

**In the High Court of Justice  
Family Division  
Sheffield District Registry**

**Rotherham MBC**

**Re: C Judgment**

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**Introduction**

1. The main application in this matter is by the applicants, Rotherham MBC for a placement order in respect of (C who is the child of the first and second respondents (hereinafter called mother and father). C was born on and is therefore now aged two years eight months.
2. Within the placement application C's parents have indicated that they wish to challenge the findings of fact made by me in care proceedings under case number . In support of this application, mother and father's solicitors have filed a document headed 'Application to Rehear Factual Evidence'. On 12 June 2012 they

indicated that they no longer wished to challenge the final care order made by me on 21 June 2011. The documentation which had earlier been filed, in readiness for the case management conference on 10 May 2012, has been rendered otiose. In this judgment when I have referred to the 'first skeleton argument' it is that document, although at this hearing its arguments contained therein have been effectively abandoned.

This will be the third judgment therefore that I have delivered in respect of C .

### **Background**

3. Mother and father are not married to each other but mother adopted father's name so that she would have the same name as C . Both parties share parental responsibility and are now represented by the 'Wrongly Accused' team of Brendan Fleming solicitors Birmingham. It is mother's third set of solicitors and father's second. The solicitors representing C have not changed and indeed Junior Counsel instructed by Rotherham MBC and the children's guardian have been the same throughout these lengthy proceedings. Mr Prest junior counsel for Rotherham MBC has helpfully prepared a detailed skeleton in reply to the skeleton filed by the respondents. I consider that Mr Hayden QC and Mr Prest's skeleton fairly and accurately sets out the response to the application and in large parts I have adopted it.

### **The care proceedings**

4. In the care proceedings (matter number , at the threshold stage, on 05.07.10 the court made findings that within 4 weeks of his birth C had suffered (see Findings Made at [A29a – b]):
  - (a) 12 bone fractures (of different kinds and to different parts of his body) and genital injuries;

(b) inflicted on a minimum of 2 different dates and involving a minimum of 4 different inflictions of force;

(c) Caused non-accidentally by Mother and / or Father.

5. It must be noted that:

- (a) Those findings were made on the basis of very extensive medical evidence. As well as the evidence of the treating doctors at both District General Hospital and Children's Hospital there was additional expert evidence from Dr Consultant Paediatrician), Dr (Consultant Paediatric Radiologist), Prof Consultant Neonatologist), Prof (Professor of Paediatric Bone Disease), Dr (Consultant Clinical Scientist and Head of Molecular Genetics Service), and Dr (a second Consultant Paediatrician) (see judgment paras 35 – 37 [A12 – 13]);
- (b) the court allowed the instruction of every expert / test requested by the parents, including, in particular – and contrary to medical opinion – genetic testing for possible bone disorder (see judgment para 33 [A11]);
- (c) even during the course of the hearing the court checked with those representing the parents whether there was any other expert evidence they sought – and was told 'no' (judgment para 64 [A23]);
- (d) the expert evidence was 'all one way' – this is not a case in which the warning of Butler-Sloss P in Re U (Serious injury: standard of proof) Re B [2004] EWCA Civ 567, [2004] 2 FLR 263: "*particular caution is necessary in any case where the*

*medical experts disagree, one opinion declining to exclude the reasonable possibility of a natural cause” applies;*

- (e) in particular, the result of the genetic testing was that there was no evidence of any genetic abnormality related to any bone disorder (care bundle [E134] and judgment para 62 [A22]);
- (f) there was a full hearing (lasting 6 days of evidence, plus submissions and judgment) in which the parents had every opportunity to cross-examine those witnesses;
- (g) the findings were not only of multiple fractures but also of genital injuries, all caused non-accidentally.

**6** At the welfare stage, on 21.06.11, the court made a full care order on the basis of a plan that C would be placed with his paternal aunt and her husband , with restricted and diminishing contact with his parents, and with the express contingency plan that if this placement broke down C , should be placed for adoption outside his birth family [A30 – 39]. It should be noted that by then.

- (a) Mother had by then obtained fresh legal advice (her second firm of solicitors and different counsel);
- (b) The court again allowed the parents to instruct every expert they requested, notably of ;
- (c) The whole point in instructing was because he specialises in situations where the court has made adverse findings but these are not accepted by the parents. There would have been no purpose in instructing him if the parents’ case had been that the findings were wrong and should be appealed / reheard;

- (d) At the final hearing in June 2011, the parents declined to cross-examine the experts instructed for the welfare stage, accepting that there was no support from the experts for their hope that despite the findings C might be rehabilitated to them;
- (e) In Mother's case, that decision was taken with the benefit of advice from leading counsel;
- (f) At no stage was it suggested that the findings made on 05.07.10 should be re-opened.
- (g) Neither the findings nor the Care Order have been appealed. Both stand and are the foundation of these proceedings

### **Law in relation to the Parent's Application to Rehear Factual Evidence**

7 Rotherham MBC has never disputed that the court has power in these proceedings to conduct a rehearing of the facts found on 5 July 2010 in the care proceedings. The leading authority on the issue is the decision of Hale J (as she then was) in Re B (children act proceedings)(issue estoppel) [1997] 1FLR 285 which I have paid particular attention to. Hale J specifically identified, towards the end of her judgment various factors and whilst no one can suggest this is an exhaustive list it is a useful tool and analysing these factors I find as follows:

Of *"the court will wish to balance the underlying considerations of public policy"*.

- (a) *“there is a public interest in an end to litigation ...”*: any rehearing would be (very) lengthy and (very) expensive to the public purse and in its use of the resources of the court;
  - (b) *“any delay in determining the outcome ... is likely to be prejudicial to the welfare of the child”*: it would cause further, serious delay to C (attempting to identify adoptive parents will inevitably, in practice, stall) who has already been seriously delayed in achieving permanency. At the end of the Finding of Fact the court intended that C’s future should be determined no later than 24.01.11 (see judgment para 84 at [A29]). C is now more than twice as old as he would have been then;
  - (c) *“the welfare of the child is unlikely to be served by relying upon determinations of fact which turn out to have been erroneous”*: it is of course true that C’s welfare is unlikely to be served by relying on determinations of fact which turn out to have been erroneous but it is a fact that there is no real likelihood of this in this case;
  - (d) *“The court’s decision ... ‘must be applied so as to work justice and not injustice’”*: together with the overriding objective in FPR 2010, Pt 1;
- (1) *“The court may well wish to consider the importance of the previous findings in the context of the current proceedings ...”*: Obviously the findings made in the care proceedings are at the heart of its application for a Placement Order;
  - (2) *“Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial ...”*: there is no (good) reason to think that a rehearing of the issue will result in any different finding. On the contrary, it is overwhelmingly likely

in the circumstances of this case that the same findings would be made.:

- (a) *“whether the previous findings were the result of a full hearing in which the person concerned took part and the evidence was tested in the usual way”*: the previous findings were the result of a full hearing in which the parents took a full part and the evidence was tested in a full way;
  
- (b) *“if so, whether there is any ground upon which the accuracy of the previous finding could have been attacked at the time, and why therefore there was no appeal at the time”*: the previous findings could have been appealed against at the time, or later in the care proceedings (when the mother had changed her legal team for the first time), or since the care proceedings finished. It has only been raised now following the breakdown of the family placement with and Rotherham MBC issuing an application for a Placement Order. The points now made on behalf of the parents, along the lines of, ‘the experts failed to take into account ...’ – that is to say essentially everything in the list (a) – (z) at para 9 of the Application to Rehear Skeleton Argument [D249 – 252], which is at the heart of their argument – should, if there had been any substance in them, have resulted in a prompt appeal in 2010;
  
- (c) *“whether there is any new evidence or information casting doubt upon the accuracy of the original findings”*: despite the volume of papers produced on behalf of the parents, there is little if any new evidence or information casting any real doubt upon the earlier findings. In particular the extracts from Mother and C’s medical records attached to the ‘Application to Rehear’ Skeleton on behalf of the parents are,

almost without exception, documents that pre-date the Finding of Fact hearing.

d) The parents in their application have cited two cases being *London borough of Islington v Al Alas & Wray [2012] EWHC865* and *A County Council v M and F [2011] EWHC 1804* and I am bound to say neither decision assists the court nor indeed the parents for the following reasons:

3 Neither *London Borough of Islington v Al Alas and Wray* nor *A County Council v M and F* involves any new point of law.

4 *In London Borough of Islington v Al Alas and Wray*, Theis J very clearly prefaced her judgment by saying:

*“It is important to remember that my conclusions set out below are entirely related to this case. Despite their differences of opinion, all the medical experts agree this case is extremely complex. By their very nature, cases such as this are very fact specific and great caution should be adopted in using any conclusions I reach to support any wider views outside the very specific facts of this case ...”* (para 6 of judgment, [D34])

Differences between *Jayden Wray’s* case and C’s case are stark. For example, in the *Wray* case:

(1) It involved a baby who had died and had as its central issue non-accidental head injury and the application of the triad (see e.g. para 9 of judgment, [D35]), which is a highly complex, contentious and a rapidly evolving area of medical science. C’s case self-evidently did not;



- (2) It proceeded on the common ground that Jayden Wray did indeed have rickets (see e.g. para 5 of judgment, [D34]). In C's case, while the parents continue to assert that C had / may have had rickets, all the medical experts who have considered the issue have ruled it out;
- (3) Jayden Wray was vitamin D deficient (para 5 of the judgment [D34]). C was not (care bundle [F132] and e.g. [E106]);
- (4) Further in the Wray case, it was acknowledged by all the medical experts that it was extremely complex. By contrast, C's case is one which, at least as regards the fractures, all the medical experts regard as clear-cut and straightforward;
- (5) The Wray case involved sharp divergences of opinion between experts (the root of this, but not the only issue, was the difference between the two pathologists Dr Scheimberg and Dr Cary about the cause of death, the former concluding that it was the result of hypoxic ischemic injury, cause undetermined in the context of vitamin D deficiency and rickets, the latter concluding that it followed Non Accidental Injury (shake / impact)). By contrast, C's case is one in which there was no significant difference of opinion amongst the experts;
- (6) In the Wray case the legal system cleared the parents at the first time of asking, in both the criminal and the family courts. It was not a miscarriage of justice case. By contrast, in C's case, his

parents are asserting that the findings made on 05.07.10 amount to a miscarriage of justice.

(7) Similar comments may equally well be made about the decision of Mostyn J in *A County Council v M and Fin* that it takes the parent's case no further.

### **Abnormalities in C and Mother as now asserted**

8 This is the linchpin of the application made by the parents for a re- hearing.

### **C**

- a) Hernias – this was well known at the time of the Finding of Fact. They were, for example, referred to in the report of Prof (care bundle [E106])
- b) Blue sclerae – this was well known time of, and cross examined about at, the Finding of Fact. Prof Bishop does not say that C had blue sclerae. What he says is “*C's sclerae have a slightly blue tinge but it is not deep blue*”. He was clear C's sclerae were not the blue sclerae that are associated with bone disease, as were all the other experts who were asked about it. In passing, C was also checked again for blue sclerae at DGH on 19.04.11 because Mother continued to press the point, and again he was assessed as normal [C36]
- c) Poor gross motor mobility – this is an effect of injury, not its cause. At 13 months old C's ‘*motor milestones are mildly delayed but progressing*’. This is hardly surprising given that he had had a severely fractured femur as a result of which he was in a harness for five weeks [C33].

- d) Legs of uneven length – this is an effect of injury, not its cause. The reason that C’s right leg was longer than his left on 6 May 2011 was as a result of his fracture, it having nothing to do with the cause of the fracture.
- e) Soft dysmorphism etc – these were well known at the time of the Finding of Fact. Although Dr     had raised possibility of dysmorphism no other expert thought C     had this, and Prof     was clear that whether or not C     had it, it was not the kind of dysmorphism associated with bone disease (judgment para 60 [A21]). I was satisfied on the evidence that C     was not dysmorphic (judgment para 64 [A23])
- f) Re-fracture of femur in foster care – this was well known at the time of the Finding of Fact. The balance of evidence was that there was no such fracture and I so found: judgment para 63 [A22] However, more importantly, even if there was a re-fracture, whether it was of any significance. Here the medical opinion was unanimous, if there was a re-fracture it was through callus. As stated by Dr     *“A fracture through the callus is a recognised feature of even normal handling of the child and is different from primary fracture of a bone”* [D272] – a point that is clearly in the document referred to on behalf of the parents but not identified by them. The expert evidence at court was the same, that if there was a re-fracture it was not a sign of the cause of the original fracture but a consequence of it;
- g) Symptoms of chronic bacterial infection – these documents were well known at the Finding of Fact
- h) Hypersensitivity to sound – this was well known at the time of the Finding of Fact. It is likely this was attributable to the effects of the multiple abuse he suffered and the effects of being in hospital
- i) Oral thrush in hospital – this was well known at the time of the Finding of Fact

j) Administered antibiotics – this was well known at the time of the Finding of Fact

k) Intermittent high temperature – this was well known at the time of the Finding of Fact

l) Thickening of tunica etc – these were well known at the time of the Finding of Fact

m) Hypothyroidism – this information was well known at the time of the Finding of Fact. There is nothing in the symptoms / complications in the documents produced linking it with bone disease or anything else

n) Abnormal liver function – this was well known at the time of the Finding of Fact.

o) Brachycephaly – this was well known at the time of the Finding of Fact – indeed the reference relied on is not to the medical notes but to the report of Prof

p) Mongolian blue spot – this was well known at the time of the Finding of Fact.

q) Hyperpigmentation no one has been able to find a reference to this condition nor how I receive submissions on and I therefore ignore it.

In short, all these issues / the documents on which they are based were well known / available at the time of the Finding of Fact hearing, with the exception of c) and d) (poor gross motor mobility and legs of uneven length) when it is plainly wrong to suggest that they are connected to the cause of C's injuries but as a result of the fracture.

[Mother]

a) Carrier of group C streptococcus – this was well known at the time of the Finding of Fact

- b) Required antibiotics in first trimester of pregnancy – this was well known at the time of the Finding of Fact
- c) Signs of infection at birth – this was well known at the time of the Finding of Fact
- d) Polycystic ovaries – this was well known at the time of the Finding of Fact
- e) Prescription steroid inhaler to treat asthma – this was well known at the time of the Finding of Fact
- f) Addiction to coca cola –I heard no evidence that Mother was “addicted” to coca cola or that the document produced [D378] comes close to establishing this, and nor, therefore, do I accept that Mother was suffering from “modern malnutrition”. Even if this were true, I note that the document produced about the effects of coca cola provides no evidence of any effect upon the foetus [D379]. The point was, in any event, raised and argued on behalf of Mother at the Finding of Fact
- g) Vitamin D deficiency – this was well known at the time of the Finding of Fact. It misses the essential point: C’s vitamin D level was normal (see care bundle [F132] and e.g. [E106])
- h) Low bone density – the document to which reference is made is not evidence that Mother had low bone density but that she said she did. In any event this information was well known at the time of the Finding of Fact and misses the point that there is no evidence that C had low bone density (e.g. care bundle [E38])
- i) Oligomenorrhea – this was well known at the time of the Finding of Fact.

In short, all these issues / the documents on which they are based were well known / available at the time of the Finding of Fact hearing. It does not pass

the test in *Re B* particularly Hale J holding; ‘ *if so whether there is any ground upon which the accuracy of the previous finding could have been attacked at the time and why therefore there was no appeal at the time*’

Therefore if these matters were to be relied upon it should have warranted an appeal immediately, following the finding of fact hearing.

**Criticism of the expert evidence at the Finding of fact hearing as detailed in paragraph 9 of the Respondents’ skeleton argument to rehear factual evidence.**

- 9 The parents maintain, as has been their stance throughout, that they did not cause the injuries to C . To this end the skeleton produced details with Internet documents to try and put a different emphasis on the alleged abnormalities of C and mother to explain his injuries. The majority of the parents written documents can only fall to be considered at the level of ‘generic’ since there has been no specific application to the individual facts and collection of symptoms experienced by C . They can be roundly discounted and to my mind the research takes the case no further forward although I propose to deal with their allegations as set out in paragraph 9 of the skeleton, point by point.

**Bone Density**

- a) (i) It was not a presumption of normal bone density but expert opinion that “*there is no evidence of any abnormality of C’s bones*” (care bundle [E38], emphasis added). (ii) Dr explained at trial how it was not just a matter of density but also other factors such as bone architecture that were relevant. (iii) It is ironic that the parents now seek to rely on articles by Drs and both of whom were involved with C (respectively as expert and, albeit perhaps peripherally, as

part of the treating team) – they are likely to have been particularly alert to the point. (iv) It does not fairly represent what is being said in the articles. For example, immediately after underlining that “... *osteopenia is not detectable radiographically until 50% of the calcium is lost from the bone* ...” Dr [redacted] says “*However, this does not translate into proportional loss of bone strength, since live bone has considerable physiological reserve*” [D388] but this is not mentioned. I can see no reference to DXA scanning in Dr [redacted]’s article.

#### Dating of Fractures

- b) (i). There is no evidence of vitamin / mineral deficiency in C [redacted] (see care bundle [F132] and e.g. [E106]). (ii) Dr [redacted]’s evidence, both written and oral, recognised the limitations in dating but this does not affect the two essential points she made, that none of the injuries were as old as from birth (an opinion supported by Prof [redacted]’s evidence from a different medical specialism, and in the case of the broken femur), and that the left rib fracture is older than the others (care bundle [E39]). (iii) All this is consistent with what is stated in her article, and that the parents now rely on.

#### Vitamin D

- c) (i) I do not accept the assertion, for which no evidence is provided, that the vitamin D test should have been repeated, (ii) but in any event the only evidence the court will ever now have is that the test done showed C’s vitamin D level to be normal (see care bundle [F132] and e.g. [E106]).

#### Vitamin D continued

- d). (i) On the *Jayden Wray* case It would only have been of relevance if C was vitamin D deficient but, there is no evidence of this. (ii) It ignores the research filed on behalf of the parents with their first skeleton argument (to discharge the care order) that “... *suboptimal vitamin D status was not associated with a diagnosis of abuse or the presence of*

*multiple fractures or rib or metaphyseal fractures*” [D176]. (iii) There are many areas relevant to child protection in which there is a lack of research and (a) courts daily have to make child protection decisions in such cases, and (b) absence of research is a very limited foundation on which to mount a challenge.

#### Phosphoric Acid and Coca Cola

e)(i) The starting point for this argument depends on the mother’s evidence in circumstances where her credibility has been seriously damaged by her lack of truthfulness previously. (ii) It ignores the fact that all the evidence that exists is that C was a healthy, well nourished child with normal bones. (iii) The only article on the subject produced on behalf of the parents [D379], which speaks of how this *“may promote bone loss”* *“may be damaging their bones”* (a) refers only to *“may increase the risk of osteoporosis in later life”* and (b) provides absolutely no evidence of this being transmitted by a pregnant woman to the foetus.

#### Rickets

f) (i) This relies again on the Jayden Wray case. (ii) In any event, contrary to what is stated, the point was explicitly addressed by Dr (care bundle E119) in that C does not/ did not have rickets.

#### Metaphyseal Fractures

g) (i) This assertion is a misrepresentation of what the document produced actually says. All it says is *“There were no published comparative studies of children with metaphyseal fractures. Two studies of femoral fractures found that femoral metaphyseal fractures are more common among abused infants but data were not suitable for meta-analysis”* [D407]. (ii) The assertion is contrary to what is stated in two of the articles produced with the First Skeleton Argument on behalf of the parents: see para 17(2) and (3) of Skeleton above. (iii) Prof gave careful written (care bundle [E108]) and oral evidence on the issue.



### Inconsistencies in the Radiological evidence

- h) (i) I do not accept that there were a lot of inconsistencies in the radiological diagnosis as alleged: see para 18(2) Skeleton above. (ii) I am not clear where in the report it is stated that 4 radiologists failed to detect rickets in Jayden Wray (no reference is given), but in any event (a) it is clear that at least one radiologist thought that Jayden Wray might have had rickets (judgment para 60, [D45]) and (b) if they were part of the team treating Jayden Wray they were responding to a critically ill (dying) child with no time for careful reflection.

### Poor mineralisation and growth plate

- i)(i) Again in the case of Jayden Wray, (ii) I do not accept that this is an accurate statement of the evidence of Prof Miller in Jayden Wray's case and in any event it does not represent a finding by the court. (iii) It depends on establishing that C had vitamin and mineral deficiency which is contrary to the evidence. (iv) It depends on those involved with C having in fact made that error.

### Thickening and widening of the growth centre of the rib

- j) (i) Further in the case of Jayden Wray, It leaves out a critical detail in Dr Barnes' evidence in Jayden Wray's case. He specifically identified "the front part of the ribs near the breast bone" in making this point [D400]. C's right 10<sup>th</sup> and 11<sup>th</sup> ribs were posterior fractures (care bundle [E37]). (ii) Again, this does not represent a finding by the court.

### Absence of bruising to C

- k) With reference to Jayden Wray, (i) It ignores the bruising to C that was seen with when he was admitted on 26.10.09 with genital injuries. (ii) It assumes that bruises for injuries on C, that cannot

be precisely dated, would still have been visible on 30.10.09. (iii) It ignores the fact that C's right leg was quickly strapped / bandaged so any bruising that happened would not have been visible.

#### Alleged re-fracture of C's femur

l) There can be no argument, based on a possible re-fracture as it is on the evidence simply wrong. (i) It also chooses to ignore the much more striking feature of the evidence: that C suffered multiple fractures in the first month of his life living with his parents, but has suffered no known fractures in more than 30 months since. (ii) If the final part of this point is suggesting that the broken femur which caused C's admission on 30.10.09 might have been a re-fracture it is plainly wrong. It is inconceivable that C could have suffered an earlier transverse fracture of the femur without it being immediately obvious. (iii) In any event, it would simply beg the question: how was it broken in the first place?

#### Absence of risk factors in either parent

m) (i) This is not, essentially, a medical issue (ii) However it was well-known to the experts and, more importantly, to the court at the time of the Finding of Fact hearing. There is no basis for asserting that it was not taken into account. The problem was that despite this, the evidence that C's injuries were non-accidental was, as I held, "*overwhelming*": (judgment para 81 at [A28]).

#### Mother's streptococcus infection during pregnancy

n) (i) All such medical information about Mother was well-known at the time of the Finding of Fact hearing and was, or at the very least, could and should have been, put to whichever medical experts as appropriate. (ii) Infection was considered in the differential diagnosis for C's genital injuries and indeed was the working diagnosis on

his discharge on 26.10.09. It was thoroughly cross-examined about at the Finding of Fact hearing: Dr [redacted] and Mr [redacted] (i.e. those who had actually seen C [redacted] at the time) believed this to be Non Accidental Injury. (iii) The article produced on behalf of the parents makes no reference to Group B Streptococcus causing fragile bones (osteopenia, osteogenesis imperfecta) but to osteomyelitis, the symptoms of which are not broken bones [D408]. In short, even if C contracted this from Mother (or indeed anyone else) it is not the cause of his fractures.

#### Bacteria cultures

- o) (i) I am unclear what this refers to. The footnote does not contain a cross-reference to any document in the bundle of papers supplied, nor is reference made to any page showing the culture test referred to (is it a test of C [redacted] or of Mother? If C [redacted], does it relate to admission for genital injuries on 26.10.09 or fractured femur on 30.10.09?). (ii) In any event it seems that the basic information was known at the time of the Finding of Fact hearing, and there is no basis for asserting that it was not taken into account.

#### C's intermittent high temperature

- p) (i) Again, the footnote does not contain a cross-reference to any document in the bundle of papers supplied. (ii) This information about C was well-known at the time of the Finding of Fact hearing and was, or at the very least could and should have been, put to whichever medical experts as appropriate. (iii) There is no basis for asserting that it was not taken into account.

#### C's alleged abnormal liver test results

- q) (i) Contrary to what is stated, the extract from Dr [redacted]'s report makes no reference to blood tests but to "C's observations"

[D410]. (ii) At its highest, this is not “the paediatricians misreported” but “a paediatrician” and as such can do no damage to the opinions of any of the other experts. (iii) It is clear from my judgment that the crucial evidence leading to the finding that the genital injuries were non-accidental (which is what this point is about) was that of Dr and Mr the treating doctors who actually saw C [A14 – 16] (I did not think it necessary to include a particular heading for Dr who carried out a general paediatric review, in my review of the medical evidence in the judgment of 5 July 2010. [A14 – 23]). (iv) The other page referred to in the footnote supporting this point is an article about a hermaphrodite infant. I do not understand how this article can have any bearing on the point being made or, and more importantly, on anything to do with C it presumably being common ground that he was / is not hermaphrodite.

#### Mother’s polycystic ovaries

- r) (i) all such medical information about Mother was well-known at the time of the Finding of Fact hearing and was, or at the very least could and should have been, put to whichever medical experts as appropriate. (ii) There is no basis for asserting that it was not taken into account. (iii) There is no evidence that Mother did pass excess testosterone to C (iv) There is no evidence C suffered an adrenal crisis. (v) The pages referred to in the footnote are nothing to do with polycystic ovaries but are further copies of the hermaphrodite infant article already included at [D207 – 208] and [D411 – 412].

#### C’s lymphocytes

- s) (i) The document in support of this [D414 - 416], albeit the final page is missing, is about lymphoedema following circumcision of a 50 year old morbidly obese man. This is wholly different from C’s circumstances. (ii) If and insofar as this point is based on what is actually in C’s medical records, the information was well-known at the time of the Finding of Fact hearing and was, or at the very least could and should have been, put to whichever medical experts as

appropriate. (iii) Dr [redacted] and Mr [redacted] were fully cross-examined about the differential diagnosis for the genital injuries, and there is no basis for asserting that I did not take it into account.

#### Failure of the hospital to carry out a light test on C's hydrocele

t)(i) The short point is that this is speculative. The matter can only be determined on the evidence there is.

#### Hydroceles affecting 6% of baby males

(i) This assertion is simply not true. The possibility that what C presented with on 26.10.09 was caused by a hydrocele was expressly put to and wholly rejected by Mr [redacted] in his oral evidence. (ii) In any event it cannot account for the separate bruising and cut at the base of the penis as seen by Dr [redacted].

#### C's gestation period

1. (i) The assertion that C's duration of gestation and the asserted possible consequences of his having been born post-mature are addressed below. (ii) Whilst the point asserted relates to post maturity, the article purportedly supporting it is instead about pre-term and term babies [D424 – 426] and cannot support the argument or have any relevance to C [redacted]. As to 'C's gestational period is unknown – Possibly Growing very slowly in womb' [D247], I hold as follows;

(1) the first step in this argument is the suggestion that C [redacted] was born at term + 18 days. This is entirely speculative. As the Skeleton makes clear it depends on if the last menstrual period is correct. Further, as the parents' own documents make clear, "*Although the last menstrual period (LMP) has been traditionally used to calculate the estimated due date (EDD) many inaccuracies exist in using this method in women who have irregular cycles ...*" [D338] (as Mother is known to have);

- (2) instead the best evidence in the case will always be the evidence at the time Mother gave birth to C , and as it was taken to be at the Finding of Fact hearing, namely that C was born at EDD plus 12 days (see care bundle e.g. Prof E105], Prof [E90]; and as recorded in my judgment at para 4 [A2]);
- (3) the second step in the argument postulates that C failed to thrive in utero. This builds speculation on speculation. The problem with that, is not only is there no evidence to support it, the evidence is overwhelming that he did not fail to thrive in utero:
  - (a) there is no suggestion in any of the contemporary medical records that C was thought to be underweight / have failed to thrive in utero when he was born;
  - (b) on the contrary he weighed 3450g i.e. approx 7lbs 9 oz when he was born (Red book, care bundle [F214], judgment para 4 [A2]);
- (4) this falls far outside the definition of IUGR given in the documents produced by the parents: see 'Definition of IUGR' [D330];
- (5) the third step in the argument is to assert that post maturity "could cause infection and weakness to C bones". But it is important to note:
  - (a) "could": there is no evidence that in fact it did;
  - (b) in any event, I cannot see where in the three articles cited [D338 – 349] there is any reference to whatever condition the article relates to, causing weakness in the infant child's bones. It does not appear under the headings 'Fetal and neonatal risks' [D339-340] and 'neo-natal and long-term complications' [D348];
  - (c) the parents then apparently place reliance on an article 'Post-maturity of the foetus' [D350-352]. This is extraordinary, because the article is more than 90 years old and cannot be

regarded as a safe guide to modern medical science / practice. Further, the paragraph marked is clearly about the risk of injury during delivery. It is inconceivable that C's femur was fractured during birth but was unnoticed in the following 4 weeks;

(6) in any event, these are all matters that plainly could and should have been raised at the original Finding of Fact hearing. Indeed it was for exactly this sort of reason (was there anything unusual about C's birth or C at birth ?) that Prof            consultant neonatologist, was instructed: as set out in my judgment para 52 at [A19];

(7) I also note that elsewhere the parents seek to rely on documents 'Late-onset Group B streptococcal cellulitis in a premature infant' [D372] and 'Inadequate growth and nutritional requirements of preterm and term babies' [D424] (emphasis added). They cannot have it both ways, arguing that C        was born post-term with complications arising from that and then relying on documents about pre-term babies. The whole argument that C        may have suffered his injuries as a result of growing slowly in the womb is completely unsustainable,

C's inguinal hernias, and whether the bruising to his genitals was pigmentation and/ or thickening due to calcification

u) (i) This cannot be true. All these matters were well known at the time of the Finding of Fact hearing and Dr        and Mr        were cross-examined about them and this suggestion was roundly discounted.

Mother's anaemia during pregnancy

v) (i) Despite the footnote to this paragraph, no document is referred to in support of this matter. (ii) All such medical information about

Mother was well-known at the time of the Finding of Fact hearing and was, or at the very least could and should have been, put to whichever medical experts as appropriate.

Mother's fertility problem and Father's relationship with his other children

- w) (i) All such medical information about Mother was well-known at the time of the Finding of Fact hearing and was, or at the very least could and should have been, put to whichever medical experts as appropriate. (ii) I concluded that Mother *"was so concerned about father's reaction to her pregnancy that she was worried he may leave her"* [A23] and that she *"did want C to be a girl"* [A24]. As to Father, I rejected his account that they were astonished and delighted when Mother became pregnant [A26], and he has since remembered what he did not remember in 2010, that he discussed with Mother her having a termination [A26 and care bundle E184]. (iii) It has never been disputed that Father has a good relationship with his children (but not with his first child). This was common ground at the Finding of Fact hearing and there is no basis for asserting that I did not take it into account.

The medical experts (1)' sweeping comments and (2) conflict between treating and independent experts'

- x) (i) The first part of this assertion is wholly unparticularised. (ii) In any event, all the experts were cross-examined at the Finding of Fact hearing. (iii) The second part misses the essential points that (a) the treating doctors who saw C gave oral evidence at the Finding of Fact hearing, (b) they were clearly of the opinion that the genital presentation on 26.10.09 was Non Accidental Injury, i.e. inflicted



injury, and (c) it was their evidence, rather than that of the experts who subsequently reported without having seen C at the time, that underpinned my findings on this issue. (iv) I agree that Dr was asked / gave an opinion about the genital presentation and that this was (probably) outside her area of expertise. However her evidence was not the basis of my decision on this point. Nor does this undermine her expertise within paediatric radiology, as indeed is recognised by the decision to place reliance on an article by her with the First Skeleton Argument on behalf of the parents [D233].

**Conclusions in relation to the Parent’s application for a re-hearing of the factual evidence.**

**10** In addition to the authority of *Re B* above I have also borne in mind that the decision of Charles J cited in my earlier judgment in the case of *Lancashire County Council v D & E [2004] EWHC 832* that in assessing whether the symptoms were organic or inflicted the correct approach for the court to take is:-

- (i) To determine the range of possible explanations for the injuries seen.
- (ii) Assess the degree of likelihood for each explanation.
- (iii) Decide which explanation/s can be established as a real possibility
- (iv) Decide which real possibility can be established as an event that was more likely than not to have occurred and as Charles J held:

*‘ The correct position is that a medical review as to the most likely cause of injuries is that that cause is clearly established as a real possibility that has to be considered, in all the circumstances of the case, together with the other possibilities, in determining whether a child was the victim of an inflicted injury’*

Further at p.86 Charles J held, as indeed I cited at para 32 of my judgment in July 2010:

*‘The medical evidence in conclusion, together with the reasoning underlying it, are, as I have explained, only parts of the overall picture or jigsaw, albeit important parts. Put at its simplest the court will have additional information and that information will include its findings relating to the evidence of the parents, and thus the events in the household and the observations of the clinical presentation of the child.’*

**11** I cannot divorce my assessment of the medical evidence, including the generic evidence produced by the parents in this application to rehear because my assessment of the parents is all part and parcel of the same jigsaw. In the finding of fact hearing I reminded myself of the appropriate *‘Lucas Direction ‘77Cr App 139 (A12(34) judgment)*. I consider that I can confidently and properly dismiss the parent's application for a re-hearing. Contrary to what is argued by Mr Fleming on behalf the parents this is not a ‘golden opportunity’ to put an end to litigation by way of a re-hearing, but it is one where I have a duty as I have, with the assistance of the submissions I have received, to attempt to put an end to this litigation and proceed to consider C's placement application. In fairness to Mr Fleming he conceded that if I was against a rehearing then C's welfare throughout his life would demand he became a placed person.

It does behove me to give composite reasons having analysed the medical evidence and rejected the so-called new evidence produced to make plain that at the finding of fact case, although expressed in terms of the balance of probability, I was in fact satisfied well beyond the standard 51%. Indeed as I set out in my judgment at paras 80, 81 at [A28]:

*(a) ‘I have reached a clear and unequivocal conclusion that this case is one that involved inflicted injuries on a baby’*

*(b) ‘I have reached the clear conclusion that the findings [the local authority] seek our overwhelming’*

This was not a finely balanced decision and the medical evidence at the finding of fact hearing, as earlier as set out was all one-way. I do not consider that the parents have produced anything at all that would persuade this court to reopen the matter and rehear the case, even limited as Mr Fleming sought, to an experienced midwife and a blood expert. Although at D66 Mr Fleming sought to argue that the bloods taken from C were abnormal I do not find that they were, particularly when one reads the footnote that bloods from babies can be three times above the limits which are otherwise considered normal. It has to be borne in mind that at the end of the finding of fact hearing the credibility of both parents was seriously damaged (paras 66-77) [A23-27] and nothing has occurred to undo the damage to their credibility. There is no new medical evidence regarding mother, and more importantly no new medical evidence regarding C, and the arguments mounted to suggest C has legs of uneven lengths is simply disingenuous particularly as he suffered a fractured femur in the first four weeks of his life, which is the cause of the uneven length. I am satisfied, again well beyond the balance of probability, that a rehearing of the matters I dealt with in the finding of fact hearing in July 2010 would produce no different result other than causing delay in the planning and achieving long overdue permanency for C and as such the application for a rehearing is dismissed.

### **Application for a placement order**

**12** The local authority seeks and the guardian strongly supports the making of a placement order. There can be no dispute that the care plan approved in my order of 21 June 2011 contemplated the fact that in the event that placement with [redacted] and [redacted] broke down, C's welfare was best met by his being adopted. I am satisfied that the process has been compliant with ECHR and particularly Articles 6 and 8. As I have refused the parents of application for a re-hearing then the findings made on 5 July 2010 stand and the threshold is clearly made out. I have asked myself the simple question '*does C's welfare require*

*a care order to be made in accordance with section 1 Children Act 1989?* I approved the care plan on 21 June 2011 pursuant to S31A of the 1989 Act which clearly contemplated the possibility of a placement order. In accordance with sections 21(3)(a) and 52 of the Adoption and Children Act 2002 namely has parental consent been validly given in accordance with those sections or should parental consent be dispensed with in accordance with sections 21(3)b, 52 and 1 of the 2002 Act. Hardly surprisingly parental consent has not been given but it is clear that it should now be dispensed with because this is what C's welfare now requires and in accordance with section 1 of the 2002 Act '*does the child's welfare 'throughout his life' require a placement order to be made?*'. I am completely satisfied that C needs a secure permanent placement and that adoption is the best way to achieve this. I am also satisfied that the making of a placement order/adoption order thereby ending family life between C and his birth family does not infringe Article 8 ECHR as it is a necessary and proportionate step (Article 8(2)). It is noteworthy that the parents concede, if I dismiss the application to rehear they have no argument that can properly be mounted against a placement order being made and so although I have considered the relevant aspects of the 2002 Act I do not set it out in detail but do rely on the closing submissions made by counsel on behalf of C, Mrs Marson and the Guardian's report of 11 June 2012 which plainly and absolutely supports the making of a placement order so as to secure C's future.

Her Honour Judge Carr QC

18 June 2012