

LESSONS FROM LIEVEN J:

A realistic approach to obtaining evidence from children.

Birmingham City Council v M & Ors [2023] EWHC 3312 (Fam)



Holly Hilbourne-Gollop

2 January 2024

1. On 12 December 2023, Lieven J handed down judgement in the matter of *Birmingham City Council v M & Ors* [2023] EWHC 3312 (Fam), a composite fact-find/welfare final hearing. Timothy Bowe KC and Holly Hilbourne-Gollop represented the children.
2. Lieven J provided guidance on a realistic application of the ABE Guidance, in circumstances where there might be minor failings by family members, professionals or police when obtaining accounts and evidence from children.
3. The proceedings were in respect of two children, AA a boy aged 10 and BB a girl aged 8. Their Mother ('M') had two older daughters from a previous relationship, SS aged 16 and TT aged 17, who were not subject to these proceedings.
4. At the heart of the case, were allegations made, SS aged 16 and TT aged 17, that their step-father (AA and BB's Father) ('F') had sexually assaulted them. F denied these allegations.
5. SS's allegations first surfaced in 2020 as follows:
 - a. On 7 November 2020, SS wrote a handwritten note in her notebook under the heading 'Story, Fiction, Help' in which she alleged she had been sexually abused by F in September/October 2020.
 - b. In November/December 2020, M found the notebook and showed it to F at which point SS had said it was not true and that she had made it up.
 - c. On 14 April 2021, SS wrote a suicide note in her phone which said the story was true. F found this note on 29 April 2021 and when confronted by M and F, SS confirmed the allegation to be true.

- d. On 30 April 2021, SS was taken to her biological Father's home where she now remains. SS did not wish to speak about her allegations when arriving there and instead wrote them down on the morning of 1 May 2021. Her biological Father then telephoned the police.
 - e. On 1 May 2021 the police attended to speak to SS and she was then ABE interviewed on the same day.
6. In January 2022, after F's bail conditions ended, he was released under investigation and returned to the family home. SS was no longer living there, but TT remained there with her younger siblings.
7. TT's allegations surfaced as follows:
 - a. In September 2021 (prior to F's return to the home), TT told her then girlfriend that F had sexually abused her.
 - b. On 6 March 2022, TT wrote a note on her phone for her then girlfriend referencing the allegations by F.
 - c. On 22 March 2022, TT wrote a suicide note to her M saying *'a lot has happened to me that u never know but I couldn't tell you because it'll break you'*.
 - d. TT wrote a further note on 28 March 2022, alleging that F had groomed and sexually assaulted her on many occasions but this had ceased for some time. She wrote that her sister had spoken up which *'made me feel like a coward for not saying anything but I seen how it broke my mom and how they just completely got rid of my sister'*.
 - e. On 4 May 2022, TT told a teaching assistant at college that she had been sexually assaulted by F for some time. The police were called, and TT confirmed the allegations and wrote down her complaint.
 - f. On 5 and 6 May 2022 there were two attempts at ABE interviews with TT unable to answer questions.
 - g. On 11 July 2022, TT provided her ABE interview with the help of an intermediary.
8. SS and TT gave evidence to the Court from St Ives Chambers, with Timothy Bowe KC asking the questions whilst Lieven J was in the room.

9. During the hearing, various criticisms were made on behalf of F in relation to how SS and TT's initial and subsequent accounts were taken and in respect of how the ABE's were conducted.
10. The *'Achieving Best Evidence In Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures'* provides comprehensive guidance on obtaining evidence from children at different stages of an investigation, from their initial accounts to their ABEs.
11. In respect of initial contact, this is *'intended to elicit a brief account of what is alleged to have taken place; a more detailed account should not be pursued at this stage'*. The Guidance at Paragraph 2.4 onwards suggests some initial questioning may be needed, but should *'as far as possible'* adhere to the following principles:
 - a. Questions should, as far as possible in the circumstances, be open-ended or specific-closed as opposed to forced-choice.
 - b. A comprehensive note should be taken of the discussion to include the questions asked of the victim/witness with a full record of any comments made by the victim/witness.
12. Comprehensive guidance is also given in respect of the phases of ABE interviews:
 - a. Phase one: Establishing Rapport:
 - i. One way to achieve good rapport is to begin with a brief period of neutral questioning. However, it is not 'essential' to discuss neutral topics in every interview.
 - ii. It is important to set out the ground rules and what is expected.
 - iii. Towards the end of the rapport phase, the interviewer should advise the child to give a truthful and accurate account. There is no legal requirement to do this, but it is helpful for any future Court to know the child was made aware of the importance of telling the truth.
 - b. Phase two: Free Narrative Account:
 - i. The interviewer should initiate an uninterrupted free-narrative account. During this phase, the interviewer should not interrupt to ask questions but should encourage an account by using non-specific prompts.

- ii. The guidance supports the use of reassurance for individuals who may be reluctant to talk openly and freely about incidents but makes clear that the use of verbal reinforcement is not appropriate.
 - c. Phase three: Questioning:
 - i. Comprehensive guidance is provided in respect of the questioning stage and the different methods. As a general guide, questioning should be with open-ended questions, proceeding to specific-closed questions if necessary, and forced-choice questions only as a last resort.
 - d. Phase four: Closing the interview:
 - i. This involves recapitulation and closure.
13. In this case, the criticisms in obtaining the children’s accounts included the following:
- a. SS’s allegations being reinforced by her biological Father and police interviews.
 - b. SS’s biological Father reinforcing and supporting SS’s allegations.
 - c. TT being supported and comforted by the teaching assistant.
 - d. Failures by the police to properly record initial accounts and suggestions that the police encouraged TT to speak.
 - e. A lack of rapport building in TT’s ABE with directional questioning.
14. Lieven J provided the following guidance:
- a. Police and professionals need to take a nuanced and proportionate response when dealing with individuals who may be reluctant to speak. *“They were faced with a teenage girl who had made serious allegations but was very reluctant to speak...the [ABE] Guidance...does not mean that the police should be so concerned about not ‘encouraging’ allegations that they cannot help a potential victim of abuse to speak. There needs to be a nuanced and proportionate response to such situations, which may well not be uncommon”* (Paragraph 141).
 - b. Whilst there may have been some support from family and professionals, the question to be asked is whether there was any evidence that such support undermined the truth of the allegations (Paragraph 155). It is important to apply the ABE Guidance with *“some humanity”*. *“If there is a deeply distressed child who is making allegations, then it is only human to give them some support, which might later be interpreted as encouragement. It is a matter of judgement whether such support stepped over a line”* (Paragraph 160).

- c. If there are minor failings in following the ABE guidance, such as police not writing down the questions they asked during initial accounts being taken and a lack of rapport building, the question for the Court is whether this impacted the weight to be attached to the evidence (Paragraph 161).
15. Lieven J provides a helpful reminder that the ABE guidance is just that: guidance to achieve best evidence. Where there have been minor failings to strictly adhere to that guidance, the question for the Court will be whether those failings undermine the truth of the allegations or impact the weight of the evidence. The guidance must be applied with some *'humanity'*, with individuals taking a nuanced and proportionate approach dependant on the circumstances and the individual they are dealing with.

Holly Hilbourne-Gollop



Law is correct as at 2 January 2024

Whilst every effort has been taken to ensure that the law in this article is correct, it is intended to give a general overview of the law for educational purposes. Readers are respectfully reminded that it is not intended to be a substitute for specific legal advice and should not be relied upon for this purpose. No liability is accepted for any error or omission contained herein.

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St Ives Chambers, 1-3 Whittall Street, Birmingham, B4 6DH