Neutral Citation Number: [2023] EWCA Civ 38

Case No: CA-2022-001532
CA-2022-001715

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT BIRMINGHAM
HH Judge Tucker
BM21C00115

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 January 2023

Before :

LORD JUSTICE BAKER
LORD JUSTICE WARBY
and
LADY JUSTICE WHIPPLE

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C AND OTHERS (CARE PROCEEDINGS: FACT-FINDING)

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Lorna Meyer KC and Kirsty Gallacher (instructed by **Greens Solicitors**) for the **Appellant**
Nick Goodwin KC (instructed by **Local Authority Solicitor**) for the **First Respondent**
Owen Thomas KC and Tracy Lakin (instructed by The DM Partnership) for the **Second Respondent** (written submissions only)
Gina Allwood (by **direct access**) for the **Intervenor**

Hearing date : 20 December 2022

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Approved Judgment

LORD JUSTICE BAKER :

Background and summary of proceedings

1. This is an appeal against findings of fact made in care proceedings.

2. The case concerns a large family. The father has nine children, four with his first wife, who tragically died in a road accident in 2009, and five with his second wife, hereafter referred to as "the mother", to whom he was married in 2010. I shall refer to the children by anonymous initials. The children of the first marriage are A (now aged 24), B (23), C (17) and D (14). The children of the second marriage are E (9), F (7), G (6), H (born in July 2020, now aged 2½) and J (born in June 2022, during the course of these proceedings).

3. After the father's remarriage, the mother moved into the family home and helped to look after his older children. The judge found that there were difficulties between the mother and her stepchildren who resented her role in their lives and felt a degree of jealousy towards the younger children as they arrived. In her judgment, the judge observed: "The emotional distress of the older children in losing their own mother, and their struggle to come to terms with the consequences of this have been very real and are important dynamics within the family." The mother, on the other hand, "was responsible for the running of the house and the care of the children …. [Her] task, given the number of people in the household and their differing needs was a significantly demanding one." Her second child, F, is on the autistic spectrum.

4. The family has been known to social services for a number of years. On several occasions, allegations were made that the children had been assaulted by one or other of the parents, but with one exception none of the allegations was either proved or accepted by the parents. On some occasions, the allegation was made by one or other of the children, but on every such occasion the allegation was later retracted. The exception was an allegation in 2017 that the mother had slapped D.

5. On Saturday 8 May 2021 at about 6pm, the mother telephoned the NHS 111 number and reported that H, then aged 10 months, had a "big lump" on his head. She denied that he had bumped his head and said that it had come from nowhere. She passed the phone to the father who described "a watery kind of bump on the side of his head". They were advised to take H to hospital and, in line with Covid procedures then in place, arrived at the pre-arranged time of 8pm. During the initial assessment, the mother said that she had first noticed the bump when bathing H earlier that afternoon and that she did not know of any incident which might explain the injury. She said that she had waited until the father returned from work to see what he thought about it before calling 111. The mother repeated this account on other occasions when questioned at the hospital that evening.

6. On examination, H was found to have a swelling over the right side of his head measuring 10 x 8 cm. Scans revealed that he had sustained a linear undisplaced fracture of the right parietal bone and a shallow focal extra-axial haematoma (probably extradural) beneath the fracture line.

7. The parents were arrested and interviewed. The mother provided a written statement but otherwise refused to comment. The father described an occasion when H had fallen backwards while trying to pull himself up on 4 May. The police spoke to the children who described various incidents – that H had fallen from his mother's lap, that he fell when trying to pull himself up, that he had fallen off the bed some time earlier, that he had been dropped by his siblings on occasions, that on 5 May he had fallen onto metal bars used in weights training, and that on 8 May he had been driven in the footwell of A's car supported by his mother's legs. One of the children said that the mother had first noticed the lump on the evening of 7 May (rather than on the afternoon of 8 May as she had alleged). Two of the older children, C and D, were later interviewed under the Achieving Best Evidence procedure. In the course of his interview, C, then aged 15, gave more details of the incident involving the metal bars. The judge summarised his account at paragraph 31 of her judgment:

> "C stated that H had hurt his head 'a few days before' but that the injury was only noticed at the end of Friday night. He stated that H had fallen onto some metal gym equipment and hurt his head, by going onto his bottom first and then falling back onto the metal thing. He stated that he did not tell his mother initially as he thought he would get into trouble, but eventually told his sister who told their father. C stated H had cried, describing it in different levels of intensity at different points. He also stated that on the morning after noticing the injury (i.e., the Saturday morning) his mother had asked him what she should do and that C told her to take H in an ambulance."

8. On 9 May, the six younger children were placed under police protection. H was placed in foster care and the other five children remained at their home, living with a paternal aunt. The parents and two eldest children, A and B, moved out of the property. On 3 June, the local authority started care proceedings in respect of the six younger children and, on 21 June, they were all made subject of interim care orders. The father's eldest adult child, A, was joined as an intervenor to the proceedings. On 9 November 2021, C was returned to his parents' care under the interim care order. All of the other subject children are now placed with members of the extended family.

9. The proceedings were listed for a final hearing (initially intended to encompass both fact-finding and welfare determination) lasting 15 days in March 2022. The local authority filed a lengthy "schedule of allegations which are asserted to satisfy the threshold criteria" (i.e. for the making of orders under s.31 of the Children Act 1989). The schedule (hereafter "the local authority threshold document"), was divided into two parts – part A (allegations 1 to 18) relating to the injuries sustained by H, and part B (allegations 19 to 30) headed "Assaults and allegations of assault (other than H's injuries)".

10. On 18 February 2022, a case management hearing took place to consider in particular two issues – (1) the composition of the local authority threshold document, in particular (a) "whether the way in which the local authority seeks to rely on part B of the threshold was lawful" and (b) "whether it is proportionate for the local authority to rely on part B in any event", and (2) whether any of the children should give evidence. The order made following the hearing recorded that the local authority confirmed its position "that they do not intend to prove the truth of the allegations in part B of the threshold but

only that the fact that the allegations were made (sic) as they accept that on the basis of the evidence they are unable to prove that they are true". The order also recited that the judge indicated that she would provide a determination on the two issues during the week commencing 21 February 2022. The order contained a number of other recitals and case management orders, including a recital that the 15-day hearing in March was "not ready to proceed to welfare determination" and would therefore proceed as a fact-finding hearing only, and orders relating to police disclosure, the submission of supplemental questions to the experts, and a timetable for the filing of further statements.

11. In the event, it was not until 2 March that the parties were informed of the judge's decision on the issues in dispute at the case management hearing, and a judgment was handed down on those issues on 4 March. On the first issue, she concluded that "it would not be appropriate to exercise case management powers at this stage to prevent the local authority from placing before the Court the evidence [it] relies upon to prove the determinations it seeks and which are set out in … the [revised threshold]." She acknowledged that some of the findings

> "may be more problematic for the local authority to establish on the evidence without proving the truth of the allegations made by the children. However, I still did not consider it appropriate at this point to prevent that issue proceeding to trial. Whether any inference can be drawn from such primary facts as may be established will depend upon the evidence and the Court's assessment of that evidence. It would, in my judgment, be premature, at this stage, to prevent the evidence the LA seeks to adduce to establish these matters from being considered and heard … I recognise … that the Court will need to be astute not to be led (improperly) into making findings on an unsafe basis, but, with clear and structured analysis and thought process that error can be robustly avoided."

12. As for the second issue, the judge decided that the parties should have an opportunity to consider her ruling on the first issue before setting out their final position in respect of the children giving evidence, adding "an initial observation" that, given the local authority's allegation that the parents may have influenced the children's accounts, "there may be legitimate questions over the probative value of the children's evidence". In the event, although there were further submissions and discussion about the matter at the fact-finding hearing, no party ultimately argued for the children to give evidence and the issue has not featured in this appeal.

13. On 7 March 2022, the fact-finding hearing got underway. On that date, or shortly before, the local authority filed a series of statements from witnesses relating to the matters in Part B of the threshold document. The hearing started with oral evidence from two expert witnesses giving evidence about H's injuries, a consultant neuroradiologist and a consultant paediatrician. In the course of the hearing, the parents and the intervenor filed further statements, in part in response to the late statements filed by the local authority relating to the Part B allegations but also setting out further evidence about the injuries sustained by H. On 15 March, the local authority filed reports, running to over 1,400 pages, on material found on the adults' telephones. Over four court days between 17 and 22 March, the parents and A were called to give oral

evidence. On 21 March, in the middle of that evidence, an addendum report from the consultant paediatrician was filed. On 24 March, the parties filed closing written submissions. When the hearing resumed on the following day, in the course of oral submissions, the mother was recalled to give further evidence. On the next day, further evidence was filed in the form of two written responses by the consultant neuroradiologist to supplementary questions posed on behalf of the parents. In a draft order at the end of the hearing filed by the parties, but apparently never sealed, it was recorded that the judge had indicated that she aimed to provide a judgment following the fact-finding hearing by 8 April.

14. In the event, a draft judgment was not sent to the parties' representatives until 25 May. A further court order of that date included recitals that the draft had been circulated, that the parties were directed to submit requests for amplifications or clarifications by 6 June, that the court intended to hand down a perfected judgment in response to such requests by 15 June, and that the time for appealing would run from the date on which the perfected judgment was delivered. On 7 June, written requests for clarification were submitted by the parents.

15. On 15 June, the mother gave birth to her fifth, and the father's ninth, child, J. The local authority started care proceedings in respect of the new baby who was made subject to an interim care order on 24 June. He too is currently placed within the extended family.

16. On 30 June, the court circulated what was intended to be a perfected version of the judgment, accompanied by a document setting out clarifications and amplifications in response to the parties' requests. The original draft judgment had anticipated that it would be accompanied by a note agreed between the parties recording the evidence about the Part B allegations. In the event, however, the parties had been unable to agree such a note. Email exchanges between the court and the parties' representatives disclosed some uncertainty as to when the time for appealing would start to run. On 19 July, the judge made a further order reciting that the judgment would be formally handed down at a hearing on 26 July, directing that applications for permission to appeal should be submitted in writing to her by 25 July, and recording that the time for appealing started to run on 14 July. On 25 July, the mother, father and intervenor each filed an application in the lower court seeking permission to appeal. At the hearing on 26 July, the court indicated that both the formal handing down of the judgment and a decision on the applications for permission to appeal would be deferred to 29 July pending receipt of the local authority's submissions in response to the applications. On 27 July, after the parties had been unable to agree the local authority's draft note on the evidence relating to the Part B allegations, the mother's representatives sent an email explaining why it was "not possible for the annex to be identified as a document which is agreed in every respect on behalf of every party". On 29 July, the court issued a further order by email that the handing down of the judgment and of the decision on the applications for permission to appeal was adjourned to 1 August with the local authority submissions on the appeal application to be filed by 10am that day and the other parties' responses by 2pm. On 1 August, the local authority asked for an extension of time for filing its response to the permission to appeal applications and the handing down of the judgment. On the same day, the court made a further order to the effect that the applications for permission would be determined without considering a response from the local authority and that the handing down of the judgment and decision on the permission to appeal applications would be adjourned again to 4 August.

17. In the event, that date passed without the formal handing down of the judgment or the delivery of a decision on the permission to appeal applications. At that point, concerned that the time for appealing, which had been previously fixed as starting on 14 July, was about to expire, the mother filed a notice of appeal in the Court of Appeal. The Civil Appeals Office, however, declined to issue the notice on the grounds that no decision had yet been made by the lower court on the applications for permission to appeal.

The judgment and findings

18. On 10 August, the final version of the fact-finding judgment was handed down, accompanied by no fewer than seven annexes, consisting of:

- Annex 1, headed "Clarification/amplification" – this document, hereafter referred to as "the clarifications document", was an amended version of the document setting out the court's clarification of its judgment distributed on 30 June.

- Annex 2 – headed "Summary of the evidence before the Court regarding allegations in Part B of the threshold". As noted above, this document was intended to be agreed between the parties but in the event consisted of a draft, running to 117 paragraphs, submitted by the local authority and not agreed by the respondents.

- Annex 3 – headed "Summary of general legal principles and their sources updated 24 Mach 2022", a document extending to 14 single-spaced pages and 41 paragraphs, submitted by the mother's legal representatives.

- Annex 4 – headed "Revised Threshold – Schedule of allegations which are asserted to satisfy the Threshold Criteria (revised 23 December 2021)", drafted on behalf of the local authority.

- Annex 5 – "CMH Judgment" – the judgment following the case management hearing in February 2022.

- Annex 6 – headed "Allegations proved by the local authority", consisting of a schedule of the findings prepared by the judge herself.

- Annex 7 – headed "Judgment on application for permission to appeal", being the judgment on the three applications made by the mother, father and intervenor.

19. The schedule of findings in Annex 6 was a lengthy document containing a degree of repetition. It will be necessary to set out some of the findings in more detailed terms later in this judgment. At this stage, the findings can be summarised as follows:

Under Part A

(1) H has suffered significant physical harm, in the form of a skull fracture and associated injuries (summarised at paragraph 6 above), within the meaning of section 31(2) of the Children Act 1989 whilst in the care of his mother and/or father

and/or brother A. The harm is attributable to the care given to him not being what it would be reasonable to expect a parent (or carer) to give to him.

(2) On a balance of probabilities, it is likely that the injuries occurred at the same time and as a result of the same event at a time from the evening of 6 May 2021 onwards.

(3) The likely mechanism was an impact of his head with a hard unyielding surface.

(4) The amount of force which would have been required to cause the injuries is significant and excessive and would not have occurred from normal domestic handling, over-exuberant play or rough or inexperienced parenting. It is likely that the force required is such that the perpetrator or an independent witness would regard it as obviously inappropriate, even if the injury was sustained as a result of an undisclosed accident.

(5) H's injuries are likely to have been inflicted by the mother, father, A, or a combination of the same; or the result of an undisclosed accident whilst in the care of the mother, the father or A. Those who cared for H at the relevant time have not been honest about their knowledge of relevant facts. No clear account has been disclosed that explains how the injuries occurred.

(6) The injuries are likely to have resulted in signs which would have been obvious to a reasonable carer. The onset of scalp swelling would appear between a few minutes to 24 hours of the fracture, but may not have been noticeable under his hair, unless touched, but once seen and then observed to change, its presence would prompt a caregiver to seek medical attention particularly if they were aware of an episode of trauma.

(7) There was a delay in seeking medical attention from, at least, the point when the mother noticed that the swelling to H's head had changed and become 'boggy'/soft until the call to 111 was made.

(8) The court could not fairly determine whether either parent failed to protect H from an inflicted injury as the parents have, by their lack of honesty and deliberate decisions not to be open and honest with professionals and the court, prevented the court from being able to make clear findings about how H sustained his injury and whether, in the light of those findings, there was a failure to protect.

Under Part B

(9) There have been established incidents of violence within the family. (a) In November 2017, the mother slapped D. (b) On 27 February 2020, the father assaulted the mother by slapping her and pulling her hair. This took place in the car in the presence of B, C, D, E, F and G. The mother refused further police involvement after reporting to police that the father was violent to her in front of the children in February 2020.

(10) During the hearing, the parents did not have a clear understanding of domestic abuse and its impact upon children and families and both minimised the admitted incident of domestic abuse which took place on 27 February 2020.

(11) There have been numerous past allegations made by the subject children and the now adult children, and others, about physical assaults by the father and mother; additionally by the mother against the father. In addition, there have been allegations made by the children that their siblings have assaulted them. The court was not asked to determine the truth or accuracy of those historical allegations. A fair summary of the evidence before the court regarding those allegations is set out in Annex 2.

(12) The local authority did not prove (a) the assertion that the children have retracted their allegations because of parental pressure or (b) that it is likely that the parents' care of the children has been characterised by the use of physical violence and physical chastisement.

(13) Having regard to the evidence adduced by the local authority in respect of Part A, the court inferred that there is an understanding within the family/household that difficult issues (specifically how a child has sustained a serious injury) should be addressed as a family first, even if that means that professionals are given inaccurate or misleading accounts. The court found that (a) the parents have not been open or honest with professionals or the court about factual information within their knowledge as to how H sustained a serious skull fracture; (b) the parents and A deliberately withheld relevant information about how H sustained his skull fracture whilst at times discussing it within the family; (c) in doing so, the parents did not have regard, or adequate regard, to the direct and indirect repercussions of that for the children.

Overall

(14) As a result of the matters set out above, (a) H has been subjected to significant physical harm; (b) all the children in the family are likely to suffer significant physical and/or emotional harm.

20. In her judgment, the judge began by summarising the family background as set out above. Turning to Part A of the threshold document and the allegations relating to H's injuries, she started with the following observations:

> "16. The one matter of which I am confident, is that the adult witnesses were not able or willing, within the proceedings, to be open and truthful about matters relevant to the circumstances in which H sustained a skull fracture. Unfortunately, the manner in which they have provided information to the Court about what occurred, when the injury was first observed, the accounts given to those who were seeking to provide appropriate care to H, or understand what occurred within the family, has led me to the conclusion that I cannot safely conclude that that which they now state is an honest and accurate account of events.
>
> 17. The overall impression given of the manner in which both parents have given evidence, is that they have, to varying degrees, only admitted something, or given evidence about it, when they have had to do so. I do not consider that they have taken part in the fact finding process with an active willingness

> to assist the Court in working out how a significant injury was caused to their son. Rather, my overwhelming impression is that they have sought to provide as little evidence as possible, preferring to keep the details of what has occurred within the family, from the Court and professionals, for reasons which I do not fully understand. There are many reasons why a witness may not be truthful, fear of the consequences of the truth for themselves or for others, a misplaced sense of loyalty are two examples. In addition, I consider it quite possible that different witnesses have provided accounts which are partially true and accurate and partially not. It is not the Court's role to speculate, to fill in gaps in evidence which might then provide a likely reliable or credible account, but it must, where it can safely do so, make findings of fact on the basis of the evidence seen and heard, which are relevant to the welfare outcomes for the children."

21. The judge then summarised the evidence about the events leading up to H's admission to hospital and the subsequent investigation. Next, she considered the medical evidence. We were not provided with copies of the experts' reports or a transcript of their evidence. But no party has challenged the judge's summary of that evidence, the salient features of which are as follows.

22. At paragraph 32 of her judgment, she said:

> "The medical experts gave evidence that the injury to [H's] skull could have been caused accidentally or deliberately; none of the experts could determine whether the injury, looking simply at the injury, was inflicted or not. It was, however, in each of their opinions, most likely to have been caused by a single episode of impact against a hard unyielding object or surface. Further, whilst the injury was a significant force to break the bone, of all skull fractures seen in infants, this type of injury was the one most likely to occur accidentally."

23. In addition, the judge recorded the experts expressing the following opinions:

(1) Radiologically it could only be said that the fracture occurred within two weeks of the scans carried out on 8 May. The timing of the appearance of the scalp swelling would give a better indication. The onset of swelling is variable but would usually appear within six to twelve hours of the fracture being sustained.

(2) The presence of scalp swelling, particularly if it was a "boggy" swelling, would usually prompt a carer to seek medical attention, particularly if they were aware of a traumatic incident.

(3) The pain response would be immediate and probably strong and likely to last in the region of five minutes.

(4) The explanation of the child falling backwards onto metal bars, as described by one of the other children during the police investigation, was a possible mechanism

through which the fracture could be caused, although a fall onto a protruding object would, generally, lead to a depressed fracture and a linear fracture was more likely to occur from a fall onto a hard flat surface.

(5) The incident described by the adult family parties in the additional statements filed during the hearing (a fall from a car seat placed on the bottom step of the staircase at home) could provide a possible explanation, at least if the fall was onto the uncarpeted floor at the bottom of the stairs. There was a difference between the experts as to whether it could be the explanation for the fracture if the fall was onto the skirting board.

24. The judge then set out in considerable detail the various statements made by the parents and A about the events surrounding H's injuries. At paragraph 48, she said:

> "The mother's account of relevant events has not been consistent. In addition, significant parts of her oral evidence, particularly when considered within the context of the other evidence, lacked apparent credibility."

She then cited a number of examples from the mother's evidence supporting this conclusion. At paragraph 56 to 57, she drew some of these examples together in these terms:

> "56. Standing back for a moment, her evidence was that an incident occurred on 7th May 2021 in the morning when A told her that H had fallen and hit his head but, that she forgot about that incident entirely later that day when she discovered a bump on his head and whilst she was actively asking questions about what had occurred; that she only recalled this incident in the hospital when she was informed that H may have sustained a skull fracture. She then mentioned it to her husband, but not only did not tell the police or the medics treating H, but also told them that she only found the lump on 8th May 2021. She then forgot about the incident until she received her phone back from the police, and saw the messages she states she sent family members in Pakistan (on the night of the 8th May 2021) in which she made the connection between the fracture and the fall, but then forgot about it when preparing her first statement, and then decided, deliberately, not to mention it until the end of the first week of the trial because of her husband's (alleged) warning that she might look like a liar if she changed her account. In addition, she stated that she was concerned about the impact upon A's future if she informed professionals about the incident.
>
> 57. Significant aspects of the mother's oral evidence lacked credibility. I simply did not believe it."

25. Turning to the father's evidence, she recited a number of passages from his written statements and continued (at paragraph 65):

> "I found the father's evidence about what he knew about any event occurring on the morning of 7th May 2021 to be very troubling, particularly when considered in the light of the passages set out above within the father's written evidence. I felt unable to confidently rely upon it. In addition, the father's oral evidence was unconvincing and inconsistent. During it he made assertions, then later changed that evidence and at times simply accepted that the evidence he had previously given was false. I had the impression at times, particularly when he was cross examined by the mother's counsel, that he would change his evidence to accord with that which the questioner put to him."

Having set out passages from his oral evidence, she concluded that she was not satisfied that he had given an accurate or truthful account of his whereabouts on the evening of 7 May.

26. Of A's evidence, the judge observed:

> "In general, A's evidence was given orally in an apparently open, credible way. Nonetheless, there were aspects within it upon which I was not confident. Those aspects of his evidence were relevant to the issues I was required to determine."

She cited parts of his evidence which she found unreliable.

27. At paragraph 81, she concluded:

> "It is with great sadness that I have concluded, on a careful review of the oral and written evidence I have seen and heard, that none of the adult parties had been wholly honest and truthful with the Court about their own knowledge of how H sustained a skull fracture and events within the family at the relevant time. As a result, I have not felt able to place sufficient reliance upon their evidence to conclude how, on the balance of probabilities, the injury actually occurred."

28. The judge then set out her findings on Part A of the threshold document relating to H's injuries, as summarised above. She started at paragraph 94 of the judgment by finding that allegation 1, in which the local authority asserted inter alia that H had suffered significant physical harm whilst in the care of one or more of the three adults attributable to the care given to him not being what it would be reasonable for a parent to give, was "established on the evidence". In respect of the cause of the injuries, she referred to allegation 9, which read:

> "H's injuries are likely to have been inflicted by the mother, father, A, or a combination of the same; or the result of an as-yet undisclosed accident whilst in the care of the mother, the father or A."

At paragraph 96 of the judgment, the judge said:

> "I consider that the words set out allegation 9 are established on the evidence. For clarity, again, that does not preclude the possibility of the injury having been caused accidentally. The failure of the adult parties to be honest with the Court has precluded the Court from being able to determine whether the injury was inflicted deliberately or accidentally. The local authority have proved, on the evidence, that the injury could either have been caused deliberately or accidentally and that those who cared for H at the relevant time have not been honest about their knowledge of relevant facts."

29. At paragraphs 99 to 102, she considered the allegations that there had been a delay in seeking medical treatment and a failure to protect H:

> "99. The finding about a delay in seeking medical treatment is more nuanced. I consider that the medical evidence was that the presence of scalp swelling would concern a reasonable parent concern and make them, at least, inquisitive as to the cause, but not necessarily seek medical treatment. However, both [the experts] were clear that once the swelling became boggy, a reasonable parent would seek medical treatment.
>
> 100. In my judgment there was a delay in seeking treatment from, at least, the point that the mother noticed that the swelling had changed to the call being made to 111. Her evidence at that stage was that she was concerned and that, had she been able to find care for the other children she would have wished to take H for medical treatment/ assessment. In addition, C explained that he had told the mother to seek medical assistance or to call an ambulance. The father did not explain, in my judgment, why he did not support the mother to do so, but rather instructed her to wait until he returned from work and could see the swelling himself.
>
> …
>
> 102. Given my conclusions regarding allegation 9, I do not consider that I can properly conclude on the evidence that any of the adult parties have failed to protect. However, I consider that they have, by their lack of honesty, prevented the Court from being able to make clear findings about how H sustained his injury and that deliberate decisions were made not to be open and honest with professionals or the Court."

30. She then set out her conclusions on a likelihood of future harm to H. Under its allegation 16, the local authority had sought a finding that, by reason of the findings as to the causation of his head injuries, H was likely to suffer significant harm in future within the meaning of s.31(2). At paragraph 103, the judge concluded:

> "I consider that allegation 16 is established. Further than set out above, it has not been possible to conclude exactly how H's

> injury was sustained. The parents and A have not been open and honest about their knowledge of relevant events. In the circumstances of this case, and the evidence in it, it is not possible to take steps to protect against a re-occurrence of a significant injury occurring in the future in a similar way to H or one of his young siblings."

With regard to the other subject children, she observed at this point:

> "104. The issue is more complex in respect of the older children, C and D given their ages in the light of the conclusions I have reached above.
>
> 105. However, I refer to my conclusions below …."

31. Turning to Part B, the judge referred to Annex 2, which she described as a fair and accurate record of the agreed evidence and facts regarding allegations 19 to 26, but added that

> "[t]hose historical matters formed a background, no more, no less, against which I heard the evidence about allegations in Part A."

She then recorded that she had not been asked to determine the truth of allegations 27 and 29 (which were, in short, that the children had retracted and/or contradicted statements under parental pressure and that it was likely that the parents' care of the children had been characterised by violence). She added some observations about these allegations which she "considered to be important to the welfare outcomes for the children". She recorded that she did not make another finding sought by the local authority that the parents had encouraged an understanding in the family that professionals were not to be told the truth about physical assaults in the home but added that the local authority had established that the parents had not been open and honest about the circumstances in which H had sustained his injuries. She then set out her finding about the mother slapping D and the incident of violence between the parents in the children's presence as summarised above. Having recorded some of the evidence about this incident, she concluded:

> "127. Having heard that evidence, I am concerned that the parents do not have a clear understanding of domestic abuse and its impact upon children and families. The evidence of both parents appeared to seek to minimise the one, conceded, episode of domestic abuse. The evidence recorded above revealed, in my judgment, a need for further work to be undertaken with the family in this area.
>
> 128. Again, my conclusions in respect of these allegations must be considered within the context of the lack of openness and honesty regarding the parent's knowledge of circumstances relevant to the cause of H's injury.

> 129. In the light of my conclusions set out above, I consider that all of the children, in the absence of candour and openness by the parents are likely to suffer emotional harm."

32. The parents' requests for clarification and amplification were lengthy. It is unnecessary to recite them in full. The most substantial request concerned the finding as to the cause of H's injuries. In particular, the judge was asked to explain how she had concluded that the s.31 threshold was crossed when she had been unable to determine whether the injuries had been sustained intentionally or accidentally. In the clarifications document, the judge gave a lengthy response to this request of which the important passages are as follows:

> "2. I consider that threshold for the making of public law orders as set out in s.31 of the CA 1989 has been met. That is as a result of both the findings made in respect of the threshold allegations in respect of the skull fracture and, against the background of those findings, the findings made in Part B and vice versa. The skull fracture was a significant injury. It was sustained either by deliberate infliction by one of the three adult parties or as a result of an accident (pleaded as 'undisclosed' in the threshold document). To view that finding in its proper factual context, it must be read against the background established by the local authority in respect of the findings in Part B. So too, the findings in Part B must be considered alongside those in Part A. The past harm (skull fracture) which occurred is attributable to parental care which was not reasonable to expect a parent to give (because it was either deliberately inflicted or caused accidentally as a result of deficient parenting), as is the likelihood and likely risk of future significant harm. In terms, I was satisfied that at the date the proceedings began H had suffered significant harm, attributable to the care given to him, not being that which it would be reasonable to expect a parent to give him. On the findings I have made in respect of part A of RT I also consider (given the failure to work openly and honestly with professionals, considered within the context of all the evidence I have heard and seen) that the other children suffered, or were likely to suffer significant emotional and physical harm, attributable to the care given to the parents, not being that which would be reasonable to expect a parent to give.
>
> …
>
> 9. The parents and A had no obligation to prove anything. The burden was on the local authority. They have chosen to give inaccurate, misleading and, at times, deliberately dishonest accounts. As a result, it was simply not possible to draw conclusions from the unsatisfactory evidence they gave about what, on the balance of probabilities, had occurred, with whom, or precisely when. It is, in my judgment, a real possibility that H was injured through an accident. The injury was sustained; it was

one which could have occurred accidentally. That remains a real possibility. Yet, if that were the case, in assessing the evidence, considering each component part within the whole, a factor to consider was why those involved or with knowledge about it chose to hide that fact? The explanation could lie in feelings of shame, fear, misplaced loyalty etc. It could also be because the shame or fear is of disclosing a more serious incident. The local authority proved the assertion it advanced. In my judgment, on the basis of all the evidence in this case, sadly, it is, indeed, a real possibility that the injury was inflicted and that family members are not willing or able to describe what occurred or their knowledge about it. Given the lack of honest information from the adults, I could not properly determine which of them was involved in either the accidental cause of the injury, or the infliction of the injury.

10. I do not agree (if it is suggested) that, because I have not concluded that the injury was, either deliberately inflicted, or caused accidentally, I have not concluded that the s.31 threshold for the making of public law orders has been met. Nor does that conclusion contradict itself. It accurately reflects the facts the court could find on the balance of probabilities in this particular case. On the findings made:

(a) Either, the injury was caused deliberately by one of the family members with care of H, and the parents have not been truthful about their knowledge or suspicion …

(b) Alternatively, the injury was caused as a result of an accident and the parents have not been truthful about their knowledge or suspicion about that, it being likely that …

(c) I accepted that genuine accidents may, and occur, where there has been no deficient parenting (i.e. not being what it would be reasonable to expect a parent to give). However, other accidents do occur where they have been caused, or not reasonably. avoided, because of deficient parenting. An obvious example might be leaving an infant in a chair within reach of a pan of boiling water; the infant pulls the pan over themselves and is severely scalded. That was an accident; the parent did not intend for the child to be badly hurt. However, that injury arose from deficient parenting: leaving the infant within reach of the pan and/or the failure to supervise to prevent the infant from pulling over the pan. Even if there had been that failure in parenting, if the parents worked honestly to identify what went wrong and to prevent a reoccurrence, that deficient parenting could be safeguarded against. In this case, one inference I drew from the parents' and intervenor's evidence and the parents' deliberate dishonesty about relevant information (in its proper context including, for example being the apparent lack of straps/ seat belts in the car seat) was that the accident (if that was how

> the injury occurred) was likely to involve some kind of deficient parenting which they were unwilling or unable to admit and be honest about. There was also a large volume of evidence before me about H travelling in a car seat without straps, being placed in a footwell to travel. The inference I drew went further – it was that they chose to keep things within the family and not share them with professionals.
>
> In either case the harm (fractured skull) was attributable to the care (undisclosed deliberate infliction or [undisclosed] accident) given by the parents, not being that which it would be reasonable to expect them to give. Against that background, a future likelihood of harm has also been established through the lack of honesty about past events which prevents/impedes appropriate safeguarding taking place and/or leaves open the real possibility of a repetition of such harm occurring."

33. Later in the clarifications document, she added:

> "11. I accepted that the wording in paragraph 129 above required clarification. The point I wished to make at this point… is that at the welfare stage, careful consideration will need to be given to both the risk of future harm for each of the children, in addition to the extent to which the past, established, significant harm has impacted them individually. If, for example, the skull fracture occurred accidentally, there is, of course, the possibility that the risk of physical harm for the older children is different to that for the younger as the older children are more able to take steps to protect themselves and require less supervision. If it was caused deliberately, the risk of future physical harm some risk of significant physical harm is likely to remain for all. All the children, however, are likely, in my judgment, to have suffered past harm as a result of the lack of honesty within the family about what has occurred and that (emotional) harm is, in my judgment, likely to be greater or more intense, for the older children with greater understanding of the impact of lies and dishonesty.
>
> Professionals working with the family towards the welfare stage will need to work on the basis of a number of possibilities: that any one of the three adults 'accidentally' caused the injury by deficient parenting but cannot or will not admit it or admit which that which they know or suspect; any one of the three adults deliberately inflicted the injury but cannot or will not admit it or that which they know or suspect.
>
> 12. 1 have not able to conclude which of the three adults deliberately inflicted the injury (if that occurred), because the adults have not been honest about their knowledge of the circumstances surrounding the cause of the injury, nor how it occurred (for the same reason). Nor can I rule out the possibility

> that the injury occurred as a result of an accident. I could not make a finding that that was so, on the balance of probabilities, because the adults have not been honest about their knowledge of the circumstances surrounding the cause of the injury and the evidence I heard, in its totality was not sufficiently reliable or credible for me to make that finding. The father's evidence was particularly troubling. I was unable, with any confidence, to rely upon his account of events, including his whereabouts, during the relevant timeframe.
>
> 13. The fact that the adults have not been honest about their knowledge of the circumstances relevant to the cause of the injury does not mean, of itself, that, on the balance of probability, they (or any of them) deliberately caused the injury. Applying a *R v Lucas* direction in this case has been particularly important. The family dynamics are complex. There are, in my judgment, many reasons why, in this case, the adult family members may have lied, fear of the truth, misplaced senses of loyalty, torn loyalties, being some examples only…."

The appeal – preliminary observations

34. In the event, for reasons that are not entirely clear but apparently tied up with the confusion about the time for appealing mentioned above, the mother filed two notices of appeal, both in substantially the same terms, in which she asked this Court to set aside the findings and the determinations that the s.31 threshold had been crossed and either substitute a finding that the local authority had failed to establish the threshold was crossed with respect to any of the children or alternatively remit the matter for rehearing.

35. I granted permission to appeal on 30 November and the hearing of the appeal took place on 20 December. The parties represented at the hearing were the appellant mother, the respondent local authority, and the intervenor. The father's representatives filed written submissions in support of the mother's appeal. The children's solicitor filed a statement indicating that the guardian did not oppose the appeal and adopted a neutral position as to the merits.

36. Before considering the merits of the appeal, I have some preliminary observations to make about the conduct of the proceedings.

37. Any case involving a large number of children and a history stretching back over several years presents challenges to the court, and the judge plainly approached her task with commendable diligence and determination. I have a number of concerns, however, about the prolonged and tortuous process that followed the fact-finding hearing. I recognise the problems which hard-pressed judges sitting in the family court are facing week in, week out. I am, however, concerned that what happened in this case may reflect practices which are becoming more common in care proceedings, partly as a result of the increased complexity of the cases and the wider pressures on the family justice system, but also because of a blurring of the boundaries which have traditionally

marked up the field of litigation delineating what might be called the "technical areas" of the judge and the advocate.

38. First, there was an inordinate delay before the production of the final version of the judgment. It was handed down over 18 weeks after the end of the hearing and 10 weeks after the circulation of the preliminary draft. In the intervening weeks, there were no fewer than six interim orders (or draft orders) dealing with matters relating to the production of the judgment and its annexes and prolonged exchanges of emails between the court and the legal representatives. One consequence of this confusing process was uncertainty as to whether the time for filing a notice of appeal to this Court was about to expire. A further consequence was that there were three separate and in some respects different accounts of the judge's key reasoning (the main judgment, the clarifications document and the "findings" document). Another related problem is that each of the first two documents came in more than one version. But the main concern, of course, was the delay in making decisions about the future welfare of subject children.

39. Secondly, it is to my mind inappropriate for a judgment in care proceedings to be accompanied by as many as seven annexes. I recognise that this was a complex case and that the judge wanted to consolidate all the documents. A judgment structured in that way, however, presents difficulties for any later reader seeking to identify the reasoning behind the court's decision. In *Re N-S* [2017] EWCA Civ 1121, McFarlane LJ observed at paragraph 30:

> "Not only is the presentation of adequate reasoning of immediate importance to the adult parties in the proceedings (in particular the party who has failed to persuade the judge to follow an alternative course), it is also likely to be important for those professionals and other judges who may have to rely upon and implement the decision in due course and it may be a source of valuable information and insight for the child and his or her carers in the years ahead."

In that case, McFarlane LJ was dealing with a judgment in which the reasoning was said to be insufficient. But a similar criticism can be made where a judgment is structured and presented in a way that makes the reasoning difficult to discern.

40. Generally, a draft judgment should be a single document that can simply be read from beginning to end. Annexes are sometimes appropriate but not on the scale adopted in this case. Whilst I can see the point of appending the findings made by the court (annex 6) and the response to the request for clarification (annex 1), I question whether it was either necessary or appropriate to append the other annexes. The two other judgments appended, giving reasons for the case management decision made on 16 February 2022 and for refusing permission to appeal on 9 August 2022, either pre-dated or post-dated the fact-finding decision and formed no part of the reasoning for that decision. Similarly, neither the local authority's revised threshold document nor its summary of evidence relating to Part B of the threshold formed any part of the judge's reasoning. As for the annex containing the mother's counsel's lengthy exposition of the law, there are clear dangers in such an approach, as explained by King LJ in *Re A (Children) (Pool of Perpetrators)* [2022] EWCA Civ 1348 in which a similar note had been appended to a judgment in care proceedings. In fairness to the judge in the present case, I add that her judgment was handed down before the publication of the judgment in *Re A.*

41. Thirdly, the whole process of clarification and amplification was excessive. Some clarification was unquestionably necessary. With respect to the judge, the judgment, as she herself fairly recognised, did not set out some aspects of her sequence of reasoning with sufficient clarity. But whilst the judge was right to recognise the need to respond to requests for clarification or amplification of her reasoning, and entitled to incorporate some of her responses into the final version of her judgment, the document containing clarifications and amplifications appended as Annex 1 to the judgment was longer and more detailed than the circumstances required.

42. To a very considerable extent, the fault lies in the drafting of the requests for clarification or amplification by the parents' representatives. For example, on behalf of the mother, a request was made in these terms:

> "Please consider how, if the injuries may have been sustained whilst in the care of A or the father, what the court has concluded in respect of mother's dishonesty."

Another example was the following request made on behalf of the father:

> "(a) What period or periods within the 24-hour window does the court identify as ones when the child was in the care of the father?
>
> (b) In terms of that period, or those periods, when does the court identify that the father could have inflicted the skull fracture, or could the skull fracture have occurred accidentally in the father's care?
>
> (c) Does the court accept the uncontroverted evidence that the father was in work during the hours he stated?
>
> (d) Does the court accept the uncontroverted evidence that the father was out with friends during the evening on Friday, 7 May 2021?
>
> (e) In placing the father within a pool of possible perpetrators for this skull fracture, how does the court say the local authority has discharged its burden of proving on the evidence that there is a real possibility that he inflicted the injury?
>
> (f) In which possible circumstances and at which possible times?"

43. This degree of interrogation of the judgment seems to me to be manifestly excessive. The guidance on the process of making and responding to requests for clarification in family proceedings is set out in *Re A and another (Children) (Judgment: Adequacy of Reasoning)* [2011] EWCA Civ 1205 ("the Practice Note"), *Re I (Children)* [2019] EWCA Civ 898 and most recently *Re F and G (Children) (Sexual Abuse Allegations)* [2022] EWCA Civ 1002. As I observed in the last-named case:

> "When giving judgment in a complex children's case, no judge will deal with every point of evidence or every argument advanced on behalf of every party. The purpose of permitting requests for clarification to be submitted is not to require the judge to cover every point but rather, as the Practice Note emphasised, 'to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process.'"

It is the responsibility of counsel and courts to be disciplined when making and responding to requests for clarification. As King LJ observed in *Re I* (at paragraph 38):

> "The family court is overwhelmed with care cases. Judges at all levels often move seamlessly from one trial to the next without judgment writing time between them. Routine requests for clarification running to a number of pages are not only ordinarily inappropriate, but hugely burdensome on the judges who have, weeks later, to revisit the evidence and their judgment when their thoughts and concerns have long since moved onto other cases. This is not conducive to the interests of justice."

In at least one respect, as discussed below, the request for clarification was undoubtedly justified. But overall the requests drafted on behalf of the mother and father were excessive, repetitive and sometimes not easy to follow and in some respects these faults were mirrored in the judge's responses.

Grounds of appeal

44. The mother put forward six grounds of appeal. As her counsel recognised, there is a considerable degree of overlap between the grounds and I find it convenient to address them under the following headings adopted by Mr Goodwin KC on behalf of the local authority:

(1) Flawed decision in case management hearing;

(2) Errors concerning H's injuries;

(3) Flawed decision-making in respect of the five older children;

(4) Contradiction on failure to protect; and

(5) Error in finding parents had delayed seeking medical treatment.

(1) *Flawed decision in case management hearing*

45. Chronologically, it is appropriate to consider first the challenge to the judge's case management following the hearing on 25 February 2022. The "overarching basis" of this aspect of the appeal is that the judge was wrong to allow the local authority to pursue findings of fact based on the fact of, and inferences to be drawn from, past allegations when the local authority did not intend to prove the truth of any of those

allegations. Under this "overarching basis of appeal", the mother advanced two specific grounds. Under ground 5, she asserted that the judge failed to apply the correct legal principles relating to case management, in particular that an alleged but unproven fact is not a fact upon which a court can properly infer that a child is suffering or likely to suffer significant harm. Under ground 6, the mother asserted that the judge made "an error in balancing case management including the allocation of resources and issues of proportionality". It was argued that, in deciding to permit the local authority to proceed with the allegations in Part B of the threshold document, the judge (a) failed properly to consider the relevance of the age of the past allegations in the context of the current proceedings and the trigger event, (b) failed properly to consider the resulting consequences of her decision to allow the local authority to continue to pursue the findings sought by them based on the past unproven allegations including the late provision of evidence by the local authority and the time that would be required to be devoted to responding/determining those issues by each party and by the court, and (c) failed therefore to give adequate weight to those factors the court is bound to consider with respect to case management as set out in the Family Procedure Rules 2010. On behalf of the father, it was argued in written submissions that the judge was wrong as a matter of law to allow these disputed allegations to form any part of the fact-finding landscape.

46. I am not persuaded that there is any merit in this aspect of the appeal. It is generally wrong for an appellate court to interfere with a case management decision unless the decision is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree: see *Global Torch Ltd v Apex Global Management Ltd* [2014] UKSC 64, [2014] 1 WLR 4495 at paragraph 13. This principle of restraint is applied in family cases as in any other. In *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250, Sir James Munby P said (at paragraph 35):

> "it must be understood that in the case of appeals from case management decisions the circumstances in which it can interfere are limited. The Court of Appeal can interfere only if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

47. In making her case management decision in this case, the judge adopted a measured and nuanced approach to the Part B allegations in the threshold document, concluding that it would not be right to prevent the local authority putting before the court the evidence on which it sought to rely whilst plainly recognising the potential dangers of the course she was adopting ("the Court will need to be astute not to be led (improperly) into making findings on an unsafe basis"). As Mr Goodwin KC observed on behalf of the local authority, in permitting the authority to adduce evidence which provided the context for its main threshold allegations, the case management judgment does not disclose any error of law, or any failure to apply the correct legal principles. I am satisfied that the judge did consider the age of some of the past allegations and the likelihood that allowing the local authority to adduce evidence about them would extend the length of the hearing. Although other judges might have taken a different

course, I can see nothing inherently wrong in her case management decision to proceed in the way she chose. I would therefore dismiss the appeal against the case management decision. The more substantial question, in my view, is whether the judge fell into the trap she identified of making findings under Part B on an unsafe basis. I shall return to this question below.

(2) *Errors concerning H's injuries*

48. Next, I consider a series of arguments relating to the judge's treatment of the injuries sustained by H. This entails drawing on aspects of several grounds of appeal advanced on behalf of the mother.

49. Under ground 1, the mother contended that the judge failed to answer the key question as to causation of the skull fracture sustained by the child. She was unable to decide between deliberate infliction or accidental cause. In those circumstances, she failed to identify how the significant harm suffered by H, if accidental in origin, was attributable to the care being given to the child not being what it would be reasonable to expect a parent to give to him, and thereby failed to explain how her conclusions as to causation satisfied the s.31 criteria.

50. On behalf of the mother, Ms Meyer KC acknowledged that, in the clarifications document appended as Annex 1 to the handed-down judgment, the judge had stated (at paragraph 10(c)) that she drew the inference from the adults' evidence and the parents' deliberate dishonesty:

> "that the accident (if that was how the injury occurred) was likely to involve some kind of deficient parenting which they were unwilling or unable to admit and be honest about. [and that] they chose to keep things within the family and not share them with professionals. In either case the harm (fractured skull) was attributable to the care (undisclosed deliberate infliction or [undisclosed] accident) given by the parents, not being that which it would be reasonable to expect them to give."

Ms Meyer pointed out, however, that this passage was not included in the original document containing the judge's responses to the request for clarification and amplification and only appeared in the version appended as Annex 1 when the judgment was finally handed down. She submitted that in the judgment the judge had not explained how any possible accidental cause was, on the balance of probabilities, attributable to the care given to H not being what it would be reasonable to expect a parent to give to him. In his written submissions on behalf of the father, Mr Thomas KC adopted these arguments, adding that the judge repeatedly failed to find as a possible cause an accident of a nature or type or which occurred in such circumstances as could meet all the criteria in s.31. In oral submissions, Ms Meyer went so far as to contend that the explanation for this failure is that the judge initially fell into error by thinking that any "accident", whether or not it was due to lack of parental care, was sufficient to cross the s.31 threshold. She submitted that, as the judge was unable to distinguish between inflicted or accidental cause, it was not open to her to find that the local authority had discharged the burden of proving that the harm sustained by H was attributable to unreasonable care.

51. Under ground 2, the mother asserted that, in considering the cause of H's injuries, the judge failed to apply the correct approach to the burden and standard of proof. Ms Meyer cited the well-known dicta of Lord Hoffman in *Re B* [2008] UKHL 35, [2009] 1 AC 11 (at paragraph 2):

> "there is no room for finding that it might have happened …….the law operates a binary system ….the fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it a value of zero is returned and the fact is treated as not having happened."

Ms Meyer also cited the observations of Baroness Hale of Richmond in the same case at paragraph 32:

> "In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue; the party with the burden of showing that something took place will not have satisfied him that it did …."

It was Ms Meyer's submission that the judge fell into precisely this error by "sitting on the fence" in failing to make a decision as to whether the injury was inflicted or accidental.

52. Ms Meyer identified what she maintained was a further flaw in the judge's approach to the burden of proof. It was her submission that at paragraph 12 of the clarifications document, (set out at paragraph 33 above), the judge had shifted the burden of proof from the local authority to the parents/intervenor by appearing to require that in order for the court to reject inflicted injury as a proven cause of the fracture the evidence of the parents/intervener should be such as to persuade her to make a finding on the balance of probabilities that the cause of the injury was more likely than not accidental.

53. Further within ground 2 it was asserted that, when considering the cause of H's injuries, the judge erred in her approach to the issue of dishonesty and lies. Although she expressly acknowledged that a person may lie for several reasons, she applied only part of the principle in *R v Lucas* [1981] QB 720, omitting any reference to the possibility that a person may lie for innocent reasons such as an attempt to bolster a just cause or the need for caution in taking a lie as direct evidence of guilt, and failing to correct this omission when clarifying and amplifying her reasons. Furthermore, there was no reasoned analysis in the judgment or the subsequent clarifications document as to why any particular lies or lack of honesty created a likelihood of significant harm. Ms Meyer submitted that, given the importance which the judge attached to the adults' lies when reaching her conclusion, these were important omissions. Her submissions were adopted by Mr Thomas who added that the judge made general findings about the father's credibility without identifying with sufficient particularity or at all the lies which she found had been told. A similar submission was made by Ms Allwood on

behalf of the intervenor. Having stated that there were aspects of A's evidence on which she was not confident, the judge failed to provide a detailed analysis of those aspects or to apply the *Lucas* direction to them except in a general way.

54. Mr Goodwin conceded that, taken by itself, paragraph 96 of the judgment would not, as he put it, pass muster, because a finding that an injury was either inflicted or accidental is, without more, insufficient to cross the threshold. If that is a judge's conclusion, the attribution of the injury to unreasonable parental care is no more than one of two possibilities, the other being an injury caused by an innocent accident. In her response to the request for clarification, however, the judge had added that, if the injury was sustained accidentally, it was her inference from the evidence that this was likely to have involved some kind of deficient parenting which the parents and/or A were unable or unwilling to admit. Mr Goodwin submitted that through this clarification the judge eliminated the possibility of the injury being caused by an accident that was not the product of unreasonable parenting. As a result, the attributability condition within s.31 was met either way. Having regard to the serial dishonesty and obfuscation shown by the three adults, it was open to the judge to exclude an innocent accident if she concluded that, if this had been the explanation for the injuries, it would have been disclosed.

55. Mr Goodwin submitted that it did not follow from the judge's conclusion that she was unable to say whether the injury was inflicted or caused as a result of an accident for which one or more of the adults was culpable, that she was "sitting on the fence" in the way deprecated by Baroness Hale in *Re B*. The binary approach had to be applied to the question whether the local authority had proved that the child suffered significant harm attributable to unreasonable parental care. The judge found that this had been established by the local authority although she was unable to say whether the injuries suffered by H had been inflicted intentionally or sustained through an undisclosed culpable accident.

56. On this issue, I accept Mr Goodwin's submissions. Without clarification or amplification, paragraph 96 of the judgment by itself was insufficient to support a conclusion that H had suffered significant harm as a result of unreasonable parental care so as to cross the s.31 threshold. But the mother sought clarification and amplification precisely on this question and the judge provided it, albeit only in the final amended version of the document ultimately appended as Annex 1 to the handed-down version of the judgment. On the totality of the evidence, it was open to the judge to infer that, if the injury was sustained accidentally, this was likely to have involved some kind of deficient parenting which the parents and/or A were unable or unwilling to admit. I reject Ms Meyer's submission that the judge only inserted a finding that any accidental cause must have been attributable to deficient parenting at a late stage and that this was not part of her initial thinking. It was her finding, clearly stated in the judgment (at paragraphs 94 and 103 respectively), that the harm which H had suffered, and was likely to suffer in future, was and would be attributable to unreasonable parenting. That was the central issue in the case. The omission from the judgment related to the basis on which she reached that conclusion if the injuries had not been deliberately inflicted. The judge drew an adverse inference against the parents that they were lying to cover up the culpable cause of H's injuries but did not expressly say so in the judgment. It would obviously have been better if the judge had stated that in clear terms, because this was an important step in her reasoning. But once that adverse

inference was drawn, it was open to the judge to conclude that any accident must have been attributable to deficient parenting. The clarifications document stated that in terms and satisfied the criteria in s.31

57. In those circumstances, Ms Meyer's arguments based on the dicta of Lord Hoffmann and Baroness Hale in *Re B* fall away for the reasons identified by Mr Goodwin. I am also unpersuaded by Ms Meyer's submission that the judge was guilty of reversing the burden of proof. Looking at the judgment and annexes as a whole, I am satisfied that the judge was careful to ensure that she did not do that, expressly reminding herself of where the burden lay in paragraph 9 of the clarifications document quoted above. The language used by the judge in paragraph 12 of that document, on which this submission is based, does not call into question the judge's application of the principle clearly stated a few paragraphs earlier. Similarly, there is no merit in the criticisms of the judge's approach to lies and the *Lucas* principle. It is to my mind clear both from paragraph 17 of the judgment and from paragraph 13 of the clarifications document (both quoted above) that the judge was fully aware of all aspects of the principle. In the latter passage she expressly said that applying the *Lucas* direction had been "particularly important", adding:

> "The family dynamics are complex. There are, in my judgment, many reasons why, in this case, the adult family members may have lied, fear of the truth, misplaced senses of loyalty, torn loyalties, <u>being some examples only</u>…." (emphasis added).

She was manifestly aware of the need for caution when analysing lies told by the parties and in my judgment she identified the lies, as far as she could, with sufficient particularity. In those circumstances, she was entitled to rely on those lies when making her findings, given the scale of dishonesty and obfuscation which she found in the evidence given by the adult family members, and for my part, reading the judgment and clarifications document together, I consider her explanation of how and why she relied on the dishonesty of the three adults to be a sufficient exposition of her reasoning.

(3) <u>*Flawed decision-making in respect of the five older children*</u>

58. Within ground 1, it was argued that the judge failed properly to answer the key question for each of the older subject children as to how the factual findings she had made as to the causation of H's injuries, or any of her additional findings, satisfied the necessary criteria for concluding that the s.31 threshold was crossed in respect of each individual child. Under ground 4, it was contended that there was an inadequacy of reasoning for these conclusions. It was submitted that the judge failed to explain the basis for her finding that the older children were likely to suffer significant physical harm. At paragraph 104 (recited at paragraph 30 above), she had identified that "the issue [i.e. of the likelihood of physical harm to the older children] is more complex … given their ages". In the following paragraph, she had added "However, I refer to my conclusions below". In the event, however, she did not expressly return to this issue later in the judgment. Although there is a finding of a likelihood of future emotional harm to all six subject children (paragraph 129), there is no reference in the judgment to any finding as to the likelihood of future physical harm to any of the children save H. That finding is only expressly stated in the findings document appended as Annex 6 to the handed-down version of the judgment. It was submitted by Ms Meyer that the judge's amplification of her reasoning in the clarifications document was insufficient to

demonstrate how the finding was made. Taken together, the judgment and annexes failed to make clear the judge's conclusions, in particular (1) as to the nature of the harm each of the children, whose ages range from two to 16, was likely to suffer, (2) why in each case it was significant, (3) the degree of likelihood of the harm occurring, and (4) the respects in which parental care was likely to fall short. In short, there was no reasoning to explain how the inflicted or accidental harm sustained by a small baby led to a finding of a likelihood of harm to a much older child. Similarly, it was submitted that there was no or no sufficient explanation as to why the findings made under Part B supported the conclusion that there was a likelihood of physical or emotional harm to the older children. Ms Meyer stated that the mother and her representatives were driven to the conclusion that, contrary to her assertion, the judge had in fact relied on the unproven historical allegations concerning the family.

59. In response, Mr Goodwin submitted that the foundation for the s.31 determination in respect of the older children consisted of the following findings:

(1) the incidents of violence in the home (the admitted slap of D's head and the incident of domestic violence perpetrated by the father on the mother and witnessed by several of the children);

(2) the parents' minimisation of the latter incident and lack of understanding as to the impact of domestic abuse on children;

(3) the parents' failure to work openly with professionals;

(4) the children's exposure to the lack of honesty within the family; and

(5) the professionals' inability to safeguard the children when the parents had not told the truth about H's injuries.

He submitted that the argument that the judge had relied on the unproven allegations could not be sustained in view of her repeated assertions to the contrary.

60. As mentioned above, I am sceptical as to the purpose of appending, as Annex 2 to the judgment, a lengthy summary of the evidence about the past allegations which, it was agreed, would form no part of the findings. This document seems to me, with respect to the judge, to be superfluous, as do the paragraphs in Annex 6 relating to those unproven allegations which I have summarised above but which are set out at greater length in the findings document itself. I am, however, unpersuaded that the presence of this material in the bundle of documents indicates that the judge was in reality taking the unproven allegations into account when she categorically stated that she was not. Her reasoning in support of the findings relating to the older children, although not straightforward, is discernible. The findings identified by Mr Goodwin and set out above, together with the findings relating to H's injury, gave rise to a likelihood of significant harm, both emotional and physical, to all of the subject children. As the judge explained in paragraph 11 of the clarifications document, the extent of the risk of harm to each child could not be gauged with precision. Tellingly, she was at pains to alert the parties to the need for careful evaluation of the risk of future harm to each child in due course at the welfare stage. At the conclusion of the fact-finding hearing, the "absence of candour and openness" on the part of the three adults in the family and the consequential difficulty faced by professionals seeking to safeguard the children

precluded a precise calculation of the extent of risk. Nevertheless, the judge felt able to conclude that the likelihood of future physical and emotional harm to all the children was sufficient to cross the s.31(2) threshold, and for my part I think this conclusion was open to her on the evidence. Of course it would have been preferable for the judge to have stated in terms in the text of her judgment that her finding of a likelihood of significant harm to the older children extended to physical as well as emotional harm but in this case, notwithstanding my earlier observations, "the judgment" must be taken as including the various annexes. Taken all together, the judgment and its annexes record the fact that the judge was making that finding and her reasons for making it whilst being unable to gauge precisely the extent of the future risk.

(4) *Contradiction on failure to protect*

61. The origin of this issue, raised by the mother under ground 2 (failure to apply legal principles correctly), is an example of the convoluted process undertaken after the draft judgment was distributed.

62. In her judgment at paragraph 102 the judge said:

> "Given my conclusions regarding allegation 9, I do not consider that I can properly conclude on the evidence that any of the adult parties have failed to protect. However, I consider that they have, by their lack of honesty, prevented the Court from being able to make clear findings about how H sustained his injury and that deliberate decisions were made not to be open and honest with professionals or the Court."

In their request for clarification, the mother's representatives asked this question (actually directed at paragraph 103):

> "How has the court reached the conclusion that it is not possible to take steps against a re-occurrence of significant injury in circumstances whereby the court has found the injuries may have been caused by one of the 3 adults, the non-perpetrator has not failed to protect and that this may have been caused accidentally" [emphasis added].

As part of her response to this in the clarifications document, the judge said:

> "I did not conclude that the non-perpetrator had not failed to protect."

She then recited paragraph 102 of the judgment and continued:

> "By that I meant that I could not properly/ fairly reach a conclusion on the allegation about failure to protect because the adults' lack of honesty prevented the Court from making clear conclusions about what had occurred and then, having regard to that which it found occurred, to look at what others did, or did not do to protect H before reaching conclusions about that."

In the summary of findings at Annex 6, the judge said:

> "The Court could not fairly determine whether either parent failed to protect H from an inflicted injury as the parents have, by their lack of honesty and deliberate decisions not to be open and honest with professionals and the Court, prevented the Court from being able to make clear findings about how H sustained his injury and whether, in the light of those findings, there was a failure to protect."

63. On behalf of the mother it is argued that there is a contradiction between the judgment and the clarifications document on this issue, and that this is a further example of the judge failing to recognise that at all stages it can only rely on facts proven to the requisite civil standard and inferences which can properly be drawn from such proven facts and reversing the burden of proof.

64. In my judgment, there is no contradiction. As Mr Goodwin observed, there is a difference between stating that one cannot make a finding of failure to protect and finding that there has been no failure to protect. Although the result, in law, of not making a finding is that the parents cannot be treated as having failed to protect the children, there is no linguistic or principled contradiction in stating, on one hand, that such a finding could not be made and, on the other, that a finding that the parents had not failed to protect the children had not been made. The important conclusion in paragraph 102 of the judgment lies not in the first sentence – that no finding could be made that any of the adult parties had failed to protect – but rather in the second sentence – that all of the adults, by their deliberate lack of openness and honesty, had prevented the court from being able to make clear findings about how H sustained his injury.

(5) *Error in finding parents had delayed seeking medical treatment*

65. Finally, as part of ground 3 – "errors in fact-finding" – it was submitted that the judge's finding that there had been a delay in seeking medical treatment, set out in paragraphs 99 to 101 of the judgment quoted above, was against the weight of the evidence. Ms Meyer relied on the evidence of the expert paediatrician that it would not be unreasonable for a parent not to seek medical assistance prior to the change in the swelling to one of a 'boggy' nature and that in fact the course of medical treatment/outcome would not have altered had medical treatment been sought any earlier. As Mr Goodwin pointed out, however, the judge's finding that there had been a delay "from, at least, the point that the mother noticed that the swelling had changed to the call being made to 111" was consistent with the expert evidence and supported by passages in the mother's own evidence. It was plainly a finding open to her on the totality of the evidence.

Conclusion

66. Despite my concerns about the process leading to the final production of the judgment and its seven annexes, and about the clarity of those documents, I have ultimately concluded that the judge was not wrong to reach the findings set out in Annex 6 and that her reasoning is clearly discernible from the judgment documents. Although it could be said that the concerns raised above amounted to irregularities in the process, they did not result in any injustice to the parties. I would therefore dismiss the appeal.

LORD JUSTICE WARBY

67. I share the disquiet which Baker LJ has expressed about a judgment package of this scale and nature. I am sympathetic to the task confronted by judges dealing with cases of this kind. This judge worked hard over many days to produce a fair result. But the core material for our review is unduly voluminous. More problematic is the distribution of judicial reasoning across several documents coupled with a lengthy and iterative gestation process. However, I also agree with my Lord that on a careful and fair analysis the final judgment, read as a whole, is not flawed in the ways complained of by the appellants. I therefore agree that the appeal should be dismissed for the reasons given by Baker LJ.

LADY JUSTICE WHIPPLE

68. I thank Lord Justice Baker for his careful exposition of the background and issues raised by this appeal. I share his concerns about some aspects of the approach adopted in this case, and I agree with Lord Justice Warby's further observations. But in the end, with careful analysis and the benefit of the submissions we have heard, the judge's reasons can be identified and I am satisfied that her conclusions on the facts were justified. For the reasons given by Lord Justice Baker, I therefore agree that this appeal should be dismissed.