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Case Number: RG23C50038

IN THE FAMILY COURT SITTING AT SLOUGH

The Law Courts
Windsor Road
Slough
SL1 2HE

Heard on 30-31 January, 1, 5-8 and 19 February 2024
Judgment given on 19 February 2024

Before

HIS HONOUR JUDGE RICHARD CASE

Between

SLOUGH CHILDREN FIRST

Applicant

and

MOTHER (1)

FATHER (2)

SK (THE CHILD) (3)

Respondents

Representation

For the Applicant: Dylan Morgan, counsel instructed by the Applicant Council

For the Respondents: Sally Stone KC and Susan Quinn, counsel instructed by the First Respondent Mother

Aidan Vine KC and Nairn Purss, counsel instructed by the Second Respondent Father

Jason Green, counsel instructed by the Third Respondent child by their Children's Guardian, Peggy Sipeer

This judgment was delivered in private. The judge has given permission for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

JUDGMENT

This judgment is deemed handed down at 10am on 19 February 2024

Contents

Summary	4
Parties	5
Background	5
Chronology.....	5
Positions.....	6
Evidence Summary.....	6
Law	8
Threshold	9
Fact Finding.....	9
Lying.....	14
Injuries	15
List of perpetrators	17
Findings	20
Credibility generally	20
Mother	21
Father.....	25
Allegations.....	29
1: The Child has suffered physical harm and emotional harm by reason of suffering the following injuries.....	29
3: The injuries occurred on two separate occasions	29
2(a): Injury (a) (spiral fracture of the mid shaft of the left tibia) was suffered between 23 January 2023 and 6 February 2023.....	30
2(b): Injury (b) (metaphyseal fracture) was suffered between 12 February 2023 and 20 February 2023	31
4: At the material time, the Child had only been in the care of one, or both, of her parents.	31
5(b): The Child has no disposition to suffer fractures and/or there is no metabolic cause or contribution to the fractures occurring	31

5(a) The injuries were non-accidental	35
7(a): The parents failed to seek medical attention in good time when the injuries were inflicted and this would have prolonged the physical and emotional harm	42
8: One parent would have known the other parent inflicted the injuries and therefore failed to protect the Child	42
6(a): The parents reported the Child had a swollen lower left leg which was red and painful from the afternoon of 19 February 2023 to admission to hospital on 20 February 2023	46
6(b): The parents reported the Child was crying and in discomfort throughout the afternoon of 19 February until the morning of 20 February 2023	46
7(b): The parents failed to seek medical attention when the observations at allegation 6 were made and this would have prolonged the physical and emotional harm	46
Conclusion.....	48

Summary

1. I have set out my findings in bold under the heading "Findings" below. By way of summary they are as follows:

The Child suffered the 2 identified fractures on 2 separate occasions

The Child suffered physical and emotional harm by reason of a spiral fracture of the mid shaft of the left tibia between 23 January 2023 and 6 February 2023

The Child suffered physical and emotional harm by reason of a left distal tibial metaphyseal fracture on 19 February 2023 at some point before 20.30

At the time of the spiral fracture of the mid shaft of the left tibia the Child was in the care of the Mother, the Father or both and at the time of the left distal tibial fracture the Child was in the care of the Mother

It is unknown whether the Child's vitamin D deficiency actually did result in reduced bone fragility compared to children without that deficiency

The injuries were not perpetrated by either parent using force beyond that which it would be reasonable for a parent to use

The parents did not fail to seek medical attention in good time when the fractures were inflicted nor would the non-perpetrator parent have known of the infliction of the fractures and could not therefore have failed to protect the Child

The parents noted the Child had a swollen lower left leg which was red and painful at between 19.30 and approximately 20.30 on 19 February 2023

The Child was crying and in discomfort from the afternoon of 19 February 2023 to the morning of 20 February 2023 but not continuously

It was not unreasonable for the purpose of section 31(2)(b)(i) Children Act 1989 to fail to seek medical attention until 20 February 2023

Parties

2. I am concerned with a child born in late 2022, now aged 1. I shall refer to her as the Child and in the interests of anonymisation I will refer to her parents as the Mother and Father. I mean no disrespect to them.

Background

Chronology

3. The following is an edited extract from the Local Authority case summary:

1. ...The Mother and Father are Indian nationals [who arrived in the UK in late 2021] formerly resident in the UK under the mother's student visa...Mother was the principal carer for the Child as Father worked full-time – two jobs one in the daytime and one at night (5pm to 5am).

...

3. On 19th February 2023, in the evening, the Mother reports that she noted the Child to be unsettled and crying and that her left leg was swollen. The parents did not seek medical attention that day. On 20th February, the parents state that they attempted to make a GP appointment for the Child and called the health visitor. The health visitor advised the Mother to call 111. The 111 call, led to advice to take the Child to hospital. These calls are accepted by the parties and two calls were made to the GP surgery at 08.34 and 08.37 on the 20.2.2023.

4. Shortly after her arrival at Hospital (Arrival at 10.13 on 20.2.2023 [J130] Triage at 10.20) – ...the Child was examined by A&E consultant Rebecca Cummings who noted that her left leg was “diffusely swollen and warm from knee to ankle” and “x3 small marks to anterior shin.” [statement at J1382 and notes at J127/128]. Of further relevance Dr Cummings arranged a bone profile for the Child - results at [J137] dated 20.2.2023 at 13.59. Also Vitamin D testing which is at [J138].

5. On admission to the paediatric assessment unit she was examined by Dr Kriti Singh who carried out a Child Protection Medical [C132 & C139, J224, J138, J142 & J155-159]. Later on that day she was also seen by Dr Edate, a consultant paediatrician [C24a & C24g, J183 & J184-186], an orthopaedic consultant Mr Patel [J161] and a consultant in trauma, Mr Shah [C28a, J162]. Each of these doctors examined the Child, spoke to the parents and took a history from them.

6. Subsequent investigations including x-ray and skeletal surveys revealed that the Child had suffered 2 fractures to her left lower leg. The fractures were a metaphyseal fracture to the

bottom of the left tibia and an older mid-shaft medial tibial fracture which radiological opinion considered to be 10 to 14 days old. The lower leg fracture was considered more recent. Both injuries would have been painful...

...

8. On 21st February 2023, the hospital made a referral to the Local Authority and strategy meetings were convened on 21st and 24th February [H1-H8]...

...

9. During the course of the Child's hospital admission, concerns were noted by hospital staff that Mother had been observed sleeping while holding the Child on ward on two occasions despite having been advised about the risks to her. Furthermore, when the parents were informed on 2[7]th February that the Police were exercising their protection powers and Child would be accommodated in a foster-placement, Father appeared to incite the mother to take the Child and spoke about "taking the baby and going", saying "if I'd known this was going to happen I would have taken the Child to the village" [H16].

10. The police duly exercised their powers of protection and the Child was placed into foster care. The Local Authority applied for, and was granted, an EPO on 2nd March 2023. The Local Authority subsequently applied for an interim care order which was granted (without active opposition) on 10th March 2023.

Positions

4. I have set out the parties positions in relation to each allegation below.

Evidence Summary

5. I have had the benefit of reading/viewing the following documents:

Composite threshold	10.1.2023	A122
Transcript 111 call	19.1.2023	J6
Dr Cummings statement (A&E paediatrician)	7.9.2023	J1383
Dr Singh statement (Ward paediatrician)	7.9.2023	C139
Dr Edate statement (Consultant paediatrician) (not FPR compliant)	31.3.2023	C24f
Dr Shah statement (not FPR compliant)	10.4.2023	C28a

Dr Ternent statement	5.9.2023	C136
Mother's statement (FPR compliant version at [Z21])	14.4.2023	C31
Mother's Police Interview transcript	7.6.2023 (interview date)	M100
Mother's second statement (FPR compliant version at [Z43])	19.12.2023	C147
Mother's third statement (FPR compliant version at [Z51])	26.1.2024	C153
Father's statement (not FPR compliant)	10.7.2023	C81
Father's Police Interview transcript	7.6.2023 (interview date)	M75
Father's final statement (not FPR compliant)	29.1.2024	Z1
Dr Johnson, Paediatric Radiologist	29.6.2023	E1
Dr Johnson, addendum report	17.7.2023	E6
Dr Johnson, addendum report	6.9.2023	E75
Dr Johnson addendum report	24.1.2024	E134
Dr Yadav, Paediatrician	10.8.2023	E8
Dr Yadav, addendum report	6.11.2023	E77
Dr Yadav addendum report	23.1.2024	E122
Body Cam recording	22.2.2023	M71
Body Cam recording	22.2.2023	M72
YouTube Video	22.12.17	O76
Hospital Notes	Various Dates	

6. I heard oral evidence from:

- a) Dr Johnson, radiologist;
- b) Dr Yadav, paediatrician;
- c) Dr Edate, paediatrician;
- d) Dr Cummings, paediatrician;
- e) Dr Singh, paediatrician;
- f) The Mother; and
- g) The Father.

7. At the outset of the hearing the parties agreed a series of facts based on the video evidence [Z8]:
- 1) The forensic download material extends to 68 MB of data.
 - 2) It includes call logs, hundreds of videos and images, and WhatsApp communications created by and or held on each parent's phone, including for the radiological period for the Child's spiral fracture and leg fracture.
 - 3) The dates attributed to videos and images, may be either the date the image or video file was originally created or the date on which a copy was created in WhatsApp on the phone.
 - 4) There are no videos or images of the Child displaying either distress relating to her left leg or restricted mobility in her left leg. Many of the videos show the Child with full mobility in her left leg.
 - 5) There are 9 short calls (the longest is 43 seconds) and 1 attempted call between the parents between 18:31 pm and 21:42 pm on 19 February 2023.
 - 6) There are no communications between either parent (or between either parent and any other person) evidencing knowledge that the Child has leg injuries before admission to hospital on 20 February 2023.
 - 7) There are no communications between either parent (or between either parent and any other person) evidencing any attempt to prevent any other person knowing how the Child sustained her leg injuries.
 - 8) The images and videos of the Child are affectionate, and show gentle interactions between the Child and each of her parents in hundreds of videos and images, representing an almost daily record.
 - 9) There are short videos of naïve parental handling of the Child on five occasions – being held on the father's lap on playground swings, being held by the father and descending on a playground slide, being held on the mother's lap on a playground swing, being placed unsecured in an upright baby chair and being held on her father's shoulder with one hand.
 - 10) These videos appear either to have been made or to have been copied to WhatsApp on 5 February 2023, 6 February 2023 and 9 February 2023.
 - 11) There is one video of careless parental handling of the Child – being carried unsecured inside a small rucksack/daypack on her father's shoulders.
 - 12) This video is not dated.

Law

8. I remind myself that the burden of proving allegations rests with the Local Authority on the balance of probabilities.

Threshold

9. I must consider if the Local Authority has proved that the threshold test set out in section 31(2) Children Act 1989 is met. It provides:

- (2) A court may only make a care order or supervision order if it is satisfied –
 - (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
 - (b) that the harm, or likelihood of harm, is attributable to –
 - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
 - (ii) the child's being beyond parental control.

10. I remind myself that the relevant date for the purposes of making the assessment is the date on which the Local Authority initiated the procedure (*Re M (Care Order: Threshold Conditions)* [1994] 2 FLR 577) but subsequent events and behaviour are capable of providing relevant evidence about the position before the relevant date (*Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050).

11. I also consider Hedley J in the same case at para 49

“...society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done.”

Fact Finding

12. I remind myself of the fact-finding self-directions that I must give myself adapted from the helpful summary of Munby P in *Re X (Children) (No 3)* [2015] EWHC 3651:

20. ...The principles are conveniently set out in the judgment of Baker J in *Re L and M (Children)* [2013] EWHC 1569 (Fam), to which I was taken. So far as material for present purposes what Baker J said (and I respectfully agree) was this:

- “First, the burden of proof lies at all times with the local authority.
- Secondly, the standard of proof is the balance of probabilities.

Third, findings of fact in these cases must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation ... 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. The court invariably surveys a wide canvas. 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.

Fifthly, ... Whilst appropriate attention must be paid to the opinion of ... experts, those opinions need to be considered in the context of all the other evidence. It is important to remember that the roles of the court and the expert are distinct and it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence. It is the judge who makes the final decision.

Sixth, ... 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.

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.

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)." [I address this further below]

13. Munby P continued:

21. To this admirable summary I add three further points.

22. First, that the legal concept of proof on a balance of probabilities "must be applied with common sense", as Lord Brandon of Oakbrook said in *The Popi M, Rhesa Shipping Co SA v Edmunds, Rhesa Shipping Co SA v Fenton Insurance Co Ltd* [1985] 1 WLR 948, 956.

23. Secondly, that the court can have regard to the inherent probabilities: see Lady Hale in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35, [2009] 1 AC 11, para 31. But this does *not* affect the legal standard of proof, as Lord Hoffmann emphasised in the same case (para 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. In many cases, the other evidence will show that it was all too likely.”

24. Thirdly, that the fact, if fact it be, that the respondent ... fails to prove on a balance of probabilities an affirmative case that she has chosen to set up by way of defence, does *not* of itself establish the local authority’s case. As His Honour Judge Clifford Bellamy recently said in *Re FM (A Child: fractures: bone density)* [2015] EWFC B26, para 122, and I respectfully agree:

“It is the local authority that seeks a finding that FM’s injuries are non-accidental. It is for the local authority to prove its case. It is not for the mother to disprove it. In particular it is not for the mother to disprove it by proving how the injuries were in fact sustained. Neither is it for the court to determine how the injuries were sustained. The court’s task is to determine whether the local authority has proved its case on the balance of probability. Where, as here, there is a degree of medical uncertainty and credible evidence of a possible alternative explanation to that contended for by the local authority, the question for the court is not ‘has that possible alternative explanation been proved’ but rather it should ask itself, ‘in the light of that possible alternative explanation can the court be satisfied that the local authority has proved its case on the simple balance of probability’.”

14. In relation to experts in *Re B (Care: Expert)* [1996] 1 FLR 667 at 674 Butler-Sloss LJ said:

I agree with the judgment of Ward LJ. Family judges deal with increasingly difficult child cases and are much assisted in their decision-making process by professionals from other disciplines: medical, wider mental health and social work among others. The courts pay particular attention to the valuable contribution from paediatricians and child psychiatrists as well as others, but it is important to remember that the decision is that of the judge and not of the professional

expert. Judges are well accustomed to assessing the conflicting evidence of experts. As Ward LJ said, judges are not expected to suspend judicial belief simply because the evidence is given by an expert. An expert is not in any special position and there is no presumption or belief in a doctor however distinguished he or she may be. It is, however, necessary for a judge to give reasons for disagreeing with experts' conclusions or recommendations. That, this judge did. A judge cannot substitute his views for the views of the experts without some evidence to support what it is he concludes.

15. In his President's Memorandum on Witness Statements dated 10 November 2021 McFarlane P said:

14. Parties should understand that the court's approach to witness evidence based on human memory will be in accordance with CPR PD 57AC, Appendix para 1.3.

This states that human memory:

- a. is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but
- b. is a fluid and malleable state of perception concerning an individual's past experiences, and therefore
- c. is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration.

16. I also direct myself to the judgment of Peter Jackson J (as he was) in *Lancashire County Council v The Children* [2014] EWHC 3 (Fam):

9. 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 and relaying the account. The possible effects of delay and 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 which might inelegantly be described as “story creep” – may occur without any inference of bad faith.

17. That should be borne in mind when considering perceived differences between accounts over time and generally when considering a witness' recall.

18. As to propensity to cause harm to children I refer myself to Ryder J in *Lancashire County Council v R* [2010] 1 FLR 387:

59. Such evidence may demonstrate that each parent has been or is capable of being physically aggressive or emotionally abusive to the other. The potential for harm to a child in such circumstances is self evident but in order to ensure that it is considered in every case, Parliament has enacted an amendment to the 1989 Act to provide for the same: by s 31(9) as introduced by s 120 Adoption and Children Act 2002 harm explicitly includes impairment suffered from seeing or hearing the ill-treatment of another: in colloquial terms, domestic abuse.

60. However, despite the above, what such incidents do not of themselves demonstrate, is that either parent has the propensity to violence towards small children. A clear distinction is to be drawn between the relevance and admissibility of evidence which describes the harmful circumstances in which a child is being cared for and the same evidence when it is used to suggest that a person has a propensity to commit a particular act. In other words, the evidence will be very relevant to harm or its likelihood in s 31(2) and the court's assessment of risk in s 1(3)(e) of the 1989 Act but not necessarily to perpetration. It may be forensically unwise for the court to attach much, if any, weight to this evidence if it is directed only to the question of propensity...

19. As regards demeanour I have regard to Peter Jackson LJ in *B-M (Children: Findings of Fact)* [2021] EWCA Civ 1371:

25. No judge would consider it proper to reach a conclusion about a witness's credibility based solely on the way that he or she gives evidence, at least in any normal circumstances. The ordinary process of reasoning will draw the judge to consider a number of other matters, such as the consistency of the account with known facts, with previous accounts given by the witness, with other evidence, and with the overall probabilities. However, in a case where the facts are not likely to be primarily found in contemporaneous documents the assessment of credibility can quite properly include the impression made upon the court by the witness, with due allowance being made for the pressures that may arise from the process of giving evidence. Indeed in family cases, where the question is not only 'what happened in the past?' but also

‘what may happen in the future?’, a witness’s demeanour may offer important information to the court about what sort of a person the witness truly is, and consequently whether an account of past events or future intentions is likely to be reliable.

26. I therefore respectfully agree with what Macur LJ said in *Re M (Children)* at [12], with emphasis on the word ‘solely’:

“It is obviously a counsel of perfection but seems to me advisable 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.”

...

28...There will be cases where the manner in which evidence is given about such personal matters will properly assume prominence. As Munby LJ said in *Re A (A Child) (No. 2)* [2011] EWCA Civ. 12 said at [104] in a passage described by the Judge as of considerable assistance in the present case:

“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... 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.”

Lying

20. I remind myself of the *Lucas* direction from *R v Lucas* [1981] QB 720, elaborated on by Macur LJ in *Re A* [2021] EWCA Civ 451:

54. That a witness’s dishonesty may be irrelevant in determining an issue of fact is commonly acknowledged in judgments...in formulaic terms:

“that people lie for all sorts of reasons, including shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure and the fact that somebody lies about one thing does not mean it actually did or did not happen and/or that they have lied about everything”.

But this formulation leaves open the question: how and when is a witness's lack of credibility to be factored into the equation of determining an issue of fact? In my view, the answer is provided by the terms of the entire 'Lucas' direction as given, when necessary, in criminal trials.

55. Chapter 16-3, paragraphs 1 and 2 of the December 2020 Crown Court Compendium, provides a useful legal summary:

“1. A defendant's lie, whether made before the trial or in the course of evidence or both, may be probative of guilt. A lie is only capable of supporting other evidence against D if the jury are sure that:

(1) it is shown, by other evidence in the case, to be a deliberate untruth; i.e. it did not arise from confusion or mistake;

(2) it relates to a significant issue;

(3) it was not told for a reason advanced by or on behalf of D, or for some other reason arising from the evidence, which does not point to D's guilt.

2. The direction should be tailored to the circumstances of the case, but the jury must be directed that only if they are sure that these criteria are satisfied can D's lie be used as some support for the prosecution case, but that the lie itself cannot prove guilt. ...”

21. What I have said above in relation to memory applies equally to a consideration of whether a person is, in fact, lying.

Injuries

22. Peter Jackson LJ summarised the questions to be answered in *Re S (A Child: Adequacy of Reasoning)* [2019] EWCA Civ 1845 at paragraph 3:

(1) Had the local authority proved that the injuries were inflicted as opposed to being accidental?

(2) If the injuries were inflicted, who had the opportunity to cause them?

(3) Of those people, could one person be identified on the balance of probabilities as having inflicted the injuries (a conventional 'known perpetrator' finding)?

(4) If only two people...could have caused the injuries, but the one responsible could not be identified it necessarily followed that there was a real possibility that each of them may have caused the injuries (an 'uncertain perpetrator' finding).

23. In *Re BR (Proof of Facts)* [2015] EWFC 41 he said the following. I have underlined those of particular relevance in this case:

Risk factors and protective factors

18. On behalf of the Children's Guardian, Mr Clive Baker has assembled the following analysis from material produced by the NSPCC, the Common Assessment Framework and the Patient UK Guidance for Health Professionals.

Risk factors

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

Protective factors

- Supportive family environment
- Nurturing parenting skills
- Stable family relationships
- Household rules and monitoring of the child
- Adequate parental finances
- Adequate housing
- Access to health care and social services
- Caring adults who can serve as role models or mentors
- Community support

19. 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.

List of perpetrators

24. The following summary of the law is taken from the Family Court Practice paragraph 2.282[19]:

Uncertain perpetrator cases—If the judge cannot identify a perpetrator or perpetrators, it is still important to identify the possible perpetrators by asking whether the evidence establishes that there is a ‘likelihood or real possibility’ that a given person perpetrated the injuries in question (*Re S-B (Children)* [2010] 1 FLR 1161, SC; *North Yorkshire CC v SA* [2003] 2 FLR 849, CA). In such circumstances, it is all the more important to scrutinise the evidence carefully and consider whether anyone, and if so who, should be included as a possible perpetrator (*Re S (A Child)* [2014] 1 FLR 739, CA). However, it is not helpful for the judge to give an indication of percentages as to the likelihood that one or other of the possible perpetrators was responsible and judges should be cautious about amplifying in this way a judgment in which they have been unable to identify a specific perpetrator (*Re S-B (Children)* [2010] 1 FLR 1161, SC).

In *Re B (A Child)* [2018] EWCA Civ 2127, and *Re B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575, the Court of Appeal gave further consideration to so called ‘uncertain perpetrator’ cases. In *Re B (Children: Uncertain Perpetrator)*, the Court of Appeal urged a change of terminology from ‘pool’ to ‘list’. The following principles can be drawn from the two authorities:

(a) The concept of a ‘pool’ of perpetrators is one that seeks to strike a fair balance between the rights of the individual, including those of the child, and the imperatives of child protection;

(b) A decision by a court to place a person in a ‘pool’ of possible perpetrators does not constitute a finding of fact in the conventional sense in that that person is not proven to be a perpetrator but is rather a possible perpetrator;

(c) Where there are a number of people who might have caused the harm to the child, it is for the local authority to show that in relation to each of them there is a real possibility that they did so;

(d) Within this context, the question is whether it has been demonstrated to the requisite standard that a person is a possible perpetrator. Approaching the matter by considering who could be excluded from a 'pool' of possible perpetrators is to risk reversing the burden of proof. The court must consider the strength of the possibility that the person was involved as part of the overall circumstances of the case;

(e) In doing so, in future the court should first consider whether there is a 'list' of people who had the opportunity to cause the injury;

(f) The court should then consider whether it can identify the actual perpetrator on the balance of probability [omitted]. At this stage, the correct legal approach is to survey the evidence as a whole as it relates to each individual in order to arrive at a conclusion about whether the allegation has been made out in relation to one or other on a balance of probability. Evidentially, this will involve considering the individuals separately and together and comparing the probabilities in respect of each of them. Within this context, the right question is not 'who is the more likely?' but rather 'does the evidence establish that this individual probably caused this injury?' In a case where there are more than two possible perpetrators, the Court of Appeal highlighted a clear danger in identifying an individual simply because they are the likeliest candidate, as this can lead to an identification on evidence that falls short of a probability;

25. In *Re A (Children)(Pool of Perpetrators)* [2022] EWCA Civ 1348 the Court of Appeal confirmed:

[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...

[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."

26. The commentary in Family Court Practice continues:

(g) Only if the court cannot identify the perpetrator to the civil standard of proof should it then go on to ask of each of those on the list whether there was a likelihood or real possibility that they caused the injuries. Only if there is, should that person be considered a possible perpetrator;

(h) In order to ensure that an imbalance of information regarding each of those on the list does not distort the assessment of the possibilities, in uncertain perpetrator cases, at the outset the court should ensure by way of case management that: (i) a list of possible perpetrators is created; (ii) directions are given for the local authority to gather (either itself or through other agencies) all relevant information about and from those individuals; and (iii) those against whom allegations are made were given the opportunity to be heard.

It is important to note that the court remains under a duty to consider the welfare of the child under ChA 1989, s 1(3) where that child has suffered injury and thereby significant harm, even where it is not possible to say who the perpetrator of harm is (*Re S (A Child)*). Note that the Court of Appeal has suggested that, in the context of the requirements of the Children Act 1989, s 31(2), the terms 'non-accidental' and 'accidental' injury are, in addition to being tautologous and oxymoronic, unhelpful, the threshold criteria not being concerned with intent or blame but rather with an objective standard of care (*Re S (Split Hearing)* [2014] 1 FLR 1421, CA).

Where the court is satisfied that the child has suffered significant harm, the threshold conditions under ChA 1989, s 31(2)(b)(i) will be met in relation to that child even though the court is unable to identify who within the pool of possible perpetrators inflicted the harm: *Lancashire County Council v B* [2000] 1 FLR 583, HL, in which helpful guidance is given as to how evidence needs to be tested to establish the threshold criteria for the purposes of s 31 where the perpetrator is uncertain. In determining whether a person is properly included in the pool of potential perpetrators, it is essential that the court weighs any lies told by that person against any evidence that points away from them having been responsible for the injuries (*H v City and Council of Swansea and Others* [2011] EWCA Civ 195). In these 'uncertain perpetrator' cases, the correct approach is for the case to proceed at the welfare stage on the basis that each of the possible perpetrators is treated as such (*Re O and N: Re B* [2003] 1 FLR 1169, HL). The House of Lords held in that case that it would be grotesque if, because neither parent had been proved to be the perpetrator, the court had to proceed at the welfare stage as though the child were

not at risk from either parent, even though one or other of them was the perpetrator of significant harm. The judge conducting the welfare hearing should have regard to the facts found at the preliminary hearing when they leave open the possibility that a parent or carer was a perpetrator of proved harm and that conclusion should not be excluded from consideration.

Findings

Credibility generally

27. General observations of demeanour should never form the sole basis of any finding of fact but they are part of the broad canvas of assessment of credibility and they feed into the assessment of the allegations.

28. Having viewed the videos and various still images prior to the agreed statement of facts set out above I note they show what appears to be doting parents. Some show the Child moving her left leg but I understand “Evidence matters has confirmed that the dates provided for the videos do not necessarily confirm the dates the videos were taken” (Mother’s case summary) so their evidential value is somewhat limited.

29. I understand it is not in dispute that the Child “was a planned child born to parents who were happily married. There are no social concerns about the family beyond inexperience as first time parents living away from home in India.” (from the Father’s case summary). That was born out in the evidence the parents gave. I also heard evidence of the parents’ living arrangements. They were modest, perhaps cramped, but there was no evidence they, their accommodation or the Child were unkempt, untidy or unhygienic. As the agreed statement of facts identifies there is evidence of naïve parenting but there is no evidence of neglectful parenting.

30. The parents appeared somewhat socially isolated with no family in the UK and I had the impression of little social interaction save with their immediate neighbour with whom they shared a kitchen/bathroom and with their landlord/lady who lived in the house the other side of the outside yard.

31. There was however no evidence of domestic abuse, substance misuse, previous police involvement, missed medical appointments or failure to engage with health professionals or any adverse evidence from primary care providers and no material concerns about their care of the Child post-admission save for the Mother falling asleep holding the Child and the Father’s behaviour when the Child was removed which I consider further below. Counsel for the Mother in closing prepared the following schedule which I adopt:

3. During the 7 days while in hospital post attendance on 20 February 2023, no concerns were expressed about mother's (or father's) behaviour towards the Child or in general on the ward.

To the contrary, the court will note the following examples:

a) Dr Cummings noted that the parents were *"appropriately distressed"* [J127]...

b) Dr Singh recorded *"Mum is appropriate and interacting well with the baby. Mum is keen for all the investigations to happen and get to the bottom of the cause of this fracture ... needs safeguarding assessment and further investigations and mum is happy with this and given consent for the whole procedure"* [J24]

c) All the nursing notes describe the mother interacting well with the Child, talking to and playing with her, feeding her, changing her nappies etc with no concerns being expressed; notes of the strategy meeting on 24 February record that the safeguarding nurse said parents *"have been appropriate at the hospital"* [M5]

d) The parents asked appropriate questions of all doctors including where the fracture (then identified) was and whether there would be long term sequelae [J193]

e) The parents showed no sign of wanting to obstruct investigations

f) A specific request was made by the LA team manager for parental interactions to be documented by staff [J181] and still no concerns were noted; one notable example records *"all the time mum been very appropriate towards child ..."* [J157]

g) The police record *"She [mother] has been very upset and crying, along with her husband. But she is feeling better now the baby is getting better"* [M11]

h) The mother expressed concern when she thought the Child was in pain [J153, J156], when she thought the swelling was worsening [J171-172] and when the Child was crying after her ophthalmology examination [J155]

i) The parents' distress at being told their baby was being removed was plain

Mother

32. When the Mother gave evidence she was at times emotional but not inappropriately so, she gave clear evidence without apparent exaggeration or attempts at concealment.

33. The Mother's evidence of what happened on 19 February 2023 from her first statement dated 14 April 2023 is (my emphasis):

[C36]

29...We came back home about 4.30pm. I took her out of her pram and put her on our bed. I changed my clothes and then changed the Child's nappy and clothes. She seemed fine and playing but at times she was whingeing. I did not see anything wrong with her when I changed

her. I did not see any swelling, redness or marks on her. A little bit later, probably about 5pm — 5.30pm, she started crying and whingeing again. I picked her up and fed her. When I put her down, she began crying again. When I walked around with her, she was fine. She nodded off. About 7.30pm, she was really crying and it was a different cry, as if she was in pain.

30. I tried to find a way to comfort her. I took her clothes off. I saw her left leg was swollen and I saw that she could not straighten it...I gave her calpol and she settled. She slept until about 9.30pm. Then she started to cry again but settled when I walked around with her and fell asleep on my shoulder. I got into bed and she slept on my lap...She woke up about 1am and I fed her. I saw swelling on her leg but the redness had reduce/gone. I gave her calpol again and she fell asleep on my lap whilst I was sitting up in bed.

31. The next morning the Child woke up about 8am. She started crying loudly. It was not her normal cry. Both the Father and I were now really worried as she kept crying.

34. It is notable the Mother says “I took her clothes off” not “we”. When she was asked about not mentioning the Father being present when the leg was examined she said “This was my first statement, I wasn’t really clear what had happened...whatever I could remember I wrote down”. That said, the Mother does not say anything about the Father having gone out.

35. To the police the Mother said (my emphasis):

[M119]

My husband did go out in the evening to the High Street. And when the Child started crying at that time I called him that I am not being able to settle her down, can you come back?

...I gave her Calpol. When she didn’t stop then I called my husband.

And that is when I noticed as well, because when she was not settling down I took her clothes off because I wanted to check if she has got any rashes or anything on her body, that why is she not settling? That’s when I saw that she had swelling on her leg.

About half past seven, eight o’clock in the evening.

[M120]

After coming back I put her in the bouncer...then I put her on the bed...

...

And when your, when you called your husband how soon did he come back?

He went on cycle High Street from our place it's about ten, fifteen minutes so he came between those ten, fifteen minutes.

36. I note that in this version the Father went out again but the Mother does not recount the Father being present when the clothes were removed. In cross-examination the Mother said "At that time that's what I could remember". It is also notable that the time of the examination is given as 19.30-20.00 but in oral evidence it was 20.30 one hour after the Mother said she called the Father (although the call record does not concur).

37. In her second statement dated 19 December 2023 she gives a different version (my emphasis):

[C149]

11...When we came home, it was about 4-4.30pm. I put the Child into her bouncer but she was not happy and then I put her on the bed and changed her clothes and her nappy from her heavy outdoor clothes to her indoor clothes (trousers and a top).

12. The Father then went out, to the High Street again to finish doing some shopping and the Child and I were alone. She was crying and really upset so I gave her some Calpol and some milk to settle her and she did settle for a while, but she then woke up again and was crying and wouldn't settle. I called the Father and he came back within [] 5 - 10 minutes. I think I was on my own with the Child for about 40-45 minutes.

38. When she gave oral evidence in answer to questions put on behalf of the Father, she said that in fact putting the Child in the bouncer, on the bed and changing her was done after the Father had gone out.

39. Having considered the call logs in her third statement dated 26 January 2024 she says the time alone must have been for longer than 40-45 minutes [C154/6-7] and she had to call the Father three times and he called her twice before he returned home at 20.30.

40. In her oral evidence she confirmed in-chief that the different cry started at 19.30 and that was an estimation, the Child had been crying from 14.00 "but not continuously". Again she said that the Father returned "after 1 hour from the call I made at 7.30". However, she was taken to the call logs for the Father's phone at [O10] which show a call to the Father at 18.31, 18.34 and 18.40 and a return call from him to her at 19.22.

41. There are 4 different versions of how long it took the Father to return after the call: to the police she said 10-15 minutes, in her second statement it is 5-10 minutes, in the third statement it is 1 hour and 50 minutes (the calls were at 18.31 per [C154/6] and he returned home at approximately 20.30 per [C154/7]) and in oral evidence it was 1 hour.

42. The hospital records have a report of (my emphasis):

[J168]

Discussion with parents:

Noticed baby was irritable at 5pm

Clothing removed

Leg was swollen. Hence came into ED.

43. The Mother was asked about that and said that there was no talk of the leg being swollen at 17.00 and the note itself is not clear on timings: being irritable at 17.00 on 19 February until the time of presentation at A&E on 20 February is all run together and it is not clear how much time passed between the baby being irritable at 17.00 and the clothing being removed.

44. That note is also inconsistent with Dr Cummings' note at [J127] which recorded "Normally happy infant distressed ++ since yesterday at 2pm. At 6pm mother stripped her to see if could find a cause [sic] of her distress and noticed left lower leg was swollen. Remained distressed overnight despite calpol". Superficially Dr Cummings' note is consistent with Dr Singh's statement that "Mum reported that the Child started crying inconsolably at 2pm" [C139] but that statement is inconsistent with the next phrase in Dr Singh's statement which is "and mum noticed at 6pm that evening that the Child has been crying more than usual"; if the Child was crying inconsolably from 2pm it seems unlikely the Mother noticed it at 6pm and was able to project back it started at 2pm or that it was "inconsolably" at 2pm but "more than usual" at 6pm. In any event, the reference to 2pm is not in Dr Singh's note which records "Mum noticed at 6/7pm last night that the Child has been crying more than usual and appeared uncomfortable" [J163] which suggests something different about the cry at 18.00-19.00 which is broadly consistent with the Mother's evidence.

45. What Dr Cummings records is also now inconsistent with the Mother's evidence which is of fluctuating distress. When Dr Cummings was cross-examined she accepted there was no discussion about what happened between 2pm and 6pm and she did not recall any detailed conversation as to whether the Child went to sleep or seemed better or worse overnight. The evidence of distress from 2pm is generally consistent with a crying child during the afternoon of the day before. The most

contemporaneous recording of the distress is from the 111 transcript which records the Mother reporting the Child having “swelling in her left leg” from “last evening” [J7] and she cried for “about three to four hours continued”, it is not clear if this is the evening before or that morning [J10] but what is clear is that it was not continuous from 2pm. Given the proximity to the event and the limitations in Dr Cummings’ recall I prefer the Mother’s evidence that the Child had been crying from some point early on the afternoon of 19 February but not continuously through to admission on 20 February 2023. For completeness Dr Edate recorded that the Child was crying at 14.00 [J190] and this was more than usual at 18.00 [C24f] but accepted she may have taken this from the other records.

46. I note the Mother gives no explanation for the recall of being left alone between the first statement and the second (see her second statement [C149/11] in which she just says “I have realised that there are some matters that are not correct and which I would like to clarify”). I am therefore left with some concerns as to this key fact being initially omitted.

47. There is further concern about the Mother’s evidence because although she was sufficiently worried about the Child’s crying to call the Father home she did not remove the Child’s clothes to see if she could identify the cause before the Father arrived home on her evidence. I find it very strange that the Mother did not think to try changing the Child’s nappy or looking for a rash under her clothing or another physical sign of the cause of the distress given that she had last changed the Child on return home earlier in the afternoon. I asked her what she had actually done in the time between being concerned and calling the Father and the Father’s return home and she said she “was holding her in my arms and walking in the room to calm her down”. This suggests indifference or a wilful avoidance of identifying the cause.

48. In the Mother’s favour she acknowledged in the course of the police interview that she was alone with the Child for some time (although it varied as above) on the afternoon of 19 February 2023 and that immediately preceded the discovery of swelling, redness and inability to straighten the leg and there has been broad consistency in the sequence of events on the afternoon of 19 February 2023 (from the Gurdwara to Primark to home, later identification of a change in the Child’s presentation prompting a call to the Father and the Child being stripped and the problem with the left leg being noted).

Father

49. When the Father gave evidence he did not always answer questions directly (without some further prompting from me) and on at least one occasion appeared confused (in relation to the purpose of the calls from/to the Mother at around 15.30 on 19 February 2023) but generally I found his explanations credible and not apparently misleading.

50. The Father's evidence about care of the Child is:

[C34]

It was my wife who would change the Child's nappy or bath her and I would help by handing things over to my wife. I think I changed the Child's nappy or clothes a handful of times but not very often as my wife would do this.

51. That is not consistent with his oral evidence which on cross-examination by the Local Authority was that he would change the Child's nappy/clothes twice a week or so and once or twice a week would feed her formula. He said he would play with the Child approximately 3 to 4 times per week. Of course even with more limited handling of the Child there would still have been an opportunity to cause injury.

52. In his police interview on 7 June 2023 the Father said they returned home but said he then went out "for about an hour...and the Mother stayed at home with the Child...After about half an hour the Mother called me and told me that the baby was crying and would not stop...I then went back home" [M78]. That differs from the Mother's second statement in which she says he was gone for about 45 minutes and then her later evidence that it was much longer.

53. In the Father's first statement (which post-dated the police interview and is dated 10 July 2023) he says:

[C84]

20...When we returned home the Child was ok and after being at home for a little while the Child started to cry. My wife picked her up and gave her milk but the Child was not settling. I said to my wife that maybe she should take the Child's clothes off to check her and when she did this we did see that the Child's left leg was swollen. Both my wife and I thought she may have been bitten when in the pram. My wife gave her Calpol and the Child settled and went to sleep. However she slept for a little while, I cannot recall the exact time, but then she started to cry and my wife picked her up and settled her and fed her again.

54. Strangely the Father does not mention going out again after returning home. His explanation in oral evidence was that at the time he was "distracted by things going on with the Child" so he did "not give too much detail about where I went". The impression given by this is that the removal of the clothes was much earlier in the day than is now being said to be the case.

55. In his second statement dated 29 January 2024 he says:

[Z2]

6...we decided to take her home and we agreed that I would return to the High Street to do the rest of the grocery shopping. I then left the house to return to Slough High Street to get the groceries and I was calling my wife to check what we needed for the house.

7. I think it was around 6.34pm that my wife called me to tell me that the Child was unsettled...

56. He then records an exchange of calls before he returned home at about 20.30 perhaps having carried out some Uber Eats deliveries and it was then that the clothes were removed to check on the Child [Z2/9].

57. The implication from that evidence is that he was out of the house not for an hour as he told the police but from at least 18.34 to 20.30 (i.e. 2 hours). His explanation in oral evidence was that "I told the police just a rough estimate" and "didn't take notes of the time when I left home and came back and sometimes you lose track of the time". This was notwithstanding he accepts doing Uber Eats deliveries which he agreed in cross-examination "would have given estimated delivery times to comply with".

58. There was further confusion in his oral evidence. In answer to questions from the Local Authority he said "I left at 6pm and went back about 8.30pm" (i.e. 2.5 hours). The Mother's third statement was put to him:

[C154/5]

We got home around 4pm — 4.30pm, as I said in my second statement. As far as I can remember, I think the Father left around 4.40pm — 5pm to go back to the High Street to finish the shopping as there were still things we needed to buy.

59. He said in fact he thought he had left at 5.30pm (i.e. he would have been out for 3 hours) although then said he did not remember. He had also earlier said that the calls from the Mother at 15.27 and 15.34 shown on [O10] were about groceries he needed to buy whilst out which would suggest he was out for 5 hours. That evidence differed from the Mother's which was the calls were when she was outside Primark which they went to straight from the Gurdwara and were to tell him she was waiting outside. When the issue came up later in his evidence that was the Father's revised evidence and he denied having earlier said those calls were about groceries he needed to buy. It did appear there was genuine confusion on his part and I do not believe he had intended to suggest the calls at 15.27 and

15.34 were about groceries and rather thought he was answering a question about the calls at 18.31 and 18.34 which appear immediately below on the call log at [O10].

60. However, that raised a different inconsistency in the Father's evidence in that in answer to questions put by the Local Authority he had said that the calls at 18.31 and 18.34 were the Mother saying "the Child had been unsettled and crying" not about groceries he needed to buy although I do acknowledge they might have covered both topics.

61. In relation to his call out to the Mother at 20.22 the Father said he had an Uber Eats delivery "near to my house and might have called the Mother to let her know I was near home". He was asked how far from home he was when making that call and said he "wasn't that far from home" and it was put to him in the circumstances it does not make logical sense to have called if he was due home at 20.30. He said he was asking if he was still needed back at home having previously spoken at 19.22. I do not find that particularly unusual however, when I asked him for clarification he gave an answer that was inconsistent with earlier evidence. He had said:

I first did 1-2 deliveries then went to the grocery store, did my shopping and when on my way back home I got another delivery and did a third delivery before going home.

62. But in answer to my later question he said:

I was still at the High Street when I got the third booking.

63. When I pointed out the inconsistency he said:

I meant I'd finished the grocery shopping and there was nowhere else to go and I got the third delivery.

64. I accept it is conceivable that "on my way back home" could mean he had turned for home but not yet left the High Street and I also acknowledge he is being asked to recall in quite fine detail the events of almost a year ago when he was not expecting a need to recall it.

65. There was further inconsistency in relation to the later calls. In answer to the Local Authority's questions the Father had said that later in the evening "the Child was settled and sleeping in her mum's lap...and I thought I can make phone calls" from the yard outside. On behalf of the Guardian he was taken back to the call log at [O10] and asked if the 3 calls at 20.33, 21.04 and 21.07 were those calls. He said they were, one to a friend and 2 others he did not recognise. Those calls were 17, 0 and

6 seconds in duration respectively. The next call is a received call from the Mother at 21.18 and then again at 21.26, he then made 3 calls to the Mother in quick succession before receiving a final call from the Mother at 21.42. The explanation for those (matching that given by the Mother) was that the Child was sleeping on her lap and she could not go to the window or come outside to speak with the Father but it begged the question why, if he only had 3 quick calls to make, he was still outside at 21.18, 21.26 and 21.42. His explanation was that maybe he was talking to his landlord who lived in the house across the yard from where the parents lived. He had earlier accepted it was a cold night and this explanation did not seem very credible.

66. A further inconsistency was explored in cross-examination. In his response to the schedule of findings the Father accepts the allegation that the Child “was crying and in discomfort throughout the afternoon” of 19 February 2023 [A110-A111]. However, in the police interview he said that she settled for a while before starting to cry again [M78]. His oral evidence was that “she wasn’t crying throughout the afternoon and night, she would settle in between when Calpol given”.

Allegations

67. I have edited the wording of the allegations which tended to overlap and duplicate allegations. I have also considered them in a more logical order:

1: The Child has suffered physical harm and emotional harm by reason of suffering the following injuries

At the time of admission to Hospital on the 20.2.2023, the Child was found to have suffered the following injuries-

- a) A spiral fracture to the midshaft left tibia - this fracture was found at the time of X ray examination to be a healing fracture
- b) A metaphyseal fracture to the left distal tibia

68. The parents accept the injuries were sustained by the Child.

3: The injuries occurred on two separate occasions

69. The parents do not admit this.

70. Dr Johnson’s evidence is:

[E3]

In my opinion, even given the difficulty in dating of fractures, these two injuries have occurred on separate occasions.

71. When he gave oral evidence he confirmed that ignoring the radiological features the fractures could have been caused by the same event (“it would cause the metaphyseal fracture and then the spiral fracture”).

72. He was properly challenged on whether it would be possible for the windows of likely injury date for the fractures to overlap but was clear in saying it was not but he acknowledged “I cannot be categorical, there is a faint possibility I could be wrong but it’s unlikely”. His view is based on the radiographs, he said “On x-rays of 20 and 23 February 2023 the tibial [spiral] fracture shows signs of healing but no signs of healing of the metaphyseal fracture; on 8 March 2023 the initial periosteal response is showing evidence of maturation whereas around the metaphyseal fracture there is early evidence of bone healing”. He agreed that it was more difficult to date metaphyseal fractures but only because the healing response may not be obvious but that difficulty was avoided in this case “because that can be seen”. He had earlier said “such is the difference in the appearance of the healing response and in the same bone they occurred on separate occasions”. I am also entitled to take account of the greater probability that the metaphyseal fracture occurred on 19 February 2023 (see below).

73. Taking account of my findings below and this evidence I find on balance that **the Child suffered the 2 identified fractures on 2 separate occasions.**

2(a): Injury (a) (spiral fracture of the mid shaft of the left tibia) was suffered between 23 January 2023 and 6 February 2023

74. The parents do not admit the dates.

75. I note that despite the query over the dates of the videos, in many of them the Child is shown moving her left leg without distress although I also note that Dr Cummings observed on admission on 20 February 2023 that “Distressed when examined but is kicking and moving leg normally when left” [J128] and Dr Singh recorded “Kicking and using her legs - full range of movement” although “Uncomfortable and crying when kicking” [C140]. It follows movement in the videos does not assist in dating the injuries.

76. The expert evidence from Dr Johnson is that this fracture was “2-4 weeks of age on 20/02/23” although “radiological dating of any fracture is difficult, imprecise and a subjective estimation” [E2]. The pleaded dates correspond with this evidence. There is no other evidence to undermine this and I find on balance that **the Child suffered physical and emotional harm by reason of a spiral fracture of the mid shaft of the left tibia between 23 January 2023 and 6 February 2023.**

2(b): Injury (b) (metaphyseal fracture) was suffered between 12 February 2023 and 20 February 2023

77. The parents do not admit the dates.

78. Dr Johnson records:

[E3]

X-ray evidence of bone healing typically starts to appear after 5 - 11 days. The absence of any healing response indicates that this fracture is no older than 11 days of age on 23/02/23 and therefore no older than 8 days of age on 20/02/23. The radiological dating of any fracture is difficult, imprecise and a subjective estimation.

79. That would put the fracture within the pleaded dates. In fact, in light of the evidence of redness, swelling and resistance to straightening in the left leg noted on 19 February 2023 and the Child requiring settling and subsequent medical advice being sought (see below), I find that the date can be very significantly narrowed and I find on balance that **the Child suffered physical and emotional harm by reason of a left distal tibial metaphyseal fracture on 19 February 2023 at some point before 20.30.**

4: At the material time, the Child had only been in the care of one, or both, of her parents.

80. The parents accept the Child was in the care of one or both of them at the material time. For reasons given below I find the second fracture was more likely to have occurred whilst the Child was in the care of the Mother on her own. I find that **at the time of the spiral fracture of the mid shaft of the left tibia the Child was in the care of the Mother, the Father or both and at the time of the left distal tibial fracture the Child was in the care of the Mother.**

5(b): The Child has no disposition to suffer fractures and/or there is no metabolic cause or contribution to the fractures occurring

81. The Father accepts that expert evidence in his response to the allegations although that is not how his case was put at trial.

82. The Mother accepts that radiologically there was no evidence of reduced bone density but puts the Local Authority to proof that there was no impact from the Child's vitamin D deficiency or being breast fed by the Mother who herself had a vitamin D deficiency.

83. Dr Johnson was asked to comment on that in his evidence in chief and said the presence of a healing response in the metaphyseal fracture confirms there is nothing of concern in terms of the health of the bone "purely from a radiological perspective". I do not equate that evidence with nothing of concern in relation to fragility.

84. Pre-injury normal development was noted and no significant concerns noted (Dr Yadav reporting from medical records at [E12-E14]). Whilst in hospital from 20 February 2023 to 27 February 2023 no concerns other than the admitted fractures and “low vitamin D” were noted (Dr Yadav [E14/1k] and [E15/1m]). Dr Yadav says:

[E15/1n]

there is no evidence of any bone metabolic disorder, evidence of rickets or any osteopenia. She was born at full term, hence there is no likelihood of any osteopenia of prematurity (a condition which can cause bone fragility in extremely premature infants who require intensive care).

...

[E15/1]

p...she does not suffer from any significant organic disorder which can predispose her to excessive fractures without trauma. She has remained well while in foster care with no further fractures identified or any other concerns. Children who have increased bone fragility due to inherited or metabolic conditions are likely to continue to have more fractures with increased mobility as they grow.

q. In my opinion, based on the above factors, it is not likely that she suffers from an organic condition which can predispose her to excessive fractures without significant trauma.

85. In relation to vitamin D Dr Yadav says (my emphasis):

[E15/1m]

Her vitamin D was noted as 20 nmols/l (reference range 50 to 200). Less than 25 nmols/l is taken as vitamin D deficiency.

[E19/6]

b. Vitamin D deficiency is a common problem in young children, especially in the Asian population. The evidence from the multiple medical reviews have indicated that low vitamin D is not likely to lead to excessive fractures without significant trauma (3- 9)...

c. The Child’s low vitamin D may have affected her bone fragility, although there was no radiological or biochemical evidence of rickets or other biochemical abnormalities indicating increased bone fragility.

[E23/10]

b. Bone fragility attributed to suboptimum levels of vitamin D have been offered as an alternative explanation for suspected non-accidental trauma in young children with fractures, although common it is unknown whether vitamin D deficiency increases the susceptibility to fractures in children.

[E24/10]

d. There is no accepted association between the serum vitamin D levels and bone strength in children. Metaphyseal fractures have been found to have high specificity for abuse, even in children with low vitamin D levels. Children with very low vitamin D levels also suffer from low calcium, elevated alkaline phosphatase, lower phosphate levels and high PTH. None of these findings were identified in the Child.

e. In my opinion, based on the biochemical parameters, it is less likely that there was demineralisation of the bone leading to increased fragility and the Child's radiological investigations did not reveal significant demineralisation of the bone.

[E25/10]

j. Studies have identified no difference in the serum concentration of vitamin D in children with fractures suspicious of abuse and non-inflicted fractures (7-10).

k. Vitamin D insufficiency was not associated with multiple fractures, especially in rib fractures or metaphyseal fractures, which have high specificity indicators for abuse.

l. In non-mobile children with a low level of vitamin D, it is not likely, in my opinion, to lead to multiple fractures. Although, as I have stated above, if the Child continues to have fractures without significant trauma while in supervised care, more investigations and assessments may be needed.

m. The Child had no radiological features of rickets or biochemical features of rickets. Hence, in my opinion, the low vitamin D is unlikely to be a factor in causing these fractures, although it is not possible to predict the bone fragility with low vitamin D levels in an otherwise healthy child.

86. No subsequent fractures have been identified although Dr Yadav accepted in oral evidence there can be no certainty about that without x-rays but "it is rare to have fractures without any symptoms at all, it is rare for metaphyseal fractures not to be noted but they cannot be ruled out without x-rays". Dr Yadav also said that rib fractures were "quite often occult until x-ray" and the parties all agreed I could take judicial notice of the fact that an x-ray may not reveal a rib fracture until it was healing and

Dr Johnson's written evidence is that "X-ray evidence of bone healing typically starts to appear after 5-11 days" [E3].

87. This evidence was explored in cross-examination and my understanding from Dr Yadav's evidence was that the following propositions present themselves:

- a) In children exhibiting evidence of rickets, fractures are likely to occur with less force being applied than in children without rickets;
- b) The Child did not have rickets (either radiologically or biochemically demonstrated) although that "does not diminish what we do not know" about the effect of low vitamin D levels on bone fragility;
- c) Accordingly, there is an area of uncertainty about fragility in children with low vitamin D levels but without evidence of rickets;
- d) The fractures are more likely to have been caused by forceful handling beyond that which would be expected from day to day care rather than a pre-disposition to fractures by reason of low vitamin D levels;
- e) His conclusion in (d) above notwithstanding (c) above was based on:
 - (i) The absence of radiological, biochemical and clinical indications of fragility although that is saying no more than the Child did not have rickets so does not assist with the conclusion at (d);
 - (ii) The referenced medical papers which were directed to a comparison between children with and without low levels of vitamin D;
 - (iii) The absence of fractures post-discharge from hospital, although acknowledging that from 20 February 2023 to June 2023 the Child's vitamin D level increased from "abnormal" at less than 20 nmol/L [J214] to a "sufficient" level (per the scale at [J214]) of 149 nmol/L (as reported in the police log which sets out, apparently verbatim, an email from Dr Edate [M29]) so, implicitly, with the improving picture any greater risk of fracture there might have been would have diminished;
 - (iv) The absence of further fractures detected on the second skeletal survey on 8 March 2023 notwithstanding that hospital handling (for blood tests and x-rays) "would have been more than in normal day to day care" although counsel for the Mother pointed to the fact that chloral hydrate (on Dr Edate's oral evidence for calming and sedation) was used in advance of both skeletal surveys and notwithstanding the evidence of the Father "physically [] holding onto the Child's chest very tightly during the removal [to foster care] process" [J174] on 27 February 2023 to such an extent that following the incident it was felt an examination was

required which revealed no “indication of injury to chest” [J175] seemingly corroborated in the second skeletal survey on 8 March 2023, although noting they may not be detectable until healing which may not appear for up to 11 days post fracture (i.e. not until 10 March 2023);

88. My conclusion from this, in its barest form, is that on balance it is unknown whether the Child’s vitamin D deficiency actually did result in reduced bone fragility compared to children without that deficiency. Point (i) above is not determinative, that is why the issue arises for my decision. Point (ii) above was not explored in much detail, in particular participant numbers. Point (iii) above has greater weight although absent any evidence of vitamin D testing from 20 February 2023 to June 2023 it is difficult to form a view of when the vitamin D levels moved from deficiency to sufficiency. Point (iv) above has limited weight given the limitations in detection of rib fractures identified and the second skeletal survey taking place 2 days before the window for detectable healing closed.

5(a) The injuries were non-accidental

89. The parents deny this.

90. The Mother “questions whether the injuries could have been caused during massage or putting the Child’s sock on the injured leg (the mother being an inexperienced parent) and/or while the Child was kicking in the bouncer.” (Mother’s case summary).

91. The Father says “He worked from 5 pm to 5 am six days a week, and would sleep in the mornings after his night shifts. His time with the Child was very limited. He was not aware that the Child had fractures at the time they must have been sustained. He was not aware that she was in specific distress until the evening of 19 February 2023 when it became clear that she was crying because her lower left leg was swollen.” (Father’s case summary).

92. As Dr Johnson observed “the presence of two fractures which have occurred on separate occasions increases the suspicion of inflicted non-accidental injury” [E4]. Whilst this is perhaps not strictly a matter of expert opinion (save to the extent it might otherwise point to a pre-disposition) it is nonetheless a valid observation but only holds good if there is no pre-disposition to fracture.

93. I have set out some of the parents’ inconsistencies in relation to the afternoon and evening of 19 February 2023 above. The key differences are the fact of the Mother being alone with the Child and the duration of that. The early statements suggest a worsening of symptoms; what the later statements clarify is that was when the Father was out and at the time of the first nappy change on arrival home, nothing untoward was noted but it was on the later change that the swelling was seen.

94. What is clear is that there was a point in time when the Child appears to have become more distressed and that immediately preceded the swelling being spotted and it was whilst she was exclusively in the care of the Mother. However, when Dr Yadav gave oral evidence he said that the injury causing the swelling seen on 19 February 2023 “might be likely to have occurred around that time or a few hours before that time”, it could have occurred “before 16.30 and swelling was observed afterwards”.

95. Dr Yadav accepted, as appears from the medical records, save for the Mother sleeping whilst holding the Child “there was no concern of the staff towards the Child, the parents were taking appropriate care...I could not find anything that was concerning”.

96. There is note from the medical records at the time of the Child being removed to foster care on 27 February 2023 which records:

[J187]

PC Marway who was also acting as the interpreter in Punjabi translated at one point that father said "let mum stay with the baby and I will stay away”.

97. The Father accepts saying that but rather than it being some admission of wrongdoing on his part says the Child was breastfeeding and was more happy with the Mother than with him, “I wanted her to be happy so was telling them take wife so she can stay with the Child all the time”. That is consistent with a father trying to negotiate some lesser separation. I find it is neutral evidence, it does not point towards an admission of guilt by the Father.

98. Dr Johnson’s evidence is:

[E3]

Each fracture is the result of significant force applied to the bone. The amount of force required to cause these fractures is unknown, but in my opinion, it is significant, excessive and greater than that used in the normal care and handling of a child.

These fractures would not have occurred from normal domestic handling, over-exuberant play or rough inexperienced parenting.

At the time that the fractures occurred, the Child was less than 4 months of age, and she would not have had the strength or level of development to self-inflict these injuries.

[E4]

The midshaft fracture of the left tibia is the result of a twisting, impact or bending snapping action applied to the bone. At the time the fracture occurred, there would have been some twisting/torsional forces applied to the bone. The radiological appearances of the fracture are non-specific with regard to the exact mechanism of causation and the same fracture pattern could occur from a variety of different causative events.

The metaphyseal fracture of the distal left tibia is typically the result of severe twisting/torsional force applied to the end of the bone. The radiological appearances of this fracture are non-specific with regard to the exact mechanism of causation.

In my opinion, the action of the Child moving and banging her legs would not create sufficient force or a suitable mechanism to cause either fracture.

99. In relation to whether putting on a sock might have caused injury Dr Johnson says (my emphasis):

[E4]

In my opinion, the action of putting on a child's socks could create a suitable twisting action of the leg and ankle to cause either tibial fracture. However, any action would require excessive force applied to the limb to cause a fracture. In my opinion, unless any dressing or changing action was done using excessive inappropriate force, this would not have caused the tibial injuries.

100. The Mother's evidence was that "when I changed her clothes she'd cry a little but when I finished she wasn't crying any more", "when I was putting socks on maybe, possible extra force may have been used without realising it" and when asked if she pulled or twisted the Child's limbs she said "Not as far as I know but it's possible without realising it because it's a first baby and there are many things we don't know about".

101. In relation to this and baby massage Dr Johnson says:

[E76]

In my opinion, the actions of dressing a child, putting socks on them and overall movement and handling would not result in any fracture, unless these actions were done using excessive inappropriate force, which has not been described.

In my opinion, similarly massaging a child would not result in a fracture unless the action was performed using excessive inappropriate force, which has not been described.

102. When he gave oral evidence he helpfully drew a distinction between mechanism and force. His view was that putting on a sock or massaging a baby was a plausible mechanism for both the fractures in that they involved “twisting or torsional force”. But he was clear that it was important to consider the force applied. His written evidence was not contradicted. When the Mother gave oral evidence she agreed that when massaging the Child she did turn both the legs

103. Dr Yadav’s evidence on causation is (my emphasis):

[E17]

i. a healed spiral fracture of the left tibia (shin bone). In my opinion, shin bone fractures in a very young child who is non-mobile could not have been caused by the child herself. She did not have any of the conditions which can lead to fractures without significant trauma. Her vitamin D levels were low, but there was no evidence of any bony changes (rickets) or metabolic biochemical changes (calcium profile and liver profile) which could indicate that she had high bone fragility. The Radiology Reports have not identified any radiological evidence of any bone disorders which could increase her susceptibility to fracture. In my opinion, a fracture of the shin bone requires significant trauma and it has been described as being a spiral fracture, and these are usually caused by torsion being applied to the leg with significant force which can lead to the fracture. The likelihood of this being caused accidentally with the lack of any plausible history is low and, in my opinion, a significant fracture in a very young child is likely to have been caused non-accidentally unless a clear plausible explanation is provided by the carers (1-10); and

ii. she also had a metaphyseal fracture of the lower end of the left tibia. Metaphyseal fractures are classically associated with non-accidental injury and are caused either by stretching or torsion being applied to the joint, and this requires significant force which is much more than that required in the usual handling and playful activity with a young child (1-10).

[E22/9]

d...If the mother had applied significant tortional [sic] force to the limb while putting the socks on, it is a likely mechanism which can explain both the fractures. The force needed to cause the fractures would have been much more than that used in usual handling and playful activity with a child of that age.

104. In his addendum report Dr Yadav says:

[E80]

b. The description was given by mother that she may have used more force while giving massage to the Child or while putting socks on. In my opinion, if significant force was applied with torsion to the left leg, then this mechanism can explain the fractures. The force needed to cause the fractures in the left limb are likely to be significantly more than that used in the usual care of young children. In my opinion, during the day-to-day care and dressing/undressing children of her age fractures (tibial spiral fracture and metaphyseal fracture) are not likely to occur unless significant force was applied (1-10).

105. In his further addendum he says:

[E127/1]

b. In clinical practice and from the assessment of multiple children who are examined by clinicians and undertake Xrays of the limbs, it is unusual to find fractures in children who have been handled normally without any excessive force, accident or trauma.

106. What is clear from the above is that neither parent has been consistent in their account of what happened on the afternoon of 19 February 2023. The following observations about this are pertinent:

- a) The inconsistencies may point to mistake in recollection, lying or a mixture of the two;
- b) If the accounts were identical it might conversely be suggested they pointed to a rehearsed story designed to cover up something;
- c) If the inconsistencies arose out of attempts at fabrication, it is difficult to identify whether they were lies told for some other purpose than to exculpate themselves.

107. In assessing whether the parents (or one of them) are lying I must take into account the broad canvas of evidence. In particular, the parents' background circumstances which I have set out above and the social media evidence which does not suggest knowledge of non-accidental injury or collusion at the material times. As regards the Father's resistance to removal, I find it hard to equate that to pre-admission physical manhandling of the Child. I bear in mind the context: the shock of the Child being removed and the parents being isolated from their family support network.

108. I turn to consider the questions in *Re S* but I will take them slightly out of order;

109. In relation to the first injury, the spiral fracture, both parents had the opportunity to cause the injury. Whilst all the evidence points to the Father having less one to one contact with the Child he had some in the radiological period as I have accepted it above. No-one else is identified as a possible perpetrator and accordingly I am satisfied that there is a real possibility that both may have caused the injury.

110. In relation to the second injury, the metaphyseal fracture, Dr Yada's evidence is such that both parents might have had the opportunity to cause injury because it might have been caused some hours before it was detected. However, on the balance of probabilities, the Mother is more likely to have caused the injury given her oral evidence that the handling of the Child on return home was by her: she put the Child in the bouncer, she put the Child on the bed, she undressed the Child and changed the nappy whilst (on her oral evidence) the Father was out. On his return, the physical evidence of injury was detected. Even if she was mistaken in her oral evidence, she gave no evidence of the Father handling the Child when he was present.

111. Has the Local Authority proved the injuries were inflicted as opposed to accidental? That is to say, did the Child suffer harm attributable to the care given not being that which it would be reasonable to expect a parent to give her? In closing submissions I was referred to a decision of HHJ Wright in *Re S* [2013] EWCC B8 (Fam) in which he said "Nor is it possible to conclude at what point 'normal day to day handling' - a vague phrase at best, and which must include the use of reasonable force and pressure at times - crosses over to the point where S's vulnerable bone structure was compromised and exceeded". That observation is apt to cover this situation where the Child suffered fractures in circumstances where I have found that it is unknown whether the Child's vitamin D deficiency actually did result in reduced bone fragility compared to children without that deficiency. That uncertainty multiplies the uncertainty as to the force required to cause a fracture in a child without vitamin D deficiency.

112. Those uncertainties must be weighed in the balance with the parents' credibility. Whilst there are multiple examples of internal inconsistencies in the parents' respective evidence and as between them, I have to address my mind to the guidance of Macur LJ: is this inconsistency proved on balance to be deliberate untruth or does it rather arise from confusion or mistake? For the avoidance of doubt there is no evidence of lying "for a reason...which does not point to...guilt" such as "shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure". I acknowledge there is at least the possibility of "misplaced loyalty" in the sense of one parent seeking to protect the other but there is no evidence of this behaviour or collusion. Also, for the avoidance of doubt, the

inconsistencies relate to a significant issue, that is when and how in the course of 19 February the Child came to suffer a metaphyseal fracture.

113. Therefore, does it arise from mistake or confusion? I remind myself that the parents were in a stressful situation both on 19 February 2023 when the Child's condition presented itself causing the Mother to phone the Father and on the discovery of unusual symptoms. They were in a stressful position in hospital with an injured child and (if innocent of using excessive force) seeking answers to how that could have happened. It was compounded by another (if innocent again) unexplained fracture. In addition to medical professionals, they were engaging with Children's Social Care and the police and ultimately their Child was removed from their care. If they had never behaved unreasonably in their handling of the Child, that must have been enormously distressing. The distress was likely compounded by English not being their first language, hampering easy, clear communication and fear their child may not be returned once removed. Over the subsequent weeks and months, they were asked to recall, ultimately at this trial in quite granular detail, the events of a day some time past and in relation to which they had no expectation at the time they would need to recall it. Inevitably, that leads to less than perfect recall; indeed it would be suspicious if there was perfect, consistent recall. I also remind myself it is not for the parents to prove these were mistakes in recall, it is for the Local Authority to prove they were lies.

114. In considering this, I take account of what purpose the inconsistent evidence might serve. It does not exonerate the Mother on any version, although might have exonerated the Father but for Dr Yadav's evidence that the fracture could have occurred in the hours before the swelling was detected rather than immediately before. But this begs the question, why the mother would seek to exonerate the Father by implicating herself? Nor is it consistent with the Father's behaviour when the Child was removed on 27 February 2023. He was clearly saying let the Mother stay with the Child; would he have said that if he was trying to escape blame? Or if he was to blame and desperately wanted the Child to remain with at least one parent this would have been the time to own up. None of this points to the inconsistencies being lies.

115. In similar vein, how does the Mother not checking the Child by removing her clothing before the return of the Father assist her case when she does not go on to say the Father handled the Child on return? Further, she had already, on her own admission, informed the Father something seemed to be wrong so waiting was not going to exonerate her. Whilst I noted above the behaviour suggested indifference or wilful avoidance of discovering the cause of injury, I do not think it points to excessive force having been used.

116. Briefly, and not wishing to repeat what I have already set out at length above, I also have no evidence of risk factors preceding injury save, perhaps, for social isolation and I have plenty of evidence of at least adequate parenting and appropriate interactions with the Child.

117. A further factor when considering if the fractures were non-accidental is that they are in the same leg but, as I have found, on different occasions. Counsel for the Mother invites me to consider the likelihood of a parent losing control and injuring the Child using the exact same mechanism on 2 occasions. There is some, but limited, merit in the submission. If the perpetrator lost control dressing the Child and applied excess force putting a sock on causing the first fracture and the Child was equally resistant to being dressed on another occasion, then it is quite plausible for the perpetrator to again apply excess force putting a sock on. There are only 4 limbs to choose to apply excessive force to and only 2 lower limbs so the probability of a second injury in the same limb as the first is either 25% (1 in 4) or 50% (1 in 2 lower limbs); in other words not unlikely.

118. What this case really comes down to is medical evidence which is uncertain as to the force required to fracture this Child's leg and inconsistencies in parental recall. When put in this blunt way I simply cannot be satisfied that the Local Authority have made out their allegation that the injuries were perpetrated by someone using excessive force, force which exceeded that which a reasonable parent would be expected to use. The inconsistencies in recall are not sufficient to plug the gap in the medical evidence. Where the Local Authority could clearly prove lies pointing to guilt the answer may have been different but that is not this case. Accordingly, I find on balance that **the injuries were not perpetrated by either parent using force beyond that which it would be reasonable for a parent to use.**

7(a): The parents failed to seek medical attention in good time when the injuries were inflicted and this would have prolonged the physical and emotional harm

8: One parent would have known the other parent inflicted the injuries and therefore failed to protect the Child

119. I will consider these allegations together.

120. The parents deny the allegations, the Mother says she was not aware of the injuries until told about them at hospital.

121. Dr Johnson's evidence is:

[E4]

At the time the fractures occurred, I would expect that the Child would have been in pain and shown signs of distress which would have lasted for some moments. Following this initial

distress, the signs and symptoms related to these fractures could have been variable and I would defer to the paediatricians in all aspects of clinical presentation, both at the time that the fractures occurred and subsequently.

122. Dr Yadav says (my emphasis):

[E22/9]

e. At the time the fractures were caused, it is less likely that the mother [perpetrator?] would have noted that the fractures had been caused although the Child would have been distressed. It is likely that a reasonable carer would have noted that the child was in distress, although they may not have been aware that there were underlying fractures.

f. In my opinion, a perpetrator would have been aware that significant force had been used to cause these injuries...

123. In oral evidence he confirmed that the perpetrator “would have been aware the child became suddenly distressed” but may not correlate that with a fracture.

124. As to whether the perpetrator should have been aware to seek medical attention in oral evidence there was this exchange in relation to the spiral fracture:

Q The person inflicting tibial

A Would have been aware the child was distressed but may not correlate to fracture

Q So person perpetrating getting medical attention

A It depends on the symptoms, if the symptoms were minimal they may not have noted anything unusual apart from the child being distressed, if there was no swelling or deformity and the limitation of movement not clearly noted they may not seek medical attention

125. Dr Yadav’s further evidence of the position after the initial distress is (my emphasis):

[E20-21/7]

a...The duration of the initial distress can be variable in a very young child as they can be easily distracted by feeding, cuddling, etc. It is also likely that, after the injury was sustained, the Child’s movements of the limb would have been reduced and she would have cried when the limb was handled during the day-to-day care of a child of her age.

b. In my opinion, it is likely that a reasonable carer would have noted that she was in distress and not moving the limb as before and was crying when the limb was moved or handled, although they may not have been aware that there was an underlying fracture.

c. After the initial injury the limb is likely to remain painful until the bones heal completely and it is likely that the Child would have demonstrated distress and pain when the limb was handled during usual day to day care of young child, eg., bathing, changing clothes, nappy change, etc.

[E22/9]

f... A non-perpetrator witness is likely to have been aware that the Child was distressed and that significant force had been applied to cause the injuries, although they may not have been aware that there were underlying fractures. A non-perpetrator non-witness reasonable carer is likely to have noted that the Child was distressed after the injuries were caused and it would have been likely that the limb was swollen, spontaneous movements may be reduced and the Child would have been distressed when the limb was handled during the usual day-to-day care of a young child. It is not likely that a reasonable carer would have been aware that there were underlying fractures, although it is likely that they would have been aware that the child was distressed when the limb was moved and the swelling of the limb could have been noted by a reasonable carer.

126. In his second addendum he says (my emphasis):

[E128/3]

b. In cases where there is a non-displaced limb fracture in a very young child, the likelihood that the carer would be aware of an underlying fracture is very low as there may be no external deformity, there may or may not be swelling and the child may have pain and distress, although this is manifested as crying. Crying in young children can be caused by multiple causes, and it is not necessary [not necessarily the case?] that a carer may be aware that there is an underlying fracture and may not seek medical attention.

...

[E129/4]

a... Especially in cases of no known event where a young child may have undergone a fracture without significant external symptoms, the carer may not be aware that there is an underlying fracture and may not present a child for medical attention.

[E130/5]

- a. It is plausible that the pain and distress responses to such fractures can be variable and the deformity, limitation in limb movement or pain may be variable in a child.
- b. In very young children who are non-vocal, it is not possible in all cases to identify that the cause of the distress or pain is from a fracture.
- c. If the fracture had led to a disability in terms of decreased limb movements, external swelling or limitation or painful joint movements, then it is likely that a reasonable carer may suspect that there is an underlying problem with the limb, although they may or may not be aware that there is an underlying fracture.

[E130/6]

- a. It is likely that a carer, who was not a perpetrator or witness to the event which caused the injuries, may not be aware that there was an underlying fracture, and it is likely that they would not have known what forces had been applied to cause such fractures.

127. When he gave oral evidence there were these exchanges:

Q In relation to a non-perpetrator after tibial fracture is going to notice a pain response
A Likely the child would respond with pain but the non-witness would not necessarily correlate that with fracture
Q Moving to the metaphyseal we have evidence of swelling, to a non-perpetrator the fracture would be obvious
A It will be as swelling but may not know underlying fracture but clearly would be noted something would not be right there

Q <u>If a child was already crying then a carer may not notice the difference</u>
A <u>That is correct</u>
Q 3m old baby may cry for all sorts of reasons
A That's correct, multiple reasons
Q Distress may not be referred to fracture
A To correlate would be very difficult

128. My conclusion is that (absent any finding of susceptibility to fractures) the perpetrator and non-perpetrator witness would have been aware harm had been caused straight away because they were aware of the force used and possibly of a distress response but not necessarily aware of fractures having been caused and not necessarily aware that medical attention was required.

129. The non-perpetrator, non-witness would have been aware the Child was unwell but unaware of the precipitating cause. That would certainly be consistent with the contemporaneous evidence in relation to the first injury (which the medical evidence suggests was incurred by 6 February 2023) because the Child was seen for immunisations on 7 February 2023 which involved removing clothing over her legs and nothing untoward was noted (see the Red Book at [J56]).

130. However, in light of my findings at 5(a) (that the force used to cause the fractures did not exceed that which it would be reasonable for a parent to use) I find that **the parents did not fail to seek medical attention in good time when the fractures were inflicted** (because excessive force had not been used) **nor would the non-perpetrator parent have known of the infliction of the fractures** (either having not witnessed the infliction or only witnessed reasonable force) **and could not therefore have failed to protect the Child.**

6(a): The parents reported the Child had a swollen lower left leg which was red and painful from the afternoon of 19 February 2023 to admission to hospital on 20 February 2023

131. The parents accept this although the balance of the evidence tends to suggest this was identified around 20.30 but on the Mother's earlier evidence could have been as early as 19.30. The Mother's evidence ([C36/30] and orally), which was not challenged and not inconsistently reported, is that the redness had reduced or gone at 01.00 on 20 February.

132. I find that the parents noted the Child had a swollen lower left leg which was red and painful at between 19.30 and approximately 20.30 on 19 February 2023.

6(b): The parents reported the Child was crying and in discomfort throughout the afternoon of 19 February until the morning of 20 February 2023

133. The parents accept this in their responses although the Mother says there were periods when the Child slept. In his evidence the Father also applied that gloss to the admission [C84/20].

134. I have considered if the crying was continuous above and find it was not. Accordingly, I find that the Child was crying and in discomfort from the afternoon of 19 February 2023 to the morning of 20 February 2023 but not continuously.

7(b): The parents failed to seek medical attention when the observations at allegation 6 were made and this would have prolonged the physical and emotional harm

135. The Father denies the allegation and the Mother says she sought attention on 20 February 2023 when the Child continued to cry and whilst she understands now she could have sought medical attention on 19 February she did not know an injury had been sustained and does not accept this was unreasonable. She does not accept the Child cried in discomfort throughout the period from the

afternoon of 19 February to the morning of 20 February 2023 and I have considered this above and concluded more likely the crying was intermittent.

136. Dr Singh records "They didn't seek medical advice as they thought this can happen" [J1382].

137. I have set out the Mother's account of the symptoms above. She continues in her statement:

[C37]

32. I don't know why we did not take the Child to the hospital straightaway instead of calling the GP. I just didn't think. I thought as she was registered with a GP I should call and take her to the GP first and they would refer me to the hospital if they thought it was necessary. I didn't know that I could take her to the hospital first. Normally, when we had any problems with our health, we called the GP first... We didn't get any medical attention for her on Sunday evening because, although she was crying it was on/off as she would settle when I walked around with her and fell asleep on me. I gave her calpol and she would settle. I really did not think she needed medical advice. I am sorry. I knew she was in pain but I didn't know what was wrong with her. The Child is my first child. I do not have parenting experience.

31. The next morning the Child woke up about 8am. She started crying loudly. It was not her normal cry. Both the Father and I were now really worried as she kept crying. I think we called the GP from the Father's phone. We held on and were number 17/19 in the queue. I was given an appointment for 3pm that day. I thought it was a long time to wait. Whilst, we were waiting to speak to the surgery, I called the Health Visitor on my phone. I was told by the person I spoke with at the Health Visiting service that they could not help me and advised me to call NHS 111/hospital. I called 111 who advised we should take the Child to hospital which we did by taxi...

138. Her oral evidence was that despite seeing the redness, the swelling and the Child not able to straighten the leg and the crying being different "she took Calpol and she fed and she slept" and that seemed like normal behaviour and when she fed the Child at 01.00 on 20 February she looked at the leg and the redness had decreased.

139. There is no evidence to contradict this account.

140. The Father says:

[C85]

22. We should have taken the Child to the hospital straightaway but we both thought we should first contact the GP. That is something we have always done.

141. Dr Singh recorded the following history on transfer from Accident and Emergency to the ward on 20 February 2023:

[J163]

She noticed no other bruising or swellings that she can [sic] remember. They didn't seek medical advice as they thought this can happen and might improve on its own. At midnight the Child was crying again so gave paracetamol and observed.

142. In the strategy meeting on 24 February Dr Edate is recorded to have said that "Given that this is the first-time parents are dealing with this then makes sense why they did not know who to contact." [H7] and accepted that was her expressed view when cross-examined.

143. On this evidence on balance it was not unreasonable for the purpose of section 31(2)(b)(i) Children Act 1989 to fail to seek medical attention until 20 February 2023.

Conclusion

144. I finish with these observations:

145. Firstly, I acknowledge the deep trauma that these proceedings will have caused to the parents and, through the consequence of these proceedings, the Child. They have my sympathy in having to go through what must at times have seemed an endless nightmare. Notwithstanding this their presentation in court was never antagonistic of the process or those who, properly, probed and tested their evidence. This is to their enormous credit.

146. Secondly, for the Mother and Father's benefit I want to be clear that the Local Authority simply had to investigate the cause of the Child's injuries and notwithstanding the harm that has caused it was both necessary and proportionate.