same as those made by her mother. The mother has now said that the allegations were untrue. Nobody knows whether L would now say that they are untrue. For entirely proper reasons, this has not been explored. But this lacuna in the evidence leaves the judge in a most unusual and an extremely difficult position. It is true that there is other evidence from which the truth of the allegations might be assessed. The parents submit that L's interview evidence is riddled with inconsistencies and cannot be relied on. On the other hand, it appears that L has voluntarily repeated her allegations to a social worker. In my view, the judge has an exceptionally difficult task. Although I can see some force in Ms Nicholes' submission that the evidence is tainted and of limited value, it seems to me that the judge's clear (although not articulated) view that he really needs this evidence is justified.

49. Second, the issue which is to be decided is of great importance for the welfare of L herself. The consequences to her of a wrong decision on the question of what has happened in the past are very serious indeed. She could be wrongly deprived of an upbringing by her parents. Alternatively she could be wrongly exposed to physical and moral danger of a serious kind. In my view, it is right, in the exceptional circumstances of this case, to give great weight to the judge's need to hear the evidence.

50. I, for my part, would accept the judge's assessment that, despite her young age, L is sufficiently mature to understand the need to tell the truth and to understand the issues about which she is asked. Much more difficult is the assessment of the potential for damage if she gives evidence. There are two aspects of this. First, in preparation for the hearing, L will be required to watch at least the material parts of her video interviews. I do not think that experience will be oppressive in the sense of making too great a demand upon her concentration. However, she will have to relive the experience of being interviewed and also be reminded either of the abuse itself or of having to make allegations which were untrue at the behest of her mother. In either case, the experience is likely to be distressing if not positively damaging.

51. The second aspect is giving evidence itself. The judge himself accepted that cross-examination might be oppressive although it is not clear to me what he meant by that. If he meant that cross-examination might last a long time, it will be up to him to ensure that the process is kept within reasonable bounds. I do not think, looking at his remark in context, that he was holding that the process would in fact be damaging. In my view, there is a danger that it will cause psychological harm. In the absence of evidence, I cannot assess the gravity of that danger. I can only place limited reliance on the judge's impression of L gathered from viewing the video films. He seems to regard her as fairly robust. But in my view, that is not a satisfactory basis on which to conclude that there will be no psychological harm.

52. It follows that I find the exercise of discretion a difficult one. In the end, I have concluded that the judge's need for this evidence in his search for the right decision in respect of L's future must outweigh the concerns that I have in respect of the harm that may be done to her. I stress that I regard the judge's factual decision as being of exceptional difficulty.

53. For those reasons, I would dismiss this appeal.

Lord Justice Wilson:

54. I agree.

55. As my Lady has explained, both before the judge and before this court attention has been given to a judgment which, as it happens, was given by me, sitting as an additional judge of this court, in *Re P (Witness Summons)* cited by her at [15] above. In that case the court refused to give a mother and stepfather permission to appeal against a judge's refusal in care proceedings to direct that oral evidence be taken from a 12-year-old girl, who, by video-taped interview, had alleged that a friend of hers, namely the mother's daughter, had been sexually abused by the stepfather. The judge had proceeded to find that the sexual abuse had occurred. In the course of my judgment I observed at p. 454E that I had never encountered the giving of oral evidence by a child in care proceedings; and, following powerful observations to similar effect made in the judgment of Butler-Sloss L.J. in *R v. B County Council ex P*, also cited at [15] above, I stated that I would expect that in most cases family courts would not favour the giving of oral evidence by children even at the expense of a reduction in the weight to be afforded to other evidence already given by them, usually in such an interview.

56. After I gave that judgment, I served for a further eight years as a judge of the Family Division. By the end of my service there in 2005, it remained the fact that no oral evidence, whether by video-link or otherwise, had ever been given to me by a child in any care or other public law proceedings. The child is always a party to the proceedings and is professionally represented by both a guardian and a lawyer. His wishes and feelings are professionally collected from him; conveyed to the court; debated; appraised and weighed. And, in cases in which he appears to be able to give relevant evidence of past events, in particular of abuse allegedly perpetrated upon himself, his evidence is generally taken by video-taped interview (or interviews) conducted in accordance with the detailed guidance issued, ostensibly for the purpose only of criminal proceedings, by the Home Office Communications Directorate in March 2002 and entitled "Achieving Best Evidence …" ("ABE"). In the family court the ABE interview is admitted as hearsay evidence; the video-tape and its transcript are studied; and the weight of the evidence is assessed, occasionally with the assistance of a child psychologist. But it is, on any view, uncommon for the family court to direct the child to give oral evidence to it, even by video-link; and the lack of the facility for the parties to ask questions of the child is factored into the assessment of the weight to be attached to the evidence in the interview.

57. The case of *B v. Torbay Council*, cited at [14] above, illumines a grave miscarriage of justice. In 2000 a circuit judge had ordered three children to be taken into care (where they were to remain for four years), by reference mainly to allegations of sexual abuse made by the eldest, a boy then aged 13, in a video-taped interview, which she had found to be true. In 2006, after receiving oral evidence from the boy, then aged 18, in which he retracted the allegations, Coleridge J. concluded that the retraction was honest and he took the step, permissible in rare circumstances, of setting aside the circuit judge's finding that the allegations were true. Although he observed that "there were sufficient obvious inconsistencies in the versions produced by [the boy in 2000] to have given the court much more pause for thought", i.e. inconsistencies which the circuit judge might surely have discerned even in the absence of oral evidence from the boy, Coleridge J proceeded to speculate that, had he given oral evidence to her, she might not have made the finding. Then, in a passage which is clearly obiter, he remarked that:

> "where children are of the age of this child, rising 13, it seems to me more serious consideration should be given to such a child giving evidence with the usual safeguards and the procedural arrangements familiar in the criminal jurisdiction."

58. In one sense Coleridge J's remark is quite unexceptionable: for every application in family proceedings for a child in or approaching adolescence to be directed to give oral evidence deserves very "serious consideration". Insofar, however, as Coleridge J was intending (as I believe that he was) to imply that the discretion to direct such oral evidence should be exercised more often than is reflected in current practice, then, in my view, his remark should be treated with great caution. For I cannot overstress that such is a large and difficult issue, with far-reaching ramifications. Nor is there anything to suggest that, before Coleridge J. made that and other similar remarks in the *Torbay* case, the general advantages and disadvantages of the receipt of oral evidence from children in family proceedings had been canvassed before him; or even that he had been reminded of the guidance given by this court, particularly of course in the judgment of Butler-Sloss L.J., in that regard. As Coleridge J. recognised, there is a substantial difference in this regard between the practice of the criminal court and that of the family court. But in this regard is the business of the two courts analogous? In the family court the welfare of the child is the paramount consideration in the substantive enquiry and is always relevant to, although not paramount in, its procedural determinations such as a direction for oral evidence. So the effect on the child of receiving questions on matters of supreme sensitivity from lawyers obliged to seek to advance their respective cases, including in some cases questions suggesting that things which the child knows to have happened to him did not happen to him and that he is mistaken or even lying about them, needs carefully and imaginatively to be gauged. In the family court, moreover, the question is whether to draw the child directly into the forensic arena in which he will often be in a position of direct conflict with close family members, the nature and extent of whose future relationship with him are usually the very matters in issue. Indeed, even to the extent that there are analogies in the business of the two courts which militate in favour of analogous practice, should we assume that it is the practice in the criminal court which is preferable and should be replicated in the family court? One may guess that the big advantage of the criminal practice is the increased chance that, where a child's allegations are false, their falsity will be exposed. But one may need to consider whether, in the case of allegations by a child which are true, its effect may also often be to make them appear false or at any rate to render them unproved; such would be a price less obviously worth paying in the family court than in the criminal court.

59. It was by reference to the remarks of Coleridge J. in the *Torbay* case that in the present case the judge observed that the principles which inform the exercise of the discretion to direct a child to give oral evidence in public law proceedings were "moving on". I have already explained why, with great respect to Coleridge J., I

regard his remarks as a shaky foundation for any such conclusion. Thereupon, however, the judge added:

> "If a child can be questioned in a court setting, without damage to the child which is oppressive, then normally, if they are of appropriate age, the child may be questioned."

That sentence, allied to his earlier reference to the effect of the judgment of Coleridge J. as being that the best evidence "should usually be oral evidence", has caused me substantial concern. Mr Pulman QC on behalf of the mother argues that the emphasis in the sentence should be taken to lie on the word "may". In my view, however, the emphasis more naturally lies on the word "normally". If so, the judge's formulation of current principle is not one to which I can subscribe or which either Mr Pulman or Mr Tillyard QC on behalf of the father seeks in this court to defend; indeed it goes significantly further than did the remarks of Coleridge J. Although it correctly identifies the criterion of oppression, what is presently "normal" and indeed "usual" is that the child may *not* be questioned in a court setting.

60. I therefore consider that the judge conducted the discretionary exercise by reference to a misleading formulation of current legal principle and that it falls to us either to conduct it upon the proper basis or, if we lack the material upon which to do so, to remit it to him to conduct it again.

61. In my view the present case is quite different from that which obtained in *Re P* above or indeed that which obtains in the vast majority of public law applications. The present case does not reflect the straightforward situation in which a parent who has been accused by a child denies the accusation and aspires to cross-examine her or him. This is a case, by contrast, in which in 2005 the mother and L made similar, grave allegations that the father had sexually abused L and in which in 2006 the mother not only retracted the allegations but maintained that she had instructed L to join with her in making them even though they were false. Even if the mother's revised version of events is true, it represents at first sight a serious indictment of her capacity to act as a parent with even an elementary degree of responsibility. Nevertheless it remains exceedingly important that, if able to do so, the judge should adjudicate upon the allegations which, by reference in part to L's video-taped ABE interviews, the local authority continue to seek to establish, namely that the father did indeed perpetrate sexual abuse upon her. In relation to the task ahead of him it is clear to me that the judge is likely to be in a most unenviable position. It may well be that, were he to survey the mother's evidence on its own, he would find it impossible to discern whether the truth lies in what she previously said or in what she currently says. He is likely to need to give close study to the other evidence of abuse, in particular the evidence of L herself. Yet there is great doubt as to what L would, if asked, now say in relation to the allegations which she has previously made. Ms Nicholes on L's behalf concedes that, since the mother's volte-face in 2006, there has been no organised professional attempt to elicit what L would say referable to her previous allegations; nor in particular any attempt to explore with her – in the recommended manner – such matters relevant to the enquiry as are now raised by the mother, in particular the suggestion that she instructed L falsely to say what she did.

62. If L were now to say that her previous allegations of sexual abuse against the father are untrue, it would be necessary to attempt some enquiry of her as to why she contends that she previously said otherwise. Her answers in that regard might prove to be a window through which the judge could discern the veracity or otherwise of the original allegations notwithstanding their joint retraction. If on the other hand L, who seems strongly to wish to return to her mother's care and apparently knows that her mother now contends that their previous allegations were fabricated, were nevertheless to maintain that what she previously alleged against the father is true, such might equally be of considerable probative significance.

63. In my view the present is therefore a rare case in which, as he must have considered but, at any rate in his judgment, did not expressly state, the judge is likely to need further, up to date evidence from L in order satisfactorily to determine the issues before him. It is too late for such to be provided by a further ABE interview of her. If it is to be provided, it must take the form of oral evidence by video-link. So the application for L to be directed to give oral evidence crosses the initial hurdle, namely that such evidence appears to be necessary for fairly disposing of the proceedings (see, for example, *Bookbinder v. Tebbit (No. 2)* [1992] 1 WLR 217 at 223E); and the crucial question becomes whether it would nevertheless be oppressive to require her to give such evidence. In this regard I share some of my Lady's anxieties. On any view the matter is complicated by the fact that, although the whole drift of his judgment was to reject the submission that to require L to give oral evidence would be not just unpleasant for her but oppressive to her, the judge, when asked to approve an uncertain area of counsel's joint note of it, appended in handwriting the words "I *believe* I said the child would be caused to be oppressed by cross-examination". That appendix is however inserted, at the point which I will identify, into the following passage of the judgment:

> "[L] is 10 years old. That is young but not so young as necessitates me to say that in the circumstances of this case she is not capable of understanding the need to tell the truth and … of giving evidence. Her demeanour in interview is that of a child who is nervous but not agitated and not unduly troubled by the interview process … [Insertion] … I fully accept that cross-examination is a different process. I draw some limited comfort from the fact that she showed no distress in video interviews."

It is clear to me from the above that the judge did not intend to say that L would be oppressed by a requirement to give oral evidence in the sense (and here I hesitate because the articulation in this court of alternative definitions can be dangerous and yet I consider that I have no option but to venture one) of being in all the circumstances unacceptable in terms of her welfare. It is clear to me that he intended to convey the contrary. I consider also that we can safely conclude, in the light, in particular, of the judge's advantage over us in being able to observe L's demeanour during the ABE interviews, coupled of course with his duty firmly to control the ambit of her evidence and his power to terminate it altogether, that the likely adverse consequences to L of her giving oral evidence are not of such gravity as to amount to oppression.

Lord Justice Longmore:

64. I agree with both judgments. Accordingly the appeal will be dismissed. There will be no order for costs save an order for detailed assessment of the costs of the guardian, the mother and the father.