Neutral Citation Number: [2023] EWCA Civ 905

Case No: CA=2023=001011

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM TH FAMILY COURT AT YORK
HH Judge Mitchell
YO21C50035

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2023

Before :

LORD JUSTICE BAKER
LORD JUSTICE LEWIS
and
LORD JUSTICE SNOWDEN

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B (A CHILD) (FACT-FINDING)

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- -

Alison Grief KC and Charlotte Keighley (instructed by **Watson Woodhouse**) for the **Appellant**
Frank Feehan KC and Chloe Ogley (instructed by **Local Authority Solicitor**) for the **First Respondent**
Charlotte Worsley KC and Oliver Latham (instructed by **Newtons**) for the **Second Respondent**
Simon Bickler KC and Catherine Mason (instructed by **Switalskis**) for the **Third Respondent by his children's guardian**

Hearing date : 19 July 2023

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Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2pm on 31 July 2023.

LORD JUSTICE BAKER :

1. This is an appeal by a mother against a finding that she was the perpetrator of serious physical injuries inflicted on her small baby, hereafter referred to as B.

2. The mother is 25 years old, the father is 20 years old. They met in December 2020 and began a relationship. Within weeks the mother was pregnant. In January 2021, the father moved into the mother's house. They married in May 2021 and in September of that year they moved into their own accommodation.

3. On 29 October 2021, the mother gave birth to B. It was a difficult birth, requiring a forceps delivery, in the course of which the mother lost blood and needed stitching and catheterisation. The stitches split and she developed an infection. As a result, when the family returned home from hospital, the father looked after both mother and baby for the two weeks he was on paternity leave.

4. The general routine established by the parents was that the mother would give B night feeds on Sunday night and during the week, the father would be responsible for night feeds on Friday, and they would share feeding during the night on Saturdays. Both parents described B as an unsettled baby, who cried a great deal. On 8 November, B was taken to hospital because he was crying inconsolably. He was discharged after no cause could be found for his crying.

5. The father returned to work on 14 November and was away in another part of the country until 17 November. He was then at home until 25 November when he returned to work during the day, returning in the evenings. On 26 November, the parents took B to hospital again because they were concerned about his crying. On that occasion he was examined by two consultants who found nothing of concern.

6. On Friday 3 December (as the judge found), the father arrived home from work at 2.30pm. Neither parent reported B being particularly unsettled that day. The family were then together over the weekend. The father looked after B overnight on 3 to 4 December. On 4 and 5 December, B was reported as being unsettled. On 5 December, the mother noticed that B's left leg was hard and swollen. On 6 December, he was taken to the GP and then to hospital where he was admitted that afternoon. A radiological examination revealed that he had an oblique fracture of the mid-shaft of the left femur, a fracture to the left proximal tibial metaphysis, seven healing rib fractures and other changes to five more ribs.

7. On 14 December, the local authority started care proceedings and at the first hearing the court made an interim care order. On discharge from hospital, B was placed in the care of his paternal grandmother ("the grandmother") and her partner, where he has remained ever since.

8. On 7 April 2022, the mother called the police to complain that the father was shouting at her. She asked for their help in getting him to leave the home. During her call to the police, the mother alleged that the father had committed an act of sexual assault on her while they lay in bed together on 16 March 2022 when she was under the effects of medication. This allegation was investigated by the police but they took no action about it.

9. Following this incident, the parents separated. In August 2022, however, they resumed communications. During a conversation, the father raised the possibility that he had inflicted the injuries to B. On the mother's case, the father told her more than once that he had in fact caused the injuries but could not remember doing so and that she had not hurt the baby. The mother later said that she thought he was testing the waters to see how a confession might be received. The father's case was that he was exploring whether he could have injured B, having found his memory of the early weeks of the baby's life to be "a blur". He denied saying that he had caused the injuries. Both had heard from a friend about dissociative disorders and that a sufferer might experience blackouts. The father attended an appointment with his GP about the possibility of a dissociative disorder, either supported or encouraged by the mother. When he spoke to the grandmother about the possibility, she was dismissive of the idea and said that she thought the mother was manipulating him. The father subsequently alleged that the mother had manipulated him on this issue. His doctor rejected the possibility that he had suffered from a dissociative disorder.

10. The fact-finding hearing took place over 15 days between 29 March and 27 April 2023. At first, the local authority sought findings that one or both parents had caused the injuries to B. Each parent denied that they had caused the injuries. The mother sought findings on her allegations of sexual assault on 16 March 2022 and on her allegations that the father had made a quasi-confession to her in August 2022. The witnesses who gave oral evidence included four medical expert witnesses, including a consultant paediatrician, Dr Kavita Chawla, both parents and the grandmother. At the end of the evidence, the local authority, supported by the guardian, amended its case to plead that the mother was responsible for B's injuries.

11. On 27 April, the judge handed down a judgment in which she found that the mother had inflicted B's injuries. She found that in the first five weeks of B's life the mother had been under enormous stress and pressure as a result of health difficulties, that she loved B and would never harm him intentionally, and that the injuries had been caused as a result of a loss of control rather than any malice or intention. She found that the father had behaved selfishly and inconsiderately towards the mother in relation to his sexual demands and his preoccupation with his work and did not support the mother sufficiently following his return to work. She found that the father had "failed to notice on 3, 4 or 5 December 2021 that B's leg had been harmed, that he did not notice the decreased movement which was present and in this respect he did not meet B's needs". She found that on 16 March 2022, the father "had attempted to initiate sexual intercourse with the mother by removing her pyjama bottoms and masturbating". Finally, she found that "in August 2022 the parents had discussed the possibility of the father having caused B's injuries but not remembering doing so, that the mother was aware that this was not a possibility as she had caused the injuries and that she manipulated the father by encouraging him to explore this possibility." Following judgment, a case management order was made, making directions leading to a final hearing at the end of July 2023.

12. An application for permission to appeal was made to the judge by the mother and refused on 11 May 2023. On 26 May, the mother filed a notice of appeal to this Court. Permission to appeal was granted on 20 June.

The judgment

13. In view of the challenge to the judge's approach to the issues, it is necessary to set out passages from her judgment in some detail.

14. The judge started her judgment by summarising the issues and the finding she was being asked to make. She then set out the background in more detail. She recorded her impressions of the parents at paragraphs 28-9:

> "These two young people have both looked me in the eye and repeatedly and vehemently denied hurting B. But, as the paternal grandmother said, someone has done it and someone knows what has happened. One of them has lied to me about this. The father admits lying about the sexual incident between him and the mother in March 2022. The parents have each blamed the other for the injuries, and I am satisfied that, however much they loved one another at one time, they would not hold back information now which would implicate the other, they would not protect one another. If either of them could give me clear evidence of harm being caused by the other, they would have done so…. The mother is clearly an attentive mother and attuned to B. The social work evidence supports this. It is clear that when she thought he was in pain, she was worried about him. The father by his own account handed over responsibility to the mother when he went back to work…."

The judge noted that the grandmother's relationship with the father was very close and that in contrast she presented as hostile towards the mother. She added, however, that her impression of the grandmother's evidence was that she had done her best to assist the court and that she was being honest.

15. The judge then considered in some detail the findings sought by the mother, starting with her allegation of sexual assault. In the course of the prior investigation and the hearing, the father had changed his account of what had happened in a number of respects. The judge concluded that he had lied about the incident in a number of respects and found the mother's allegation "in all aspects proved on the balance of probabilities". She observed that, if the mother had wished to bolster her allegation, she could have lied about it. She accepted that it "came out as a result of the police questions, not because the mother was intent on damaging the father". The judge expressed her finding as "the initiation of sexual intercourse by the father", rather than sexual assault.

16. The judge continued:

> "I accept that the father was and still is embarrassed about his behaviour, and I think he is ashamed because he knows it was wrong. It is my view that he denied it because he hoped to avoid the consequences of his actions, which he knew were wrong and serious. I have considered the authority *Lucas*, and the other family law authorities in relation to lying and lies. In this instance it is not a case in which I need to rely on the father's lies as corroboration to assist me in coming to my

> conclusion. This was a serious incident, both in terms of its effect on the mother, and the fact that the father acted in this way when the mother was on medication. It will need to be considered further during further assessments…. The lies the father has told in this regard I do not consider help me in relation to the injuries to B. They show him to be capable of lying and willing to do so. But this situation was very different and specific, and I do not find it helps me in relation to the local authority's allegations".

17. The judge then considered the second issue on which the mother sought findings, relating to the father's statements in August 2022. Having summarised the evidence about this, she set out her conclusions on it at paragraphs 58 to 61:

> "58. I have found this part of the case very difficult to make sense of. I have particularly struggled with the father's assertion that he knew he had not hurt B, but still wanted to explore it as a possibility, having heard of dissociative periods. It seems to me that he must at that stage at least have been having doubts, otherwise what was there to explore? However, I am now satisfied that there is no evidence of the father suffering any condition which might make this a plausible explanation for what happened to B. The paternal grandmother [and his doctors] have all rejected that possibility.
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> 59. I do not accept that the father admitted to the mother causing the injuries. He may well have said that he did not believe she had done it, but I find that anything he said about himself was put only in the terms of a possibility. F confirms that this was the way he spoke to her.
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> 60. I am also satisfied that the mother encouraged and promoted the further investigation of this issue of blackouts, both with the GP, and making sure that their respective legal teams were aware of it.
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> 61. The father's actions were equally consistent with both exploring this possibility and also testing the waters for a reaction to a confession. I do not find that this episode helps me to come to a view as to which parent caused B's injuries. The question of who was manipulating whom in all of this depends on who actually caused the injuries. If the father did, then it could be that he was indeed trying dishonestly to find an easier and less damaging way to confess, and get the most positive outcome he could. In that situation it is entirely understandable that the mother would want to find out what had happened. If the mother caused the injuries, then it would be manipulative on her part to be encouraging the father to go on considering whether he had done it during a blackout."

18. The judge then turned to B's injuries. She started by setting out the agreed facts. The injuries had been inflicted and the parents were the only possible perpetrators. The evidence of the expert radiologist was that the two sets of rib fractures had been sustained on two different occasions, between seven and fourteen days apart, the windows being 9 to 23 November 2021 for the first set and 23 November to 6 December 2021 for the second. The leg fractures and second set of rib fractures could have been sustained at the same time but required two separate applications of force. The force needed to cause the fractures was excessive, more than any normal handling.

19. Next the judge considered the expert evidence, focusing in particular on the evidence of Dr Chawla. She had drawn a contrast between the symptoms of rib and leg fractures. Rib fractures can be difficult to identify clinically. The symptoms are non-specific and a carer who is unaware of what happened may notice that the child is unsettled without knowing why. In contrast, there are almost always clinical signs of a broken limb, including swelling, decreased movement, and pain on movement. It was Dr Chawla's evidence that she would expect a carer to notice decreased movement of the affected limb, for example when changing a nappy. She said that an observation that the leg is visibly swollen and hard, as the mother noticed in B's case on 5 December 2021, was consistent with the injury having occurred within the previous 48 hours. Dr Chawla also said if the fracture was present the previous evening when B was bathed, it is unlikely that there were no clinical signs then. On admission to hospital at 4pm on 6 December, B was described as being in pain. Dr Chawla's evidence was that the pain from the fracture would have been likely to settle within 72 hours of the injury. Thus on her evidence, the window during which the injury was inflicted was between 4pm on 3 December and 4pm on 5 December.

20. The judge then recorded Dr. Chawla's evidence about crying. A cry of pain would be different from a cry when hungry. It would be an obvious change in cry, but if the baby was already crying that change might be momentary. A person who was, in Dr Chawla's words, "not right there" (i.e. physically present) may not notice the change, but the person who had used force on the baby and heard the change in cry would realise that the force they had used was excessive even if they may not realise that they had caused a fracture. Later, she added that a person not observing the incident, but present in the house would be aware of an escalation in the crying but may not know why.

21. On the issue of B's crying, the judge noted the parents' evidence that he was an unsettled baby who cried a lot. She described the house as small and said that it was "clear that sound travels through the relatively thin walls, and between up and down stairs" adding that there were "texts from each of them to the other referencing hearing B crying in another room, indicating that that sound was being heard from another room". As to their night time routine, she recorded (paragraph 77):

> "During the night time the parents and B slept in the same bedroom. B had a crib attached to the mother's side of their bed. Generally he would be fed during the night with the feeding parent sitting in their bed and then he would be placed back in his crib. Bottles of milk needed to be fetched from downstairs. There is evidence of very occasionally B being

> cared for downstairs during the night, but that was not the norm."

22. The judge recorded the local authority's case that, if the father was the perpetrator, he must have injured B twice in the house when the mother was also in the property and it was very unlikely that she would have missed the change in his crying. Under the next section of the judgment, headed "Opportunity", the judge noted that the mother was alone with B for much more time than the father. It was not feasible to consider every moment when she had been alone with him but it was "possible to gain a pretty clear picture of when the father cared for B either alone entirely or when the mother was also in the house". She then indicated that she was going to consider the evidence relating to the father's care of B.

23. The judge first considered evidence about the father finding things difficult on 5 November and the mother suggesting he might go to stay with the grandmother, but dismissed this because it was too far outside the radiologist's time window to be considered as a realistic time when the first set of rib fractures might have been caused. She also referred to a video of B being winded on 13 November during which B did not appear to be in pain, and the fact that a health visitor who examined B on 12 November and did not notice anything wrong.

24. The judge also considered in some detail the evidence in relation to the period from 17-21 November during which the father had cared for B overnight on two occasions and also during the day. During this period the mother had been largely present in the house but had been away visiting a neighbour for about 25 minutes on 19 November. During the mother's absence, the father had texted her indicating that B was "screaming" but it would seem he had settled by the time the mother returned. The mother did not suggest that the father had injured B during this time.

25. In relation to the second set of rib fractures, the judge accepted a submission by Ms Grief KC for the mother to focus on the period 24 to 26 November, continuing (paragraph 91):

> "The local authority submits that it is possible that the father caused the fractures in this period, saying specifically on the 25th. Ms Grief highlights on the 24th there was an escalation in crying, and the mother texting, "He's in pain again". On the 25th the father was alone for 40 to 45 minutes while the mother was out at a neighbour's. The father was frustrated that the mother took longer than expected to come back, and B was crying the whole time she was away, and he was then unsettled during that night."

26. The judge also referred to evidence that B had been observed by a health visitor to have been very unsettled on 26 November, that the mother had sent a text indicating that she thought B was in pain, and that the parents had taken B to hospital on the evening of 26 where he was kept in overnight and examined by two consultants, who diagnosed oral thrush but no other injuries.

27. At paragraphs 94-95 the judge dealt with the evidence concerning the leg injury. She said,

> "94. Based on Dr Chawla's evidence about swelling and pain, the parties agree that the window of causation for B's leg fractures is from 3 to 5 December. The father cared for B overnight on 3 December, as was the parents' routine on a Friday. The mother could not remember in cross-examination whether the father was up or downstairs that night. The normal routine was upstairs, and the father's evidence was that only once or twice did he care for B overnight downstairs, 19 November being one of those occasions, and he did not remember that being the case on 3 December.
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> 95. The father says in his statement … that B was very unsettled that night, 3 December. The mother says … that he went to sleep pretty quickly. During the following weekend, 4th and 5th, the family were together throughout. Both parents agree that B was very unsettled that weekend, especially when he was in his pram going over cobbles on their trip to a nearby town on 5 December."

28. After considering evidence about the occasions when there had been an opportunity to inflict the injuries, the judge said (at paragraph 96):

> "Having considered all of these dates, it is apparent to me that the father had the opportunity to cause fractures in each of the radiological windows, but I remind myself again that opportunity and likelihood must not be conflated."

She then summarised the arguments advanced on behalf of, on the one hand, the local authority and, on the other, by the mother as to when the injuries could have been caused.

29. The judge then set out her conclusion as to the cause of the leg injury in a section headed "Discussion":

> "114. I have already said that I find that there is only one perpetrator in this case and that both of the parents have had the opportunity to cause the fractures in the relevant time windows. The question I have to answer is whether I can say that it is more likely than not that the perpetrator was one of the parents, and therefore not the other.
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> 115. Neither of them has given evidence of hearing a sudden cry of pain from B. They talk about him crying a lot, and his crying escalating at times, and they thought he was in pain at times, but no identifiable difference in cry, to use Dr Chawla's expression, has been identified by either of them.
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> 116. I am satisfied that sound travels in their home, to the extent that the type of cry Dr Chawla was describing when a baby suffers a fracture would be heard from room to room and upstairs to downstairs. I base this on the texts in which the parents say they can hear crying, and the other matters already referred to in this respect.

That means that either one parent is withholding evidence of having heard such a cry from B while the other parent was caring for him, and I think this is unlikely given the cases that they have run, or the injuries happened when one parent was out or, as Ms Grief submits, asleep.

117. There are only four times when the father is actually alone with B, and 25 November is the only one that I find now to be relevant, this is when the mother went to her friend's house for 40 or 45 minutes. I have said that the father could have hurt B in that window of opportunity, but are there realistic opportunities when he could have caused the other injuries? The first rib fractures and the leg fractures are not, on the radiological evidence, caused on 25 November.

118. Looking firstly at the leg fractures, I am satisfied that B's leg was fractured by the time the family were in the nearby town on 5 December. Both parents noticed that bouncing in the pram on the cobbles seemed to be causing him pain. The father said in his evidence that B "just was not himself" on that trip, and that is even accounting for how much B usually cried.

119. The father had cared for B overnight on 3 December. On the balance of probabilities I find that this was in the main bedroom, changing and feeding him, with the mother in the room. I find that because that was the couple's usual practice. The father says that B was very unsettled that night, the mother says not, so I do not derive much help there.

120. I approach this issue with caution, and I remind myself of Ms Grief's warning about the Local Authority's argument based on whether or not the mother heard a cry. But I simply do not accept that this mother would have slept through B's reaction to having his leg fractured during that night. She had asked the father not to text her with information to go onto the app during the night because that woke her up. The mother is attuned to B's needs and moods. The cry of pain, which I am sure there would have been on the leg fracturing, and then the ensuing crying and distress until he settled, which Dr Chawla said would have been 30 minutes to two hours, that would have woken up the mother, I find, and she would have seen and heard how B was.

121. Even if B had been crying already, before the fracture was caused, I am satisfied that the pain cry would have woken the mother, but of course if he was already crying before that, it is less likely that she would have been asleep anyway.

122. B's leg would have been painful immediately the fractures were caused. Dr Chawla said it would be obvious something was wrong, with particular reference to decreased movement. The initial cry and the ensuing crying and distress would have caused the mother to

> check on B. She frequently got the father to bring B to her when he was crying. The pain that his leg was causing him would have been apparent immediately if his leg was moved or touched.
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> 123. These are inferences I draw from the medical evidence, from the evidence about how the family had lived and cared for B, and the evidence about the mother as a parent. The same would apply if the father had fractured B's leg during the daytime that weekend. The mother would, I am satisfied on the balance of probabilities, have been aware and would tell me. The fact that there is no evidence of B being in such pain, in pain like Dr Chawla described, from the point when the father came home on 3 December, causes me to find on the balance of probabilities that he was not injured after the father came home.
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> 124. I have, with some sadness, concluded that on the balance of probabilities, the mother caused the leg fractures on 3 December, before the father came home. This timing, I recognise, requires some extension of Dr Chawla's 72 and 48-hour timeframes, but only by a few hours, and that seems valid to me, given the variability of a child's reactions."

30. The judge then said that, in addition to relying on the lack of evidence against the father in that time period, she relied on four other matters in making her finding against the mother which she considered at paragraphs 126 to 133 of the judgment. The first related to a short video recording taken on the afternoon of 3 December after the father had returned from work which showed B in a buggy. She observed that

> "although B's chubby cheeks are jiggling, I am not satisfied that the ground he is travelling over is uneven enough to disturb his leg, which appears likely to be well wrapped up in winter wear."

Secondly, she rejected a submission that the father had changed his evidence about the time he arrived home from work on 3 December to fit the medical evidence.

31. Thirdly, the judge considered the evidence about a phone call made by the father to the grandmother on the evening of 5 December in which he mentioned that B's leg was swollen, and in the course of which the father sent the grandmother a photo of B's leg which had been taken on 31 October. The judge agreed that it was "very odd" that he had not mentioned the call either to the police or to the mother or within the proceedings until November 2022. But she rejected a number of submissions by Ms Grief about the call, in particular that the father had used the call to gain support for not seeking medical attention that night, observing that, if that were the reason, he would have told the mother about the advice which he received from the grandmother, which was to call the health visitor the next day.

32. Fourth, the judge considered evidence of the mother Googling about the swelling on the night of 5 and 6 December. She described this as "equally consistent with her hoping against hope that she might find that there could be another reason for the swelling, which in fact she knew she had caused".

33. Turning to the rib injuries, the judge said:

> "134. Having found that the mother caused the leg injuries, and that there is only one perpetrator in this case, it follows that I find that the mother caused the rib fractures also. I cannot say with certainty when within the radiological windows this happened, the mother had lots of time when she was alone caring for B in those periods. I agree with the Local Authority's submissions that the most likely dates would seem to be 14 to 15 November, and 25 to 26 November; the surrounding evidence supports this submission. The very stressful sleepless night on the 14th and the presentation of B on the 26th, crying whenever he or the mother moved, that sounds like presentation very likely to be because the 2nd set of rib fractures had occurred by then.
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> "135. I have already set out and considered the evidence that Ms Grief argues goes against these findings. It is absolutely clear that the mother had a terrible night on 14 to 15 November, of the sort which could cause the most loving mother to lose control. The fact that B was relatively settled on the 15th and 16th does not mean that the fractures were not present. She says they had lots of sleep then and once he got to sleep and was still, then the pain of the rib fractures would not be so distressing for him, according to Dr Chawla's evidence.
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> 136. I have accepted that the father also had the opportunity to cause fractures in the period 25 to 26 November, but that is not the same as it being likely that he did so. The period he was alone on the 25th while the mother was out, 40 to 45 minutes, I think it is unlikely in that period he would have become so stressed and frustrated as to lose control. Yes, B was crying for the whole of that time, and the father wanted to get on with sorting his work equipment, and he was cross that the mother was taking too long to come back, but in my estimation the evidence does not come close to showing that he lost control of himself and hurt B in that period."

The appeal

34. Six grounds of appeal were put forward on behalf of the mother by Ms Alison Grief KC leading Ms Charlotte Keighley. They can be summarised in these terms.

35. First, it was submitted that the judgment was not an evaluation of all the evidence in a holistic manner but an exercise in demonstrating "the lack of evidence against the father" and in so doing the judge ignored relevant evidence and/or used evidence only so as to inculpate the mother. Ms Grief submitted that the judge made a finding to fit a hypothesis without considering the totality of the evidence. Secondly, and following on from the first ground, it was argued that the judge decided the evidence in compartments and ignored, in very material respects, evidence that would point towards or support a finding that the father was the perpetrator of the injuries.

36. Thirdly, it was said that the judge adopted an approach in respect of the evidence as to what the mother 'would have heard' or 'would have done' in respect of the leg injury that was considered in isolation, to underpin findings regarding the other injuries and was unsound because it:

    (a) was based on speculation;

    (b) failed to consider Dr Chawla's evidence as a whole;

    (c) placed reliance only on evidence pointing to support this approach and ignored obvious and contrary evidence:

        i. e.g. ignoring the evidence in the text messages showing the mother to be unaware of B's crying over a prolonged period despite her being in the house when the father was caring for him;

        ii. the oral evidence of the mother in answer to the judge herself, in which she confirmed there were times when the mother slept through and the father was carrying out feeds without her waking up;

        iii. how normalised B's prolonged crying had become;

    (d) in order to fit this approach, was based on a finding against the medical evidence of the timing of the leg injury in three material respects, in order to elongate the times to a point when the mother was on her own:

        i. the evidence as to the swelling becoming apparent being up to 48 hours and therefore the 'variability' being up to that point, not beyond it;

        ii. contrary to the evidence of Dr Chawla that the leg injury occurred 'no more than 72 hrs before presentation to hospital' at 16.00hrs on 6 December 2021;

        iii. the father's own evidence (as well as that of the mother) as to the presentation of B upon his return on 3 December 2021 and the remainder of the afternoon and evening which is inconsistent with Dr Chawla's evidence as to presentation.

37. Fourth, Ms Grief submitted that the finding that the father cared for B in the bedroom on the night of 3 December 2021 was made without a factual or evidential basis for doing so and in doing so, the learned judge failed to consider relevant evidence which makes such a finding unsustainable, namely:

    (a) the lack of congruency between the father's account of the child being awake most of the night compared to the mother's account that he settled off quite easily – indicating he could not have been in the bed next to her during the night;

    (c) the texting by the father at 08.45am of the information as to the events during the night.

38. Fifth, having concluded that the most likely time for the second set of rib fractures was 25/26 November (para 87 of the judgment), the judge erred in making a finding that "it is unlikely in that period (40-45 minutes) that the father would become so stressed as to lose control":

    (a) without any factual or evidential basis for doing so;

    (b) which was in direct contradiction to the evidence as to the father's presentation that evening which was not considered;

    (c) which was made without any consideration, at all, as to father's poor impulse control and approach to B when caring for him in difficult circumstances.

39. Finally, it was submitted that the judge failed to engage with or consider the broad canvas and credibility issues which would point towards the father as a possible perpetrator and which, if considered and/or weighed properly, would have sufficiently pointed away from a finding that the mother was the perpetrator.

40. At the conclusion of the fact-finding hearing, the children's guardian supported the local authority case that the injuries had been inflicted by the mother. On further reflection, however, the guardian changed her position and supported the mother's appeal.

41. On her behalf at the appeal hearing, Mr Simon Bickler KC leading Ms Catherine Mason submitted that the judge had failed to conduct a holistic and balanced analysis of the evidence and instead concluded that the mother was the perpetrator of the injuries by way of a process of elimination. The key flaw in the judge's reasoning was her starting point that the injuries could not have been inflicted while both parents were in the house. She found that a non-perpetrating parent present in the house would have been alerted to the child's reaction and crying immediately following infliction and that the absence of a description of such an event by either parent led her to the view that the injuries must have occurred whilst only one parent was present in the house. But in concluding that the mother "would have been aware" if the father had injured the child while she was in the house, the judge departed from the evidence of Dr Chawla that a person "not right there" may not have noticed a change in cry or, if they did, may not have known the reason for it. Mr Bickler further submitted the finding that the father was upstairs when looking after B on the night of 3 to 4 December was reached on a questionable evidential basis. Indeed, the text messages would tend to suggest that he was, in fact, downstairs.

42. Mr Bickler also submitted that having wrongly started on the basis that the injuries could not have been inflicted while both parents were in the house, the judge went on to examine the four occasions that the father was alone with the child. She dismissed them all and went on to attempt to identify an opportunity for the mother to have inflicted the leg injury in father's absence. In doing so, the judge created a hypothesis of the mother inflicting the leg injury on the afternoon of 3 December, notwithstanding that this was outside the timeframe provided by Dr Chawla. Furthermore, in coming to the view that the leg injury was caused by the mother in the short time before the father returned home on 3 December, the judge failed to recognise that the time at which the father arrived home would have been in the

immediate aftermath of the injury having been caused and that the evidence of B's presentation later in the afternoon on 3 December was not of a child who had just been injured.

43. The appeal was opposed by the local authority and the father. On their behalf, counsel stressed the well-established principle that appellate courts should not interfere with findings of fact by trial judges unless compelled to do so, citing the familiar passages from the judgments of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraphs 115 to116 and *Volpi and another v Volpi* [2022] EWCA Civ 464 (considered below).

44. Mr Frank Feehan KC, leading Ms Chloe Ogley for the local authority on appeal, identified the judge's observations about the small size of the house, and the inferences that she drew from that fact, as paradigm examples of the sort of finding made by a trial judge with which an appellate court ought not to interfere. He made the same point about the judge's finding, at paragraph 119 of her judgment, that on a balance of probabilities the father cared for B overnight on 3 and 4 December in the parents' bedroom rather than downstairs. Mr Feehan submitted that the judge was entitled to infer that this was what happened on the basis that this was the normal practice and equally entitled to infer that, if the fracture had been inflicted that night, the mother would have been woken by the change in cry. Mr Feehan further submitted that the judge had plainly and properly considered whether the father was the perpetrator and took us to several references in the judgment to support that submission.

45. On behalf of the father, Ms Charlotte Worsley KC leading Mr Oliver Latham acknowledged that this was not an easy case, but stressed that both parents had given evidence and that the trial court room was the place where credibility was assessed, not on appeal. She submitted that the judge's finding at paragraph 123 ("the fact that there is no evidence of B being in such pain, in pain like Dr Chawla described, from the point when the father came home on 3 December, causes me to find on the balance of probabilities that he was not injured after the father came home") was another example of the sort finding made by a trial judge on the evidence with which an appellate court ought not to interfere.

Discussion

46. I agree with Ms Worsley's observation that this was not an easy case. Family proceedings involving complex injuries to children rarely are. Analysing evidence from a variety of sources presents a challenge to the judge. It is clear from her judgment that the judge in this case approached that challenge carefully and conscientiously.

47. I regret to say, however, that I have reached the conclusion that the judge's findings as to the perpetrator of B's injuries cannot stand. I find myself in the same position as in *Re O (A Child) (Judgment: Adequacy of Reasons)* [2021] EWCA Civ 149 (see in particular paragraph 44). The findings cannot stand, not because they are necessarily wrong, but because of the way the judge arrived at her conclusion. As in *Re O*, there are three overlapping problems with the judgment. First, the reasoning is, in a number of respects, insufficient and flawed. Secondly, in reaching her ultimate conclusion, the judge failed to take into account some material factors. Thirdly, she looked at the

evidence in compartments and did not have regard to each piece of evidence in the context of the totality of the evidence before making her findings.

48. In reaching this conclusion, I have not overlooked the clear case law as to the proper approach of an appellate court to an appeal against findings of fact as identified and repeated many times by courts at the highest level and summarised by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraphs 114-115 and in *Volpi and another v Volpi* [2022] EWCA Civ 464 at paragraph 2. An appellate court must not interfere with findings of fact by trial judges, including the evaluation of those facts and to inferences to be drawn from them, unless compelled to do so. An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it. This approach is followed by this Court hearing family appeals just as it is in other appeals in civil cases. Those passages from *Fage* and *Volpi* have been cited and applied in this Court hearing appeals in family proceedings on many occasions, most recently in *Re T (Fact-Finding: Second Appeal)* [2023] EWCA Civ 475 when allowing a second appeal after the first appellate judge had failed to follow that approach when setting aside findings made by the trial judge.

49. The appellant's argument, supported by the guardian, is that the judge manifestly failed to take specific parts of the evidence into account when reaching her decision that the fractures had been inflicted by the mother. As Lewison LJ observed in *Volpi*, an appeal court is bound to assume that the trial judge has taken the whole of the evidence into consideration unless there is a compelling reason to the contrary. The appellant's argument here is that there is a clear and compelling reason to the contrary in this case.

50. Judges in care proceedings are invariably reminded of the principle identified by Dame Elizabeth Butler-Sloss P in *Re T (Children)* [2004] EWCA Civ 558 at paragraph 33:

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

This passage was cited to the judge by the parties' legal representatives in a document headed "Agreed Legal Framework". In her judgment, she said that she had read the document carefully and taken account of the contents. It is clear to me, however, that she did not follow this approach when reaching her decision. On the contrary, she evaluated and assessed various parts of the evidence in separate compartments and failed to have regard to the relevance of each piece of evidence to other evidence or to exercise an overview of the totality of the evidence.

51. As Peter Jackson LJ observed in *Re S (A Child: Adequacy of Reasoning)* [2019] EWCA Civ 1845 at paragraph 33, "what was required was an analysis of the factors that pointed towards and away from each adult as being the perpetrator". Here, by

focusing on the night of 3 and 4 December and drawing conclusions about what the mother "would have done", the judge ignored relevant evidence about what had happened at earlier points. The judge may have been right to start with the events of that night, but not to start and finish there. She had to consider the totality of the evidence.

52. The judge's findings are really based on a linear process that eliminated the father and therefore led to the conclusion that the mother was the perpetrator. Put simply, the line of reasoning was as follows: (1) the leg fracture cannot have been sustained during the very limited occasions when B was in the sole care of the father; (2) it cannot have been inflicted by the father when the mother was in the house because she would have heard a change in cry; (3) therefore, it must have occurred when B was in the sole care of the mother before the father returned home at 2.30pm on 3 December 2021; and (4) since there can only have been one perpetrator for all of the injuries, the mother must also have inflicted the rib fractures on one or more occasions when B was in her sole care.

53. The judge said that in addition to relying on the lack of evidence that the father had caused the leg fractures, she relied on a number of other matters identified in paragraphs 126 to 133 of her judgment and summarised above at paragraph 25 of this judgment. But in reality, none of the four points identified in those paragraphs as matters which the judge said she relied on to make her finding against the mother in fact supported the finding. As described above, the four matters were: the video evidence of B looking untroubled in his chair on 3 December; the reason for the father's changing his evidence about the time he arrived home that day; the phone call made on 5 December by the father to the grandmother about the swelling of B's leg; and the mother's Google searches about swelling on the same evening.

54. On the first three matters, the judge rejected submissions on behalf of the mother that the evidence supported a finding that the father was the perpetrator. On the fourth matter – the Google search – the judge seems to have found that it was equally consistent with the mother being the perpetrator searching for another reason for the swelling as with an anxious mother who had not caused the injuries searching for an explanation. None of the four matters amounts to a positive ground for finding that the mother was the perpetrator. It follows that the reason given by the judge for her finding was simply the lack of evidence against the father.

55. All then turned on the process of elimination. In fact, as Lewis LJ observed during the hearing, it all turned on one small point in the judge's reasoning, contained in paragraph 119 of her judgment, which was really no more than an assumption that the father had cared for B upstairs in the parents' bedroom on the night of 3 and 4 December "because that was the couple's usual practice". As recorded in paragraph 94 of the judgment, neither parent gave any clear evidence either way as to where the father had cared for B that night. The mother's evidence was that she could not remember whether the father was upstairs or downstairs that night, and the father's evidence was that he only cared for B overnight downstairs on one or two occasions, but he could not remember that being the case on 3 December.

56. In their statements, as recorded at paragraph 95 of the judgment, the father had said that B had an unsettled night on 3 December whereas the mother said that he went to sleep pretty quickly. The judge was aware of this difference in the evidence but

thought it irrelevant. At paragraph 119 of the judgment, she said that "the father says that B was very unsettled that night, the mother says not, so I do not derive much help there". However, the judge seems not to have considered that one explanation of the difference in evidence might be that the mother was simply not present in the same room with the father and B, and that the mother slept straight through. This, coupled with the text messages that passed between the couple, including the message the following morning in which the father described the child's feeds and changes overnight, undermined the judge's finding that the father cared for the child overnight in the bedroom and not downstairs, a finding based solely on the fact that this was their normal (though not invariable) practice.

57. If the mother was not in the same room as the father and baby overnight on 3 December, the basis on which the judge approached her subsequent findings of fact is also undermined. In paragraph 120 of the judgment, the judge said that she simply did not accept that the mother would have slept through B's reaction to having his leg fractured. But Dr Chawla's evidence was that a change in the child's cry could have been "momentary" and might not have been noticed by someone who was "not right there". Dr Chawla's evidence also plainly assumed an observer who was conscious. But if the mother was asleep upstairs when the father and child were downstairs, she would not only have been, (in Dr Chawla's phrase), "not right there", but would also not have been conscious, so may well not have noticed any change of cry, even though this was a small house in which sound travelled up and down stairs.

58. In these important respects, I find the judge's reasoning insufficient.

59. In addition, as stated above, I have further concerns about the process by which the judge reached her findings. In reaching her ultimate conclusion, the judge failed to take into account some material factors, looked at the evidence in compartments and did not have regard to each piece of evidence in the context of the totality of the evidence.

60. The important pieces of evidence which were not taken into account by the judge in finding that the mother was the perpetrator of the injuries are as follows.

61. The first, and in my view most glaring, omission from the judge's analysis was her failure to take into account the absence of any evidence that B was distressed or unsettled on the afternoon of 3 December. Had B sustained a fracture to his leg shortly before the father's return at 2.30 that afternoon, he would have shown symptoms of the sort identified by Dr Chawla. In particular, she said that he would have been in distress for 30 minutes to 2 hours after the injury and thereafter he would have demonstrated signs of pain when the leg was moved. There was no evidence from either parent of any such symptoms at all on the afternoon or evening of that day. The short video clip taken on 3 December showed B in his buggy being wheeled over a cobbled path, with no sign of distress. In contrast, the evidence of both parents was that B was very unsettled over the weekend of 4 and 5 December, especially when he was pushed over a cobbled path on 5 December. The judge found that the earlier video did not assist her because she was not satisfied that the ground over which he was travelling was "uneven enough to disturb his leg". However, during this period, as the video clip showed, the child was taken in a buggy into town wearing a winter coat. The judge seems not to have considered the fact that getting B into his winter coat and into the buggy would have required movement of his limbs. The

absence of any symptoms consistent with fracture being present at that stage is evidence that the leg fracture did not occur before the father returned that afternoon. This was an important factor which should have been weighed by the judge as part of her evaluation of the evidence. Instead, it does not seem to be considered at all.

62. The judge stated at paragraph 123 that "the fact that there is no evidence of B being in such pain, in pain like Dr Chawla described, from the point when the father came home on 3 December, causes me to find on the balance of probabilities that he was not injured after the father came home". In my judgment, however, the more obvious inference from the fact that there is no evidence of B being in such pain from the point when the father came home on 3 December is that at that point he had not yet sustained the leg fracture. There is no indication that the judge considered that possible inference at all.

63. Secondly, there was the evidence of Dr Chawla about the timing of the injuries. She gave two markers – what might be called coordinates – for plotting the timeframe for the leg fracture. First, noting that B had exhibited pain in his leg on admission to hospital at 4pm on 6 December, it was her evidence that the injury had been sustained up to 72 hours earlier. Secondly, it was her further evidence that it would have been inflicted up to 48 hours before the appearance of the hard swelling. This second "coordinate" is, admittedly, less reliable than the first because, as Mr Feehan rightly observed, it does not follow from the fact that the swelling was only seen on the evening of 5 December that it was not present earlier. With that caveat, however, the evidence as to timing was plainly inconsistent with the judge's finding that the injury must have been caused before 2.30pm on 3 December.

64. The way in which the judge dealt with this evidence was to my mind not acceptable. She did not take the expert evidence as to timing into account as part of her assessment of the totality of the evidence before reaching her finding as to the perpetrator. Rather, she made her finding on the basis of the process of elimination described above and then noted that it required "some extension" of the expert's timeframe. She dismissed this on the basis that it was "only by a few hours, and that seems valid to me, given the variability of a child's reactions". Had she considered the totality of the evidence, she ought to have noted that the absence of any sign of injury shortly after the father returned home on 3 December was consistent with the expert evidence as to the most likely timeframe for the injuries.

65. Thirdly, there is the judge's approach to the evidence of the father's conduct outside the timeframes for the injuries. The judge acknowledged, for example, that on 5 November there was evidence that he was finding things difficult, but she disregarded this on the basis that this took place outside the radiologists' window when the fractures could have been sustained. But the evidence of the behaviour of the possible perpetrators of the injuries was plainly relevant whenever it occurred. There was evidence that the mother asked the father to bring B to her if he was crying. One example is the occasion on 24 November when the father was caring for the child and there was an escalation in cry which cause the mother to text "he's in pain again". But this evidence needed to be considered in the context of the father's behaviour and the evidence that he had found it difficult to cope at times. The judge ought to have considered whether that evidence indicated that the father might have injured the child and weighed it against the evidence that the mother was the perpetrator.

66. Fourth, the judge when reaching her finding failed to give any consideration to the evidence about the father's comments in August 2022. She was entitled to reject the evidence that he had suffered from blackouts or a dissociative disorder. The suggestion that the father had suffered blackouts was a red herring. But that did not eradicate the fact that the father had said that, while he knew he had not hurt B, he had wanted to explore the possibility that he might have done. This piece of evidence was plainly relevant to the question whether he had inflicted the injuries. The judge made a number of observations about it. She said that she found it "very difficult to make sense of", that she had "struggled" with the father's statements about it, and that "he must at that stage at least have been having doubts, otherwise what was there to explore?". She concluded that his "actions were equally consistent with both exploring this possibility and also testing the waters for a reaction to a confession".

67. Whichever explanation was correct, these statements by the father were plainly relevant as part of the totality of the evidence as to the perpetrator of the injuries, yet when it came to considering her finding, the judge seems not to have taken them into account at all. Instead, having made the finding that the mother was perpetrator, at paragraph 144 of her judgment, the judge then relied entirely upon that finding to conclude that "it follows" that the mother had manipulated the father into exploring the possibility of blackouts. That reverse engineering did not, however, explain the father's comments which the judge had found difficult to make sense of and with which she had "struggled". This is another example of the judge putting evidence into different compartments and not considering each piece of the evidence in the context of the totality.

68. Finally, the judge's treatment of the rib fractures is peremptory. She found that the mother was responsible for the leg fracture and on that basis simply concluded that she was also responsible for the rib injuries because it had been agreed that there was only one perpetrator for all of the injuries. But in my view the judge should have looked more closely at the evidence about what was happening in the period when the rib fractures were sustained before reaching her finding as to the perpetrator, rather than base her conclusion on the narrow process of elimination described above.

69. For these reasons I have reached the conclusion that the process by which the judge arrived at her findings was flawed and the analysis of important parts of the evidence insufficient. In those circumstances, if my Lords agree, there will have to be a rehearing of the fact-finding hearing. I therefore propose that the case be remitted for rehearing by another circuit judge. I stress that nothing I have said in this judgment should be read as indicating any view about the findings which should be made as to the perpetrator of B's injuries. That will be a matter to be determined by the judge allocated to conduct the rehearing.

70. I have reached this conclusion without reference to the additional evidence which the appellant sought to adduce on appeal. In short, that evidence was a single emoji which had been included in a text message sent by the father to the mother on 19 November 2021. The text in the message was adduced in evidence before the judge but the emoji was not reproduced in the format in which the message was transcribed. The appellant submitted that evidence about the emoji should be admitted on appeal under CPR rule 52.21(2). This submission gave rise to potentially interesting arguments as to whether the application satisfied the principles in *Ladd v Marshall* [1954] 1 WLR 1489 but, given the view I have come to that the appeal must be allowed, it is unnecessary to

consider those arguments here. No doubt the emoji will be relied on by the appellant at the rehearing.

LORD JUSTICE LEWIS

71. I agree.

LORD JUSTICE SNOWDEN

72. I also agree.