



Neutral Citation Number: [2013] EWHC 2410 (COP)

Case No: COP1201711T

IN THE COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Heard on 21 February 2013
Supplementary submissions by 8 May 2013
Handed down on 17 July 2013

Before:

DISTRICT JUDGE ELDERGILL

Between:

A Local Authority

Applicant

- and -

HS

1st Respondent

(By her litigation friend the Official Solicitor)

and

BS

2nd Respondent

and

HLS

3rd Respondent

Mr Bryan McGuire QC (instructed by the local authority) for the Applicant
Mr Vikram Sachdeva (instructed by Irwin Mitchell LLP) for the First Respondent
Mr Parishil Patel (instructed by Fisher Meredith LLP) for the Third Respondent
Ms Alexis Hearden (instructed by Guile Nicholas Solicitors) for the Second Respondent
was not party to the costs applications

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

DISTRICT JUDGE ELDERGILL

This judgment is being handed down in private. It consists of 38 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

District Judge Eldergill:

1 — INTRODUCTION

1. These applications for costs against the local authority are made by the Official Solicitor on behalf of the First Respondent and by the Third Respondent, HLS, who is the brother of the First Respondent.
2. The costs claimed are likely to be significant. Excluding VAT, HLS's are thought to be in the region of £21,000 and the Official Solicitor's approximately £45,000.
3. These estimates relate to 'the relevant period of time,' which itself is in dispute.
4. The Official Solicitor claims costs for the period from the beginning of his involvement in the proceedings to 28 May 2012 — the date on which the local authority withdrew its allegations that HLS had sexually abused his sister, such that a scheduled three-day fact-finding hearing, and any further preparation for it, became unnecessary.
5. As concerns this period, the Official Solicitor claims only all costs attributable to the withdrawn fact-finding allegations. He does not claim any costs in relation to the general residence and contact welfare issues, which would have been incurred anyway.
6. He says that his attributable costs of around £45,000 are 'clearly proportionate to the work required ... as a result of the factual allegations being raised'.
7. In the alternative, the Official Solicitor seeks his costs for such period as appears just, at the very least from 29 February 2012, which is the date on which the local authority sought a separate fact-finding hearing.
8. The Official Solicitor also asks the court to award the costs of this costs application, which was opposed by the local authority.
9. According to the Official Solicitor, but for the allegations, the case would probably have involved two directions hearings, after which capacity and best interests in relation to residence and contact would have been agreed. The effect of the local authority's 'manifestly wrongful decision to make formal allegations against HLS' was that the proceedings have been unnecessarily lengthy and costly:

'On proper analysis at the time (i.e. prior to issuing these proceedings; or, at the very latest, prior to asking for a fact-finding hearing on 29 February 2012) the local authority should not have sought a separate fact-finding hearing ... It is only just that the local authority bears the costs of such unreasonable conduct.'

10. The Third Respondent's claim is that the local authority should pay his costs for the period between 14 February 2012 and 28 May 2012. The former date is that on which he joined the proceedings; the latter is that on which the local authority formally confirmed that it was not proceeding with the abuse allegation.
11. HLS's core submission is that these were the gravest possible allegations — a brother sexually abusing a disabled and vulnerable sister in his care — and they should never have been brought against him. The allegations were vague and insufficiently particularised. The evidence filed in support was manifestly inadequate: It was internally inconsistent and unreliable, contradicted the allegations which were made and relied on interpretations by care staff who had neither the qualifications nor the expertise to interpret it. The local authority did not need HLS's evidence, or court authorised experts, to appreciate these basic truths.
12. In the alternative, at the very least costs should be awarded to him from 20 or 27 February 2012. The first hearing which HLS was permitted to attend was on 20 February. By then, he says, the local authority ought to have weighed and rejected the abuse allegations and have been in a position to inform the court that they were not part of the case HLS had to meet. Because the local authority did not make its position clear at the hearing on 20 February 2012, the court directed it to set out all of the allegations it relied on by 27 February. According to HLS, at the hearing on 29 February 2012, the local authority still had not even begun the process of weighing the abuse allegations. Even though it sought an additional six weeks to set out its case, it still had not done so by 11 April 2012, with the result that the court made a costs warning order on 23 April 2012.
13. Both of the applicants for costs referred me to emails sent on 22 May 2012 [CB/89] and 29 May 2012 [CB/97], informing the local authority that the costs of the entire fact-finding exercise would be sought if the fact-finding proceeded and the facts were not proved. The whole process was 'misconceived,' the local authority 'could and should have reached its current position a long time ago,' 'the allegations should never have been made and pursued.'
14. At the end of the costs hearing on 21 February 2013, I indicated that I intended to award costs against the local authority but would reflect on whether to award costs for all or part of the periods claimed.
15. With my permission, some supplementary written submissions about costs awards were made in April and early May. On the basis of the court's indication that some costs would be awarded, the local authority submitted to me that it might be exposed to an adverse costs order for the period between 23 April 2012 (the date on which I gave the costs warning for non-compliance with directions) and 28 May 2012.
16. The parties appear to agree that quantum need not be assessed by me. A ruling in principle should be given, after which a Bill of Costs should be drawn up, which can be assessed in the SCCO.
17. In order to make this decision as readable as possible, I sometimes refer to HS as 'Ms S' and to her father BS as 'Mr S'.

2 — THE LEGAL FRAMEWORK

18. Mr Patel's very helpful summary of the legal framework was accepted.
19. Costs in the Court of Protection are at its discretion subject to the Court of Protection rules: section 55(1) of the Mental Capacity Act 2005 ('MCA 2005' or 'the Act').
20. The court has 'full power to determine by whom and to what extent the costs are to be paid': MCA 2005, s. 55(3).
21. The general rule in welfare proceedings is that there is no order for costs: Court of Protection Rules 2007, r.157 ('COP Rules 2007').
22. The court has a wide discretion to depart from the general rule 'if the circumstances so justify, and in deciding whether the departure is so justified, the court will have regard to all the circumstances': COP Rules 2007, r.159(1).
23. 'All the circumstances' includes '(a) the conduct of the parties (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) the role of any public body involved in the proceedings': COP Rules 2007, r.159(1).
24. The 'conduct of the parties' includes – (a) ... conduct before, as well as during, the proceedings; (b) whether it was reasonable for a party to raise, pursue or contest a particular issue ...': COP Rules 2007, r.159(2).
25. There is now a large body of case-law concerning the court's discretion: see *G v. E* [2010] EWHC EWHCC 3385 (Fam), Baker J, *Manchester CC v. G* [2011] EWCA Civ. 939, Court of Appeal, *AH v. Herts NHS Foundation Trust* [2011] EWHC 3524 (COP), Peter Jackson J, *Hillingdon LBC v. Neary* [2011] EWHC 3522 (COP), Peter Jackson J, *Chester West & Cheshire Council v. P* [2011] EWHC 1330 (COP) Baker J and *WBC v. CP & ors.* [2012] EWHC 1944 (COP) Ryder J.
26. The case-law 'does not purport to give guidance over and above the words of the Rules themselves'; 'instead, the decisions represent useful examples of the manner in which the court has exercised its powers' (AH supra. at [10]).
27. It adds nothing to say that a case must be exceptional or atypical for costs to be ordered (AH supra. at [11]).
28. Each application for costs must be considered on its own merit or lack of merit with the clear appreciation that there must be a good reason before the court will contemplate departure from the general rule. Beyond that, as MCA s. 55(3) – cited above – makes plain, the court has 'full power' to make the appropriate order. The questions that must be addressed are:

(1) Is departure from the general rule justified in all the circumstances, including the conduct of the parties, the outcome of the case and the role of the local authority as a public body?

(2) If so, what order should be made?

Neary, supra, at [9]

29. Departure from the general rule is not limited to cases which involve ‘bad faith or flagrant misconduct’ but can include cases where ‘there has been substandard practice and a failure by the public bodies to recognise the weakness of their own cases and the strength of the cases against them’ (AH supra. at [69] and WBC supra. at [13]). Therefore,

Was there ‘substandard practice and a failure by the public bodies to recognise the weakness of their own cases and the strength of the cases against them’ and, if so, from which date?

30. The fact that public bodies have limited resources and operate in times of financial austerity ‘does not mean’ that ‘[they] can be excluded from liability to pay costs in appropriate cases’ (G v E supra. at [39]).

31. In G v E supra., Baker J concluded at [40] (approved on appeal by the Court of Appeal in Manchester CC v. G supra. at [16]-[17]):

‘Of course, it is right that the Court should follow the general rule where appropriate. Parties should be free to bring personal welfare issues to the Court of Protection without fear of a costs sanction. Local authorities and others who carry out their work professionally have no reason to fear that a costs order will be made. The submission that local authorities will be discouraged from making applications to the Court of Protection if a costs order is made in this case is a thoroughly bad argument. The opposite is, in fact, the truth. It is only local authorities who break the law, or who are guilty of misconduct that falls within the meaning of rule 159, that have reason to fear a costs order. Local authorities who do their job properly and abide by the law have nothing to fear. In particular, the Court of Protection recognises that professional work in this very difficult field often involves very difficult judgments and decisions. The Court is not going to impose a costs burden on a local authority simply because hindsight demonstrates that it got those judgments wrong.’

32. I do not believe that there is a useful ‘parallel with Administrative Court costs cases,’ at any rate in this case.

3 — HISTORY OF THE ALLEGATIONS AND PROCEEDINGS

33. The conduct of the parties includes conduct before the proceedings, and also whether it was reasonable for a party to raise, pursue or contest a particular issue.

34. In my view, the local authority’s conduct before these proceedings were issued is relevant, both generally and in terms of whether it was reasonable to pursue the sexual abuse issue before this court.

35. HS was born in 1980 and is now 32 years old. She has Down’s syndrome, a learning disability and communication difficulties. In 1993, she had a ‘psychotic breakdown’ which involved ‘exhibiting signs [of] withdrawal into an internal hallucinatory world’. In December 1994, she had ‘a further breakdown’ [F/30].

36. The local authority’s learning disability services were involved with the family from 1998 onwards. Their involvement included periodically providing home care, day services and transport [C/4].

37. HS's mother died in 1997, following which she continued to live with her father BS and brother HLS (the Second and Third Respondents), until 2008.
38. In 2007, her father, who has significant health problems of his own, asked social services to investigate alternative accommodation for his daughter. Between 13 and 30 April 2007, a FACE core review was undertaken [C/27]:

'Mr S encourages H to eat a healthy diet and she needs support around this. H eats both Asian and English food cooked by her brother

It is sometimes difficult to understand some of what she says

Assistance needed to wash in the bath

PERSONAL HYGIENE H is prone to sores and is unable to put the necessary creams on the sores

H lives at home with her father. He is unwell and elderly and very concerned that she should be found accommodation in the near future as he does not feel able to continue to support her

DLA Mobility High, DLA Care High. Benefits go into Mr S's account.

Psychological well-being: No issues

Changeable mood: 'No issues. H is a happy person. She mixes well and is a good team player ...'

Sleep disturbance, Challenging behaviour: No issues

Psychiatric diagnosis: None

Although H is deaf in her right ear and she has a hearing aid, she does not wear it.

H has a hearing aid and glasses. She does not wear the glasses ...

[Father's] ill-health makes it a struggle ... He would like H to live elsewhere in an environment which will ensure her safety and protection and where she can develop her potential He was very clear that he is unable to continue to support H in her own home for much longer ...'

Mr S said his son would assist if he was ill.

Risk: 'H needs some support with personal care and if this was reduced she may be at risk of self neglect. She also needs prompting and support around daily living skills. H needs daily p.c. to prevent self neglect.'

Strengths and Protective factors supporting the person's independence: 'Father and brother provide ongoing support on a daily basis to ensure that H can live independently in the community.'

'With regards to personal hygiene HS was described as being prone to sores and she was unable to apply the necessary cream to these sores ... It was suggested that HS required

personal care, otherwise she would be at risk of self-neglect. This assessment described HS as requiring full assistance with money management, if she were to live away from the family home' [E/151].

39. Several aspects of the 2007 FACE analysis of the home care environment are noteworthy:
- (a) HS was aged 26 and had been living with her father and brother since birth.
 - (b) Her father encouraged her to eat a healthy diet and her brother cooked food for her.
 - (c) HS needed support with personal care. If this was reduced she could be at risk of self neglect. She needed assistance to wash in the bath, was prone to sores and unable to put the necessary creams on the sores.
 - (d) HS's level of self-care was such that she was receiving the highest level of the care component of Disability Living Allowance.
 - (e) In care terms, the highest rate was awarded to individuals who were so severely disabled physically or mentally as to require from another person in connection with their bodily functions frequent attention throughout the day and prolonged or repeated attention at night.
 - (f) Her brother assisted HS if her father was ill.
 - (g) Her father was unwell and elderly, and he was very concerned for her.
 - (h) He contacted social services. He wanted his daughter 'to live ... in an environment which will ensure her safety and protection and where she can develop her potential'.
 - (i) As to HS's psychological well-being, there were 'no issues ... H is a happy person. She mixes well'. Her sleep was not disturbed. Her behaviour was not challenging. She was not diagnosed as having a psychiatric disorder of any kind.
 - (j) HS's communication skills may have been affected by not wearing her glasses and hearing aid.
 - (k) Father and brother were categorised as being 'strengths and protective factors'.
 - (l) The assessment described HS as requiring full assistance with money management, if she were to live away from the family home.
40. In 2007, therefore, the assessment was that HS needed help with personal care in order to avoid self-neglect, which she received from her (male) family. Her father and brother supported her and were 'protective factors'. Her father wanted her to live in an environment which would ensure her safety and protection. The picture is of a generally contented 26-year old looked after at home by her father and brother. She has had some contact with learning disability services since 1998, when she was aged around 18. No one has expressed concern about improper family behaviour and she is said to be happy and well psychologically.

41. It is difficult to see that social services had any adequate regard for, or gave any adequate weight to, this historical context in 2010. To my mind, this is significant when deciding whether the opinion later (and quickly) reached by MB was reasonable and whether it was reasonable for social services to attach the weight they did to it, for example in restricting contact with her brother.
42. No suitable alternative accommodation was available for HS in April 2007. However, the local Mencap Asian Outreach service was involved and encouraged her to attend culturally specific community activities.
43. In May 2008, HS was referred to a local advocacy service. An advocate JC was allocated to work with her in relation to a possible move from the family home to a new residential home called 2R.
44. JC advocated for her from 3 July 2008 until 17 December 2009 (and, subsequently, was instructed to advocate for her again).
45. In August 2008, HS moved to 2R at her father BS's request, initially on an emergency respite basis. He had found himself unable to cope.
46. In July and August 2009, HS went on holiday with her brother to Kenya.
47. The manager of 2R was Ms GD. According to GD, at first BS was very happy with the care provided by 2R. However, the relationship began to deteriorate towards the end of 2009 when 2R and the local authority began 'working with HS to manage her own finances'.
48. Around September of that year, her then social worker CT contacted the Department of Work and Pensions (DWP) to have her father removed as HS's appointee, on the ground that she had capacity to manage her own benefits and wished to do so [C/181]. After this step was taken, GD says that 'the number of complaints from the family about 2R went up exponentially, often about minor issues or mistaken beliefs' [GD, C/182]:

'Up until this point BS had come and gone at 2R without any problems ... He was heavily involved with HS when she first moved to 2R. He would visit on two or three evenings per week, often staying until late in the evening and would come most weekends and there was never any problems' [C/182].
49. In November 2009, 2R wrote to Mr S asking him not to attempt 'to engage in his daughter's personal care when visiting her at the home' [C/6].
50. The fact that Mr S was providing 'personal care' of this kind, without embarrassment [C/206] — in the care home as well as previously — strongly indicates an intimate but non-sexual act. His daughter had, of course, been in receipt of the highest 'assistance with bodily functions' rate of the care component.
51. According to the note at C/206, when contacted by GD, the social work manager JB 'mentioned that there have been a few cases like this where parents (male) do not understand or have boundaries around personal care' [C/206].

First reference to sexual activity relied on by the local authority

I prefer this clumsy sub-heading to 'First Allegation' because when the Scott Schedule was finalised it did not allege separate specific behaviour at specific dates and times. Rather, it set out three references to behaviour which the local authority alleged took place and was sexual in nature.

52. On 1 November 2009, HS mentioned to GD ‘that she was going to India with her brother ... HS said she would be staying in a hotel and when asked if she would have her own room she said “I sleep with my brother and he tickles me in bed and makes me laugh” she also said her brother will be helping her with showering and bathing including dealing with the spots between her legs’ [C/183].
53. In fact, there is no reference in the GD’s contemporaneous case note at C/209 to ‘helping her with showering and bathing including dealing with the spots between her legs’. This possibility was raised as a question by HS’s keyworker A the following day.
54. On 2 November 2009, GD asked HS’s keyworker ‘to have a gentle chat with HS ... to find out more information’. The contemporaneous notes of A’s meeting with HS that day are at C/210:
- ‘HS also talked about her brother ... and how he tickles her before going to sleep. HS laughed about this and said, “It is funny” with a big smile on her face.’*
- A: HS, I heard that you are going to India over the Christmas period?*
- H: (clapped her hands and smiled): Yes, that is right. I’m going with my brother.*
- In response to A’s questions about who will help her with her personal care, including ‘your spots in between your legs, as when they are raised, they have to be squeezed,’ HS says that her brother will look after her: ‘My brother does it all. Don’t worry my love.’*
55. ‘Tickles me in bed and makes me laugh’ and “It is funny” (with a big smile on her face) suggests that ‘tickle’ means ‘tickle’; it was humorous and enjoyable, not frightening or disturbing, behaviour. ‘I sleep with my brother’ when said by someone with a learning disability and limited language skills, in response to a question whether she would have her own room, suggests possibly sharing a room. As to the likelihood that sexual activity was being referred to, the context is provided by the words that follow, ‘... and he tickles me in bed and makes me laugh’. Helping his sister with showering and bathing, and dealing with spots between her legs, must be interpreted in the context (a) that A put this as a leading ‘what if’ question and (b) the FACE assessment in April 2007: ‘With regards to personal hygiene HS was described as being prone to sores and she was unable to apply the necessary cream to these sores ... It was suggested that HS required personal care, otherwise she would be at risk of self-neglect.’
56. The person making the comment wants to go on the holiday and is excited by the prospect. She wants to reassure the questioner — who is now her carer and keyworker — that she will be overseen and her personal hygiene will be attended to. The words ‘will be helping’ are in the future tense and are a perception of what will happen, not a description of what has happened. If it had happened in the past, the FACE assessment and a reference to ‘dealing with spots’ suggests dealing with spots, rather than sexual indecency.
57. Whether behaviour such as touching is sexual depends on the context, mental state and intention of the ‘toucher’. If it happened in the past, whether it was appropriate depends on one’s view of what personal care it is appropriate for a family member of the opposite sex to give. That turns on a great many considerations, most of which are subjective, but which also include the non-availability of female carers within the family after one’s mother has died.

58. On 12 November 2009, GD completed a safeguarding adults alert/referral [G/16]. According to this, 'HS, in conversation with staff said that she was going to share a room in a hotel with her brother HLS when he proposed to take her to India for a holiday in Dec 2009. She said on previous holidays she had shared a room and a bed with her brother and he had tickled her.'
59. As a result of GD's conversation with HS, on 20 November 2009, she met HLS and discussed the holiday with him. According to GD, he said that his friend would help HS with personal care. He had helped her with her personal care in Kenya in August 2009 'and HS was quite happy for him to support her, I considered following this meeting that further work needed to be done about the level of HS's sexual awareness and [to] help her to be aware of what is appropriate ...' [C/183]
60. The words 'I considered' are significant. It is GD, not HS, who believes there are 'sexual' things that HS needs to be aware of. GD has introduced a sexual perspective. It is GD who thinks that HS needs to be helped to be aware what is appropriate, the inference being that she, GD, thought such behaviour was inappropriate. GD will now be making HS aware of what is appropriate and inappropriate.
61. GD's notes of this meeting are at C/213:
- 'I asked where they planned to stay and he gave me an email from a female friend with her address and her phone details. He said that they were going to stay with this person and her partner in their flat. On my asking, he said HS would have her own room. I asked about personal care and he said that HS needed some help washing her hair and her back and his friend would help her with this [details of the female carer, phone numbers, given]*
- I asked about the arrangements for the previous holiday in Kenya in August 2009. He said that they had mostly stayed with their uncle, although he and HS had spent a couple of nights in a game lodge. He had helped her with her personal care there. He had several times previously taken HS on holiday. He said that [she] was quite happy for him to support her. When they had visited Florida, he had shared a double room with HS, (separate beds)*
- I asked him about his support for his father and he spoke about his father's health but did not say anything about their relationship. I said that his father was domineering and controlling towards HS and interfering too much in the details of her care. He did not comment on this, but appeared surprised at this idea*
- [HLS] appeared to have a poor opinion about HS's capacity to have views of her own or to make choices for herself*
- I did not raise any safeguarding issues with Mr HLS*
- I did not raise the comment from HS that her brother tickled her.*
- My first impressions [of HLS] are that'*
62. It appears that GD did not know HLS well, if at all ('My first impressions [of him] are that ...'). Describing his father as domineering, controlling and interfering was confrontational, hostile even, and unlikely to develop a positive alliance with family carers.

63. On 3 December 2009, a safeguarding report completed by social worker CT found that any concerns about HS going to India with her brother were not substantiated and [the] matter was not pursued further: 'Her brother HLS sometimes visits but heretofore has been little known to services ... There are no previous allegations ... HS is not aware that this matter has been raised as a safeguarding concern. She was very pleased to go on holiday with her brother several times in the past and she is very keen to go on the proposed holiday to India in December 2009. Staff who work closely with her have not observed any adverse behaviour or signs.' She was 'considered to have a very limited understanding and interest in sexual matters or adult relationships.' The two staff at 2R 'were to continue informal work with her about good touching, bad touching, personal privacy, no secrets, etc' [G/9-11]. The summary of the findings reads:

'There is inconsistency between HS's reports that she stayed in hotels with her brother and that she would stay in a hotel in Mumbai. It is independently confirmed that she will stay with a family known to her and her brother in Mumbai and she will have her own room and female help with her personal care. Her brother says that they stayed with an uncle in Kenya apart from a few nights in a game lodge, where they shared a room (but not a bed) and he helped her with her personal care. He confirmed that he went to Florida previously with her and shared a room with HS. HLS and his father had the main responsibility for HS's personal care for many years prior to her coming into care. There is no indication that HLS was uncomfortable with this. This is normal in this family. Since coming into care HLS has been educated about privacy about personal care and that it is not now appropriate for her father or brother to be involved in her personal care. It is not considered there are sufficient grounds for an investigative interview with HLS in relation to her report of her brother tickling her ... It was not considered that there were sufficient grounds to refer the concerns to the police.

The concern is not substantiated.'

64. In their Scott Schedule of 2012, the local authority sought a finding that 'the incident happened as described by HS' [C/377]. What was 'the' incident? Tickling that made HS laugh? Sharing a room? Sharing a bed? HLS's statement that he had provided his sister with personal care in the past?

65. In relation to the safeguarding report, I note that:

- (a) GD had reported a safeguarding concern.
- (b) GD's concerns were not substantiated.
- (c) HS had been very pleased to go on holiday with her brother several times in the past.
- (d) He had taken his learning disabled sister on some very exotic (and, one would think, expensive) holidays, including Kenya and Florida.
- (e) She was clearly excited about going on this holiday with him.
- (f) The holiday passed without incident. (It 'went ahead with no concerns raised' [JB, C/7] and passed 'without incident' [GD, C/183]).
- (g) Staff who worked closely with her did not observe any adverse behaviour or signs.
- (h) HS was not herself told that the matter was being raised as a safeguarding concern.

Subsequently, the local authority argued that she had capacity to make her own decisions about information disclosure and contact. Strange therefore that a safeguarding investigation, involving the exchange and discussion of sensitive and

personal information about her, should be undertaken for her benefit and in order to safeguard her, without her knowledge or permission. Why was this if the local authority genuinely believed that she had capacity to safeguard herself and/or to make her own decisions about contact and the disclosure of information? Why did the council need to be satisfied about the support plans 'before we could agree to the holiday' [C/213]?

- (i) Despite the length of time during which HLS had lived with his sister, he was little known to services and there were no reported allegations against him.
 - (j) HLS was given an opportunity, in a roundabout way, of dealing with GD's anxieties and was able to provide a satisfactory explanation which avoided matters needing to go any further.
 - (k) When asked, he gave a detailed account of previous holiday and personal care arrangements, which was accepted. In other words, he was not guarded or defensive.
 - (l) He and his father had the main responsibility for HS's personal care for many years prior to her moving to 2R (as to which, see MCA 2005, s.5).
 - (m) There was no indication that HS was uncomfortable with this.
 - (n) It was normal in this family.
 - (o) However, since 'coming into care' — which may imply that the local authority viewed her as a person in their care, rather than as an autonomous, capacitous, individual receiving social services — her brother had been 'educated' about personal care. (By implication, he was uneducated or ill-educated in such matters before).
 - (p) It was not appropriate for him or their father to be involved in her personal care (but see section 5 of the 2005 Act).
 - (q) GD and her deputy manager at 2R were working with her about good touching, bad touching and personal privacy.
 - (r) She was 'considered to have a very limited understanding and interest in sexual matters or adult relationships'. (The reference to HS having very limited interest in sexual matters does not suggest the kind of trauma following years of sexual abuse hypothesised by MB.)
 - (s) Her reports were inconsistent.
66. The safeguarding report is also interesting for stating that her father 'continues to see her very frequently, and attempts to dominate and control her money and her activities and he is being prevented from doing this.'
67. Clearly, relationships between 2R, social services and the family had soured dramatically during the past three months. Dad was domineering and controlling and had to be prevented from doing certain things; whether HS needed to be safeguarded from her brother had been reported and reviewed; he had been educated about personal care and what constituted appropriate behaviour.
68. In fact, at the beginning of 2010, the objective evidential situation with regard to the existence of a risk of sexual abuse was that:

- (a) In 2007, HS was assessed to be a contented 26-year old woman looked after at home by her father and brother. She was said to be happy and well psychologically. She needed help with personal care in order to avoid self-neglect, which she received from her (male) family. Her father and brother supported her and were 'protective factors'.
 - (b) She had been cared for at home for most of her life and had been in contact with learning disability services since the age of 18. She saw a child psychologist and psychiatrist at an earlier age, when her mother was dying. She was now 29. Despite this involvement with professionals, there were no concerns of sexual abuse.
 - (c) Following the move to 2R, in September 2009, her then social worker contacted the DWP to have her father removed as her appointee, on the ground that HS had capacity to manage her own benefits and wished to do so. Father was also told not to provide any personal care to her and was now in conflict with GD, as evidenced by her reference to him as being domineering, controlling and interfering.
 - (d) On 1 November 2009, HS had a conversation with GD which led to the latter raising a safeguarding concern.
 - (e) This concern was investigated and not substantiated. HLS was willing and able to give a satisfactory account of holiday arrangements. HS's reports were inconsistent.
 - (f) HS was not traumatised by the prospect of being in the company of HLS or of going on holiday abroad with him. Quite the contrary. A: HS, I heard that you are going to India over the Christmas period? H: (clapped her hands and smiled): Yes, that is right. I'm going with my brother.
 - (g) The holiday went well.
 - (h) She had a very limited understanding of and interest in sexual matters.
69. It was in 2010 that the situation got completely out of hand and ended up in the Court of Protection.
70. It is said that HS began to express some reservations about contact with her father and brother.
71. Some time prior to 12 March 2010, HS's father was banned from 2R, because of 'the history of concern that the brother and father have tried to exert pressure on HLS, since she was deemed to have capacity to manage her own finances with the aid of an advocate [G/18].
72. On 9 March 2010, 2R had instructions from social services that they were not to allow HS to spend time with her brother alone on that day without a member of staff being present [GD, C/199].
73. HLS made complaints on 10 March 2010, including to 2R and the Care Quality Commission, about wanting HS to return home, the denial of access and his dissatisfaction with the care provided to her. He and his father maintained that HS was very suggestible and that her reported wishes were not her true wishes.

74. On 12 March 2010, there were angry telephone exchanges between HLS and 2R. HLS thought it was ridiculous that he couldn't see his sister. Despite their holiday together, he was told that she was frightened of him [G/31]. HLS 'threatened to turn up at 2R to see his sister. I [GD] told him that I will call the police if he turns up' [G/31]. HLS then attended the premises, 'asking for a complaint form', and refused to leave when asked to do so. The police were called [by GD] and he then left the premises.'
75. According to GD, 'it was evident from around this time that HS was very reluctant to have contact with her father and brother and that she was becoming more afraid of them' [C/183]. In particular, she was distressed by their arguing. (It is certainly the case by then that both father and brother were in a state of conflict and 'arguing' with GD and professional carers.)
76. A second referral to advocate JC was made by social worker CT in relation to family contact, and JC then worked with HS from 16 March 2010 until 16 March 2011 [C/70].
77. On 25 March 2010, keyworker A noted that the advocate JC 'feels that HS may need drama or art therapy' [C/219].
78. A referral was made to MB, a drama therapist, because 'HS was finding it hard to assert herself with her family' [C/291].
79. JC's view was that HS had 'full capacity' to decide where and with whom to live and capacity to make her own treatment and care decisions.
80. On 1 April 2010, GD wrote to HLS, informing him that 'We have been instructed by social services that HS should not visit you, because of fears that she is under pressure ... [C/201]
81. It is unnecessary to recite all of the relevant case notes around this time. However, they are full of references such as, 'Best Interest Meeting ... The purpose of the meeting was to ... agree on contact arrangements' [C/220]; 'Mr S Senior is now allowed to visit HS at 2R' [C/223]; 'The frequency of visits will be reviewed after 6 weeks' [C/223]; regarding contact, 'JC will meet with HS again ... to discuss concepts of days, weeks, months. Not sure how much HS understands' [C/226]. To me, the strong overall impression is of decisions about family contact being made for HS, not by her, and often not even in her presence.
82. Drama therapist MB saw HS for their first 'individual dramatherapy session' on 17 May 2010 [C/86].
83. MB summarises her background and qualifications at C/290. She obtained a degree in sociology in 1977, followed by a PGCE in English and drama and a period teaching drama at a further education college. In 1996, she worked as a speech and language therapy assistant. The following year, she took a certificate course in *The Uses of Storymaking in Therapy and Education*, before completing a part-time post-graduate diploma in dramatherapy in 2000. Since then, she has worked for the local authority's learning disability service as a drama therapist, and also for a voluntary organisation called Respond, 'specialising in abuse and trauma'.
84. I cannot find any evidence in the bundles that MB has any relevant professional qualifications, forensic training or experience concerning the investigation or interpretation of allegations of sexual abuse.
85. To put it at its mildest, MB's written evidence was unsatisfactory.

86. According to her witness statement, 'to the best of my recollection it was on [5 July 2010] that GD informed me that HS had told her that her brother had come into her room and got into bed with her, that he had tickled her, HS had apparently said she didn't like it and wanted it to stop. The impression I received from GD was that this had happened on more than one occasion ... to the best of my recollection I raised my alert after my meeting with GD on 5 July 2010.'
87. Clearly, MB's recollection is not very good, which is (and should have been) relevant to the issue of how much weight to place on it.
88. It was on 17 May 2010, the very day she first met HS, that MB completed a safeguarding adults alert/referral [G/7]. According to her alert, the disclosure involved alleged sexual abuse and was made to GD and her advocate JC: 'HS disclosed to both her staff at 2R and to her advocate that her brother would regularly sleep in her bed and "tickle her" all over and she did not like it.' The alleged perpetrator of abuse was (said to be) HLS and a previous referral concerning him had been made during the past year.
89. Where the information that HLS had regularly slept in her bed and tickled her all over and that HS 'did not like it', comes from is unknown. In GD's statement, and the contemporaneous notes, HS said to GD and A that 'I sleep with my brother and he tickles me in bed and makes me laugh', and also "'It is funny" with a big smile on her face.' The fact that MB reported a previous referral concerning HLS during the past year indicates that she knew of the safeguarding alert raised by GD.
90. I note the reference to JC. However, she states at C/174:
'6. Disclosures
No disclosures were made to me in any of the work that I did with HS.'
91. On the face of it, MB met HS for the first time on 17 May 2010. That very day, she raised a safeguarding alert based on the old information from GD. There is no record of any new information.
92. I can find no notes of MB's 'assessment' meeting with HS on 17 May 2010.
93. MB's recollection and evidence now is that she did not become aware of these issues until July. On 17 May, HS 'did not want therapy ... I spoke to GD [and] explained that direct work with HS did not seem indicated ...' [C/291] Similarly, in her first statement, JC seems to imply that she suggested referral to a therapist sometime after her session with HS in June 2010, rather than discussing it in March [C/73, C/219].
94. The evidence is so inconsistent as to be almost worthless.
95. MB met her drama therapy supervisor following her meeting with HS. MB's statement is short on dates and details. However, it seems that although HS 'did not want therapy ... [and] direct work with HS did not seem indicated ...,' her supervisor suggested she 'go back through HS's health files and look for reports or indicators of prior trauma and/or abuse' [C/292]. Her supervisor 'concurred with my conclusion that HS was displaying signs of sexual abuse' [C/295]. MB goes on,

'I noted in the file a report by Dr St dated 19.11.96. The report documented a psychotic breakdown in 1993 when she was seen by Child Psychiatrist Dr Sn where she was exhibiting signs of "*withdrawal into an inner hallucinatory world*"; this report was at a time when HS's mother's health was deteriorating and her mother was nearing death. I further noted that Dr St had written that It seemed to me that *HS's emerging adolescence was provoking an independence which also meant the end of childhood security (perhaps like her birth) and so it frightened her. With her parents' illness and her own mental handicap it seemed that she couldn't face growing up.*'

96. MB states that, 'I would not expect a psychotic breakdown in a child unless it was as a result of earlier trauma of some kind'. The report by Dr St from 1996, referring to a psychotic breakdown in 1993, 'indicated to me (especially the wording I have italicised [italicised here in paragraph 95 above] that there may be some longer term abuse ... I was not concluding at this stage that HS had been sexually abused ... I took very seriously that it was likely that what she was disclosing appeared to be family abuse ...' [C/293].
97. Based on one brief meeting therefore ('the early sessions HS could not sustain for more than about 20 minutes', C/295), and reading the medical notes, MB 'took very seriously that it was likely that what she was disclosing appeared to be family abuse ...' The key passages in the medical reports which indicated this were: '*withdrawal into an inner hallucinatory world; HS's emerging adolescence was provoking an independence which also meant the end of childhood security (perhaps like her birth) and so it frightened her. With her parents' illness and her own mental handicap it seemed that she couldn't face growing up.*'
98. Actually, according to the consultant child psychiatrist Dr Sn, who saw HS in 1993, 'the external circumstances were [in fact, not longer-term abuse but] difficulties at school [and that her] mother had developed breast cancer in 1991' [C/379-380].
99. Furthermore, 'Dr St' was in fact Mrs St, a senior child psychotherapist. Her letter to HS's GP of 19 November 1996 is in the bundle at C/379. I can find no evidence that Mrs St herself concluded at the time from her sessions with HS that there 'may be some longer term abuse,' or that it crossed anyone's mind to investigate any such matter.
100. In my opinion, MB's witness statement and approach demonstrates that she lacked the necessary common-sense, judgement and analytical skills to make reliable judgements about the likelihood of sexual abuse, let alone to reinterpret reports of therapy with more highly trained professionals years earlier, and she was not qualified or trained to do so. That may sound harsh but the consequences of MB over-reaching herself, and the local authority relying on her opinion in such an unconditional way, were devastating.
101. Having decided that drama therapy might be useful, in the light of the medical notes and her conversations with GD, MB then met HS, together with advocate JC, on 9 August 2010, 'so that she would have an opportunity to understand we were all supporting work around building her self-esteem and confidence when dealing with family issues ... At no stage did I mention any kind of abuse in the therapy sessions' [C/294].
102. The witness statements of MB and JC are therefore both to the effect that HS made no disclosures of inappropriate conduct to them.

103. This observation does not sit comfortably with social work team leader JB's comment on 2 February 2012 that 'HS had had advocacy and counselling sessions to assess her allegations' [F/36]. Nor does it sit easily with his statement that '... in May 2010 MB approached [the learning disability service social work team] and explained that the information gathered and interpreted within her sessions should be regarded as a disclosure of sexual abuse, specifically in relation to her brother' — albeit that JB then states, '*It was acknowledged at the time that this was not a direct disclosure, but was an interpretation, based upon her experience and knowledge of the case file ...*'
104. Either way, it is worrying. It is worrying if MB concluded that HLS had sexually abused HS without ever discussing the subject with her, and without HS at any time mentioning any kind of abuse in the therapy sessions. Equally, it is worrying if she concluded this based on what was said by HS in therapy, but did not record it and cannot now recall it having been said.
105. Given the discrepancy, it is, at the very least, unfortunate that MB's notes of her earlier sessions are brief and unilluminating — and that she was 'unable to locate any contemporaneous notes for the later sessions' [C/294].
106. Because she was unable to locate any contemporaneous notes for the later sessions, on 18 April 2012 she exhibited some handwritten notes which were 'made more recently when I was requested to put some details of my session[s] on paper' [C/294]. These handwritten notes at C/305-C/310, made as they were without the lost original notes to hand, are full of detail for sessions taking place over a year ago, surprisingly so given that in the main statement the writer to the 'best of her recollection' did not raise her safeguarding alert until July 2010, rather on the first day she met HS in May [C/292]. For example, 23.11.10 ... At first she says it's all right, "fine". I say you often say its fine but you don't always seem fine. She denies it but later says ... I say ... she smiles ... she says,' etc.
107. Having seen HS for a second time on 9 August 2010 (with JC), on 16 August 2010 MB completed a brief report. This 'is in the bundle at F29-31. My intention was to give her a safe place in which to deal with her difficult feelings'[C/294]. The report goes rather further than that:
- 'By building a trusting relationship with staff and with JC [her advocate] she has disclosed a history of abuse perpetrated by her brother who shared her bed for many years as an adult. HS describes this as having to tolerate "tickling" and would show staff that this would take place on the sexual, genital areas of her body and would express distaste. There have been strategy meetings regarding keeping her safe' [F/29]*
108. MB is now reporting, without giving any source, that HLS 'shared her bed for many years as an adult.' When was that said, and to whom? The tickling is now recorded as having taken place on the sexual, genital areas. When was that said, and to whom? She would express distaste. When was that said, and to whom? Where is the evidence? On the evidence, nothing new is recorded or accepted as having been said since the safeguarding concern in 2009 was dismissed as unsubstantiated the previous December.
109. MB's report then states that it is 'not clear whether [HS] would like to be accompanied on home visits' but that 'it would act as an essential protective safeguard in keeping her safe' [F/30].
110. The report concludes:

'Given that she does have a history of mental health which may well be a result of early trauma, it is important that we all work toward supporting her engagement in therapy as one of the potentially protective factors for her in dealing with her abusive history' [F/31].

111. Somehow, on the basis of no new information, or no new information that anyone is now willing to own up to receiving or imparting, the position has moved from the concern being unsubstantiated in December 2009 to 'a history of abuse perpetrated by her brother who shared her bed for many years as an adult,' distasteful "tickling" on the sexual, genital areas, a reinterpretation of the medical notes of 1993 and accompanied home visits being an essential protective safeguard, against a background of being unable to recall that the safeguarding alert was made on the day of their first meeting in May. To me, that is at best substandard practice.
112. In the light of these developments, on 14 September 2010 a safeguarding meeting was held, chaired by JB [G/43]. This meeting was attended by JB (team manager, learning disabilities), MB (drama therapist), a manager and social worker from MENCAP, the advocate JC, GD and A from 2R and the case social worker CT. The manager of the local day services sent her apologies but (presumably) would have received the minutes. In addition, the safeguarding alert/referral forms were shared with the local mental health NHS trust and the local PCT.
113. According to the minutes:
- (a) The 'allegations/concerns investigated' were that HS had been sexually abused by her brother at home before 'coming into care in 2008'; that since then she had been sexually abused by him whilst on holiday together; that 'she is in danger of sexual abuse from HLS'; that she was being bullied by her father and brother into having unwanted contact with them; that each of them was domineering and bullying to her; that she was frightened by their saying that she needed to move from 2R [G/44].
 - (b) It was now clear from reviewing the files and reports that 'there was clear evidence that HS had suffered sexual abuse by HLS and continued to be at risk of sexual abuse from him ... She needs continued safeguarding about contact with her brother and her father' [G/45].
 - (c) HS had not consented to the police being contacted and it was against her best interests to inform them at present [G/45].
 - (d) HS had not been advised of the case conference [G/45] (which is odd if she had capacity to make her own decisions in respect of the relevant matters).
 - (e) 'HLS has not been spoken to about this concern at this stage' [G/45].
 - (f) 'BS has not been spoken to about this concern' [G/45].
 - (g) 'The meeting considered that each of them would emphatically deny any grounds for concern and raising this matter with either of them or with other relatives would lead to them putting severe pressure and stress on HS and that this is against her best interests' [G/45].

- (h) The summary of the discussion, two pages further on at G/47, then states: 'The meeting agreed that she continues to be at risk of sexually abusive family relationships ... While she generally has capacity with support to make decisions, the meeting considers that she does not always have capacity to safeguard herself' [G/47].
- (i) Going on holiday to India with her brother 'shortly' was not in her best interests and the meeting agreed that the local authority needed to make a best interests decision for her [G/47].
- (j) JC would advise HS 'that a police report can be made about abuse' [G/48].

Risk Assessment

'HS's care plan of living in residential care ... and moving on to supported living ... largely manages risk of overt abuse.

She is at risk of sexual abuse if she spends any time on her own with [her brother]

She is at risk of extreme pressure from her brother if he becomes aware that she is disclosing sexual abuse [G/49].

- 114. It is difficult to reconcile the last sentence with decision of the meeting that JC will advise HS 'that a police report can be made about abuse' [G/48], and with the apparent absence of any 'disclosure' of sexual abuse.
- 115. According to JB, weight was given to the 'surrounding circumstances namely:
Interpretation of behaviour/demeanour/comments as disclosure of sexual abuse by a recognised professional within the field of Learning Disabilities and Sexuality/Relationships [C/132].'
- 116. To me, that is a worrying statement. At its highest, the drama therapist's (re-) interpretation of the evidence was a matter on which to seek further evidence and/or on which to ask an appropriately-qualified and experienced person to investigate and advise.
- 117. Whether to share this interpretation with father and brother was considered but rejected. 'The safeguarding representatives were very conscious that this assertion would be challenged ... the collective decision of those attending the safeguarding conference [was] that the allegation of sexual abuse was substantiated on the balance of probability ... The safeguarding conference did not have sufficient evidence to be able to say when and where exactly sexual abuse had taken place ...' [C134-5].
- 118. There are a number of points that I would wish to make about the safeguarding meeting on 14 September 2010:
 - (a) The allegations against HLS were grave. They involved (i) the indecent assault (ii) over many years (iii) of a person with a learning disability (iv) by a brother (v) who was/had been her carer. The alleged conduct was criminal, had the potential to destroy his reputation within his family and community, was relied on to restrict contact with him, was not based on any new evidence that anyone is now willing to admit to receiving, and was based on the interpretation of a drama therapist whose recollection and conduct is flawed.

- (b) Clear findings were made that HS had been sexual abused by her brother.
- (c) It was alleged that she had been sexually abused by him since 'coming into care in 2008'.
- (d) These findings were made on remarkably thin evidence; it is difficult to see that the known facts were significantly different from those known on 3 December 2009.
- (e) There is no evidence which I have seen that MB was appropriately qualified, trained or competent to investigate reports of sexual abuse or to draw conclusions about such allegations.
- (f) Before coming to a finding that sexual abuse occurred, no expert evidence was obtained concerning the reliability of HS's accounts or the reliability and objectivity of those who noted and recorded her comments.
- (g) Before coming to a finding that sexual abuse occurred, no expert evidence was received as to HS's use of language and the meaning conveyed by words she used.
- (h) There was a basic unfairness in the procedures in that HLS was condemned in his absence, and his contact with his sister limited, without him being made aware of the meeting or the concerns that gave rise to it.
- (i) Neither he nor his father was given an opportunity to deal with concerns that they formed an abusive family.
- (j) In late 2009, when he was given some opportunity, he was able to provide a satisfactory explanation.
- (k) He might well 'emphatically deny any grounds for concern' and have relevant evidence to give, which it would be a very necessary to have before drawing adverse conclusions.
- (l) The fact that the meeting agreed that the local authority needed to make a best interests decision for HS was an admission that she lacked capacity to make decisions about having contact and being alone with her brother.
- (m) The subsequent court application made without a COP3, on the basis that she had capacity in all relevant respects, gave a misleading impression of what the case was about.
- (n) In essence, everyone involved in HS's day-to-day life now knew of the allegations — which, in fact, now had the status of findings, not allegations — and were devising strategies based on this fact, except for HS's father and brother. The meeting considered that each of them would emphatically deny any grounds for concern and that it was 'against her best interests' for them to be told. One of the grounds for emphatically denying allegations of vague or unclear origin would, of course, be that they were not true.
- (o) Indeed, no one in the family knew of the safeguarding meeting. HS herself, although supposedly having capacity to make decisions about residence, contact and disclosure for herself, was not at the meeting or told of it, even though momentous decisions about her family life were being made for her, which I find contradictory.

- (p) There appears to be no evidence for the finding that HS would be at risk of extreme pressure from her brother if he was made aware that she was disclosing sexual abuse. I assume this was conjectural. He certainly has not applied any inappropriate pressure since he was informed within these proceedings. He may well have applied further 'pressure' on social services.

119. On 7 October 2010, HS's advocate JC saw her, in response to the request made by her social worker at the safeguarding meeting some three weeks before. On 10 October 2010, she wrote up a report of the visit [G1-2]:

'This request was to follow up on the possibility of HS thinking about whether she would like to proceed with criminal proceedings against her brother and father (sic) for sexual/emotional abuse

I explained that all of the people (professionals) at the [safeguarding] meeting were listening to what HS had to say ... these people were understanding this and were putting in actions to make sure that [she] did not have to be with her family alone ... these people wanted to make [her] feel safe and respect her choices ...

I ... explained to [her] that these people (professionals) were trying to make sure that [her] father, brother and family were aware of her choices and that they had to respect these.

[As to her reasons for not wanting to go home] she did not like the "shouting" of her father. She would not elaborate on the inappropriate touch from her brother although she seemed more able to admit to herself [my emphasis] that it might have been wrong but was not able to discuss it in any detail

I used the word "abused" in the conversation. I explained to HS that this had been wrong ... I explained that currently social services were dealing with the issue by ... making her safe. I said that social services would continue to keep listening to her and would act on her choices rather than what her family might wish for her.

I also explained that this abuse is wrong and that it breaks what is called the "law" in this country

It became quiet [sic] clear that HS could not understand this process and was unsure what it meant ... It appears that she is just coming to terms with [the] idea that things were wrong when she lived at home but is not able to understand the full meaning of abuse and its implications.'

120. The message conveyed to HS at this meeting was a very clear one indeed:

- (a) The word 'abused' was used by a trusted figure appointed to advocate for her. It was explained to her that what(ever) happened had been wrong.
- (b) Whatever touching or tickling had taken place, it was a criminal offence that her brother had committed against her.
- (c) Her father might well also have committed a criminal offence or offences against her.
- (d) All of the 'people (professionals)' understood her and were listening to what she had to say.

- (e) They respected her choices. They would act on her choices rather than what her family might wish for her.
 - (f) All of the 'people (professionals)' were making sure that she did not have to be with her family alone and were making her safe. They wanted to make her feel safe; by implication, her family did not.
121. HS herself 'would not elaborate on the inappropriate touch from her brother but 'she seemed more able to admit to herself that it might have been wrong': how would one know that?
122. The clear message being conveyed by all of the professionals was that your brother has been touching you in a way that is criminal. Your father's behaviour towards you may also be criminal in nature.
123. Given HS's suggestibility, it was unfortunate that her advocate and day-to-day carers, the people on whom she relied, kept telling her (or advocating to her) that they understood her and were empowering her, and that the way or ways in which her brother had tickled or touched her were criminally inappropriate.
124. The bias and lack of basic fairness in the process is, to my mind, obvious and it formed the backdrop to the second reference to sexual activity relied on by the local authority.

Second reference to sexual activity relied on by the local authority

125. A month later, on 8 November 2010, GD states that she and HS were discussing her forthcoming meeting that day with MB, the drama therapist.
126. This statement immediately raises several questions. What were they discussing in connection with the forthcoming drama therapy session with MB (the notes to which are the first to have been lost)? Were they discussing touching? Did GD say or infer to HS, as JC had done, that what her brother had done was criminal or wrong? Did GD say that she, MB and the other 'people (professionals)' were her friends and would protect her? Was HS being encouraged to open up and say anything in particular to GD or MB?
127. HS 'then revealed that her father and brother were always fighting and that her brother had been touching her. She had tears in her eyes.'
128. Was that all said in a single sentence? If not, what was said in between? Did HS mention first that her father and brother were always fighting? If so, was she already tearful at that point? Did she mean fighting together or fighting GD and staff? Was she upset that they were not getting on with staff? Was she upset at learning/being told that her brother's touching had not been innocent personal care but a criminal assault?
129. Why 'revealed'? This report is phrased as new information but according to MB's report of 16 August, three months earlier, 'By building a trusting relationship with staff and with JC [her advocate] she has disclosed a history of abuse perpetrated by her brother who shared her bed for many years as an adult. HS describes this as having to tolerate "tickling" and would show staff that this would take place on the sexual, genital areas of her body and would express distaste [F/29].'

130. 'I asked her to show me where and she stood up and clearly demonstrated by placing her hands on her breast, her private parts and her bottom ... I passed this on to MB before her session with HS that day; I also alerted the social worker CT' [C/186].
131. The Scott Schedule put it as follows: 'On 8 November 2010, HS told GD that HLS and BS were always fighting and that HLS had been touching her. She had tears in her eyes and when asked to show where she had been touched she demonstrated by placing her hands on her breasts, her private parts and her bottom' [C/370, C/377, GD para. 15w and Exhibit GD/5].
132. In their Scott Schedule, the local authority sought a finding that 'the incident happened as described by HS' [C/377].
133. Again, it is a report that is recorded. The report is that:
- HLS and BS are always fighting.
 - HLS has touched HS in the area of her 'breasts, her private parts and her bottom.'
134. Given that a clear finding of sexual abuse had already been made, communicated to HS and in my view hammered home by GD, JC and their colleagues, more information was needed in order to know what weight (if any) to attach to the conversation. Just to list some obvious questions by way of example, who brought the subject up? Was a question asked that made it clear what answer was required? Was it the question JC had asked? How many times had the question been asked before but not answered, or answered in that way? Was HS upset because her father and brother were always fighting? Did she mean fighting with each other or with her carers? Was she upset that they were in conflict with her carers, and not able to visit her? Was it a touch or a tickle, was it in the context of providing personal care or not, over the clothes or under the clothes, when, how often, in what location, etc? Why had she said before that her brother's tickling in bed made her laugh, rather than brought tears to her eyes? Did she fear that unless she fell into line with the common view that she might incur the displeasure of those she relied upon? Was she tearful because she was in a double-bind?
135. GD then accompanied HS to the drama therapy session and reported to MB that 'HS had disclosed to her that her brother had touched her in the past and that HS had stood up and pointed where her brother had touched her, that is on her breast and her genitalia.'
136. According to MB, 'again I did not raise the issue with HS No overt disclosures of sexual abuse were made to me' [C/295].
137. At the risk of repetition, some of the relevant context is that:
- (a) HS lived with her father and brother from birth until her mid-to-late twenties.
 - (b) She needed support with personal care, including assistance to wash in the bath and help to put the necessary creams on sores.
 - (c) HLS and his father had the main responsibility for her personal care for many years.
 - (d) Father and brother did not deny providing personal care.
 - (e) It was normal in this family.

- (f) There had been no indication that HS was uncomfortable with this.
- (g) GD was uncomfortable with this and the family were educated about what was appropriate, good and bad touching, etc.
- (h) Relations between the family, 2R and social services quickly deteriorated.
- (i) On 1 November 2009, HS had a conversation with GD which led to the latter raising a safeguarding concern about 'tickling' and holiday arrangements.
- (j) This concern was investigated and not substantiated. HLS was willing and able to give a satisfactory account. HS's reports were inconsistent.
- (k) HS had a very limited understanding of and interest in sexual matters.
- (l) HS was not traumatised by the prospect of being in the company of HLS or of going on holiday abroad with him. Indeed, she was thrilled. The holiday went well.
- (m) Drama therapist MB met HS for the first time on 17 May 2010.
- (n) Based on one brief meeting, and reading the medical notes, MB 'took very seriously that it was likely that what she was disclosing appeared to be family abuse ...'
- (o) It is worrying if MB concluded that HLS had sexually abused HS without at any stage mentioning or discussing the subject with her. Another way of putting that is that HS never confided to MB that HLS had interfered with her.
- (p) In August 2010, MB reported, without giving any source, that HLS had 'shared her bed for many years as an adult.' The tickling was now recorded as having taken place on the sexual, genital areas. HS would express distaste. Where is the evidence? On the face of it, nothing new is recorded since the safeguarding concern in 2009 was dismissed as unsubstantiated, the previous December.
- (q) In the light of these 'developments', on 14 September 2010 a safeguarding meeting concluded that it was now clear from reviewing the files and reports that 'there was clear evidence that HS had suffered sexual abuse by HLS and continued to be at risk of sexual abuse from him ... She needs continued safeguarding about contact with her brother and her father' [G/45].
- (r) HLS and BS had not been spoken to about this concern.
- (s) On 7 October 2010, HS's advocate JC saw HS. JC used the word "abused" in the conversation and explained to HS that what her brother had done had been wrong. Social services were dealing with the issue by making her safe. JC explained that this abuse is wrong and that it breaks what is called the "law" in this country.
- (t) The clear message being conveyed was that your brother has been touching you inappropriately in a way that is criminal. Your father's behaviour towards you may also be criminal in nature.
- (u) This conversation took place on 8 November 2010. It was followed by a drama therapy session, the notes to which are the first to have been lost.

- (v) On 7 December 2010, a month later, GD discussed with HS a proposed holiday with her brother. 'She was excited about going' (see below).
 - (w) On 16 December 2010, the advocate JC discussed the proposed holiday with HS. She wanted to go with her brother, said that sharing a room with him would be fine, and (when asked) that even sharing a double-bed would be fine (see below).
 - (x) The areas of the body which HS pointed to were described on 7 January 2011 as her tummy area (not private parts), breast area (not breast) and lower back (not bottom) (see below).
138. On 10 November 2010, a 'protection plan meeting' was held, attended (amongst others) by JB, CT and JC [G/21]. The context was stated to be that HS's father and brother had 'made persistent demands to have contact with HS.' HLS was alleged to have made frequent and sometimes abusive calls to 2R and had corresponded by email about his father's and his own family rights. He had made a series of complaints about the quality of her care and their lack of access to her. These complaints had not been upheld. BS (father) had corresponded on the same issues 'via his solicitor'. For some time, HS had not agreed to any requests to see either of them. The local authority was, apparently, satisfied that HS had capacity to make decisions about contact and about access to files. HS continued 'to have weekly counselling sessions with MB. There have been further things said by HS that indicate that she was sexually abused in the past by HLS ... On Monday 8th November, HS described to GD inappropriate sexualized behaviour by HLS to her in the past, which appeared clearly to be sexually abusive' [G/21-22]. 'The meeting considered that HS was becoming more forceful and precise about refusing request for contact from her brother and father ... Her brother and father have asked that she return home to live or that she be moved to another residential home. This is likely to have frightened her and made her clearer in her declining to have contact with them' [G/22].
139. The notes of the meeting record that HS did not want the police to be involved: 'It is very likely that such involvement would provoke unpredictable negative reactions from father and brother and perhaps also from other relatives. It is most unlikely that there would be sufficient evidence for the matter to be taken to court' [G/22]. HS needed to be protected from unwanted contact; the police were to be called if HLS or BS turned up at various venues attended by HS and they refused to leave [G/23]. Legal challenges disputing HS's capacity to make the relevant decisions for herself was a 'possibility' [G/23].
140. On 18 November 2010, letters were sent to relevant local service providers, advising them that if BS (sic) attempted to contact his daughter he should be asked to go away; if he could not be persuaded to go, 'you may wish to advise him that police will be called to ask him to go' [G/51].
141. An email dated 19 November 2010, from the social worker CT to the local authority's solicitor AB indicates that legal services were involved at this stage in considering the issues later raised in the COP1 application to this court [G/24].
142. On 7 December 2010, GD 'discussed with HS ... [a] holiday which her brother proposed. She was excited about going but when I mentioned about going home to see her father and brother she said "no"' [C/187]. The fact is that she was excited by the prospect of going on holiday again with her brother:

GD: Do you want to go on your own with [your brother] to India?

HS: Yes, that's right ...

GD: Why don't you come to India with us?

HS immediately replied [X activity], that's why.' [C/249]

143. This is the 'she' the meeting on 8 November considered 'was becoming more forceful and precise about refusing request for contact from her brother'.
144. On 16 December 2010, the advocate JC discussed the proposed holiday with HS [C/172-3]. She wanted to go with her brother, said that sharing a room with him would be fine and, when put to her, that even sharing a double-bed would be fine.
145. In January 2011, HS moved out of the residential setting of 2R into supported living at CRN, which she shared with three other women.

Third reference to sexual activity relied on by the local authority

146. On 7 January 2011, a locum consultant psychiatrist Dr AG and a staff grade doctor Dr Ay were asked by social services to undertake a series of mental capacity assessments and best interests determinations [F/32].
147. According to the them, HS lacked the capacity to weigh the relevant information relating to her brother's wish to take her on holiday to India:

'Although HS would like to go to India as she enjoys travelling she has disclosed some sexually inappropriate behaviour towards her from her brother on a prior trip to India where she slept in the same bed with HLS.

She says he would "cuddle" and "tickle everywhere — She pointed to her tummy area, breast area and lower back.

She has expressed specific situations/issues for her to be able to go on this holiday which include: Staying with her brother's female friend (secure sleeping arrangements which can ensure her privacy).

She would also be happy to stay in a hotel provided both herself and her brother have separate beds.

She is, however, unsure about what to do if she is faced with sharing a bed with her brother again. She would be unable to conceptualise or make alternative arrangements by herself due to language barriers, communication difficulties etc.

Her brother used to come into her bed wearing just shorts [C/377, GD/9].

Her brother tried to kiss her on the cheek [C/377, GD/9].

148. In their Scott Schedule, the local authority sought a finding that 'the incident happened as described by HS' [C/377]. Again, what incident is being referred to? The same incident as in December 2009?
149. If a brother has had a life-long protective relationship with a learning disabled sister who (when at home) had very limited language skills, a lot of communication may be by way of gestures, friendly play, etc. If he has had to provide personal care since the death of their mother, he may also be fairly pragmatic about having to attend to bodily functions: that does not demonstrate a sexual interest. Similarly, in a warm country, a male may well wear

shorts in the day and at night, which may refer to one of many things (outdoor shorts, sports shorts, boxers, with T-shirt, etc). What is the presumed significance of being kissed on the cheek by a brother? I kiss my sister on the cheek and that certainly is not inappropriate. Nor is sharing a room or even a bed with an adult sibling inappropriate *per se*. On holiday that may be all that is available, one may be watching television, it could be on top of the bed or in the bed, and/or wearing a range of clothes. At the end of the day, it all context: is the sexual thought in the mind of the brother or the interpreter?

150. On 14 January 2011, social worker CT emailed HLS to inform him that the local authority was still awaiting the capacity assessments: 'When we get the report we will study it and make a decision. In the meantime it would not be wise to purchase tickets or make bookings' [G/52].

151. On 20 January 2011, a safeguarding meeting was held. 'MB, a highly experienced therapist had [sic] worker with HS and had studied her file she had reported to Social Services that the reports by HS, taken with her file records were a clear indicator of sexual abuse by HLS towards HS' [G/38]. Dr AG and Dr Ay were 'completely satisfied' that she had capacity to make decisions about her contact with her father and brother but she lacked capacity to decide to take the holiday to India with her brother. She was likely to feel helpless in his presence and was prepared to accept the risk. Her capacity was compromised and she 'needed to be safeguarded in this matter' [G/39]. The local authority:

'will advise HS that, for her safety, they do not agree with her going on holiday with her brother

JB [social services team manager] confirmed that HS's father or brother had not been informed about the concerns of social services and health services about this matter ... It was ... the strong view of JC and GD and CT from their knowledge of HS, and the family that the consequences of disclosing the allegation of sexual abuse would be likely to be very detrimental and severe and the reaction of her father and her brother and the wider family would be very detrimental to HS. AB [the solicitor] advised that if HS did not wish this information to be disclosed, then the local authority were constrained by this and did not have to consent to disclose.

The issue of reporting the matter to the police was discussed. JC had discussed this matter with HS. In her view this was too complex a matter for HS to understand the process or the likely consequences and HS did not have capacity to make a decision about this. The meeting accepted this assessment. The meeting agreed about the lack of evidence and the poor capacity of HS to make a witness statement and that the prospect of charges leading to a conviction was most unlikely ...' [G/39].

152. I find some of these passages disturbing, for example: The 'consequences of disclosing the allegation of sexual abuse would be likely to be very detrimental and severe and the reaction of her father and her brother and the wider family would be very detrimental to HS.' If HLS had sexually abused his sister, which was firmly believed, he as the abuser would know that fact. What, in reality, would be being disclosed was simply that HS had reported some form of touching or tickling which the professionals had interpreted as sexual abuse. Most likely, it would be their interpretation that he challenged, and perhaps precisely what was said and in what context, rather than her being at any risk of retribution. Certainly, there has been none since and there is no history of him acting in that manner towards his sister.

153. Was HLS to go through life not knowing the basis on which contact with his sister was being limited or refused? Was it in her best interests not to give him an opportunity to explain the situation, which he had done successfully before? In precisely what way did HS have capacity to weigh the consequences and decide not to share the information with HLS, but lack capacity to decide whether to share it with the police? What conclusions did the meeting draw in terms of the likelihood of their common belief being true given that they also agreed about the 'lack of evidence' and HS's poor capacity as a witness [of fact]? In what sense did or could HS have capacity to decide whether to have contact with HLS but not contact alone or on holiday?
154. I note that it was recorded that there were likely to be 'continued challenges and disputes' from father and brother, who had a poor view of HS's capacity, and therefore it was likely that a Court of Protection application would be necessary in this respect [G/40].
155. In essence, the local authority found that HS did **not** have capacity to be alone with her brother, because he had sexually abused her and there was a continuing risk. As a result family contact was being restricted. She wanted to see her brother in such circumstances but, according to the local authority (Applicant), **lacked** capacity to have contact with him and to protect herself in such circumstances. Meetings had been held, and decisions taken, in her absence and without her knowledge, as being in her best interests.
156. The local authority's application to this court was dated 5 July 2011, and issued on 2 August 2011.
157. Section 5.2 of the application form COP1 ('Please state the order you are asking the court to make') states:
- 'That HS has capacity to make decisions (as above) herself.*
- Alternatively, if she does not have capacity that it is in her best interests: to continue to reside in supported living arrangements and that the Director of Adult Social and Health Care do sign any tenancy agreement on her behalf; that all contact with her father and brother should be supervised and arranged in advance with: To not take holidays with her father and/or brother unless all arrangements are agreed in advance with the Applicant (Or ????)'*
158. The inclusion in the 'order sought' section of passages such as 'arranged in advance with:' and 'agreed in advance with the Applicant (Or ????)' does not suggest that the Applicant had thought through what it was seeking, even at this fairly basic level. It was an indifferent piece of work.
159. The accompanying COP2 (Permission) Form stated:
- Section 2.2 (What are your reasons for making the application?):*
- 'There is a dispute with HS's father about whether she has capacity to make decisions regarding where she lives, contact with her father and brother, whether to go on holiday with her father and brother and disclosure of confidential information.*
- The Applicant local authority is of the opinion, supported by psychiatric evidence, that HS can make these decisions herself. Given this dispute and the confidentiality issues the Applicant believes that the matter cannot be settled without the intervention of the court.*

[In fact, the psychiatric evidence was that HS lacked capacity to make decisions about going

on holiday with her brother]

In the event that the court decides she doesn't have the requisite capacity the Applicant seeks best interests decisions in relation to these matters.'

Section 2.3 (How would the order ... benefit the person to whom the application relates?):

'Whether or not HS has capacity the order would be in accordance with [her] stated wishes, it would support her independence, keep her confidences and keep her safe.'

[In fact, her stated wish was to go on holiday with her brother]

Section 2.4 (Is there any other way this benefit could be achieved?):

'No. The Applicant has tried to work with the family but they have refused to accept that HS has the capacity to make these decisions and they dispute whether they are in her best interests in any event.'

Section 2.5 (Are you seeking any directions from the court at the permission hearing?):

'An independent psychiatrist be instructed to report on whether HS has mental capacity generally and specifically to make decisions on the issues stated

The Applicant to identify three suitable psychiatrists within seven days and the father to choose one of the three within a further seven days.'

160. No mental capacity certificate was filed: 'As it is [the local authority's] position that Miss S does have mental capacity a Form COP3 has not been completed ...' [para. 50].

161. The respondents were given on the COP1 application as being BS (father) and HS herself. HLS was simply listed as a person to be notified. Note 2 to the COP1 Form states under the sub-heading 'Respondents,'

'You must provide the details of any person who you reasonably believe has an interest which means they ought to be heard by the court in relation to the application ... You must serve respondents with copies of all documents relating to your application when the court has issued your application form, in order to allow them the opportunity to support or oppose your application.'

162. These forms were supported by a statement from JB, the social work team manager, dated 5 July 2011. In his statement, no reference is made to any allegations of sexual misconduct. According to JB, HS's father and brother maintained that she 'was very suggestible' and they were not convinced that her reported wishes represented her authentic voice, 'despite the involvement of independent advocacy services'. HS had made a number of disclosures which were not included in the statement [para. 39] and it was necessary to consider 'how the disclosure would impinge upon Miss S's immediate and extended family. It would be highly likely that both Miss S's brother and father would challenge the disclosure, therefore resulting in undue pressure upon what was already a difficult situation. It was concluded that it would not necessarily be in Miss S's best interests to disclose the allegation to her family ...' [para. 40] Her family had requested the involvement of a psychiatrist instructed by BS, and this had led to a decision that an application should be made to the court for it 'to decide whether Miss S does have the necessary capacity.'

163. From this it can be seen that it was the family's request for a psychiatric report that prompted the local authority to make the application. The court was told that the local authority believed HS had capacity to make her own decisions about going on holiday. That being so, there was no COP3. A declaration confirming capacity was sought. No mention was made of sexual abuse. HLS was not made a party to the application.
164. On 29 July 2011, I gave the local authority permission to apply, on the papers, and (as requested) directed the preparation of a psychiatric report. Quite complex directions were necessary in order to ensure that whatever confidential information was not being disclosed it was not disclosed unless and until I determined that HS herself lacked capacity to make this decision for herself. I did direct that HS's father's solicitors were to see all information so that they could make representations as to the need to disclose information to him on the grounds that it was in the interests of justice or on the basis that HS lacked capacity and it was in her best interests to do so.
165. By the time of the first hearing on 27 October 2011, the local authority had filed and accidentally disclosed MB's 'witness statement' of 30 August 2011 to BS's solicitors. This expressly referred to allegations of sexual abuse by HLS:
- 'It became evident in liaison with staff and by looking back to past medical records that HS was displaying signs of sexual abuse and was in fact disclosing this abuse by her brother to the staff at 2R where she was living when she began work.'*
166. As noted in the Official Solicitor's position statement for that hearing, it was, to say the least, unfortunate that the document did not make it clear that it was one that was not to be disclosed to BS until HS's capacity to make her own decisions about disclosure had been determined. However, the reality was that BS (and, indeed, the court) was now aware of the allegations against his son. In the circumstances, it was 'difficult to see what purpose could be served by the continued withholding of the various capacity assessments from him.'
167. The local authority was of the opinion that these remaining documents should not be disclosed to BS [see statement of JB dated 19 October 2011].
168. The psychiatric report (and addendum report) directed by the court was deficient in a number of respects, and unhelpful in that the consultant psychiatrist Dr Y decided not to talk with HS about the alleged abuse and perceived holiday risks. The report does, however, contain a good example of HS's suggestibility [E/25]:
- 'On interviewing Miss S she initially found it difficult to understanding [sic] the type of information that may be contained in her social services and medical files. However, GD stated that Miss S knows that such information about herself is "private" at which Miss S jumped in, stating "staff allowed — private is OK for staff."*
169. I remember the first hearing well because, although not referred to in the application, it slowly emerged with quite a lot of pressing that at the core of the local authority's application was alleged sexual abuse and holiday contact/contact alone with HLS, who had not been named as a respondent. The local authority case was that HS had capacity to make the decisions for herself; if not, it was not in her best interests to disclose the sexual abuse issue to HLS; if wrong on that, it was true and it was not in her best interests to have such contact with him.

170. Had events unfolded differently, it is quite possible that the court would have made declarations of capacity based on Dr Y's first report, without HLS being a party and without the court being aware of the history and context, or what the contact and disclosure capacity issues were really all about.
171. On 27 January 2012, Dr IH, a consultant psychiatrist, provided a report for the court. He concluded that HS lacked capacity to make her own decisions in relation to all of the relevant matters (residence, contact, holidays with family members, disclosure of information to family members) (E/45):
- 'Overall, I find that HS lacks capacity to make decisions with regard to residence, contact, taking holidays with family members and disclosure of personal information. This is largely due to her impaired ability to understand sufficient information to make these decisions' [E/53].*
172. I agree. In reality, these decisions were decisions taken for her by professionals based on their perceptions of her best interests.
173. Social work team leader JB commented on 2 February 2012, at a roundtable meeting, that 'The initial safeguarding procedures had not been conclusive ... HS did not say that she had been sexually abused but she did say that something untoward had happened and she did not want to discuss it' [F/36]. Fairly obviously, that is not how the case was progressed in 2010. For example, see the minutes of the safeguarding meeting chaired by JB himself on 14 September 2010, summarised above.
174. On 29 February 2012, I directed that an expert report be prepared, dealing with HS's understanding of sexual matters; her use of vocabulary relating to sexual matters; the meaning attributable to the words reported by MB; the extent to which HS is suggestible and whether reactions from professionals has reinforced her perception of inappropriate behaviour on the part of her brother [B/26].
175. On 23 April 2012, I refused the local authority's application for an extension of the Scott Schedule time limits prescribed by the court's order of 29 February: 'The Applicant is now at risk of a costs order because of repeated non-compliance with court orders' [B/30].
176. On 19 May 2012, Dr AP (Chartered Clinical Psychologist) provided her report for the court. She reported that 'compared with norms for adults in the general population, HS presents as significantly suggestible [E/125] ... This means she may be suggestible to reactions from professionals as to the appropriateness of her brother's behaviour' [E/129]. She was likely to be 'easily influenced by others' [E/129]. She 'did not know what behaviour is appropriate and inappropriate in the various types of relationships in relation to affection, touch and sexual contact' [E/127]. Despite requests to show Dr AP where she had been touched by her brother, she did not do so [E/128]. She had a correct understanding of the words reportedly used by her, such as tickling, touching, kiss, bottom, etc, and was likely to have known the meaning of what she was saying [E/129].
177. As the independent social worker (and others) noted, 'There is a clear concern that HS when approached on issues where there is a sense of expectation from others she will often take a position which relates to pleasing the other' [E/156].
178. On 28 May 2012, the local authority formally indicated that it did not intend to rely on the allegations and that the fact-finding hearing was no longer required.

179. At the hearing in June 2012, the local authority sought an order for costs against HLS in respect of the costs incurred by it in instructing Leading Counsel. Subsequently, it made an offer of £1,000 towards HLS's costs.
180. On 12 November 2012, HS completed a move to a supported living placement called GH.
181. A psychologist has been instructed 'to improve or mend relations' between HS and her family.

4 — DECISION AND FINDINGS

182. The legal framework includes the statement of principle in *VA v Hertfordshire* [2011] EWHC 3524 (COP) to the effect that a costs order may be justified where there has been 'substandard practice and a failure by the public bodies to recognise the weakness of their own cases and the strength of the cases against them'.
183. I accept that there has been substandard practice and a failure by the local authority in this case to recognise the weakness of its own case. In my opinion, this has been proved.
184. In order to make good such serious allegations, cogent evidence would be required bearing in mind the guidance given by the House of Lords in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, D-H:

'The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.'

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.' Ungood-Thomas J expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 W.L.R. 451, 455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

*This substantially accords with the approach adopted in authorities such as the well known judgment of Morris LJ in *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247, 266. This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.'*

185. Cogent evidence never existed. It should have been obvious long before these proceedings were commenced — the allegations had been made in 2009 and 2010, giving plenty of time for analysis of whether they were likely to stand up — that there was never any cogent evidence.
186. The local authority's solicitor and the senior social workers ought to have been aware of the flaws and the fact that any case based on that evidence would not get anywhere near the threshold required by the court. The local authority's case was never there.
187. This is not a case of the local authority being 'damned if it does and damned if it doesn't' or of it being on the horns of a dilemma. The local authority was not expected to investigate and analyse the allegation and evidence to the same high standard later demonstrated by Mr McGuire QC. However, It had plenty of time, and took plenty of time and resources, before proceedings were commenced to come to and defend a position: this was not a case of having urgently to remove someone following an allegation of abuse at home, where a difficult and immediate decision has to be made as to what weight to give a yet-to-be investigated allegation.
188. There was a prolonged failure on the local authority's part to recognise the weakness of its case. The allegations were vague and insufficiently particularised. The 'evidence' in support was manifestly inadequate. It was internally inconsistent and unreliable. The truth of what was alleged was assumed without any proper, critical, analysis.
189. From what I have said above, I think it is fairly obvious what view I have taken of the case and what my findings are. It is not necessary for me to be more explicit, unless the local authority wishes me to be because it is not clear.
190. Having noted that, there are a few points that I need to address specifically because they were the subject of representations.
191. I do not accept as being significant the submission that, 'It is simply wrong in any event to expect local authority, whilst pursuing a case on the basis that a person has capacity, to invest substantial work in preparing a case on the premise that she lacked capacity. What local authority and the Official Solicitor were doing at that stage was not merely sensible and logical but right. Deal with the capacity issue first, and once that had been resolved, take careful stock of where that leaves the parties.' As a result of the safeguarding meetings, the local authority's 'evidence' of sexual abuse — such as it was — was in place and known to the local authority before proceedings were commenced. The material necessary to come to the conclusion was available before proceedings were instituted.
192. Nor do I accept that prior to the commencement of the proceedings there was plainly an issue as to whether HS had capacity in relation to holiday contact with her brother and the issues relating to the alleged sexual abuse. In my opinion, the local authority was itself of the opinion that HS lacked capacity to make her own decisions about going on holiday with her brother and (on the 'facts' found by the local authority) having contact alone with him.
193. The Applicant sought orders in the alternative restricting contact between HS and her family in her best interests. It is therefore plain, on the Applicant's own case, that it should have weighed and rejected the abuse allegations prior to the issue of proceedings.
194. Furthermore, the local authority did not require the evidence of Dr AP to come to the view which it did. It was clearly aware that HS was significantly suggestible.

195. As concerns the telephone hearing on 10 February 2012, in my view no weight should be attached to the point that counsel for the Official Solicitor ‘noted that we are in a peculiar position due to the way these proceedings have been brought about. However, [he] noted that this was not a criticism of [the local authority] in any way.’ The opinion expressed by counsel changed not in parallel with a change of outcome but in line with the evidence that emerged once disclosure was made, and the paucity of the local authority’s case and its Scott Schedule was apparent.
196. As Mr Sachdeva said, ‘counsel did not know that local authority was relying on such flimsy evidence when he declined to criticise local authority (Nor indeed did the court) ... It is not a breach of the injunction against hindsight for the court to rely on the evidence actually known by local authority at the time.’
197. Furthermore, having been the judge at all of the hearings, I must add that from the outset the Official Solicitor was perturbed by aspects of the Applicant’s case but, quite properly, avoided taking a position until the evidence was available.
198. I do not accept that the Official Solicitor’s costs application relies on hindsight bias, nor therefore that allowing it would be unfair on this ground. The mere fact that proceedings of this kind necessarily follow the events giving rise to the proceedings does not mean that the idea of reasonable foresight must be abandoned as unfair. The court is not required to excuse retrospectively omissions which were inexcusable at the time, such as a failure to obtain or analyse basic information. In this case, the allegation of substandard practice is focused on the quality of the local authority’s processes, rather than outcome. It is not a question of being wise after the event. Furthermore, sometimes, the main risk of hindsight bias lies in the natural tendency of service providers to rationalise retrospectively their management of the case, to convince themselves that they carefully considered risks now apparent to them, and to think of, and believe, new justifications for what was hastily done, or not done at all.
199. I do not accept that anyone who received my order of 23 April 2013, stating that the local authority’s repeated non-compliance with court orders ‘now’ exposed it to the risk of paying costs, thought it expressed anything other than a view on the non-compliance issue before the court that day. The local authority had failed again to meet the deadline set in a court direction, the court refused to extend the deadline again, leaving the local authority in breach and at risk of costs. In no sense did that mean that once the evidence was received there could be no costs consequences whatever the history revealed by that evidence. The non-compliance is simply an additional reason for awarding costs, being additional evidence of sub-standard practice.
200. Given that MB states that no disclosures were made to her, it is not strictly necessary to rely on the observations of McFarlane J in *Re SA* [2010] EWHC 196 [Admin] at paras. 65-69. However, the points made there are of general relevance when considering the weight to give information obtained therapeutically and that obtained as part of a forensic process:

69. Often the therapist will alert others to matters of concern arising from the therapeutic interview and the child or vulnerable person may then be subject to an interview aimed at the forensic process

Drama Therapist’s evidence

65. AJ is a freelance drama therapist who has worked with SA at the day centre since February 2007 and sees SA once a week for a 30 minute session. AJ reports that over time SA has begun to make 'disclosures' about 'feeling unsafe and frightened in her home environment' and has complained on a number of occasions about being hit at home. In her statement of 31st August 2009, AJ sets out a number of detailed examples of encounters with SA which support the concerns that she raises.

66. When AJ gave oral evidence the court was impressed by the obvious care and concern that she demonstrated towards SA and about the various worrying allegations that SA had made to her over the past two years. Despite this positive impression of AJ as a concerned professional, I consider that there is a real need for caution when evaluating the evidential quality of her contribution to the case. AJ's statement, which runs to 12 paragraphs, describes nine separate occasions when SA has said and/or demonstrated matters which may suggest that she is being physically harmed in her parents home. AJ's statement is the only information that the court has been given about AJ's extensive work with SA. AJ explained that she keeps weekly session notes of the half-hour spent each week with SA. None of these notes have been produced. In particular the notes of the nine or so sessions referred to in the statement have not been disclosed and it is therefore not possible to establish the context in which SA may have said or demonstrated the matters which are now reported. AJ explained that the notes for each session are "extensive". If something of particular concern has arisen then she will compile an "alerter form" which is passed on to social services. AJ explained that the first draft of her court statement was drawn up by the local authority solicitor who will have had the alerter forms and, she presumed, her session notes. She then checked the draft statement against her notes. On a rough estimate AJ must've conducted some 120 sessions with SA, yet all the court has been given is a list of some edited extracts drawn from nine of these sessions

68. When looking at evidence from a witness who is engaged in providing therapy to an individual who then, during the course of the therapeutic relationship, makes statements which are then produced as evidence of the truth, the words of Butler-Sloss LJ in *Re D (Child Abuse: Interviews)* [1998] 2 FLR 10 must be borne in mind:

'It is essential to distinguish between interviewing the child to ascertain the facts and interviewing to provide the child with help to unburden her worries. The therapeutic interview would seem to me to be generally unsuited to use as part of the court evidence, although there may be rare cases in which it is necessary to use it.'

69. Often the therapist will alert others to matters of concern arising from the therapeutic interview and the child or vulnerable person may then be subject to an interview aimed at the forensic process — as indeed happened here with the ABE interview. In the event the ABE interview did not provide any evidence to support the local authority case and thus reliance is made on the original statements made to AL I do not regard AJ's reports as being inadmissible or to be automatically of no weight, but I do have regard to the observations of Butler-Sloss LJ and, the reasons behind them, in being cautious as to the amount of weight that can be attached to the material that originates from the drama therapy sessions.

201. The fact that this local authority did not carry out its functions adequately on this occasion ought not to discourage other local authorities from discharging their functions or making appropriate court applications to court.

202. Mr McGuire was involved very late in the day. He reviewed the local authority's evidence and advised it not to proceed with the fact-finding. He has presented the local authority's case as well as it can fairly be presented. As always, he has been an adept General and he has brought his troops home safely without further casualties. But the fact is that they ought not to have been in the exposed position where he found them.
203. To summarise, my decision is that the local authority pays all of the costs claimed by the Official Solicitor and HLS in respect of the sexual abuse allegation/fact-finding from the date on which each party first became involved in the proceedings.
204. Given that it is what both parties seek, such costs to be paid 'on a sub-standard' rather than an indemnity basis.
205. Those costs include the costs incurred by the parties in making their costs applications.
206. Judgment accordingly. I should be grateful if counsel can submit a draft Order that gives effect to my decision. I can then append the Order to this decision and formally hand down judgment, for the purpose of the appeal time limits.

District Judge Eldergill

IN THE COURT OF PROTECTION

CASE NUMBER: 1201711T

MENTAL CAPACITY ACT 2005

**In the matter of
HS**

B E T W E E N:

A LOCAL AUTHORITY

Applicant

and

HS

**First Respondent
(By her litigation friend, the Official Solicitor)**

and

BS

Second Respondent

and

HLS

Third Respondent

CONSENT ORDER

UPON HS, through the Official Solicitor, and HLS having made applications for an order for costs against the Local Authority in relation to the costs in respect of the fact-finding from the date on which each party first became involved in the proceedings until 28th May 2012 and the costs of seeking such orders

AND UPON the learned District Judge having found that the Local Authority should pay the costs sought in the said applications to be assessed on the standard basis if not agreed

AND UPON the Local Authority offering to pay to HLS the sum of £35,000 and to pay HS, through the Official Solicitor, the sum of £53,000, both within 14 days of the making of this order;

AND UPON both the Official Solicitor, acting on behalf of HS, and HLS agreeing to accept those sums in full satisfaction of all or any costs claimed herein including the costs of pursuing an order for costs, and that no further hearing is required.

IT IS ORDERED THAT the Local Authority shall pay the said costs of HS and of HLS agreed at £53,000 and £35,000 respectively.

Dated: 17 July 2013