Re A, B, C & X (Children)(NAI)
Case No: ZW21C00012

IN THE FAMILY COURT AT WEST LONDON

West London Family Court,
Gloucester House, 4 Dukes Green Avenue
Feltham, TW14 0LR

Date: 1 August 2021

Before :

HIS HONOUR JUDGE WILLANS

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Between :

THE LONDON BOROUGH OF EALING **Applicant**

- and –

(1) THE MOTHER **Respondents**
(2) THE FATHER
(3-6) A, B, C & X (by their Children's Guardian, Annette O'Callaghan)

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Christopher Archer (instructed by **Legal Department, LB Ealing**) for the **Applicant**
Margaret Styles (instructed by **Barrett & Thompson Solicitors**) for the **First Respondent**
Janine Sheff (instructed by **Reena Ghai Solicitors**) for the **Second Respondent**
Mark Rawcliffe (instructed by **Blaser Mills Solicitors**) for the **Third-Sixth Respondents**

Hearing dates: 12-16 & 19-23 July 2021
Judgment Handed Down on 9 August 2021

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JUDGMENT

His Honour Judge Willans:

INTRODUCTION

1. This judgment follows a 10-day fact find hearing and I am asked to investigate the circumstances which led to a very young child suffering a serious fracture injury to her right upper leg. I intend to preserve anonymity by using the labels found within the table below. No discourtesy is intended. There is no need to anonymise the identity of the professionals in the case.

The Mother	………………..
The Father	………………..
The Child (X)	………………..
The Other Children (A, B and C)	……………….
The Aunt	…………………
The Friend	………………….

2. All parties have been represented before me by experienced counsel. I have considered their submissions with care. I am grateful for the measured and professional manner in which they have approached their task in this case. I heard live evidence (in order) from; (i) Dr Patrick Cartlidge (Expert Paediatrician); (ii) Dr Ronelle Naidoo (Treating Consultant Paediatrician); (iii) Dr Karl Johnson (Expert Consultant Paediatric Radiographer); (iv) Janet Duncan (Social Worker); (v) Dr Bolutito Akinbiyi (Treating Paediatric Registrar); (vi) the Mother; (vii) The Aunt; (viii) The Friend; (ix) The Father.

3. I have also considered the documents contained within the digital final hearing bundle and the various additional bundles containing medical disclosure. In the course of the hearing some limited additional items were added to the papers in the case. I bear all of this in mind. I will not within this judgment be able to address all aspects of the evidence or indeed all the documents placed before me, but the parties can rest assured that I have kept all in mind. My judgment will inevitably select and focus upon those aspects of the evidence which have allowed me to reach my central conclusions. Finally I have considered with care the submissions made by counsel for all parties.

4. The hearing proceeded on a hybrid basis. Aside from the Mother and Father I heard all other witnesses on a remote basis. The Mother and Father physically attended Court to give their live evidence.

5. The parents are from country **AA**. It has experienced significant social unrest in recent years with internal strife/civil war and population dislocation. This family are asylum seekers from the turmoil left behind. Neither parent has a strong grasp of the English language with the Mother's grasp the poorer of the two. Both have been assisted by interpreters throughout the hearing. I offer my thanks to the interpreters for the very hard work required of them to ensure this hearing has proceeded promptly and efficiently. There are also issues as to the parents' cognitive abilities. Again of the two it is the Mother who has the greatest difficulties. She has been assisted by an intermediary, Ms Nicola Lewis. As with the others mentioned above the intermediary has played a central role in ensuring the Mother has the fair hearing to which she is entitled as of right. I offer my thanks for her support.

6. I have attached to this judgment as **Annex I** an explanation of this judgment in simple language. I hope in doing so I make it easier for the parents to understand the route I have taken in reaching my conclusions. However in the event of any apparent disagreement between that document and this main judgment, it is this judgment which should be taken to be the final word on the subject.

LEGAL PRINCIPLES

7. At my request the representatives have produced an agreed statement of the legal principles which I should have regard to when carrying out my analysis. I adopt the statement which can be found at **Annex II** to this judgment.

THE THRESHOLD ALLEGATIONS / PARTIES' POSITIONS & REAL ISSUES

8. The Applicant alleges:

   1. *During the period of 4th to 12th December 2020, X – who was aged 1 month and was non-mobile - suffered a fracture to her right femur. The fracture was caused by the application of significant force whilst X was in the care of both or either of her parents.*

   2. *There are no organic/hereditary/underlying medical factors or conditions which could explain what caused X's fracture. The explanation offered by the parents (that C might have caused the fracture by jumping on X) could not have caused X's fracture.*

   3. *The amount of force required to cause the fracture was significant, excessive and greater than that used in the normal care and handling of a child. The fracture would not occur from normal domestic handling, over exuberant play or rough inexperienced parenting. It was the result of "a blow, impact or bending snapping action".*

4. *The fracture was caused as a result of: (a) non-accidental injury; or (b) a concealed accidental injury; or (c) an unwitnessed accidental injury.*

5. *The parents failed to seek prompt medical attention for X when they knew or ought to have known that she had sustained a serious injury to her leg.*

6. *In the event the Court concludes that the injury was caused as in 4(b) or (c) above there was a failure to protect X.*

9. The **Applicant** submits this injury required an event in which significant force was applied to X's right upper leg. It rejects the explanation offered by the parents and notes the absence of any alternative credible explanation. In the light of the force required and the expert evidence, the Applicant submits there must have been an alternative event in which the injury was either inflicted or arose out of circumstances concealed by the parents. The Applicant cannot itself provide an account of what truly took place but submits in either case the injury is sufficient to establish the threshold finding. The Applicant leaves open the potential for an unwitnessed accident whilst noting that there is no evidential basis for making such a finding. In any event were this to be the case then, say the Applicant, this would require some level of failure to protect on the part of the parents (or one of them). Finally, and in any event, the Applicant contends there was a failure to seek prompt medical care and that this of itself caused significant harm to X. The Applicant is unable to identify which of the parents is most likely to have been responsible for the above.

10. The **parents** stand by the explanation alluded to at §8.2 above and detailed in §20-24 below. They contend this event properly explains the injury suffered by X. Furthermore, on the information available to them and in the light of their particular circumstances they claim to have responded in a manner that does not justify a threshold finding.

11. The **guardian** in closing noted a number of factors of concern and felt the Court had not been told all the parents knew about how X came to sustain the injury in question. In expressing this view she clearly alligns herself with the Applicant as to the existence of either an unknown non-accidental injury; concealed accidental injury or unwitnessed accidental injury.

12. The real issues can be identified as being:

    12.1 How did X suffer the fracture? Does the likely mechanism meet the threshold test?

12.2 If it arose out of an accident (witnessed; concealed or unwitnessed) then are there any grounds for finding a failure to protect X?

12.3 However it arose was the delay in seeking medical care such as to amount to a threshold event?

12.4 In answering these questions can the Court discriminate between the parents as to responsibility/fault, if established?

BACKGROUND

13. The parents are aged 26 and 22 respectively. X was born in November 2020 at 36½ weeks gestation and was a relatively small 4lb. (1790grams) baby girl. On 12 December 2020 aged less than one month she was presented to hospital by her mother.

14. X was born into a family of three siblings all aged 5 or under at the date of her birth. The father and a number of his siblings have found their way to this country as refugees and the parents have indefinite leave to remain. He describes a close family and a warm upbringing until strife came to his country. He suffered a serious illness as a teenager and feared he could not have children as a result. He describes his children as much wanted and loved. The Mother equally describes a simple but positive upbringing. Some of her siblings have found their way to this country but others remain displaced.

15. The parents married in 2014 when the Mother was a teenager and the father a young adult. The Father describes the difficult process he underwent to enter this country. In doing so he left the Mother behind with his family. During this period of separation she gave birth to A. The parents were reunited in this country in 2017 and refugee status was conferred in 2020. B, C and X have followed A into the family.

16. The parents describe a home life run on traditional lines with the Mother caring for the children and running the home and the Father working. The parents describe the Father as having a limited role with the babies of the family based on cultural norms and with him not changing or bathing the children or indeed seeing the female child undressed[1]. They agree he helped with the older children and had some limited roles in the home. The parents suggest they enjoyed the opportunity to establish new roots in a home in this country. Prior to 12 December 2020 there were no concerns raised in respect of the family or with regards to the care being given to the children of the family.

[1] Although in live evidence I was told there is no cultural prohibition on the Father carrying out such tasks

17. At approximately 12 noon on 12 December 2020 the Mother attended the Central Middlesex Urgent Care Centre (UCC) and raised concerns as to X's leg. The right leg/thigh was noted to be swollen and discoloured. The cause was unknown, but X was found to suffer *a lot of discomfort* on the slightest movement of her right lower limb. There was palpable crepitus (a crackling sound arising when the fractured joint ends grind together). As that unit was unable to carry out a full assessment, they transferred X by ambulance to the Northwick Park Hospital. At Northwick Park the Mother was seen by the Paediatric Registrar, Dr Akinbiyi at about 3.15pm[2]. Later she was seen by the Paediatric Consultant, Dr Naidoo. Over the days that followed further investigations were undertaken and the injury under consideration was identified. At this time there were additional concerns as to a potential fracture(s) to the lower right leg. Children services were informed and the social worker, Janet Duncan, was allocated. She remained the allocated social worker for about a month thereafter.

18. On 23 December 2020 X was discharged home into the care of the Aunt under a safety plan in which the Aunt moved into the family home to provide supervision. On 30 December 2020 X returned to hospital for a planned skeletal survey. This survey raised concerns as to further injuries including fractured ribs although a follow up x-ray on 6 January 2021 removed these concerns. The survey maintained concerns surrounding the left tibia and right tibia/fibula bones (lower leg). However, matters have moved on and it is agreed that the only issue of concern is the fracture under investigation. Nonetheless these circumstances led the clinicians and social care team to be concerned as to whether the injuries were non-accidental or inflicted. As at 12 January 2021 X was due to be discharged from hospital. On that day the Applicant issued these proceedings[3]. I do not intend to detail the Court process which can be found at section B of the hearing bundle. It is sufficient to note that the parties have worked co-operatively with the Court to ensure the proceedings and this hearing have progressed fairly and effectively. I am grateful for this assistance.

THE MEDICAL EVIDENCE

19. There is little if any real dispute concerning the expert medical evidence and I can summarise it in concise terms.

    19.1 X suffered a displaced fracture to her right femur;

    19.2 The likely cause was an impact, blow or a bending/snapping action (whilst the parents have raised a series of possible

[2] Medical Bundle 549
[3] B1

alternative explanations for the fracture the experts are in full agreement that none of these explain the fracture).

19.3 Dr Johnson dates the timing of the fracture between 4-12 December 2020.

19.4 X was vitamin D deficient both in utero and post birth. This would likely reduce the strength of the bones, albeit the exact extent of weakening cannot be calculated. It has not reached the 30% demineralization that would show by 'greying' on x-ray.

19.5 X as a small baby would have, in absolute terms, thinner diameter bones (albeit proportionate to other babies). Dr Cartlidge appeared to accept this might be a further factor when assessing the necessary forces required to fracture the bone. I understood Dr Johnson as being less accepting of this proposition given the complex way in which bone strength is formed and simple diameter not being the determiner of strength. This 'dispute' has no material impact on my decision making.

19.6 Irrespective of 19.4 and 19.5 above the causative mechanism would fall outside the normal range of handling and would be requiring of excessive and significant force and obvious as such to an objective bystander;

19.7 X would have immediately demonstrated significant pain as a result of the fracture and the same would have been obvious to anyone present. This immediate response would have endured for at least 10 minutes but thereafter the picture would be less consistent. If X was settled and not moving, then she might quieten. However, if her leg was moved (for instance when having her nappy or clothes changed) then she would experience further pain, and this would be obvious to a carer. This picture might be complicated to a degree with the possibility of associated swelling acting as a splint for a period of time but even then, pain would continue (albeit perhaps at a lessened level) before increasing once again in due course'

19.8 The observed swelling was secondary to the fracture and led to likely venous congestion as the blood supply was affected. It was this feature which led to the noted discolouration. This had the potential to become very serious if blood flow continued to be blocked. As to the swelling itself, the starting point was that swelling would normally continue post injury reaching a peak at about 24-36 hours. However, this was on the basis of appropriate treatment. Without this and with the limb continuing to move the process was likely to fall outside of these parameters. As such it

was clear that little could be gained, insofar as timing of fracture is concerned, from the swelling. I have no evidence as to the point at which the swelling reached its maximum level other than it had not done so at the point of admission to hospital.

THE PARENTS' EXPLANATION

20. The Mother claims that on 10 December 2020 she was caring for X whilst siting on a cushion on the floor of the family living room. I have been provided with two short videos and a photograph of the room to assist my understanding. The Mother was sitting cross legged with X supported in her arms across her lap. The Father was at work and the other children were in the room.

21. The Mother claims C proceeded towards her at speed (described as running) and then either 'sat' 'jumped' or 'fell' onto X in her lap. The Mother reports X immediately crying and continuing to do so for about 30 minutes.

22. It is fair to observe at this point that there are significant challenges to the account and the timing of its revelation. I will at this time simply take the account at face value.

23. The experts were asked to consider this explanation. Prior to the hearing they appear to have rejected the account as being one which might explain the fracture. In his report Dr Johnson comments on what he understood to be C 'hugging' or ' squeezing' X[4]. Dr Cartlidge dealt with the explanation[5] but was of the opinion the reported event could not explain the fracture. The issue was dealt with in short order during the experts' meeting[6] and the expert opinion continued to view this explanation as unlikely. However in live evidence the expert opinion materially changed. Dr Johnson was clear the mechanism of a fall or jump could be sufficient to cause the fracture but deferred to Dr Cartlidge as the plausibility of such forces being generated by a child of C's age/size. In his evidence Dr Cartlidge accepted the suggested mechanism was a plausible explanation for the injury and explained his views in the context of the femur being bridged (i.e. with the leg being supported at knee and hip) and force being applied to the mid-section. He questioned why there was the delay in bringing the child to hospital and this raised caution in his mind as to the veracity of the explanation. He told me that in the event of a timely hospital admission with the suggested mechanism he would have been willing to accept the

[4] E52
[5] E78 4.4.5
[6] E139-140

explanation. I understood Dr Cartlidge's evidence not to be conditional on any weakening of the child's bony material.

24. At the conclusion of the evidence the expert evidence did not rule out the explanation given by the parents but left me to examine the history and the surrounding circumstances to assess whether the account was itself reliable.

DISCUSSION

25. In its opening note the Applicant comments that '*Non-accidental injury is often referred to as a diagnosis of exclusion'*. I agree with this observation and it explains why this case has placed such focus on the parents' account of the incident said to involve C. The Court is concerned with a non-ambulant child of tender age who was entirely dependent on her carers. The fracture required an incident in which significant forces were applied to X's leg. It is difficult to conceive of circumstances in which this could have occurred without either parent witnessing the event or becoming quickly aware that something had happened (i.e. by hearing a cry when out of the room). It is simply implausible and outside the evidence to conclude that this might have happened whilst X was in the care of either (or both) parent(s) – and whether in their immediate sight or not – without them having some experience of the event. As a result there is understandable focus on the sole event noted by the parents which is thought to have possible connection to an injury being sustained.

26. Within this section I examine the above point through the key issues in dispute and in doing so I set out the competing positions. I am bound to take a somewhat linear approach, considering each point or feature in turn. This is an inevitable feature of any judgment. However, I very much appreciate that many of these strands entwine in the ultimate assessment. I wish to make it clear that I have reflected on the manner in which each point impacts or engages with another (or might do) before setting down my views.

27. I consider a sensible and proportionate approach to this task is through an examination of a series of points raised by the parties as being of direct relevance to my conclusions. Having touched on each of the points I will then attempt to bring together my thoughts in a concluding section.

28. <u>Language related issues: -</u>

    28.1 I intend to approach the information provided by the parents with care in the light of the language issues in this case. Not only have the parents had their accounts provided second hand

through interpreters but there is also argument as to (a) the effectiveness of such interpretation at the hospital stage given the parents' use of a dialect of a classical language with the potential that not all communications were fully understood; (b) the particular additional needs of the Mother which flow from her cognitive difficulties, the Court appointed interpreter in this case having relayed the interpretation using a simplified form of the Mother's dialect to aid understanding.

28.2 A second but related feature is the potential for language to be structured differently and for confusion to arise over particular words which may convey different meanings between English and the parents' language or situations in which words or phrases may be interchangeable in the foreign tongue when they are not in English. I am mindful of the potential for these features to subtly shape the words used and in turn the potential for disputes to arise. There are many examples in the evidence but two examples include; (a) the use of the word 'run', 'fall' and 'sit' when describing C's purported actions; (b) the weight to be drawn from the friend reporting the Father saying *'one time…'* rather than '*yesterday'* when purportedly reporting the event in which C came into contact with X. I will have to consider whether it is fair and indeed helpful to become overly focused on the choice of word when there is a broad impression of the event being described. In the course of the hearing the interpreters at times had to pause to find a way of translating the questions being raised. There is the possibility that outside the Court arena an interpreter may have taken a 'short cut' in translation with the result noted above. A real issue when considering interpreted evidence (and particularly in the case of the Mother) is as to the potential for there to be a disconnect between the speaker and the interpreter, with the speaker not knowing what the interpreter is saying in English and thus being unable to correct it, whereas the interpreter may not fully understand they are not being understood by the speaker, and thus unable to bring this to the attention of the third party dependent on the interpreter.

28.3 I appreciate the Applicant, whilst accepting the limitations of the Mother, is somewhat skeptical as to the limitations of the Father. Attention is drawn to a report provided by a support worker organisation in which the Father's language issues are described as not being a major hurdle. I am unclear whether this amounts to an assessment which really assists me when considering these points.

28.4 The nub of the concern is succinctly summarised by the expert who assessed the parents[7] and made the following observation:

> *Relatively little information was gained during the assessments compared with other cognitive assessments conducted by this writer. It seemed at times that they were reluctant to divulge information and some of their responses did not answer the questions. The difficulties could have been caused by low levels of functioning leading to a failure to recognise the importance to provide the information or a reluctance to provide information because of concerns about the use to which the information could be put.*[8]

28.5 For my part, having heard all the evidence and having seen the parents in person, I would want to be very careful when I come to examine the oral accounts of the parents. I am in no doubt the Mother's cognitive difficulties will have impacted on her ability to communicate effectively and I am sure that at times of high stress this difficulty will have been compounded. In the Court context, with the support of an intermediary and interpreter familiar with her needs, she can be understood. However, in the heated and stressed environment of a hospital and with four children under her care I am less confident as to her ability to be understood effectively.

28.6 In the case of the Father I am equally wary. In the Court arena it was at times almost impossible to contain the Father and keep him focused on the need to be direct in his responses. My experience was not unique:

> *It was not easy to get him to listen to questions regardless of whether they were posed in English or in Arabic. In addition, he was intent on giving discursive answers and appeared to want to manage the situation.*[9]

My strong sense is of an emotional individual who is sensitive to criticism and who finds it too easy to stray into distracted and confused responses. He was unable to impose upon himself any discipline when responding to questions, and despite my repeated encouragement. I find it very easy to imagine the challenge this would face to professionals dealing with the Father in a situation of heightened emotion and particularly so where the obvious impression is of him being under the spotlight in terms of criticism. I recognise that the Father has his own cognitive issues which amplify these difficulties. I also understand his plea to me that this was his chance to give his case and that it was crucially important that he have the chance to say what he wanted to say. I could not agree more with these

[7] E29
[8] E39 §60: David Morgan (Psychologist)
[9] E35 §37

views but sadly it was the Father alone who obstructed my ability to understand his case through his manner of presentation.

28.7 I do not lose sight of the potential for these aspects to be misused by the parents to distract the Court and evade appropriate questioning (see possibility aired by expert above). Indeed, the submission of the Applicant is that the Father's evidence showed him to be evasive and deeply lacking in credibility. However, my conclusion is somewhat different. I accept the Father was overly defensive in his examination and consequent upon this he was evasive and unhelpful. But I am not so confident this is probative when considering what happened to X. It would be very easy to categorise the Father in this way and draw serious conclusions against him. But there is a danger in doing so that I elevate presentation and demeanour over substance. I will continue to weigh the Father's presentation with care in the light of the evidence placed before me and not on the mode of evidence giving itself. My intention is to approach his evidence with caution but not to dismiss it out of hand.

28.8 Returning to the Mother I intend to be similarly cautious. I have set out some preliminary views above, but this does not mean I should not scrutinise her evidence with appropriate rigour. When considering her evidence as to what she understood from the interpretation at the hospital I am not minded to accept she understood '*nothing*' as suggested by her at one point in her evidence. I prefer her later concession that she '*did not understand everything*'. This must be right given the clear evidence of Dr Akinbiyi that she was receiving answers from the interpreter which were comprehensible. If the Mother literally understood 'nothing' then this could not have been the case. My assessment is that there was the ability to hold a conversation but that there were areas into which the conversation likely strayed during which time the interpretation became less but not entirely unreliable. During these periods there is the danger that gaps in understanding were filled with assumptions or extraneous information. An example of this is likely to be the report of 'Manchester' and the use of the word 'unfortunately' which I deal with below.

29. An isolated mother?

29.1 In the course of the hearing some time was taken examining the Mother's circumstances as a young mother of 4 children under 5 and with a home life in which gender roles were traditional and which left her with significant responsibilities notwithstanding her

cognitive challenges. I do not criticse this examination. I can readily see the potential for these factors to explain, or help explain, what may have happened to X. Social isolation compounded by significant caring responsibilities with or without cognitive challenges may be fertile ground for neglectful or uncontained behaviour.

29.2 This is all part of the 'wide canvas' on which I am required to reflect. In their closing submissions the Applicant and Guardian draw on the following matters:

- The relatively young age of the parents
- Their traumatic history associated with their refugee experience
- The number of young children and the demands they place on the parents (Mother in particular)
- The Mother's cognitive challenges and the Father's lack of insight into the same
- The Father's own cognitive challenges
- A suggested reduction in support from the Aunt around the time of fracture
- Generalised social isolation
- The Father's return to work in the period preceding the likely event and the impact on the Mother of the same (he appears to have taken about two weeks off work before returning on around 3 December 2020)
- The parents being in debt (although it was not clear to me why this was said to be a significant issue[10])
- The impact of likely exhaustion on the parents of managing the routine for X in addition to the needs of the other children

Each of these factors have the potential to increase stress with the potential of a momentary loss of control or reckless or negligent act causing harm to X. It is suggested the combination of the same is such as to carry weight in the analysis as to causation. However, these surrounding points (even if correct) do not, and are not said to, establish causation without more. Rather

[10] Post judgment the applicant explained this was suggested to explain the imperative for the father to return to work

they provide a setting in which it may have occurred and may lend weight to a possible explanation.

29.3 It must be acknowledged that against these factors balance more positive factors also within the 'wide canvas'

- Whilst there can be no doubt the parents are young, I must not lose sight of the reality that such a state of affairs is well within their own cultural norms, under which they are expected to marry young and have large families. In this respect the situation the Mother finds herself in is by no means unexpected and fits with her own experience of growing up and likely plan for life. Consequently, there is no reason to believe that the Mother would not have been ready and prepared to assume such care.

- It has to be noted that her role is entirely child focused and as such it may be that she is insulated against the perceived stresses that are said to arise from the same.

- The fact of a number of children of similar age has the potential to act as a built-in support. It means the Mother is not constantly called upon to entertain the older two children being able to play together.

- There seems to be no doubt these children were very much wanted and are loved by both parents. Both parents were genuine and animated when the evidence turned to their relationship with their children. All the professional witnesses who have observed the parents speak as one as to the care they bring to their children and the natural interactions within the family.

- On the evidence I have the parents appear to have a strong and loving bond. Based on their own expected roles they are supportive of each other. There is no evidence of domestic violence or controlling behaviours.

- Although the history of the parents and the stress it might induce is a feature of the case neither parent sought to make a great deal of it in evidence. In fact the Mother's process of getting to this country was relatively straightforward. It was the Father who appears to have taken the greatest risk. I find it difficult to view his experience as being anything other than traumatic, but it maybe he now views matters through the prism of his current life and that this overwhelms any previous

history. There is no suggestion of PTSD for example. I should not lose sight of the evidence that these parents are now very happy to have found stability in this country. Their lived experience is settled in good accommodation and with adequate financial resources available to them. Viewed from this perspective the parent's position is positive.

- It is open to question as to the actual impact on the Mother's day to day care of the children of her cognitive issues. I am reluctant to assume this negatively limits or restricts her capacity to care and particularly so as this is a family with no previous history of concerns. Further as noted above all professional evidence of her engagement with the children is positive. This point balances the suggestion of the challenges of caring for four children. Viewed objectively this is an understandable concern. However, the parents appear to have successfully managed this task for a period of time without concern.

- It is correct to note the social isolation, and particularly arising in time of Covid. However the family relationships appear strong and the role of the Aunt and Friend suggest the family is not significantly isolated from support.

- There are no issues as to drink or substance abuse or indeed relevant mental health difficulties

29.4 I am concerned not to fall into lazy assumptions when considering the totality of the points above. The reality is that family life is a personal and unique experience for all individuals and what may be for one family a daunting challenge is for another simply part of daily life. Some parents struggle desperately with one child whereas others breeze through life with a large brood. I am not sure how much I can infer from the Mother's cognitive issues. There is no evidence to suggests that the common tasks of motherhood are impacted by her cognitive difficulties. It is also clear this family have come through difficult times and it may be this is as likely to leave them resilient to the challenges life throws at them as damaged and vulnerable. It also seems clear that the concept of family (in its close and wider sense) is important to them and that support (such as from the Aunt) should not be seen as a marker of lack of confidence in the Mother but rather simply voluntary support based on family ties. In summary there are relevant markers within the broad canvas of the case which deserve consideration, but they must be assessed with a close view to this family and not in simply objective terms. Any

assessment is bound to place significant weight on the manner in which the family were functioning prior to the December events. This is perhaps the fairest gauge of their stability and capacity. Put another way the broad canvas is always informative but rarely determinative of the issues in the case. It is the evidence which founds the Court's analysis and the canvas can have application in shifting but not fixing the evidential balance.

30. *The Father's role*

30.1 This question is associated with the points made above. The Applicant questions whether the Father's role has been consciously distanced from the child in some way so as to hide what happened to X. This is both in general terms (his day to day role in normal family activities) and specific (relating to his whereabouts on 12 December 2020).

30.2 On the general point the family evidence was of traditional roles in the home with the Father as bread winner and Mother as home maker. Whilst the evidence was not entirely consistent on this point it was also said that cultural norms within the parents' society distanced the Father from responsibilities such as changing the child's nappy. By the end of the evidence the Father was clear that such a role was not prohibited but was not one he assisted with. The parents also pointed to the child's small size and the Father's concern not to inadvertently harm her as a further reason as to why he was not 'hands-on' with X. It was agreed the Father did assist the Mother with the older children, playing with them and cooking for the family and helping in the home.

30.3 In many ways this was far from unique evidence for the Court to hear (both within domestic and international communities). If accepted it meant the Father's interaction with X would have been somewhat limited with the potential that he would not have had the same opportunity to note a change in her behaviour. In any event for a significant period he would have been at work and dependent on the Mother's reporting. On the evening of 11 December his understanding can be considered in the light of the Friend's visit and his views as to the normality of home life at that point. If the fracture occurred on 10 December 2020 then his opportunity would have been limited to the period on return from work on 10 December through to leaving for work on the morning of 11 December and similarly for the next evening/morning of 11/12 December. On the evening of 11 December his understanding can be considered in the light of the Friend's visit and his views as to the normality of home life at that point. During

this period, on the evidence of the parents he would most likely have been present during a limited number of feeds/changes of clothing/nappies. His sense of X's fracture related pain would then depend on his capacity to distinguish between a colic and fracture cry (see below) and as importantly his personal attunement to the sounds of this child. One cannot rule out, in such circumstances, the Father's awareness also being influenced by the fact of the child settling again after changes and by the fact that of his children X was unusually small.

30.4 An issue which is unclear is as to when the Father was first informed about the incident with C. In her evidence the Mother varied between informing the Father on the day of the incident and informing him whilst at hospital. The Father gave evidence as to being told on the day in question and checking the child when he returned home. On the evidence of Dr Cartlidge it is possible there would have been no identifiable signs of injury at that time (i.e. swelling or deformity) save for crying on manipulation.

30.5 I will deal with the specific point later in this judgment. But at this time whilst I acknowledge there is the potential for the parents to have sought to distance the Father, it is equally plausible that the evidence as to his restricted role is simply a truthful statement of their family life and the ordering of responsibilities within the home. It is not inherently implausible.

31. *Did X suffer with Colic?*

31.1 The parents claim X had been suffering with stomach pain in the days preceding the admission to hospital. They suggest this was Colic and claim to have treated this and managed to settle X using medication and soothing techniques. However, consequent upon the Colic X was expressing pain and crying more than would be normally expected.

31.2 There is no medical foundation for such a diagnosis and the Applicant expresses some scepticism as to whether this was the case. However, against this there is no reason for the parents to have sought particular medical assistance with Colic if they were confident this was occurring. Colic is a common condition and amenable to treatment with over the counter remedies. It is credible the parents would have simply dealt with the perceived concern without formal medical assistance. But I am in no position to determine whether in fact the child had Colic. Rather I can consider the evidence as to pre-existing pain and the treatment of the same.

31.3 The relevance of X suffering from Colic relates to the potential for an underlying state of pain to have masked to some degree the fracture related crying when X was moved. Dr Cartlidge was clear that X would have been in pain and cried when changed due to the fracture and that this would have been noticeable to a carer. However, he accepted that the impact of the crying (associated with the fracture) would be likely diminished if overlaid on a baby already in pain and crying. In simple terms if X was already crying when her limb was moved then the heightened crying might not be so obvious to a carer.

31.4 What is the evidence that enables me to second-guess the parental account in this case. The Applicant directs particular attention to the combined evidence of the Father and the Friend and suggest the account given by the two relating to Colic treatment was not credible and as such was undermining of the suggestion.

31.5 The focus of this challenge is on the use of 'Infacol' as a medication to treat the child. The Friend told me that when he visited X's home with his own family on 11 December 2020, he became aware of X being in pain and discussion turned to Colic. He had experienced this with his own children and recommended the parents buy certain medication to treat the condition. He told me that he and the Father then went to the shops but were fruitless in their search. The medication he was looking for was called 'infacol'. The Father added to the account in oral evidence suggesting the Friend later obtained and supplied the parents with the medication. The difficulty with this account is that it appears to conflict with the Father's statement from June 2021 in which he explicitly details the parents using 'Infacol' to treat the child prior to the Friend's attendance. This simply does not fit with the account set out above as the Father would not have needed to go shopping for the medication if he already possessed it.

31.6 This is the only meaningful challenge to the 'colic' account, other than the broad submission that the parents have not given a full and truthful account. For my part I found the Friend to be an entirely genuine and straightforward witness. I did not sense I was being misled and my impression was of a witness who was giving honest evidence. This is not to say that everything he told me was 100% correct. As with any witness his memory will be affected by the passage of time and by the fact that the events, he recalled were not of themselves remarkable such as to be seared onto his memory. Most importantly, I accept his essential evidence of a discussion around the question of Colic and his attempts to assist

the parents. I have considered the issue which concerns the Applicant with care and note there are many potential explanations which might explain the contradiction noted at §31.5 above:

a) The Friend was not explicit as to 'Infacol' in his written evidence when referring to the medication he was seeking to obtain for the parents. It is possible the name 'infacol' has found its way wrongly into his memory from a subsequent conversation with the parents.

b) Alternatively, the Friend's oral evidence may be entirely correct, and it is the Father who 6-months later has wrongly inserted into his account the name of the later supplied medication. It is possible he has inadvertently filled the gap with the medication he later came to possess and effectively showed to his solicitor not the medication he had prior to 11 December but rather the medication obtained after that date.

c) Alternatively, it is possible that the Father and Friend had a discussion around obtaining medication without formally naming the medication to be obtained. It is plausible they went searching with the Friend having a sense of what he was looking for but not being able to find it. In this context it is not beyond belief that he was in fact searching for the medication already used by the parents. I recall no evidence of the Friend being shown the medication being used by the parents at the relevant time.

If compelled I would consider (b) above to be the most likely explanation for this discrepancy. Having considered the evidence I am not persuaded the Friend has come to Court to lie over what at first glance would have been such a peripheral issue (it was not until the evidence of Dr Cartlidge that the role of Colic as a mask took on any importance).

31.7 I am satisfied the child was experiencing pains informally diagnosed as Colic and that the account given by the Friend is essentially true.

32. *Dating the event involving C*

32.1 This is perhaps the most significant concern in respect of the parents account of the 'incident' with C. At hearing both parents stood by an account of the event taking place on 10 December 2020 - and thus 2-days before admission. Whilst this very much left open questions as to the parents' delay in obtaining medical

care, it did significantly reduce the window of time over which this might have occurred.

32.2 Yet the date of 10 December 2020 was not specifically referred to at any point prior to the end of March 2021 when the Mother in her statement referred to the incident with C occurring a 'couple of days' prior to admission. However, this account is undermined by the following points:

(a) On 27 March 2021, in conversation with their family support worker the incident was dated to **5** December 2021[11]. There can be no dispute as to interpretation in this regard as the Applicant had sourced a worker who was conversant in the parent's language. The conversation appears to have proceeded with the Mother in person and the Father on a loudspeaker on the phone. It is unclear which of the parents shared this date with the worker although it is clearly recorded on the note relating to the conversation. It also seems clear the discussion was not focused with one or both parents wishing to provide an account of what had happened, and it appears, in the knowledge they would shortly be providing statements to such effect.

(b) On 30 March 2021 the Father provided his statement in which, whilst not providing an actual date, he dated the incident to '*the first week in December'*[12].

(c) Subsequently in a statement dated 24 June 2021[13] the Father provides the date as being 5 December 2021. This statement is itself a surprisingly detailed account of events over a period of about 10 days.

I consider this a puzzling aspect of the evidence. I accept it raises legitimate concerns as to the credibility of the account.

32.3 The Applicant additionally relies on the evidence of the Friend. In his oral evidence he detailed a minor incident occurring between his child and C on 11 December 2020 with, I understood, the Father having to intervene to calm C. In the following moments he reported the Father saying words to the effects 'one time C had fallen on X'. The Applicant comments that it is surprising the account was not of this happening 'yesterday' if the 10 December was the relevant date.

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[11] F99
[12] C25
[13] C78

32.4 A further aspect of the puzzle is that neither parent provided the 5 December as a date in their initial statement notwithstanding the appearance of supplying this date to the support worker only days before. Further the Mother did not join the Father in dating the incident to 5 December 2020 at all when she filed her own statement and instead dated it closer to 12 December 2020. I will need to resolve why this is the case. I will also need to consider why it was that the Mother did not challenge or seek to clarify the date given to the support worker in her presence.

32.5 What am I to make of this puzzle? I have drawn the following observations: -

a) The essential challenge raised by the Applicant is not that the incident in fact took place on 5 December but rather this conflict suggests it did not happen at all. It is an allegation of fabrication rather than timing dispute. Given this it is not immediately obvious why the Father would falsely date the incident at such an early date. By definition this places the parents in a more problematic position of explaining away a full week of untreated care. If such a fabrication was to be attempted, then surely the parents' focus would be on dating it to shortly before admission?

b) This is particularly so when I bring into account the Applicant's further challenges relating to (i) distancing the Father from the home on 12 December, and; (ii) the suggestion that he was '*buying time'* on 12 December to construct a false story. If this is so, then it makes the selection of 5 December difficult to understand.

c) Related to the above is the suggestion of some form of parental collusion. Questions were put to treating staff as to whether the Mother appeared engaged in use of her phone whilst in hospital. The inference included the possibility of being in contact with the Father with a view to getting a story in place. In fact this suggestion was denied by the staff who observed the Mother to be entirely engaged in childcare. But if there was a collusive attempt on the part of the parents then why was it that the Mother provided a statement giving a date '*a couple of days'* before admission. This would suggest the parents had not reached a common position in advance of their statements.

d) In considering the issue I am struck by the content of the Father's statement. I agree with the Applicant[14] that the statement has:

> *"a wealth of detail, notwithstanding he is recounting events from six months previously"*

Yet the Father was unable to explain how he was able to recall such detail, confirming he had no contemporaneous records or diary on which to draw. Yet in many ways it is the content of this statement which permits significant challenge to the Father's case.

e) My very strong sense was that the statement was not a faithful and correct account of events occurring in the period up to 12 December 2020. Rather it was a document largely based on patterns of general behaviour (e.g. the time the Father would leave for work and what he would do when he got home rather than the actual time he left and what he actually did on return). which was then transposed into an account of events during the period which the Father could recall. My suspicion is that the Father has reached the view that his case would be advantaged by firm and fixed dates and perhaps that this would give his evidence an impressive gloss. That the dates had no firm foundation was evidenced easily in examination and the Father was wholly unable to maintain a clear case as to the timeline covered by his statement. Whilst he may have felt this would impress, the impression was completely to the opposite as the account crumbled on investigation.

f) I am left to determine what I draw from this willingness to construct an account in a manner which is misleading. Later in this judgment I will summarise my views. But my overarching conclusion is that the account must be viewed with real caution. My strong sense is that there may be within it elements which appropriately and correctly fit together but that picking out these features is now made most difficult by the overall presentation. I have questioned whether there are elements within the account which are chronologically sound (in the sense that they occurred in the order suggested and in proximity to each other) but which are now wrongly dated. I have wondered whether an explanation for the accident on the 5 December may be that this date preceded a visit from the Friend on 6 December and the

[14] Applicant Opening Note §54

Father has incorrectly applied that date due to the visit and in doing so has wrongly linked it to the earlier not later visit. But this is speculation and can only take me so far. Ultimately, I am unable to reconcile the Father's case in a satisfactory form. It may be that this feature acts as a window into the understanding of a false account and in falling apart has shown the inherent dishonesty of the case promoted by the parents. But I am not blind to the possibility that it may simply reflect the misguided actions of an innocent parent attempting to improve their case in circumstances where they are concerned, they may be about to lose everything that matters to them.

g) But there is no fundamental reason as to why the Father's confusing narrative should fatally undermine the Mother's account. Subject to the discussion below I find she has kept to a broadly consistent dating of 10 December. Whilst the support worker account does not fit with this, I am simply unable to determine who led that conversation and the extent to which the Mother was engaged in the explanation. It is certainly possible that the information was supplied by the Father and that the Mother for whatever reason was unable to or unwilling to challenge the date. That she was clear only a few days later remains relevant.

h) Finally, and subject to acceptance of the parents' case, it may be relevant that it was only the Mother who witnessed the incident. Whilst it would not be unreasonable to assume that the same date would be fixed into the mind of the Father via discussion with the Mother I leave open the possibility, given the parents' cognitive difficulties, that the Father did not maintain a clear grasp of the timing of the events by March 2021.

33. *An inconsistent account of the incident?*

33.1 Within this section I consider the suggested conflicts in the parental description of the incident involving C and X. At §20 I have summarised the event.

33.2 The key criticism raised by the Applicant relates to the various words used to describe the sibling physical contact. As previously noted, there is some lack of clarity both as to the speed of C (was he 'charging', 'running' or was he 'walking' or 'toddling' - moving in an unsteady walking fashion). Secondly, what was the exact

manoeuvre by which C came into actual contact with X. Did he ‘jump’, ‘fall’ or ‘sit’?

33.3 My assessment of the expert evidence is that the fracture does not require a particular combination of the above forms of movement. I do not understand Dr Cartlidge to be saying it would have required C to have been running and then jumped to have occasioned a fracture. What is required is sufficient force applied to a bridged long bone to cause a fracture. Such forces will turn on conventional scientific principles of mass and speed. However, there is no suggestion of a fixed line in the sand required to cause this fracture. It may, however, be justified to rule out a very cautious sitting movement which might not meet the force threshold for a fracture. Such a motion would be close to a stepping on action which I understood the experts to rule out as a likely cause.

33.4 But this discussion does not help distinguish between C ‘toddling’ at speed and falling on X’s leg and C ‘running’ and then ‘jumping’ on X’s leg. It may therefore be thought the debate is somewhat sterile if it does not provide any real answer to the issues before me. Still I understand the Applicant to raise these points as they are said to suggest inconsistency and thus a lack of credibility.

33.5 As with a number of discrete language based points noted in this judgment, I question the validity of the argument. If I accept the Mother’s account then I question whether it is reasonable to expect her to provide a clear and detailed account of the event having regard to (i) her position in the moments prior to the reported incident (in a prone position sitting on a floor rug and caring for X), and; (ii) the limited warning notice she had of C’s impending arrival. The Court is very familiar with the difficulty witnesses legitimately have in applying speed to events which occurred without real warning. Too often a sense of the accident or the consequences of it can lead to incorrect inferences as to speed and other features. My sense of the evidence is that the Mother’s account suffers from these features and this has led to the apparent conflict in terminology. Without knowing the motivation of C the Mother may be left to guess whether it was a ‘jump’ ‘fall’ or ‘sit’. There may indeed be overlap between these concepts. But I wonder whether the exact description is the point. Rather it is whether it meets the threshold for a fracture. It is in this regard that I consider the notion of the ‘run’ has relevance. This conveys a sense of force in the action, and whilst the description may not be entirely accurate this impression remains helpful. Whether C jumped or fell or indeed sat may never be

known and again from the Mother's perspective I question whether one can roll back the event now to reach a clear understanding. What is more important is the sense of him landing on her and the baby. In that regard I thought her suggestion of jumping and falling conveyed a sense of a forceful event.

33.6 But could C have been running? Dr Cartlidge doubted a child of 14 months could run. I am reluctant to disagree with the expert and in the ultimate evaluation it matters not (as the expert did not require a run). But I note the evidence of the family of C walking at 11 months and it maybe he could string together a series of quick steps akin to a short run some 3 months later. But it may be a collapsing toddle ended by a fall has all the impression of a short run. It matters not in my judgment.

33.7 In considering this point I bear in mind the extraneous evidence of C being somewhat jealous of his new sibling and craving his Mother's attention. The suggestion of him innocently toddling towards and then falling on his Mother (and thus X) has the ring of truth about it. Both the family and social workers agree as to the lively character of C (which is not intended as a criticism).

33.8 I was not assisted by the attempted reconstruction using two dolls. I appreciate this permitted a very broad understanding of the report, but it was of no use in helping me understand the finer detail of the incident. Put simply the dolls were of equal size whereas my understanding is that C's leg would have approximated the global length of X. Further I understood X to be less than 40cm long as at December 2020 and so the relevant bone in question would be a fraction of that length. In such circumstances I consider it foolhardy to seek to establish detail from the use of two equally sized dolls. One simply cannot recreate the event with any sense of exactitude. Rather one ends up with a ham-fisted reconstruction which is wholly unnatural and apt to mislead. As with the Applicant I noted the Mother effectively bringing Doll 1 (C) almost vertically down on Doll 2 (X) but given their dimensions I struggle to see how one could have achieved anything approaching a fine description of the purported event.

34. _*Where is the evidence of a changed presentation following the incident?*_

34.1 This issue flows from the clear medical evidence that the fracture would have caused X to suffer real pain at the moment of causation but also later, and on each occasion on which the leg came to be manipulated (e.g. on nappy change or clothing) and that this would be noticed by a carer and would call for

explanation. The evidence was clear that this would continue pending treatment but that during interim periods X, in a largely immobile state would likely settle and not present in pain. The only potential caveat to this was a possible period of alleviated pain (but not removed) when the associated swelling might act to splint the fracture.

34.2 This is not purely opinion based as the Applicant points to X's presentation when first examined at UCC. The notes remark[15] '*child crying* ++' with the '++' signifying an elevated level of distress. This confirms the opinion of the experts as to how X would likely have presented at times of being changed etc., the Applicant questions whether the parents' account fits with the expert evidence as to these expectations. It raises issues as to (i) no unusual cry at the time of the event; (ii) no evidence of repeated crying thereafter and (iii) no linkage between manipulation of the leg and crying[16].

34.3 I am not persuaded by these points for the following reasons:

a) I understood Dr Cartlidge to accept the Mother's account of a sustained 30-minute period of crying post event as fitting with the infliction of a fracture to X. This undermines the suggestion of no unusual response to the incident. Indeed Dr Cartlidge confirmed this was the sort of response one would expect.

b) My impression of the evidence (see notes on admission to hospital[17]) indicate the Mother was of the view X had been exhibiting unusual behaviour for the last couple of days. I sense the Applicant fixes this account to an event 2-3 days before admission, but my overall sense was of this being a largely continuing state of affairs. Whilst there were attempts to obtain from the parents comparative evidence of X's normal crying against her colic and 'fracture' crying they seemed simply unable to set out with clarity the audible nature of the differences whilst making clear there was a difference.

c) As to no evidence of crying on manipulation I again respectfully understood the evidence to be that there was such response on nappy changing.

[15] 273
[16] Applicant Closing Submission Page 6
[17] H1 but elsewhere

34.4 So overall I did not find this line of criticism justified. In addition there are some points which deserve mention:

a) I must feed into my evaluation the potential for colic crying to somewhat mask a stark response to manipulation.

b) I also have regard to evidence of Dr Akinbiyi of the Mother changing X in the presence of the medic without any significant concerning presentation on the part of X. This account does not fit comfortably with the evidence of Dr Cartlidge that X would experience real pain whenever she was changed. In the presence of the treating doctor the Mother was observed to use real gentleness in her care of the child and without the child expressing significant pain. This led both the Applicant and Guardian to suggest that the Mother must have learnt this gentleness as a response to fracture related pain. This might be correct but the timelines over which to develop this skill would be very short (if the Mother's timing is correct) and this must leave open the possibility that the experience of X crying on changing was not as stark an experience as suggested.

c) Finally, I note the UCC presentation was at a point at which X's leg was being manipulated causing '*palpable crepitus'* as the ends of the broken femur came into contact. On any assessment this process was likely to be pain inducing at a heightened level

34.5 In my assessment whilst these points do not lessen the probability of X experiencing pain when being changed by her parent there does remain the potential for these signals to be clouded by a combination of the colic pain masking the signal and the Mother's approach (whether learned or innate) reducing the pain experienced. Later in this judgment I will need to consider to what extent the Mother's cognitive difficulties may have impacted on her response to the signals. I will also at some point have to resolve the question of the likely period over which these signals continued without care being sought.

35. *When did the Mother become aware something was wrong?*

35.1 The Applicant states the Mother's account in this regard is contradictory and impacts on her credibility. In making this claim the Applicant refers to the Mother variously describing noting the leg was swollen when 'washing' or 'showering' the child or when 'changing her nappy' or 'getting her dressed after a nappy change'. In response the Mother contends this was a single

process in which she changed X's nappy; washed her and then clothed her. The fact she has on occasion referred to one part of this single process and on other occasions another part has no importance.

35.2 I can deal with this in short order. I accept the broad thrust of the Mother's evidence. In simple terms she is describing a nappy change which brought with it a need to clean and re-clothe the child. It is in my judgment inconsequential that the Mother may on different occasions highlighted one part of this simple process when identifying when she first noticed the injury. Having regard to language issues I find this suggested point of little assistance.

35.3 I bear in mind the evidence of the photograph taken by the Mother and said to have been sent to the Father. I accept the evidence of the Father asking the Mother to send him a picture of what she was seeing. There was some confusion in the Father's evidence as to whether he received the picture on that date, but I accept the Mother's evidence. It seems clear X was partially undressed to enable the picture to be taken. Logically it would appear the Mother completed dressing X prior to calling the Father and then had to reveal her leg again to take the picture. Whilst this detail is not found in her evidence, I did not consider this had any material impact on the credibility of her account. It did of course mean that X likely experienced a further level of pain as her leg was manipulated to enable the photograph. But given hospital attendance shortly afterwards there is little I can draw from this occurring.

36. *The Father's whereabouts on 12 December?*

36.1 The Applicant contends confusion as to the Father's whereabouts on 12 December 2020 is concerning and may suggest the parents seeking to distance the Father from the home and potentially an attempt to provide an alibi. Alternatively I understood the Applicant to suggest that this may have been used simply to give the Father time to fabricate an account as to what had happened.

36.2 I have not found this suggestion at all persuasive and consider the most likely explanation arises out the Father's relatively poor geographical knowledge of London combined with some language issues. In reaching this conclusion I note the following:

a) The suggestion of distancing does not fit with the Father's timing of the incident to 5 December 2020. How would distancing on the day of admission have relevance for responsibility for an event 1-week previously.

b) The confused account / limited account given by the parents does not suggest the Father buying time to come up with an explanation. If this was the plan, then the time made available does not appear to have been used in any meaningful way. Further there is no evidence of the Mother being engaged on the phone with the Father whilst awaiting his arrival (discussed above).

c) In reality no-one is actually suggesting the Father was in fact in Manchester so far as I can see. The evidence I have heard as to his work makes this most unlikely. On balance I consider he has been misunderstood when stating where he was, and this has then become part of the travelling record. I am confident Dr Akinbiyi received this information from the records travelling with X rather than from either parent. I am very confident the Father did not actually claim to be in Manchester to disguise his whereabouts as he soon afterwards presented himself at the hospital. Why would he use Manchester as an alibi and then turn up as he did? As Dr Naidoo commented this caused confusion as he could not have come from Manchester in the available time.

d) The confusion over whether Father was in Southwark; London Bridge, or Tower Bridge is most likely related to the individual witnesses' perception of place rather than any collusive and dishonest behaviour. The Father's ultimate arrival fits with being in that part of London and to the uninitiated the three areas are relatively close. Southwark Station being 1 mile from London Bridge (London Bridge is in Southwark), and; London Bridge being within 1/2 mile of Tower Bridge[18]. References to Wembley and Westminster may be explained by the Father's route to the hospital. It is equally plausible they have been confusingly added to the conversation as the Father travelled to hospital, whether or not he was physically present at that point when the place was given.

e) Fundamentally the evidence suggested the Father was at work in South London and left work at short notice to travel to the hospital, arriving within a relatively short period of time. The evidence is confused but I am not of the opinion the confusion is anything more than innocent mistake. The contrary account would be of the Father deliberately providing various false locations as to his whereabouts but

[18] See Google Maps

then arriving at hospital consistent with being in London. I stand back and ask on what reasoned basis can one link those features.

f) A linked point worthy of consideration under this heading is the Mother's reference to the Father being 'away' and of the Aunt 'staying with and helping her'. I am in little doubt the inferences drawn from this are wrong and are certainly not justified on the evidence I heard. The suggestion is again of the Father being distanced as working away from home on an overnight basis with the Aunt staying in his place. I accept this was the inference drawn by Dr Akinbiyi, but I understood her to accept that there was a high level of assumption in drawing this inference. Strictly speaking the Father was 'away' when he was working in South London. Rhetorically if he was not working at home then where would he be working other than 'away'. I simply do not accept that the use of this word by this Mother can be taken to convey the meaning attributed to it. Again the Father's prompt arrival and the evidence of where he was working undermines this inference. Further what benefit was drawn from this in any event? I am equally clear with regards to the reference to the Aunt 'staying with and helping the Mother'. On the evidence this is what was happening when the Father was at work. It does not require her to sleep over to provide this support. The phrase 'staying with' is equally consistent with day-time support as with overnight support.

37. *Delay in taking to hospital on 12 December*

37.1 Subject to its general submission, the Applicant draws attention to the likely delay between the Mother noticing the swelling and arriving at hospital. On the Applicant's case this period of up to 2 hours is inexplicable for a journey of around 30 minutes.

37.2 One of the difficulties in assessing this feature is the absence of any fixed times for the various events of the day. The most accurate time available is for reception into UCC at 11.47am[19]. The Mother told me that she travelled by bus to the hospital; that she knew where to go; that the bus stopped outside the hospital and that she had not needed to wait long for the bus. It can be noted the Mother was in no way seeking to build a case for delay. I am told and accept the bus journey is close to 20 minutes[20]. Allowing 45 minutes for the Mother to get to the bus stop; wait for

[19] P.272 Medical Bundle
[20] Google maps reference: LA closing submissions

the bus; journey to the hospital; leave the bus and enter the hospital minutes to get off the bus and be received into hospital this would have the Mother leaving her home at about 11.00am. There are some obvious assumptions built into this timing, but I consider these both fair and realistic having regard to the fact the Mother was travelling with two children in a pushchair and a further 2 children travelling on foot by her side.

37.3 Prior to this the Mother explains she spoke to the Father on the phone as she was concerned as to the swelling. This in turn prompted a video call and a photograph was sent to the Father. The parents say the Father told her to take X to hospital. The Mother agrees she acted on this advice and got the children ready to leave for the bus stop. I note the evidence that the children were already dressed at this point. I once again have to make a balanced assessment of the likely time involved in this process as the Mother was not able to supply detail. In my judgment this part of the process is likely to have lasted up to 20 minutes and at least 15 minutes. In reaching this conclusion I bear in mind the conversation between the parents would have likely lasted a number of minutes during which the Mother first called and then videoed the Father. I also bear in mind that whilst the children were dressed they were not prepared for a journey and the process of getting children into coats and shoes and two children into a buggy is unlikely to have been achieved in much less than 10 minutes (at 2½ minutes a child). Working back this would time the call to the Father at no later than 10.40am. Whilst on this point I found nothing of value in what is said to be conflicting accounts as to the communication that morning. It seemed to me the account of a call, leading to a video call and photo was entirely plausible. I can readily imagine the Father receiving the call, then wanting to see his daughter and asking for a photo to be sent.

37.3 I have undertaken the above backwards analysis so as to be placed to consider the Applicant's contention of unexplained delay in admission on 12 December. What is it about the timings that concerns the Applicant?

37.4 In reality the issue arises from the unsurprising approximation of times provided by the parents as to the events of that morning:

a) In his first statement[21] the Father wrote of leaving for work at between 7.30-8.00am and receiving the call 2-3 hours

[21] C25

later. Using a mid-point this would place the call at about 10.15am with a range of 9.30-11.00am);

b) In his second statement[22] he wrote of leaving at 8-8.30am and receiving a call 2 hours later (again producing a mid-point of 10.15am and a range of 10-10.30am);

c) In her statement evidence[23] the Mother wrote of noticing the swelling at 9-10am. However, in her live evidence this moved to 10-10.30am. It is noteworthy that this produces a similar mid-point to the Father.

d) Reflecting on this mid-point and the previous analysis one has a 'lost' period of 25 minutes (between 10.15 here and 10.40 above). This period can be extended to up to 2 hours on 'worst' assumptions but can equally be removed altogether if more 'favourable' assumptions are used.

37.5 It is unclear to me this is a period of such duration as to merit real concern. What exactly is said to have happened within these 25 (possible) minutes. I imagine the concern is that fear of discovery delayed presentation, yet the period is not really sufficient to establish this argument. This time could simply dissipate if the waiting time for the bus was longer than remembered or if the children took longer to ready to leave. It is a fine straw on which to build a case.

38. *Delay between 10 December 2020 and admission*

38.1 The date of fracture is in dispute, albeit subject to the window suggested by Dr Johnson. In my assessment it is very likely the fracture occurred towards the end of the window period (mid-point on and thus after about 8 December 2020). I reach this conclusion as it seems unlikely X could have borne the fracture for more than four days without the impact being greater (and more obvious). Indeed the evidence surrounding the swelling and the developing seriousness around venous congestion supports this approach. I accept I may be wrong but judge this is the most plausible maximum timeline. I raised this during the hearing and there was no challenge to this provisional view. The parents argue for the 10 December 2020. This is plausible as to timing. I believe Dr Cartlidge was of the view the fracture could have occurred on 12 December 2020 with the same presenting symptoms.

[22] C87
[23] C40

38.2 The Applicant raises a justified question as to the delay in any event between an incident on 10 December and admission approximately 48 hours later. This point is raised in two ways. First, it is threshold allegation in its own right that in delaying admission the child suffered significant harm for which the parents are responsible. However secondly, I understand the Applicant to question the credibility of the parents' case asking whether it really could be that 48 hours passed with X having a fractured leg without the parents being aware of the seriousness of the situation? The Applicant question whether such delay may suggest concern or fear of the consequence of discovery of what really took place. This is effectively an extended version of the argument considered in the preceding section.

38.3 I note the parents now express remorse and state acceptance that they should have taken X to hospital earlier. However, I need to be careful when considering this admission because it is based on their subsequently discovered knowledge of the fracture. I am reluctant to take this to be an admission of actual contemporaneous fault on their part or acceptance that the circumstances were such (and known to them as such) to merit immediate transport to hospital. I am more interested in their position judged contemporaneously to the suggested incident.

38.4 The parents (Mother principally) state they were conscious of X being in pain and crying when changed but that there was no swelling or deformity to suggest a significant injury. It was only with the onset of swelling on 12 December that concern arose and shortly thereafter X was conveyed to hospital.

38.5 Elsewhere in this judgment I have commented on the possibility of Colic and other features masking the level of pain visible to the Mother. I have also dealt with the specific timeline for 12 December. Should the Mother have taken X to hospital immediately following the claimed incident based purely on the event itself and the prolonged period of crying? Many parents would have sought medical assistance in such circumstances, but I am not sure all would, and many would have been reassured when X appeared to settle shortly afterwards. Should the Mother have taken the child promptly to hospital on noting swelling as she claims on 12 December? The answer to this is clear and she did. The real question in my view relates to the period in between when X continued to cry.

38.6 There is limited evidence as to the progress of swelling over the interim period. I consider the onset of notable swelling would itself

have been a feature that should have prompted action. Yet Dr Cartlidge's evidence was that swelling may not have been present earlier and it would of course have been at a lower level. There is no expert evidence of when swelling would have been notable.

38.7 The real issue is the appropriate response to repeated crying on changing etc. I have noted the evidence in this regard and my observations on the same in the preceding sections. I will come back to this in the conclusion section.

38.8 Does the evidence of delay in admission plainly undermine the parents' case. I am not persuaded it does. The account may be open to question, but I do not view this point as amounting to a firm pointer against the authenticity of the account.

39. *Words used on admission*

39.1 I have dealt with the reference to *Manchester* and the Father being *away* above. A third reference was to the Mother using the word *unfortunately* when questioned as to who lived with her. It is suggested that this was a Freudian slip and revealed something darker about the home environment. The Mother is reported to have answered 'unfortunately' just her and her Husband and children.

39.2 I simply cannot draw anything at all from the use of this word. It is quite plain it did not make sense to the treating doctor. It seems to have been entirely out of context. As a result the Mother was asked whether there were domestic issues at home to which she clearly responded 'no'. She was never asked why she had used that particular word. It is entirely possible that this reflects some level of misunderstanding between the Mother and her interpreter but even if it was intended then the most it could reasonably support would be the Mother reporting it is unfortunate there is just her and Husband to care for the children. I do not see how I could reasonably take the word to have been deliberately used but to then interpret its use in a manner positively denied by the Mother only moments later. This falls far short of a meaningful revelation on the Mother's part.[24]

40. *Delay in identifying the suggested cause*

40.1 This is a significant point. The Applicant correctly notes the parents delay in providing any real dating until late March 2021. But the point made by the Applicant is more than just dating. The

[24] Following the hearing the Applicant clarifies it did not make final submissions about the allegd use of the word 'unfortunately'

Applicant questions why it was that the parents were not saying to the hospital staff that X had suffered an impact with her younger brother only two days prior to the admission if this were true. This point raises a series of related factual disputes which I will attempt to set out in the following paragraphs.

40.3 The first point is that the Applicant is correct to contend that there was no formal or clear account of the incident now under consideration until late March 2021. It is perhaps unfortunate that the timing of the parents' initial response was delayed whilst issues of cognitive capacity were resolved.

40.4 But there were earlier suggestions of something occurring or possibly occurring involving C. On 14 December 2020 in a telephone call to a Ms Mark (social worker) the Mother is reported[25] as saying C was very jealous and may have fallen on X's leg but that she [the Mother] had not seen this. Separately in a meeting between the social worker and the Father on 14 December 2020 further mention was made as to the potential for C to have caused the injury.

40.5 It is also clear the investigation in the hospital was complicated by the initial views as to lower leg fracture and a developing belief of upper body fractures. The advice provided was that this or these injuries could not be caused by C[26]. The social worker was clear the medical guidance she was receiving was that the injury could not have been caused by C.

40.6 It is important to note that the medical views were in part shaped by the absence of a sensible timeline or account explaining what C was said to have done. From the clinician's perspective this appeared to be speculation alone. It is hardly surprising that they did not probe a cause which was speculative and un-evidenced. But is there an explanation for the parents' approach? They make the following points:

a) That they did hint at C having caused the injury, but they were told this was not possible and that they should stop saying this. They level this suggestion at the door of the social worker. For her part she denies speaking in such terms but accepts the parents spoke to her about C being a possible cause and she agrees she told the parents the doctors did not think this was possible. Having heard the social worker I am minded to broadly accept her account. I

[25] C8
[26] F12-13

found her a genuine and entirely straightforward witness. She made many concessions in favour of the parents and gave the appearance of being sympathetic to their situation. She made a very favourable impression. But this does not mean I reject the parents' position altogether. Rather I think they have misinterpreted what the social worker was saying and in doing so wrongly characterised her actual words. Having seen the Father give evidence I find it very easy to imagine him getting the 'wrong end of the stick' and exaggerating the message given by the social worker. But there is an important kernel of common account in what each says. This is that the parents were being told that C could not have caused the injury.

b) An additional point is that the parents have not said they know that the injury was caused by C. They explain this is the only event that could explain the injury if other less plausible explanations are rejected. But from the parents' perspective they could not be sure C had caused the injury and as with many parents in such cases they were looking for an internal child related explanation.

c) Further to this were the range of injuries under consideration. Whilst the parents might have linked C to one injury it was less likely that he would have injured X from 'top to bottom'.

d) The parents also explain they were reluctant to be more forthcoming because they feared what this would mean for their family. In evidence they told me they feared C might be removed from the family if they placed the blame on him. The Applicant says this is an inherently improbable thing to believe and it undermines the parents' rationale. I agree of course that this would never happen. But I think this point is more subtle. Within these proceedings the Applicant has laid out a broad canvas of the parents struggling with four children in debt and without support. In such a context it is not that difficult to empathise with the concern of parents as to what might happen to their family if they are found to have allowed one child to seriously injure another (accidental or not). In such a moment it is perhaps artificial to expect these parents to comprehend the unlikelihood of removal. But there is within the evidence a foundation for evidencing this approach on the part of the parents. They can be seen to be hinting at C having caused the injury. It may of course be that they were setting the basis of a future false account, but

if this were the case then why not elaborate on it earlier. The alternative is that they were gently testing the reality of what the Mother experienced but wishing to leave some doubt by saying this had not been witnessed. They may have felt that this would deal with the problem without there being a need to formally resolve whether C had caused the injury.

e) This perhaps addressed the point made by the Applicant as to why would the parents shy away from putting forward an explanation of innocent accident involving C when at the same time, they were raising the prospect of deliberate behaviour on his part. This does appear both illogical and contradictory. Yet in effectively distancing their state of knowledge (it may have happened out of our sight) but giving positive evidence of behaviour (he is jealous and has acted out towards her) it may be they felt they were constructing a solid basis for the Applicant to accept their suggestion but without enough to blame C positively.

e) Unfortunately the Father here, as elsewhere has complicated understanding through his account of seeking advice from friends and through Facebook and being advised not to report the accident. I found this account difficult to follow as it moved around (at one point being told he had spoken to friends overseas only to be told the next day he had not) and I was left doubting whether it was a credible and honest account of the Father's actions. I suspect he may have sought some advice but does not wish to name who gave him the advice and has chosen the convoluted route of the Facebook post to cover this. But here as elsewhere the Father's evidence was so conflicting as to leave me with little in the way of firm foundations on which to build.

f) It is though not lost on me that the parents have persevered with this account notwithstanding it was apparently ruled out by the experts until the hearing itself. Indeed at the time they formally put the account forward they must have been aware the prevailing opinion was that it did not explain the fracture. It seems to me it is a relevant factor that they have chosen to maintain an account in such circumstances.

g) I also consider it relevant that the Aunt told me she had a clear recollection of being told of such an incident on 10 December 2020 and the Friend's account of being told of an incident involving C. Whilst I appreciate neither detailed this

in their statement evidence I am not sure so much really turns on that given the statement was only filed a short time before the hearing. There was nothing in the evidence of the witnesses which caused me to doubt their honesty and this is therefore important supportive evidence of an incident taking place in the days before admission. On the point of the Friend saying, 'one time' rather than 'yesterday', whilst I note this is an odd feature it does not really undermine the evidence. It is clear given her age that X had only been home for a matter of days/weeks, yet the witness was not told 'last week', 'last month' or some other time frame. The inexactitude of 'one time' is unusual phraseology but in being so does not exclude the 10 December.

h) In considering this point I also recognise the argument made by the guardian questioning why the parents would be reluctant to be forthcoming as to the incident, given they had previous experience of presenting B with a burn at hospital and without any consequences. The answer to this is I consider the one given on behalf of the parents, that on that occasion the cause of the injury was clear and with this came confidence to report. In the case of X the cause was not clear and with a lack of clarity came uncertainty and risk.

i) I also bear in mind the potential for distrust of state actors to factor into the reasoning. Whilst neither parent made much of this point it is a matter of record that the government in state AA has acted towards its populace in a manner subject to the most severe critcism. It is not a state which generates a high level of popular trust in it. There is the potential for these reservations to colour parental decision-making within this jurisdiction when confronted by local state agencies. This is a point I have regard to but place only limited weight upon given it did not feature significantly in the arguments advanced by the parents.

CONCLUSIONS

41. Returning to the threshold allegations there is no dispute that items 1, 2 (save for second sentence) and 3 are established as a matter of fact in that X suffered a fracture whilst in the care of her parent(s) and that the same did not have an organic origin but rather arose out of an event requiring the application of significant force outside of reasonable handling.

42. The real question is as to the acceptability of the parent's explanation and whether this in any event leads to a necessary finding as to a failure to seek prompt medical care.

43. I have little difficulty in rejecting the possibility of an unwitnessed accident allied with a failure to protect. I say this because there is no evidential basis upon which to found such a conclusion. I consider it highly unlikely that X could have suffered a fracture inducing event in the temporary absence of her parents without one of them being immediately conscious of something seriously untoward having occurred. I reach this conclusion on the basis of the clear evidence of a likely significant response from X; that on any case the caring parent if not physically present would be in close proximity, and; that the period under review is short and it seems to me highly likely that if there had been such an event then one or other of the parents would have mentioned it. In reaching this conclusion I reject allegation 6. For my part I struggle to imagine a factual matrix in which I can find a failure to protect in connection with a concealed accident.

44. And so I am left to determine between (1) the parent's case and (2) either of (a) concealed accident or (b) non-accidental (inflicted) injury with (3) the residual issue of failure to seek prompt medical attention on any outcome.

45. It is both logical and appropriate to review the case from the perspective of the parent's explanation. I agree cases of this sort do involve an '*exclusionary'* approach. This is particularly so where parents put forward an explanation given the duty on the Applicant to disprove a reasonable explanation. If following a review of the evidence the explanation remains reasonable/plausible then it would be difficult to identify on what basis the Court could go on to make threshold findings of non-accidental injury.

46. In this case I have considered all of the evidence with care. I accept the basic premise of the parents' explanation being objectively plausible. The language of 'plausibility' does not connote a mere possibility but is indicative of reasonableness and probability. This is made clear to me by the evidence of Dr Cartlidge as to what he would have done if this explanation had been promptly provided on an early admission. He would have accepted it as a reasonable explanation and subject to some investigation the matter would have likely gone no further.

47. If the evidence does not shift this viewpoint then in my assessment the Applicant will fail to make out a case for NAI or concealed accident. Has the evidence shifted my viewpoint?

48. I have set out in great detail my review of a range of cross arguments said to undermine this explanation. Importantly within this controversy is the concern of Dr Cartlidge as to the failure to bring X to hospital earlier and to provide the explanation immediately.

49. But there are also a range of more peripheral issues which are said to go to credibility and inherent plausibility/consistency. I have already explained why I have not been particularly moved by many of these points. Examples are the debate as to the Father's whereabouts; the point at which the swelling was noticed; the suggestion of an isolated mother, and; the language on admission. I will not repeat these points but generally refer back to the preceding paragraphs.

50. As in many cases there is a danger that a series of straws are joined together to form the impression of a strong rope supporting a case. Yet on close analysis the rope can be seen to be seriously frayed and in danger of breaking. In running through the arguments I fear this case may suffer from this feature. The sense I have from the Applicant (and to an extent the Guardian) is that all the evidence is flowing in one direction. But I disagree and I have explained why many of the features relied upon do not justify this reliance.

51. For me the key features which have caused me to pause when considering the parents case have been:

    a) The confusion/conflict over dating of the incident, and

    b) The failure to be explicit at an early stage as to the C incident

    Interlinked generally with this is the concerns that have arisen in the manner in which the Father gave evidence and the inconsistencies in the same.

52. But I must not lose sight of the 'wide canvas' . I have noted positives and negatives earlier in this judgment, but my assessment of the canvas was skewed very much towards the positive end. In this case there is powerful evidence of the close attachments between the parents and with the children. The childcare observed has been at a high level and outside of this application the parents were successfully raising their children despite the challenges they have faced. As I noted this is not a determining factor but in a balanced case it may be a feature which has real impact. I make these observations in the knowledge that otherwise functioning families are not insulated against findings of non-accidental injury.

53. Returning to the case I have explained why the dating issue has purchase but does not automatically undermine the consistency of the

Mother's case. Further my assessment of the Father is of a defensive individual and I consider there is a danger that his demeanour and approach says more about him than it does about the underlying issue in the case.

54. Separately I have reflected on the delay in explicit reference to the C incident. But even here I have recognised the position is more nuanced, and this cannot be said to be a case in which there was complete silence on the issue until a late date. I also cannot overlook the supporting evidence of the Aunt and the Friend and the potential for the surrounding circumstances to have impacted to silence or redirect the parents.

55. Ultimately, I have found myself with a plausible explanation and many positives in the family structure which carry weight in my analysis. Many of the points raised by the Applicant have not persuaded me but others have caused me to pause and reflect. Having done so I have nonetheless reached the conclusion that the parents case remains plausible and one which I cannot and do not reject. As such I do not find the allegation of non-accidental injury or concealed accident established.

56. That does though leave the question of allegation 5 regarding a failure to seek prompt medical care. I consider this is a very balanced question for the following reasons:

a) The medical evidence is clear that X would have been in pain regularly and this would have been obvious to a carer

b) The crying would have been preceded by the incident itself which might be felt to have supplied a clear basis for being concerned for X (it was not crying unassociated with any event)

c) The Mother should have been able to associate pain with manipulating the leg and in turn associated this with the incident. At some point this connection should have led to a reaction on her part

d) The situation would have become more pressing as the leg swelled and colour changed

But against this

e) It is not altogether clear to me that the Mother being involved in the incident would have had the same objective benefits of a watching bystander. From her perspective the incident happened to her as much as X and this may have diluted the sense of impact on X

f) There is good evidence that X would have settled between changes and this had the potential to calm the worries that might have arisen

g) The question of colic had the potential to somewhat mask the impact of the crying whilst not removing it.

h) The Mother's observed gentleness in changing X cannot be overlooked. Whether learnt or not this reduced the key indicator of injury

i) I accept the parents did act promptly when the swelling was noted. For these purposes I have no convincing evidence of an earlier dating for swelling.

j) I also bear in mind surrounding factors such as the attendance of the Friend. These were it seems experienced parents who did not raise particular alarm and perhaps placed more focus upon the Colic issue than was warranted. In doing so this may have acted as a distraction from the real issue.

k) I also have regard to the Mother's cognitive issues which might to some degree have impeded earlier action.

l) For reasons explained earlier I am not persuaded that remorse and acceptance now is helpful to answering this question.

57. I consider there can be no question that X was suffering significant harm during the period in question. Her leg was fractured, and this was likely causing pain and her position was deteriorating as the blood supply was impacted.

58. However, on balance I do not make the finding sought. I consider a combination of the features above meant the full significance of the situation was not sufficiently known to the Mother until the onset of swelling and that once this was noted she acted with appropriate speed.

59. I would struggle on my assessment of the evidence to have made a finding against the Father in any event. On my assessment he was somewhat distant from the care of the child; was working for much of the period under debate and clearly directed Mother to take X to hospital when he became aware of the swelling. I consider there are reasonable grounds for believing that of the two parents he was the one likely to be less attuned to X's cries in any event.

60. Finally, I would wish to make it clear that had I made a finding of delay in seeking care then this would in my view have been measured in a period of little more than 1 day. On any basis one could understand why the Mother may have delayed on 10 December (if she did not see the immediate need to attend hospital). It would likely have been on the next day when matters did not seem to be resolving that thoughts might have

turned to medical care. Furthermore it would have been delay consequent upon an accident rather than culpable action. Understood in this way I can see no basis upon which the case would justify continued Court intervention if a finding had been made on this limited basis.

WHAT NEXT?

61. As discussed with counsel the case now stands adjourned for handing down of judgment at 9am on 10 August 2021 at a remote hearing.

62. I have indicated this judgment can be shared with professional and lay clients (there is no embargo). This extends to the support teams around the parents. The Applicant should ensure a copy of this judgment is sent to the experts in the case on condition that anonymity is maintained, and that the judgment is not used as a teaching tool without the permission of the Court.

63. I would welcome any corrections or requests for clarification by 4pm on 6 August 2021. This will enable me to address the same in advance of the handing down.

64. Subject to any further applications this judgment will dispose of the proceedings as threshold has not been found to be crossed. It may however be that Applicant and parents recognise the benefit of some continuing support for at least a short period. It may also be that some short transition plan is agreed. This will be for the parties. I will be happy to hear about the same on 10 August.

65. I again thank all who have helped with making this an effective hearing. Cases of this sort are challenging for all and the professionalism and care shown is much appreciated by the Court.

66. But it will be the parents who have carried the greatest burden over the months that have passed. I would really want them to try and reflect on why this has happened as it has. Given the injury suffered by their daughter and the lack of a clear explanation there was bound to be a need for investigation to ensure she (and her siblings were kept safe). It is a marker of a civilized society, and I imagine why they have chosen this society for their future, that those who are vulnerable are safeguarded until concerns have been addressed. I can understand the concerns expressed by the Father in particular, but I would ask him to pause and think again. In this case the social workers have worked very hard to keep his family together. Assisted by his sister this has been possible whereas in many cases the children would have been separated from their parents. This has been in my view an example of a local authority acting in a wholly child focused manner. They deserve no

criticism notwithstanding the impact of their role will have distressed the parents.

67. I wish X and her siblings the best for the future.

His Honour Judge Willans

ANNEX 1

In December X was taken to hospital and was found to have a broken leg. This was a serious injury for a child of her young age and required an explanation.

I have listened to evidence from doctors, professionals and family members. The possible explanation is that X was accidentally hurt when C fell on her or more worryingly that she might have been hurt deliberately whilst at home or hurt accidentally in a different way which is being kept secret.

The Court has to decide what is most likely to have happened. Keeping children safe is very important and young children are very vulnerable and need to be looked after in a safe home.

When I thought about the evidence that I heard I also had to apply the law correctly. This is quite complicated, but the main point is that the parents do not need to prove what happened although any explanation they give needs to be considered very carefully indeed. Instead the local authority has the responsibility for proving things it says have gone wrong.

I listened to a lot of arguments and the lawyers pointed to many things which either supported the parent's explanation or didn't. I listened to the detail of what was said to have happened and how people acted in the days before going to hospital. But it was also important for me to think about the full history of the family. The Father told me no-one could understand his case without understanding his history. He was right to ask me to think about everything that had happened to his family.

The evidence as to this family was very positive. The children are much loved, and the parents appear to have no significant problems. But caring for 4 young children is bound to come with some stresses and I had to bear in mind how all of these points might help me decide what happened to X.

An important piece of evidence was from Dr Cartlidge and Dr Johnson when they accepted the explanation given by the Mother might explain how X had broken her leg. This was very important as up to that point the doctors did not believe the explanation given could explain the broken leg. As a result, I had to look very carefully at the circumstances surrounding this explanation.

When I did, I found a number of things which seemed a little odd but which when I looked at them carefully did not justify criticism of the parents. An easy example is the suggestion the Mother said 'unfortunately' when at hospital and also the confusion as to where the Father was that day.

But there were some things which were more worrying even after I had thought about them. Examples of this was the confusion over the accident happening on 5 December and the fact that the parents didn't tell the hospital straightaway what had happened with C. I was asked to agree that normally there would not be such confusion and that parents would obviously be more open when talking to the doctors.

It was these things in particular that I considered with care when asking myself whether I believed the Mother's explanation. Sadly, the Father did not help me as much he could have done in the way he gave his evidence. He should have been more trusting that a fair answer would be reached if he was open and answered questions straightforwardly. But he was difficult in the way he acted, and he might have led me to believe he was hiding something.

After thinking about this for a long time I decided the explanation given as to an accident with C is one that I believe. As a result, I do not find the parents have deliberately harmed X or that they have hidden what really happened.

It is a concern that the parents did not take X to hospital earlier than 12 December. They now accept that. It would have been much better to have done so on 10 December. In fact, Dr Cartlidge told me that if he had seen them at the hospital on 10 December and he had been told about the accident then there probably would have been no Court case at all. But I have decided that this delay is just about understandable.

The result is that I make no findings against the parents. The only findings I make are agreed matters of fact about the broken leg. The case will come to an end as a result. It may be that the family would benefit from some continuing support if this is available and if they agree. Bringing up four young children is of course a matter of real joy but it does not come without difficulties and the best parents are able to say when things are becoming more difficult and to accept help if it is offered, and whether this is from family or professionals. It is no failure to be able to admit when things are hard.

HHJ Willans
1 August 2021

ANNEX II:

STATEMENT AS TO LEGAL PRINCIPLES

1) The burden of proof lies with the local authority. It is the local authority that brings these proceedings and identifies the findings they invite the court to make. Therefore, the burden of proving the allegations rests with them.

2) In family proceedings there is only one standard of proof, namely the balance of probabilities. This was described by Denning J in **Miller v Ministry of Pensions** [1947] 2 All ER 372: "*If the evidence is such that the tribunal can say: "We think it more probable than not", the burden is discharged but, if the probabilities are equal, it is not"*

3) In **Re B (Care Proceedings: Standard of Proof)** [2008] UKHL 35, [2008] 2 FLR 141, Baroness Hale, while approving the general principles adumbrated by Lord Nicholls in *Re H and Others*, expressly disapproved the formula subsequently adopted by courts to the effect that '*the more serious the allegation, the more cogent the evidence needed to be to prove it'*. Baroness Hale stated:

> *"[70] My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under s 31(2) or the welfare considerations in s 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.*
>
> *[71] As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future."*

4) The inherent probability of an event remains a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred: *Common sense, not law, requires that in deciding this question regard should be had, to whatever extent appropriate, to inherent probabilities* – per Lord Hoffman in **Re B** at para. 15

5) The burden of disproving a reasonable explanation put forward by the parents falls on the local authority (see §10 **S (Children)** [2014] EWCA Civ 1447).

6) The inability of a parent to explain an event cannot be relied upon to find an event proved. See **Re M (A Child)** [2012] EWCA Civ 1580 at §16 – the view taken by the Judge was *"that absent a parental explanation, there was no satisfactory benign explanation, ergo there must be a malevolent explanation. And it is that leap which troubles me. It does not seem to me that the conclusion necessarily follows unless, wrongly, the burden of proof has been reversed, and the parents are being required to satisfy the court that this is not a non-accidental injury".*

7) Findings of fact in these cases must be based on evidence. As Munby LJ, as he then was, observed in **Re A (A Child) (Fact-finding hearing: Speculation)** [2011] EWCA Civ 1:

> *"[26] It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation."*

Peter Jackson J in **Re BR (Proof of Facts)** [2015] EWFC 41 said, at paragraph 15:

> *"It would of course be wrong to apply a hard and fast rule that the carer of a young child who suffers an injury must invariably be able to explain when and how it happened if they are not to be found responsible for it. This would indeed be to reverse the burden of proof. However, if the judge's observations are understood to mean that account should not be taken, to whatever extent is appropriate in the individual case, of the lack of a history of injury from the carer of a young child, then I respectfully consider that they go too far.*
>
> *Doctors, social workers and courts are in my view fully entitled to take into account the nature of the history given by a carer. The absence of any history of a memorable event where such a history might be expected in the individual case may be very significant. Perpetrators of child abuse often seek to cover up what they have done. The reason why paediatricians may refer to the lack of a history is because individual and collective clinical experience teaches them that it is one of a number of indicators of how the injury may have occurred. Medical and other professionals are entitled to rely upon such knowledge and experience in forming an opinion about the likely response of the individual child to the particular injury, and the court should not deter them from doing so. The weight that is then given to any such opinion is of course a matter for the judge.*
>
> *In the present case, an adult was undoubtedly in the closest proximity to the baby whenever the injuries occurred and the absence of any account of a pain reaction on the baby's part on any such occasion was therefore one of the matters requiring careful assessment".*

8) In the **<u>BR</u>** case, Peter Jackson J sets out a list of risk factors and protective factors that might assist the court in assessing the evidence it hears in cases of alleged inflicted injury. At para 18 he said:

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

9) The judge must decide if the facts in issue have happened or not. *There is no room for finding that it might have happened. The law operates a binary system in which the only values are 0 and 1*, *per* Lord Hoffman in **<u>Re B</u>** at para. 2. This applies to the conclusion as to the fact in issue (e.g. did it happen; yes or no?) not the value of individual pieces of evidence (which fall to be assessed in combination with each other).

10) When carrying out the assessment of evidence regard must be had to the observations of Butler-Sloss P in **<u>Re T</u>** <u>[2004] EWCA (Civ) 558</u>:

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

11) When considering the 'wide canvas' of evidence the following section of the speech of Lord Nicholls in **<u>Re H and R (Child Sexual Abuse: Standard of Proof)</u>** <u>[1996] 1 FLR 80</u> remains relevant:

"[101B] I must now put this into perspective by noting, and emphasising, the width of the range of facts which may be relevant when the court is considering the threshold conditions. The range of facts which may properly be taken into account is infinite. Facts including the history of members of the family, the state of relationships within a family, proposed changes within the membership family, parental attitudes, and omissions which might not reasonably have been expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child, and unsatisfactory parental responses to complaints or allegations. And facts, which are minor or even trivial if considered in isolation, taken together may suffice to satisfy the court of the likelihood of future harm. The court will attach to all the relevant facts the appropriate weight when coming to an overall conclusion on the crucial issue."

12) The evidence of the parents and of any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable

weight on the evidence and the impression it forms of them (see **Re W and another (Non-accidental injury)** [2003] FCR 346).

13) The findings made by the judge must be based on all the available material, not just the scientific or medical evidence; and all that evidence must be considered in the wider social and emotional context: **A County Council v X, Y and Z (by their Guardian)** [2005] 2 FLR 129. This was expressed as "*the expert advises and the judge decides"* in **Re Be (Care: Expert Witnesses)** [1996] 1 FLR 667.

14) In **A Local Authority v K, D and L** [2005] EWHC 144 (Fam), [2005] 1 FLR 851 Charles J referred to the important distinction between the role of the Judge and the role of the expert (see para.39), saying:

"(a)that the roles of the court and the expert are distinct, and

(b)that it is the court that is in the position to weigh the expert evidence against its findings on the other evidence, and thus for example descriptions of the presentation of a child in the hours or days leading up to his or her collapse, and accounts of events given by carers."

15) These comments were developed by Charles J. in a lengthy section in the judgment in **K, D and L** by a review of the relevant case law in the area. For present purposes, the court may find it useful to consider two short passages from that judgment:

"[44]…in cases concerning alleged non accidental injury to children properly reasoned expert medical evidence carries considerable weight, but in assessing and applying it the judge must always remember that he or she is the person who makes the final decision;"

"[49]…In a case where the medical evidence is to the effect that the likely cause is non accidental and thus human agency, a court can reach a finding on the totality of the evidence either (a) that on the balance of probability an injury has a natural cause, or is not a non accidental injury, or (b) that a local authority has not established the existence of the threshold to the civil standard of proof ;"

16) The conclusion reached by Charles J. (following his judicial summation of the relevant case-law in this area) is to be found at para.63, where he said:

"I am therefore able to reach a conclusion as to cause of death and injury that is different to, or does not accord with, the conclusion reached by the medical experts as to what they consider is more likely than not to be the cause having regard to the existence of an alternative or alternatives which they regard as reasonable (as opposed to fanciful or simply theoretical) possibilities. In doing so I do not have to reject the reasoning of the medical experts, rather I can accept it but on the basis of the totality of the evidence, my findings thereon and reasoning reach a different overall conclusion."

17) In assessing the expert evidence the court must bear in mind that in cases involving a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bring their own expertise to

bear on the problem, and the court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others (see observations of Eleanor King J in **Re S** [2009] EWHC 2115 Fam).

18) In **Re JS** [2012] EWHC 1370 (Fam),(full summary at end of this note) Baker J stated:

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

19) The Court must always be on guard against the over-dogmatic expert, the expert whose reputation or "amour propre" is at stake, or the expert who has developed a scientific prejudice. The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark. (**Re U** (Serious Injury: Standard of Proof); **Re B** [2004] 2 FLR 263))

20) The precepts contained within **Re JS** are now recited in all inflicted injury cases, including the comprehensive summary of these precepts and additional matters (most notably by Mostyn J) now set out by Roberts J in **Re D (A Child)** [2017] EWHC 3075 (Fam) [paragraphs 94 following]. Those principles are not repeated here. They encapsulate in summary form the established law as to the standard and burden of proof, the limits of science, the need for experts to keep their evidence within the bounds of their own expertise, the need to consider the evidence as a whole, the centrality of the parents' evidence and, in considering this the applicability of the 'Lucas' direction.

21) The court is not precluded from making a finding that the cause of harm is unknown. The judgment of Hedley J in the case of **Re R (Care Proceedings: Causation)** sets this out:

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

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

22) In **R v B County Council ex parte P** [1991] 2 All ER 65 (at 72J), [1991] 1 FLR 470 at 478, Butler-Sloss LJ observed that "*A court presented with hearsay evidence has to look at it anxiously and consider carefully the extent to which it can properly be relied upon*." When assessing the weight to be placed on hearsay evidence the Court may have regard to the matters set out in section 4 of the Civil Evidence Act 1995 even in cases (such as this one) where the Civil Evidence Act does not strictly apply.

Section 4 of the Civil Evidence Act reads:

In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

Regard may be had, in particular, to the following—

> *whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;*
>
> *whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;*
>
> *whether the evidence involves multiple hearsay;*
>
> *whether any person involved had any motive to conceal or misrepresent matters;*
>
> *whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;*
>
> *whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.*

23) The rule of **R v Lucas** [1981] QB 720 was adopted in the family courts in **A County Council v K, D and L.** The principle is that "*if the court concludes that a witness has lied about one matter it does not follow that he has lied about everything. A witness may lie for many reasons, for example out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure*."

24) In the criminal courts a lie can only be used to bolster evidence against a defendant if the factfinder is satisfied that the lie is deliberate, relates to a material issue and there is no innocent explanation for the lie.

25) The court is respectfully referred to the case of **H-C (Children)** 2016 EWCA Civ 136 and to paragraphs 98 to 100 of the decision of Lord Justice McFarlane where he said:

"97. Within that list of factors, although the judge does not expressly prioritise them, the finding that Mr C lied about the quietness in his flat that night is given the greatest prominence in this section of the judge's analysis. A family court, in common with a criminal court, can rely upon a finding that a witness has lied as evidence in support of a primary positive allegation. The well-known authority is the case of ***R v Lucas*** *(R) [1981] QB 720 in which the Court of Appeal Criminal Division, after stressing that people sometimes tell lies for reasons other than a belief that the lie is necessary to conceal guilt, held that four conditions must be satisfied before a defendant's lie could be seen as supporting the prosecution case as explained in the judgment of the court given by Lord Lane CJ:*

"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."

98. The decision in ***R v Lucas*** *has been the subject of a number of further decisions of the Court of Appeal Criminal Division over the years, however the core conditions set out by Lord Lane remain authoritative. The approach in* ***R v Lucas*** *is not confined, as it was on the facts of Lucas itself, to a statement made out of court and can apply to a "lie" made in the course of the court proceedings and the approach is not limited solely to evidence concerning accomplices.*

99. In the Family Court in an appropriate case a judge will not infrequently directly refer to the authority of ***R v Lucas*** *in giving a judicial self-direction as to the approach to be taken to an apparent lie. Where the "lie" has a prominent or central relevance to the case such a self-direction is plainly sensible and good practice.*

100. One highly important aspect of the Lucas decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the "lie" is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in Lucas, where the relevant conditions are satisfied the lie is "capable of amounting to a corroboration". In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of ***R v Middleton*** *[2001] Crim.L.R. 251.*

In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt".

26) Also see the views of Macur LJ. In **A, B & C (Children) [2021] EWCA**

Civ 451 as to the expectation on representatives to identify for the Court in an appropriate case the component elements necessary to establish a **Lucas** finding.

27) When seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators is whether there is a likelihood or a real possibility that he or she was the perpetrator (see **North Yorkshire County Council v SA** [2003] 2 FLR 849). In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injury to be identified both in the public interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judge should not strain to do so (see **Re D (Children)** [2009] 2 FLR 668, **Re SB (Children)** [2010] 1 FLR 1161).

28) Identification of perpetrators - In a simple binary case, the identification of one person as the perpetrator on the balance of probabilities carried the logical corollary that the second person had to be excluded. However, the correct legal approach was to survey the evidence as a whole as it related to each individual in order to arrive at a conclusion about whether the allegation had been made out in relation to one or other on a balance of probability. Evidentially, that involved considering the individuals separately and together, and comparing the probabilities in respect of each of them. The court had still to ask itself the right question, which was "does the evidence establish that this individual probably caused this injury?". Where there were more than two possible perpetrators, there were clear dangers in identifying an individual simply because they were the likeliest candidate, as that could lead to an identification on evidence that fell short of a probability. Although the danger did not arise in that form where there were only two possible perpetrators, the correct question was the same, if only to avoid the risk of an incorrect identification being made by a linear process of exclusion, (See **Re B (A Child)** [2018] EWCA Civ 2127)

29) In the tragic case of **R (Children) [2018] EWCA Civ 198** McFarlane LJ said this:

"*…it must be clear that criminal law concepts, such as the elements needed to establish guilt of a particular crime or a defence, have neither relevance nor function within a process of fact-finding in the family court. Given the wider range of evidence that is admissible in family proceedings, and, importantly, the lower standard of proof, it is at best meaningless for the Family Court to make a finding of 'murder' or 'manslaughter' or 'unlawful killing'. How is such a finding to be understood, both by*

the professionals and the individual family members in the case itself, and by those outside who may be told it for example, the police? The potential for such a finding to be misunderstood and to cause profound upset and harm is, to me, all too clear." (See judgment of McFarlane LJ, at para 65.)

McFarlane LJ then issued a plea for less formalism and more realism, though of course he did not use those terms. He put it like this:

"Lastly, I would mention the specific matter of the use of language. The potential for the court to become drawn into reliance upon criminal law principles is demonstrated by the present appeal. Even where the family court succeeds in avoiding direct reference to the criminal law, it is important that, so far as it is possible to do so, the language of the judgment (and in particular any findings is expressed in terms which avoid specific words or phrases which may have a bespoke meaning in the context of the criminal jurisdiction, for example 'self-defence', or 'reasonable force' or 'the loss of self-control'. Phrases such as 'inappropriate force' or 'proportionate force' may reflect the judge's findings in a particular case, and avoid the risk that the judge's words may be misunderstood as expressing a finding based directly upon criminal law principles." (See para 90.)

30) In the recent case of **Re L-W** [2019] EWCA Civ 159 Lady Justice King grappled with the question of the degree of evidence required to support a finding of a failure to protect. She concluded that the court must have evidence of a factual basis from which to find a failure to protect and that the Court should ask itself whether those facts justify the conclusion that the carer knew or ought to have known that injury would be inflicted? The Court must establish a causative link between the facts as found and the risk to a child. In this case, a man with an established history of violence to adults outside the home, could not have been forecast to assault a small child within the home. Any finding of a failure to protect by a carer on that basis effectively reversed the burden of proof. The Court also noted that ergo events post injury could not be relied upon to support a finding of failure to protect in respect of those injuries. A finding of failure to protect must not be a 'bolt on' to the central finding of perpetration and must not assume that cohabitation will lead to an inevitable finding. Specifically, Lady Justice King stated that:

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

Such findings where made in respect of a carer, often the mother, are of the utmost importance when it comes to assessments and future welfare considerations. A finding of failing to protect can lead a Court to conclude that the children's best interests will not be served by remaining with, or returning to, the care of that parent,

even though that parent may have been wholly exonerated from having caused any physical injuries.

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

31) The law in relation to a "pool of perpetrators" finding was recently reviewed by the Court of Appeal in the case of **B (Children: Uncertain Perpetrators)** [2019] EWCA Civ 575. Having considered the development of the doctrine and the test to be applied, Jackson LJ, giving the lead judgment identifies the following key principles:

In order to place a person in the pool of perpetrators, the court must be satisfied that there is a real possibility that person caused the harm identified and should guard against an approach which requires "exclusion from the pool".

Placing a person in the pool makes them a possible perpetrator and not a proven perpetrator.

32) The court suggests the following process being undertaken:

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

33) The parents' first language is not English. The following dicta of Moor J in ***Swansea County Council v MB & Ors [2014] EWHC 2842 (Fam)*** may be relevant to the Court's assessment of their evidence:

"[21] The parents are both Polish. English is not therefore their first language. The majority of their evidence was given to me and to the Police in Polish and translated into English by interpreters. I accept that this means I must take great care in assessing their evidence, given that processing information provided in a foreign language may put the participant at a disadvantage. I must guard against the very real possibility that questions or answers or both are misunderstood or at the least nuances and shades of different meaning are lost in the process. I also accept the submissions of Mr Jones (for the Father) that answers may be repeated by the interpreter in a dispassionate/neutral manner whereas the original response may have been loaded with relevant emotion."

34) In **SS (Sri Lanka), R (On the Application of) v The Secretary of State for the Home Department [2018] EWCA Civ 1391** Leggatt LJ. cautioned as to what might be learnt from the manner in which a witness presented when giving evidence:

[33] The term "demeanour" is used as a legal shorthand to refer to the appearance and behaviour of a witness in giving oral evidence as opposed to the content of the evidence. The concept is, in the words of Lord Shaw in Clarke v Edinburgh & District Tramways Co Ltd 1919 SC (HL) 35, 36, that:

"witnesses ... may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page."

[34] The opportunity of a trial judge or other finder of fact to observe the demeanour of witnesses when they testify and to take this into account in assessing the credibility of their testimony used to be regarded as a peculiar advantage over an appellate court which insulated findings of fact based on such observation from challenge on appeal. This approach was encapsulated by Lord Sumner in Owners of Steamship Hontestroom v Owners of Steamship Sagaporack [1947] AC 37, 47, when he said that:

"... not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

[35] Nowadays the reluctance of an appellate court to interfere with findings of fact made after a trial or similar hearing is generally justified on other grounds: in particular, the greater opportunity afforded to the first instance court or tribunal to absorb the detail and nuances of the evidence, considerations of cost and the efficient use of judicial resources and the expectation of the parties that, as Lewison LJ put it in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5, para 114(ii): "The trial is not a dress rehearsal. It is the first and last night of the show."

[36] Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge". That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval:

"I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me

straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help."

"Discretion" (1973) 9 Irish Jurist (New Series) 1, 10, quoted in Devlin, The Judge (1979) p63 and Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, The Business of Judging p9).

[37] The reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is giving evidence through an interpreter. Scrutton LJ once said that he had "never yet seen a witness giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not": see Compania Naviera Martiartu v Royal Exchange Assurance Corp (1922) 13 Ll L Rep 83, 97. In his seminal essay on "The Judge as Juror" Lord Bingham observed:

"If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in deceit or the reaction of an honest man to an insult? If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear the truth of what he has said on the lives of his children, what (if any) significance should be attached to that? If a Japanese witness, accused of forging a document, becomes sullen, resentful and hostile, does this suggest that he has done so or that he has not? I can only ask these questions. I cannot answer them. And if the answer is given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm." (emphasis added)

See Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, The Business of Judging at p11).

[38] Ms Jegarajah emphasised that immigration judges acquire considerable experience of observing persons of different nationalities and ethnicities giving oral evidence and suggested that this makes those judges expert in evaluating the credibility of testimony given by such persons based on their demeanour. I have no doubt that immigration judges do learn much in the course of their work about different cultural attitudes and customs and that such knowledge can help to inform their decision-making in beneficial ways. But it would hubristic for any judge to suppose that because he or she has, for example, seen a number of individuals of Tamil origin giving oral evidence this gives him or her a privileged insight into whether a particular witness of that ethnicity is telling the truth. That would be to assume that there are typical characteristics shared by members of an ethnic group (or by human beings generally) which can be relied on to differentiate a person who is lying from someone who is telling what they believe to be the truth. I know of no evidence to suggest that any such characteristics exist or that demeanour provides any reliable indication of how likely it is that a witness is giving honest testimony.

[39] To the contrary, empirical studies confirm that the distinguished judges from whom I have quoted were right to distrust inferences based on demeanour. The consistent findings of psychological research have been summarised in an American law journal as follows:

"Psychologists and other students of human communication have investigated many aspects of deceptive behavior and its detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanor as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments."

OG Wellborn, "Demeanor" (1991) 76 Cornell LR 1075. See further Law Commission Report No 245 (1997) "Evidence in Criminal Proceedings", paras 3.9–3.12. While the studies mentioned involved ordinary people, there is no reason to suppose that judges have any extraordinary power of perception which other people lack in this respect.

[40] This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.

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

35) The Court may also find the summary of the law by Baker J in uncertain perpetrator cases to be useful: ***Re JS [2012] EWHC 1370***:

"37. In determining the issues at this fact finding hearing I apply the following principles. First, the burden of proof lies with the local authority. It is the local authority that brings these proceedings and identifies the findings they invite the court to make. Therefore the burden of proving the allegations rests with them.

38. Secondly, the standard of proof is the balance of probabilities (Re B [2008] UKHL 35). If the local authority proves on the balance of probabilities that J has sustained non-accidental injuries inflicted by one of his parents, this court will treat that fact as established and all future decisions concerning

his future will be based on that finding. Equally, if the local authority fails to prove that J was injured by one of his parents, the court will disregard the allegation completely. As Lord Hoffmann observed in Re B:
"If a legal rule requires the facts to be proved (a 'fact in issue') a judge must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1."

39. *Third, findings of fact in these cases must be based on evidence. As Munby LJ, as he then was, observed in Re A (A Child) (Fact-finding hearing: Speculation) [2011] EWCA Civ 12:*
"It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation."

40. *Fourthly, when considering cases of suspected child abuse the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. As Dame Elizabeth Butler-Sloss P observed in Re T [2004] EWCA Civ 558, [2004] 2 FLR 838 at 33:*
"Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."

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

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

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

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

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

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

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

47. *Finally, when seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators is whether there is a likelihood or a real possibility that he or she was the perpetrator (see North Yorkshire County Council v SA [2003] 2 FLR 849. In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injury to be identified both in the public interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judge should not strain to do so (see Re D (Children) [2009] 2 FLR 668, Re SB (Children) [2010] 1 FLR 1161)."*