A "Transferring" clearly includes transferring the data in its binary form. Whether this can also constitute disclosing or whether disclosing requires that it should actually have come to someone else's knowledge is a question which I prefer to leave open.

Appeal dismissed. Certified question answered in negative.
B
Defendant's costs in House of Lords to be paid out of central funds.

Solicitors: Crown Prosecution Service, Headquarters; Durlings, Gillingham, Kent.

C M. G.

D

[HOUSE OF LORDS]

In re H. AND OTHERS (MINORS) (SEXUAL ABUSE: STANDARD OF PROOF)

E
1995 July 17, 18; Dec. 14

Lord Goff of Chieveley, Lord Browne-Wilkinson, Lord Mustill, Lord Lloyd of Berwick and Lord Nicholls of Birkenhead

Children—Care proceedings—Threshold conditions—Allegations of sexual abuse of elder sibling by mother's partner not proved—
F
Whether condition that younger children likely to suffer significant harm satisfied—Standard of proof—Children Act 1989 (c. 41), s. 31(2)

The mother had four children, all girls, the elder two by her husband, from whom she was separated, and the younger two by R., with whom she was living. In September 1993 the eldest girl, then aged 13, alleged that she had been sexually abused by R.
G
since she was 7 or 8 years old. She was thereupon accommodated with foster parents and R. was charged with rape. In February 1994 the local authority was granted interim care orders in respect of the three younger children, followed by interim supervision orders. In October 1994 R. was tried on an indictment containing four counts of rape of the eldest girl. The jury acquitted him on all counts after a very short retirement. The local authority proceeded with the applications for care orders in respect of the
H
three younger children based solely on the alleged sexual abuse of the eldest girl by R. The local authority, relying on the different standard of proof in civil and criminal matters, asked the judge to find that R. had sexually abused the girl or that there was a substantial risk that he had done so, thereby satisfying the

conditions prescribed by section 31(2) of the Children Act 1989[1] for the making of a care order. The judge rejected the evidence of the mother and R.; nevertheless he held that he was not sure to the requisite high standard of proof that the girl's allegations were true and that the statutory criterion for the making of a care order were not made out, albeit he had his suspicions that there was a real possibility that the girl's statement and evidence was true. On appeal by the local authority the Court of Appeal (by a majority) dismissed the appeal.

On appeal by the local authority:—

Held, dismissing the appeal (Lord Browne-Wilkinson and Lord Lloyd of Berwick dissenting), that the requirement in section 31(2)(*a*) of the Children Act 1989 that the court had to be satisfied that the child was likely to suffer significant harm if the care order was not made did not require a finding that such harm was more likely than not, but it sufficed if the occurrence of sexual harm was a real possibility; that the burden of proving any relevant fact lay on the applicant and that the standard of proof was that of the balance of probabilities; that the judge had rejected the only evidence alleged which gave rise to the making of the care order applications, and that, therefore, it was not open to him to proceed to the second stage and to consider the likelihood of further harm to the children since the establishment of the threshold conditions prescribed by section 31(2)(*a*) had to be founded on a factual basis and not on suspicions (post, pp. 572B–C, 574B–C, 585A–C, E–F, 586A–D, 587E–F, G–588B, G–H, 591G–592A, F–593A).

H. v. H. (Minors) (Child Abuse: Evidence) [1990] Fam. 86, C.A. considered.

In re G. (A Minor) (Child Abuse: Standard of Proof) [1987] 1 W.L.R. 1461 and *In re W. (Minors) (Sexual Abuse: Standard of Proof)* [1994] 1 F.L.R. 419, C.A. overruled.

Decision of the Court of Appeal [1995] 1 F.L.R. 643 affirmed.

A B C D E

The following cases are referred to on their Lordships' opinions:

A. (A Minor) (Care Proceedings), In re [1993] 1 F.C.R. 824
B. (Minors) (Termination of Contact: Paramount Consideration), In re [1993] Fam. 301; [1993] 3 W.L.R. 63; [1993] 3 All E.R. 524, C.A.
Bater v. Bater [1951] P. 35; [1950] 2 All E.R. 458, C.A.
Blyth v. Blyth [1966] A.C. 643; [1966] 2 W.L.R. 634; [1966] 1 All E.R. 524, H.L.(E.)
Davies v. Taylor [1974] A.C. 207; [1972] 3 W.L.R. 801; [1972] 3 All E.R. 836, H.L.(E.)
Dellow's Will Trusts, In re [1964] 1 W.L.R. 451; [1964] 1 All E.R. 771
Dunning v. United Liverpool Hospitals' Board of Governors [1973] 1 W.L.R. 586; [1973] 2 All E.R. 454, C.A.
F. (Minors) (Wardship: Jurisdiction), In re [1988] 2 F.L.R. 123, C.A.
G. (A Minor) (Child Abuse: Standard of Proof), In re [1987] 1 W.L.R. 1461
H. v. H. (Minors) (Child Abuse: Evidence) [1990] Fam. 86; [1989] 3 W.L.R. 933; [1989] 3 All E.R. 740, C.A.
Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247; [1956] 3 W.L.R. 1034; [1956] 3 All E.R. 970, C.A.
M. (A Minor) (Appeal) (No. 2), In re [1994] 1 F.L.R. 59, C.A.
M. (A Minor) (Care Orders: Threshold Conditions), In re [1994] 2 A.C. 424; [1994] 3 W.L.R. 558; [1994] 3 All E.R. 298, H.L.(E.)

F G H

[1] Children Act 1989, s. 31(2): see post, p. 574F.

A *Newham London Borough Council v. A.G.* [1993] 1 F.L.R. 281, C.A.
P. (A Minor) (Care: Evidence), In re [1994] 2 F.L.R. 751
Preston-Jones v. Preston-Jones [1951] A.C. 391; [1951] 1 All E.R. 124, H.L.(E.)
Serio v. Serio (1983) 4 F.L.R. 756, C.A.
W. (Minors) (Sexual Abuse: Standard of Proof), In re [1994] 1 F.L.R. 419, C.A.
W. (Minors) (Wardship: Evidence), In re [1990] 1 F.L.R. 203, C.A.

B

The following additional cases were cited in argument:

Birmingham City Council v. D. [1994] 2 F.L.R. 502
C.B. (A Minor) (Wardship: Local Authority), In re [1981] 1 W.L.R. 379; [1981] 1 All E.R. 16, C.A.
G. (A Minor) (Care Order: Threshold Conditions), In re [1995] Fam. 16; [1994] 3 W.L.R. 1211
C *Mallett v. McMonagle* [1970] A.C. 166; [1969] 2 W.L.R. 767; [1969] 2 All E.R. 178, H.L.(N.I.)
Nottingham County Council v. P. [1994] Fam. 18; [1993] 3 W.L.R. 637; [1993] 3 All E.R. 815, C.A.
S.W. (A Minor) (Wardship: Jurisdiction), In re [1986] 1 F.L.R. 24

The following additional cases were referred to in the appellants' printed case:

D *Bramblevale Ltd., In re* [1970] Ch. 128; [1969] 3 W.L.R. 699; [1969] 3 All E.R. 1062, C.A.
Dean v. Dean [1987] 1 F.L.R. 517, C.A.

APPEAL from the Court of Appeal.

This was an appeal by leave dated 5 April 1995 of the House of Lords E (Lord Keith of Kinkel, Lord Mustill and Lord Lloyd of Berwick) by the appellant, Nottinghamshire County Council, from the judgment dated 14 December 1994 of the Court of Appeal (Sir Stephen Brown P. and Millett L.J., Kennedy L.J. dissenting) dismissing the local authority's appeal from orders dated 23 November 1994 of Judge Davidson Q.C. in the Nottingham County Court. By the orders the judge dismissed F (a) the applications dated 7 February 1994 of the local authority made pursuant to section 31 of the Children Act 1989 for care orders in respect of the fourth, fifth and sixth respondents, the children, the subject of the applications represented by their guardian ad litem; and (b) the applications dated 19 April 1994 of the local authority made pursuant to section 34(4) of the Children Act 1989 for authority to refuse contact between the children and the father.

G There were three main issues in the appeal. (1) Where the allegation that a child is "likely to suffer significant harm" within the meaning of the second limb of section 31(2)(*a*) of the Children Act 1989 arises solely out of alleged sexual abuse in the past, is it first necessary to prove to the appropriate standard of proof (see (2) below) that such abuse has in fact occurred? (2) In so far as it is either relevant or necessary in proceedings H under the Act to prove an allegation of sexual abuse, is the standard of proof required (i) a standard higher than the ordinary civil standard though falling short of the criminal standard of proof, (ii) the balance of probabilities but so that the more serious the allegation the more convincing is the evidence needed to tip the balance in respect of it, or

(iii) the simple balance of probabilities? (3) In order to establish that a child is "likely" to suffer significant harm in the future, is it necessary to establish the likelihood of such harm on a balance of probabilities, i.e., to establish that it is more likely than not that the child will suffer such harm in the future, or is it enough that there is a "substantial" as opposed to a "speculative" risk? A

The local authority did not pursue in the Court of Appeal and the House of Lords the applications under section 34(4) of the Act. The third respondent, the husband of the first respondent, the mother, took no part in the proceedings and took no part in the appeal to the House of Lords. B

The facts are stated in their Lordships' opinions.

James Munby Q.C. for the local authority. The outcome of this appeal turns on the meaning to be given to the words "likely to suffer" in section 31(2)(*a*) of the Children Act 1989. C

Section 31(2)(*a*) postulates a simple two-stage process: (i) the judge has to consider "the threshold question," which is one of jurisdiction, namely, whether the child is likely to suffer significant harm; (ii) the judge, if satisfied on the threshold question, has to consider the "welfare question" and, applying the "welfare" test in section (1)(*a*) and the "welfare checklist" in section 1(3) of the Act, has to decide whether or not to make a care order. This two-stage process was recognised and emphasised in *In re M. (A Minor) (Care Orders: Threshold Conditions)* [1994] 2 A.C. 424, 433E, 434B, 437C, 440B, 441A, 441D. The correct approach to the test was put accurately by Kennedy L.J. [1995] 1 F.L.R. 643, 654E, 656F. D

Prior to the Act of 1989 there were different routes into care, including voluntary care, i.e., local authority reception into care (section 2(1), (3) of the Child Care Act 1980) and compulsory care, which fell under four main headings, namely, (1) family proceedings: (i) matrimonial causes—section 43(1) of the Matrimonial Causes Act 1973; (ii) guardianship proceedings—section 2(2)(*b*) of the Guardianship Act 1973; (iii) custodianship proceedings—sections 34(4), 36(2) and 36(3)(*a*) of the Children Act 1975; (iv) adoption proceedings—section 26(1)(*b*) of the Adoption Act 1976; (v) magistrates domestic proceedings—section 10(1) of the Domestic Proceedings and Magistrates' Courts Act 1978); (2) wardship proceedings, which came either under the inherent jurisdiction of the court (*In re C.B. (A Minor) (Wardship: Local Authority)* [1981] 1 W.L.R. 379; *In re S.W. (A Minor) (Wardship: Jurisdiction)* [1986] 1 F.L.R. 24) or under the powers conferred by secton 7(2) of the Family Law Reform Act 1969; (3) criminal proceedings (section 1(2)(*f*) of the Children and Young Persons Act 1969); and (4) care proceedings (section 1(2) of the Children and Young Persons Act 1969). E F G

In relation to both family and wardship proceedings the relevant statutory requirement for the making of a care order was that there were exceptional circumstances making it impracticable or undesirable for the child to be entrusted to other carers. In relation to criminal proceedings the relevant statutory requirement was that the child was guilty of an offence. In relation to care proceedings under the Children and Young Persons Act 1969 there were alternative statutory criteria for making a H

A care order, including section 1(2)(*a*), that the child's "proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated;" section 1(2)(*c*), that the child "is exposed to moral danger;" section 1(2)(*d*), that the child "is beyond the care of his parent or guardian;" and section 1(2)(*e*), that the child is "of compulsory school age . . . and is not receiving efficient full time education suitable to his age, ability and aptitude." The test for B statutory care under the Act of 1969 was in all cases governed by the word "is."

As to wardship before 1989, it was well established that the wardship court could intervene to protect the child from suspected sexual abuse, if need be by placing the child in care, even if the fact of past abuse or the likelihood of future abuse could not be proved on the balance of C probabilities. It was enough that there was an "unacceptable risk" to the child, i.e., a risk that was a "real, reasonable or distinct possibility" or a "real possibility" as opposed to being merely an "unreal or fanciful possibility" or a "fanciful or insubstantial possibility:" see *In re F. (Minors) (Wardship: Jurisdiction)* [1988] 2 F.L.R. 123, 128B–D, 130H–131A, 132C; *H. v. H. (Minors) (Child Abuse: Evidence)* [1990] Fam. 86, 94D–H, 101A–C, 101F–102C, 120A, 121C and *In re W. (Minors) (Wardship:* D *Evidence)* [1990] 1 F.L.R. 203, 215C–H, 222C, 223E, 228E, 229B.

It would be extraordinary if the present law were less protective to the child than the pre-1989 legislation, particularly as the Act of 1989 aimed to incorporate the best of the wardship jurisdiction within the statutory framework: *In re B. (Minors) (Termination of Contact: Paramount Consideration)* [1993] Fam. 301, 310H, *per* Butler-Sloss L.J.

E In a case such as the present section 31 of the Act of 1989 is the *only* mechanism now available to a local authority for protecting children from risk. The inherent jurisdiction of the court can no longer be used to place a child in care or under the supervision of a local authority (see section 100(1) and (2)(*a*) of the Act of 1989) or to require a local authority to accommodate a child (see section 100(2)(*b*)). A local authority's ability to have recourse to the court's inherent jurisdiction is severely limited (see F section 100(3)–(5)). Nor can a local authority apply for a residence order or contact order (see section 9(2)) or seek to achieve through the back door, by means of a specific issue order or prohibited steps order, a result precluded by sections 9(2) and 100(2): *Nottingham County Council v. P.* [1994] Fam. 18, 25E, 35E, 38H.

For the legislative history of the Children Act 1989, see the consultative G document published by the Department of Health and Social Security in 1985, Review of Child Care Law, paras. 15.11, 15.12, 15.25; the White Paper published in 1987, The Law on Child Care and Family Services (Cmnd. 62), paragraphs 59, 60 and The Law Commission Report, 1988, Family Law, Review of Child Law, Guardianship and Custody (Law Com. No. 172), paragraphs 5.1 to 5.9 and 8.106. It is apparent from the legislative material that the new law was intended to cover cases covered H by wardship. The Children Bill, as introduced in November 1988, followed closely both the general approach and, in relation to what ultimately became section 31(2) of the Act of 1989, the detailed recommendations of the working party's Review, the White Paper and the Law Commission's

Report. However, in clause 26(2)(*a*) the Law Commission's use of the words "real risk" was abandoned in favour of the earlier "likely . . . harm" formula. Clause 26(2) was amended in a number of aspects before it finally reached the form in which it became section 31(2), but none of those amendments is relevant to the issues arising on this appeal. A

As to the three main issues arising in the appeal, it is to be remembered that section 31 of the Act of 1989 is a section being applied daily and not only by judges but also by lay justices. B

As to issues (1) and (3), the *only* route into care now is section 31 of the Act of 1989 and the *sole* criteria now for making a care order are those specified in section 31(2). Section 31(2) provides two temporally alternative threshold criteria, in distinction to section 1(2)(*a*) of the Children and Young Persons Act 1969 which provided only one.

Deciding whether something is "likely" involves assessing the risk or chance of it happening in the future, an exercise which is wholly different from that involved in determining whether or not something has happened in the past: *Mallett v. McMonagle* [1970] A.C. 166, 176E–G and *Davies v. Taylor* [1974] A.C. 207, 212B–213C. Whether or not something has happened in the past is decided by the court on the balance of probabilities. It simply asks whether, on the basis of the evidence, it is more probable than not that it did happen. In contrast, a quite different approach is necessary when the court has to decide whether something "is likely." To determine whether or not something "is likely" to happen in the future the court must, of course, found itself on evidence. Mere concern, suspicion or unsubstantiated fears are not enough: *In re F. (Minors) (Wardship: Jurisdiction)* [1988] 2 F.L.R. 123, 132C. But to find that something "is likely" to happen in the future does *not* require the court to find on the balance of probabilities that the same thing, or something else, has happened in the past: see *H. v. H. (Minors) (Child Abuse: Evidence)* [1990] Fam. 86, 101F, 121C and *In re W. (Minors) (Wardship: Evidence)* [1990] 1 F.L.R. 203, 215C, 222C, 228E, 229B. Nor, to find that something "is likely" to happen in the future, does the court have to find that it is more probable than not that it will happen. In its ordinary dictionary meaning, the word "likely" is sometimes used to mean "more likely than not," sometimes as connoting a possibility which is "less likely than not:" *Davies v. Taylor* [1974] A.C. 207, 222F. Usually in a legal context, and certainly in section 31(2)(*a*) of the Act of 1989, "likely" is used in the latter sense. "Likely" in section 31(2)(*a*) does not mean "more likely than not." As the Court of Appeal [1995] 1 F.L.R. 643, 650H, 654D, 657E, unanimously and correctly recognised, it is enough that there is a "real" as opposed to a merely "fanciful" or "speculative risk:" *Newham London Borough Council v. A.G.* [1993] 1 F.L.R. 281, 286F, 288A, 288D–E, 289C–D. C D E F G

Cases decided since the Act of 1989 show that "likelihood of harm" in section 31(2) does not require proof on a balance of probabilities either of the fact of past abuse or of a likelihood of future abuse: see *Newham London Borough Council v. A.G.* [1993] 1 F.L.R. 281; *In re A. (A Minor) (Care Proceedings)* [1993] 1 F.C.R. 824, 827D; *In re G. (A Minor) (Care Order: Threshold Conditions)* [1995] Fam. 16, 25F–26A; *In re M. (A Minor) (Appeal) (No. 2)* [1994] 1 F.L.R. 59, 65B, 67B–F, 69G and H

A *Birmingham City Council v. D.* [1994] 2 F.L.R. 502, 504H. Ultimately the question under section 31(2)(*a*) remains as it was before the Act of 1989 when the court was exercising its jurisdiction in wardship, whether there is an "unacceptable risk:" *In re G. (A Minor) (Care Order: Threshold Conditions)* [1995] Fam. 16, 25F and *In re M. (A Minor) (Appeal) (No. 2)* [1994] 1 F.L.R. 59, 69G. The only authority to the contrary is *In re P. (A Minor) (Care: Evidence)* [1994] 2 F.L.R. 751, a decision at first B instance which cannot be supported.

There are additional reasons in support of the view that the approach of the judge and of the majority in the Court of Appeal was wrong. (i) It involves, in effect, writing into section 31(2)(*a*) of the Act of 1989 words that are simply not there. (ii) It is inconsistent with the approach to section 31(2)(*a*) adopted in *In re M. (A Minor) (Care Orders: Threshold* C *Conditions)* [1994] 2 A.C. 424, and, in particular, the observations of Lord Mackay of Clashfern L.C., at p. 437A. (iii) It has the bizarre result that the more serious the nature of the alleged abuse, and therefore the greater the potential danger to the child, the higher the evidential burden on the local authority and the *more* difficult it thus is to satisfy the threshold test. That simply cannot be right. The effect of the Court of Appeal's decision will be to deny protection to children in some of the most serious cases D where there is a likelihood, though not a certainty, of abuse having taken place, and, moreover, to deny them the protection which they would have enjoyed before the Act of 1989. In this connection, it is to be remembered that the child's welfare is the paramount consideration.

As to issue (2), in so far as it is either relevant or necessary in proceedings under the Act of 1989 to prove an allegation of sexual abuse, E the standard of proof required is the balance of probabilities, but the more serious the allegation the more convincing is the evidence needed to tip the balance in respect of it.

Lindsey Kushner Q.C. for the guardian ad litem. Pursuant to section 31(2)(*a*) of the Children Act 1989 a court may only make a care order or supervision order if it is satisfied "that the child concerned is suffering, or is likely to suffer, significant harm." These are commonly referred to as F the threshold criteria. In the present case the judge and the Court of Appeal were considering the second limb of section 31(2)(*a*), namely, whether the children concerned were likely to suffer significant harm in the future. There are many cases where the findings of fact are of assistance to enable the judge to decide whether a child in the future is likely to suffer harm. Moreover, it is wholly unrealistic to take the G attitude, if the alleged abuse is not proved to the required standard, that it can then be inferred that there has been no abuse at all. The situation in relation to children is quite different from such civil cases, as, for example, accident cases, where the court has to assess the likelihood of future injury. The judge and the majority in the Court of Appeal were wrong to hold that only an express finding that the child had been sexually abused would suffice to invoke the threshold criteria. The argument of the H local authority on this question is correct.

The local authority was also correct that the judge was wrong in holding that in the case involving the most serious allegations against a stepfather, the standard of proof required when determining whether or

not something had happened in the past was higher than the ordinary civil standard though falling short of the criminal standard of proof. The test was correctly stated by the Court of Appeal [1995] 1 F.L.R. 643, 647B–F, 652B, 654C, 659D–G.

As to issue (1) the correct answer is in the negative. As to issue (3), the correct answer is that in order to establish that a child is "likely" to suffer significant harm in the future it suffices to establish that there is a "substantial" as opposed to a "speculative" risk of such harm.

The Act of 1989 imports no requirement to make findings of fact on past events, but only to assess risk in the future. A requirement to make findings of fact on past events cannot be inferred from the Act or imported into it, since in many cases there are no past events which may contribute to the satisfaction of the threshold criteria. Consideration of past events is only of relevance in so far as those past events may assist in assessing risk in the future.

Irrespective of whether or not there is a finding of fact that abuse has happened in the past, a court has nevertheless to assess whether there is a likelihood of significant harm in the future. Such assessment must be founded on all the evidence before the court. This was the view of Kennedy L.J. [1995] 1 F.L.R. 643, 654E. If such likelihood arises solely out of alleged sexual abuse in the past, and the court at first instance is led to the conclusion such abuse has *not* occurred, it would necessarily follow that the court could not find that the child was "likely to suffer significant harm" in the future. However, if the evidence is not sufficient to discount any past abuse, the fact that it has been insufficient to satisfy the court that there *has* been abuse does not render such evidence irrelevant or less cogent in the assessment of significant harm. [Reference was made to *In re F. (Minors) (Wardship: Jurisdiction)* [1988] 2 F.L.R. 123; *In re P. (A Minor) (Care: Evidence)* [1994] 2 F.L.R. 751; *In re W. (Minors) (Wardship: Evidence)* [1990] 1 F.L.R. 203, 222B–D, 223D, 228D–F, 229 and *In re M. (A Minor) (Appeal) (No. 2)* [1994] 1 F.L.R. 59, 61G, 64E, 65.] Evidence leading to a finding that there was, for example, a "real possibility" that abuse had occurred would form an essential ingredient of the process of assessment of likelihood of significant harm in the future. As to the observations of Sir Stephen Brown P. in *Newham London Borough Council v. A.G.* [1993] 1 F.L.R. 281, 283, 289C, the reference there was to the threshold test.

As to issue (2), the correct answer is (iii) subject to the context thereof as outlined in (ii). [Reference was made to *Davies v. Taylor* [1974] A.C. 207.]

Allan Levy Q.C. and *Judith Claxton* for the first and second respondents, the mother and father. The majority judgment in the Court of Appeal is correct and *Newham London Borough Council v. A.G.* [1993] 1 F.L.R. 281 was wrongly decided.

As to issue (3) the appropriate test to be applied is that of the balance of probabilities.

As to the Children Act 1989 and the policy of the legislation, Part IV of the Children Act 1989 is primarily concerned with the protection of children. Parliament was concerned to balance the rights of the child, the family and the state. In particular, concern over the circumstances in

A which the state should be permitted to intervene in the family led to the careful formulation of specific grounds which have to be proved before any care or supervision order may be made in favour of a local authority. The general approach has always been that where possible children should be brought up by their parents. That is why section 31(2)(*a*) is couched in the terms that it is. By contrast section 7(2) of the Family Law Reform Act 1969 refers to "exceptional circumstances." [Reference was also made B to Department of Health and Social Security, Review of Child Care Law 1985, paras. 15.10–12, 15.14, 15.17, 15.23, 15.25.] Kennedy L.J.'s dissenting judgment minimised the importance of the threshold test. This reflects a devaluing process in that the threshold test is important since it is the first barrier against state intervention.

As to issues (1) and (3), there is no risk of harm to the children unless C the allegations are true. Accordingly the court must, if they are disputed, investigate them and decide whether they are made up or not: see [1995] 1 F.L.R. 643, 649A–652D, 657F–G, *per* Sir Stephen Brown P. and Millett L.J., respectively.

The local authority is wrong in its approach to wardship proceedings. The tests which were laid down in the earlier cases were often subsequently D criticised and were replaced by the carefully prescribed tests to be found in the Children Act 1989. There is nothing in paragraphs 59 and 60 of the White Paper, The Law on Child Care and Family Services (1987) (Cm. 62) which contradicts the view that the aim of the legislation was to tighten up the conditions relating to taking children into care and to prevent unwarranted state intervention. For parental rights, see section 3 of the Act of 1989. The background to these is the Convention for the E Protection of Human Rights and Fundamental Freedoms (1953) (Cmnd. 8969), article 8. The threshold test does not contain a paramount welfare consideration. The words "satisfied" and "likely to suffer" in section 31(2) have an ordinary meaning, and in the context of section 31 they should be given that ordinary meaning. There is no indication from the cases that after the Act of 1989 the wardship approach continues. The judge in the F present case was stating no more than that he had suspicions. On the true meaning of section 31(2), see *per* Millett L.J. [1995] 1 F.L.R. 643, 658.

Section 31(2)(*a*) is to be contrasted with section 47(1)(*b*), where the local authority's duty to investigate depends on the authority having "*reasonable cause to suspect* that a child . . . is suffering, or is likely to suffer, significant harm." Kennedy L.J. failed to take account of this G contrast in the wording. Compare section 44(1)(*a*), where the relevant words are "reasonable cause to believe." Section 38(2) is linked to section 31(2). This is a strong indicator that more than reasonable belief is required to bring section 31(2) into operation. [Reference was also made to *In re P. (A Minor) (Care: Evidence)* [1994] 2 F.L.R. 751; *In re M. (A Minor) (Care Orders: Threshold Conditions)* [1994] 2 A.C. 424, 437A; *In re M. (A Minor) (Appeal) (No. 2)* [1994] 1 F.L.R. 59, 67C–E; *In re* H *F. (Minors) (Wardship: Jurisdiction)* [1988] 2 F.L.R. 123; *H. v. H. (Minors) (Child: Abuse: Evidence)* [1990] Fam. 86; *In re W. (Minors) (Wardship: Evidence)* [1990] 1 F.L.R. 203 and *In re B. (Minors) (Termination of Contact: Paramount Consideration)* [1993] Fam. 301, 310G–H.]

As to *Newham London Borough Council v. A.G.* [1993] 1 F.L.R. 281, the Court of Appeal adopted a wrong approach. Sir Stephen Brown P., at p. 286E–F has conflated satisfied into "likely." His judgment is harking back to the approach adopted in wardship proceedings. The *Newham* case was a case where no harm had occurred which related to the specific risk in the future. The present case is entirely dependent, however, on past alleged events. There must be a "necessary" connection for the local authority to succeed. Regarding the purely future aspects of evaluation, the approach in the *Newham* case was incorrect.

Munby Q.C. replied.

Their Lordships took time for consideration.

14 December. LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Nicholls of Birkenhead. For the reasons which he gives, I, too, would dismiss this appeal.

LORD BROWNE-WILKINSON. My Lords, I have the misfortune to disagree with the view reached by the majority of your Lordships. Although the area of disagreement is small, it is crucial both to the outcome of this appeal and to the extent to which children at risk can be protected by the courts.

I agree with my noble and learned friend, Lord Nicholls of Birkenhead, that the requirement in section 31(2) of the Children Act 1989, that the court must be satisfied that the child "is likely to suffer significant harm" does not require the court to find that such harm is more likely than not: it is enough if the occurrence of such harm is a real possibility. I further agree with him that the burden of proving any relevant fact is on the applicant and that the standard of proof is the ordinary civil standard, i.e. balance of probabilities. The point on which I differ is how those principles fall to be applied by a judge faced with the decision whether he is "satisfied" that the child is likely to suffer significant harm. Even on this point, I agree that the judge can only act on evidence and on facts which, so far as relevant, have been proved. He has to be satisfied by the evidence before him that there is a real possibility of serious harm to the child.

Where I part company is in thinking that the facts relevant to an assessment of risk ("is likely to suffer. . . harm") are not the same as the facts relevant to a decision that harm is in fact being suffered. In order to be satisfied that an event has occurred or is occurring the evidence has to show on balance of probabilities that such event did occur or is occurring. But in order to be satisfied that there is a risk of such an occurrence, the ambit of the relevant facts is in my view wider. The combined effect of a number of factors which suggest that a state of affairs, though not proved to exist, may well exist is the normal basis for the assessment of future risk. To be satisfied of the existence of a risk does not require proof of the occurrence of past historical events but proof of facts which are relevant to the making of a prognosis.

Let me give an example, albeit a dated one. Say that in 1940 those responsible for giving air-raid warnings had received five unconfirmed

A sightings of approaching aircraft which might be enemy bombers. They could not, on balance of probabilities, have reached a conclusion that any one of those sightings was of an enemy aircraft: nor could they logically have put together five non-proven sightings so as to be satisfied that enemy aircraft were in fact approaching. But their task was not simply to decide whether enemy aircraft were approaching but whether there was a risk of an air-raid. The facts relevant to the assessment of such risk were B the reports that unconfirmed sightings had been made, not the truth of such reports. They could well, on the basis of those unconfirmed reports, have been satisfied that there was a real possibility of an air-raid and given warning accordingly.

So in the present case, the major issue was whether D1 had been sexually abused (the macro-fact). In the course of the hearing before the C judge a number of other facts (the micro-facts) were established to the judge's satisfaction by the evidence. The judge in his careful judgment summarised these micro-facts: that D1 had been consistent in her story from the time of her first complaint; that her statement was full and detailed showing "a classic unfolding revelation of progressively worse abuse"; that there were opportunities for such abuse by Mr. R. and that he had been lying in denying that he had ever been alone either with D1 D or with any of the other children; that D2 had made statements which indicated that she had witnessed "inappropriate" behaviour between Mr. R. and D1; that the mother (contrary to her evidence) also suspected that something had been going on between Mr. R. and D1 and had sought to dissuade D2 from saying anything to the social workers. The judge also found a number of micro facts pointing the other way. Having summarised E all these micro facts pointing each way, he reached his conclusion on the macro fact: "I cannot be sure to the requisite high standard of proof that [D1's] allegations are true." But he also made further findings (which he thought to be irrelevant in law) on the basis of the micro-facts:

> "This is far from saying that I am satisfied the child's complaints are untrue. I do not brush them aside as the jury seem to have done. F I am, at the least, more than a little suspicious that [Mr. R.] has abused her as she says. If it were relevant, I would be prepared to hold that there is a real possibility that her statement and her evidence are true, nor has [Mr. R.] by his evidence and demeanour, not only throughout the hearing but the whole of this matter, done anything to dispel those suspicions . . ."

G That conclusion that there was a real possibility that the evidence of D1 was true was a finding based on evidence and the micro-facts that he had found. It was not a mere suspicion as to the risk that Mr. R. was an abuser: it was a finding of risk based on facts.

My Lords, I am anxious that the decision of the House in this case may establish the law in an unworkable form to the detriment of many children at risk. Child abuse, particularly sex abuse, is notoriously difficult H to prove in a court of law. The relevant facts are extremely sensitive and emotive. They are often known only to the child and to the alleged abuser. If legal proof of actual abuse is a prerequisite to a finding that a child is at risk of abuse, the court will be powerless to intervene to protect

children in relation to whom there are the gravest suspicions of actual abuse but the necessary evidence legally to prove such abuse is lacking. Take the present case. Say that the proceedings had related to D1, the complainant, herself. After a long hearing a judge has reached the conclusion on evidence that there is a "real possibility" that her evidence is true, i.e. that she has in fact been gravely abused. Can Parliament really have intended that neither the court nor anyone else should have jurisdiction to intervene so as to protect D1 from any abuse which she may well have been enduring? I venture to think not.

My Lords, for those reasons and those given by my noble and learned friend, Lord Lloyd of Berwick, I would allow the appeal.

LORD MUSTILL. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Nicholls of Birkenhead. For the reasons which he gives I would dismiss this appeal.

LORD LLOYD OF BERWICK. My Lords, in this case we are concerned with two sisters and two half-sisters. In September 1993 the eldest sister, C. then aged 15, gave a detailed written statement to the police in which she alleged that she had been subject to sexual abuse by her stepfather since the age of 7 or 8, culminating in four acts of rape. The stepfather (whom I shall refer to as "the father") was arrested and charged. C. gave evidence at his trial. In October 1994 he was acquitted on all six counts. The jury took only 14 minutes to reach their verdict.

Meanwhile in February 1994 Nottinghamshire County Council applied for care orders in respect of the three younger sisters. It was decided not to apply for a care order in respect of C., since she had been living with foster parents since November 1993, following a short period under police protection, and the placement appeared to be satisfactory.

The hearing took place before Judge Davidson Q.C. in November 1994. It lasted seven days. The question he had to decide was whether the threshold criteria set out in section 31(2) of the Children Act 1989 were satisfied. That subsection provides:

> "A court may only make a care order or supervision order if it is satisfied—(*a*) that the child concerned is suffering, or is likely to suffer, significant harm; and (*b*) that the harm, or likelihood of harm, is attributable to—(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or (ii) the child's being beyond parental control."

Since it was not suggested that the three younger sisters had suffered or were suffering any harm, the question was whether, on the evidence before the court, the judge was satisfied that they were likely to suffer significant harm in the future.

The judge heard from the mother (who came from prison to give her evidence) as well as the father. As to the mother, he found that he could not rely on her evidence, since she had been untruthful in at least three respects in the witness box. As to the father, he said that he had seldom been less impressed by a witness. But, as he went on to point out, the fact

A that the mother and the father told material lies in the witness box did not mean that C. was necessarily telling the truth.

As to C. herself, the judge set out carefully and comprehensively the factors which told for or against her evidence. It was clearly a most anxious case. But in the event he found that he could not be sure to the "requisite high standard of proof" that C.'s allegations were true. Accordingly he held that he had no jurisdiction to make a care order. The B threshold test was not met. But the judge did not leave it there. He went on to say that he was far from satisfied that C.'s complaint was untrue.

> "I am at the least more than a little suspicious that the [father] has abused her as she says. If it were relevant, I would be prepared to hold that there is a real possibility that her statement and her evidence are true, nor has the [father] by his evidence and demeanour, not only C throughout the hearing but the whole of this matter, done anything to dispel those suspicions . . ."

The Court of Appeal dismissed the local authority's appeal, Kennedy L.J. dissenting. There is now an appeal to your Lordships' House. The parties have helpfully identified five points for decision. The first three are of general importance. I will take them in the reverse order, D since it is only the third which gives rise to any difficulty.

(1) In order to establish that a child is "likely" to suffer significant harm in the future, is it necessary to establish the likelihood of such harm on a balance of probabilities, i.e. to establish that it is more likely than not that the child will suffer such harm in the future, or is it enough that there is a E "substantial" as opposed to a "speculative" risk?

The word "likely" in ordinary language may mean probable, in the sense of more likely than not; or it may include what might well happen. Thus in *Davies v. Taylor* [1974] A.C. 207, one of the questions was whether the judge had applied the correct test in a case under the Fatal Accidents Acts 1846–1959. In the course of his judgment he had used the F word "likely" to indicate the test which he was applying. Lord Cross of Chelsea said, at p. 222:

> "The word 'likely' which occurs in the last two of the three passages from the judgment which I have quoted above may be used in different senses. Sometimes it may be used to mean 'more likely than not' at other times to mean 'quite likely' or 'not improbably' though less likely than not."

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Similarly, in *Dunning v. United Liverpool Hospitals' Board of Governors* [1973] 1 W.L.R. 586, the question was whether a claim in respect of personal injuries was "likely to be made" for the purposes of section 31 of the Administration of Justice Act 1970. Lord Denning M.R. said, at p. 590, that "likely to be made" should be construed as meaning "may" H or "may well be made." James L.J. said that he would construe "likely" as meaning a "reasonable prospect."

Coming to section 31(2)(*a*) of the Act itself, the Court of Appeal in *Newham London Borough Council v. A.G.* [1993] 1 F.L.R. 281, rejected an argument that "likely to suffer significant harm" was to be equated with

"on the balance of probabilities." In *In re A. (A Minor) (Care Proceedings)* [1993] 1 F.C.R. 824, it was again argued that "likely" meant more probable than not. Thorpe J. held that the argument was not open to the appellants in the light of *Newham London Borough Council v. A.G.*, a decision which he regarded as of great importance.

In the present case the Court of Appeal have held unanimously, in line with the *Newham* case, that the threshold test is satisfied if, in the court's view, there is a real or substantial risk of significant harm in the future.

Mr. Levy, for the respondents, submitted that the *Newham* case was wrongly decided. He pointed out that both halves of section 31(2)(*a*) are governed by the words "if [the court] is satisfied." Since, as was common ground, the court has to be satisfied on a balance of probabilities under the first half of the clause, i.e. that the child *is* suffering harm, it must follow (so he argued) that the court must be satisfied on a balance of probabilities that the child will suffer harm under the second half of the clause. Therefore "likely" in the second half of the clause must mean more likely than not. But this is a non sequitur. It confuses what has to be proved under the second half of the clause, i.e. the likelihood of significant harm, with the standard of proof required under the first half of the clause. There is no necessary connection between the two.

As for the word "satisfied" on which Mr. Levy placed reliance, it does not throw any light on the degree of risk contemplated by the second half of the clause. It is a word with a range of meanings covering the criminal burden of proof ("satisfied so as to be sure") through the civil burden of proof ("satisfied on a balance of probabilities") to a synonym for "conclude" or "determine." In *Blyth v. Blyth* [1966] A.C. 643, the House had to consider section 4(2) of the Matrimonial Causes Act 1950. That subsection provided:

> "If the court is satisfied on the evidence that—(*a*) the case for the petition has been proved; and (*b*) where the ground of the petition is adultery, the petitioner has not in any manner . . . condoned, the adultery . . . the court shall pronounce a decree of divorce . . ."

Lord Pearson said, at p. 676:

> "The phrase 'is satisfied' means, in my view, simply 'makes up its mind;' the court on the evidence comes to a conclusion which, in conjunction with other conclusions, will lead to the judicial decision."

Lord Pearce, at p. 672, regarded "satisfied" as a neutral word allowing of proof to a different degree in relation to the two halves of the subsection, i.e. proof of adultery and proof that the petitioner has not condoned the adultery. So here, the word "satisfied" in section 31(2)(*a*) is neutral. It means that the court must make up its mind. It thus bears the same meaning in relation to both halves of the clause, but, as I have said, throws no light on the meaning of "likely."

I therefore conclude that the decision of the Court of Appeal as to the meaning of "likely to suffer significant harm" was correct.

(2) *In so far as it is either relevant or necessary in proceedings under the Act to prove an allegation of sexual abuse, is the standard of proof required (i) a standard higher than the ordinary civil standard though falling short of*

A *the criminal standard of proof, (ii) the balance of probabilities, but so that the more serious the allegation the more convincing is the evidence needed to tip the balance in respect of it, or (iii) the simple balance of probabilities?*

All three counsel were agreed that the correct answer to the above question should be (ii). As a result there was no argument as to the theoretical difference between the three possible answers, or, perhaps more B important, the practical consequences. Nor was there any citation of earlier authority on the point, of which there is a great deal.

In the course of his judgment at first instance Judge Davidson referred to and followed the headnote in *In re W. (Minors) (Sexual Abuse: Standard of Proof)* [1994] 1 F.L.R. 419, 420 which reads:

> "Charges of sexual abuse in civil proceedings must be proved to a C standard beyond a mere balance of probability, but not necessarily a standard as demanding as the criminal standard."

In other words, the judge favoured solution (i). In the Court of Appeal [1995] 1 F.L.R. 643, 659E Millett L.J. said that in all civil cases there is only one standard of proof, namely, proof on the balance of probabilities, and that, contempt of court apart, it is never necessary to prove facts to a D standard beyond the balance of probabilities. Since we have heard no argument on the point, I am not for my part prepared to endorse so wide a proposition. It will have to await a future occasion when authorities in other branches of the civil law, including decisions of your Lordships' House, can be considered. So I propose to confine what I am about to say to the standard of proof under section 31(2) of the Act.

In my view the standard of proof under that subsection ought to be E the simple balance of probability however serious the allegations involved. I have reached that view for a number of reasons, but mainly because section 31(2) provides only the threshold criteria for making a care order. It by no means follows that an order will be made even if the threshold criteria are satisfied. The court must then go on to consider the statutory checklist in section 1(3) of the Act. But if the threshold criteria are not F met, the local authority can do nothing, however grave the anticipated injury to the child, or however serious the apprehended consequences. This seems to me to be a strong argument in favour of making the threshold lower rather than higher. It would be a bizarre result if the more serious the anticipated injury, whether physical or sexual, the more difficult it became for the local authority to satisfy the initial burden of proof, and thereby ultimately, if the welfare test is satisfied, secure G protection for the child.

Another indirect pointer may be found in section 26 of the Family Law Reform Act 1969. At common law the presumption of legitimacy could only be rebutted by proof beyond reasonable doubt. This was one of the considerations which led the House to its conclusion in *Preston-Jones v. Preston-Jones* [1951] A.C. 391. By section 26 of the Act of 1969 the presumption can now be rebutted on a simple balance of probabilities. H Although in *Serio v. Serio* (1983) 4 F.L.R. 756, 763 the Court of Appeal held that the standard of proof should be "commensurate with the seriousness of the issue involved" (in other words, that it might require more than a mere balance of probabilities), this seems to read words into

the statute which are not there. If the legislature has ordained that the presumption of legitimacy can be rebutted on a simple balance of probabilities, I have no great difficulty in concluding that section 31(2) requires a simple balance of probabilities, and no more, even when there is a serious allegation of sexual abuse.

There remains the question whether anything should be said about the cogency of the evidence needed to "tip the balance." For my part I do not find these words helpful, since they are little more than a statement of the obvious; and there is a danger that the repeated use of the words will harden into a formula, which, like other formulas (especially those based on a metaphor) may lead to misunderstanding. The formula seems to owe its origin to the need to qualify or explain Denning L.J.'s judgment in *Bater v. Bater* [1951] P. 35 and *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247. But once it is accepted that the standard of proof under section 31(2) is the simple balance of probabilities, and that the subsection does not require a degree of probability commensurate with the seriousness of the allegation, then the need for the qualification disappears. Despite the unanimity of counsel's preference for answer (ii) to the second question, I would prefer (iii), and leave the rest to the good sense of judges and magistrates. They will be well aware of, and pay full regard to, the factual context in which they must reach their difficult decisions.

As for the present case, I can have no doubt that the judge applied a higher than ordinary standard of proof. It is what he says in plain terms. Sir Stephen Brown P. said that the judge may nevertheless have applied the right test and drew attention to the reference in his judgment to *In re W. (Minors) (Sexual Abuse: Standard of Proof)* [1994] 1 F.L.R. 419. But *In re W.* is the very case in which the Court of Appeal held that a higher than ordinary standard is required. Millett L.J. also thought that the judge had applied the correct test, despite what the judge said. I fear that in this respect the majority of the Court of Appeal were being over-generous to the judge.

(3) *Where the allegation that a child is "likely to suffer significant harm" within the meaning of the second limb of section 31(2)(a) of the Act arises solely out of alleged sexual abuse in the past, is it first necessary to prove to the appropriate standard of proof (see (2) above) that such abuse has in fact occurred?*

The third question is the one that gives rise to difficulty. The problem can be stated quite simply. The case has been fought on the basis that the sole cause for concern is the allegations of sexual abuse made by C. It may be that in that respect the case is unusual, and that in many, if not most cases, a local authority applying for a care order will rely on a number of contributing factors. It is only when the local authority relies, as here, on a single incident or series of incidents relating to the same child, that the problem arises in a stark form. If the court finds on the balance of probabilities that the incidents did not occur, how can it go on to hold that by reason of those incidents there is a real or substantial risk of significant harm in the future?

Before giving my answer to that conundrum, it is helpful to look at the background to section 31 of the Act. A feature of the 1970s and 1980s

A was the sudden and very rapid increase in the number of applications for wardship in the High Court, mainly due to the increased use of wardship by local authorities: see the Government's White Paper on The Law on Child Care and Family Services (1987) (Cm. 62), p. 15, para. 59 and the table set out in *Bromley's Family Law*, 8th ed. (1992), p. 477. One of the purposes of the Act of 1989, as I understand it, was to abrogate the power of the High Court to place a ward of court in care (see section 100 of the
B Act, which repealed section 7 of the Family Law Reform Act 1969 and placed tight restrictions on the High Court's inherent jurisdiction), while at the same time making the benefits of the old wardship jurisdiction more generally available. As Butler-Sloss L.J. said in *In re B. (Minors) (Termination of Contact: Paramount Consideration)* [1993] Fam. 301, 310, the Act "aims to incorporate the best of the wardship jurisdiction within
C the statutory framework." The consequence was that Part IV and V of the Act became the only route open to a local authority for protecting children at risk.

A number of cases prior to 1991 (when the Act of 1989 came into force) illustrate the old wardship approach. Thus in *H. v. H. (Minors) (Child Abuse: Evidence)* [1990] Fam. 86, a case concerning access, Butler-Sloss L.J. said, at p. 101:

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> "[The judge] may have found individual facts, such as inappropriate knowledge or behaviour, which constitute a high degree of concern about the child without being able to say on the test that they amount to actual abuse. They are, however, relevant to the exercise of the discretion. He may have sufficient evidence of concern about the past care of the child to be satisfied that the child was in a potentially
E abusing situation without having sufficient evidence to be satisfied as to the extent of the abuse in the past or the identity of the abuser."

Stuart-Smith L.J. said, at p. 121:

> "In the type of case with which we are concerned in these appeals there may be insufficient evidence upon which the judge can conclude
F that the father *has* sexually abused his children, nevertheless there may be sufficient evidence to show that there is a real chance, possibility or probability *that he will do so in the future* if granted access."

In *In re W. (Minors) (Wardship: Evidence)* [1990] 1 F.L.R. 203, another wardship case, Butler-Sloss L.J. said, at p. 215:

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> "It is not necessary to make a finding of sexual abuse against a named person in order for the judge to assess the risks to the child if returned to that environment. He is engaged in a different exercise, that of the assessment of the possibilities for the future."

Neill L.J. said, at p. 228:

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> "There may also be cases, however, where the court may not be in a position to make a positive finding on the evidence as to what has happened in the past, but may, nevertheless, come to the conclusion that a child may be at risk for the future."

Although these cases were decided in wardship, and not under the Children Act, they underline a general point. Evidence which is insufficient to establish the truth of an allegation to a required standard of proof, nevertheless remains evidence in the case. It need not be disregarded. The point will be familiar to anyone who has taken part in a criminal trial. It is not uncommon for defence counsel to tell the jury that unless they are sure that a particular witness is telling the truth, they must reject his evidence altogether. But this is quite wrong. The witness's evidence remains evidence in the case. The jury is entitled to take it into account in deciding whether on all the evidence they are sure of the defendant's guilt.

I now return to the second half of section 31(2)(*a*). It requires the court to be satisfied that the child is likely to suffer significant harm in the future. There is nothing in the second half of the subsection which requires the court to make a finding about anything in the past or present. The finding of future risk must, of course, be based on evidence. It cannot be based on hunch. If there is no evidence to support a finding of risk, the finding will be set aside. But if there is such evidence, then a finding may be made, even though the same evidence is insufficient to support a finding of past fact. In the present case the judge was not persuaded by C.'s evidence that she had been sexually abused. But that does not mean that he rejected her evidence as worthless. On the contrary, he went out of his way to find that she might well have been telling the truth. He was prepared to hold that this was a real possibility.

In those circumstances it would, I think, have been open to him to find, on C.'s evidence, that there was a real possibility of one or more of C.'s sisters suffering significant harm so as to satisfy the threshold test. But the judge never asked himself that question. He adopted what has been called the two-stage approach. Once he had decided not to make a finding of sexual abuse on the balance of probabilities, he never asked himself the vital question posed by the second half of the subsection, whether, on such evidence as there was, he should make a finding of serious risk for the future. I quote from his judgment:

> "Bearing in mind all these factors . . . I find myself in the position that I cannot be sure to the requisite high standard of proof that C.'s allegations are true. It must follow that the statutory criteria for the making of a care order are not made out."

With great respect this does not follow. The fact that the first half of section 31(2)(*a*) is not satisfied on the balance of probabilities does not mean that the second half may not be satisfied. The two halves of the subsection are not interlinked, logically or linguistically. They could as well have been contained in separate sub-paragraphs.

Sir Stephen Brown P. [1995] 1 F.L.R. 643, 652, and Millett L.J., at p. 657, upheld and adopted the judge's two-stage approach. Millett L.J. said, at p. 658:

> "If the likelihood of the child suffering harm in the future depends upon the truth of disputed allegations, the court must investigate the allegations and determine, on the balance of probabilities, whether they are true or false. It is not sufficient that there is a real possibility

A that the allegations may be true if the probability is that they are not."

The fallacy, if I may respectfully say so, lies in the protasis. The likelihood of future harm does not depend on proof that disputed allegations are true. It depends on the evidence. If the evidence in support of the disputed allegations is such as to give rise to a real or substantial risk of significant B harm in the future, then the truth of the disputed allegation need not be proved.

In another passage, at p. 658, Millett L.J. refers to the two different factual situations covered by section 31(2)(*a*):

> "In the first it is plain that the court must be satisfied, on a balance of probabilities, that the child is suffering significant harm. It is not C enough for the court to conclude that there is a real possibility that the child may be suffering significant harm. The same test must be applied to the second factual situation."

I have difficulty with the last sentence for two reasons. In the first place, there is nothing in the subsection which requires the same test to be applied to both halves of the subsection: see *Blyth v. Blyth* [1966] A.C. D 643. The argument accepted by the majority in the court below is very similar, if not identical, to the argument rejected by the majority of the House in that case. Secondly, I am not clear in what sense the future, which is the subject matter of the second half of the subsection, can ever be said to be a "factual situation" subject to proof in the same way as past or present fact: see *Davies v. Taylor* [1974] A.C. 207, 212, *per* Lord E Reid.

I confess that I much prefer the simpler one-stage approach adopted by Kennedy L.J. Although a two-stage approach may come naturally to lawyers, the same cannot necessarily be said for magistrates, social workers, and others who have got to understand and apply section 31. It may not be too difficult when there is an isolated issue of fact on which alone the outcome depends. But this will seldom, if ever, be the case in F practice. Facts are always surrounded by other facts. Macro facts, to adopt my noble and learned friend Lord Browne-Wilkinson's vivid terminology, are surrounded by micro facts. In the usual case, there will be a number of interlocking considerations, all of which will give rise to separate issues of fact, and on all of which, if the Court of Appeal be right, the court would have to make separate findings on the balance of G probabilities before proceeding to the second stage. Suppose, for example, there are three or four matters for concern which have led the social services to the belief that a child is at risk, on each of which there is credible evidence, supported, it may be, by evidence from a child psychiatrist, but suppose the evidence is insufficient on any of them to justify a finding that the child has been abused. Is the court powerless to proceed to the second stage? This is not what Parliament has said, and H I do not think it is what Parliament intended. Parliament has asked a simple question: Is the court satisfied that there is a serious risk of significant harm in the future? This question should be capable of being answered without too much over-analysis.

A In an unusual case such as the present, which has been fought on the basis of a single issue of past fact, it will no doubt make sense for the court to start by deciding whether that issue has been proved to its satisfaction, or not. But this is only the beginning. Even if the evidence falls short of proof of the fact in issue, the court must go on to evaluate the evidence on that issue, together with all the other evidence in the case, and ask itself the critical question as to future risk.

B In *Newham London Borough Council v. A.G.* [1993] 1 F.L.R. 281 Sir Stephen Brown P. said, at p. 289:

> "I very much hope that in approaching cases under the Children Act 1989 courts will not be invited to perform in every case a strict legalistic analysis of the statutory meaning of section 31."

C The editors of *Clarke Hall & Morrison on Children*, 10th ed. (looseleaf), vol. 1, para. 612, commented: "This strongly suggests that the court should be flexible in interpreting section 31 and then exercise its discretion in the light of sections 1 and 8." I agree.

I have left to the end an argument which Millett L.J. regarded as confirming his approach. Under section 43 of the Act, a court may make an assessment order if it is satisfied that the local authority has "reasonable D cause to suspect" that a child is likely to suffer significant harm. Under section 44 the court may make an emergency order if it is satisfied that there is "reasonable cause to believe" that the child is likely to suffer significant harm. Similarly, under section 38 it may make an interim care order if it is satisfied that there are "reasonable grounds for believing" that a child is likely to suffer significant harm. Finally, under section 31(2) the court may make an order if it is satisfied that the child is likely to E suffer significant harm.

These sections represent progressive stages on the road to the making of a care order, from "cause to suspect" through "ground for belief" to the substantive finding. Little evidence suffices at the early stages. Much more evidence is required at the later stages. But it will be noticed that at all the stages the court has to be "satisfied" on whatever evidence there is. F So the use of the word "satisfied" at the final stage does not, I think, point a contrast with the earlier stages; nor does it show, as Millett L.J. thought, that the likelihood of significant harm has to be proved on a balance of probabilities before a care order can be made. For the reasons which I have attempted to state in answer to the first question "satisfied" is a neutral word which means no more than conclude or determine or decide. G

I can summarise my views as follows (1) "Likely" in section 31(2)(*a*) means that there is a serious risk or real possibility that the child will suffer significant harm. (2) Where it is claimed that the child has suffered or is suffering significant harm the standard of proof is the simple balance of probabilities, no matter how serious the underlying allegation. (3) Where it is claimed that the child is likely to suffer significant harm, the H simple one-stage approach suffices. The question is whether, on all the evidence, the court considers that there is a real possibility of the child's suffering significant harm in the future. If so, the threshold criterion is satisfied. The court does not have to be satisfied on the balance of

A probabilities that the child has in fact suffered significant harm in the past, whether by sexual abuse or otherwise, even where the allegation of abuse is the foundation of the local authority's case for a care order.

It follows that the judge fell into error in two respects. First, he applied a standard of proof in respect of C.'s allegation of sexual abuse which was manifestly too high. Secondly, he never asked himself the right question about significant harm in the future. He was misled by the two-stage B approach, as a consequence of which he held that the second and vital question did not arise.

For the reasons which I have given, as well as those given by Kennedy L.J., I would allow this appeal. If I have not quoted at length from Kennedy L.J.'s judgment, it is only because I have read it with admiration, and agree with every word.

C I would therefore have remitted the case to the judge for a further hearing if there were to be continuing cause for concern. But as a majority of your Lordships take a different view, this will not be necessary.

LORD NICHOLLS OF BIRKENHEAD. My Lords, the subject of this appeal is the care of children. Section 31 of the Children Act 1989 empowers the court to make an order placing a child in the care of a local authority or D putting a child under the supervision of a local authority or a probation officer. Section 31(2) provides that a court may only make such an order:

> "if it is satisfied—(*a*) that the child concerned is suffering, or is likely to suffer, significant harm; and (*b*) that the harm, or likelihood of harm, is attributable to—(i) the care given to the child, or likely to be given him if the order were not made, not being what it would be E reasonable to expect a parent to give to him; or (ii) the child's being beyond parental control."

In short, the court must be satisfied of the existence or likelihood of harm attributable either to the care the child is receiving or likely to receive or to the child being beyond parental control. Harm means ill-treatment or impairment of health or development: see section 31(9). This appeal F concerns the need for the court to be "satisfied" that the child is suffering significant harm or is "likely" to do so.

The facts are set out in the judgment of Sir Stephen Brown P. sitting in the Court of Appeal [1995] 1 F.L.R. 643. For present purposes I can summarise them shortly. The mother has four children, all girls. D1 and D2 were children of her marriage to Mr. H. in 1979. D1 was born in June 1978 and D2 in August 1981. Mr. H. and the mother then separated. In G 1984 she commenced living with Mr. R. and they had two children: D3, born in March 1985, and D4, born in April 1992.

In September 1993, when she was 15, D1 made a statement to the police. She said she had been sexually abused by Mr. R. ever since she was 7 or 8 years old. She was then accommodated with foster-parents, and Mr. R. was charged with having raped her. In February 1994 the H local authority applied for care orders in respect of the three younger girls. Interim care orders were made, followed by interim supervision orders.

In October 1994 Mr. R. was tried on an indictment containing four counts of rape of D1. D1 was the principal witness for the Crown. The

jury acquitted Mr. R. on all counts after a very short retirement. Despite this the local authority proceeded with the applications for care orders in respect of D2, D3 and D4. These girls were then aged 13, 8 and 2 years. The local authority's case, and this is an important feature of these proceedings, was based solely on the alleged sexual abuse of D1 by Mr. R. Relying on the different standard of proof applicable in civil and criminal matters, the local authority asked the judge still to find that Mr. R. had sexually abused D1, or at least that there was a substantial risk he had done so, thereby, so it was said, satisfying the section 31(2) conditions for the making of a care order in respect of the three younger girls.

The applications were heard by Judge Davidson Q.C. sitting in the Nottingham County Court. On 23 November, after a hearing lasting seven days, he dismissed the applications. He was not impressed by the evidence of Mr. R. or of the mother. Nevertheless he concluded he could not be sure "to the requisite high standard of proof" that D1's allegations were true. He added:

> "It must follow that the statutory criteria for the making of a care order are not made out. This is far from saying that I am satisfied the child's complaints are untrue. I do not brush them aside as the jury seem to have done. I am, at the least, more than a little suspicious that [Mr. R.] has abused her as she says. If it were relevant, I would be prepared to hold that there is a real possibility that her statement and her evidence are true, nor has [Mr. R.] by his evidence and demeanour, not only throughout the hearing but the whole of this matter, done anything to dispel those suspicions, but this in the circumstances is nihil ad rem."

By a majority, comprising the President and Millett L.J., the Court of Appeal dismissed an appeal by the local authority. Kennedy L.J. disagreed.

"Likely" to suffer harm

I shall consider first the meaning of "likely" in the expression "likely to suffer significant harm" in section 31. In your Lordships' House Mr. Levy advanced an argument not open in the courts below. He submitted that likely means probable, and that the decision of the Court of Appeal to the contrary in *Newham London Borough Council v. A.G.* [1993] 1 F.L.R. 281 was wrong. I cannot accept this contention.

In everyday usage one meaning of the word likely, perhaps its primary meaning, is probable, in the sense of more likely than not. This is not its only meaning. If I am going walking on Kinder Scout and ask whether it is likely to rain, I am using likely in a different sense. I am inquiring whether there is a real risk of rain, a risk that ought not to be ignored. In which sense is likely being used in this subsection?

In section 31(2) Parliament has stated the prerequisites which must exist before the court has power to make a care order. These prerequisites mark the boundary line drawn by Parliament between the differing interests. On one side are the interests of parents in caring for their own child, a course which prima facie is also in the interests of the child. On the other side there will be circumstances in which the interests of the

A child may dictate a need for his care to be entrusted to others. In section 31(2) Parliament has stated the minimum conditions which must be present before the court can look more widely at all the circumstances and decide whether the child's welfare requires that a local authority shall receive the child into their care and have parental responsibility for him. The court must be satisfied that the child is already suffering significant harm. Or the court must be satisfied that, looking ahead, although the B child may not yet be suffering such harm, he or she is likely to do so in the future. The court may make a care order if, but only if, it is satisfied in one or other of these respects.

In this context Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision C orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not. Strictly, if this were the correct reading of the Act, a care or supervision order would not be available even in a case where the risk of significant harm is as likely as not. Nothing would suffice short of proof that the child will probably suffer significant harm.

The difficulty with this interpretation of section 31(2)(*a*) is that it D would draw the boundary line at an altogether inapposite point. What is in issue is the prospect, or risk, of the child suffering significant harm. When exposed to this risk a child may need protection just as much when the risk is considered to be less than 50–50 as when the risk is of a higher order. Conversely, so far as the parents are concerned, there is no particular magic in a threshold test based on a probability of significant E harm as distinct from a real possibility. It is otherwise if there is no real possibility. It is eminently understandable that Parliament should provide that where there is no real possibility of significant harm, parental responsibility should remain solely with the parents. That makes sense as a threshold in the interests of the parents and the child in a way that a higher threshold, based on probability, would not.

In my view, therefore, the context shows that in section 31(2)(*a*) likely F is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case. By parity of reasoning the expression likely to suffer significant harm bears the same meaning elsewhere in the Act; for instance, in sections 43, 44 and 46. Likely also bears a similar meaning, for a similar reason, in the requirement in section 31(2)(*b*) that the harm G or likelihood of harm must be attributable to the care given to the child or "likely" to be given him if the order were not made.

The burden of proof

The power of the court to make a care or supervision order only arises if the court is "satisfied" that the criteria stated in section 31(2) exist. The expression "if the court is satisfied," here and elsewhere in the Act, H envisages that the court must be judicially satisfied on proper material. There is also inherent in the expression an indication of the need for the subject matter to be affirmatively proved. If the court is left in a state of indecision the matter has not been established to the level, or standard,

needed for the court to be "satisfied." Thus in section 31(2), in order for the threshold to be crossed, the conditions set out in paragraphs (*a*) and (*b*) must be affirmatively established to the satisfaction of the court. The legal burden of establishing the existence of these conditions rests on the applicant for a care order. The general principle is that he who asserts must prove. Generally, although there are exceptions, a plaintiff or applicant must establish the existence of all the preconditions and other facts entitling him to the order he seeks. There is nothing in the language or context of section 31(2) to suggest that the normal principle should not apply to the threshold conditions.

The standard of proof

Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the established general principle. There are exceptions such as contempt of court applications, but I can see no reason for thinking that family proceedings are, or should be, an exception. By family proceedings I mean proceedings so described in the Act of 1989, sections 105 and 8(3). Despite their special features, family proceedings remain essentially a form of civil proceedings. Family proceedings often raise very serious issues, but so do other forms of civil proceedings.

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. Ungoed-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 L.J. in *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247, 266. This approach also provides a means

A 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.

No doubt it is this feeling which prompts judicial comment from time to time that grave issues call for proof to a standard higher than the preponderance of probability. Similar suggestions have been made recently B regarding proof of allegations of sexual abuse of children: see *In re G. (A Minor) (Child Abuse: Standard of Proof)* [1987] 1 W.L.R 1461, 1466, and *In re W. (Minors) (Sexual Abuse: Standard of Proof)* [1994] 1 F.L.R. 419, 429. So I must pursue this a little further. The law looks for probability, not certainty. Certainty is seldom attainable. But probability is an unsatisfactorily vague criterion because there are degrees of C probability. In establishing principles regarding the standard of proof, therefore, the law seeks to define the degree of probability appropriate for different types of proceedings. Proof beyond reasonable doubt, in whatever form of words expressed, is one standard. Proof on a preponderance of probability is another, lower standard having the in-built flexibility already mentioned. If the balance of probability standard were departed from, and a third standard were substituted in some civil cases, it would be D necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond reasonable doubt, what would it be? The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences. A formula to this E effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty. As at present advised I think it is better to stick to the existing, established law on this subject. I can see no compelling need for a change.

I therefore agree with the recent decisions of the Court of Appeal in several cases involving the care of children, to the effect that the standard F of proof is the ordinary civil standard of balance of probability: see *H. v. H. (Minors) (Child Abuse: Evidence)* [1990] Fam. 86, 94, 100, *In re M. (A Minor) (Appeal) (No. 2)* [1994] 1 F.L.R. 59, 67 and *In re W. (Minors) (Sexual Abuse: Standard of Proof)* [1994] 1 F.L.R. 419, 424, *per* Balcombe L.J. The Court of Appeal were of the same view in the present case. It follows that the contrary observations already mentioned, in *In re G.* G *(A Minor) (Child Abuse: Standard of Proof)* [1987] 1 W.L.R. 1461, 1466 and *In re W. (Minors) (Sexual Abuse: Standard of Proof)* [1994] 1 F.L.R. 419, 429, are not an accurate statement of the law.

The threshold conditions

There is no difficulty in applying this standard to the threshold conditions. The first limb of section 31(2)(*a*) predicates an existing state H of affairs: that the child is suffering significant harm. The relevant time for this purpose is the date of the care order application or, if temporary protective arrangements have been continuously in place from an earlier date, the date when those arrangements were initiated. This was decided

by your Lordships' House in *In re M. (A Minor) (Care Orders: Threshold Conditions)* [1994] 2 A.C. 424. Whether at that time the child was suffering significant harm is an issue to be decided by the court on the basis of the facts admitted or proved before it. The balance of probability standard applies to proof of the facts. A

The same approach applies to the second limb of section 31(2)(*a*). This is concerned with evaluating the risk of something happening in the future: aye or no, is there a real possibility that the child will suffer significant harm? Having heard and considered the evidence, and decided any disputed questions of relevant fact upon the balance of probability, the court must reach a decision on how highly it evaluates the risk of significant harm befalling the child, always remembering upon whom the burden of proof rests. B

Suspicion and the threshold conditions C

This brings me to the most difficult part of the appeal. The problem is presented in stark form by the facts in this case. The local authority do not suggest that the first limb of section 31(2)(*a*) is satisfied in respect of D2, D3 or D4. They do not seek a finding that any of the three younger girls is suffering harm. Their case for the making of a care order is based exclusively on the second limb. In support of the allegation that D2, D3 and D4 are likely to suffer significant harm, the local authority rely solely upon the allegation that over many years D1 was subject to repeated sexual abuse by Mr. R. D

The judge held that the latter allegation was not made out. Mr. R. did not establish that abuse did not occur. The outcome on this disputed serious allegation of fact was that the local authority, upon whom the burden of proof rested, failed to establish that abuse did occur. However, the judge remained suspicious and, had it been relevant, he would have held there was a reasonable possibility that D1's allegations were true. The question arising from these conclusions can be expressed thus: when a local authority assert but fail to prove past misconduct, can the judge's suspicions or lingering doubts on that issue form the basis for concluding that the second limb of section 31(2)(*a*) has been established? E F

In many instances where misconduct is alleged but not proved this question will not arise. Other allegations may be proved. The matters proved may suffice to show a likelihood of future harm. However, the present case is not unique. *In re P. (A Minor) (Care: Evidence)* [1994] 2 F.L.R. 751 is another instance where the same problem arose. There the only matter relied upon was the death of the child's baby brother while in the care of the parents. Douglas Brown J. held that it was for the local authority to prove that the death was non-accidental and that, since they failed to do so, there was no factual basis for a finding of likelihood of harm to the surviving child. G

In the Court of Appeal [1995] 1 F.L.R. 643 in the present case the President adopted the same approach, at p. 652. Since the judge rejected the only allegation which gave rise to the applications for care orders, it was not then open to him to go on and consider the likelihood of harm to the children. Millett L.J. agreed. He said, at p. 657: H

> "where the risk of harm depends on the truth of disputed allegations, the court must investigate them and determine whether they are true

A or false. Unless it finds that they are true, it cannot be satisfied that the child is likely to suffer significant harm if the order is not made."

Kennedy L.J. reached a different conclusion. To satisfy the second limb there must be acceptable evidence of a real risk that significant harm will be sustained, but he added, at p. 654:

B "... I ... do not accept that if the evidence relates to alleged misconduct ... that misconduct must itself be proved on a balance of probabilities before the evidence can be used to satisfy the threshold criteria in section 31(2)(*a*)."

A conclusion based on facts

C The starting point here is that courts act on evidence. They reach their decisions on the basis of the evidence before them. When considering whether an applicant for a care order has shown that the child is suffering harm or is likely to do so, a court will have regard to the undisputed evidence. The judge will attach to that evidence such weight, or importance, as he considers appropriate. Likewise with regard to disputed D evidence which the judge accepts as reliable. None of that is controversial. But the rejection of a disputed allegation as not proved on the balance of probability leaves scope for the possibility that the non-proven allegation may be true after all. There remains room for the judge to have doubts and suspicions on this score. This is the area of controversy.

In my view these unresolved judicial doubts and suspicions can no more form the basis of a conclusion that the second threshold condition E in section 31(2)(*a*) has been established than they can form the basis of a conclusion that the first has been established. My reasons are as follows.

Evidence is the means whereby relevant facts are proved in court. What the evidence is required to establish depends upon the issue the court has to decide. At some interlocutory hearings, for instance, the issue will be whether the plaintiff has a good arguable case. The plaintiff may F assert he is at risk of the defendant trespassing on his land or committing a breach of contract and that, in consequence, he will suffer serious damage. When deciding whether to grant an interlocutory injunction the court will not be concerned to resolve disputes raised by the parties' conflicting affidavit evidence.

At trials, however, the court normally has to resolve disputed issues of relevant fact before it can reach its conclusion on the issue it has to G decide. This is a commonplace exercise, carried out daily by courts and tribunals throughout the country. This exercise applies as much where the issue is whether an event may happen in the future as where the issue is whether an event did or did not happen in the past. To decide whether a car was being driven negligently, the court will have to decide what was happening immediately before the accident and how the car was being H driven and why. Its findings on these facts form the essential basis for its conclusion on the issue of whether the car was being driven with reasonable care. Likewise, if the issue before the court concerns the possibility of something happening in the future, such as whether the name or get-up under which goods are being sold is likely to deceive

future buyers. To decide that issue the court must identify and, when disputed, decide the relevant facts about the way the goods are being sold and to whom and in what circumstances. Then, but only then, can the court reach a conclusion on the crucial issue. A decision by a court on the likelihood of a future happening must be founded on a basis of present facts and the inferences fairly to be drawn therefrom.

The same, familiar approach is applicable when a court is considering whether the threshold conditions in section 31(2)(*a*) are established. Here, as much as anywhere else, the court's conclusion must be founded on a factual base. The court must have before it facts on which its conclusion can properly be based. That is clearly so in the case of the first limb of section 31(2)(*a*). There must be facts, proved to the court's satisfaction if disputed, on which the court can properly conclude that the child is suffering harm. An alleged but non-proven fact is not a fact for this purpose. Similarly with the second limb: there must be facts from which the court can properly conclude there is a real possibility that the child will suffer harm in the future. Here also, if the facts are disputed, the court must resolve the dispute so far as necessary to reach a proper conclusion on the issue it has to decide.

There are several indications in the Act that when considering the threshold conditions the court is to apply the ordinary approach, of founding its conclusion on facts, and that nothing less will do. The first pointer is the difference in the statutory language when dealing with earlier stages in the procedures which may culminate in a care order. Under Part V of the Act a local authority are under a duty to investigate where they have "reasonable cause to suspect" that a child is suffering or is likely to suffer harm. The court may make a child assessment order if satisfied that the applicant has "reasonable cause to suspect" that the child is suffering or is likely to suffer harm. The police may take steps to remove or prevent the removal of a child where a constable has "reasonable cause to believe" that the child would otherwise be likely to suffer harm. The court may make an emergency protection order only if satisfied there is "reasonable cause to believe" that the child is likely to suffer harm in certain eventualities. Under section 38 the court may make an interim care order or an interim supervision order if satisfied there are "reasonable grounds for believing" that the section 31(2) circumstances exist.

In marked contrast is the wording of section 31(2). The earlier stages are concerned with preliminary or interim steps or orders. Reasonable cause to believe or suspect provides the test. At those stages, as in my example of an application for an interlocutory injunction, there will usually not have been a full court hearing. But when the stage is reached of making a care order, with the far-reaching consequences this may have for the child and the parents, Parliament prescribed a different and higher test: "a court may only make a care order or supervision order if it is satisfied . . . that . . . the child . . . is suffering, or is likely to suffer, significant harm; . . ."

This is the language of proof, not suspicion. At this stage more is required than suspicion, however reasonably based.

A The next pointer is that the second threshold condition in paragraph (*a*) is cheek by jowl with the first. Take a case where a care order is sought in respect of a child on the ground that for some time his parents have been maltreating him. Having heard the evidence, the court finds the allegation is not proved. No maltreatment has been established. The evidence is rejected as insufficient. That being so, the first condition is not made out, because there is no factual basis from which the court could B conclude that the child is suffering significant harm attributable to the care being given to him. Suspicion that there may have been maltreatment clearly will not do. It would be odd if, in respect of the selfsame non-proven allegations, the self-same insufficient evidence could nonetheless be regarded as a sufficient factual basis for satisfying the court there is a real possibility of harm to the child in the future.

C The third pointer is that if indeed this were the position, this would effectively reverse the burden of proof in an important respect. It would mean that once apparently credible evidence of misconduct has been given, those against whom the allegations are made must disprove them. Otherwise it would be open to a court to hold that, although the misconduct has not been proved, it has not been disproved and there is a real possibility that the misconduct did occur. Accordingly there is a real D possibility that the child will suffer harm in the future and, hence, the threshold criteria are met. I do not believe Parliament intended that section 31(2) should work in this way.

Thus far I have concentrated on explaining that a court's conclusion that the threshold conditions are satisfied must have a factual base, and that an alleged but unproved fact, serious or trivial, is not a fact for this E purpose. Nor is judicial suspicion, because that is no more than a judicial state of uncertainty about whether or not an event happened.

I must now put this into perspective by noting, and emphasising, the width of the range of facts which may be relevant when the court is considering the threshold conditions. The range of facts which may properly be taken into account is infinite. Facts include the history of members of the family, the state of relationships within a family, proposed F changes within the membership of a family, parental attitudes, and omissions which might not reasonably have been expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child, and unsatisfactory parental responses to complaints or allegations. And facts, which are minor or even trivial if considered in isolation, when taken together may suffice to satisfy the court of the G likelihood of future harm. The court will attach to all the relevant facts the appropriate weight when coming to an overall conclusion on the crucial issue.

I must emphasise a further point. I have indicated that unproved allegations of maltreatment cannot form the basis for a finding by the court that either limb of section 31(2)(*a*) is established. It is, of course, open to a court to conclude there is a real possibility that the child will H suffer harm in the future although harm in the past has not been established. There will be cases where, although the alleged maltreatment itself is not proved, the evidence does establish a combination of profoundly worrying features affecting the care of the child within the

family. In such cases it would be open to a court in appropriate circumstances to find that, although not satisfied the child is yet suffering significant harm, on the basis of such facts as are proved there is a likelihood that he will do so in the future. A

That is not the present case. The three younger girls are not at risk unless D1 was abused by Mr. R. in the past. If she was not abused, there is no reason for thinking the others may be. This is not a case where Mr. R. has a history of abuse. Thus the one and only relevant fact is whether D1 was abused by Mr. R. as she says. The other surrounding facts, such as the fact that D1 made a complaint and the fact that her mother responded unsatisfactorily, lead nowhere relevant in this case if they do not lead to the conclusion that D1 was abused. To decide that the others are at risk because there is a possibility that D1 was abused would be to base the decision, not on fact, but on suspicion: the suspicion that D1 may have been abused. That would be to lower the threshold prescribed by Parliament. B C

Conclusion

I am very conscious of the difficulties confronting social workers and others in obtaining hard evidence, which will stand up when challenged in court, of the maltreatment meted out to children behind closed doors. Cruelty and physical abuse are notoriously difficult to prove. The task of social workers is usually anxious and often thankless. They are criticised for not having taken action in response to warning signs which are obvious enough when seen in the clear light of hindsight. Or they are criticised for making applications based on serious allegations which, in the event, are not established in court. Sometimes, whatever they do, they cannot do right. D E

I am also conscious of the difficulties facing judges when there is conflicting testimony on serious allegations. On some occasions judges are left deeply anxious at the end of a case. There may be an understandable inclination to "play safe" in the interests of the child. Sometimes judges wish to safeguard a child whom they fear may be at risk without at the same time having to fasten a label of very serious misconduct on to one of the parents. F

These are among the difficulties and considerations Parliament addressed in the Children Act 1989 when deciding how, to use the fashionable terminology, the balance should be struck between the various interests. As I read the Act, Parliament decided that the threshold for a care order should be that the child is suffering significant harm, or there is a real possibility that he will do so. In the latter regard the threshold is comparatively low. Therein lies the protection for children. But, as I read the Act, Parliament also decided that proof of the relevant facts is needed if this threshold is to be surmounted. Before the section 1 welfare test and the welfare "checklist" can be applied, the threshold has to be crossed. Therein lies the protection for parents. They are not to be at risk of having their child taken from them and removed into the care of the local authority on the basis only of suspicions, whether of the judge or of the local authority or anyone else. A conclusion that the child is suffering or is likely to suffer harm must be based on facts, not just suspicion. G H

A It follows that I would dismiss this appeal. In his judgment, when deciding that the alleged sexual abuse was not proved, the judge referred to the headnote in *In re W. (Minors) (Sexual Abuse: Standard of Proof)* [1994] 1 F.L.R. 419 and the need for a higher than ordinary standard of proof. Despite these references the Court of Appeal were satisfied that the judge applied the right test. I agree. Reading his judgment overall, I am not persuaded he adopted a materially different standard of proof from B the standard I have mentioned above. Sexual abuse not having been proved, there were no facts upon which the judge could properly conclude there was a likelihood of harm to the three younger girls.

I have not referred to the wardship cases such as *In re F. (Minors) (Wardship: Jurisdiction)* [1988] 2 F.L.R. 123, *H. v. H. (Minors) (Child Abuse: Evidence)* [1990] Fam. 86 and *In re W. (Minors) (Wardship:* C *Evidence)* [1990] 1 F.L.R. 203. I do not consider they assist in arriving at the proper meaning of the relevant provisions of the Children Act. In the material respects the Act set up a new code. It is to be approached and interpreted accordingly.

Appeal dismissed.

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J. A. G.

E

F [HOUSE OF LORDS]

In re D. (MINORS) (ADOPTION REPORTS: CONFIDENTIALITY)

1995 July 19, 20; 24; Sept. 1 — Lord Goff of Chieveley, Lord Browne-Wilkinson, Lord Mustill, Lord Lloyd of Berwick and Lord Nicholls of Birkenhead

G

Adoption—Adoption proceedings—Guardian ad litem's report—Application by mother for disclosure—Whether report presumed to be confidential—Whether onus on party seeking disclosure to show good reason—Adoption Rules 1984 (S.I. 1984 No. 265), r. 53(2)

A mother, who was opposing an application by her former H husband and his new wife for the adoption of her two sons, applied under rule 53(2) of the Adoption Rules 1984[1] to inspect two sections of the report of the guardian ad litem that expressed

[1] Adoption Rules 1984, r. 53(2): see post, p. 605B–C.