type security, there seems little doubt that it should be regarded as a single convertible charge (a view supported by Gough and Goode (otherwise a powerful critic of *New Bullas*) and perhaps misunderstood at first instance in *Brumark* where indivisibility was assumed to preclude convertibility). This would be a pro-secured creditor result since a convertible charge which is created as a fixed charge, though it later converts to a floating charge in respect of proceeds, will rank ahead of preferential debts. If there were two security interests—a fixed charge on the debts and a floating charge on the proceeds—the preferential debts would rank ahead in respect of the proceeds.

EILÍS FERRAN

ATTRIBUTING HARM: CHILD ABUSE AND THE UNKNOWN PERPETRATOR

How far should we as a society concerned to protect children be prepared to run the risk of trampling on the rights of potentially innocent parents? Once the technicality is stripped away, this was essentially the issue which the House of Lords confronted in *Lancashire County Council* v. *B* [2000] 2 W.L.R. 590. The courts may only make a care or supervision order where the local authority can satisfy the "threshold conditions" in the Children Act 1989, s.31(2). The child must be suffering, or likely to suffer, significant harm but this harm, or the risk of it, must also be:

> attributable to—
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
> (ii) the child's being beyond parental control.

What then is the position if it can be shown that the child is suffering significant harm, which is attributable to a deficiency of proper care, but which cannot be directly attributed to either of the child's parents or to any identifiable individual? The *Lancashire* case concerned two babies and four adults. Child A was looked after partly by her mother and father and partly by a childminder who was the mother of child B. The father of B was living with B's mother. During the period of this arrangement, A suffered serious non-accidental head injuries which were caused by at least two episodes of violent shaking. The father of B was exonerated from any blame, but the parents of A, together with the childminder, all remained under suspicion. The evidence could not, however,

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establish that any one of them was the perpetrator. In these circumstances the local authority, concerned for the safety of both children, sought care orders in relation to each of them. The judge refused both applications but the Court of Appeal allowed the authority's appeal in relation to A. There was no further appeal in relation to B, on the basis that this child had not yet suffered harm and could not be said to be at risk either—since it had not been established that his mother had caused the injuries to A. The House of Lords therefore only had to consider whether the threshold conditions were established in relation to A.

The argument for the appellants was that the phrase "care given to the child", bearing in mind the statutory context and the legislative policy, referred only to care given by parents or other primary carers and was not wide enough to cover care given by substitute carers such as a childminder. Hence, if the harm could not be attributed to the standard of care provided here by the parents, there would be no jurisdiction to make an order. This interpretation, it was urged, was consistent with the "non-interventionist" philosophy of the legislation—that children's interests were best served by leaving them to be cared for by their parents unless the State could demonstrate some serious deficiency in the standard of care provided by *those parents*. The House of Lords unanimously rejected this contention, adopting an interpretation which was wide enough to include the many situations in which there is now *shared* care of children, but excluding wholly temporary delegations of parental authority. Thus, in situations where care is shared, the statutory language applies to all those involved in the care of the child, including in this case both the parents and the childminder. As Lord Clyde pointed out, the statute does not expressly require the identification of the author of the harm, and the phrase "not being what it would be reasonable to expect a parent to give to him" simply defines the *standard* or *level* of care and "does not restrict the scope of the persons who may be responsible for the care given to the child in the particular case".

So much for the technical arguments, but is this a defensible decision on policy grounds? The Lords themselves advanced two policy arguments justifying this relatively liberal, purposive interpretation. The first was that Parliament could not possibly have intended a child in this situation to remain unprotected. As Lord Nicholls of Birkenhead put it, to adopt the more restrictive interpretation "would mean that the child's future health, or even her life, would have to be hazarded on the chance that, after all, the non-parental carer rather than one of the parents inflicted the

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injuries. Self-evidently, to proceed in such a way when a child is proved to have suffered serious injury on more than one occasion could be dangerously irresponsible." The continued exposure of the child to such risks justified intervention even when set against the consideration that "parents who may be wholly innocent, and whose care may not have fallen below that of a reasonable parent, will face the possibility of losing their child, with all the pain and distress this involves". The second policy argument was thought to mitigate this risk of unfairness to parents. Repeating an argument which had weighed with the House in its earlier decision in *Re M (A Minor) (Care Orders: Threshold Conditions)* [1994] 2 A.C. 424, the House was influenced by the consideration that the issue before it was merely a *jurisdictional* question. Even if the threshold were crossed, the Court would not be bound to make a care order, supervision order or indeed any order if, applying the welfare principle at the discretionary stage, it decided that no order was required in the circumstances. Thus, according to Lord Clyde, "it is reasonable to allow a degree of latitude in the scope of the jurisdictional provision, leaving the critical question of whether the circumstances require the making of an order to a detailed assessment of the welfare of the child".

On a close examination of the principal speeches and of the original decision of Judge Gee, it is evident that a particular concern in this case was that it might not be possible even to make a *supervision* order. This is because the threshold for supervision is the same threshold which applies in relation to *care* orders. The reasoning behind this was every bit as ideological as it was practical, and we have to go back to 1985 to find it. It was grounded in that same "non-interventionist" philosophy which the appellants invoked in this appeal. In the *Review of Child Care Law*, para. 18.18, the case for establishing different and less onerous grounds for supervision was rejected largely on the basis that nothing less than the minimum grounds for a care order "could justify compulsory state intervention even at the level of supervision". The kind of problems which arose in *Lancashire* and in the earlier decision of the House of Lords in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] A.C.563 (in which there was a strong suspicion, but insufficient evidence, of sexual abuse) suggest that this view should be revaluated and that ideology ought perhaps to give way to more practical concerns. If, as *Lancashire* reveals, there are going to be cases in which it is felt that there is a necessity for compulsory intervention even where it is not possible to prove the case against a parent, there will be those who may feel that such compulsory action should be confined to the more limited

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form of intervention which supervision represents, and that the more draconian care order (which authorises removal of the child from the family) should be available only on proof of the allegations against the parent. This would require primary legislation to amend the Children Act, but it is not inconceivable that the Government might be forced down this road in order to comply with the European Convention on Human Rights. The argument was indeed presented by the appellants that the actions of the local authority, in continuing the care proceedings and leaving A in foster care after it realised that the case against the parents could not be proved, was a violation of their rights to family life under Article 8(1). This was cursorily dismissed by Lord Nicholls on the basis that the steps taken were "no more than those reasonably necessary to pursue the legitimate aim of protecting A from further injury" and were thus within the exceptions set out in Article 8(2). It seems entirely likely that parents and other primary carers will continue to invoke the Convention whenever there is a suggestion of compulsory action but the evidence against them is inconclusive. In this, as in other areas of family law, the courts are increasingly going to be called upon to resolve the clash between the fundamental rights of individual family members protected by the Convention—in this case the child's fundamental right to protection and the parents' fundamental right to family integrity. Where the harm has already occurred to the child, as it had in the case of A, the message of *Lancashire* seems to be that it is legitimate to give priority to the former, whereas where it has not, as in the case of B and in the case of the younger girls in *Re H*, priority must be given to the latter. But is this not also open to the objection that we ought not to have to wait for serious harm to befall a child before taking protective measures?

ANDREW BAINHAM

FORUM-SHOPPING: FROM RUSSIA WITH LOVE

RECENT years have witnessed considerable controversy over the principles that determine when a court has jurisdiction to hear claims against foreign publishers who circulate defamatory material in several jurisdictions, including England. This is the situation that arose in the recent decision of the House of Lords in *Berezovsky* v. *Michaels* [2000] 1 W.L.R. 1004. In 1996 Forbes Magazine, a company incorporated in the United States, published an article

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