Neutral Citation Number: [2022] EWFC 193
Case No: ZW21C00348

IN THE FAMILY COURT AT BARNET (sitting at the Royal Courts of Justice)

The Royal Courts of Justice,
The Strand, London
WC2A 2LL

Date: 12 December 2022

Before :

HIS HONOUR JUDGE WILLANS

- - - - - - - - - - - - - - - - - - - -

Between :

A LONDON BOROUGH

Applicant

- and –

(1) The mother
(2) The father
(3-5) X, Y and Z (by their Children's Guardian)

Respondents

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Brendan Roche KC and Richard O'Sullivan (instructed by **HB Public Law**) for the **Applicant**
Cyrus Larizadeh KC and Sarah McMeechan (instructed by **Machins Solicitors**) for the **First Respondent**
Sam Momtaz KC and Baldip Singh (instructed by **AC Gilead Solicitors**) for the **Second Respondent**
Kate Hudson and Ravi Mahey (instructed by **Duncan Lewis Solicitors**) for the **Third-Fifth Respondent**

Hearing dates: 14-17, 21-24 and 28-29 November 2022

- - - - - - - - - - - - - - - - - - - -

JUDGMENT

His Honour Judge Willans:

The essential issues at the heart of this case

1. In this judgment I am asked to reach decisions as to the following questions: (a) How was it that a child came to have a number of bony fractures when presented to hospital in August 2021? (b) Was the relationship between that child's parents one with features of domestic abuse? (c) Did the mother/parents later conceal a pregnancy in relation to that child's younger sibling? There are three children under consideration, and each is said to have suffered significant harm as a result of the answers the applicant would give to each of the questions above.

Introduction

2. Over the course of 10-days I have heard evidence from a number of witnesses[1]; I have considered documents contained in three digital bundles together with some additional information filed[2]; I have read documents filed by the party's lawyers and listened to and read[3] their final submissions. I have borne all of this in mind whether or not I refer to each document within this judgment.

3. Within this judgment I intend to preserve the anonymity of the family by the use of the following initials and labels. There is no basis for providing wider anonymity. In using this shorthand, I intend no discourtesy:
   - The first respondent: "the mother"
   - the second respondent: "the father"
   - the third to fifth respondent children: "X", "Y" and "Z" from eldest to youngest child respectively
   - the country of origin of the parents: "AA".

4. This was a fact find hearing conducted on a hybrid basis with all witnesses save the social worker, mother and father giving evidence remotely. Matters of welfare will await my fact-finding determination. Both parents were assisted throughout the hearing by court appointed interpreters. They gave their evidence entirely in the language of country AA.

5. In this judgment references given will be to the relevant page within the bundles unless otherwise indicated.

[1] In order: Dr Oystein Olsen (Paediatric Radiologist); Ms Faith Tyndale (retired nurse); Dr Colin Michie (Consultant Paediatrician); Ms Sheree MacPhail (allocated social worker: "ASW"); Ms Anna Patel (treating Physiotherapist); Dr Nicholl (treating Consultant Paediatrician); Ms Kim Edwards (Health Visitor); Dr Hamoud (treating Paediatric Registrar); the mother; Police Constable Paul Sarton; the father; Dr Melita Irving (Clinical Geneticist), and Trainee Detective Constable Noami Morgan-Fajuyi.

[2] In no particular order: Body worn footage ("BWF") of PC Sarton; video from a contact session; a handwritten note from the child's foster carer setting out Y's mobility development; a family video pursuant to the wide canvas principle; a video showing the internal layout of the family home; a video of part of a medical appointment for Y with Ms Patel; some photographs from X's 4th birthday; a handwritten document showing the father's overtime hours in early July 2021; an agreed note of evidence, and; an agreed note of the interview shown in the BWF

[3] The written submissions total 118 pages

Legal principles

6. I accept and approve a note of the law provided by counsel and attached to this judgment. It is unnecessary to repeat those principles within the body of this judgment. I will apply that law in reaching my decisions.

The background to the case

7. I intend to provide a rather general overview which will assist when I turn to the more detailed matters under consideration. I will identify the key signposts in the case and then return to consider the evidence later. I do intend to make some observations which will inform this judgment and the parameters of my enquiry when I turn to the evidence.

8. In approaching this aspect of the case, I note the chronology evidence located within the bundle as follows:
    - A chronology provided by the applicant [**A128-132**], this would appear to be supplemented by the social work chronology found in the SWET [**C104-111**]
    - Details within the ISW assessment [**C190**] and particularly within section 4-6 of that assessment
    - I note there is limited background details within the parental evidence.

The family history

9. The parents are aged 35 (father) and 26 (mother) respectively. They were born and brought up in European country, AA. Their family relationships and early life is set out within the ISW assessment.

10. The mother has a child from a previous relationship ("D"). This child is now aged around 8 years and continues to live with the child's father. It is unclear whether she is currently living in AA or another EU State. The mother makes clear she continues to have contact with D, but this is limited by their physical separation. She suggests an amicable relationship with D's father. The father has no other children, but was involved in a relationship in which he played a significant father figure role for two children whilst in AA.

11. The father came to this country in 2015 having separated from the partner referred to above. He formed a relationship with a woman ("M") for about 9 months and lived with her for a period of around 5 months. Their relationship came to an end no later than early 2016 when she cheated on him. The father and mother state they have known each other from childhood and kept in contact. The father encouraged the mother to come to this country and she did so in 2016. It appears they commenced a relationship shortly afterwards and have lived together now for around 6 years or so.

12. The father has some family in this jurisdiction. The mother has no family of note in this jurisdiction, but keeps in contact with her mother in AA.

13. The parents now have three children: X born in 2018 aged 4; Y born in 2021 and now approximately 21 months, and Z born in 2022 and aged approximately 10 months.

14. Save for a limited incident referred to in the chronology - relating to the father and his mother's partner - there is nothing concerning the parents that deserves particular identification within this judgment prior to the 2021. There is no recorded police involvement, mental health issues or reported issues with drink or drugs. To the extent there is the limited report noted above I have failed to see how this has any material relevance to my enquiry.

Y's birth and early months

15. Y was born on 9 February 2021 at 26 weeks 5/7 estimated gestation. As such he was extremely premature. As a consequence of the same he remained in hospital for the first 4 months of his life. In the first period of his life, he was cared for at the Homerton University Hospital ("HUH"). By 23 April 2021 he was considered sufficiently well to be transferred to the Neonatal Ward at the parent's local hospital at Northwick Park ("NWP"). He remained at NWP until discharge on 16 June 2021. Y was discharged home to the three-bedroom property shared by his parents and older brother X. Following discharge, the family had support from nurse Faith Tyndale and health visitor Kim Edwards. Y was supported with an oxygen tank. He continued to be subject to review as to his development. During this process he saw Dr Nicholls and Physiotherapist Anna Patel.

Domestic abuse

16. The family had not previously come to the attention of any state agency as a consequence of reports of abuse or other inappropriate conduct whether from the father to the mother or vice versa. However, on 10 August 2021 the mother called the police and raised allegations against the father of domestic violence and a level of controlling behaviour. The nature of the reports can be found in the immediate call to emergency services and in the interview between the mother and PC Sarton undertaken at the family home on 10 November 2021 with the support of a translation line interpreter and captured on Body Worn Footage ("BWF"). Following interview, the police remained at the scene and arrested the father on his return from work. However, at a subsequent meeting at the Wembley police station on 13 August 2021 the mother withdrew her allegations. Initially the father remained on bail however as I understand the evidence this came to an end on about 20 August 2021 with the father returning to live with the mother.

Y's medical admission and fractures

17. On 13 August 2021 Y was admitted to NWP having been brought to hospital by the mother. Investigations suggested multiple fractures leading to a joint police/social services section 47 investigation. In the course of this investigation both parents were interviewed by the police and I have access to these interview records. The parents denied any responsibility for the injuries found. During this period Y was under the care of Dr Sheana Wijemanne (Consultant Paediatrician) and the x-rays taken were reviewed by Dr Karl Johnson working out of the Birmingham Children's Hospital.

18. On 25 August 2021 the applicant received a report from Dr Wijemanne indicating the fractures identified were suggestive of non-accidental injuries [**E5**]:

"The injuries found are suggestive of non- accidental injury as he is a non- mobile baby. He has multiple fractures in bones that according to the literature are highly likely to be inflicted in this age group, especially if there is no history of trauma. Literature suggests that 71% of rib fractures occurring in his age group in the absence of trauma are likely to be non-accidental. Metaphyseal fractures are highly suggestive of abusive injury."

The proceedings

19. On 26 August 2021 the applicant issued these proceedings. The history of the proceedings can be found in **section B** of the bundle. At an urgent hearing on 1 September 2021 both X and Y were placed into the care of the applicant under interim care orders [**B31**].

20. The proceedings came on for fact finding before a Judge sitting at Barnet for 8 days in March 2022. However, that proved to be insufficient time to conclude the evidence and the fact-finding hearing was adjourned part-heard for a further five days in June 2022. Additionally, the Court fixed a 5-day welfare hearing for October 2022.

21. On 28 June 2022 the Judge handed down judgment. Threshold was found in respect of Y, but not X and Z. The applicant sought permission to appeal and a stay. Both were refused [**B157**]. On 28 June 2022 an out of hours stay was granted by Simler LJ pending hearing of the appeal. Subsequently Baker LJ granted permission to appeal and listed the case for substantive hearing on 5 September 2022. On 11 August 2022 the Court of Appeal set aside the previous decision of the Court with the agreement of all parties. The Court sent the matter back to this Court to be listed before a different Judge [**N19].**

22. The case was considered by the Designated Family Judge, HHJ Corbett, who gave case management directions on 5 September 2022 [**B183]**. She listed the proceedings before me for PTR and fact-finding hearing. She gave directions as to the necessary witnesses at the hearing and determined that, subject to further argument, neither I nor the experts should have sight of the first judgment. For the avoidance of doubt, I have not seen that judgment and appreciate the perceived issues were I to do so prior to reaching my own conclusions. I have a synopsis of the appeal process [**N28**] and a transcript of the evidence given to the first Judge [**Section L of the Bundle**]. On 28 October 2022 I held a PTR and approved the witness template for the upcoming hearing together with other necessary directions.

Z's birth and inclusion within the proceedings

23. Stepping back somewhat, on 1 December 2021 the Court recorded the mother's denial at Court when asked whether she was pregnant [**B103 recital K**]. This issue was again raised by the social worker with the mother on 5 January 2022 only for the mother to repeat her denial [**C95]**. On 2 January 2022 the mother attended the Royal Berkshire Hospital ("RBH") complaining of stomach pains and a UTI. On examination she was estimated to be 31 weeks pregnant [**C95**]. She was then admitted to NWP on 13 January 2022 following her waters breaking. Z was born on 15 January 2022 at 32 weeks estimated gestation. When the applicant issued care proceedings, Z was made subject to an interim care order and placed with her siblings in foster care. Her proceedings were consolidated with those of her brothers'.

Findings Sought

24. The findings sought in this case are as follows [**A134**]:

Injuries to Y

1. *Between 1st July and 31st July 2021 Y sustained eleven rib fractures towards the back of his rib cage (left ribs 3,4,5,6,8,9 and 10 and right ribs 6,7,8 and 9) caused by either a direct blow to his back or by excessive side to side squeezing (E32, E34, E35, E36-E37, E17, E18).*
2. *Between 1st July 2021 and 31st July 2021 Y suffered a fracture to his left 7th rib close to the joint with his spine caused by his spine being forced forward into his chest cavity (E32, E34, E35, E36-E37, E14, E18).*
3. *Between 1st July 2021 and 31st July 2021 Y suffered a fracture to the shaft of his right thigh bone caused by a twisting, bending or shearing mechanism (E32, E35, E37-E38, E17, E18).*
4. *Between 4th August 2021 and 13th August 2021 Y suffered eight ribs fractures towards the side and front of his rib cage (left ribs 3,4 and 8 and right ribs 5,6,7,8 and 9) caused by either a direct blow to the sides of his chest or a front to back compression of his rib cage (E32, E34, E35, E36-E37).*
5. *Between 4th August 2021 and 13th August 2021 Y suffered an incomplete fracture at the lower end of the shaft of his left radius as a likely consequence of a forward force being applied to the lowest segment of his forearm just above his left wrist (E32, E35, E37 to E38, E17, E18).*
6. *Between 4th August 2021 and 13th August 2021 Y suffered a fracture of the metaphysis at the upper end of his left thigh bone as a likely consequence of a forceful twisting of his left hip and/or forceful pulling of his left leg (E32, E35, E38, E17).*
7. *Between 4th August 2021 and 13th August 2021 Y suffered a fracture of the metaphysis at the lower end of his left thigh bone as a likely consequence of twisting and/or sideways bending of his left knee and/or sharp pulling of his left calf (E32, E35, E38, E17).*
8. *Between 6th August 2021 and 13th August 2021 Y suffered a refracturing of the shaft of his right thigh bone (E32, E35, E37- E38, E17).*
9. *The injuries detailed at 1 to 8 above would have caused Y considerable pain and distress (E18).*
10. *With the exception of the refracture of his right thigh bone, all of the injuries set out above were the consequence of the application of excessive force (E18, E38).*
11. *The refracture of his right thigh bone was the consequence of a failure of the mother and the father to seek appropriate medical attention for Y at the time of the original fracture (E38).*
12. *More generally Y was caused additional pain and suffering from the failure of the mother and/or the father to seek appropriate medical attention for him at the time of injury.*
13. *All of the injuries set out above were caused by either the mother and/or the father.*
14. *The non-perpetrating parent failed to protect Y from the perpetrating parent.*

Exposure to controlling behaviour and domestic violence

15. *The father prevented the mother from speaking to her parents freely on the telephone or by text message (K171 to K172).*
16. *The father assumed control of the mother's Facebook account preventing her from communicating freely with others (K171 to K172).*
17. *The father only allowed the mother to communicate with her parents by email correspondence which he would monitor and vet (K171 to K172).*
18. *The father prevented the mother from inviting friends to the family home (K171 to K172).*
19. *On 7th August 2021 after the mother refused the father's invitation that she masturbate him, he grabbed her and threw his down the stairs (K171 to K172).*
20. *On 9th August 2021 the father slapped the left side of the mother's head after discovering dust on a surface and threatened to kill her in the future if the house maintained to his standards (K171 to K172).*

Concealment of Z's pregnancy

21. *The mother and the father concealed the mother's pregnancy of Z from professionals and the court preventing the pregnancy from being properly monitored placed Z at risk of significant physical harm (B103, C95).*

General

22. *Section 31(2) of the Children Act 1989 is satisfied in respect of Y as a consequence of the injuries that he has suffered and his exposure to conflict between his parents that placed him at risk of emotional and physical harm.*
23. *Section 31(2) of the Children Act 1989 is satisfied in respect of X as a consequence of his exposure to conflict between his parents that that placed him at risk of emotional and physical harm.*
24. *Section 31(2) of the Children Act 1989 is satisfied in respect of Z as a consequence of her parents' concealment of her pregnancy that placed her at risk of likely physical harm, the conflict between her parents that placed her risk of likely emotional and physical harm and the injuries inflicted on X.*

The parties' respective positions

25. These can be summarised in brief although I will return to them within this judgment. The applicant seeks a positive finding on all matters alleged. Their position has not changed in the light of the evidence heard. The applicant has identified the key evidence, but has not identified with clarity which of the parents they say is responsible for the fractures. As such they appear to either seek or very much leave open a pool finding. The parents take a common approach in denying any responsibility for inappropriate handling that may be found to have occasioned any of the injuries. In essence they question whether the applicant has established a prerequisite of inappropriate handling in order to occasion any of the injuries and as such, whilst they may accept 'responsibility', this would not amount to handling such as to justify criticism. To the extent inappropriate handling is required they deny any such handling or knowledge of the same. They challenge the suggestion that a non-present parent would be aware of the nature of the injuries and deny any failure to protect. They deny the presence of domestic violence in their household whilst agreeing lies have been told in this regard. They accept to a limited extent concealment of Z's pregnancy, but deny this amounts to a matter which crosses the section 31 threshold. In short, they ask the Court to find the allegations not proven or if proven insufficient to meet the section 31 threshold. They ask for the proceedings to be brought to an end on that basis and the children returned to their care. The guardian does not formally argue for a finding, but highlights evidence which might assist the Court. She identifies aspects of the evidence which might be felt to cause concerns as to credibility and sets out factors which point in favour of or against the allegations. She engages with the factors that might assist with the pool determination if this is relevant.

The Evidence

26. In this section I will summarise the key evidence I received in respect of the three chief issues in dispute: (i) the 'concealed' pregnancy; (ii) the alleged domestic abuse; and (iii) the fractures. I will not detail all the evidence and there will be aspects of the evidence received which do not need to be summarised at all or in any great detail. I will focus on those aspects of the evidence which I consider to be relevant to my decision-making process.

The 'concealed' pregnancy

27. The allegation is that the parents, or at least the mother, consciously concealed the impending birth of Z. The reasoning for doing so is implied to be to avoid the applicant bringing proceedings in the same manner as had occurred in the case of X and Y.

28. It is of course agreed that the mother was pregnant. It is the mother's case that she knew about this no earlier than 2 January 2022 when she attended the RBH complaining of stomach pains and a UTI. The father agrees he knew about the pregnancy on 3 January 2022 on the mother's discharge from that hospital. It is agreed the mother was at that point approximately 31 weeks into her pregnancy. It is agreed the mother subsequently attended NWP on 12 January 2022 and was kept in before giving birth to Z on 15 January 2022. The written evidence in this regard is found in the father's second statement of 23 February 2022 [**C169 §31-41**], the mother's second statement of 8 March 2022 [**C236 §22**] and the social worker statement of 18 January 2022 [**C93**].

29. In her written evidence the social worker confirmed a question was asked of the mother as to whether she was pregnant at the court hearing on 1 December 2021. As noted above this is recorded on the face of the order. The mother denied this was the case. The social worker then reports raising the issue for a second time on 5 January 2022 when seeing the mother at Y's audiology appointment. Again, the mother denied being pregnant. Although reasons are not given for holding this belief it seems plain the circumstances were such as to lead the social worker to have a concern and to have raised the issue on two separate occasions. The social worker then confirms being formally notified by the mother's GP practice on 13 January 2022. The social worker gave some limited evidence during the fact-finding hearing, but was not examined on these issues.

30. The parents have a common case. In their written evidence the father gives the greater detail with the essential position being that the mother was not aware of being pregnant principally because her menstrual cycle continued during the pregnancy. Their case is that the mother was wholly unaware of being pregnant until attending the RBH. The father was not informed until her discharge.

31. The father was not cross examined in any detail on this issue. The mother agreed she had lied to the social worker when questioned on 5 January 2022. She said this had been on the phone rather than in person and she had done so because the social worker was 'putting too much pressure on her' and 'she might take her child away'. She didn't trust the social worker.

32. When questioned by the applicant as to the likely signs that would have signalled her pregnancy prior to January 2022 the mother denied there were any physical or other changes which impacted on her and caused her to become conscious that she might be pregnant. She did agree she was getting bigger visibly, but due to the stress of everything she was not focused on this. She agreed that this pregnancy related to a period in May/June 2021 when the parents were having both protected and unprotected sexual intercourse. She was asked about being questioned at the court hearing and whether this caused her to pause and reflect on the issue. She told me it hadn't caused her to reflect. She understood that the delay meant there had not been any ante-natal care notwithstanding the real issues that had arisen with Y's premature birth, but told me that if she had known she was pregnant then she would have certainly sought help. The mother told me the father had suggested she take a pregnancy test, but she had felt no need to do so as she continued to have her menstrual cycle.

33. She was asked as to delay between finding out on her case and attending her GP about 10 days later. She explained that she acted promptly when they returned from being away over Christmas and felt the short delay was not significant.

Alleged domestic violence

34. The allegation is that domestic abuse was present in the parental relationship and that the mother's reports to the Metropolitan Police was based on an essentially truthful account of this history. The parents both deny the same contending any such reports were fabricated by the mother.

35. The applicant relies on the police complaint made by the mother and the ensuing investigation in support of its case. I note the following written evidence:
    - A CAD Single Incident report detailing the mother's call to emergency services [**K207]**
    - A CRIS report of the investigation [**K95]**
    - The statements of the attending police officers (Sarton and Locke) [**O7 and O10**] but more particularly the account of the mother as contained on the BWF taken by PC Sarton when speaking to the mother.
    - The statement and typed account of interview of TDC Morgan-Fajuyi [**K218 and K1**]
    - The response to DASH questions [**K231**]

36. In considering this evidence it needs to be noted the best evidence of the report is the direct account given to both PC Sarton (see BWF) and TDC Morgan-Fajuyi. To the extent the other records extend beyond this they largely amount to a recasting or summary of that told to the officers or the views of others having read these accounts. I will naturally focus on the direct accounts given. Time was spent at the hearing working through the BWF interview with the assistance of the Court appointed interpreters to obtain a clear account of what was said. I listened with care and kept a detailed account of the translation. I also have an agreed note of the same. TDC Morgan-Fajuyi confirmed the account at [**K1**] was a typed original account provided by the mother directly via an interpreter present at the interview. These two reports are then supplemented by the emergency call.

37. The account starts with the emergency record between 3:00 – 3:15pm on 10 August 2021. It seems clear a telephone line translator was used, and the mother is reported as saying: 'he is being quite aggressive…this is my partner…he hit me in the head…my partner is not here now…if he was at home he wouldn't let me call…if he knows I have called the police he will kill me….has said to someone else before "if my woman ever called the police I would break her legs"'.

38. In the course of the BWF interview when questioned by PC Sarton the mother is translated as having said:

[When questioned as to having been hit] "yes at home…here in the kitchen….last night at around 9…I can't remember exactly" [when asked about detailing anything else] "…Yes I understand I have to tidy up but I forget sometimes you know…and there are many things…he is not allowing me to speak to anyone…my [relatives?]…he's allowed to and I'm not allowed….for example let me tell you one thing yesterday we argued …because someone stopped in front of the house and I can't tell him anything….

….because he said that person had come to see me…I said it's not true…" [when asked as to whether money was restricted] "No, no, no, not the money…" [When asked if he had hit here before today] "Before today…I don't understand…yes, yes" [when asked about previously attempting to break up] "We went to [AA] to make a certificate…for this little one and I wanted to stay there…and I returned because…I came back because he threatened me… yes I do want to leave but I do not want to tell him because I am afraid…it has been just over a year that his behaviour has got worse…" [when asked about any messaging or telephone calls out of the ordinary] "Wait a minute I have many messages here…one I fell asleep and didn't pick up the phone…for example "what the hell are you doing why don't you answer the phone…are you sitting on a dick right now" and other ugly words…" [she was asked if had ever said anything of a sexual nature that made her uncomfortable] "Yes but I don't like to do it and I don't want…there was a thing he wanted to do and I didn't want and I said only whores do this …I did not like it and said only whores and I am not a whore…suck a dick…No [he is not sexually violent to me] but after this I did not love him anymore and he said I was good for nothing…he says I am someone who fucks everyone but this is not true…he says that he took me in to be slave to look after the kids…he doesn't like my food….the problem is he is on Facebook talking to someone…when you are having an affair with someone it is obvious you will treat your wife badly…" [when asked if he had ever tried to strangle her] "No…last night when told me I was the most stupid person he said do you not think I am capable of killing you…try me… that is what he said…he was having a bath…he came out… he said should suck his dick and because I didn't he threw me on the stairs…so I have a bruise here from what he did….he came out and said I should do what a whore does…and I said this makes me sick… and he took me by the hand and threw me on the stairs…and then I wanted to call the police… and I did call but hung up…he asked me to forgive him…this is what he said…last week on Saturday…I can't remember the time…"

39. As previously noted, the officers then waited for the father to return, following which he was arrested and subsequently bailed not to contact the mother. The mother had an appointment to attend the Wembley Police Station on the next day. The evidence of TDC Morgan-Fajuyi was that the mother initially attended and indicated she wished to withdraw her allegations. The officer confirmed she understood the mother to be saying that she had been contacted by a family member about this who had spoken to the father:

I have nobody because there no were (sic) for me to go. I don't have my mother in laws number – his mother called his brother and his wife called me today. He said [the father] called her and he told her he would be transferred to prison, if I don't withdraw my statement, that's why came today to withdraw my statement.

40. In any event the mother proceeded to speak to the officer, initially with the assistance of an AA speaking police officer, but then more substantially with the assistance of an AA interpreter. The officer's typed account of the interview is at [**K1**] and includes the following account:

[The mother appeared to time the physical assault to Monday 9 August at about 2130hrs] "I put the baby's oxygen levels on to see if he needs more or less, then we went to the kitchen, and it was dirty, not that dirty but I forgot about one corner and we argued he slapped me once, Left side of the head behind the ear, right hand closed fist. And I just shut up. I didn't stumble. He said forgive me, and I said yes I will forgive you, but I did not forgive him. I told him I would forgive him so he can calm himself down and he went to bed, I spent time with the baby watching cartoons on TV. There was nobody else present, just the two of us…He has his moments, sometimes he's calm sometimes he's angry, but when

he's angry it's just verbal offending. He has never hit me before. I did not attend the hospital after he hit me, I did not consider it necessary."

[When questioned about controlling conduct] "We were on the street and some guy looked at me, and he said "well you also know this guy" but I didn't…He doesn't let me speak to friends or family, my family has been here and we helped them but he thinks that my mother wants to separate us, but it's not true she doesn't (brother and mother), I have no contact with step dad…He told me he doesn't want me talk to brother and mother, he forbid me, once he forbid me from having Facebook as well, I don't have Facebook, I had Facebook when I came here but I forgot the password because It was a different phone. I don't communicate with my mother and brother, but if he's no longer around I could speak. They are in AA, through Facebook and WhatsApp video I usually call….To buy food yes, its 10 minutes to the shop, If I wanted to go alone without the children I won't be allowed to go. Before he would check my phone, he was accusing with me of texting someone and deleting it. Now I just have a simple phone only to call and text he stops checking it….He's obsessed with me, he's a perfectionist…I have no rules and conditions…he gives me money as much as I need for things, he also spends some, but the money is in the house. On a card, he leaves the pin…He has access to my email but we both don't know the password. I left my email open on the phone and he uses that phone now. My phone has no credit, I communicate on WhatsApp, but I don't communicate with anyone because I have no friends, I don't communicate with anyone besides my sister-in-law because he doesn't let me, he told me you don't need friends you don't need anything"

[With reference to an incident on the staircase] 2 weeks ago, it happened on a Saturday, I was on my own, he came from work, he had a bath, he put me on the couch, and he said, "suck me dick" and I said no because I don't like it and that's when he pushed me down the stairs, he knew I didn't like this. He grabbed me off the sofa because I didn't want to do what he wanted He grabbed me on my arm, he pushed me onto the hallway and he pushed me down the stairs, he used his right arm and grabbed me. I landed with me right arm on the floor, after he sat on the sofa and then he spoke to his father who is in [AA] on Facebook. I spent time with the baby, I put him in the cot and went to buy an ice cream for [X] as the ice cream van just arrived….Before I had plenty of friends, I also worked in [AA] and spoke to my parents often. Now I feel like a prisoner, no freedom. This makes me feel very bad, I held back because I thought he was allowed to do it, but I feel very bad. Pushed down the stairs and hit me, and that makes me feel very bad, I told him what's wrong with you, why do you keep on doing this, and he said, "your no good you're not even good for fucking". I'm used to it, its normal I felt like the last person on earth after he forced me to do that sexual thing. I wanted to call the police, but I forgave him but then he done it again. He calls me a dirty bitch…"

41. At face value the applicant has a case based on the mother's reports to the police over the course of two days in which she alleges physical assault on two occasions and behaviour patterns which are capable of amounting to controlling and coercive behaviour. The applicant argues this is a credible and consistent account which supports the findings sought. PC Sarton and TDC Morgan-Fajuyi were each examined, and the parents gave their own accounts and were questioned.

42. The parents' case was as follows. The allegations were false and had been fabricated by the mother in the circumstances described by her. Having raised the allegations, she then felt pressured or coerced to maintain them until she withdrew the same. In fact, the relationship between the parents was wholly positive and benign with limited disagreements and certainly no abuse. The father had at no point acted in any of the critical ways suggested in the reports.

43. The father told me about his first relationship with 'M'. This ended in 2016, but he saw her again in 2018 at a chance meeting in the street. On that occasion he had X with him. M had suggested a wish to resume their relationship, but he had indicated he had a family now. He had not seen her again, although when questioned he told me his aunt had retained a relationship with M and understood she was now in AA. The father told me he only became aware of M's involvement in the case when he was put on the phone to the person the mother had been speaking to and discovered this was M (having heard her voice). She then terminated the call and blocked further communications.

44. The mother told me she had met M (without knowing her relationship to the father) at a funfair in the park. They had developed a friendship although the mother had limited details as to M other than her first name. The relationship had developed in part out of the mother's lack of friends. Over a period of time M had started to suggest things to the mother as to the father. These included him being unfaithful to the mother and being abusive to previous partners. The suggestion was that M knew people familiar with the father and they had passed this information to her. Secondly, and associated with this, M encouraged or persuaded the mother to consider separating from the father and discussed with her the potential to obtain benefits and support in her own right. The mother indicated there was a level of unhappiness or uncertainty linked to the father's long working hours and there was room in her mind for the seeds of doubt to be sown. Encouraged or perhaps persuaded/pressured by M she made the reports to the police. M told her what to say and what she said derived from M. In fact, even when speaking to PC Sarton she was receiving messages from M detailing what she should say. Unfortunately, any record of this has been lost as the mobile phone was dropped by one of the children into water.

45. The mother then felt guilt at telling lies about the father and sought to withdraw her allegations. However, she then felt pressured by the police and particularly by an AA speaking officer who verbally abused her at the police station.

46. The father confirmed this account although a significant part of it relates to the account given to him by the mother.

47. It was put to the father as to his failure to mention the role of M in his early written documents. In these he professed not to know why the mother had said what she said. In evidence to me he told me he knew about M's central involvement from August 2021. He was also questioned as to detail relating to M and it was suggested his lack of detail demonstrated the falsehood of the explanation.

48. Similar questions as to detail were put to the mother. She was also questioned as to how it was that she allowed herself to make such allegations against the father given: (a) they were all entirely untrue; (b) their relationship was essentially positive; and (c) they derived from an individual with who she had only a limited relationship. The mother suggested she felt under pressure and was at the time wrongly doubting the father's fidelity.

49. Those acting for the parents sought to identify inconsistencies in the accounts or matters which could be shown to be erroneous. It is argued these features when considered cast doubt

on the essential truth of the allegations. Those acting for the applicant point to the detail and surrounding circumstances as giving support to the allegations. I will need to assess these points.

50. The initial interviewing PC was questioned as to the manner in which the mother is recorded as speaking and the officer accepted the written account of the interview is somewhat more extensive than the mother's actual report (for example the mother gave limited evidence as to any physical assault whereas the written report details multiple occasions). The process of questioning of the mother was also considered and the officer agreed he had limited experience. It is suggested his direct questioning without any free flow may have contributed to the form of report. He was criticised for not independently investigating aspects of the account (for instance checking whether the bathroom was in fact on the first floor of the house). I am asked to focus on what was actually said as seen in the BWF. I agree this is the best evidence and there is no need to go behind this and rely on the officer's recollection of what was said (whether recorded then or remembered now).

51. There was also some limited questioning with respect to suggested corroboration from a 'neighbour'. PC Sarton was questioned as to this anonymous report and the perceived gaps in the report. The parents question the value of this given the lack of detail as to the individual and the potential for mistake or malice in the report.

52. TDC Morgan-Fajuyi was asked about her process. She confirmed she had interviewed the mother (the mother did not believe this was the officer she had spoken to). She was initially assisted by an AA speaking officer, but saw no signs to suggest the conversation between the officer and the mother was problematic. The mother alleged this officer had verbally abused her. The balance of the interview was undertaken with an AA speaking independent interpreter and the note [**K1**] was typed during the meeting. The officer confirmed her understanding that there had been some family communications with the mother leading to her expressed wish to withdraw her complaint. It was put to the officer that there were discrepancies between the account given to her and to PC Sarton on the previous day. The officer indicated she would have sought to understand any obvious conflicts, but had not been aware of the same.

53. The parents' case is that a lie was told in the circumstances detailed. The lie should have been capable of discovery on proper investigation. In any event on any reasoned consideration the account given is contradictory and inherently unsafe. The mother admits this was not the truth and gives a plausible account of why she said what she said. The surrounding wide canvas of evidence better fits with the account of no DV than it does with the account of DV.

The Fractures

A. Medical Evidence: Initial Observations

54. Having heard the evidence, I make the following initial observations.

55. In the course of the hearing reference was made to the views of non-instructed experts in other cases familiar to the advocates and/or reported. I expressed a level of disquiet as to the

weight that could be attached to these points. Those for the parents seemingly placed material weight on the same whereas the applicant urged me to proceed on the instructed expert evidence. In principle I prefer the second course. There are routes by which third party opinion might come to be introduced into proceedings. In the first instance a party can advocate for that expert to be instructed. If this does not occur then the party can raise questions of the instructed expert by reference to third party opinion; they can examine the instructed expert at final hearing and put to the expert contrary medical views. However, I do not accept it is appropriate to ask the Court to reach conclusions solely based on the views of experts who have neither been instructed in the proceedings nor subject to examination therein. I struggle to see how any such hearing could be adjudged fair. Were I to find in favour of the parents or contrary to their interests based on the views of an individual who was not a witness in the case then it would be relatively easy to forecast the objection to any conclusion based on the same. Of course, both judges and advocates build up a knowledge base from dealing with cases of this sort on a regular basis, but at no point do we become experts on the point in question. It is tempting to analogise from apparently similar cases, but the danger lurks in the detail of the case which may not be apparent to the outsider. For my part I intend to resolve this case on the evidence directly tested before me.

56. My second observation relates to the use of professional expert meetings. Both Drs. Olsen and Michie expressed the view that the same would have been helpful and indeed had an expectation that one would take place. Dr Michie appeared unclear as to how an expert could obtain the same if required. He told me about experience of seeking the same, but having no understanding as to why they did not occur.

57. For my part the position is clear. Under the Family Proceedings Rules 2010 the Court can give directions for an experts' meeting (r. 25.16) and an expert can seek directions (r. 25.17). These provisions are supplemented by Practice Direction 25E. In the normal course of events the question of an experts' meeting will be canvassed at about the same time as experts are appointed. However, where this is not the case the same can be raised later either by a party or by the expert seeking directions. Whilst there is no default position in a complex case such a meeting will often be considered routine. There should be no hesitation in experts making clear the need for the same and in such a case the expert should be entitled to a clear explanation as to why the same has not been granted, if this is the case. It will be important though for the Court to understand from whom the request derives. There may be circumstances in which the Court misunderstands the suggestion to be a legal rather than an expert suggestion. The Court should not be in doubt when the issue arises.

58. Finally, it will normally be best practice for an expert paediatrician to be the last of the experts to provide their report. This is particularly apt where they are in effect carrying out a clinical overview for the Court. Without this delay is likely to be occasioned as addendum reports are sought reflecting on further pieces of expert reporting. In this case Dr Michie was due to report last but modifications to the timetable led to Dr Olsen coming in last. This placed him in the invidious position of being asked to provide conclusions before all the evidence was in and then being criticised in an entirely professional manner for expressing conclusions before all the evidence was in. He ultimately accepted he should have been clear as to the applicable

caveats to his report pending full evidence, but a better position would have been for him not to be placed in such a position at all. This was not of his making and was not his fault.

B. Medical Evidence: Overview

59. The Court appointed three experts. Dr Olsen was appointed to express an opinion from a radiological perspective. His expertise permits him to comment on the presence or otherwise of fractures, the likely timing of the fractures and the expected forces and mechanisms which are felt to be associated with the same. His experience also permits him to highlight areas of further investigation. Dr Michie was asked to report from a paediatric viewpoint and does so in the light of the radiological evidence. He is able to comment on professional understanding as to likely forces required in respect of fractures and the expected pain response to the same. He is expected to consider a differential diagnosis and consider all realistic potential explanations. Dr Irving was instructed to provide a genetic perspective. Her role was more focused and was to assist the Court in understanding whether there was a possible or likely genetic explanation for the fractures. As part of her reporting, she was expected to inform the Court as to whether there were other reasonable lines of enquiry to follow in this regard. A distinction is drawn between the possible genetic explanations (which are for Dr Irving) and biochemical explanations (which would be for Dr Michie). In addition, I have the medical records and the investigations undertaken by the treating team and supporting professionals. These include treating paediatricians (Dr Wijemanne and Dr Hamoud) and reviewing radiologist (Dr Johnson).

C. Medical Evidence: Identification of Fractures

60. This is the province of Dr Olsen. The findings sought in this case all derive from his report. Dr Olsen identifies 24 fractures (and one re-fracture). These can be found at §24 1-8 above and are as follows:

i) Eleven fractures towards the back of Y's rib cage being right ribs 6-9 and left ribs 3-6 and 8-10.
ii) A fracture of the left 7 rib close to the joint with the spine.
iii) A fracture to the shaft of the right thigh bone
iv) Eight rib fractures to the side and front of the rib cage being right ribs 5-9 and left ribs 3-4 and 8
v) An incomplete fracture at the lower end of the shaft of the left radius (lower arm bone)
vi) A fracture of the metaphysis at the upper end of the left thigh bone
vii) A fracture of the metaphysis at the lower end of the left thigh bone
viii) A re-fracture of the shaft of the right thigh bone (iii above)

61. There was no challenge to this opinion, and it appears accepted that evidence of such fractures was present on review. There was however questioning on the basis of the initial review undertaken by Dr Johnson. This clinician is a well-known expert in the field (as is Dr Olsen) and is often found to provide second opinions for the treating team in cases of this sort. It is important to note that he concurs with the conclusions reached by Dr Olsen as to

fractures set out above. However, his report can be read to suggest the potential for further fractures. On 19 August 2021 [**E1**] he reported with respect to an x-ray dated 8 May 2021:

There is marked periosteal thickening along the shafts of both humeri and there is some irregularity around both proximal humeri, but this is poorly identified due to the nature of the film. There is some increased density around the left clavicle which is concerning for a healing fracture. No obvious rib fracture is seen, but in view of the lung changes and exposure parameters, one could not definitely exclude any rib abnormalities. The periosteal thickening…has a differential diagnosis…[T]here may be a healing fracture of both humeri (as well as the clavicle).

62. These observations led those acting for the parents to suggest the potential for fractures whilst Y was in hospital prior to discharge and under the care of the treating team. It was also suggested the absence of a full and timely skeletal survey post the discovery of the fractures means there may have been post-removal fractures. Dr Olsen deals with this in an email [**E70**] and in his report [**E32 §6.6-6.7**]. He distinguished between his role as an expert witness and Dr Johnson's role as clinical reviewing expert. His role was to report to the Court applying the appropriate standard of proof. Where imaging did not meet this standard, it was his duty to make this clear. In contrast Dr Johnson's role was to inform and guide those treating the child. Identifying areas of concern in such a context might inform further investigations but did not need to meet a legal standard. It is important to make clear that both practitioners are viewing the same imaging evidence. Dr Olsen was clear that the evidence with respect to the additional concerns was insufficient to meet the appropriate threshold for him to include the same as being more likely than not evidence of a fracture.

63. Dr Olsen later reviewed a range of x-rays taken in respect of Y during his early months. Due to his prematurity and the need for his development to be closely monitored he was subjected to a high level of radiological examination. At [**E74**] he notes the same and the absence of evidence of fractures present in the same. However, he also observes the skeleton to be under mineralised and on some imaging '*so under mineralised that non-displaced fractures could be present whilst being undetectable*'. As set out in §62 above this led the parents' representatives to raise the possibility of unidentified fractures prior to discharge from hospital. I understood Dr Olsen to accept this amounted to an '*unknown unknown'* and as such a matter which he could not rule out or comment upon. He advised that if you cannot see the bone due to low mineralisation then you cannot see a fracture present at that time. One would require evidence of deformity or displacement of the bone to show a fracture in such cases.

64. In summary the unchallenged evidence was of 24 fractures and 1 re-fracture, but with argument as to whether in fact there may have been additional undiscovered fractures or potential fractures as raised by Dr Johnson, but not agreed as meeting the threshold test by Dr Olsen. I should make clear the underlying proposition of the parents was that: (a) Y suffered fractures whilst out of the care of his parents prior to discharge from hospital; (b) it is assumed his care at such times would have been appropriate and within normal handling expectations; and (c) conditions (a) and (b) being the case it is therefore the case that Y likely suffered fractures arising out of normal handling. Further, in the absence of clarity as to potential fracturing post-removal from the parents it is possible, and cannot be ruled out, that Y suffered further unidentified fractures during this period again during a time of assumed

normal handling. These arguments can only be properly understood when I turn to the evidence of causation below.

D. Medical evidence: Timing of fractures

65. This is again radiological evidence provided by Dr Olsen. He was clear in placing the fractures into two separate time windows leading to him offering the view that all injuries could not have been occasioned at the same time. Within each of the two time brackets he was not able to further breakdown the timing of events and so within a bracket all fractures could have arisen at the same time (within the same event); in close proximity to each other or on a series of separate occasions relating to each fracture within that time frame. Greater clarity is out with the radiological evidence.

66. Dr Olsen dated the two windows as follows. He identified older fractures as being those at §60(i-iii). These were at least ½ month old as they demonstrated evidence of healing and new bone formation. They were unlikely to be older than 1½ months as none were seen to be fully healed although this upper point was by no means certain, although it was a reasonable conclusion to draw.

67. He identified newer fractures as those at §60(iv-viii). The end point of this window was the point of discovery on admission to hospital. The start of the window was put at 1-1½ weeks of age due to the absence of any evidence of healing. The later skeletal survey on 31 August 2022 showed signs of healing.

68. Whilst Dr Olsen was willing to permit some modest modification of these windows they would not intersect. This conclusion as to two non-intersecting windows was shared by Dr Johnson in his review. Dr Olsen commented on the absence of evidence of healing with respect to the 'suggested' humeri fractures noted by Dr Johnson He noted that there was no evidence of the same in x-rays taken in August around 3 months later when one would expect the same to be seen.

69. This was also an area of limited controversy, albeit there was some questioning as to the potential for widening of the windows. Dr Olsen considered it was close to impossible for the acute (most recent) fractures to have arisen during the earlier period in hospital. With regard to the older fractures such a suggestion did not fit with what he was saying, but he could not rule out the older fractures being 2 months old (i.e., mid-June at the earliest). He explained the dating approach he had taken was as per practice and that he acted within a '*likelihood space*'. When asked about the potential for low mineralisation to slow the speed of healing he was willing to accept this potential, but measured the delay as being a matter of days. It was very unlikely a genetic condition, such as osteogenesis imperfecta, would delay the process of healing. He considered a parental account of a resuscitation episode in April 2021 fell well outside of the likely window during which the fractures arose.

E. Medical evidence: Mechanism

70. Here I am considering the likely directional forces required to cause each fracture. I am not commenting as to the level of actual force required to cause the fracture. This is what I

understand by the concept of mechanism. I contrast that with a '*mechanistic assessment*' which Dr Olsen uses to explain a calculation of forces [**E36 §8.2**]. There was a debate before me as to whether the evidence on mechanism is itself tied to a child with normal bones or applicable to both children with normal and abnormal bones. It seems this derives from the opinions of Dr Olsen being caveated by reference to a child of normal bone strength. It is a matter for me to resolve whether this distinction was as to the directional forces required or the level of force required. I understand the parents to suggest it is referable to both whereas the applicant and guardian suggest only the level of force. I do not recall Dr Olsen being asked to comment on this point in evidence.

71. As to Dr Olsen's evidence as to directional forces ('mechanism'), I note the following written evidence (with which Dr Michie agreed):

i) Rib fractures are normally caused by compression or direct impact. Whilst one can't be confident as to the exact mechanism, fractures to the sideward portion of the ribs are normally associated with front-to-back squeezing or direct impact to the side of the chest. Fractures to the backward-facing aspect of the ribs suggests side-to-side squeezing or direct impact against the back. The left 7 fractures are believed to most likely result from the spine being forced forward into the chest cavity.

ii) The fracture of the left radius is strongly suggestive of a forceful forward bending of the very lowest segment of the forearm just above the wrist. Forward bending means the palm bending inwards rather than outwards.

iii) As to the thighbone fracture the situation is complicated by the re-fracturing. The original fracture may have been caused by a range of mechanisms including twisting, bending or shearing.

iv) The most likely mechanism causing the metaphyseal fractures is unnatural forceful bending, pulling, rotation or a combination of the same. In the case of the left hip this most likely resulted from forceful twisting of the hip and/or pulling of the left leg. In the case of the lower end of the thigh bone the most likely mechanism was twisting and/or sideways bending of the left knee, and/or sharp pulling of the left calf.

F. Medical Evidence: Force Required

72. This is a subject which can only be introduced within this section. I will return to the subject when considering the relevance of bone fragility. For the time being I will set out the basic propositions as to force typically required to occasion fractures of this sort.

73. Dr Olsen [**E36-9**] confirms that in children with otherwise normal bones, fractures do not occur spontaneously. The concept of spontaneous fractures was elsewhere described in the evidence as being fractures which occur without a history of handling outside normal bands. Further in children such as Y, who are pre-ambulatory, fractures will not be self-inflicted (e.g., by falls or self-occasioned accidents). I am advised the general view is that rib fractures require more than normal handling and instead require substantial force. In considering the sort of activity that might occasion a fracture my attention is drawn to the potential for 'vigorous'

resuscitation to lead to rib fractures and it is suggested that this is a good indicator of the minimum level of magnitude of force required to cause a rib fracture. Clinically this amounts to a compression of the chest by about 1/3. In general Dr Olsen considers that fractures do not arise on normal handling when children have normal bones, and that excessive force is required to occasion the same. When comparing metaphyseal and shaft fractures both likely require force outside of ordinary handling, but shaft fractures likely require higher forces than required for metaphyseal fractures.

74. In his written evidence Dr Michie generally speaks of inappropriate forces being required to cause the fractures under consideration. He agrees with Dr Olsen as to a higher magnitude of force being expected to occasion a long bone (shaft) fracture. In his written evidence Dr Michie placed the forces over that of rough handling and suggested a likelihood of inflicted harm [**E18**].

75. The essence of this evidence, which was in this regard uncontroversial, was that non-mobile children with normal bones do not suffer fractures spontaneously and that such fractures require a level of force which is excessive and beyond normal handling levels, with long bones in particular requiring higher levels of excessive force. It is pertinent to pause to note that the case has moved on to consider how this might change in a case in which a child has, or may have, bone fragility and therefore abnormal bone strength. As I have made clear I will return to this below.

76. I should also note the expert evidence of Dr Olsen as to the distinction that should be drawn in the case of the re-fracture. It is accepted this might arise on normal handling given the pre-existing fragility arising from the prior fracture. There is broad consensus in this regard and no specific finding is sought with respect to the re-fracture itself.

G. Medical Evidence: Pain response

77. Dr Michie explained in his written report [**E18-19**] that fractures on long bones can cause episodes of intense pain. Rib fractures are also likely to lead to pain on breathing and on movement and crying as the lungs inflate and deflate and the rib cage moves. In general, a carer would be expected to be concerned as to the emotional state of a child with fractures such as these. However, children are highly variable in their pain response and any pain response can be mollified by feeding, suckling or provision of a dummy.

H. Medical Evidence: Biochemical explanation

78. Dr Olsen essentially deferred to Dr Michie on biomedical explanations which suggest bone fragility and an underlying tendency to bone fractures. Dr Irving was not relevant to this issue.

79. The evidence in the case ultimately focused on the issue of Metabolic Bone Disease of Prematurity (“MBDP”). This is a condition related to bone demineralisation. Other than this Dr Michie was of the view there were no features in the evidence which suggested an alternative biochemical explanation for the fractures.

80. By the conclusion of the evidence, it was agreed that Y was experiencing MBDP. Within his written evidence, Dr Olsen had been somewhat equivocal on the issue. He noted evidence of bone demineralisation (suggestive of MBDP) in a May scan, but this was balanced by an otherwise normal scan in August 2021. The difficulty with drawing too much from the later scan was due to the fact that a level of significant bone mineralisation could co-exist with 'normal' scans. In the course of the hearing various % levels of demineralisation consistent with an otherwise 'normal' scan were suggested to Dr Olsen, but he was not willing to commit to a figure. In any event having subsequently reviewed a range of other x-rays Dr Olsen formed a reasonably firm conclusion that Y had been suffering with MBDP in April-May of 2021.

81. Both Dr Olsen and Michie agreed that whilst a linear relationship could not be plotted between levels of demineralisation and fragility there was a well understood relationship between demineralisation and fragility. Furthermore, prior to seeing the range of scans, Dr Olsen expressed the opinion that the simple number of fractures called for a broader investigation:

> *I will however say that a great number of fractures may in itself be a sign of bone fragility. It should also be noted that a chest x-ray taken 8 May 2021 may suggest that there was some underlying metabolic bone disease (of prematurity), but that the same had resolved by mid-August 2021. It is my opinion that these two observations underscore the importance of excluding any possibility of bone fragility not evident radiologically.* [**E33 §6.10**]

My understanding is that the later observations, based on additional scans and the confident determination of MBDP, fulfilled the earlier concern of a need for clarity.

82. The implications for the case was the potential for normal handling to be associated with fractures. Referring to research and experience Dr Olsen noted the potential for 'spontaneous' fractures. As noted above these are not fractures without **any** force, but rather fractures without a history of handling which would normally be expected to cause fractures. Dr Olsen was though mindful of research which suggested such circumstances were not found to be associated with the number of fractures in this case. Dr Olsen was not saying the research established a ceiling for such fractures, but he remained mindful of the high number of fractures experienced by Y.

83. Dr Michie was able to confirm evidence of normal blood chemistry by mid-June 2021, but accepted that this chemistry, whilst suggestive of normal bone levels, was as with the scans capable of co-existing with ongoing demineralisation.

84. Both experts accepted one could not identify an end point at which mineralisation returned to normal or acceptable levels. Absent a scanning process, which was not used in this case and understandably so at the relevant time, one might reasonably assume a return to normality at some point, but not any given date within the period of interest. As such there was the potential for Y to continue to exhibit continued bone demineralisation during the fracture windows under consideration. Furthermore, the parents suggested the same would hold during those periods where fractures may have arisen, but not have been evidenced due to lack of scanning. Dr Michie did though draw attention to the relevance of continued fracturing or a lack of the same as evidence of a return to normal mineralisation or alternatively mineralisation at a level where the risk of fracturing was removed.

85. The evidence did not suggest a pain result would be affected by the presence of MBDP (Dr Michie) or that the mechanisms required (see above) would fundamentally change. The point was that the force associated with the same may not be required to be at the level previously discussed. Dr Michie when questioned observed that ordinary processes like changing would impact on the sites in question leading to the expression of pain on a regular basis. However, he was wary as to how far he could go as to the obviousness of the same to a carer given the ability for individuals to perceive matters in different ways and for there to be a band of responses. However, he felt an experienced parent should notice.

86. Whilst Dr Olsen had drawn attention to the number of fractures, Dr Michie similarly referenced the same, but also expressed the view that fractures of the long bones would be a less likely consequence of MBDP.

87. Both experts expressed the benefits that would have been obtained from an experts' meeting. It was clear to me that Dr Olsen ultimately deferred to the overview of the paediatrician and accepted there was a bluntness to the radiological evidence. It was valuable evidence, but its limitations for these purposes needed to be understood. However, Dr Michie shared this view commenting that he would have liked to have discussed these issues with the radiologist. I do though note Dr Olsen took some comfort in the availability of the intense examination of the evidence found within the transcript of the first trial process. He accepted this addressed some of his points as to the failure to have an experts' meeting.

88. In examination Dr Olsen was of the view the nature of the abnormality strongly suggested MBDP, but that this was a diagnosis that needed to be made by a paediatrician. By the end of Dr Michie's evidence I understood him to be agreeing with Dr Olsen, albeit subject to the shared caveats, as to not knowing when this ended.

89. In summary, the evidence made clear a developing appreciation of Y as a MBDP affected child. This understanding was shaped in the knowledge that there were a number of unknowns or uncertainties as to the exact impact of the same on Y. In any event this condition raised the need to consider enhanced fragility, but in the light of the fact of numerous fractures, the location of the fractures and the multiple and different mechanisms required for the fractures.

90. Finally, there was evidence from Dr Olsen suggestive of a peak in bone demineralisation (MBDP) at around 2-3 months post birth. My understanding was that this related to the prematurity of the child and this period being related to the stage in in-utero development when bone mineralisation was laid down. In essence Dr Olsen was indicating that this would likely have been the point of likely greatest fragility. He was not saying that these were the maximum parameters of fragility. As such this evidence was informative, but is unlikely to be conclusive on its own.

I. Medical Evidence: Genetic Evidence

91. Dr Olsen expressed the need for a thorough review, but was clear that whilst he might suggest recourse to genetic advice he could offer no direct guidance on this subject. He did though give evidence on which the geneticist came to rely.

*Regarding medical conditions that may be associated with fragile bones, I can only comment on the presence of any radiological sign of subjectively low bone density, and of any in-born, metabolic (e.g., nutritional deficiency), cancerous, or infectious disease. In my opinion, there is no subjective evidence of low bone density, **no evidence of abnormal shape or size of any bone, and no evidence of any focal bone abnormality** apart from the fractures on the x-ray images from August of 2021 (**my emphasis**)* [**E33 §6.9**]

He also expressed the opinion that when considering proposed alternatives, a genetic explanation would (subject to the views of Dr Irving) be a more likely explanation than a metabolic explanation. This flowed from research (referred to above) and the high number of fractures experiences by Y.

92. Dr Michie was expected to and did offer some views on the prospects of genetic disorder or abnormality as a diagnostic explanation in Y's case. Ultimately and properly, he deferred to Dr Irving, but he was able to consider and reject the likelihood of various known conditions whilst accepting there were always '*unknown unknowns*' when considering medical understanding. His rejection of specific conditions related to the physiological features typically associated with the same and the absence of this in Y's case. He also made the point that were the fractures under consideration a consequence of genetic abnormality then one might reasonably be expecting to see further fractures arising outside of the period of consideration and particularly in more recent times as Y has become mobile, and his skeletal frame is required to absorb much higher natural forces associated with mobility. The absence of reported further fractures is a telling piece of evidence. In the case of Osteogenesis Imperfecta ("OI") for instance one tends to normally detect this condition at the point when children start to walk, and fractures are experienced to the spine and lower limbs. Dr Michie recognised the role of family history in any consideration of genetic abnormality but noted this can be inherently problematic. The evidence he received as to some bone related issues for elder members of the family (osteopenia) did not cause him to view Y's case as genetic in origin. When examined he told me: "*There are no signs biomedically or radiologically of the footprints of such conditions".*

93. Dr Irving (geneticist) was asked to report on the following instructions:

1. *Please consider whether there is any underlying condition, which would explain or help account for the number of fractures suffered.*
2. *Please consider whether there is any history within the extended family, which, in the context of the fractures, would justify further clinical exploration and if so, please provide recommendations in this regard.* [**E56**]

94. In her written evidence she made clear she had not examined Y, nor had she seen photographs of him. Rather, she had interpreted the findings of a number of other clinicians. Specifically, she had regard to: (i) family history; (ii) clinical history; and (iii) investigations including radiological assessment. Insofar as family history was concerned, there was nothing to suggest Y had a material genetic abnormality, but it was acknowledged that this may be the case for those with established genetic conditions and so this was viewed as only part of the assessment. Turning to the clinical assessment there was nothing to suggest a material genetic condition. Blood tests, bone profile testing and other observable clinical features did not suggest a genetic condition. Dr Irving considered both the documents deriving from Dr Olsen and Dr Johnson. Neither identified abnormal bone modelling or obvious reduced bone mineral

density around the time of the fractures. There were no radiological features of a genetic predisposition to fractures, such as OI, either.

95. The expert recognised limitations to her assessment. She had not examined Y, nor had she had a chance to examine the wider family history. But she was not convinced this would add anything additional as examination of a young child often does not provide meaningful insights. She expressed an interest in being informed as to whether there had been further fractures since discharge and as to any updated relevant information such as around his development. In conclusion she had found no indicators of a genetic condition and did not suggest any further testing was warranted.

96. During examination Dr Olsen offered comments as to various factors that might point to genetic conditions whilst making clear he could only take this so far. In summary, he did not identify anything indicative of a genetic condition. Dr Michie expressed the view at the end of **§92** above. Dr Irving was examined and confirmed she did not identify an underlying genetic condition. She accepted the presence of MBDP, but this was for the other experts and is a biochemical not genetic condition.

97. She was questioned as to her position on further testing. Her evidence was that she formulated a view as to the benefit of testing based on a combination of the family history/clinical evidence and investigations undertaken as noted above. Where these raised a concern for a genetic condition then one might be warranted. However, here these aspects did not suggest a genetic condition and so to test would not have been based on a clinical assessment of the available evidence. In a summarised form tests are undertaken when necessary and appropriate. For her the gap in scans (May to August 2021) did not have material relevance. Further questioned she confirmed that testing cannot be done to exclude something and can only be confirmatory. In substance that is why she looks for a basis in the available evidence with the test then confirming the same. Standing alone a test has limited value.

98. I understood the expert to say that tests undertaken without objective clinical justification might indeed throw up genetic abnormalities. In reality every individual has a highly complex genetic make-up and as such variation is not surprising. However, in cases of genetic abnormality and multiple fractures one is considering cases of severe genetic abnormality and these cases present clinically with bone bowing and other features. These were not present in the case of Y. To form this view Dr Irving relies on radiological and other clinical evidence despite not being an expert in those fields. This is in the very nature of her own expertise. A similar point was made as to blue sclerae of the eye. This is often not present even when a genetic condition is present, <u>but</u> it is more commonly present in severe cases.

99. Dr Irving explained the tests that are undertaken. In reality the testing process itself is simple and is invasive to only a low level. However, the results of such testing can be problematic. One either finds nothing on testing which doesn't change our understanding (and does not in fact rule out a genetic condition per se) or finds something which is clearly damaging. It will have been seen before and is known to be associated with identified harmful consequences. One will typically have a clinical picture which fits with this and the test is confirmatory. The

third option is finding something and not knowing what it means. Testing often reveals variations which cannot be understood and the significance of which cannot be identified. This is much more common where there have been no clinical findings to support testing. The result would tell us there is something but not as to whether it is associated with the likelihood of developing symptoms.

100. In Dr Irving's opinion '*there is no genetic condition in this little boy*'. She then used the phrase '*variability of expression*' meaning that different people could express the effect of a genetic condition in different ways and moreover the same person could express the effect in different ways at different points of time. However, the condition would not change and if Y had a condition leading to heightened bone fragility and fracturing then he would continue to have the condition and one would expect him to experience further fracturing particularly as he obtained greater independent mobility.

101. Finally, Dr Irving was questioned as to an observation that testing might produce a result that would be impossible to explain and would make any understanding more problematic. It was suggested this might be the very thing the Court might want or need to know. Counsel for the father expands this point within final submissions at **§30** describing the expert's approach as '*extremely worrying*'. Yet it was clear to me she was not seeking to keep something material from the Court, but was rather seeking to highlight that such an outcome would not amount to relevant evidence of anything probative to the Court's understanding of the issues in the case.

J. Medical Evidence: 'Unknowns'

102. All the experts agreed there were unknowns in the case. Some of these arise out of the classic exposition that medical science does not know everything. However, other features are said to derive from the absence of scans or as noted above the absence of genetic testing. Further aspects relate to the quality of evidence. In particular, the ability to observe bone on early scans due to the low level of mineralisation. I do not consider it useful to develop this aspect of the case - which is not so much evidence as non-evidence - within this section. I will return to this below.

K. Medical Evidence: Parental Explanations

103. Consideration was given to a sling that was used by the mother and whether this might have been associated with fractures. The experts ruled this out as a likely cause of the fracturing in general, but agreed that it, along with a variety of other normal handling features, might have caused the re-fracture.

104. A significant area of investigation related to the parental evidence of both witnessing and being informed about resuscitation procedures undertaken in respect of Y whilst in hospital. This evidence is best found in the father's third statement where he details what took place [**C255**]. The first incident is a reported resuscitation which took place at the HUH in April 2021. Both parents reported experiencing this process first-hand while at the hospital. The second

incident was in June 2021, but on this occasion the report was relayed via the telephone to the mother who passed the news onto the father.

105. The experts (Olsen and Michie) agree and accept that a resuscitation process can be associated with rib fracturing in young children. As such there is the potential for either incident to lead to fracturing in principle. The experts though expressed some doubt as to the description of the process which was witnessed, which did not fit with a conventional resuscitation approach. Dr Michie felt what was being described fell outside of any practice typically used in this jurisdiction. Furthermore, Dr Olsen indicated that the fractures in this case were not where one would expect them to be were they resuscitation associated and that the dating of an April incident could not be associated with the fractures under consideration in any event. Dr Michie drew attention to the close proximity of the reported resuscitation process and the transfer to the NWP hospital. He considered it was most unlikely the child would have been transferred in such circumstances having just experienced a significant deterioration in health necessitating an emergency procedure of this sort. Likewise, it would have been unusual for the child to be discharged from hospital in June shortly after an episode of resuscitation. Finally, Dr Michie told me there appears to be no record of a resuscitation process undertaken whilst in hospital at any point. He did distinguish between a classic emergency resuscitation and assisted breathing where the there is a perceived drop in respiration and medical staff may support the child.

106. It was also suggested Anita Patel may have inadvertently caused a fracture when manipulating Y on 13 August 2021 [**J4-5**]. As part of her normal assessment, she took a video of Y. Dr Michie felt the video suggested Y was avoiding moving his right leg and that this supported the suggestion that the re-fracture had already been experienced at that time. Given his presentation in the video it was unlikely the re-fracture had just occurred. Ms Patel told me that when Y was moved, he became unsettled and the notes on the day record him as being '*irritable unless held by his mother*'. She had limited recall of the session, but agreed that whilst she was not undertaking an assessment with respect to fractures, she would have noticed anything of concern linked to the same, whether the child's response or some clinical presentation. At no point did she accept any physical contact outside of the normal process of assessment of a child in Y's position. She was referred to her previous evidence and accepted that would have been at a time when her recollection was better. In that evidence [**L22**] she accepted some normal handling of Y, but no therapeutic handling (i.e., physiotherapy). In fact, the expert explained that premature babies received therapy, but it is observational rather than physical in the manner normally understood by the language of physiotherapy. She had been concerned about his general lack of movement and being unsettled and the mother had told her he was likely hungry. Dr Nicholl saw Y after he left Ms Patel. His evidence does not change my understanding of this particular point. In her evidence when examined the mother indicated she was sure Ms Patel had moved Y's legs up to his chest when sitting him between her legs. I note in the earlier hearing Ms Patel accepted this might be possible.

107. There was also a generalised point made by the mother as to the care received by Y when in hospital. She was asked about the care Y had received and told me that '*the staff were not so*

good, they held him in a strange way'. This point was not developed before me and I do not understand there to be a specific complaint as to the care received.

108. I would finally note evidence from professionals such as Ms Tyndale and Dr Hamoud (and others) who engaged with Y, whether directly or indirectly, but did not sense or identify any concerning physical or emotional features in his presentation.

General Overview: The wide canvas

109. I do not overlook the broad evidence obtained from a number of professionals as to the mother's (in particular) open engagement with each professional. No professional expressed criticism of the mother's care, her warmth towards her children or her engagement with them during visits or appointments. Whilst there were some missed appointments these did not necessarily signify anything amiss. It was agreed the mother had not shielded Y as if to hide something from a professional and had appeared to engage with learning and applying the skills required with respect to the use of the oxygen tank. The overarching sense was, and in a way the normal response one would expect from an interested parent. Professionals also commented on the mother's interaction with X when he was present and the mother showing patience and an appropriate response to an at times understandably disruptive child. I have the BWF which lends support to this.

110. I was taken to a range of visual evidence detailing family life within the parents' home. This included a video tour of their home which suggested a clean and appropriate place for the children to live. There was nothing of concern and it appeared appropriately child focused in areas where the children slept and played. I was taken to a short video of photographs displayed in the home. These were typical (not a criticism) photos of family life in which the children and parents were variously seen in entirely natural and warm settings. Objectively they point to much loved children. I also saw a photograph of X's 4th birthday and a video of his upset when being separated from his father at the end of contact.

111. Within submissions I am asked to consider an overview of family life and the dynamics therein by reference to the NSPCC Common Assessment Framework and the Patient UK Guidance for Health Professionals. Counsel for the father makes the point that '*almost all of the protective factors and almost none of the risk factors, save for allegations of domestic abuse which we address below, are present in this case'.*

112. Counsel for the mother provides an appropriately detailed overview of these positive features within submissions. It is neither practical nor necessary to fully summarise these points within this section. I consider **§109** above provides a sensible overview of these points, but for the avoidance of doubt I have read these points with care and note the following points:

i) Stripped of the allegation of domestic violence an entirely positive parental relationship both in the history, in the relevant professional medical meetings when both parents were present and subsequent to August 2021 **[§§51-57**].
ii) Evidence of a patient and attentive mother and engaged parents in contact **[§§58-59**].

iii) Evidence of Y being visible and the mother being co-operative and appropriate at appointments **[§§63-99 and 104-106**].

iv) The mother's choice to take Y to hospital and the knowledge that, but for this presentation the fractures would likely have not been identified **[§§107+].**

Discussion

113. I will now provide my analysis and resolve the fundamental disputes on the evidence. In doing so I by necessity provide a linear explanation. However, prior to reducing my views to the page I have considered and cross-referenced the various features and issues. In doing so I have ensured I have not allowed myself to be pushed inappropriately down a false path fitting subsequent answers to conclusions I have already drawn.

Evidence as to fractures

114. Dr Olsen was not challenged as to fractures identified. I accept this evidence and find that Y had each of the fractures identified by Dr Olsen, but what can I make of the suggestion of possible additional fractures?

115. In my assessment the key issue relates to Dr Johnson's observations raising the possibility of a healing fracture of both humeri and clavicle and which could not exclude rib fractures [**§61** above]. In considering this point the balance of probability remains applicable. I have not heard from Dr Johnson so cannot say what he would say were the point raised with him. However, Dr Olsen dealt with these points and told me the top diagnosis for the periosteal thickening would be MBDP, but in reality, it could signify anything and is very general and non-specific. He added that given no fractures were actually seen it would be a stretch to say this was a healing fracture. With regard to the suggested clavicle and rib fractures, Dr Olsen agreed that in the acute stage identification is much harder and particularly when considering the ribs. Here a combination of the density of the lungs and the level of bone demineralisation meant it was difficult to trace the ribs and thus identify any irregularities. It is in the healing process that evidence of fractures becomes clearer. Subsequent scans did not show healing fractures in this regard other than with respect to the fractures under direct consideration.

116. Dr Olsen also provided the distinction between his role (as expert) and that of Dr Johnson (as reviewing clinician) as noted above. Whilst this distinction was questioned, it was one I found to be sensible. Dr Johnson was plainly involved to guide the treating team in their investigations. This was his role. He was not subject to any Part 25 obligation and was in my evaluation expected to draw attention to anything of potential significance, but this is not the same as advising the Court as to the presence of fractures by reference to legal standards. If Dr Olsen had provided a report in which he opined as to fractures using the former approach, then he would have been duly and appropriately criticised. I accept his distinction.

117. I am then left with fractures that may have been present, but have not been identified due to an absence of radiological scanning. This touches upon the period prior to initial discharge and the period subsequent to removal from the parents. I am also asked to reflect on the absence of a second full skeletal survey later than the end of August 2021 as a follow up to the scans

undertaken on admission. The evidence told me there can be differences of approach to second skeletal scans, but my experts agreed a later skeletal survey would have been preferable.

118. Taken on its own I am struggling to see how far the point under consideration can be taken. Plainly the absence of evidence may in some circumstances be probative of an event. There are occasions when a Court expects supporting evidence and can reach a contrary conclusion when the same is not forthcoming. However, here no scan was taken and so one must be left in a position of broad neutrality on the question. This is not a case in which the gap flows from a conscious decision on the part of one of the key actors to obtain information. The evidence simply does not and has never existed. In my assessment the absence of proof that something did not occur is not of itself probative that something did in fact happen.

119. In reaching this conclusion I have borne in mind the information from Dr Johnson. For my part I read his observations as to rib fractures to be equally neutral in tenor. He is making clear he cannot exclude such fractures for the reason given by Dr Olsen – that there is insufficient mineralisation and visibility of the bone to reach any conclusion.

120. I bear in mind the evidence I will turn to as to MBDP, but even this does not raise a *prima facia* likelihood of undisclosed fractures. It rather raises a speculative possibility and that alone, but there is countervailing evidence which points otherwise as follows. First, there is the absence of healing fractures on both later and contemporary scans. As Dr Olsen told me there is a timeline for healing and this can be up to 12 months. Yet no such older fractures were identified when the scans were obtained in August 2021. This was at a point only 6 months post birth and the evidence of Dr Olsen makes clear that whilst an earlier fracture may no longer have been apparent it would often be expected to be visible in some form. Further as one gets closer to the point of August 2021, so the likelihood increases. Here no additional fractures were noted which could clinically be placed within the pre-hospital discharge phase which ended on 16 June 2021. This is an important feature in considering this point. Second, there are no reports of the child presenting with behaviour indicative of a fracture during the pre-discharge phase. Again, this is not conclusive, and patterns of behaviour may be unpredictable and to some extent might be missed, but this was a premature child under a high level of medical supervision of a highly specialist nature. Unusual patterns of behaviour representing fractures would on balance have likely been noted and investigated. Third, with respect to post-removal fractures, I agree there would likely be a heightened level of oversight on the part of those caring for the child. Again, there are no reports. None of these features are determinative, but in conjunction these features point against the argument of undisclosed fractures whether pre-discharge or post-removal. I bear in mind the submission that Y's bones may have been recovering (if the explanation is biochemical) and that therefore at some point post re-admission they would have reached a stage of sufficient strength to rule out further fracture. However, this point fits with, rather than opposes, my views set out above.

121. **In summary, I am satisfied to a high level of confidence far beyond the balance of probability that Y suffered the fractures identified by Dr Olsen. I am satisfied on balance that no other fractures have been identified. I consider entirely speculative the suggestion that he**

suffered fractures either prior to discharge (16 June) or post removal (16 August). Whilst I cannot be sure this was not the case the evidence persuades me this suggestion falls materially below the balance of probabilities having regard to the factors set out above.

Timing of fractures

122. I accept the evidence of Dr Olsen in this regard. He was clear as to there being two windows and that not all the fractures could have arisen at the same time. The rationale for this was clear and reliable. Dr Olsen is a balanced and careful expert witness who expressed his opinions with clarity and caution. As such his conclusions justify the most careful consideration before being rejected. I find no basis for doing so in this regard.

123. I am persuaded we have two sets of fractures. A first set which likely fall within a period of at least ½ a month and up to 1.5, but possibly no more than 2 months prior to discovery and a second set which fall between 1-1.5 weeks prior to discovery. There is a potential for a variation in this regard of days (perhaps a couple) not weeks. I have identified the relevant fractures falling into each group earlier in this judgment. As to the individual fractures and their respective point of occurrence, I accept this cannot be further clarified on a radiological basis.

124. Having considered the evidence, I am satisfied Y did not suffer resuscitation related fractures whilst in hospital. It seems very clear that whatever took place in hospital in April 2021 could not have caused any of these fractures given the dating evidence. Dr Olsen went as far as to suggest this was '*virtually impossible*'. It seems likely the parents witnessed some form of respiratory procedure. I do not entirely discount their evidence. However, I judge a combination of the likely emotion of the moment (this would have been a frightening experience for any parent) and the search for an answer to the fractures has caused a degree of inadvertent exaggeration on their behalf and modelling of the experience to the current facts. I accept the evidence of Drs. Michie and Olsen that the description of the process used is not consistent with training in this jurisdiction. Given the specialist team around Y at the time a non-conventional approach would appear most unlikely. I do though note that whatever took place it did not leave evidence of fractures (healing or substantially healed) four months later. Dr Olsen indicated that remnants of such fractures remain for at least 2-4 months. Further, consequent upon the same, Y did not demonstrate behaviour patterns causing recorded concern as to fractures.

125. **This means there may be a wider dating range with the earlier fractures occurring at about 16 June 2021, but no earlier, and the later fractures on 10 August 2021 and a narrow dating range with the earlier fractures as late as 1-2 August 2021 and the earlier fractures around 5 August 2022. As noted there is no intersection. I note all fractures therefore occurred in the period between discharge in June 2021 and re-admission in August 2021. I consider it most unlikely the earlier fractures coincidentally occurred on the very day of discharge from hospital on 16 June 2021. It is at the very boundaries of the time period and is likely to be a day with a high level of professional/parent interaction. It is inherently implausible that something material happened on this day. Nothing of note is reported. Further this is at the**

very boundaries of the period suggested by Dr Olsen and I understood his principled position to be the narrower period going back no more than 1.5 months.

Biochemical explanation other than MBDP

126. This was a case in which no obvious (alternative to MBDP) biochemical explanation was suggested as being applicable. There was no relevant questioning of Dr Michie in this regard. I heard some limited evidence as to blood results and preventative treatment received by Y to rebalance his body chemistry. I bear in mind reference in the evidence to EDS; OI; Marfan's and Menke's, but I consider these are matters for the geneticist in any event. Certainly, so far as Dr Michie was concerned there was no acceptance of features or results which would support such a conclusion.

127. **I am satisfied on balance that Y did not suffer from a biochemical (non-genetic) condition which predisposed him to fractures as a result of weakened bones or other skeletal abnormality. This is with a significant caveat as to the relevance of MBDP to this case – to which I now turn.**

MBDP

128. There is significant consensus at both an expert and party level on this subject. This permits me to provide a focused summary of the evidence, which I accept, for the purposes of this judgment. Where appropriate I will add relevant comment:

1. MBDP is a condition which, given its title, unsurprisingly impacts on children born prematurely such as Y.
2. In simple terms this arises because the prenatal foetus would be laying down the bone mineralisation in the final third trimester of pregnancy and a premature child such as Y is born into the world prior to this happening.
3. The peak of such demineralisation for a child would normally be around month 2-3 post-birth.
4. However, such a child may well continue to experience bone demineralisation at a material level outside of this period. It is simply the peak period of demineralisation.
5. Bone demineralisation can be observed on radiological scans and assessed in more detail using more complex scanning equipment. However, the latter is not routinely used and was not used in the case of Y. It is now too late to carry out such a scan and this would have no purpose.
6. However, ordinary scans cannot confidently tell us when bone mineralisation returns to a normal or acceptable level (presumably 100% or an approximation to the same).
7. There is a level of demineralisation which is simply not visible on scanning. Estimates of this have varied widely and I was told this might be in the range of 20-40% or even up to 50% by counsel in the case. My expert was unwilling to commit to a figure as there are too many variables in play to provide a meaningful figure which can be applied to the facts of any case. However, there is a material level of demineralisation (whatever the %) which will not be picked up by scans.
8. Blood tests can tell us when the body appears to have normal mineralisation and when the brain believes the system is in a normal state however even these results can co-exist with continuing demineralisation.
9. Whilst mineralisation does recover over time and likely does so gradually the rate of recovery and the end of point of recovery cannot be plotted or estimated other than by using the more specialist scanning devices referred to above.

On the evidence Y was exhibiting the signs of MBDP in April/May 2021. In April this was very clear. The May scan was less clear, but taken with the April scans is suggestive of MBDP being present. This is not surprising and both Dr Olsen and Michie have reached a diagnosis that Y was suffering from MBDP at this point in time. I accept this shared opinion.

In the August 2021 scan Y's bones appeared normal without evidence of continuing MBDP. His blood results showed a normal result as of 14 June 2021 prior to discharge from hospital [Dr Michie: J216]. There are no scans between 8 May 2021 and 16 August 2021. Both experts agree this does not rule out MBDP as of August 2021, but there is also no positive evidence of the same at this point or during this period in time.

10. MBDP reduces bone mineralisation, and this can reduce bone strength and increase fragility. There is an association between MBDP and increased fragility.
11. However, the relationship whilst existing is not linear and one cannot calculate bone strength based upon the perceived level of demineralisation. For example, a bone which appears half as mineralised by comparison with another bone will not necessarily be half as strong.
12. There is evidence of 'spontaneous fractures' arising and particularly in the case of premature children. In this context spontaneous does not mean without an external force, but rather without an external force which would normally be expected to be required to cause a fracture. So normal handling may be posited to cause a 'spontaneous fracture'.

It is therefore likely that for at least the period around April-May 2021 that Y was suffering from MBDP and likely had bone fragility greater than would be expected in the case of a child with normal bones. The point at which he recovered from the same and returned to a point at which his bones were not comparatively fragile cannot be said, but it is likely over a period he recovered in a gradual way. It is likely he is now (so far as MBDP) is concerned back to normal. The level of actual fragility (if at all) cannot be calculated although on balance there is likely to have been diminished strength. It cannot be said as to whether any diminution left Y susceptible to fracturing on normal handling or alternatively handling below excessively forceful handling. However, the prospects of the same increased as a result of the condition.

13. There is evidence of associated fractures including multiple rib fractures on a spontaneous basis.
14. Metaphyseal fractures tend to require less force than long bone fractures.
15. Long bone fractures are felt to require a heightened level of force to cause fractures.

129. It seems to me that these are the building blocks relevant to MBDP and Y that I am called to apply within my assessment of the evidence. On the basis of these fundamental building blocks, I am satisfied that Y experienced the fractures under consideration whilst in the care of his parents. I am satisfied there were at least two 'events' during which the fractures were experienced. The key question is as to whether the explanatory feature in this case is the presence of MBDP and whether this led to a situation in which otherwise normal handling led to unexpected fractures.

130. I found Dr Olsen to be very helpful expert witness. His evidence was appropriately conditioned by the boundaries of his expertise, was measured and informative. I have no hesitation in accepting his evidence.

131. Dr Michie was subject to some criticism as to the presentation of his evidence. He was open to accepting many of the points raised, but this did not cause me to reject his evidence and I feel the suggestion that his report was not fit for purpose to be somewhat extreme. I have some sympathy with the situation Dr Michie was put in. He should have had Dr Olsen's report, but instead had the report of Dr Johnson (an expert who was rightly held in very high esteem by all counsel in the case). He felt he was required to report and made an error in referencing Dr Olsen when he was meaning to reference Dr Johnson, but in my assessment he was caught in a position where he was being asked to report before he had all the necessary material. Yes, he should have held back to an extent, but there is no question he has reappraised the evidence in a fair and professional fashion. My sense of his evidence was that he was left somewhat battered by the early criticism and was willing to accept points which were less merited. An example is the criticism made that he had failed to refer to the observations of Dr Johnson as to additional fractures. He was told he had received this and agreed he was in error not to reference the same. In a rather quiet way, it was later accepted that in fact he had not had this document at the relevant time and had therefore not made the error that he had both been chided for and accepted being made. Expert witnesses are human and harsh criticism can leave them uncertain. The danger is that meaningful evidence may be lost in the consequential fall-out. In the ultimate analysis I found Dr Michie a helpful and fair witness.

Genetic explanation

132. I found the evidence of Dr Irving clear and impressive. I do not share the criticisms expressed on behalf of the parents. Dr Irving was not commissioned to carry out genetic testing, but was asked to advise, amongst other things, as to the need for the same. I found her explanation for there being no benefit cogent and conclusive. Her evidence was clear as to there being no identifiable genetic concern. This conclusion was importantly a function of family history, clinical evidence and investigations including radiological surveys. This is the normal process under which she would apply her clinical expertise. It is not part of her clinical experience to seek answers from testing without justification. She explained and I accept that none of these factors were suggestive of a genetic foundation to the fractures.

133. I observe the criticism - in submissions - of Dr Irving as to a failure to accept radiological evidence as a blunt instrument. I consider this criticism is misconceived. As she explained she would look to the available scans to identify characteristics associated with genetic conditions and susceptibility to bone fractures. Dr Olsen's evidence in this regard was available, relevant and helpful. The fact that elsewhere the radiological evidence had limitations does not mean it is limited for the purposes of this part of the assessment. In any event it is as explained only part of the genetic assessment. This can be seen in the evidence of Dr Irving as to family history. This did not point to a genetic condition, but invariably comes with uncertainties and so requires consideration of the other elements of the assessment.

134. I simply do not share the concern as to her observation that in the absence of a justification for testing a later found anomaly would simply confuse the situation. Her evidence was in this regard clear. Genetic variation is not an unusual state of affairs given the quantum of genetic information and individual variability. In these circumstances where there is no other supporting evidence a finding of an anomaly alone would simply raise questions which cannot be answered. I accept this creates an '*unknown unknown*', but I consider in isolation this is of rather limited value to my analysis.

135. In this regard I was referred on a number of occasions to the decision of HHJ Jack in Re P [2020] EWFC 71 and the evidence of Professor Saggar in that case. It is noteworthy that on testing two anomalies were discovered in relation to the child in that case. My experts were referenced to this case and questioned as to the failure to test Y. For my part I consider there are real issues in attempting to carry out a form of comparative analysis between cases where the relevant expert did not give evidence before me and I do not have access to all the evidence. However, this is perhaps unnecessary when I consider the evidence of Dr Olsen (who appeared in that case) that there were many differences between the two cases. Having read the judgment, I agree. It is particularly noteworthy that although Dr Saggar did find two anomalies in that case it does not appear this finding was particularly relevant to his concerns in the case. Rather it was the radiological evidence of there being something peculiarly unusual in the radiological results that caused him to pause and reflect. It was this that fed his position on '*unknown unknown*' rather than the two identified anomalies. Elsewhere, and cross referencing, I am unsure there is in fact so much disagreement between the approaches of Dr Irving before me and Professor Saggar before HHJ Jack. These observations should not be understood to be a review of Dr Saggar as an expert or of the decision in Re P. As explained above, I am not in a position to undertake such a task and it is not necessary for me to do so to resolve this case.

136. I have weighed up this evidence and the criticisms of the same. I accept the conclusion of Dr Irving that '*there is no genetic condition in this little boy*'. I consider it a particularly telling point that there have been no reports of further issues despite Y's increasing mobility. It is intuitively and clinically logical that as mobility develops, and forces increase, that an enduringly fragile skeletal frame will show the signs of this fragility. On any assessment this has not been the case. Might there be genetic unknowns? In a sense, and on the evidence of Dr Irving, this is bound to be the case absent testing and to a material extent even after testing. However, the better question is as to whether there is a likelihood of genetic unknowns with probative relevance to the question of fractures in this case. I find on balance this is not the case. In submissions it is said Dr Michie did not exclude Menke's Syndrome. However, this is a genetic condition and I do not recall the same being raised with Dr Irving. If it is said to be relevant then she was the relevant expert to question

An unknown aetiology?

137. On my assessment this is not a case which obviously calls for, or suggests, an answer is to be found in an unknown aetiology. Rather this is a case in which the answer is found following a thorough consideration of a known feature being the MBDP. It is not for the parents to prove MBDP as an explanation, but for the applicant to disprove its relevance to the fractures under

consideration. In my assessment if the applicant fails then it is highly likely the answer will be found in the territory of MBDP. However, if the applicant succeeds in this task, then for reasons developed elsewhere in this judgment, it is most unlikely the alternative answer is an unknown aetiology. In my assessment this is not a case in which I cannot find the answer within the available evidence.

138. This is not a case in which the experts are identifying unusual features which cannot be explained, and which bring unknown cause into focus. In my assessment Dr Olsen called for a thorough investigation in the light of the multiple fractures. This investigation has identified the presence of MBDP, and its causative role needs to be considered. The investigation engaged the instruction of Dr Michie. His reporting process has not identified an alternative biochemical cause other than MBDP. Dr Irving has considered the potential for a genetic explanation and has rejected the same. I do not see a remaining and reasonable route map to a conclusion of unknown cause.

The wide canvas evidence

139. I must not lose sight of this aspect of the case. Many things are said on behalf of the parents that touch on their likely propensity to have harmed their child in the manner suggested by the fractures.

140. This is a case with no previous police involvement or criminal convictions. Neither parent is seen to have a mental health, substance or alcohol difficulty that might impact on their decision making and lead to problematic behaviour.

141. There is an older child, X. There is no record of social agency involvement in his life[4], and this suggests the parent's ability to meet his needs in an appropriate manner. This begs the question as to why this might change for Y? It is a reasonable presumption to expect the parent to apply their learning from X positively in Y's case.

142. The parents have a settled comfortable home. The father works hard, and it appears the parents have no real financial concerns that might unsettle their home environment.

143. Their family life appears objectively to be one in which family life is promoted and there is evidence of the children as valued parts of the family.

144. It was in the very nature of Y's prematurity that he would require greater professional engagement than X. The evidence from this engagement is entirely positive. The mother was felt to be open and engaged with Ys's care. When seen with either X or Y she appeared to be patient and in control. There were no red flags or warning signs in either her physical presentation or in her interaction with the medical professionals.

145. Albeit with some discrepancies medical appointments were kept and the child was visible on an appropriate and regular basis.

[4] See §14 above – a feature on which I attach no weight within this judgment

146. This is all evidence which would contrast with the suggestion of a home environment in which Y came to be harmed by his parents or one of them. Of course, I bear in mind the reality that children do on occasion come out of such homes with injuries which can only be traced to parents, but this reality does not diminish the positives on the facts of the case. It simply means the Court must take an appropriately rigorous approach to all the evidence before reaching conclusions.

147. This is of course a summary of the wide canvas points noted elsewhere in this judgment.

The allegations of domestic abuse

148. It is in this context that I am bound to resolve the dispute as to the allegations of domestic abuse. It seems unavoidable that such issue must bear on the otherwise positive canvas noted above. The allegations are either true, in which case they recast the home environment elsewhere described as entirely positive or are untrue, in which case a careful analysis is required to understand the motivations of the mother and whether the same is itself a factor which touches on the broader canvas.

149. I consider I first need to assess the explanation given by the parents as to why the allegation was made. I will have to ask myself as to whether the Applicant has disproved this account. If they have, then I will need to do my best to understand why the parents have collusively plotted to mislead the Court as to the reason for the complaint. I will need to determine whether this is to hide actual abuse; or whether in fact no abuse occurred (or has been significantly exaggerated) and the parents for some reason have chosen to give a false narrative in any event.

150. In assessing this evidence, I make clear I have fundamentally accepted the evidence of the investigating police as honest and genuine. It is clear there are errors in the reporting, but there is nothing in the criticisms made which suggest the officers were not doing their best to understand the case before them.

151. Separate criticism was made of an AA speaking officer. I did not hear from this officer, but I have to say I found the account of the mother implausible. In any event it is far from clear to me it had any material impact on the issues now under consideration.

152. I do not accept the parental case in this regard. I do so with a high level of confidence. Frankly I found the account inherently implausible, and I found it sat very uncomfortably with the other evidence given in the case. In reaching this conclusion I note the following points in particular:

    i. The account of the mother coincidentally meeting and forming a friendship with the father's ex-girlfriend without knowing the same is unlikely in the first instance. However, added to this is the puzzling reality that she at no point appears to have discussed this developing friendship with the father. If she had of, then it is likely there would have been some level of scrutiny as to who the individual was, given the common name 'M' used in both relationships. I find it inexplicable that the mother would form such a friendship and keep it from an otherwise loving partner. Keeping

the relationship from him would suggest a pre-existing dynamic in the relationship contrary to the parents' evidence. This might change when 'M' started to make problematic observations about the father, but not at the initial stages of the suggested friendship.

ii. The sense of the evidence is that this was in some way staged by 'M' in an attempt to gain revenge on the father or alternatively re-engage their relationship. Yet it is most unlikely 'M' would plot a plan towards getting the father back by putting in place a plan that does not simply separate him from the mother, but in fact places him at risk of prosecution and incarceration. If it is revenge then where is the basis for the same on the evidence. On the father's case he broke up with 'M' because she cheated on him not him on her. Further, when they met on a single occasion she expressed continued feelings for him. This is not a particularly rich seam on which to base a case of premeditated revenge some two years later as suggested by the parents.

iii. Perhaps most puzzling of all is the likelihood of the mother adopting the complaints raised by 'M' about the father without any real investigation of the same and in the knowledge that they were diametrically opposed to her experience of him as a partner. Why would she make allegations of violence against him based on an unevidenced history given by 'M' when her own experience of the father did not support such an allegation at all?

iv. Given the global evidence it is of course far more likely the mother would have raised all of this with the father before calling the police. It simply is beyond belief that she would adopt the views of this almost stranger over her own lived experience.

v. I bear in mind the suggestion of a sense of disquiet and unjustified worry that the father might be having an illicit relationship due to his absence from the home, but this is most unlikely to be sufficient foundation for a report to the police on the basis of allegations which are known to be untrue.

vi. I then consider the actual allegations made. Notwithstanding my rejection in principle, I would have thought a complaint made in such circumstances would be measured to an extent. Yet here the mother made allegations of controlling behaviour, of physical assault, and of sexually related assault. I consider it most unlikely such a complaint would have been so extensive in nature in the circumstance detailed by the mother

vii. My views are supported by the conflict between the father's case of knowing from an early stage as to 'M's' role, but his later reference in statement evidence [**C68 §9** 27.10.21] that: '*I do not understand why [the mother] made the domestic violence allegations'*. On his case before me he would have known exactly why the allegations were made at the time of this statement.

viii. It is also an odd feature of the case to discover in evidence that the father appears still to have a route to contacting 'M', but that no action has been taken in this regard.

ix. I was not impressed with the suggestion that 'M' was real, because one can see the mother receiving messages from 'M' when speaking to the police on BWF. The footage does show the mother interacting with her phone, but I am conscious part of her allegation was that there was evidence on the phone. I only have the evidence of the mother to support this account of receiving messages from 'M' during the interview telling her what to say. I consider it beyond convenience that this cannot now be evidenced because the phone was dropped into water by X (as I understood it) subsequently. I consider it most unlikely.

x. I do not entirely reject the notion of mother having spoken to someone and that individual having advised her on the basis of what she was saying that she should call the police. This may have occurred and might be the seed on which the parents have then worked to create the 'M' account, but that alternative would not be one which supports the case of a third party constructing the allegations.

153. This does not make the allegations true, whether entirely or in substantial measure. It may be the parents have formed the view this is the best way to account for a false account otherwise given by the mother. I am bound to speculate, but it may be that there is no good reason, or the mother has given the father no good reason, and so they have together dreamt up this account. I make clear the 'M' account has ended up being a collusive and false account to which the father has subscribed. He has not simply accepted what the mother has said, but has himself falsely, in my judgment, sought to buttress the case by claiming to have spoken to 'M'. I reject this evidence. It does make the false explanation somewhat more problematic.

154. The difficulty I have is, in the absence of an alternative account, finding a plausible reason why the mother might have made these allegations notwithstanding she knew them to be entirely untrue. Buried in the 'M' account was a suggestion that this process might generate financial benefit for the mother. However, the evidence I have is that the family were well housed utilising benefits available to them. I cannot conceive of why the mother would be looking, for no obvious good reason, to separate from the father and obtain her own housing whilst being happy in their relationship. It simply makes no sense to suggest the same.

155. I also fall back on the concern as to why the mother would make such extensive allegations against the father were they to be entirely untrue. She would not need to relate the somewhat embarrassing elements related to the sexual encounters to make out a case of domestic abuse. So why would she elaborate her account in such a way?

156. Of course, I do not reject the notion of the mother being an individual who has falsely sought to besmirch her partner out of anger or revenge at some slight or for some other reason, but this simply does not fit with the evidence. The evidence is of a level of concern as to whether the father was having an affair, but no obvious evidence of the same and an otherwise entirely positive relationship. This is not a likely foundation for a false allegation and were it to be then why would the same allegation have been withdrawn so quickly? Again, this really does not make sense.

157. I have reached the conclusion that this is a case in which the mother's allegations need to be considered on the basis they were made and cannot be put to one side as suggested on the parents' behalf. Having done so, I have reached the conclusion that the mother's allegations are fundamentally genuine and correct and represent a true account of domestic abuse, albeit not at a particularly high level, in the family relationship.

158. I have reached this conclusion on all the evidence, but with particular regard to the following points:

i. The account was fundamentally consistent. Whilst it can be said the questioning was focused on the points made by the mother and thus did not allow greater room for departure from these issues and consequential inconsistency, nonetheless what was reported both to PC Sarton and later to TDC Morgan-Fajuyi was broadly consistent.

ii. The account had elements of balance suggesting it was truthful. It is right to say the mother was clear in denying certain concerns. Whether this was relating to financial abuse or abuse of the children the mother was clear that this was not a feature of the abuse. I consider this adds credibility to the account as it suggested the mother was taking care in the report she made and was not willing to exaggerate the allegations to obtain the outcome she sought.

iii. The allegations, as previously described did not need to extend in the manner they did to achieve the goal of having the police take action against the father. In raising certain allegations, the mother was touching on embarrassing material and my sense of watching the BWF was that the mother was experiencing a level of embarrassment. I consider this is a relevant feature. If the allegations were untrue then the mother would likely have made allegations with which she was more comfortable. Having made the sexual allegation, it is noteworthy the mother did not claim to have then been sexually abused. This again had a sense of truth about it

iv. I also bear in mind that this was a mother who had never previously called the police and was living in a foreign country. In my assessment this tends to diminish the likelihood of an entirely false report

v. Although a point of limited weight my sense of the mother giving her evidence to the police was of an anxious individual. This might of course be because she was lying, but in my assessment, it fitted with her giving a troubling and honest account.

vi. I have borne in mind the suggested discrepancies in police onward transmission. I am conscious of these errors, but they do not touch on the truth of the allegations. The fact the police have extended the extent of the allegations beyond that justified by the mother's report does not make the report itself unreliable. I have relied on the BWF account and the account given to TDC Morgan-Fajuyi directly, rather than the interpretations of various police officers.

vii. Particular point was taken with the notion of the mother being '*thrown down the stairs*' and how this was not credible once one understood the events occurred downstairs in the property. The difficulty I have with this point is that when this part of the BWF was being translated during the hearing the interpreter made clear the words used could mean '*down'* or '*on*' the stairs. Understood in this way the suggested discrepancy is not what it first appears.

viii. I also note the points made as to the presence or absence of injury. These are points which I bear in mind, but in my assessment do not undermine the allegations.

ix. Having considered all the evidence my conclusions are that the relationship was under strain at around the time of Y's birth and initial period in hospital. The father was not as engaged with the family as he had been when X was younger. This may well be because Y's prematurity did not allow a clean discharge from hospital, but instead led to a protracted period of unsettled family life prior to Y being discharged. Furthermore, the father was working long hours and for understandable reasons given the new addition to the family and other obligations. This left the mother increasingly isolated and with little, if any, support network. I accept the fundamental case of her becoming worried as to the father's commitment to their relationship, although I do not find there was a foundation for the concerns. The situation was not helped by the father being controlling of the mother in general terms as alleged by her. In this context, I find there to have been disquiet in the relationship and some emotional turmoil in the relationship. I find the father did act as alleged by the mother and that her account was an essentially true account of recent events of concern

x. I agree with the Applicant (see final submissions §29(d)) as to the dating of the stair's incident. Whilst one can interpret the dating evidence in two ways the weight of the mother's report does suggest this took place on Saturday 31 July 2021 with the hit to the head being closer to the report to the police on 9 August 2021. I note this dating fits with the report from a neighbour of having heard a level of dispute around 10 days' earlier (around 1 August 2021).

xi. I have borne in mind the argument as to visits by professionals and appointments kept. However, there really is no reason to believe any of this background would have been obvious to an attending professional absent a direct report from the mother. I bear in mind the appointments on 2 and 10 August 2021, but I am not persuaded these are of themselves sufficiently significant to displace the other evidence on which I have placed reliance.

159. **I am satisfied the relationship during this period had elements of controlling behaviour and that the father was abusive to the mother in the manner suggested by the mother and alleged at §57 of the Applicant's final submissions and at §24 above.**

Related Points

160. There are a range of further matters that require consideration before I return to the central question in the case. In the course of the evidence the father gave evidence as to: (i) spending very limited time at home during the period when Y was at home between June and August 2021; and (ii) never handling Y during this period.

161. Whilst I accept both points to an extent, I have reached the conclusion that both have been exaggerated with the desired impact of distancing the father from the home and from Y. I can deal with this in relatively short order and make the following points on the evidence:

    i. The account of long working hours was entirely credible in principle. I accept during this period the father was working hard and away from home for the greater part of the day. I accept the evidence of additional overtime. However, I consider there has been a degree of exaggeration in this regard and I can find no reason for explaining this other than to almost entirely distance the father from the home during this material period. This is clear to me given the conflicts in evidence as to the timing of the working day and the father's positive evidence of returning from work on numerous occasions to spend time in the park with X. This simply did not fit with a case of returning to shower, feed and go to bed. My overarching conclusion is that the father was away at work for much of the day, but that there were many occasions over the period when he would return home and the children would be awake. I am satisfied on the parents' own evidence that there were occasions when the father would be responsible for supervising the children, albeit I accept this was far from the norm. The father gave such evidence to the police in any event.

    ii. As to his handling of Y, I again accept there is some essential truth in the account of the father being concerned about handling such a small baby. I have no doubt his care was very secondary to that of the mother and that he was not particularly comfortable in handling Y due to his size and vulnerability, but I reject the notion that he <u>never</u> handled Y. This is inherently implausible and is inconsistent with accounts given to professionals and set out in his own statement evidence [**C69 §12 / C166 §11 / K14 at F**]. Significantly, I note that on removal and at contact the father was seen to readily hold and feed Y. There is no suggestion of a period of transition into this state. In my assessment this is because the father had experience of handling Y although to a limited extent.

162. What am I to make of this attempt at distancing? Is it because the parents are seeking to disguise something or is it because they know the father had limited contact with Y and that they feel it is better to remove him altogether from consideration? On the account of the parents the father simply could not be responsible for any handling, however appropriate, that could have caused injury to Y. Once again, I am not helped by the parental approach to the history.

Implications for the wide canvas

163. In my assessment the conclusions drawn above have a material impact on the 'wide canvas' placed before me. Rather than an entirely positive home life I now have the following factors:

i. A level of domestic abuse particularly evidenced in the period of early August 2021 with surrounding controlling behaviour which must have predated the same.

ii. The mother as an isolated individual subject to a level of controlling behaviour which further isolated her.

iii. An inevitable level of anxiety and stress in the family dynamic represented by the impact on the mother of the father's behaviour and by the father's willingness to resort to inappropriate conduct.

iv. A belief (which I accept) on the part of the mother that the father was cheating on her.

v. The mother as a largely sole carer of two children, one of whom had additional needs, and which restricted her daily activities.

vi. The mother as largely house contained and dependent on the father to assist with shopping and support but with the father away for a considerable part of the day.

164. I now return to the question as to whether the answer in this case is found in Y suffering from MBDP or whether the Applicant has established a case based on excessive handling. In reaching my conclusion I note the following key points:

i. On the evidence before me I do not find Y suffered fractures either before discharge from hospital on 16 June 2021 or after removal from the parents on about 16 August 2021.

ii. The period prior to discharge was the period of likely greatest fragility having regard to the evidence of peak demineralisation given by Dr Olsen and by the improving radiological evidence between April and May 2021 and ultimately by August 2021 and by the blood results in June 2021. During this period Y was handled and there were invasive procedures which may have included a form of resuscitation and certainly included a hernia operation. Notwithstanding this there is nothing to suggest that he only balance suffered any fractures during this period.

iii. He was then discharged.

iv. In the following 60 days he suffered 24 fractures with these arising on at least two occasions.

v. During this very same period there was in fact domestic abuse and stress in the home. The father was otherwise largely absent and the mother isolated.

vi. I have no account of any event that might explain the fractures or indeed any one of them (I ignore the re-fracture).

vii. On removal on 16 August the fractures were identified.

viii. During the post-discharge / pre-removal period we have the uncertainty expressed within this judgment as to bone mineralisation.

ix. However, viewed from a blood chemical perspective it had been some time (some 8 weeks) since an ordinary reading was obtained. On that day the scans gave the impression of normal bone mineralisation.

x. There is no evidence of further fractures since removal.

165. I have weighed up the likelihood of such fractures being related to fragility and consequent on normal handling. I have considered the alternative that, for whatever reason, one of the parents (or both) have strayed into the use of excessive force and caused the fractures. I have kept in mind throughout the burden being on the Applicant and the case law. I have reached the conclusion that the Applicant has proven its case as to the fractures deriving from excessive force in handling of the child.

166. In my assessment it is striking as to the high number of fractures all arising in a relatively contained period between discharge and re-admission. It is most unlikely that such a child who fractured so readily post-discharge due to underlying fragility would have avoided doing so prior to discharge on handling and despite that being a period of likely peak fragility.

167. I consider the range of fractures to be relevant. I accept they call for different mechanisms and in the normal course of events different forces. This is not a case of a single form of fracture in a focused location which might be explained by a for instance a resuscitation process or something equivalent. Rather and even in the case of the ribs we have multiple sites with different compressive mechanisms and at different points. The L7 fractures stands out given the type of force and form of mechanism required. It is difficult to conceive of the normal handling leading to that form of fracture. I then have the long shaft fracture and the requirement for a combined mechanism and force outwith normal handling. Taken in totality it simply is not plausible that all of these separate fractures requiring different mechanisms and at different times were occasioned by a pattern of normal handling.

168. In assessing these issues, I am obviously keen to understand the likely progression of Y's mineralisation over the period. I keep in mind the important caveats raised by both Dr Olsen (scanning as a blunt instrument in this regard) and Michie (potential for normal blood results to co-exist with demineralisation). However, I have a wide canvas of evidence and I consider it would be inappropriate to simply discard what we have in seeking to properly resolve this case. In my assessment, whilst it cannot be calibrated with absolute confidence it is probable Y was experiencing gradual, but consistent improving mineralisation from May onwards. This seems to me an inevitable finding based on the medical guidance, but also based on the August scans which show normal bones in comparison to earlier in the period. It is also seen in a far more focused manner in the changes evident in the scans over the short period

between April and May. Added to this one has the blood test results taken in the following month. These were normal and as advised by Dr Michie (and I accept) showed that the component elements of bone construction and the associated enzyme was present and normal. Further the marker of the brain's evaluation of bony development was also normal. I accept that this might co-exist with demineralisation, but note this was relatively early in the timeline being in mid-June and many weeks before the last fractures. I consider this important. The brain at that point in time was receiving information that normality had been achieved. Whilst this might co-exist with a state of demineralisation it seems to me unlikely it would co-exist with a state of profound demineralisation. It seems to me that were this the case then Y would likely continue to maintain mineralisation at these same levels. In my assessment this suggests it is highly likely that one is approaching a point of normality if the brain is no longer evaluating an issue with ongoing bony development. In my assessment this casts real doubt on the suggestion of continuing MBDP as of August 2021.

169. I also have regard to the overlay between the domestic abuse and associated issues and the window of opportunity. It is striking that these fit in the way they do. As noted, I find no acceptable evidence of fractures prior to mid-June 2021 and discharge. However, at the same time as these fractures arise there is a developing level of disharmony in the home. This is an obvious source for poor decision making and it seems to me this is a significant feature of the case.

170. In my judgment there have been at least two occasions on which a parent handled Y in a manner which was excessive and caused the fractures. It is likely that each window comprised either a number of smaller events or a particularly complex event to account for the various directional forces required (e.g., compression of ribs and movement of leg). However, if more than two occasions it need not have been very many more than two. I cannot comment on the exact surrounding circumstances or the full appreciation of the parent on each occasion, but they should have been aware that in handling Y in that manner he was likely to suffer some real harm, if not a fracture.

171. In reaching this conclusion I have borne in mind the evidence as to the child's likely response. I accept there would have been some level of response and particularly with the long bone fracture. I accept he would likely have continued to be unsettled when moved or indeed when moving and breathing after the rib fractures. However, I accept there is a degree of variability in this regard and that such response may have been disguised by the effects of soothing. I am not confident either of these parents would have necessarily understood the exact nature of the harm caused to Y on each of the occasions. The consequential ability to soothe Y may have led to the impression that any harm was temporary in character. Sadly, in my judgment this may have led to a failure to respond differently on at least one further occasion when he was harmed again.

172. Having considered the evidence I am not satisfied it would have been clear to the parent that Y had suffered an injury requiring treatment. In my judgment this changed with the re-fractured leg which presented in an obvious and concerning manner. My view in this regard is supported by the professional engagement during the period which did not pick up on an existing issue. I strongly suspect whichever parent was responsible quickly regretted their

behaviour and sought and took comfort in the impression that Y was well. They may have been willing to think the best given the implications for themselves if this were not the case.

173. I am satisfied that a parent who was not present at the time of the fractures would be unlikely to draw very much from Y's presentation on return. If as I find the present parent might have discounted the concern, then it is hardly surprising a returning parent might equally do so. As such I do not find a failure to protect.

174. In my assessment both §§172-3 fit with the evidence of Dr Michie which I accept.

175. Plainly I have found the parents willing to collude in a lie and give exaggerated evidence to paint an impression that suited their case. I have borne in mind they have given their evidence in strained emotional circumstances and that this whole process must have been traumatic for them. Yet I cannot ignore this case had an element of deception from an early stage and this has not assisted the Court in working through the evidence.

176. It is clear to me that the parents very much love their children. This case has not called that into question. My findings do not conflict with this proposition. Yet Y has been harmed at the hands of one or either parent.

Can I determine which of the parents caused the fractures?

177. I apply a simple balance of probabilities and weigh up the available evidence. I consider it inherently improbable that one 'set' of fractures was caused by each of the parents acting alone on each separate occasion. It is far more likely that one parent was responsible for both 'sets'. I also consider it inherently improbable that the fractures were caused by both parents at the same time or by one parent with the other watching or witnessing the behaviour. In my assessment on balance this was likely to be a private event.

Father?

178. The factors in favour of the father would include my finding of domestic abuse and what this may say about his willingness to recourse to force when upset. If he were to affect such an emotion when handling Y then a risk of harm is obvious. Secondly, there is the evidence of him being less involved with Y and perhaps having less experience and thus handling him in an inappropriate fashion. Third, there is the evidence of him working long hours with the potential for him to be tired and perhaps lose his patience on return home. Fourthly, there are my findings as to the distancing of the father from Y. Might this be linked to an attempt to deflect attention from him in the knowledge that he is responsible? Fifthly, it is suggested the evidence is of a lesser bond with Y deriving from the protracted hospital period. This may have reduced his protective instinct towards Y.

179. The factors against the father being responsible recognise his rather limited role in Y's life and my acceptance of him being out of the house for significant periods. He would simply be less involved with Y and less likely to have caused the injuries. Secondly, one has the obvious classic division of labour in the home which placed central responsibility on the mother for childcare. There was a ring of truth in the evidence as to the father being somewhat hands off

with Y even when called upon to supervise. Thirdly, there is the evidence of him being worried about handling Y due to his size and vulnerability. Although I reject his argument of never handling Y this does not mean he was not particularly cautious due to worry when handling him. Fourthly, I accept the positive relationship with the children. Fifthly, there is a much greater likelihood of the mother witnessing or becoming aware of mishandling by the father than the other way around. The dynamic between them would likely place her relatively proximate to the child at all times, whereas when the mother was alone with the child the father was often far away. Consequent to my views as to joint culpability, this points against the father.

Mother?

180. The factors in favour of the mother being responsible are that she was the hands-on carer and took significant, if not almost entire, care of Y. Secondly, she was isolated, and this may well have left her stressed and led to unpredictable poor handling. Thirdly, she was receiving little support from the father. Fourthly, she likely felt overwhelmed by the combination of the domestic abuse, her caring responsibilities and her worries for her relationship.

181. The factors against the mother being responsible are the evidence of her engagement with professionals and ability to care for Y. Secondly, the patience she is shown to have exhibited when caring for the children. Thirdly, her love for the children and the success she has shown in the case of X. Fourthly, the positive evidence of her care for X.

182. Both parents have the benefit of the wide canvas evidence summarised above albeit viewed in the light of my findings.

183. I have reached the conclusion that I can identify the likely perpetrator on the balance of probabilities. I consider the likely responsible parent was the mother. I do so, having regard to the following conclusions:

i. The mother was not only the primary carer, but was close to being the exclusive carer.

ii. Even at times when the father was caring his likely physical care was limited.

iii. The evidence as to his distancing from Y whilst not fully accepted did have an element of truth within it.

iv. I very much doubt the father would have caused the injuries by non-deliberate, but excessive handling, but then gone onto repeat the same on a later occasion. He had every opportunity to avoid significant contact with Y and this would have been different if the excessive handling was deliberate and in some way malicious, but I do not find this to be likely on the facts

v. I have made the finding as to domestic abuse, but in doing so I accept the broad initial account given by the mother of the father's behaviour to the children being appropriate. In my assessment if the father were responsible then on the facts of this

case the mother would likely have become aware of the same and would have likely added this to her catalogue of complaints. The failure to do so is relevant.

vi. In contrast, I find there were significant stresses on the mother which were likely to impact on her mood and presentation. I find it very likely these stresses impacted on her otherwise caring approach. The situation was complicated by worry over her relationship and increasing responsibility without much support for two children. I can see how this may on occasions have led to a loss of control in handling Y.

vii. It can be seen that I have viewed the domestic violence (for which the father bears responsibility) as a likely significant contributory factor to the fractures. I cannot say that without this there would have been no fractures, but it is in my assessment a significant feature of the case.

viii. I have borne in mind the positive reports, but take the view these are not fundamentally inconsistent with my finding. This is an essentially competent mother. She is not generally incapable and observably so. I can readily see how at planned appointments and visits there would be nothing of note and that she would present in a positive fashion. There is nothing in my assessment to suggest this was anything other than a genuine presentation and fair impression of her normal care of the children.

Concealed pregnancy

184. I consider the evidence clear in this regard. The mother admits that on 5 January 2022 she deceived the social worker. The real issue is whether she was aware prior to 2 January 2022 when she attended the RBH.

185. On the available evidence I am persuaded the mother was aware prior to this date. I cannot say with confidence the exact date on which she became aware, but find she was aware on or about 5 December 2021 when enquiries were made at Court. I make this finding having regard to:

i. The admitted deception as of 5 January. Plainly the mother had a wish to hide her pregnancy to avoid steps being taken to remove the child. It is quite clear this intention would have arisen from the point of knowledge of the pregnancy. If the mother was aware in December then she concealed it from this point.

ii. The mother accepted noting her body changing, but says she was distracted by external factors.

iii. This is particularly so as both the Court and the father raised with the mother whether she was present. It is implicit in the former that others had formed the impression the mother was showing signs of pregnancy.

Conclusions

186. I make the findings set out at §24 as follows:

i. I find proven allegations 1-12 with regard to the fractures.

ii. As regards item 13 I find the injuries were caused by the mother save for the re-fracture. I can make no finding as what action led to the re-fracture.

iii. I do not make the finding 14 as to failure to protect.

iv. I find proven the allegations as to domestic abuse at allegation 15-20 although the wording 19 should reflect the mother was thrown onto the stairs.

v. I find proven allegation 21 as to the concealed pregnancy.

187. I am satisfied as to allegation 22-24 and that the threshold is crossed for each child. In my assessment the concealed pregnancy did place Z at risk of significant harm given the mother's experience of Y's pregnancy. By concealing the pregnancy and as a consequence not engaging with medical services the mother placed Z at risk of an unmanaged premature birth with obvious consequence for her physical wellbeing.

188. Having set out my fact-finding conclusions I will now send this judgment to the representatives. They may share the judgment with their clients (both professional and lay). I set out a plan of action towards the handing date listed on 19 December 2022 at 9am. Can I please have any corrections or requests for clarification by 4pm on 15 December 2022. Can I have a draft order by 4pm on 16 December 2022. Any Part 25 application should be made in advance of the hearing. I will be looking to give case management decisions through to IRH and possibly final hearing. Can parties attend with dates to avoid.

His Honour Judge Willans

AGREED NOTE ON THE RELEVANT LAW

Threshold

1) In **RE W (CARE PROCEEDINGS: FUNCTIONS OF COURT AND LOCAL AUTHORITY) [2013] EWCA Civ 1227** Ryder LJ stated that:

[36] Although it is conventional to speak of facts having to be proved on the balance of probabilities by the party who makes the allegation, proceedings under the CA 1989 are quasi-inquisitorial (quasi-inquisitorial in the classic sense that the court does not issue the process of its own motion). The judge has to decide whether sufficient facts exist to satisfy the threshold (the jurisdictional facts) whether or not the local authority or any other party agree. Furthermore, the basis upon which the threshold is satisfied is a matter for the judge, not the parties. It is a question of jurisdiction, not just the facts in issue between the parties.

The threshold statement

2) In **Re J (A Child) [2015] EWCA Civ 222** McFarlane LJ, at paragraph 46 of his judgment, endorsed Sir James Munby's view on the format and length of the 'threshold statement' that a local authority must file in support of any application under CA 1989, s 31 (*View from the President's Chambers: the process of re-form: the revised PLO and the local authority* [2013] Fam Law 680 (June 2013)) in which he states that 'the threshold statement is to be *limited to no more than 2 pages*' (original emphasis) and that 'it is not necessary for the court to find a mass of specific facts in order to arrive at a proper threshold finding' and, in answer to the question 'what does the court need?' he answers:

"It needs to know what the nature of the local authority case is; what the essential factual basis of the case is; what the evidence is upon which the local authority relies to establish its case; what the local authority is asking the court, and why."

3) At paragraph 56, Aikens LJ stated that:

"ii) If the local authority's case on a factual issue is challenged, the local authority must adduce proper evidence to establish the fact it seeks to prove. If a local authority asserts that a parent "does not admit, recognise or acknowledge" that a matter of concern to the authority is the case, then if that matter of concern is put in issue, it is for the local authority to prove it is the case and, furthermore, that the matter of concern "has the significance attributed to it by the local authority".

iii) Hearsay evidence about issues that appear in reports produced on behalf of the local authority, although admissible, has strict limitations if a parent challenges that hearsay evidence by giving contrary oral evidence at a hearing. If the local authority is unwilling or unable to produce a witness who can speak to the relevant matter by first hand evidence, it may find itself in "great, or indeed insuperable" difficulties in proving the fact or matter alleged by the local authority but which is challenged.

iv) The formulation of "Threshold" issues and proposed findings of fact must be done with the utmost care and precision. The distinction between a fact and evidence alleged to prove a fact is fundamental and must be recognised. The document must identify the relevant facts which are sought to be proved. It can be cross-referenced to evidence relied on to prove the facts asserted but should not contain mere allegations ("he appears to have lied" etc.)"

*v) It is for the local authority to prove that there is the necessary link between the facts upon which it relies and its case on Threshold. The local authority must demonstrate **why** certain facts, if proved, "justify the conclusion that the child has suffered or is at the risk of suffering significant harm" of the type asserted by the local authority. "The local*

authority's evidence and submissions must set out the arguments and explain explicitly why it is said that, in the particular case, the conclusion [that the child has suffered or is at the risk of suffering significant harm] indeed follows from the facts [proved]".

vi) It is vital that local authorities, and, even more importantly, judges, bear in mind that nearly all parents will be imperfect in some way or other. The State will not take away the children of "those who commit crimes, abuse alcohol or drugs or suffer from physical or mental illness or disability, or who espouse antisocial, political or religious beliefs" simply because those facts are established. It must be demonstrated by the local authority, in the first place, that by reason of one or more of those facts, the child has suffered or is at risk of suffering significant harm. Even if that is demonstrated, adoption will not be ordered unless it is demonstrated by the local authority that "nothing else will do" when having regard to the overriding requirements of the child's welfare. The court must guard against "social engineering".

vii) When a judge considers the evidence, he must take all of it into account and consider each piece of evidence in the context of all the other evidence, and, to use a metaphor, examine the canvas overall."

Principles of fact finding

4) In **A (Children- Findings of Fact) (No 2) [2019] EWCA Civ 1947** Peter Jackson LJ stated as follows:

96. The court is not bound by the cases put forward by the parties, but may adopt an alternative solution of its own: Re S (A Child) [2015] UKSC 20 at [20]. Judges are entitled, where the evidence justifies it, to make findings of fact that have not been sought by the parties, but they should be cautious when considering doing so: Re G and B (Fact-Finding Hearing) [2009] EWCA Civ 10; [2009] 1 FLR 1145, where Wall LJ said this:

> *"15. I am the first to acknowledge that a judge … is entitled to take a proactive, quasi-investigative role in care proceedings. Equally, she will make findings of fact on all the evidence available to her, including her assessment of the parents' credibility; she is not limited to the expert evidence. I am also content to decide the question in this appeal on the basis that a judge … is not required slavishly to adhere to a schedule of proposed findings placed before her by a local authority. To take an obvious example: care proceedings are frequently dynamic and issues emerge in the oral evidence which had not hitherto been known to exist. It would be absurd if such matters had to be ignored.*
>
> *16. All that said, however, the following propositions seem to me to be equally valid. Where, as here, the local authority had prepared its Schedule of proposed findings with some care, and where the fact finding hearing had itself been the subject of a directions appointment at which the parents had agreed not to apply for various witnesses to attend for cross-examination, it requires very good reasons, in my judgment, for the judge to depart from the schedule of proposed findings. Furthermore, if the judge is, as it were, to go "off piste", and to make findings of fact which are not sought by the local authority or not contained in its Schedule, then he or she must be astute to ensure; (a) that any additional or different findings made are securely founded in the evidence; and (b) that the fairness of the fact finding process is not compromised."*

97. As to fairness, the decision in B (A Child) [2018] EWCA Civ 2127, in which Newey LJ and I participated, confirms that:

> *"15. It is an elementary feature of a fair hearing that an adverse finding can only be made where the person in question knows of the allegation and the substance of the supporting evidence and has had a reasonable opportunity to respond. With effective case management, the definition of the issues will make clear what findings are being sought and the opportunity to respond will arise in the course of the evidence, both written and oral."*

Definition of a non-accidental injury

5) In **RE S (SPLIT HEARING) [2014] EWCA Civ 25** Ryder LJ, at paragraphs 19 to 21 of his judgment, stated:

> *"19. The term 'non-accidental injury' may be a term of art used by clinicians as a shorthand and I make no criticism of its use but it is a 'catch-all' for everything that is not an accident. It is also a tautology: the true distinction is between an accident which is unexpected and unintentional and an injury which involves an element of wrong. That element of wrong may involve a lack of care and/or an intent of a greater or lesser degree that may amount to negligence, recklessness or deliberate infliction. While an analysis of that kind may be helpful to distinguish deliberate infliction from, say, negligence, it is unnecessary in any consideration of whether the threshold criteria are satisfied because what the statute requires is something different namely, findings of fact that at least satisfy the significant harm, attributability and objective standard of care elements of s 31(2) of the CA 1989.*
>
> *20. The court's function is to make the findings of fact that it is able on the evidence and then analyse those findings against the statutory formulation. The gloss imported by the use of unexplained legal, clinical or colloquial terms is not helpful to that exercise nor is it necessary for the purposes of section 31(2) to characterise the fact of what happened as negligence, recklessness or in any other way. Just as non-accidental injury is a tautology, 'accidental injury' is an oxymoron that is unhelpful as a description. If the term was used during the discussion after the judgment had been given as a description of one of the possibilities of how the harm had been caused, then it should not have been; it being a contradiction in terms. If, as is often the case when a clinical expert describes harm as being a 'non-accidental injury', there is a range of factual possibilities, those possibilities should be explored with the expert and the witnesses so that the court can understand which, if any, described mechanism is compatible with the presentation of harm.*
>
> *21. The threshold is not concerned with intent or blame; it is concerned with whether the objective standard of care which it would be reasonable to expect for the child in question has not been provided so that the harm suffered is attributable to the care actually provided. The judge is not limited to the way the case is put by the local authority but if options are not adequately explored a judge may find a vital piece of the jigsaw missing when s/he comes to look at all the evidence in the round."*

Burden of proof

6) The burden of proof is on the local authority

7) There is no pseudo-burden or obligation cast on the respondents to come up with alternative explanations: **Lancashire County Council v D and E [2010] 2 FLR 196** at paras [36] and [37]; **Re C and D (Photographs of Injuries) [2011] 1 FLR 990**, at para [203]. If an explanation or hypothesis is put forward by or on behalf of a parent which is not accepted by the court, the failure to do so does not establish the local authority case. There is no obligation on a parent to provide an explanation; see **The Popi M Rhesa Shipping Co SA v. Edmunds Rhesa Shipping Co SA and Fenton Insurance Co Ltd [1985] 1 WLR 948**.

8) In **Re M (A Child) [2012] EWCA Civ 1580** Ward LJ held that the judge had fallen into error in taking the view that *"absent a parental explanation, there was no satisfactory benign explanation, ergo there must be a malevolent explanation. And it is that leap which troubles me. It does not seem to me that the conclusion necessarily follows unless, wrongly, the burden of proof has been reversed, and the parents are being required to satisfy the court that this is not a non-accidental injury"*.

Findings of fact

9) Findings of fact must be based on evidence. As Munby LJ, as he then was, observed in **Re A (A Child) (Fact-finding hearing: Speculation) [2011] EWCA Civ 12**:

> *"It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation."*

10) As Dame Elizabeth Butler-Sloss P observed in **Re T [2004] EWCA Civ 558, [2004] 2 FLR 838** at 33:

> *"Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the*

totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."

11) The court is referred to the guidance of the House of Lords in the case of **Re B [2008] UKHL 35** and the oft-cited dicta of Baroness Hale:

"70. My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.

71. As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.

72. As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

73. In the context of care proceedings, this point applies with particular force to the identification of the perpetrator. It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Some-one looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied."

12) As to the binary principle:

"31. … In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability.

32. In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."

13) In **A, B and C (CHILDREN) [2021] EWCA Civ 451** Macur LJ stated that:

"Findings of fact in the Family Court are to be made on the balance of probabilities but should be subject to a similar forensic rigour as deployed in the criminal courts."

Identifying a perpetrator

14) So far as the identification of perpetrators is concerned, that issue was considered in detail in the Supreme Court case of **Re S-B [2009] UKSC 17**. The standard of proof with respect to any such identification is the balance of probabilities:

"34. The first question listed in the statement of facts and issues is whether it is now settled law that the test to be applied to the identification of perpetrators is the balance of probabilities. The parties are agreed that it is and they are right. It is correct, as the Court of Appeal observed, that Re B was not directly concerned with the identification of perpetrators but with whether the child had been harmed. However, the observations of Lord Hoffmann and Lady Hale, quoted at paragraph 12 above, make it clear that the same approach is to be applied to the identification of perpetrators as to any other factual issue in the case. This issue shows quite clearly that there is no necessary connection between the seriousness of an allegation and the improbability that it has taken place. The test is the balance of probabilities, nothing more and nothing less.

35. Of course, it may be difficult for the judge to decide, even on the balance of probabilities, who has caused the harm to the child. There is no obligation to do so. As we have already seen, unlike a finding of harm, it is not a necessary ingredient of the threshold criteria. As Lord Justice Wall put it in Re D (Care Proceedings: Preliminary Hearings) [2009] EWCA Civ 472, [2009] 2 FLR 668, at para 12, judges should not strain to identify the perpetrator as a result of the decision in Re B:

"If an individual perpetrator can be properly identified on the balance of probabilities, then ... it is the judge's duty to identify him or her. But the judge should not start from the premise that it will only be in an exceptional case that it will not be possible to make such an identification."

15) Where a perpetrator cannot be identified, the Court should seek to identify the pool of possible perpetrators on the basis of the "real possibility" test:

"40. As to the second, if the judge cannot identify a perpetrator or perpetrators, it is still important to identify the pool of possible perpetrators. Sometimes this will be necessary in order to fulfil the "attributability" criterion. If the harm has been caused by someone outside the home or family, for example at school or in hospital or by a stranger, then it is not attributable to the parental care unless it would have been reasonable to expect a parent to have prevented it. Sometimes it will desirable for the same reasons as those given above. It will help to identify the real risks to the child and the steps needed to protect him. It will help the professionals in working with the family. And it will be of value to the child in the long run.

41. In North Yorkshire County Council v SA [2003] EWCA Civ 839, [2003] 2 FLR 849, the child had suffered non-accidental injury on two occasions. Four people had looked after the child during the relevant time for the more recent injury and a large number of people might have been responsible for the older injury. The Court of Appeal held that the judge had been wrong to apply a "no possibility" test when identifying the pool of possible perpetrators. This was far too wide. Dame Elizabeth Butler-Sloss P, at para 26, preferred a test of a "likelihood or real possibility".

42. Miss Susan Grocott QC, for the local authority, has suggested that this is where confusion has crept in, because in Re H this test was adopted in relation to the prediction of the likelihood of future harm for the purpose of the threshold criteria. It was not intended as a test for identification of possible perpetrators.

43. That may be so, but there are real advantages in adopting this approach. The cases are littered with references to a "finding of exculpation" or to "ruling out" a particular person as responsible for the harm suffered.

This is, as the President indicated, to set the bar far too high. It suggests that parents and other carers are expected to prove their innocence beyond reasonable doubt. If the evidence is not such as to establish responsibility on the balance of probabilities it should nevertheless be such as to establish whether there is a real possibility that a particular person was involved. When looking at how best to protect the child and provide for his future, the judge will have to consider the strength of that possibility as part of the overall circumstances of the case."

16) In **B (Children: Uncertain Perpetrator) [2019] EWCA Civ 575**, Peter Jackson LJ stated:

46. Drawing matters together, it can be seen that the concept of a pool of perpetrators seeks to strike a fair balance between the rights of the individual, including those of the child, and the importance of child protection. It is a means of satisfying the attributable threshold condition that only arises where the court is satisfied that there has been significant harm arising from (in shorthand) ill-treatment and where the only 'unknown' is which of a number of persons is responsible. So, to state the obvious, the concept of the pool does not arise at all in the normal run of cases where the relevant allegation can be proved to the civil standard against an individual or individuals in the normal way. Nor does it arise where only one person could possibly be responsible. In that event, the allegation is either proved or it is not. There is no room for a finding of fact on the basis of 'real possibility', still less on the basis of suspicion. There is no such thing as a pool of one.

47. It should also be emphasised that a decision to place a person within the pool of perpetrators is not a finding of fact in the conventional sense. As is made clear in Lancashire at [19], O and N at [27-28] and S-B at [43], the person is not a proven perpetrator but a possible perpetrator. That conclusion is then carried forward to the welfare stage, when the court will, as was said in S-B, "consider the strength of the possibility" that the person was involved as part of the overall circumstances of the case. At the same time it will, as Lord Nicholls put it in Lancashire, "keep firmly in mind that the parents have not been shown to be responsible for the child's injuries." In saying this, he recognised that a conclusion of this kind presents the court with a particularly difficult problem. Experience bears this out, particularly where a child has suffered very grave harm from someone within a pool of perpetrators.

48. The concept of the pool of perpetrators should therefore, as was said in Lancashire, encroach only to the minimum extent necessary upon the general principles underpinning s.31(2). Centrally, it does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown. This is why it is always misleading to refer to 'exclusion from the pool': see Re S-B at [43]. Approaching matters in that way risks, as Baroness Hale said, reversing the burden of proof.

49. To guard against that risk, I would suggest that a change of language may be helpful. The court should first consider whether there is a 'list' of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so: Re D (Children) [2009] EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is should A or B or C be placed into the 'pool'.

50. Likewise, it can be seen that the concept of a pool of perpetrators as a permissible means of satisfying the threshold was forged in cases concerning individuals who were 'carers'. In Lancashire, the condition was interpreted to include non-parent carers. It was somewhat widened in North Yorkshire at [26] to include 'people with access to the child' who might have caused injury. If that was an extension, it was a principled one. But at all events, the extension does not stretch to "anyone who had even a fleeting contact with the child in circumstances where there was the opportunity to cause injuries": North Yorkshire at [25]. Nor does it extend to harm caused by someone outside the home or family unless it would have been reasonable to expect a parent to have prevented it: S-B at [40].

> *51. It should also be noted that in the leading cases there were two, three or four known individuals from whom any risk to the child must have come. The position of each individual was then investigated and compared. That is as it should be. To assess the likelihood of harm having been caused by A or B or C, one needs as much information as possible about each of them in order to make the decision about which if any of them should be placed in the pool. So, where there is an imbalance of information about some individuals in comparison to others, particular care may need to be taken to ensure that the imbalance does not distort the assessment of the possibilities. The same may be said where the list of individuals has been whittled down to a pool of one named individual alongside others who are not similarly identified. This may be unlikely, but the present case shows that it is not impossible. Here it must be shown that there genuinely is a pool of perpetrators and not just a pool of one by default.*

17) Where there are multiple injuries sustained at different times the court must consider separately the question of who is the perpetrator of each injury. If the court is able to identify the perpetrator of one injury, the question would then arise as to the extent to which the court is entitled to rely upon that finding in order to identify the perpetrator of other injuries. That issue was considered by the Court of Appeal in **Re M (A Child) [2010] EWCA Civ 1467**. Wilson LJ (as he then was) said:

> *'37 The first basis of the cross-appeal is the father's responsibility for the October event. Is it likely, asks Miss Hodgson on behalf of the mother, that, within the space of less than seven weeks, the partial suffocation of a baby is caused by one parent and yet injuries to his body are, or even just may be, perpetrated by the other? It is certainly not unknown for judges to give a negative answer to that type of question and, by reference to it, to proceed to identify the perpetrator of a second non-accidental injury. When they do so, their reasoning is – in my view – in principle valid . . . '*

18) In **Re A (Children) (Pool of Perpetrators) [2022] EWCA Civ 1248** King LJ considered the use of the word "strain" as follows:

> *33. The evaluation of the facts which will enable a court to identify the perpetrator of an inflicted injury to a child will be determined on the simple balance of probabilities and nothing more. Having considered the matter afresh in the light of Elisabeth Laing LJ's observation, I am of the view that to go further and to add that the courts should not "strain" to make such a finding is an unnecessary and potentially unhelpful gloss which has outlived its usefulness and which was directed at a different issue . . .*
>
> *34. I suggest, therefore, that in future cases judges should no longer direct themselves on the necessity of avoiding "straining to identify a perpetrator". The unvarnished test is clear: following a consideration of all the available evidence and applying the simple balance of probabilities, a judge either can, or cannot, identify a perpetrator. If he or she cannot do so, then, in accordance with Re B (2019), he or she should consider whether there is a real possibility that each individual on the list inflicted the injury in question.*

Checklist of applicable principles

19) The Court may be assisted by the summary of applicable law and principles espoused by Baker J in **Re JS [2012] EWHC 1370**.

> *"36. In determining the issues at this fact finding hearing I apply the following principles. First, the burden of proof lies with the local authority. It is the local authority that brings these proceedings and identifies the findings they invite the court to make. Therefore the burden of proving the allegations rests with them.*
>
> *37. Secondly, the standard of proof is the balance of probabilities (**Re B [2008] UKHL 35**). If the local authority proves on the balance of probabilities that J has sustained non-accidental injuries inflicted by one of his parents, this court will treat that fact as established and all future decisions concerning his future will be based on that finding. Equally, if the local authority fails to prove that J was injured by one of his parents, the court will disregard the allegation completely. As Lord Hoffmann observed in Re B:*

"If a legal rule requires the facts to be proved (a 'fact in issue') a judge must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1."

38. Third, findings of fact in these cases must be based on evidence. As Munby LJ, as he then was, observed in ***Re A (A Child) (Fact-finding hearing: Speculation) [2011] EWCA Civ 12****:*

"It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation."

39. Fourthly, when considering cases of suspected child abuse the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. As Dame Elizabeth Butler-Sloss P observed in Re T [2004] EWCA Civ 558, [2004] 2 FLR 838 at 33:

"Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."

40. Fifthly, amongst the evidence received in this case, as is invariably the case in proceedings involving allegations of non-accidental head injury, is expert medical evidence from a variety of specialists. Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. The roles of the court and the expert are distinct. It is the court that is in the position to weigh up expert evidence against the other evidence (see ***A County Council & K, D, & L [2005] EWHC 144 (Fam)****; [2005] 1 FLR 851 per Charles J). Thus there may be cases, if the medical opinion evidence is that there is nothing diagnostic of non-accidental injury, where a judge, having considered all the evidence, reaches the conclusion that is at variance from that reached by the medical experts.*

41. Sixth, in assessing the expert evidence I bear in mind that cases involving an allegation of shaking involve a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bringing their own expertise to bear on the problem. The court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others (see observations of King J in ***Re S [2009] EWHC 2115 Fam****).*

42. Seventh, the evidence of the parents and any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them (see Re W and another (Non-accidental injury) [2003] FCR 346).

43. Eighth, it is common for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear and distress, and the fact that a witness has lied about some matters does not mean that he or she has lied about everything (see R v Lucas [1981] QB 720).

44. Ninth, as observed by Hedley J in ***Re R (Care Proceedings: Causation) [2011] EWHC 1715 Fam****:*

"There has to be factored into every case which concerns a disputed aetiology giving rise to significant harm a consideration as to whether the cause is unknown. That affects neither the burden nor the standard of proof. It is simply a factor to be taken into account in deciding whether the causation advanced by the one shouldering the burden of proof is established on the balance of probabilities."

The court must resist the temptation identified by the Court of Appeal in R v Henderson and Others [2010] EWCA Crim 1219 to believe that it is always possible to identify the cause of injury to the child.

45. Finally, when seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators is whether there is a likelihood or a real possibility that he or she was the perpetrator (see North Yorkshire County Council v SA [2003] 2 FLR 849. In order to make a finding

that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injury to be identified both in the public interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judge should not strain to do so (see Re D (Children) [2009] 2 FLR 668, Re SB (Children) [2010] 1 FLR 1161)."

21) An expanded checklist was provided by MacDonald J *A Local Authority v W (No 2)(Finding of Fact Hearing)* [2020] EWFC 68, which included a useful consideration of inherent probabilities as previously examined in the dicta of Peter Jackson J as he then was in Re BR (proof of facts) [2015]EWFC 41 and the application of *Lucas* (see post):

48. The legal principles that apply when the court is determining questions of fact are now well established and can be summarised as follows:

i) The burden of proving the facts pleaded rests with the local authority. In cases of alleged non-accidental injury, it is for the local authority to establish on the balance of probabilities that the injuries were inflicted. There is no requirement on the parents to show that injuries resulted from some other cause. Where a respondent parent seeks to prove an alternative explanation but does not prove that alternative explanation, that failure does not, of itself, establish the local authority's case, which must still be proved to the requisite standard (see The Popi M, Rhesa Shipping Co SA v Edmunds, Rhesa Shipping Co SA v Fenton Insurance Co Ltd [1985] 1 WLR 948 at 955-6).

*ii) The standard to which the local authority must satisfy the court is the simple balance of probabilities. The inherent probability or improbability of an event remains a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred (**Re B [2008] UKHL 35** at [15]). I examine the topic of inherent probabilities further below.*

iii) Within this context, there is no room for a finding by the court that something might have happened. The court may decide that it did or that it did not (Re B [2008] UKHL 35 at [2]).

*iv) Findings of fact must be based on evidence not on speculation. The decision on whether the facts in issue have been proved to the requisite standard must be based on all of the available evidence and should have regard to the wide context of social, emotional, ethical and moral factors (**A County Council v A Mother, A Father and X, Y and Z [2005] EWHC 31 (Fam)**).*

v) In determining whether the local authority has discharged the burden upon it the court looks at what has been described as 'the broad canvas' of the evidence before it. The role of the court is to consider the evidence in its totality and to make findings on the balance of probabilities accordingly. Within this context, the court must consider each piece of evidence in the context of all of the other evidence (Re T [2004] 2 FLR 838 at [33]). However, the concept of the broad canvas is not an excuse for forensic laxity. Wide as it is, the canvas surveyed must still be comprised of threads of relevant admissible evidence.

vi) In this context, and self-evidently, I am not limited to considering the expert evidence before me. Rather, I must take account of a wide range of matters that includes the expert evidence but that also includes, for example, my assessment of the credibility of the witnesses and inferences that can be properly drawn from the evidence. Accordingly, the opinions of the medical experts need to be considered in the context of all of the other evidence.

*vii) When considering the medical evidence with respect to the child's presentation, the court must bear in mind, to the extent appropriate in the given case, the possibility of an unknown cause for that presentation (R v Henderson and Butler and Others [2010] EWCA Crim 126 and **Re R (Care Proceedings: Causation) [2011] EWHC 1715 Fam**). As observed by Dame Elizabeth Butler-Sloss P in **Re U, Re B (Serious Injury: Standard of Proof [2004] EWCA Civ 567**:*

"The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research would throw a light into corners that are at present dark."

viii) The evidence of the parents and carers is of utmost importance and it is essential that the court forms a clear assessment of their credibility and reliability. The court is likely to place considerable reliability and weight on the evidence and impression it forms of them. In this regard, it is important to bear in mind the observations of Peter Jackson J in ***Lancashire County Council v M and F [2014] EWHC 3 (Fam)*** *that:*

"To these matters I would only add that in cases where repeated accounts are given of events surrounding injury and death, the court must think carefully about the significance or otherwise of any reported discrepancies. They may arise for a number of reasons. One possibility is of course that they are lies designed to hide culpability. Another is that they are lies told for other reasons. Further possibilities include faulty recollection or confusion at times of stress or when the importance of accuracy is not fully appreciated, or there may be inaccuracy or mistake in the record keeping or recollection of the person hearing or relaying the account. The possible effects of delay and repeated questioning upon memory should also be considered, as should the effect on one person of hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be unnatural – a process that might inelegantly be described as "story-creep" may occur without any necessary inference of bad faith."

ix) It is also important when considering its decision as to the findings sought that the Court take into account the presence or absence of any risk factors and any protective factors which are apparent on the evidence (see Re BR [2015] EWFC 41). These, however, cannot be determinative by themselves.

x) It is in the public interest that those who cause injury to children be identified (Re K (Non-accidental Injuries: Perpetrator: New Evidence) [2005] 1 FLR 285). The court should accordingly endeavour to identify on the simple balance of probabilities the person or persons responsible for inflicting the injuries in question where it is possible to do so.

xi) The Court should not, however, 'strain' the evidence before it in order to identify on the simple balance of probabilities the individual or individuals who inflicted the injuries. If it is clear that it is not possible on the evidence before the court for the court to conclude on the balance of probabilities who the perpetrator of the injuries is, or perpetrators of the injuries are and the court remains genuinely uncertain, then the court should reach that conclusion (Re D (Care Proceedings: Preliminary Hearing) [2009] 2 FLR 668).

xii) Where it is not possible to identify which parent inflicted injuries found to be non-accidental, it is open to the court to conclude in respect of each parent that the local authority has demonstrated that there is a likelihood or real possibility that they inflicted the injuries and to proceed to the welfare stage on the basis that one or other or both parents caused the injuries in question (see Lancashire County Council v B [2000] UKHL 16, O and N (Minors); Re B (Minors) [2003] UKHL 18 and ***Re B (Children: Uncertain Perpetrator) [2019] EWCA Civ 575****).*

49. In this case, and in light of the evidence of Professor David, it is important to examine in a little more detail the proposition that the inherent probability or improbability of an event remains a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. In Re B [2009] 1 AC 11 Lord Hoffman observed as follows at [15]:

"There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship

between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred."

And Baroness Hale observed as follows at [72]:

"Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

50. Within this context, Peter Jackson J (as he then was) noted as follows in Re BR (Proof of Facts) [2015] EWFC 41 at [7]:

"[7]...
(3) the court takes account of any inherent probability or improbability of an event having occurred as part of a natural process of reasoning. But the fact that an event is a very common one does not lower the standard of probability to which it must be proved. Nor does the fact that an event is very uncommon raise the standard of proof that must be satisfied before it can be said to have occurred.

(4) Similarly, the frequency or infrequency with which an event generally occurs cannot divert attention from the question of whether it actually occurred. As Mr Rowley QC and Ms Bannon felicitously observe:

"Improbable events occur all the time. Probability itself is a weak prognosticator of occurrence in any given case. Unlikely, even highly unlikely things do happen. Somebody wins the lottery most weeks; children are struck by lightning. The individual probability of any given person enjoying or suffering either fate is extremely low."

I agree. It is exceptionally unusual for a baby to sustain so many fractures, but this baby did. The inherent improbability of a devoted parent inflicting such widespread, serious injuries is high, but then so is the inherent improbability of this being the first example of an as yet undiscovered medical condition. Clearly, in this and every case, the answer is not to be found in the inherent probabilities but in the evidence, and it is when analysing the evidence that the court takes account of the probabilities."

51. The foregoing authorities demonstrate that inherent probability is sensitive to context. Within the population as a whole, a natural cause is inherently more probable than an inflicted cause. At the level of an individual family however, whilst a matter that remains to be taken into account when examining the evidence in relation to that family, the forensic utility of the competing probabilities in the population as a whole may well alter when it comes to deducing what occurred in a particular household based on the evidence before the court.

52. In this case, where the key events with which the court is concerned were witnessed only by one parent or both parents, the following further matters with respect to the significance or otherwise of demeanour and the significance or otherwise of lies call for particular consideration in the context of articulating the legal principles applicable to the fact finding process.

53. As I have noted, the evidence of the parents and carers is of utmost importance and it is essential that the court forms a clear assessment of their credibility and reliability. Within this context, I am mindful of the fact that this hearing has taken place remotely, without the court having the benefit of seeing the parents physically before the court. However, two points fall to be made in this regard. First, in circumstances

where I directed that the parents should keep their cameras on during the course of the hearing and their images 'pinned' to the computer desktop, I have in fact had a better view of the parents and their demeanour during the course of the hearing than is ordinarily available to me during the course of a face to face hearing, where the parents are sat behind their lawyers. Second, and in any event, in assessing the credibility of a person there is a need for care when it comes to the question of bare demeanour.

54. The need for care with witness demeanour as indicative of credibility was highlighted by the Court of Appeal in Sri Lanka v. the Secretary of State for the Home Department [2018] EWCA Civ 1391. Within this context, as to credibility generally, the authors of Phipson on Evidence note as follows at [12-36]:

"The credibility of a witness depends on his knowledge of the facts, his intelligence, his disinterestedness, his integrity, his veracity. Proportionate to these is the degree of credit his testimony deserves from the court or jury. Amongst the more obvious matters affecting the weight of a witness's evidence may be classed his means of knowledge, opportunities of observation, reasons for recollection or belief, experience, powers of memory and perception, and any special circumstances affecting his competency to speak to the particular case—all of which may be inquired into either in direct examination to enhance, or in cross-examination to impeach the value of his testimony."

Within this context, in undertaking the essential task of forming a clear assessment of the credibility and reliability of the parents in public law proceedings, I take the view that the court's assessment should coalesce around matters such as the internal consistency of their evidence, its logicality and plausibility, details given or not given and the consistency of their evidence when measured against other sources of evidence (including evidence of what the witness has said on other occasions) and other known or probable facts.

55. Further, and related to the matters dealt with in the foregoing paragraph, is the importance of considering carefully the significance or otherwise of lies. The court must bear in mind that a witness may tell lies during an investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear and distress. The fact that a witness has lied about some matters does not mean that he or she has lied about everything (R v Lucas [1982] QB 720). It is also important, in cases where one or more of the respondents has cognitive difficulties, that before considering the application of the principle in R v Lucas the court satisfies itself that the statement that is said to be a lie is not, in fact, merely the result of confusion or misunderstanding.

56. Within the context of family proceedings, the Court of Appeal has made clear that the application of the principle articulated in R v Lucas in family cases should go beyond the court merely reminding itself of the broad principle. In Re H-C (Children) [2016] 4 WLR 85 McFarlane LJ (as he then was) stated as follows:

> *"[100] One highly important aspect of the Lucas decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the 'lie' is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in Lucas, where the relevant conditions are satisfied the lie is "capable of amounting to a corroboration". In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of R v Middleton [2001] Crim.L.R. 251. In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt."*

57. The four relevant conditions that must be satisfied before a lie is capable of amounting to corroboration are set out by Lord Lane CJ in R v Lucas as follows:

> *"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal*

disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."

*58. Where the court is satisfied that a lie is capable of amounting to corroboration of an allegation having regard to the four conditions set out in R v Lucas, in determining whether the allegation is proved, the court must weigh that lie against any evidence that points away from the allegation being made out (**H v City and Council of Swansea and Others [2011] EWCA Civ 195**)."*

Failure to protect

20) In **Re L-W (Children) [2019] EWCA Civ 159** King LJ stated the following:

"62. Failure to protect comes in innumerable guises. It often relates to a mother who has covered up for a partner who has physically or sexually abused her child or, one who has failed to get medical help for her child in order to protect a partner, sometimes with tragic results. It is also a finding made in cases where continuing to live with a person (often in a toxic atmosphere, frequently marked with domestic violence) is having a serious and obvious deleterious effect on the children in the household. The harm, emotional rather than physical, can be equally significant and damaging to a child.

63. Such findings where made in respect of a carer, often the mother, are of the utmost importance when it comes to assessments and future welfare considerations. A finding of failing to protect can lead a Court to conclude that the children's best interests will not be served by remaining with, or returning to, the care of that parent, even though that parent may have been wholly exonerated from having caused any physical injuries.

64. Any Court conducting a Finding of Fact Hearing should be alert to the danger of such a serious finding becoming 'a bolt on' to the central issue of perpetration or of falling into the trap of assuming too easily that, if a person was living in the same household as the perpetrator, such a finding is almost inevitable. As Aikens LJ observed in Re J, "nearly all parents will be imperfect in some way or another". Many households operate under considerable stress and men go to prison for serious crimes, including crimes of violence, and are allowed to return home by their long-suffering partners upon their release. That does not mean that for that reason alone, that parent has failed to protect her children in allowing her errant partner home, unless, by reason of one of the facts connected with his offending, or some other relevant behaviour on his part, those children are put at risk of suffering significant harm."

21) In **G-L-T (Children) [2019] EWCA Civ 717** King LJ repeated what she had said in Re L-W and further stated that:

"72. I repeat my exhortation for courts and Local Authorities to approach allegations of 'failure to protect' with assiduous care and to keep to the forefront of their collective minds that this is a threshold finding that may have important consequences for subsequent assessments and decisions.

73. Unhappily, the courts will inevitably have before them numerous cases where there has undoubtedly been a failure to protect and there will be, as a consequence, complex welfare issues to consider. There is, however, a danger that significant welfare issues, which need to be teased out and analysed by assessment, are inappropriately elevated to findings of failure to protect capable of satisfying the section 31 criteria.

74. It should not be thought that that the absence of a finding of failure to protect against a non-perpetrating parent creates some sort of a presumption or starting point that the child/children in question can or should be returned to the care of the non-perpetrating parent. At the welfare stage, the court's absolute focus (subject to the Convention rights of the parents) is in relation to the welfare interests of the child or children."

Medical evidence and controversy

22) In addition to the principles referred to in the Baker J in **Re JS [2012] EWHC 1370** the following points are also of relevance:

23) When considering the evidence provided by an expert the Court is respectfully reminded that the evidence of an expert is not in any special position and there is no presumption of belief in an expert no matter how distinguished he or she may be.

24) If the Court disagrees with an expert's conclusions or recommendations an explanation is required see **Re B (Care: Expert Witnesses) [1996] 1 FLR 667** and **Re D (A Child) [2010] EWCA 1000.**

25) In ***Re B (Care: Expert Witnesses)*** **[1996] 1 FLR 667** Ward LJ gave the following guidance as regards the evidence of expert witnesses:

> "*The expert advises but the Judge decides. The Judge decides on the evidence. If there is nothing before the court, no facts or no circumstances shown to the court which throw doubt on the expert evidence, then, if that is all with which the court is left, the court must accept it. There is, however, no rule that the Judge suspends judicial belief simply because the evidence is given by an expert*."

Butler-Sloss LJ continued:

> "*An expert is not in any special position and there is no presumption of belief in a doctor however distinguished he or she may be. It is, however, necessary for the Judge to give reasons for disagreeing with experts' conclusions or recommendations. That, this Judge did. A Judge cannot substitute his own views for the views of the experts without some evidence to support what he concludes.*"

26) In **A County Council v K,D and L [2005] EWHC 144** Charles J indicated that (a) it was the role of the Court to take into account and weigh the expertise and speciality of expert witnesses; (b) in a case where the medical evidence was that the likely cause of an injury was non-accidental the Court was entitled to find that the injury had a natural cause or was accidental or that the Local Authority had not established the threshold criteria to the required standard; (c) in a case where the medical evidence was that there was nothing diagnostic of a non-accidental injury, the Court could nonetheless reach a finding on the totality of the evidence that there had been a non-accidental injury and the threshold was satisfied; and (d) it was open to the Court, on the basis of the totality of the evidence, to reach a conclusion as to the cause of the injury that was different to, and did not accord with, the conclusion reached by the medical experts.

27) There are numerous cases where the courts have had to consider the question of how to approach medical evidence, a number of which are cited above by Baker J. Two of the most notable are the cases of ***Re U (Serious Injury: Standard of Proof); Re B*** [2004] EWCA Civ 567, [2004] 2 FLR 263, and ***Re R*** (Care Proceedings: Causation) [2011] EWHC 1715 Fam.

28) In ***Re U (Serious Injury: Standard of Proof); Re B;*** Butler Sloss P stated in the Court of Appeal at paragraph [23]

- the cause of an injury or an episode that cannot be explained scientifically remains equivocal
- recurrence is not in itself probative
- particular caution is necessary in any case where the medical experts disagree, one opinion declining to exclude a reasonable possibility of natural cause
- the court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour proper is at stake, or the expert who has developed a scientific prejudice
- the judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark.

29) In ***R v Henderson*** [22] EWCA Crim. 126 , Moses LJ:

"There are few types of case which arouse greater anxiety and controversy than those in which it is alleged that a baby has died as a result of being shaken. It is of note that when the Attorney General undertook a review of 297 cases over a 10 year period following the case of R v Cannings [2004] 2 Criminal Appeal Reports 63, 97 were cases of what is known as "shaken baby syndrome". The controversy to which such cases gives rise should come as no surprise. A young baby dies whilst under the sole care of a parent or child-minder. That child can give no clue to clinicians as to what has happened. Experts, prosecuting authorities and juries must reconstruct, as best they can, what has happened. There remains a temptation to believe that it is always possible to identify the cause of injury to a child. Where the prosecution is able, by advancing an array of experts, to identify a non-accidental injury and the defence can identify no alternative cause, it is tempting to conclude that the prosecution has proved its case. Such a temptation must be resisted. In this, as in so many fields of medicine, the evidence may be insufficient to exclude beyond reasonable doubt an unknown cause. As Cannings (177) teaches, even where, on examination of all the evidence, every possible known cause has been excluded, the cause may still remain unknown".

30) A member of the Court of Appeal in that case was Hedley J who imported the reasoning of Moses LJ in the Court of Appeal in ***Henderson*** into family law in ***Re R (Care proceedings: Causation)*** [2011] EWHC 1715 (Fam) in which Hedley J explained that it does not represent forensic failure for a judge to reach a conclusion that the cause is unknown. He explained the reasoning behind unknown cause:

"There has to be factored into every case which concerns a disputed aetiology giving rise to significant harm a consideration as to whether the cause is unknown. That affects neither the burden nor the standard of proof. It is simply a factor to be taken into account in deciding whether the causation advanced by the one shouldering the burden of proof is established on the balance of probabilities…. In my judgment, a conclusion of unknown etiology in respect of an infant represents neither professional nor forensic failure. It simply recognises that we still have much to learn and it also recognises that it is dangerous and wrong to infer non-accidental injury merely from the absence of any other understood mechanism. Maybe it simply represents a general acknowledgement that we are fearfully and wonderfully made."

Lies

31) In **Re M (Children) [2013] EWCA Civ 388** the applicability of the Lucas direction to family proceedings was highlighted by Ryder LJ:

"7…. A Lucas direction is a criminal direction derived originally from a case on corroboration, R v Lucas [1981] QB 720. It is used to alert a fact-finding tribunal, that is a jury in a criminal trial, to the fact that a lie told by a defendant does not of itself necessarily indicate guilt because the defendant may have some other reason for lying; that is, he may lie for innocent reasons. A witness may lie because she lacks credibility, or because she has an innocent motive for lying. If she lies about the key fact in issue, that is one thing; if she lies about collateral facts, that may be quite another. A judge of fact may not be able to separate out every fine distinction, but may nevertheless conclude that an allegation is proved, despite the fact that the witness has lied about other matters.

8. This is often simplified in the circumstances of emotionally-charged allegations remembered through the fog of distress and relationship breakdown as a core of truth surrounded by sometimes exaggerated and sometimes badly recollected or hazy memory. There may also be an overlay of deliberate untruth arising out of the anger and distress of the breakdown and/or the nature of the application before the court, and I remind myself this was a strongly disputed application. It is also too frequently the case that a Family Judge is faced with internally inconsistent or even untruthful witnesses who are locked in a battle in which their energies and antagonism have sadly come to be focused on who should look after the children or have contact with them."

32) Further, Munby LJ observed in **Re A (A Child) (Fact-finding hearing: Speculation) [2011] EWCA Civ 12** at paragraph 104

"Any judge who has had to conduct a fact-finding hearing such as this is likely to have had experience of a witness – as here a woman deposing to serious domestic violence and grave sexual abuse – whose evidence,

although shot through with unreliability as to details, with gross exaggeration and even with lies, is nonetheless compelling and convincing as to the central core. It is trite that there are all kinds of reasons why witnesses lie, but where the issues relate, as here, to failed marital relationships and the strong emotions and passions that the court process itself releases and brings into prominence in such a case, the reasons why someone in the mother's position may lie, even lie repeatedly, are more than usually difficult to decipher. Yet through all the lies, as experience teaches, one may nonetheless be left with a powerful conviction that on the essentials the witness is telling the truth, perhaps because of the way in which she gives her evidence, perhaps because of a number of small points which, although trivial in themselves, nonetheless suddenly illuminate the underlying realities."

33) In **Hertfordshire CC v Ms T and Mr J [2018] EWHC 2796** Keehan J stated at paragraphs 9 and 10 of his judgment:

"When considering the evidence, particularly the evidence of the mother, I give myself a revised Lucas direction, namely, I should only take account of any lies found to have been told if there is no good reason or other established reason for the person to have lied. I also take into account the decision of the Court of Appeal in Re H-C [2016] EWCA civ 136 where McFarlane LJ (as he then was) said at para.100:

"One highly important aspect of the Lucas decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the 'lie' is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in Lucas, where the relevant conditions are satisfied the lie is 'capable of amounting to a corroboration.' In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of R v Middleton [2001] Crim.L.R. 251. 'In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should, therefore, take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt'."

I entirely accept that the mere fact of a lie being told does not prove the primary case against the party or the witness should they have been found to have lied to the court. I also bear in mind that there is no obligation on a party to prove the truth of an alternative case put forward by way of defence and the failure by the party to establish the alternative case on the balance of probabilities does not of itself prove the other party's case, Re X (No 3) [2013] EWHC 3651 Fam and Re Y (No 3) [2016] EWHC 503 Fam."

34) In **Re K (Children: Placement Orders) [2020] EWCA (Civ) 1503** Peter Jackson LJ stated at paragraph 29 of his judgment that:

The next general matter concerns the significance of lies. The correct approach to lies in relation to fact-finding is well known and the Judge appropriately gave himself a Lucas direction in that context. Here the more pertinent matter for our purpose concerns lies in the context of welfare. Lies, however disgraceful and dispiriting, must be strictly assessed for their likely effect on the child, and the same can be said for disobedience to authority. In some cases, the conclusion will simply be that the child unfortunately has dishonest or disobedient parents. In others, parental dishonesty and inability to co-operate with authority may decisively affect the welfare assessment. But in all cases the link between lies and welfare must be spelled out. That did not happen in Re Y (A Child) EWCA Civ 1337, where Macur LJ said this at [7(4)]:

> "… I consider the case appears to have been hijacked by the issue of the mother's dishonesty. Much of the local authority's evidence is devoted to it. The Children's Guardian adopts much the same perspective. It cannot be the sole issue in a case devoid of context. There was very little attention given to context in this case. No analysis appears to have been made by any of the professionals as to why the mother's particular lies created the likelihood of significant harm to these children and what weight should reasonably be afforded to the fact of her deceit in the overall balance."

35) In **A, B and C (CHILDREN) [2021] EWCA Civ 451** Macur LJ considered the circumstances in which a family court is invited to give a Lucas Direction and made the following suggestion:

"I venture to suggest that it would be good practice when the tribunal is invited to proceed on the basis , or itself determines, that such a direction is called for, to seek Counsel's submissions to identify: (i) the deliberate lie(s) upon which they seek to rely; (ii) the significant issue to which it/they relate(s), and (iii) on what basis it can be determined that the only explanation for the lie(s) is guilt. The principles of the direction will remain the same, but they must be tailored to the facts and circumstances of the witness before the court."

Factors relevant to factual framework

36) In **BR (Proof of Facts), Re [2015] EWFC 41** Peter Jackson J (as he then was), whilst acknowledging that each case turns on its own facts, endorsed an analysis of relevant factors to be considered by the court which had been prepared by counsel for the Children's Guardian from material produced by the NSPCC, the Common Assessment Framework and the Patient UK Guidance for Health Professionals.

37) The risk factors were:

a) Physical or mental disability in children that may increase caregiver burden
b) Social isolation of families
c) Parents' lack of understanding of children's needs and child development
d) Parents' history of domestic abuse
e) History of physical or sexual abuse (as a child)
f) Past physical or sexual abuse of a child
g) Poverty and other socioeconomic disadvantage
h) Family disorganization, dissolution, and violence, including intimate partner violence
i) Lack of family cohesion
j) Substance abuse in family
k) Parental immaturity
l) Single or non-biological parents
m) Poor parent-child relationships and negative interactions
n) Parental thoughts and emotions supporting maltreatment behaviours
o) Parental stress and distress, including depression or other mental health conditions
p) Community violence

38) The protective factors were:

a) Supportive family environment
b) Nurturing parenting skills
c) Stable family relationships
d) Household rules and monitoring of the child
e) Adequate parental finances
f) Adequate housing
g) Access to health care and social services
h) Caring adults who can serve as role models or mentors
i) Community support

39) At paragraph 19 of his judgment Peter Jackson J concluded:

"*In itself, the presence or absence of a particular factor proves nothing. Children can of course be well cared for in disadvantaged homes and abused in otherwise fortunate ones. As emphasised above, each case turns on its facts. The above analysis may nonetheless provide a helpful framework within which the evidence can be assessed and the facts established."*

Repeated accounts and possible reported discrepancies

40) Peter Jackson J (as he then was) in the case of **Lancashire County Council v The Children [2014] EWHC 3 (Fam)**, at paragraph 9 stated:

> *"… where repeated accounts are given of events surrounding injury and death, the court must think carefully about the significance or otherwise of any reported discrepancies. They may arise for a number of reasons. One possibility is of course that they are lies designed to hide culpability. Another is that they are lies told for other reasons. Further possibilities include faulty recollection or confusion at times of stress or when the importance of accuracy is not fully appreciated, or there may be inaccuracy or mistake in the record-keeping or recollection of the person hearing and relaying the account. The possible effects of delay and repeated questioning upon memory should also be considered, as should the effect on one person of hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be unnatural – a process that might inelegantly be described as 'storycreep' – may occur without any necessary inference of bad faith."*

Witness Evidence and Demeanour

41) Macur LJ in **Re M (Children) [2013] EWCA Civ 1147** at [11] and [12], stated that:

> *"Any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behaviour in the witness box and to expressly indicate that they have done so".*

42) In **A, B and C (CHILDREN) [2021] EWCA Civ 451** Macur LJ further stated that:

> *"A jury would be firmly told, and for good reason, that the presence or absence of emotion or distress when giving evidence is not a good indication of whether a person is telling the truth or not. Equally so in police interview."*

43) In **Re P (Sexual Abuse - Finding of Fact Hearing) [2019] EWFC 27** MacDonald J stated at paragraph 254 of his judgment that:

> *. . . the court's impression of a parent, and its assessment of the credibility and reliability of that parent, should coalesce around matters such as the internal consistency of their evidence, its logicality and plausibility, details given or not given and the consistency of their evidence when measured against other sources of evidence (including evidence of what the witness has said on other occasions) and other known or probable facts. The credibility and reliability of that parent should not be assessed simply by reference to, as it was termed historically, 'the cut of their jib'.*

44) In **Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor [2013] EWHC 3560 (Comm)** Leggatt J, at paragraphs 15 – 21 of his judgment, stated:

> *"An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.*
>
> *While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*
>
> *Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of*

an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth"

45) When in the Court of Appeal the same judge developed the analysis to consider reliability of witness testimony based on demeanour, **R (on the application of SS) (Sri Lanka) v The Secretary of State for the Home Department [2018] EWCA Civ 1391**:

"41. No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decisionmaking. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to

consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts."

46) In **Re A (A Child) [2020] EWCA Civ 1230** King LJ considered the import of Leggatt J's statements and referred to the Court of Appeal's decision in **Kogan v Martin and Others [2019] EWCA Civ 1645** in which it was stated that:

Gestmin is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed . . . But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.

47) King LJ concluded that:

41. The court must . . . be mindful of the fallibility of memory and the pressures of giving evidence. The relative significance of oral and contemporaneous evidence will vary from case to case. What is important, as was highlighted in Kogan, is that the court assesses all the evidence in a manner suited to the case before it and does not inappropriately elevate one kind of evidence over another.

Bias

48) The application of hindsight or outcome bias ought to be guarded against by the court and was explained by Mrs Justice Theis in **Surrey CC v E, [2013] EWHC Fam 2400**, at paragraph 75:

"I should guard against 'Hindsight Bias' and 'Outcome Bias' which is described in The Department of Education's Guidance on 'Improving the Quality of Serious Case Review' published in June 2013 as follows:

'Hindsight bias occurs when actions that should have been taken in the time leading up to an incident seem obvious because all the facts become clear after the event. This tends towards a focus upon blaming staff and professionals closest in time to the incident. Outcome bias occurs when the outcome of the incident influences the way it is analysed. For example when an incident leads to a death it is considered very differently from an incident that leads to no harm, even when the type of incident is exactly the same. If people are judged one way when the outcome is poor and another way when the outcome is good, accountability becomes inconsistent and unfair.'"