allowing women to give a false name to the hospital and for the birth certificate, but requiring that their correct personal data be sealed and stored in a central agency for access by the child once he or she turns 16. Such mechanisms provide qualified privacy for the mother, while protecting the right of the child to access information later. Further, several American and Canadian jurisdictions protect the mother's privacy by imposing restrictions on contact if she so wishes, while still allowing the child to know his or her origins.

Regrettably, the court failed to consider such alternative legislative measures for achieving balance between mothers and children. With its narrow approach, it approved all but the most restrictive forms of anonymous birth. It is hoped that when the court addresses the issue of anonymous relinquishment of children in baby-hatches, as it no doubt will in the coming years, the complete discretion given to mothers in this area will be reined in. In the meantime, however, the child's right to identity remains severely compromised.

CLAIRE SIMMONDS

SUSPICIOUS MINDS: PROTECTING CHILDREN IN THE FACE OF UNCERTAINTY

WHEN Parliament reformed the basis for state intervention in the family, it made it explicit that the threshold for such intervention might be crossed where children have not already suffered, but are likely to suffer, significant harm (Children Act 1989, s. 31 (2) (a)). "Likely to suffer harm", it was quickly determined by the Court of Appeal (*Newham L.B.C. v A.-G.* [1993] 1 F.L.R. 281), did not mean more likely than not but rather that there was a "real possibility" of it happening. It took two appeals to the House of Lords (*In Re H. (Minors) (Sexual Abuse: Standard of Proof)* [1996] A.C. 563 and *Re B. (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35) for it to be judicially entrenched that this real possibility can only be established by facts proved to the civil standard of balance of probabilities.

Is it sufficient for the local authority to show that an adult, who is now participating in the care of children, was found to be in a "pool of possible perpetrators" regarding harm caused to the child of an earlier relationship? In making the necessary prediction of risk, does it matter that it was not possible to establish who, of more than one candidate, caused that earlier harm? In *Re J. (Children)* [2013] UKSC 9 the Supreme Court has categorically and unanimously held that it does. The single consideration of consignment to a pool of possible perpetrators cannot provide the factual foundation for crossing the

threshold. However, five of the seven Justices accepted obiter that, taken in combination with other factors, being in the pool could contribute to the construction of that factual foundation, a view not shared by Lords Wilson and Sumption.

A woman, JJ, cohabited with a man, DJ (later to be her husband). The three subject children in these proceedings were the two children of DJ from a previous relationship and the child of JJ, also by a previous relationship. JJ and DJ went on to have a baby together who was not a subject in the proceedings. On 29 March 2004 JJ's first child, who had suffered multiple non-accidental injuries, died when she was 20 days old. Death was caused by asphyxia. This was either the deliberate act of JJ or SW, her then partner, or caused by SW taking the baby to bed with him, JJ having left her in his care. The judge was unable to determine who was perpetrator, but the two were found to have colluded in hiding the truth. A second child of JJ was taken into care and subsequently adopted in the earlier proceedings on this basis.

In March 2011, JJ was required by the local authority to move out of the family home under its child protection plan. She later moved back in after the judge had ruled that the threshold was not crossed on the strength of the findings in the earlier proceedings (the local authority having conceded that it would not seek to rely on JJ's failure to protect). No separate action had been taken in relation to JJ and DJ's baby.

Lady Hale emphasised that the leading authorities drew a clear distinction between "the degree of likelihood required … and the basis upon which the court can be satisfied of that likelihood". Prediction, she said, is "only possible where the past facts are proved. A real possibility that something happened in the past is not enough to predict that it will happen in the future … A finding of a real possibility that this parent harmed a child does not establish that she did." This did not however produce the conclusion that failure to identify a past perpetrator meant that future likelihood could not be established. This is because the fact that a previous child had been injured or killed in the same household as a parent "normally comes associated with innumerable other facts which may be relevant to the prediction of future harm to another child".

Lord Wilson (with whom Lord Sumption agreed) regarded this position as illogical because "if, for the purpose of the requisite foundation, X's consignment to a pool has a value of zero on its own, it can, for this purpose, have no greater value in company". Lord Hope most clearly articulated the flaw in this reasoning. In essence it involved an assumption that because something was not a sufficient fact it was also not a relevant fact. It was moreover accepted without question by the whole court (following the decision of the House of Lords in *In Re O. (Minors) (Care: Preliminary Hearing)* [2003] UKHL 18) that being

in the pool was a relevant fact, along with many others, when it came to the welfare or disposal stage, and a decision was being taken about placement of the children. Is it not illogical to accept the relevance of a combination of factors at one stage and not to do so at the other? It makes more sense, and accords more with the realities of family life, to allow the court to take everything into account in children cases when reaching its decisions on both the threshold and on welfare. There should be no distinction between the supposedly independent stages as far as this is concerned.

There was indeed an unsatisfactory feature of this appeal which led to criticism by the Court of Appeal and a division of opinion in the Supreme Court. The authority had chosen to limit its case to the single issue of JJ's inclusion in a previous pool and not to rely on other highly relevant matters. These included the mother's culpable failure to protect her baby, her failure to seek medical attention for that baby's injuries and her collusion designed to prevent identification of her then partner as the perpetrator. For Lord Wilson, it was legitimate for the authority to proceed in this way because local authorities "need to understand the parameters of their ability to obtain care and supervision orders." In contrast, Lady Hale said that the case had been "artificially constructed" and that cases in which the possibility of past perpetration was the only matter on which the authority could rely were "vanishingly rare" (such an exceptional case being *Re S.-B. (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17, [2010] 1 A.C. 678). Whatever view is taken of the procedural propriety of the authority's appeal, this case surely makes out the argument, as well as any case could, for the importance of the court taking all relevant facts into account at each stage.

What the majority approach still leaves unanswered is the weight which should be attached to being in a pool when that is set alongside other factors. This must necessarily differ from case to case but in many cases perhaps less weight is likely to be attached to it than to other factors. This is because family life is not static. The court's principal concern will be whether the parents are currently fit to have the care of children. While historic suspicions should not be ignored, they are unlikely to take centre stage. If, as here, they relate to what happened many years previously and there has been no concern expressed in relation to current parenting, their influence is likely to be limited. But the suggestion that a court, when considering the multitude of relevant facts which surface in every case, can or should ignore the previous death or serious injury of a child in one parent's household is simply not to live in the real world.

One issue which appears to be definitively settled by this decision (if indeed it was ever in doubt) is that where both or all potential

perpetrators continue to reside in the same household the threshold should be crossed. Here, as Lord Wilson puts it, "the fact is that somebody in the child's proposed home did perpetrate injuries to another child".

From a policy perspective, does this decision strike the necessary balance between the conflicting considerations of protecting the family from unwarranted intrusion while protecting children from harm? A strong case can be made for saying that it does. First, it is unacceptable in a democratic society that children should be removed in the longer term, as opposed to the interim, on the basis only of suspicion rather than proof. Otherwise, no parents under previous suspicion would ever feel able to have another child or rebuild their family lives without the spectre of local authority involvement hanging over them and their partners. Where, as will almost invariably be the case, there are present concerns relating to the current family situation, there is nothing in this decision which remotely prevents the appropriate protective action being taken. It is right that the state should demonstrate that it has real concerns which are not solely historical.

There is perhaps one reservation which should be expressed. It has been suggested that the threshold conditions might be less exacting for supervision orders than they are for care orders. For reasons which today look largely ideological, the DHSS *Review of Child Care Law* in 1985 recommended that the threshold should be the same for both forms of intervention. Yet there is a great deal of difference between merely monitoring the well-being of a child left at home under a supervision order and actually removing the child from home under a care order. In a case like *Re J.*, where on any view the history was serious, there might appear to be a case for compulsory supervision. But any such change in the law would require Parliament to intervene.

ANDREW BAINHAM

UNCERTAIN JUNCTURES BETWEEN EMPLOYMENT AND CONTRACT LAW

THE common law of contract is a key foundation of employment law. However, the peculiar nature of the employment relationship can make this a slightly uneasy fit. In the case of *Geys v Société Générale* [2012] UKSC 63 (*Geys*), the UK Supreme Court was asked to reconcile general contractual principles with the rules surrounding contracts of employment by determining whether the "automatic" or "elective" theories of termination of contract applied in the employment context, finally resolving a long-running debate in employment law.