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Contents -

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The decision of *H v R* [2014] EWCA Crim 1555: the final analysis

by

Sally Ramage

Introduction

There is a huge worry that, in the enthusiasm to take the child witness seriously at the peril of the adult criminal Defendant, the Criminal Justice System of the United Kingdom is throwing away the 'baby with the bathwater'. This case should be legally aided and be taken to the European Court of Human Rights in Brussels, Europe.

Caselaw

To reiterate the details of the caselaw H v R[2014] EWCA Crim 1555- Dr Hanilton's appeal fell on the fact that his expert witness dwelt on the false-memory syndrome, a matter for which a dozen years ago, this expert had been reprimanded because, as the Court of Appeal said, the major issues they saw in his appeal were

*the proper role of expert evidence[1] and

*the propriety of the judge's case management over the questioning of a complainant.

[1] The defence sought to call Dr Janet Boakes, a retired psychiatrist and psychotherapist whose proposed evidence had in two earlier (unrelated) trials been excluded on the basis that it would usurp the function of the jury in deciding the credibility of the witnesses and no more, though this Court of Appeal was informed that Dr Boakes was never told of these decisions but had nevertheless received many instructions since then. The trial judge found that Dr Boakes' report made 'wholly inappropriate, adverse comments on the credibility and reliability of X', had 'advanced her opinion in a wholly inappropriate way for an expert witness and had assumed the role of the advocate arguing the case for the defence' by carrying out a 'deconstruction if not demolition' of the reliability of X (paragraph 21). Dr. Boakes had further argued that X may have 'recovered' her memory during counselling although X had not said she had forgotten the allegations.

The appellant, a senior medical practitioner, who until now, with his wife also, were highly respected General Medical Practitioners in the North of England. The doctor had been found guilty of several offences, namely, cruelty by neglect of a child under 16; rape of a child under 13 and; sexual assault of a child under 13. He protested his innocence to the very end. Notably, the only witnesses for the police prosecution were his now ex-wife, now struck off the General Medical Council Register herself for drunk driving ; and the couple's two daughter, the younger and the older one. The older child alleged that her father sexually abused her.

Strikingly, what was absent from this very strange trial was the fact that there were no school reports or witnesses about the allegedly abused girl. There was just one newly qualified female psychologist testifying to what the girl had said after several years of psychiatric treatment. The lower court took no notice of the fact that this girl behaved even worse after her father was forced to leave the marital home, beating up her mother as she did her father when he had been present, and damaging the destroying the contents in the home.

The official caselaw report staggeringly stated that the younger child, in giving evidence, told the court that she thought that the father and her older sister were both clever. With the greatest of respect to the official caselaw reporter, what does the opinion of a 10 year old girl matter in assessing the medical genius of a long-practising family doctor (at Heaton Medical Centre, 2 Lucy Street, Bolton, United Kingdom) and an older sister who broke up all the furniture in the family home. She is not an expert academic witness on a professional man's IQ and nobody even tested her own IQ but allowed her to (be coached?) to say that to a court a jury.

What was wrong with the lower court judge to make him remark in passing judgement that Dr Hamilton was not even sorry? The Defendant protested his innocence throughout.

The writer conjectures that the girl's mother thought that she would 'put away' her husband in prison, thus enjoying the very large family home with her children and gain his entire bountiful pension plan to boot. But instead, Dr Hamilton had to borrow against all the equity he held at his surgical practice and his pension to pay expensive legal fees to defend himself against ludicrous and dangerous criminal offences and be put in jail for dozens of years and his ex-wife was also, like him, struck off te GMC Register so she can never practice as a doctor again. The older girl has a proper mental illness psychiatric medical record for the rest of her life and may obtain a council flat to life in with 19,000 pounds of government criminal compensation organised by her social worker.

The prosecution case was that the sex abuse alleged caused her to become severely mentally ill and that as a consequence she had a long stay of over one year in a psychiatric hospital and had to undergo therapy and counselling, playing on the jury's pity.

Studying this case at length and in great detail, I cannot help think how ignorant these two parents, medically qualified were and wonder why they did not seek help early on, even making the girl a ward of court. It was a matter of professional pride and shame that caused them to keep the matter locked away in the home instead of openly

acknowledging that their daughter was mentally ill, all to the utter demise of the whole family and to the doctors' medical careers which have been destroyed.

Reminder of youth conduct disorders

Putting aside emotional reactions to this case, as reported officially, we are reminded of youth conduct disorders which this crown court trial and appeal at the Royal Courts of Justice was completely silent on, and which the writer contends is the crux of this case, and not the technical matters of expert witnesses. The official view on childhood conduct disorder is as follows:

'Conduct disorders are characterised by a repetitive and persistent pattern of anti-social, aggressive or defiant behaviour. Young people with conduct disorder may exhibit excessive levels of fighting or bullying, cruelty to other people and to animals, severe destructiveness to property, repeated lying, unusually frequent and violent temper tantrums, and defiant provocative behaviour. The behaviours that are associated with conduct disorder major violations of age-appropriate social expectations and are more severe than ordinary childish mischief or adolescent rebelliousness. The diagnostic criteria for conduct disorder are similar but not identical to anti-social personality disorder. According to the International Classification of Diseases (ICD 10) (WHO 1994) and DSM-IV (APA 1994) diagnostic criteria), conduct disorder usually occurs during childhood or adolescence, whereas anti-social personality disorder is not diagnosed in people under the age of 18. Furthermore, according to ICD-10 and DSM-IV criteria, any diagnosis should distinguish between early-onset (symptoms present at age 10) and late-onset conduct disorder (absence of symptoms before age 10).

The diagnostic criteria are also similar to oppositional defiant disorder ('ODD'), which according to ICS-10 usually occurs in younger children and 'does not include delinquent acts or the more extreme forms of aggressive or dissocial behaviour (WHO 1994). ODD is generally seen as milder than, and a risk factor to developing conducts disorder.

Old similar case of wrongful sex abuse accusations on a grand scale

This case immediately reminded the writer of a very sad and serious set of events which occurred in the United Kingdom a couple of decades ago in which a young female doctor incorrectly diagnosed a baby with child sex abuse which led to all the children in the particular village being examined and diagnosed with having been sexually molested and all the children, like the story of the *Pied Piper*, were wickedly removed from their parents' homes, fostered and adopted, too late to mend the broken vessels that constituted that community when years later, with much zeal, heart-ache and cost, this diagnosis was proved wrong. Were this to have happened in the United States of America, the parents would have received one billion pounds sterling in compensation for hasty, neurotic, criminal and cruel acts caused by one female doctor who herself should have been at least examined for mental illness and struck off.

Sex abuse and freely availably pornography on Internet

The picture overall seems somewhat confused. In direct contradiction to this, as if we live in a schizophrenic country, money trumps this matter because the UK Internet servers have license to provide pornography to adult viewers who pay for the service;

there are hundreds of pole dancing strip clubs around the United Kingdom who, provided they pay the very large licence fee, are free to trade as such; pornography publications abound in the United Kingdom; sex shops pay to openly advertise sex 'toys' on national television in the United Kingdom; there are national television channels which, if a customer pays, can join a sex channel which reveals naked women talking sexily and in pornographic poses, etc.

Contemporary child violence

To return to the matter of child violence, a BBC programme on Thursday evening, 12 February 2015, revealed the horrendously frequent incidents of little children who continuously assault their parents in their violent rages against parental control of bedtimes etc. One child took a cleaver knife to his poor mother. When one considers the positions of the parents of child X in *R v H*, one can understand their reluctance and feelings of failure and shame as being the cause of not calling in professional help because they themselves were doctors.

Some of the children with conduct disorder are simply ones who have grown progressively out-of-control by indulgent parents, the consequence of which is a complex mix of power over the parents by such a child; the thrill of wielding such power over adults; and the progression to psychopathy in such children.

Bad children

Bad children become bad adults and this phenomenon stretches across all strata of society. Furthermore it has been established that there is a link between age and crime over the life span. Bearing in mind that the legal age of criminal liability in the UK is age 10, we find that since the year 2013, the statistics of the children under age 14 who had been prosecuted and those between ages 14 to 17 were as follows:

Child domestic violence offences prosecuted

Age range	Time period	Prosecutions
under 14	2010-2011	216
14-17 years	2010-2011	3,144
under 14	2011-2012	148
14-17 years	2011-2012	2,643
under 14	2012-2013	118
14-17 years	2012-2013	3,144

Parentline Plus – UK charity

Between the years 2008 to 2010, the charity *Parentline Plus* had received 22,537 telephone calls from mothers and fathers who were struggling to cope with their children's extremely violent behaviour. According to research the violence in children who abuse their parents peak from age 13 to 15. According to *Parentline Plus* research this child violence occurred every single day; 50 percent of such violent children destroyed property and 20 percent were drinking alcohol. According to an *Independent* article, one of the factors why children beat up their parents is their size. Modern children are well fed in the UK and some of the

assaulted parents complained that even as young as 11 years old, their daughters were almost impossible to handle physically. Other factors include early signs of mental illness, alcohol and other substance abuse. Some experts say that there is a collapse in social authoritative boundaries today, as children are pampered and given access to the Internet at a young age. If a child sees her mother abusing alcohol, she loses respect for that parent and may also begin practicing alcohol abuse, especially in a middle class family where the problem is not one of lack of finances.

The recorded phenomenon of children beating up their parents is most likely the tip of the iceberg in the UK. Because sociologists are aware that this explosion of parent abuse is shameful and largely kept within the family, several Online help centres have emerged to help parents to cope, *Parentline Plus* and *hand in hand parenting* being two such websites.

Medications used on child prescribed by medically qualified father

The child disorders that manifest themselves in property damage, parental assault and self-assault are often treated medically as follows:

Drug	Brand name	Usual dosage	Comment
Fluoxetine	Prosac	1mg/kg of body weight	Can be dissolved in water
Paroxetine	Paxil	20-60 mg per day	Dissolved in water. May cause weight gain.
Citalopram	Celoxa	20-40 mg per day	Not soluble
Sertraline	Zoloft	3mg per 1 kg of body weight	Soluble
Fluvoxamine	Luvox	3 mg per 1 kg of body weight	Not soluble
Escitalopram	Cipralex	10-20 mg per day	No studied in children
Duloxetine	Cymbalta	30-60 mg per day	Few case studies

Child sexuality

The case never questioned whether the child could possibly have been having sex with another child. The dearth of literature about this subject creates gap in public

knowledge about the development of such sexually assaultive behaviour and the professional and legal issues accompanying this little spoken-of violent child behaviour. For decades there has been much interest in the juvenile sex offender in the United States but not at all in the United Kingdom. Interest in the sexually assaultive behaviour of juveniles has a long history (Atcheson and Williams, 1954; Cook, 1934; Doshay, 1943; Waggoner and Boyd, 1941). In 1964, a study by Mohr, Turner and Jerry (1964) showed that child sex offenders pose a long-term risk. Initially child sex was seen not as violence but as innocent behaviour and this misconception was due to a profound lack of knowledge concerning social and psychological aspects of sexual development in adolescence. Available estimates show that 20% of rapes are committed by juveniles.

Aggressive and deviant child behaviour

Although aggressive and defiant behaviour is an important part of normal child and adolescent development, the level of aggressive and defiant behaviour varies considerably among children. Empirical studies do not suggest a level at which symptoms become qualitatively different, nor is there a single cut-off point at which they become impairing for the child or a clear problem for others. ‘there is no ‘’hump’’ towards the end of the distribution curve of severity to suggest a categorically distinct group who might on these grounds warrant a diagnosis of conduct disorder’.[2]

Court tactics- never lose a case

While upholding the judge’s approach, the Court of Appeal noted the ‘real concern about the use of unreliable or inappropriate expert evidence’ and cited the new Part 33 and new Practice Directions [2014] EWCA Crim 1569 and the upcoming Advocacy

[2]The NICE Guideline on Recognition Intervention and Management,, (2013) Anti-social behaviour and conduct disorders in children and young people, London: British Psychological Society, at page 16.

Training Council tool kit on the use of expert evidence, itself based upon the recommendations in the Law Commission Report on expert evidence in criminal cases (paragraph 43).

It is very telling that the court sought to attach new Practice Directions to this case which appears very improper, as if to add heavy weight to this decision, and this case should go to the European Court of Human Rights in Brussels to shame this country's courts acting as 'a law onto themselves', which they call 'DISCRETION' to do as they please. These charges were trumped up with the excitement of bringing down an important professional man.

Now let us look at the girl's anti-social behaviour from an early age, probably because she was very spoilt by her rich parents:

The severity of her conduct disorder is not determined by the presence of an one symptom or any particular constellation, but can clearly be seen by her overall volume of symptoms, determined by the frequency and intensity of antisocial behaviours; the variety of types; the number of settings in which they occurred (home, school, on holiday) and their persistence.

In general with such children, the correlation between parent and teacher ratings is low which means that many such bad children behave better in school but not at home. Curiously, the textbooks state that maternal depression is often present. Also they often achieve low levels and poor examination results.[3]

[3] Ibid, at page 18.

The ICD-10 classification names ‘destruction of property, deceitfulness, theft, serious violations of rules as good enough to diagnose such children with conduct disorders, three of the fifteen behaviours lists being enough for diagnosis. Children with conduct disorders consistently are shown to have increased rates of deficits in language-based verbal skills (Lynam & Henry, 2001). They cannot reason so they use aggression (Dodge, 2006). School becomes unrewarding because they have low abilities. They have poorly –tested executive functions (Ishikawa & Raine, 2003; Hobson et al, 2011). They often have slow pulse rate and slow heart rate (Ortiz & Raine, 2004); they have slow resistance to aversion therapy (Fung et al, 2005). They often perceive people close to them as hostile when in fact they are neutral (Dodge, 2006).

Parents should have sought mental health for daughter

What Child C’s parents should have done was to acknowledge her antisocial behaviour to the authorities and perhaps, were they lucky; they might have themselves undergone parenting style classes to deal with her. Such children’s behaviour evokes parental negativity, evidence shows. It is not clear whether the two girls saw parental violence as their mother’s alcohol consumption had brought her to the notice of police some years ago. Research has found that marital conflict influences children’s behaviours because of its effect on emotional regulation.

Factors predicting consistent childhood antisocial behaviour

Factor	Outcome
Onset	Early onset of severe problems (8-10 years old)
Phenomenology	Frequent and varied anti-social behaviour
Comorbidity	Hyperactivity and attention problems
Intelligence	Lower IQ
Family history	Parental alcoholism
Parenting	Inconsistent, low supervision; low warmth

Or, if only Dr Hamilton had sent her to boarding school. It might have solved their problems. We are reminded of the words of the past United States President Clinton on the subject of violent children. President Clinton said in his State of The Union Address; January 25, 1994:

> *'I urge you to consider this: As you demand tougher penalties for those who choose violence, let us also remember how we came to this sad point. We have seen a stunning and simultaneous breakdown of community, family, and work. This has created a vast vacuum which has been filled by violence and drugs and gangs. So I ask you to remember that even as we say "no" to crime, we must give people, especially our young people something to say "yes" to.'*

Compare *RB v R* [2008]

Consider how different this case is to the caselaw of *R v RB* [2008][4] is a very important case, hinging on the Criminal Justice Act 2003, section 101(3).
The appellant (B) appealed against his conviction for one count of rape and two counts of sexual activity with a child. B, aged 38, was convicted of raping his 13-year-old daughter (F) in his car and committing sexual activity with his stepson (X). The offence against X, who was aged eight to nine at the time, occurred roughly two years after the rape of F. B appealed because at trial prosecution brought in bad character evidence that at age 14, the Defendant, had allegedly had sexual activity with his nine-year-old nephew which was untrue, was hearsay from 24 years ago and should not have been allowed as evidence.

[4] *R v RB* [2008] EWCA Crim 1850.

being unfair to the proceedings under the Criminal Justice Act 2003 s101 (3) and causing the jury to think he had a *propensity* to commit sexual activity with a child. The court's discretion to allow the appeal, considering CJA 2003 s 101(3) and s 103(3) is rational. Moreover CJA 2003 s 108 states that 'Offences committed by defendant when a child (1) Section 16(2) and (3) of the Children and Young Persons Act 1963 (c. 37) (offences committed by person under 14 disregarded for purposes of evidence relating to previous convictions) shall cease to have effect.

RB v R [2008] so unlike *H v R* [2014]

The 2008 caselaw shows how different Dr Hamilton's appeal was to the 2008 case. Dr Hamilton was a senior Family General Medical Practitioner. He has no previous criminal record. He has no blemish in his caring profession as a family doctor. He had no pornography in his home, in his office, or on his computers. E had no adulterous relationships. All he did was foolishly attempt to keep his daughter's mental illness secret from the community.

Conclusions

One wonders if in his closing speech, Defence counsel made submissions regarding the defendant's background, character and standing in the community. The Defendant was a Family Doctor, and essentially an industrious, conscientious family man. One also wonders if Defence counsel addressed the lower court judge on various aspects of the prosecution evidence, including the injuries sustained by the Defendant and his wife from violent attacks by the disturbed daughter whom neither could cope with. Did Defence Counsel in his closing speech suggest that these points indicated that the prosecution case was not as strong as was asserted? One wonders why not. One wonders why Defence Counsel did not remind this judge that this doctor would definitely be marked out in prison for sexual assault against him and that this

miscarriage of justice is an affront to humanitarian law.[5] This caselaw will be on record forever. Child C's Child Protection record will be held for 75 years and cannot be destroyed.[6]

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[5] Warren, J.I. and Jackson, S.L. (2013) *Risk Markers for Sexual Victimization and Predation in Prison: International Perspectives on Forensic Mental Health*, London: Routledge.
[6] *R (on the application of C) v Northumberland County Council* [2015] EWC 2134 (Admin).

APPENDIX ONE-

England and Wales Court of Appeal (Criminal Division) Decision

Neutral Citation Number: [2014] EWCA Crim 1555

Case No: 2013 03235-B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT MANCHESTEER
His Honour Judge Mansell Q.C.
T20127444

Royal Courts of Justice
Strand, London, WC2A 2LL

22/07/2014

B e f o r e :
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MRS JUSTICE PATTERSON D.B.E.
and
SIR RICHARD HENRIQUES
(sitting as a Judge of the Court of Appeal)

Between:

H	Appellant
- and -	
THE QUEEN	Respondent

Miss Tania Griffiths Q.C. for the Appellant
Miss Louise Blackwell Q.C. for the Crown
Hearing date : 11 June 2014

Sir Brian Leveson P:

1. On 22nd May 2013 in the Crown Court sitting at Manchester before His Honour Judge Mansell QC and a jury, the applicant was convicted unanimously of cruelty by neglect to a person under 16. On the following day, he was also convicted (in each case by majority verdict) of three specimen counts of cruelty to a person under 16, six specimen counts of rape of a child under 13 and three specimen counts of sexual assault of a child under 13. A count of administering a noxious substance had been withdrawn at the close of the prosecution case.

2. On 20 June 2013, the applicant was sentenced to concurrent terms of 5 years imprisonment for the cruelty offences, 18 years imprisonment for the rape offences and 12 years imprisonment for the sexual assault offences, making 18 years imprisonment in all. Appropriate notification and safeguarding consequences flowed from the sentence. His application for leave to appeal against conviction and sentence has been referred to the full court by the Registrar. The sole child concerned has the protection of the Sexual Offences (Amendment) Act 1992 and s. 39 of the Children and Young Persons Act 1933 and her identity must be anonymised accordingly.

3. The facts may be summarised in this way. The complainant ('X') is the applicant's daughter. On 7 November 2011, when she was 15 years of age, she made a complaint that her father had sexually abused her over a period of 2-2½ years, from when she was 10 until aged 12/13 years. She was twice interviewed and recorded following the process of achieving best evidence. She said the abuse "happened a lot, it was almost a daily thing for a while" and happened more in the winter months. It took place at the family home in Manchester. Sometimes it happened when she was off school, poorly. Sometimes her mother and her sister would be in the house. It happened either in the evening after her father, a General Practitioner, returned from work or whilst he was off work ill (he was off work with stress and depression for some time).

4. X described how he would take her clothes off and lie on top of her. He would take his clothes off and would feel different parts of her body. He would use his hands and run them down her neck and her chest. His head would follow his hands and he would bite her chest. He would take his penis out and put it inside her (represented by six specimen counts). At times he would also put his hands around her neck and tighten them whilst he was still inside her. He would say "You deserve to fucking die" (three specimen counts). Sometimes, she thought that she would pass out for a few seconds. There was, she said, often an element of strangulation during the intercourse, although it did not happen as often as the rapes.

5. There would also be occasions, whilst having a shower or a bath, when he would come in and put his hand on her forehead and put her head back. He would keep one hand on her head whilst using the other to digitally penetrate her vagina. He would then leave as if nothing had happened (a further three specimen

counts). The abuse ended shortly before her father moved out in February 2009, her parents divorcing during the following month. He told her, she said, that if ever she told anyone he would prove she was mentally ill.

6. At the trial X's mother and sister gave evidence. Her mother said that her husband and X had an odd relationship. One minute he would be very loving, another he would be crying, another angry. They would have intellectual debates but he would have to win them. Her husband would goad the complainant into fighting him. They would fight and this would continue upstairs. She would stay with her other daughter. She heard a lot of banging from the bedroom and then silence. The arguments seemed horrendous. Her husband was violent to X and would goad her saying "Hit me… Hit me …". He would slap her and hold her off and hurt her in a sort of self-defence way. The sister said that her father and X were very clever people. The arguments would start with shouting and then become quite physical. X (who had an eating disorder and would often be ill) would often barricade herself in her room.

7. The defence case was simple. The applicant gave evidence and said all the allegations were totally untrue: no physical or sexual abuse happened at all. He accepted that on occasions he had restrained his daughter when she was attacking him or trashing her bedroom, as indeed the mother had restrained her on occasions. He, as the father, had intervened to stop her hurting her mother. After he left the house, X did on occasions attack her mother. The allegations, the defence said, were likely to be the product of her mental illness, pre-trial therapy and suggestion i.e. that her mental illness was the cause of the allegations, rather than the defendant's alleged actions being the cause of the mental illness. Effectively, it was the defence case that the X's mental illness was such that her evidence could not properly be relied upon. However the possibility of malicious allegations could not be excluded especially given their emergence in the midst of matrimonial breakdown. We will return to other aspects of the defence later but should add that the applicant called character witnesses who all spoke as to his good qualities: these were the practice manager at the Medical Centre, an old school friend, a patient of his and Dorothy the spouse of a patient.

8. In the circumstances, the issues for the jury were whether the complainant was telling the truth or whether she was making up malicious allegations against her father; and whether she gave a reliable, accurate account of alleged physical and sexual abuse. In that context her mental health was a significant issue in the trial; that background needs shortly to be summarised.

9. It was in the autumn of 2007 that X started to show signs of illness; it is worthy of note that the first counts of the indictment covered the latter part of that year. The applicant took her to the doctors and a paediatric specialist, Dr Sankar, to conduct a variety of tests to rule out a physical cause for her symptoms. The applicant also showed an apparent enthusiasm to take her for Child and Adolescent Mental Health Service ("CAMHS") appointments so that a psychiatrist, Dr Eminson, could assess her. In the event, she did not attend. Later, when she was due to attend hospital as an in-patient for tests to exclude a physical cause, the doctors there recommended a referral to CAMHS.

10. However on each of the three occasions the applicant cancelled the appointments citing unwillingness or refusal to attend on the part of his daughter and/or her mother. The prosecution said the applicant's reasons for cancelling the appointments were to prevent X from reporting the sexual abuse identified in the early part of the indictment. The applicant treated his daughter with anti-depressants including citalopram.

11. Although the drug citalopram was at all times unlicensed for use by children under 18, at trial the weight of the evidence suggested that citalopram was appropriate to use for children and, indeed, became the treatment of choice for the complainant whilst she was an in-patient at hospital. Further, whilst there, the prescription of citalopram to the complainant far exceeded the modest amounts that the applicant had arranged for her to have and exceeded the recommended safe dose for children. No criticism was made of that fact, it being accepted that the "recommended usage" was effectively set by the drug companies to avoid litigation rather than accepted medical practice.

12. The applicant said that he started giving his daughter escitlopram, his wife's tablets, with his wife's knowledge, in February/March 2008. X's evidence, not accepted by her mother, was that her mother had sometimes given her the medication crushed up in milk. In any event, provision of this medication was continued for some months without the applicant informing any other doctor who had seen her and without recording anything on her medical records (until after returning from a holiday in Egypt in July 2008). This treatment of X was the subject of the count alleging administration of a noxious substance in respect of which Judge Mansell acceded to a submission of no case to answer.

13. As for the counselling, in evidence, the mother said she did not know who Dr Sankar was, knew nothing about a psychological or psychiatric assessment and knew nothing of the CAMHS appointments. The applicant, she said, took charge of X's health. On the other hand, he said that his wife was aware of the various appointments but she did not want to engage with CAMHS. Her unwillingness to engage with CAMHSs was one of the main reasons he prescribed his daughter antidepressants. The issue of the applicant's cruelty by neglect in failing to obtain appropriate medical treatment (in respect of which the judge had rejected a submission of no case to answer) was represented by the only count upon which the jury returned a unanimous guilty verdict.

14. Moving on in time, X spent a lengthy period in hospital between October 2010 and October 2011 including the intensive care unit from where she was discharged home on weekend leave on one occasion and was returned by the police after she threatened her mother and sister with several knives. During that period she was subject to compulsory admission to hospital pursuant to s. 3 of the Mental Health Act 1983. Whilst in hospital she often heard voices in her head, experienced hallucinations including visual and tactile hallucinations and was violent, delusional and self-harmed on many occasions. She also tried to strangle

herself and others, including staff. She was also subject to physical restraint by medical staff and would sometimes hide under her bed and in her wardrobe. Sometimes her visual hallucinations "held her down against her will".

15. During her treatment, X also received psychological counselling. In the period October 2010 to January 2011, under the supervision of Dr Kirsty Smedley, a consultant clinical psychologist, she was seen by a trainee, Dr Lauren McKeown, and was, in fact, her first patient. The purpose of the counselling was an attempt to reduce the risk of self-harm by discussing strategies with her to help her deal with the voices and on occasions to explore the root causes of her illness. At the first appointment, X was encouraged to draw a "timeline" of her life. She did so. There was no suggestion then of any abuse at all. During therapy, she began to allege that the applicant had physically abused her from the age of 3 up to at least 11 years. This included manual strangulation. X made it clear that there were other aspects of the applicant's conduct that she did not want to talk about and she did not disclose any allegation of sexual abuse; indeed, she denied that she had been sexually abused when she was asked directly.

16. X made her first disclosure of sexual abuse on 7 November 2011 to a friend at school who had, herself, confided that she had been the victim of sexual assault. This was a few weeks after her discharge from in-patient treatment and at a time when, on the evidence, there was confusion as to who was responsible for administering her medication. As a result, X was persuaded to inform a teacher; the school thus became involved and police were contacted.

17. As for the medical evidence, Dr Louise Atkin, X's treating consultant child and adolescent psychiatrist gave evidence as to what hallucinations and delusions etc were but, in circumstances to which we will refer, was not permitted to give evidence as to the complainant's diagnosis.

18. The first challenge mounted by Miss Tania Griffiths Q.C. on behalf of the applicant concerns the ruling by the judge concerning the admissibility of the evidence of Dr Janet Boakes, a retired psychiatrist and psychotherapist who had prepared three reports based upon the statements, the psychiatric evidence and the medical and other notes. The first report by Dr Boakes (prepared before disclosure of a number of statements, reports and records) was used to argue that to prosecute the applicant was an abuse of process: this argument was rejected and is not the subject of challenge by way of appeal. It was agreed by Dr Boakes that there was nothing to suggest that X was responding to abnormal experiences during the initial interview and when the question of admissibility of Dr Boakes' evidence at the trial was raised, the judge decided that he would consider the question only after X and her mother had given evidence. That is what he did and, in our judgment, this was an entirely appropriate approach to the problem: it was critical that the judge approached the matter having regard to the issues in the case.

19. We shall return to his analysis of the issues later. When he ruled, however, Judge Mansell did so in an extremely comprehensive and detailed judgment some 23 closely typed pages in length. He considered a number of authorities including *R v. Turner* [1974] 60 Cr.App.R. (S) 80, *R v. Snell and Wilson* [2006] EWCA Crim 1404, *R v. Nigel Clark* [2006] EWCA Crim 231, *R v. Richard W* [2003] EWCA Crim 3490 and *R v. Bernard V* [2003] EWCA Crim 3917. He noted that Dr Boakes was involved in the cases of *Richard W* and *Bernard V* and in both cases her evidence was not admitted, Judge LJ in the former case observing (at para. 23) that the evidence would usurp the function of the jury in deciding the credibility of the witnesses and no more". In the latter case, Kay LJ made a similar point (at para. 29-31).

20. Having reviewed the authorities, the judge concluded that the principles which emerged were:

"[1] The defence were not permitted to call an expert to examine the detail of a complainant's statement/evidence, and other relevant evidence such as medical or counselling notes, and then pass judgement or adverse comment on whether the witness was a credible or reliable witness. To do so would be to usurp the jury's function.

[2] The defence were entitled, in an appropriate case, to call expert evidence on a specific subject which would be outside the knowledge and experience of the jury and which might assist them in their task of assessing the credibility and reliability of allegations of historic sexual abuse.

[3] False Memory Syndrome, or Recovered Memory Syndrome, was just such a subject where defence expert evidence was potentially admissible.

[4] There had to be a sound factual foundation for such expert opinion which had to be established in evidence prior to such expert evidence becoming admissible. It was for the trial judge to decide whether such foundation had been laid."

21. Turning to the evidence which the defence wished to adduce, the judge expressed the view that the reports from Dr Boakes were littered with wholly inappropriate, adverse comments on the credibility and reliability of X. He believed that Dr Boakes had also advanced her opinion in a wholly inappropriate way for an expert witness, and had assumed the role of the advocate arguing the case for the defence forcefully carrying out what amounted to a deconstruction, if not demolition, of the reliability of this 16 year old girl. The judge noted that Miss Griffiths conceded that much of the expert's evidence insofar as it amounted to no more than a comment on the complainant's credibility and reliability would be inadmissible although Miss Griffiths does not accept that her concession went as far as dealing with the issue of reliability but only credibility.

22. In short, Dr Boakes argued that the complainant may have "recovered" her memory during counselling or psychotherapy sessions in which case the reliability of her allegations might be affected. The judge considered whether there was any sound evidential basis for such conclusions and, based on his analysis, said that nowhere in the extensive medical records had any doctor, nurse or psychologist recorded a claim by X or given an opinion that she had recovered or retrieved memories of the abuse during her illness or during

counselling or psychology sessions. On the contrary, on numerous occasions during her hospital admission, X related a clear, and at times detailed, memory of incidents of physical abuse at the hands of the applicant.

23. The judge concluded that this demonstrated quite clearly that, despite being very ill, X had a continuous memory throughout this period of certain aspects of the way her father treated her during childhood. At no stage did she ever claim not to have a memory of this part of her life. She had on earlier occasions between 2008 and 2010 made disclosures in respect of this aspect of her childhood. She had also indicated that there was more that she could say about the applicant but was unwilling to do so. Dr Boakes, who the judge observed was not present during X's evidence, had constructed her opinion around a number of entries in the complainant's medical records which she had interpreted as indicating that the complainant had 'recovered' memories. The judge went through each in turn.

24. The judge said that the complainant's evidence was and always had been that the abuse was present as a memory but that she was unable or unwilling to report the matter to anyone prior to November 2011. She decided to report it then because at that time she was out of hospital, back at school, was on the road to recovery and was able to refute an allegation by the applicant. There was, the judge said, no basis for Dr Boakes's conclusion that the complainant had either claimed, or described, at any stage in her illness and recovery that she had recovered or retrieved memories. She had never been subjected to hypnotherapy or serious psychological counselling during which any revelation of abuse emerged.

25. Miss Griffiths argues that the jury had to reach their decisions without the assistance of any expert evidence as to how the mental illness affected the reliability of the complainant's allegations and that this was not a case of recovered memory because the allegations were false: the so called memories were false. She submits that Dr Boakes was relevant to the issue of reliability. As for the judge's analysis of the law, she submits that the cases to which he refers concern those without mental illness. She reverts to the observations of Lord Pearce in *R v. Toohey* [1965] AC 595 at page 608 who, using the analogy of physical disease (that it would be permissible to call a surgeon who had subsequently removed a cataract from a witness to say that the extent of his suffering loss of vision would have prevented him from seeing what he thought he saw) went on to the effect that it:

"must be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise. "

26. The analogy with physical disease is not, however, either appropriate or apt although it might be that the approach to mental illness in 1965 was rather less well informed than it is today. The cataract would prevent the witness seeing that which he or she purported to see. The fact of mental ill health, however, does not mean that the witness (in this case X) cannot accurately be describing what has happened to her or that it would prevent her from (or make her incapable of) being reliable in her account. These issues of fact are not for resolution by doctors but are to be determined by the jury: as Kay LJ put it in *R. v Bernard V*, (*supra* at para. 29), evidence is admissible when it is necessary:

"to inform the jury of experience of a scientific and medical kind of which they might be unaware, which they ought to take into account when they assess the evidence in the case in order to decide whether they can be sure about the reliability of a particular witness."

27. It is for this reason that the introduction of diagnosis can create issues in cases of this nature. A diagnosis, whether from a treating psychiatrist or a psychiatrist instructed in a criminal case either by the prosecution or the defence inevitably involves a value judgment as to nature and reliability of the underlying explanations provided by the patient. It is not difficult to conclude that a patient who complains that he is being followed by green aliens 10 cm in height, with two heads, is delusional because human experience simply does not permit of such a possibility. If, however, a patient complains that he is being constantly followed by the police, although it may be that he is equally delusional, the alternative may be that he is, indeed, being followed by the police and that his reporting is entirely accurate. That judgment is for the jury to make and not the doctor and it must be based on all the evidence.

28. Reinforcing that point, in many cases, the diagnosis of a psychiatric condition may be entirely distinct and free standing from any fact in issue in a criminal case; it may impact on mental responsibility (such as might be the case advanced for reducing murder to manslaughter by reason of diminished responsibility). In those circumstances, it is obviously admissible for the jury to be given the benefit of the doctor's opinion on that subject. On the other hand, where the diagnosis depends crucially on the assessment made of the complaint of crime (such as whether the allegation of rape is to be believed), the assessment of that credibility must be made by the jury with such assistance as may be necessary in the circumstances of the case.

29. Miss Louise Blackwell Q.C., for the Crown, argues that the entirety of Dr Boakes' report goes no further than to provide commentary (not dependent on the doctor's expertise) and personal opinion of the type which is, quite specifically, not admissible. The doctor's commentary on the diagnosis which followed the complaint of sexual abuse (and which was different from the diagnosis prior to that complaint) was irrelevant because, flowing from defence objection, that diagnosis was not provided to the jury.

30. Further it is argued that the way in which the case was put to X was to challenge her credibility by suggesting that she was knowingly telling lies; the challenge was not merely to her reliability (that is to say, involving an acceptance that she truly believed or might truly have believed that which she was saying but that her evidence came from delusion rather than reality). On the basis that this had become a potentially important issue in the case, we deferred concluding our deliberations until a transcript of the first part of the cross examination was available and we have received further written submissions from Miss Griffiths thereafter.

31. Reading the cross examination, it is clear that the case was put in the alternative. At the beginning, Miss Griffiths put to X that "the whole account … is pure fantasy…" and that "you either know that and you are lying or you think that happened": X repeated that what she had said was the truth. It was then suggested that she had paused when being interviewed "so that you can think of the answer". It was put that, even when distressed, she was "effectively able to tell … a lie". Intermingled with cross examination around the voluminous medical records, what she had seen and what she had written, Miss Griffiths said (in relation to her having read the book To Kill a Mocking Bird) either that she was telling outright lies or that she thought it happened and it had not. Later on, in the context of an explanation of a diary entry, it was put in terms that she was telling lies and that she did not always tell the truth.

32. We go back to a consideration of the three reports provided by Dr Boakes. Her fundamental thesis was that the complainant was suffering from false memory syndrome in that she had a delusional belief as a result of "recovered memories" and had filled in gaps in her memory to make a coherent narrative. The doctor's premise was that such recovered memories could not be relied upon in the absence of independent confirmatory information. The complainant's account was thus apparently credible but entirely false. She based her conclusion on the police video recorded interviews, the medical records and the other evidence although she did not attend the trial to watch her being cross examined (notwithstanding that the judge had deferred considering the admissibility of her evidence until after X and her mother had given evidence).

33. In the opinion set out in her first report, she baldly asserted her opinion that the allegations of abuse could not be relied upon. She said:

"[The allegations] are a late addition to her history; she describes 'recovered memories' not a continuous memory and talks of having blocked things out. She then starts to display so called symptoms of PTSD which are clearly in response to new memories as had she had a continuous memory it is likely that she would have demonstrated symptoms earlier."

The first of the two subsequent reports said that the records Dr Boakes had then seen contained "little of substance that is new". In her last report, she is critical of those who had treated X believing that the therapy she had received "may have suggested and influenced her allegations". These suggestions were tested with X and doubtless put to the relevant professionals (who gave evidence).

34. Going back to her main report, Dr Boakes has a section headed theoretical considerations in which she sets out publications and research on false memories and false memory syndrome as she acknowledges that it is not an officially recognised diagnosis in either DSM IV or ICD 10 diagnostic manuals. She did not herself examine X (and there is no suggestion that there was a request so to do) and the bulk of her reports then consist of her personal commentary and opinions on X and her family situation: at the very least in large part, if not almost entirely, this was not her function and, however valuable it might be to assist a cross examiner, the material should not be contained in a report served as expert evidence for the court.

35. The court (and the jury) had a compendious 49 page chronology which comprehensively outlined the recorded medical and other records; they also had extracts from X's writings. In relation to continuous (as opposed to recovered) memory, the judge analysed the records with great care noting that X's evidence "is and always has been that the abuse was present as a memory but that she was unable or unwilling to report the matter to anyone prior to November 2011 not least because of what her father had threatened to do if she did so". He went on to record that X had never been subjected to hypnotherapy or serious psychological counselling during which any revelation of abuse first emerged.

36. Judge Mansell concluded (at para. 53) that there was "simply no evidence, or that it is of such a tenuous nature that this jury could not make a sound finding that [X] has 'recovered' or 'retrieved' her memories during her treatment for mental ill health" and there was thus "no basis whatsoever" for admitting Dr Boakes evidence of false memory syndrome. As for 'blocking out' the judge found that the use of the phrase was "no more consistent with Dr Boakes' theory of repression" or "traumatic amnesia" as it is with someone simply getting on with her life and putting it to the back of her mind". He noted that the same phrase had been used in *Bernard V* in which it was ruled that there was no evidence of false memory syndrome.

37. As regards the evidence of the treating doctors, there was no application to adduce their diagnosis of X and the judge recognised, first, that it would seek, wrongly, to prove an illness likely to have been brought on by sexual abuse so as to prove that such abuse took place and the defence would have to be able to call evidence to contradict it. He said:

"Were the jury to hear evidence from both sets of experts, the central issues would be side-tracked by a 'trial within the trial' to determine firstly what is the precise diagnosis of [X's] mental illness and secondly what has caused it. … The jury would be presented with directly contradictory expert opinion in support of each case … Far from helping the jury in their task, it would be liable to cause confusion and detract them from their task."

38. How should the medical evidence be addressed? The judge recognised that the defence case (or, we would add, at least a significant part of it) was that the illness and treatment of X may have brought about a false belief that she had suffered physical and sexual abuse: 'fantasy", 'delusion', the voices she had heard and the external influences of television, literature and counselling were all addressed. He concluded that Dr Atkin (who had had overall clinical supervision of X since 2009) could deal with the matter. He said:

"She may give evidence about some of the symptoms which [X] has experienced – visual and audio hallucinations, physical or somatic hallucinations, deluded thought processes, paranoid thoughts and the like – all of which require some expert opinion to assist the jury to understand the nature of her illness and also to properly evaluate the defence suggestions. These are unlikely to be remotely contentious and do not call for defence expert evidence in rebuttal. Equally, she should be allowed to provide a history of [X's] illness,

treatment and recovery to bring the chronological summary of the medical records – yet to be finalized – to life and easier to understand for the jury."

39. The critical issue which the jury had to resolve in the light of all the evidence was not only the credibility of X but also her reliability. It was, however, the responsibility of the jurors to undertake that task and not that either of the treating doctors or the defence expert. The different diagnoses which were expressed were the result of their evaluation of the complaint and, equally, it was for the jury to determine, first, whether X was deliberately lying in her account (which was never an issue for the doctors at all) and, secondly, whether what she was saying was reliable: to that end, it was necessary for the jury properly to understand the nature of her illness and treatment along with the symptoms which she exhibited over the years. This decision, again, was not for the doctors to make.

40. In our judgment the judge approached the task of evaluating the admissible evidence with consummate care and with an entirely appropriate eye on the authorities. Although not specifically citing *Toohey*, his summary of the principles includes defence entitlement in appropriate cases to call expert evidence on a specific subject outside the knowledge and experience of the jury and which might assist them in the task of assessing credibility and reliability. The difficulty in the case was that the way in which Dr Boakes had formulated her opinion required the judge to untangle what was of assistance to the jury and what was confusing and inadmissible comment. To admit this evidence would only have had the effect of focussing the jury away from assessing X (in the light of all the evidence received about her mental ill health), her mother, the applicant and all the evidence; rather, it would have been towards resolving conflicting evidence of diagnosis which itself depended on what the doctors believed represented an accurate history of X's relationship with her father. The judge did not err in refusing to admit it.

41. Miss Griffiths rightly complains about late disclosure and the enormous amount of material that both she and Dr Boakes had had to evaluate very late in the day. The last of the three reports was dated only four days before the cross examination of X commenced (which, as we have said, Dr Boakes did not hear). The first report, however, was over two months before the trial and nowhere does Dr Boakes ever address or recognise that her approach had the inevitable effect of usurping the function of the jury. That fact should have been recognised.

42. In that context, it is worth repeating that the reports of Dr Boakes have been considered by this court on two occasions (in *R v Richard W* and *R v Bernard V supra*). In both, it was concluded that her evidence had been rightly excluded (although each concerned what was said to be false memory syndrome without underlying mental health issues). In the former, Judge LJ said that much of her report amounted to "no more than common sense comment on the facts" and agreed with the judge's assessment that it would "usurp the function of the jury in deciding the credibility of the witnesses and no more" (para 23). In the following paragraph, he set out the principles which were subsequently adopted by in *R v Bernard V*. In that regard, it is a matter of real concern that this is exactly the criticism that is made by the judge (and which we endorse) about the reports provided by Dr Boakes in this case, some ten years later. Miss Griffiths tells us that Dr Boakes was never informed about the views of the court in the earlier cases. We accept that explanation but Dr Boakes speaks of having received over 200 instructions since 1998: it is a matter of real concern that the impact of these decisions has never been brought to her attention.

43. Before leaving an examination of the principles governing admissibility of this type of evidence, it is appropriate to note the general concern about expert witnesses. Whilst legislative reform has not been taken forward, following the Law Commission Report on Expert Evidence in Criminal Proceedings, there is real concern about the use of unreliable or inappropriate expert evidence. As a result, Part 33 of the Criminal Procedure Rules has been revised (with effect from 1 October 2014) and a new Practice Direction is to be published which will incorporate the reliability factors recommended by the Law Commission for the admission of expert evidence. The Advocacy Training Council, also, is in the course of preparing a "tool kit" for advocates to use when considering expert evidence and its admissibility, itself based upon the recommendations in the Law Commission Report.

44. When these changes occur, a new and more rigorous approach on the part of advocates and the courts to the handling of expert evidence must be adopted. That should avoid misunderstandings about what is (and what is not) appropriately included in an expert's report and so either avoid, or at least render far more straightforward, submissions on admissibility such as those made in this case. In particular, as we have emphasised, comment based only on analysis of the evidence which effectively usurps the task of the jury is to be avoided: the task of the expert is only to provide assistance of the kind which Kay LJ articulated set out in para. 26 above.

45. It is next appropriate to consider the complaint made by Miss Griffiths that Dr Atkins and Dr Laura McEwen gave evidence which crossed the boundary of fact into opinion, thereby contravening the judge's ruling and generating prejudice which the applicant was given no opportunity to rebut. As we have explained, the judge upheld the defence objection to the diagnosis offered by Dr Atkins and, as we understand it, no formal evidence of any diagnosis was presented to the jury. What Miss Griffiths complained of (in the reply to the Crown's submissions) was that the evidence crossed the boundary of fact into opinion 'implicit in the complex PTSD diagnosis … presumptive (of the veracity of the allegations)'.

46. Suffice to say that there is no suggestion that the summing up provided any basis for concluding that the evidence had gone beyond the judge's ruling or made reference to a diagnosis which either expressly or implicitly did so: having read exchanges between Miss Griffiths and the judge in relation to other parts of the case, we have no doubt that had Dr Atkin given such evidence in such a way as offended the ruling, she would have objected and a ruling would have been forthcoming.

47. When summing up, the judge identified how Dr Atkin had given evidence explaining the symptoms from which X was suffering including auditory and tactile hallucinations, psychosis and delusions. She was taken through some of the medical notes and she gave evidence to the effect that she did not ask leading questions. The judge summarised the cross examination. There was no suggestion at the time of the trial that the summing up did not reflect the evidence.

48. Miss Griffiths similarly complains that Dr Laura McEwen, the psychologist, also exceeded or went beyond the limits of the judge's ruling. Miss Griffiths cross examined about her belief that the complainant may have blocked memories of the alleged abuse and it is said that the judge appeared to support the contention about 'blocking out' when he directed the jury in these terms:

"You have really got to ask yourself this question, having looked at all those various entries [in the detailed chronology]. Did Dr [McEwan] possibly or may she have, or did she or may she have, to use the coin of phrase used by the defence, sown a seed which then grew in [X's] mind that she had been sexually abused, by seeking to find this narrative or an explanation for the illness, the voices and linking it with her father? Was a seed sown in her mind that she had not got a memory of this but it may have been repressed or blocked out which then led [X] to create a wholly false narrative in her mind that she had been sexually abused, or did she and [a key session worker] simply gain X's trust at that time to start to reveal abuse? Physical and emotional first. What were the references [X] was making at times that there were other horrible things her father had done to her that she was not prepared to talk about? Was that allegations which she was later to make? These are matters all to weigh in the balance for you, to decide whether you regard [X] as an accurate and honest witness in terms of the physical and sexual abuse."

49. Miss Griffiths argues that by depriving the defence of the opportunity of adducing expert evidence, the jury were ill equipped properly to weigh such competing theories. But once the jury understand the symptoms that X had exhibited (including the delusions, hallucinations and the like) along with the extent to which she had suffered mental ill health, all the doctors could have added was their opinion as to which of the two scenarios was accurate and reliable – false narrative or truth. Further, the reference to blocking out is not to suggest that this supported the Crown's case; rather it supported the argument advanced by the defence.

50. Putting the judge's observations in different language, our reading of what he said was that the jury had to consider the possibility that Dr McEwan had sown a seed in X's mind that she had been sexually abused and similarly sown a seed that it had been blocked out so that now she had created a 'wholly false narrative' of sexual abuse. Far from being a misdirection, this way of putting the case to the jury accurately reflected the defence case to the jury. It is not supporting a possibility that 'blocking out' might occur in fact but that Dr McEwan might have planted the seed in X that this is what had happened.

51. Dr Atkin had said (and the jury were reminded) that staff needed to be clear about messages sent to X (that is to say 'seeds sown') "that staff do not reinforce things and allow her to work it out in her own mind". Miss Griffiths complains that the defence were not able properly to develop the argument that her memory could have been affected by pre-trial therapy. On the contrary, however, this suggestion was made and explored; the risk was recognised. Whether it affected the reliability of X's evidence was for the jury to determine. In any event, had Miss Griffiths believed that any of the witnesses went beyond the judge's ruling, it was open to her to object and to renew her application if only for limited evidence from Dr Boakes. She did not do so.

52. The next ground of appeal concerns the judge's rejection of a submission of no case to answer in relation to the allegation of cruelty reflected by the failure of the applicant to take X for CAMHS appointments. The case advanced by Miss Griffiths was that it was the applicant who had been requesting an early referral and that he (as a doctor) was entitled to conclude that it was appropriate to defer that type of treatment. Indeed, it was contended that X's health improved as the applicant treated her with his wife's anti-depressants (which the judge ruled did not disclose the alleged offence of administering a noxious substance because of the absence of evidence of intention to injure); further, it was argued that there was no evidence that X's physical or mental health had been or was likely to have been compromised by the delay.

53. Miss Blackwell pointed to the evidence of Dr Sankar (which was read) and Dr Eminson, a consultant child psychologist, that the proper treatment for X in 2008 was referral to CAMHS as had been recommended: nevertheless, on a number of occasions, these appointments were deferred by the applicant. It was contended that it was open to the jury to conclude that this was a deliberate decision, not because of a genuine consideration of the welfare of his daughter but made on the basis of the risk that if she attended, she might reveal the true nature of her unhappiness and illness, namely the abuse she was suffering. In that event, deliberate neglect was established.

54. The judge concluded that this inference was permissible on the evidence not least because the applicant had taken her to all hospital and medical appointments and, furthermore, that if the jury accepted the mother's evidence, excluded her from the decision making process. On the basis of that material (in which regard we endorse the view that the evidence of providing non-prescribed medication was relevant), we agree that there was, indeed, a case to answer.

55. During the course of argument, although not raised by the notice of appeal, the court raised a question about the way in which the jury were directed in relation to this count. Having explained that the counts must be considered separately and that all the counts (save for that of cruelty by neglect) turned "to a very large extent" on the jury's assessment of X, the judge went on:

"[T]he allegation of cruelty to a child by neglect … that falls into a very different category and does not rely to any real degree on [X's] evidence."

56. He described the competing contentions. The prosecution alleged that the applicant deliberately failed to take her to these appointments "the motivation to prevent her from reporting the offences in the early part of the indictment", the antidepressants being provided "to reduce the risk of her needing a further CAHMS referral". The defence contended that he did not go through with the CAHMS appointments "due to unwillingness on the part of either X or his wife and although his use of antidepressants might have been misguided, it was only to make her better and not to ensure her silence". The judge then went on that if the jury drew the inference for which the prosecution contended:
"… then you may use it as some support for the honesty and accuracy of [X's] allegations, but it would only be one piece of evidence to put in the balance."
57. Further, when defining the offence, the fourth ingredient was the requirement that the failure of the defendant had to be wilful, meaning deliberate. The judge elaborated that if the jury were sure that his motivation for deliberately cancelling the appointments and treating X at home was his concern that X might disclose abuse that was on going, the jury could decide that his conduct was wilful and deliberate.
58. The concern which we raised is that this crucial ingredient turns substantially on the jury's assessment of the reliability of X (supported by the assessment of her mother's evidence in relation to her reaction to the illness). In that event, it is difficult to see how that finding (a) does not rely "to any real degree" on X's evidence and (b) could be used as some support for the honesty and accuracy of X's allegations, that honesty and reliability being the premise of the finding as to motivation in the first place. The arguments become circular.
59. In that context, it is worth while bearing in mind that, in defining 'wilful' as he did, the Judge was requiring the prosecution to prove that the applicant's motive for cancelling the appointments was to ensure her silence. The criminal law, on the other hand, has always resisted requiring proof of motive and the word 'wilfully' does not import any element of motive into the crime of child cruelty. In *R v Sheppard* [1981] A.C. 394 the House of Lords held that a man wilfully failed to provide adequate medical attention for a child if he either (a) deliberately does so, knowing that there is some risk that the child's health may suffer unless (s)he receives such attention or (b) does so because he does not care whether the child may be in need of medical treatment or not.
60. Whilst the applicant was a general practitioner, he was not a psychiatrist or a child psychologist. Having accepted advice and seen fit to make the appointments, the jury must have concluded that he well knew that X required such treatment and, as a doctor, must have realised that her health may suffer unless she received such treatment: he was not simply making a different professional decision. On that basis, his conduct in cancelling the several appointments could be classified as wilful, irrespective of any abuse of X. The instruction to the Jury requiring proof of motive was over and beyond the statutory elements of the crime.
61. The issue, however, must be determined on the basis that the judge articulated. In that regard, to say that the case did not rely on X "to any real degree" mischaracterises the position as described (even if rather less so in law) although it is important that the allegation of cruelty by neglect did not depend entirely on X. Her mother gives highly relevant evidence as to the extent of her involvement in the decisions being made which themselves were challenged by the applicant and created a conflict for the jury to resolve. If the judge had said that the case did not wholly rely on X, there could be no issue save as to circularity. In the circumstances, therefore, we conclude that there was a misdirection although whether it impacts on the safety of the conviction is another matter. We shall return to this question having considered the remaining grounds of appeal.
62. The final original ground of appeal against conviction is founded on the submission that the judge intervened on a number of topics, the cumulative effect of which was to make the trial unfair. In particular, Miss Griffiths contends that the judge asked questions that constituted oath helping, that he elicited prejudicial material and inadmissible bad character evidence in relation to the applicant and that he devalued defence questions. We shall shortly deal with each of these allegations in turn but before we do, it is appropriate to emphasise the vital role that the judge plays in trials of any sexual crime in the pursuit of the interests of justice. He or she must balance, on the one hand, the needs and welfare of the complainant and, on the other, the legitimate interests of the defendant. That is particularly difficult in cases involving children as witnesses, and even more so when considering the evidence of those who are or have been mentally impaired whether as a result of intellectual deficit or by reason of having suffered mental illness. Having read with care the various transcripts in this case, we believe that the judge undertook these responsibilities with care and skill.
63. The allegation of oath helping relates to a question by the judge whether X would describe herself as moral, immoral or amoral. The context, however, is that reference had been made to a note that X had written to the effect that she wished she could be amoral. She was cross examined about it. Remembering her age, the judge asked her what her understanding of morality and amorality was and, having obtained her explanation for the terms, asked the question. In our judgment, that did not constitute a question designed to bolster X's credibility; rather, it gave her the chance to deal with the implication in the cross examination.
64. As for eliciting prejudicial material, Miss Griffiths complains that the judge started his summing up by contrasting a happy photograph taken of X in June 2007 (at the start of the period of alleged abuse) and the picture she presented 4½ years later. Although he specifically warned the jury not to try to link the illness to the alleged abuse, Miss Griffiths contends that this juxtaposition made that linkage inevitable. We reject that submission not least because it ignores the way in which the summing up continues:
"To do so [i.e. to link illness to the alleged abuse], would be dangerous and speculative, because as you have heard from Dr Atkin in particular… mental illness may have many causes, some organic, that means comes

from within. Some people are susceptible to it, some people just develop it, some external caused by experiences, sometimes a mixture of the two…"

65. This, she argues, compounded the problem of the sympathy elicited for X when the judge asked, knowing that she had had a difficult night after the first day of cross examination, how she felt about the suggestion that she had lied about her father. She replied:

"It really upset me and part of why I was struggling last night is because I couldn't get the fact that someone was calling me a liar out of my head, and it made me want to kill myself."

66. Miss Griffiths points to the widely known fact that some three months earlier, in the same court centre, a complainant in a high profile allegation of sexual abuse did commit suicide following cross examination. In our judgment, given what he knew, it would have been better had the judge not asked this question other than for welfare purposes in the absence of the jury: it is difficult to see how the answer can assist the jury in its task. Having said that, however, in the context of this case, it is simply unarguable to say that it was so prejudicial as even to start to undermine the verdicts of the jury.

67. The next complaint concerns evidence elicited by the judge about the relationship between the applicant and X's mother. He was clear that the questions were the consequence of the way in which Miss Griffiths had cross examined her, described by Miss Blackwell as combative and based on the allegation that she was a disgruntled ex-wife acting out of spite. She contends that the judge properly allowed the mother to give such evidence as "a full picture of the state of the marriage and the family circumstances". This is always a matter of balance for the judge: we reject this challenge.

68. Miss Griffiths next complains that the judge devalued a number of her questions by indicating that they were either irrelevant or of little value. It is said that his interventions on a variety of issues along with his failure to deal with a number of points made the trial unfair. She argues that the interventions went beyond those identified in *R v Khokar* [2007] EWCA Crim 1756 (in which Hooper LJ made the point that the judge went further than they would have done in probing evidence but did not consider the verdicts unsafe). We do not find the decision of any real value: rather, we have evaluated the criticisms and the approach of the judge in the summing up.

69. Miss Blackwell responds to this ground of appeal by identifying Miss Griffiths' cross examination of X and her mother as "robust and combative": in the case of X, this was notwithstanding her obvious vulnerability and fragility and as for her mother, it was based on the assertion at the start that she was a disgruntled ex-wife, acting out of spite. She submits (accurately) that a trial judge is not only entitled but under a duty to ensure that no improper advantage is taken of a complainant's vulnerability and that, in this case, the judge did no more than was necessary pursuant to his duty of fairness.

70. We have now seen the entirety of the cross examination of X and, without characterising it as improper, we certainly endorse the description of it as robust and combative; neither do we find it surprising that the judge considered that its main focus was credibility. We reject the submission that, in the context of this case, to such extent as the judge intervened, he went outside the bounds of that which was appropriate. As for the summing up, the judge was not bound to repeat every defence point: read as a whole, it gave the jury an entirely appropriate summary of the facts of the case.

71. In that regard, the judge dealt with the proper approach to any view he might have signalled by providing the standard direction that any view of his that the jury might have detected should be ignored unless it coincided with their view reached independently. As for the nature of his interaction with Miss Griffiths he made the position very clear when he explained:

"And one of my duties has been to try and ensure that the trial is fair, and by that I mean fair to the defendant on the one part and fair to the complainant and other prosecution witnesses on the other…. Now that is not always an easy task … Nor is it an easy task for counsel and particularly defence counsel, to challenge evidence of witnesses and do so in a way which is both sensitive and appropriate to the witness whose evidence is the subject of challenge and I have from time to time as you have seen … had to intervene to prevent certain lines of questioning by Miss Griffiths, or I have questioned the relevance, sometimes the tone and content of certain questions.

Now such decisions to intervene have to be made by me in effectively the heat of the moment, before the question has been answered; otherwise there is not much point intervening … this is why I have had to exclude you …

What I want you to understand in so far as what you have seen, is that there is nothing personal in this, not between me and Miss Griffiths, and there is certainly nothing personal between me and the defendant and I must stress this: that you should not think that by making any interventions or observations about whether questioning is appropriate that I was at the time expressing any view either about the defendant's case that was being put to witnesses or about the honesty or reliability of the witness to whom the case was being put and you should certainly not think that I have a view adverse to the defence case. I was simply doing my job at the time, as best I saw it, to prevent a witness being subjected to any unnecessary or inappropriate question. So I direct you specifically not to hold any of that, which is part of the adversarial court process really, against the defendant."

72. These words provide the jury with the context of what must have been a difficult trial for all. In our judgment, it is inconceivable that the jury failed to approach the task set for them other than in the spirit identified by the judge. In the circumstances, this complaint is also rejected.

73. Miss Griffiths has sought leave to pursue a further ground of appeal concerned with the judge's direction as to good character. She argues that the judge did not make it clear that this was a direction in law (although said specifically that it was a direction). Of greater significance, it is submitted that having reminded

the jury that he was of previous good character (without previous convictions and, according to witnesses of positive good character); having said that it did not constitute a defence, he went on to say that the jury were "entitled to take it into account" on the basis that it was less likely that a man of his age of good character would commit such offences and was "a matter which makes it more likely that you can accept the evidence he has given to you. In other words it supports his credibility". He explained that the weight attached to good character was "entirely" for the jury.

74. Miss Griffiths has no criticism of the direction as to the two limb value of good character but challenges the use of the word "entitled" saying that the judge should have told the jury positively that they "should" take his good character into account. She points to the quashing of the conviction in *R v Moustakim* [2008] EWCA Crim 3096 where the appropriate words were not uttered although, in that case, the vice was that the judge only said that the defendant "was entitled to say" that she was as worthy of belief as anyone and "entitled to have it argued on her behalf" that she is less likely to have committed this offence: in other words, the direction in law was represented as a submission from the defence.

75. That is not this case. Whereas the word "entitled" may not carry the same weight as "should", the instruction was characterised as a direction and the consequences were accurately described ("it is less likely" that he would commit such offences and it is "more likely that you can accept" his evidence). It was also made clear that the weight attached to good character was for the jury. We reject the suggestion that the direction was, in truth, diluted.

Safety

76. Reviewing all the criticisms of the conduct of this trial both individually and collectively, the height of concern about the safety of these convictions surrounds the impact of the misdirection and circularity of the judge's direction as to cruelty: there is nothing in the other challenges that supports it. Against that is to be considered the fundamental thrust of the entire trial and, in particular, in the context of all the evidence, the view the jury took of X. That, in truth, was what the trial was about.

77. The judge said that the resolution of the indictment depended "to a very large extent" on the jury's assessment of X's credibility. He went on to explain:

"… that is, whether she is honest, and reliability, whether she is accurate. In so far as the allegations of sexual abuse are concerned and physical abuse, for that matter, in terms of strangulation, the only two people who know what happened in [X's] bedroom on the occasion the defendant entered in the course of arguments are [X] and the defendant. Mrs H and [X's sister] cannot really assist in this regard, although they do provide some support for the context in which this abuse is said by [X] to take place. …

Now [X] was cross examined thoroughly by Miss Griffiths Queen's Counsel over a day and a half of court time with breaks obviously and she explored with her whether she might be lying, what her possible motives to lie might have been, whether her mental illness might have caused her to create a false narrative that her father had abused her, so as to make sense of her illness, whether external influences such as health care professionals, fellow patients, friends like [the girl to whom she complained] television, radio and books might have sowed the seed of this idea or reinforced false beliefs in her mind and you should conduct a thorough full and dispassionate analysis of [X]'s evidence and the following is a list of some of the matters you may like to consider. Whether she did have any possible motive to make a malicious allegation against her father, such as hatred of him. How she gave her evidence to the police in the two witness interviews … and to you when she was cross examined for those hours over the live link. In other words, what impression did she make upon you? Consider what she said. In other words, the content and detail of her evidence and her allegations. What she said about her father, their relationship, the arguments, the physical and sexual abuse. Why she failed to complain earlier and so on, and consider how she responded and what she said in response to the challenges in cross examination, and consider carefully the nature and degree of her mental illness, how it might impact on her reliability as a witness. The issues, which I shall remind you of in greater detail about the voices, the thought insertion and withdrawal, the paranoia, the delusions and the effect of her illness on memory.

It is very important that you exercise considerable caution when assessing [X's] evidence, for the following reasons: firstly, the importance of her evidence to the case as a whole. Secondly, the nature and degree of her mental illness and thirdly, the lack of any independent evidence to support what she alleges, such as evidence of internal injuries from an internal medical examination supportive of penetrative sexual abuse, or any recorded evidence such as photographs or medical evidence of physical injuries occurring at the time of any alleged assault."

78. This direction was given just before a weekend and aspects were reinforced during the summary of her evidence and the mental health issues that were canvassed in evidence. The circular misdirection in relation to the cruelty count was sufficiently masked that experienced leading counsel did not see the point, even when reviewing the case (with the result that it has never been a ground of appeal although now relied upon by Miss Griffiths) and it must be borne in mind that the direction was delivered orally to the jury. It is also relevant to note that the jury unanimously convicted of this count; the remainder of the convictions were by majority of 10:2 which means that at least two jurors must have been sure that the applicant deliberately kept X away from CAHMS in deliberate neglect of her welfare without being satisfied of the allegations of abuse: that must have been because of the evidence of the applicant's wife.

79. We have anxiously considered these verdicts, conscious of the enormous impact on all parties of the verdicts in this case and, in particular, on the applicant. Having done so, however, we have come to the conclusion that the misdirection in itself is not sufficient to render these verdicts unsafe and that nothing in the original or amended grounds of appeal either individually or collectively does so either. Although we grant the application for leave to appeal, the appeal against conviction is dismissed.

Sentence

80. The applicant who is 47 years of age (born on 13th February 1967) and of prior good character was described by the judge as a very good GP who had dedicated himself to his work and cared for his patients. The judge concluded that he had hidden another side exhibiting character traits of arrogance, manipulation, bullying and dishonesty, using physical violence (usually smacks) and excessive restraints (which included grabbing X by her wrists and on at least one occasion putting his hands around her neck) whenever she complained. He went on that as X was approaching her 11th birthday, the applicant began to rape and sexually abuse her.

81. The sexual abuse, the judge said, was less about the applicant gratifying his sexual urges and more about him exercising control over her although the judge was satisfied that he derived some sexual arousal from controlling her in this way. This went on unchecked for two and a half years. Less frequently he would go into the bathroom when the complainant was having a bath, push her head roughly back against the bath and insert his finger into her vagina.

82. On four occasions he had cancelled the appointments citing a variety of reasons. He was aware that his daughter might disclose the abuse to a professionally trained psychiatrist. He had abused his position as a doctor by obtaining and administering to her anti-depressants including Citalopram which was unlicensed for children under 18 years. He did so without informing any other doctor who had seen her and without recording anything on her medical records. He did so for many months.

83. The judge expressed himself satisfied that the combination of him avoiding a psychiatric assessment and medicating her himself, with the continuing sexual and emotional abuse, had significantly contributed X's mental ill-health which first materialised properly in early 2009. Thereafter her health deteriorated rapidly culminating in acute admissions to hospital in October 2010 and January 2011.

84. The judge concluded that there were a number of aggravating features which placed the offending in the most serious category: the repeated nature over a period of two and a half years; the age of his daughter; the gross breach of trust; the deliberate and cynical decision not to treat her for her developing eating disorder for purely selfish reasons of stopping her from disclosing the abuse; the very serious psychological harm; and the threats he made that he would use her mental ill-health against her to discredit her. At no time had he shown any remorse. It was in those circumstances that he passed a total sentence would be one of 18 years imprisonment.

85. Miss Griffiths accepts that the rape counts were correctly placed into the most serious category with a starting point of 15 years, but she argues that the judge was wrong to increase the sentence above this starting point. We do not agree. In our judgment, the judge was fully entitled to increase the starting point for the reasons that he gave and, having had the conduct of the trial and been able to assess both X and the applicant, he was in by far the best position to make the appropriate assessment. The same is so in relation to the sexual assaults notwithstanding that they occurred less frequently.

86. Miss Griffiths also argues that the sentence of 5 years imprisonment for the count of cruelty by neglect failed to reflect the fact that no injury or suffering was in fact caused and was based solely on his failure to take her to three appointments, so as to prevent her reporting what he had done. We consider there to be greater force in this submission and, in the circumstances are prepared to reduce this concurrent term to 3 years imprisonment. To that extent, we grant leave to appeal against sentence although save for varying that single sentence (which does not impact in any way on the overall term), the appeal against sentence is dismissed.