



Neutral Citation Number: [2024] EWFC 247 (B)

Case Number: RG24C50003

IN THE FAMILY COURT SITTING AT SLOUGH

The Law Courts
Windsor Road
Slough
SL1 2HE

Date 21 August 2024

Before

HIS HONOUR JUDGE RICHARD CASE

Re C1 and C2 (Children: Fact Finding)

Between

A BERKSHIRE COUNCIL

Applicant

and

MOTHER (1)

FATHER (2)

C1 and C2 (THE CHILDREN) (3-4)

PATERNAL GRANDMOTHER (5)

Respondents

Representation

For the Applicant: Vicky Reynolds, counsel instructed by the Applicant Council

For the Respondents: Catherine Purdy, counsel instructed by Reeds Solicitors LLP, solicitors for the First Respondent Mother
Gemma Chapman, counsel instructed by Boardman Hawkins & Osborne LLP, solicitors for the Second Respondent Father
Matthew Brookes-Baker, counsel instructed by OLG Solicitors for the Third to Fourth Respondent children by their Children's Guardian, Lara Guppy
Alice Darian, counsel instructed by Royds Withy King, solicitors for the Intervenor Paternal Grandmother

Hearing dates 5-8, 12-15 August 2024

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

APPROVED JUDGMENT

This judgment was handed down remotely at 10am on 21 August 2024 by circulation to the parties' representatives by email.

Contents

Summary.....	3
Parties.....	5
Background.....	5
Chronology.....	5
Positions.....	7
Local Authority.....	7
Mother, Father and Paternal Grandmother.....	7
Children's Guardian.....	7
Evidence Summary.....	7
Law.....	8
Threshold.....	8
Fact Finding.....	10
Lying.....	15
Injuries.....	16
List of perpetrators.....	17
Findings/Threshold.....	20
Agreed Findings.....	20
Disputed Findings Sought.....	24
Credibility.....	25
2: C1's carers have provided no account of an event that could have led to humeral fracture. .26	
3: In the absence of a plausible history the fracture was non-accidentally inflicted (deliberately, recklessly or negligently) by Mother, Father and/or Paternal Grandmother.....	26
4: At least one of them is withholding the explanation that accounts for the fracture.....	26

1: A non-observer would see C1 was distressed and recognise a reluctance to use her limb.....	54
5: Mother, Father and/or Paternal Grandmother failed promptly to seek medical attention for C1 from the point that the injury was sustained.....	55
6: The parents administered Calpol to C1 in the period after they were ware that she had hurt her arm.....	60
7: The Father would administer Calpol beyond the recommended dosage as a response to the Children “being in pain and crying lots”.....	60
9: The Father’s drinking is excessive and problematic.....	61
10: The Mother felt the need to apologise to the Father for the “noise” made by C1.....	63
11: The Children have been scared by the Father slamming doors and shouting.....	63
8: The domestic abuse is evidence of a domestically abusive relationship and the Children have been exposed to this.....	64
12: The Mother has failed to protect the Children.....	66
13: Threshold.....	69
Conclusion.....	69

Summary

1. I have made the following findings:
 - a) On 24 December 2023 C1 suffered a non-displaced oblique fracture to the right humerus.
 - b) The fracture was caused by the Paternal Grandmother accidentally exerting an inappropriate level of force in the course of dressing C1 into a pram suit.
 - c) The Mother and Father unreasonably failed to seek medical attention from 25 to 27 December 2023.
 - d) The Father perpetrated domestic abuse against the Mother by:
 - i) Biting the Mother’s hand on a holiday causing a purple bite mark;
 - ii) Grabbing the Mother by the wrist and restraining her on an occasion when she was pregnant on holiday;
 - iii) Overnight on 24-25 December 2023 gripping the Mother, twisting her arm, pinning her down and laughing at her for being scared whilst she was feeding C1;
 - iv) Verbally abusing her; and
 - v) Problematic drinking resulting in abusive behaviour.
 - e) The Father lied to the court about C1’s presentation in the aftermath of the fracture at (a) in order to exculpate himself from blame for not seeking medical attention.
 - f) On findings (c), (d) and (e) I am satisfied the section 31(2) Children Act 1989 threshold was met at the relevant date.

Parties

2. I have anonymised the parties and other key features to avoid identification from this published judgment. I apologise to the parties for the consequential impersonality of the judgment.

3. I am concerned with 2 young children, C1 and C2.

Background

Chronology

4. The following summary is taken from the Local Authority case summary:

5. The parents have been married for 10 years. Prior to these proceedings the family were not known to children's social care or the police.

5. At mid-day on Wednesday 27 December 2023 the parents took C1 to hospital. She was admitted at 12.49. The history given by the parents on 27 December 2023 is recorded as follows in the medical records:

"C1 was looked after by her grandmother on Christmas Eve. Children were in their romper suits and grandmother was worried they were too warm. Gently took C1 out of the suit, when her R arm was removed she cried and is now reluctant to use right arm.

Grandmother called parents immediately. Mum and Dad say that Grandmother is distraught that she might've hurt C1. She has worked with children and in schools and is a doting grandmother.

Since Christmas eve parents have noticed C1's R arm just hangs by her side. Today she has seemed uncomfortable/unsettled.

They say something similar happened to C2 (her brother). Dad described a client telling him that if you lift the left arm during burping it opens the diaphragm and helps to burp. He tried this on C2 who cried when he elevated the arm. C2 then held the arm limp for a day or so and then it resolved. They thought this might happen with C1 hence the delayed presentation"
[I529]

6. C1 had an Xray which showed an undisplaced right humeral fracture. She was admitted to the paediatric ward for management of her injury and for safeguarding due to the injury not being typical in C1's age group. C2 was also admitted on ground of safeguarding.

7. C2 underwent X-rays of his right and left humeri on 28 December 2023, from which suspected fractures were identified (subsequent investigations have since confirmed that it is

not possible to say that these were in fact fractures, and the Local Authority accordingly does not seek findings in relation to them).

8. Children's Services and the Police were informed and the children underwent Child Protection Medicals on 28-29 December 2023:

...

9. C1 had a skeletal survey on 28th December 2023 which, according to a consultant paediatrician at the hospital, showed "a spiral fracture of the distal mid shaft of the right humerus with early periosteal reaction demonstrated medially" [C5]. The author of the CP medical's, the consultant, further opined that:

"Fracture of long bones needs significant trauma and is not consistent with normal handling and raises the clinical suspicion of non-accidental injury" [C6]

10. A strategy meeting was held on 28 December 2023 [F25-F37].

...

16. The parents were released on 29 December 2023 subject to bail conditions not to have any unsupervised contact with either child unless authorised by the Local Authority.

17. The Mother signed s.20 for the children on 29 December 2023.

...

23. On 2 January 2024 the children were discharged from hospital into Local Authority foster care.

24. Proceedings were issued on 3 January 2024 and an Interim Care Order was granted at the first hearing on 5 January 2024.

25. Once it was established that the Maternal Grandparents were not in the pool of potential perpetrators, and they had returned from a planned holiday, C1 and C2 were placed in their care as Reg 24 approved carers in March 2024. They have remained in the care of the Maternal Grandparents to date, and the parents' contact with the children has remained supervised.

...

31. The Paternal Grandparents were joined as intervenors to the proceedings on 23 May 2024. By the time of the Pre-Trial Review on 5 July 2024 it was clear that no party contended that

the Paternal Grandfather was in the pool of potential perpetrators, and accordingly he was discharged as an intervenor.

Positions

Local Authority

6. The Local Authority invite findings beyond that which is admitted by the Mother, Father and Paternal Grandmother which I will set out in detail below.

Mother, Father and Paternal Grandmother

7. I will set out the individual responses below.

Children's Guardian

8. The Guardian does not advance a positive case. She says that if the fracture was caused accidentally by the Paternal Grandmother she still says threshold is crossed because the Children are at risk of harm from domestic abuse and on the basis of the Father's admission of a failure to seek medical intervention. She says that there is a paucity of evidence of the Mother losing control and inflicting the fracture.

Evidence Summary

9. I have considered the trial bundle, in particular:

- a) Radiology reports of Dr Oates in respect of C1 [E41], [E79] and [E120];
- b) Paediatric reports of Dr Robinson [E84], [E114], [E116] and [E121];
- c) Hospital records [Section I];
- d) Child protection medical of C1 [C4];
- e) Police logs [J56-J59];
- f) Police interview of Mother [J0c-J33];
- g) Police interview of Father [J34a-J34ah];
- h) Police interview of Paternal Grandmother [J35b-J35aw] and I have watched the recordings of her demonstrating mechanism of injury;
- i) Messaging between the parents from 24 December 2023 to 28 December 2023 [Section J];
- j) Witness statements of the Mother [C51] and [C239];
- k) Witness statements of the Father [C30], [C205] and [C250];
- l) Witness statements of the Paternal Grandmother [C219], [C256] and a further statement dated 5 August 2024;
- m) Witness statement of the Paternal Grandfather [C212] and police statement [J35ax];

- n) Witness statement of CB, retired nurse, [C192] and police statement [J457];
- o) Police statement of Maternal Uncle's partner [J465];
- p) Police statement of Maternal Great Aunt [J482];
- q) Witness statement of SH, nurse, [C170];
- r) Witness statement of TM [C189];
- s) Witness statement of Maternal Grandmother [C159] and police statement [J468];
- t) Witness statement of Maternal Grandfather [C156] and police statement [J472]; and
- u) Various videos.

10. I heard oral evidence from Dr Oates and Dr Robinson remotely, from CB, the Paternal Grandfather, Mother, Father and Paternal Grandmother.

Law

Threshold

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

(2) A court may only make a care order or supervision order if it is satisfied –

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to –

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child's being beyond parental control.

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

13. In relation to threshold I refer to the summary of the principles set out by Sir James Munby (then the President of the Family Division) in *Re A (a Child)* [2015] EWFC 11 which was given by Aikens LJ in *Re J (a Child)* [2015] EWCA Civ 222:

"56. The fundamental principles underlined by the President in *Re A*, which, as I say, are not new and are based on statute or the highest authority or both, can, I think, be summarised thus:

...

v) It is for the local authority to prove that there is the necessary link between the facts upon which it relies and its case on Threshold. The local authority must demonstrate why certain facts, if proved, "justify the conclusion that the child has suffered or is at the risk of suffering significant harm" of the type asserted by the local authority." The local authority's evidence and submissions must set out the arguments and explain explicitly why it is said that, in the particular case, the conclusion [that the child has suffered or is at the risk of suffering significant harm] indeed follows from the facts [proved]".

vi) It is vital that local authorities, and, even more importantly, judges, bear in mind that nearly all parents will be imperfect in some way or other. The State will not take away the children of "those who commit crimes, abuse alcohol or drugs or suffer from physical or mental illness or disability, or who espouse antisocial, political or religious beliefs" simply because those facts are established. It must be demonstrated by the local authority, in the first place, that by reason of one or more of those facts, the child has suffered or is at risk of suffering significant harm [my emphasis]..".

vii) When a judge considers the evidence, he must take all of it into account and consider each piece of evidence in the context of all the other evidence, and, to use a metaphor, examine the canvas overall.

14. The Mother relies upon *Re L-W Children* [2019] EWCA Civ 159 in relation to the allegation of failure to protect, reminding me of the need for a causative link between a failure to act on a relevant event or events and risk to the children.

15. The Guardian relies upon King LJ's judgment in *Re G-L-T (Children)* [2019] EWCA Civ 717:

73. Unhappily, the courts will inevitably have before them numerous cases where there has undoubtedly been a failure to protect and there will be, as a consequence, complex welfare issues to consider. There is, however, a danger that significant welfare issues, which need to be teased out and analysed by assessment, are inappropriately elevated to findings of failure to protect capable of satisfying the s 31 criteria.

16. Counsel for the Guardian submits, accurately as I find it, it is for the Local Authority to prove that a reasonable parent would have detected the nature of risk, acted differently and more protectively and the risk was one that met the seriousness of a threshold finding.

Fact Finding

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

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

“First, the burden of proof lies at all times with the local authority.

Secondly, the standard of proof is the balance of probabilities.

Third, findings of fact in these cases must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation ...

Fourthly, when considering cases of suspected child abuse the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. The court invariably surveys a wide canvas. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof.

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

Sixth, ... The court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others.

Seventh, the evidence of the parents and any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability.

Eighth, it is common for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a

witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear and distress, and the fact that a witness has lied about some matters does not mean that he or she has lied about everything (see *R v Lucas* [1981] QB 720).” [I address this further below].

18. Munby P continued:

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

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

23. Secondly, that the court can have regard to the inherent probabilities: see Lady Hale in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35, [2009] 1 AC 11, para 31. But this does *not* affect the legal standard of proof, as Lord Hoffmann emphasised in the same case (para 15):

“There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely.”

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

“It is the local authority that seeks a finding that FM’s injuries are non-accidental. It is for the local authority to prove its case. It is not for the mother to disprove it. In particular it is not for the mother to disprove it by proving how the injuries were in fact sustained. Neither is it for the court to determine how the injuries were sustained. The court’s task is to determine

whether the local authority has proved its case on the balance of probability. Where, as here, there is a degree of medical uncertainty and credible evidence of a possible alternative explanation to that contended for by the local authority, the question for the court is not 'has that possible alternative explanation been proved' but rather it should ask itself, 'in the light of that possible alternative explanation can the court be satisfied that the local authority has proved its case on the simple balance of probability'."

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

I agree with the judgment of Ward LJ. Family judges deal with increasingly difficult child cases and are much assisted in their decision-making process by professionals from other disciplines: medical, wider mental health and social work among others. The courts pay particular attention to the valuable contribution from paediatricians and child psychiatrists as well as others, but it is important to remember that the decision is that of the judge and not of the professional expert. Judges are well accustomed to assessing the conflicting evidence of experts. As Ward LJ said, judges are not expected to suspend judicial belief simply because the evidence is given by an expert. An expert is not in any special position and there is no presumption or belief in a doctor however distinguished he or she may be. It is, however, necessary for a judge to give reasons for disagreeing with experts' conclusions or recommendations. That, this judge did. A judge cannot substitute his views for the views of the experts without some evidence to support what it is he concludes.

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

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

This states that human memory:

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

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

9. To these matters I would only add that in cases where repeated accounts are given of events surrounding injury and death the court must think carefully about the significance or otherwise of any reported discrepancies. They may arise for a number of reasons. One possibility is of course that they are lies designed to hide culpability. Another is that they are lies told for other reasons. Further possibilities include faulty recollection or confusion at times of stress or when the importance of accuracy is not fully appreciated, or there may be inaccuracy or mistake in the record keeping or recollection of the person hearing and relaying the account. The possible effects of delay and questioning upon memory should also be considered, as should the effect on one person of hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be unnatural – a process which might inelegantly be described as “story creep” – may occur without any inference of bad faith.

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

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

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

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

unwise for the court to attach much, if any, weight to this evidence if it is directed only to the question of propensity...

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

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

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

"It is obviously a counsel of perfection but seems to me advisable that any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behaviour in the witness box and to expressly indicate that they have done so."

...

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

"Any judge who has had to conduct a fact-finding hearing such as this is likely to have had experience of a witness - as here a woman deposing to serious domestic violence and grave sexual abuse - whose evidence, although shot through with unreliability as to details, with gross exaggeration and even with lies, is nonetheless compelling and convincing as to the central core... Yet through all the lies, as experience teaches, one may nonetheless be left with

a powerful conviction that on the essentials the witness is telling the truth, perhaps because of the way in which she gives her evidence, perhaps because of a number of small points which, although trivial in themselves, nonetheless suddenly illuminate the underlying realities.”

25. In relation to electronic messages I remind myself of the observations in *Stocker v Stocker* [2019] UKSC 17 in which Lord Kerr cautioned against “elaborate analysis of a tweet; it is likewise unwise to parse a Facebook posting for its theoretically or logically deducible meaning. The imperative is to ascertain how a typical (i.e. an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on”.

Lying

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

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

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

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

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

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

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

- (2) it relates to a significant issue;
 - (3) it was not told for a reason advanced by or on behalf of D, or for some other reason arising from the evidence, which does not point to D's guilt.
2. The direction should be tailored to the circumstances of the case, but the jury must be directed that only if they are sure that these criteria are satisfied can D's lie be used as some support for the prosecution case, but that the lie itself cannot prove guilt. ...”

27. What I have said above in relation to memory applies to a consideration of whether a person is, in fact, lying; that is to say whether they are dishonestly not telling the truth.

Injuries

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

- (1) Had the local authority proved that the injuries were inflicted as opposed to being accidental?
- (2) If the injuries were inflicted, who had the opportunity to cause them?
- (3) Of those people, could one person be identified on the balance of probabilities as having inflicted the injuries (a conventional 'known perpetrator' finding)?
- (4) If only two people...could have caused the injuries, but the one responsible could not be identified it necessarily followed that there was a real possibility that each of them may have caused the injuries (an 'uncertain perpetrator' finding).

29. In *Re BR (Proof of Facts)* [2015] EWFC 41 he said the following:

Risk factors and protective factors

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

Risk factors

- Physical or mental disability in children that may increase caregiver burden
- Social isolation of families
- Parents' lack of understanding of children's needs and child development
- Parents' history of domestic abuse

- History of physical or sexual abuse (as a child)
- Past physical or sexual abuse of a child
- Poverty and other socioeconomic disadvantage
- Family disorganization, dissolution, and violence, including intimate partner violence
- Lack of family cohesion
- Substance abuse in family
- Parental immaturity
- Single or non-biological parents
- Poor parent-child relationships and negative interactions
- Parental thoughts and emotions supporting maltreatment behaviours
- Parental stress and distress, including depression or other mental health conditions
- Community violence

Protective factors

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

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

List of perpetrators

30. The following summary of the law is taken from the Family Court Practice paragraph 2.312[20]:

Uncertain perpetrator cases—If the judge cannot identify a perpetrator or perpetrators, it is still important to identify the possible perpetrators by asking whether the evidence

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

In *A (Children) (Pool of Perpetrators)* [2022] EWCA Civ 1348 the Court of Appeal reiterated that the evaluation of the facts which will enable a court to identify the perpetrator of an inflicted injury to a child will be determined on the simple balance of probabilities and nothing more. In this context, the Court of Appeal stated that judges should no longer direct themselves not to 'strain' to identify the perpetrator as the unvarnished test is clear: following a consideration of all the available evidence and applying the simple balance of probabilities, a judge either can, or cannot, identify a perpetrator. If he or she cannot do so, then, in accordance with *Re B* he or she should consider whether there is a real possibility that each individual on the list inflicted the injury in question.

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

- (a) The concept of a 'pool' of perpetrators is one that seeks to strike a fair balance between the rights of the individual, including those of the child, and the imperatives of child protection;
- (b) A decision by a court to place a person in a 'pool' of possible perpetrators does not constitute a finding of fact in the conventional sense in that that person is not proven to be a perpetrator but is rather a possible perpetrator;

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

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

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

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

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

31. The commentary in Family Court Practice continues:

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

CA). Where the court is satisfied that the child has suffered significant harm, the threshold conditions under ChA 1989, s 31(2)(b)(i) will be met in relation to that child even though the court is unable to identify who within the pool of possible perpetrators inflicted the harm: *Lancashire County Council v B* [2000] 1 FLR 583, HL, in which helpful guidance is given as to how evidence needs to be tested to establish the threshold criteria for the purposes of s 31 where the perpetrator is uncertain. In determining whether a person is properly included in the pool of potential perpetrators, it is essential that the court weighs any lies told by that person against any evidence that points away from them having been responsible for the injuries (*H v City and Council of Swansea and Others* [2011] EWCA Civ 195). In these 'uncertain perpetrator' cases, the correct approach is for the case to proceed at the welfare stage on the basis that each of the possible perpetrators is treated as such (*Re O and N: Re B* [2003] 1 FLR 1169, HL). The House of Lords held in that case that it would be grotesque if, because neither parent had been proved to be the perpetrator, the court had to proceed at the welfare stage as though the child were not at risk from either parent, even though one or other of them was the perpetrator of significant harm. The judge conducting the welfare hearing should have regard to the facts found at the preliminary hearing when they leave open the possibility that a parent or carer was a perpetrator of proved harm and that conclusion should not be excluded from consideration.

Findings/Threshold

Agreed Findings

32. The composite schedule of findings identifies the following facts are agreed:

1. Physical Harm

- a. Fracture: C1 was presented at hospital on 27 December 2023 and was found to have the following bone fracture:
 - i. An acute non-displaced oblique fracture of the right humerus (Dr Oates – [E44/E60]).

2. Timing of injury

- a. Clinical dating establishes that C1's fracture was caused during the following window of time:
 - i. Radiologist: as of 27 December 2023 the fracture was between 3 and 7 days old (connoting causation within the period from 20 – 24 December 2023). (Dr Oates – [E55]);

- ii. Paediatrician: as of 27 December 2023 the fracture was not more than 3 days old (connoting causation with the period from 24 - 27 December 2023). (Dr Robinson - [E110/E115]).

3. Causation of injury

- a. C1's bone fracture is a traumatic injury that was not self-inflicted or caused by birthing (Dr Robinson [E104]).
- b. Causation of C1's fracture required application of a significant and inappropriate level of force, including rotational force, beyond normal childcare or rough handling (Dr Oates [E53/57] and Dr Robinson [E106]).
- c. C1 would have cried out in a manner not heard previously and responded with noticeable distress in the aftermath of her fracture:
 - i) a perpetrator or observer would have been aware that excessive force had been applied and be on the 'look out' for injury;
 - ii) ...
- d. ...

4. Perpetration of injury

- a. ...
- b. The person or persons responsible for causing C1's bone fracture know how her injury was sustained, because:
 - i) they would know they had applied excessive force;
 - ii) they would have observed C1's immediate and subsequent distress;
- c. ...

5. Failure to seek medical attention

- a. ...
- b. ...
- c. ...

6. Domestic abuse and emotional dysregulation

- a. The parents' relationship is domestically abusive, and the children have been exposed to this. Particulars include:

- i. Overnight on 24-25 December 2023 the Father gripped the Mother, twisted her arm, pinned her down and laughed at her for being scared whilst she was feeding one of the children [J105-J106];
 - ii. The Father grabbed the Mother by the wrist and restrained her on an occasion when she was pregnant [J106];
 - iii. The Father bit the Mother's hand on a holiday causing a purple bite mark [J103][J442];
 - iv. The Father is verbally abusive to the Mother (for example calling her a cunt) [J102-J203];
 - v. The Father would yell at the top of his voice, shout and slam doors [J101][J106][J116][J119];
 - vi. The Mother is scared of the Father and has been more scared of him since the birth of C1[J102];
- b. ...
- i. ...
 - ii. The Mother describes the prospect of Christmas Day at home with the Father as: "hanging around this house with you getting drunk and being awful and them screaming all day" [J107];
- c. The parents struggle to appropriately control their emotions, frustrations and behaviour in the context of parenting:
- i. See 6.a.ii above [The Father grabbed the Mother by the wrist and restrained her on an occasion when she was pregnant [J106]];
 - ii. The Father has told the Mother that he is not safe to look after the children at night [J104];
 - iii. ...
 - iv. On 18 December 2023 the Father describes, in the context of caring for the children: "I needed to leave the house as I was honestly on the verge of a breakdown" [J150] and describes C1 as "a terror. A devil. A banshee" [J147];
 - v. On 20 December 2023 the Mother messaged the Father saying: "Your constant anger, aggression, shouting, swearing and general hate is really exhausting" [J124];

- vi. On 20 December 2023 the Mother messaged the Father in relation to him overdosing the children with Calpol to manage pain/crying saying “You may hate C2 and C1 with all your being but you have no right to meddle with their health” [J126];
- vii. On 20 December 2023 the Mother messaged the Father in the context of lack of sleep saying: “I hate this. I hate them. I hate being a parent. I don’t know why I signed up for it” [J125];
- viii. ...
- ix. The Mother has had to ask the Father to be more gentle when handling the children [on several occasions] [in square brackets as the Father does not accept it was more than once] [J8];
- x. The Father wanted the children to sleep on their front, against professional advice, and when the Mother objected to this he shouted at her and called her autistic [J115-J116].

7. Failure to Protect

- a. ...
 - i. At 01.29hrs on 25 December 2023 the Mother messaged the Father as follows: “That’s twice you’ve laid a finger on me lately: you grabbed me by the wrist and restrained me when I was pregnant too. I 100 per cent WILL call the police if you do it ever again. I cannot and will not live like this” [J106];
 - ii. [The Mother] failed to report the abuse;
 - iii. [The Mother] failed to support police investigation or complete a DOM5 [J399-J406].

8. Section 31(2) Children Act 1989

- a. ...

Disputed Findings Sought

33. The following findings remain in issue, I have adopted the same sub-headings as in the schedule but numbered the allegations consecutively although in my analysis I have addressed them in a different order:

3. Causation of injury

Allegation 1: A non-observer would see C1 was distressed and recognise a reluctance to use her limb.

Allegation 2: C1's carers have provided no account of an event that could have led to the humeral fracture.

4. Perpetration of injury

Allegation 3: In the absence of a plausible history the fracture was non-accidentally inflicted (deliberately, recklessly or negligently) by Mother, Father and/or Paternal Grandmother.

Allegation 4: At least one of them is withholding the explanation that accounts for the fracture.

5. Failure to seek medical attention

Allegation 5: Mother, Father and/or Paternal Grandmother failed promptly to seek medical attention for C1 from the point that the injury was sustained.

Allegation 6: The parents administered Calpol to C1 in the period after they were aware that she had hurt her arm.

Allegation 7: The Father would administer Calpol beyond the recommended dosage as a response to the Children "being in pain and crying lots".

6. Domestic abuse and emotional dysregulation

Allegation 8: The domestic abuse is evidence of a domestically abusive relationship and the Children have been exposed to this.

Allegation 9: The Father's drinking is excessive and problematic.

Allegation 10: The Mother felt the need to apologise to the Father for the "noise" made by C1.

Allegation 11: The Children have been scared by the Father slamming doors and shouting.

7. Failure to Protect

Allegation 12: The Mother has failed to protect the Children from the Father's abusive and uncontrolled behaviours.

8. Section 31(2) Children Act 1989

Allegation 13: Threshold.

Credibility

Mother

34. I make a number of more specific observations about credibility below but note that initially, and understandably, the Mother was very upset and clearly anxious about giving oral evidence. I bear in mind in assessing her credibility that giving evidence is stressful and the circumstances of doing so could not be much more serious than about an injury to her child which she is alleged to have potentially caused. That said, she in fact settled into giving evidence, she made concessions where it seemed appropriate and stuck to her guns on other occasions. Generally, I formed a positive impression that she was doing her best to recall what happened.

Father

35. Again, I will make specific observations about credibility below. Generally, I note that the Father at times struggled to answer questions with long pauses preceding some answers. I formed the impression this was at times because of the emotion of events he was being asked about but at other times it seemed he was struggling to reconcile differences between accounts he gave at different points in time.

36. One particular difference which may be of more general relevance was between his first and second statement. In his first he said that when he “checked” C1 when he visited his parents after a call from Paternal Grandfather to return to their home “she did not seem to be in any discomfort and I felt she was moving both her arms normally” [C43/33]. By contrast, in his third statement he said “My description of C1’s presentation from 24-27 December was not accurate. She was not fine. She was clearly favouring her left arm...” [C251/5]. His reply to a question in cross-examination on this change suggested a reluctance to be forthright. He said “I think at the time of producing that [first] statement I...didn’t understand the signs of how she was...I don’t know.” When pressed there was the following exchange in which I intervened as there was some inconsistency in answers (underlined):

Q Were you trying to fit her presentation to the evidence of the experts

A No, I didn't want it to look like we were being medically negligent

Q Were you lying to cover up medical negligence

A No and if I could do it again I would have gone [to hospital]

JQ You are agreeing you were not giving the full picture then

A Yes, I am agreeing

JQ So at the time of the first statement you were consciously trying to make it look like there was nothing wrong to avoid an accusation of not taking her to hospital

A Yes

JQ But not because you were trying to cover up for yourself having injured her

A Absolutely

37. Accordingly, there was an admission of deliberately not having told the truth. The following day, a continuation of the Father's oral evidence, he appeared to initially row back from this saying this was not an example of him "saying untrue things to mislead the court" and he "wasn't telling an untruth to mislead the court". When he was cross-examined by counsel for the Guardian however he once more conceded he was "trying to manipulate the court into thinking [he] hadn't been medically negligent and minimising the presentation of C1's symptoms".

38. I remind myself of the revised *Lucas* direction. This was a clear "deliberate untruth" and it related to a significant issue (C1's symptoms). However, when I ask myself whether it was "told for a reason advanced by or on behalf of [Father]...which does not point to [his] guilt" I note that the untruth could have been either to exculpate himself from having caused an injury or, as he advanced, to exculpate himself from failing to take appropriate action to seek assistance or indeed both. Whichever is the case it is evidence of his lack of candour, even in his final statement and evidence in chief.

39. In relation to domestic abuse the Father accepted he has "minimised how I behaved to the Mother but not lied".

Paternal Grandmother

40. The Paternal Grandmother found the process of giving evidence distressing; I formed the impression she was doing her best to recall the relevant events.

2: C1's carers have provided no account of an event that could have led to humeral fracture

3: In the absence of a plausible history the fracture was non-accidentally inflicted (deliberately, recklessly or negligently) by Mother, Father and/or Paternal Grandmother

4: At least one of them is withholding the explanation that accounts for the fracture

41. I will take these three allegations together.

42. The Mother, Father and Paternal Grandmother's case is that the injury was caused by the Paternal Grandmother accidentally on 24 December 2023.

Preceding 24 December 2023

43. The parents accept the following messages were sent:

[J150]

18 December 2023 09.32

Father: Last fed at 8am. I needed to leave the house as I was honestly on the verge of a breakdown xxxx

18 December 2023 10.07

Father: ...She's a terror. A devil. A banshee.Xxx

44. In her second statement the Mother explains this was his "humour" and the Children always seemed to know it was a Sunday night when the Father would need to be working on Monday.

[J129]

20 December 2023 08.37

Mother: If, as you say, you hate it / them / me / us so much, please go and spend a few days at your parents'. I can't be expected to deal with your constant anger, aggression and negativity whilst dealing with them and trying to keep myself upbeat and sane. It's not fair and it's not possible.

[J125]

20 December 2023 10.06

Mother: I hate this. I hate them. I hate being a parent. I don't know why I signed up for it.

Mother: How am I meant to be upbeat when I'm about to be up for 25 hours and have that kind of support from you?

45. In her second statement she explained the first of these two messages was a quote of what the Father had said "in a moment of exhaustion and upon feeling very overwhelmed. I was very cross with him for saying this about the children but it was a 'one off comment' and not a common thread or true reflection of how he felt about being a father." [C245/14].

46. In her police interview the Mother accepted "There have been a few times when I've said to him, 'Gentle, gentle.' Where maybe he's picked one of them up a bit quickly, possibly. And I said, 'Gentle, gentle. Be a bit more gentle with them.'" [J8]. In her first witness statement she said:

[C59]

23. ...I have told Father to watch their neck when he is holding them for example or perhaps thought that he would move a bit quicker than I would when he held them. He has not been

rough with them. I did hear him raise his voice to the children stating that he would like them to stop crying. I heard him and pulled him up on it...

47. When she was first spoken to by police, prior to the formal interview she is recorded to have said (and agreed in cross-examination this was accurate) that:

[J40]

...he has been known to be abrupt picking up the children.... The Mother comments on the Father 'scooping' up the children and states that he has shouted at them to 'SHUT THE HELL UP'.

48. In cross examination it was put, in terms, that was something she felt it was important to tell the police, i.e. that it was highly relevant to the injury but she said she had been asked if she had ever seen the Father taking out his frustrations on the Children and that was the only time she could recall it so it was important to answer that question.

49. The Mother's account of the evening/night of 23 December 2023 into the morning of 24 December 2023 was explored in cross-examination. She was taken to the following messages:

[J698]

24 December 2023 05.16

Mother: For some absolutely hateful reason I cannot sleep. If it gets horrific, come and get me

Xxx

...

Father: they are both awake, but ok xxxxx

50. She was asked if the night before had been horrific, she could not remember, she was asked if she expected it to become horrific after the Father assumed care (normally around 04.00) and she said “potentially yes” but no more so than normal with young children.

51. Her oral evidence was that between hand-over of care to the Father and the Father leaving the house with the Children (and dog) on 24 December 2023 she did not see the Children. There is accordingly a window in which the Father could have caused injury. There was an exploration with the Mother about the Father’s behaviour in leaving the house with the Children. She said it was not uncommon on a non-working day for him to “leave the house quietly so I could catch up on sleep”; I do not consider that his actions are therefore suggestive of trying to hide an injury from the Mother.

52. In his witness statement the Father says:

[C42/28]

We had been with friends the night before and went out for lunch (with the children). I woke up quite early as Mother had not had much sleep. The children were being noisy. I took the children in the pram with the dog for walk []. I didn’t want to wake my mum so I phoned my dad and asked to pop in for a coffee. My parents live close by and we see each other a lot so this was not unusual. I drove to their house after my walk.

Daytime 24 December 2023

53. The Paternal Grandmother’s evidence was that on taking over care on 24 December there were no concerns about C1, she was a “normal happy baby”, in the course of undressing them there was no reason not to move the Children’s limbs and there were no “squeaks, cries or grimaces” and before the incident when Paternal Grandmother thought she had injured C1 there was no point when her arm was noticed to be “floppy, different or abnormal”.

54. In the course of the Paternal Grandfather’s oral evidence he produced a photo with metadata indicating it was taken on 24 December at 10.53 in which C1 can be seen with her right arm up. This was a more detailed view of one of a series of photos seen in the message log at [J620]. It suggests there was no injury prior to this time.

55. There is a message to the Paternal Grandfather from the Father:

[J619]

24 December 2023 09.22

Father: Best laid plans and all that: I'm shattered, Dad, and have zero energy for a bike ride, so I'm afraid we're going to have to put it down to another day I'm afraid. I'd like to hope we can manage it over the festive period, though ! Are you in though? I'm out with the children and [dog], and I quite like the idea of popping in for a coffee ?

56. In her first statement the Mother says that having dropped the Children with the Paternal Grandparents she and the Father went shopping, the Paternal Grandparents phoned to say they could look after the Children for longer but needed more milk and when the Father arrived to deliver the same the Paternal Grandmother was upset and concerned she had hurt C1 [C53/7].

57. I now turn to consider the parties' evidence individually:

Mother

58. The parents reported to the hospital on arrival that (my emphasis):

[I514]

C1 was looked after by her grandmother on Christmas Eve. Children were in their romper suits and grandmother was worried they were too warm. Gently took C1 out of the suit, when her arm was removed she cried and is now reluctant to use right arm.

59. The Mother's explanation to the police at hospital is reported as follows (my emphasis):

[J56]

...got a call from Paternal Grandfather. C1 was upset. Neighbour was a health worker now retired, who assisted. Came back, she was upset, nothing stood out or made scene [sense?].

...The Pram is quite thick, I can only think, that (C1) maybe she's got stuck in the Pram.

Wearing a baby grow on, sat in the Pram tightly, this could be my only explanation.

Christmas eve, when taking C1 out of the Pram, and placing her on to the changing mat, this was when it's happened.

60. In her police interview she said (my emphasis):

[J0e]

They phoned us in a bit of a - his mum was a bit upset, distressed, that she was changing her. I can't remember if she was putting her into her pram suit or taking her out of it - I can't remember that - erm, but either way, erm, she did it, and C1 kind of let out a real hysterical cry, erm, and then, erm, her arm went floppy.

61. This is a different explanation from getting stuck in the pram. When the Mother gave evidence she said that she had initially told the police “pram suit” not pram. That would be consistent with saying it was “quite thick”, it would be an unusual turn of phrase to say a pram was “quite thick”. I find on balance the police record is wrong in this respect. In coming to this conclusion I bear in mind I have heard no direct evidence from the police about how the note was taken, including whether it was contemporaneous.

62. However, that account is also apparently different from what she told family friends sometime later. She was taken to a statement given on 21 March 2024 [J461] in which it was reported that the Mother told them that the Paternal Grandmother “was attempting to put C1 into her pram suit” (as opposed to not remembering if the arm was being put in or taken out). I found her explanation credible: she said prior to the interview she had been in a police cell for 5 hours, the interview was at 02.00 and she “didn’t clearly remember the details that was passed along” to her, she felt it important to know the details so she later confirmed them with the Paternal Grandparents.

63. In her police interview the Mother said (my emphasis):

[J0h]

So I think, I think what happened, was - I don't know if Father and I were in the car, or at the supermarket, or at home. I can't remember. He got a phone call from his dad, who said, erm, 'Your mum's in a bit of a state. C1's really crying, and her arm's gone floppy. Erm, we're not going out this afternoon...

64. In her statement and then her oral evidence she said the first she knew about a potential problem with C1 and the visit from CB to check C1 over was in a call from the Father at 13.51. The comment to police differs (she told them she was made aware of the incident in the phone call from Paternal Grandfather) from this evidence. She said she got it wrong, she was “distressed and exhausted and muddled some of the communication on that day”. What the Mother now says is consistent with the Paternal Grandfather’s evidence and I note that on the following page of the police interview transcript she said “I don’t know if [the Father] necessarily told me there and then” and when asked “When did you become aware of it within that day” she said “Erm, mid-afternoon, maybe three o’clock-ish, very roughly, perhaps”. Again, I accept that evidence given the context of the interview (timing and trauma of arrest), the internal inconsistency in what she told the police and the consistency of her later version with evidence from the Paternal Grandfather.

Father

65. The Father was cross-examined about inconsistencies in his evidence about the plan for 24 December 2023. As noted above there was a contemporaneous text message to Paternal Grandfather cancelling a bike ride but there was no reference to this to the police in interview. The Father said:

[J34e]

Okay. So, erm, on, on Christmas Eve, erm, we, we would go - we were due to go Christmas shopping, and, er, food shopping, and, er, Mother made a very good point that Christmas Eve shopping, food shopping, with two children would probably not be a great idea, so, erm, we phoned my parents up and said, 'Mum, Dad, can you look after the children, erm, while we go to Waitrose?' It was only a quick shop. Erm, so I dropped them up at my parents' house...

66. That is quite different from the account now advanced: there was a planned bike ride, the Father cancelled and went on a dog walk and dropped the Children with the Paternal Grandparents who said they would look after them whilst the parents shopped ([C42/28-29]). In oral evidence the Father said:

A I’m putting various communications in one sentence

I believe the day before we had a conversation about the plan to go Christmas shopping on 24/12/23 and both agreed it wouldn’t, with 2 children not an enjoyable experience and I think I’m linking it to that

JQ So you’re saying Mother had made that point on 23/12/23 but the plan on 24/12/23 was still in fact to do exactly that [i.e. shop with the Children]

A Yes

67. He seemed to be saying that having discussed it the night before with the Mother it was fortuitous that the Paternal Grandparents offered to care for the Children.

68. As above, on arrival at hospital it was reported the Paternal Grandmother was removing the arm when the incident occurred.

69. The Father is reported by JD (a family member) to have told her on 25 December 2023 that (my emphasis):

[J469]

I was aware of the incident on 24 December...Mother and Father told us all that Father's mother [] had been undressing C1 on Sunday 24th December...

70. The Father's initial account to police was (my emphasis):

[J57]

...had been gone for 20 minutes. Had a call from mum. Thought something happened to mum or dad. Got back, mum was in tears. Explained that C1 was very upset, her arm appeared floppy.

I gave the kids in their pram suites (bodygrow). Mum explained that when she got C1 out from the pram, mum had a struggle, C1 began crying and her arm appeared floppy. C1 settled and went back to Christmas shopping. [sic]

71. In cross-examination he was asked about the reference to 20 minutes which was inconsistent with the text message timings which suggested the call from Paternal Grandfather (not Paternal Grandmother) was at 13.09 [J637] in circumstances where his evidence was that he had left the Paternal Grandparents at 10.30 to 11.00. He said the reference to 20 minutes was in fact he had been shopping for 20 minutes when the message came.

72. In his police interview the Father said (my emphasis):

[J34e]

I didn't go shopping straightaway, I walked the dog. So I was walking the dog, my mum phoned

me up and said, Father you need - any chance you can come back? Don't be worried, but I'm a little bit concerned about something. Er, I just want to ask you something,' and I was like, that's a bit odd. So I, I, I went round to, to her house, and - to their house - and my mum said that - and she was terribly upset.

...

And my mum was getting C1 out in this kind of pram suit, and immediately C1 let out - she was lifting - let it - she was lifting one of her arms out, and immediately she let out this kind of bloodcurdling, erm, cry, and she said it was almost like her face was going purple, basically.

[J34j]

...she just went to get her right arm out, pull it out, erm, and, erm, you know get it so you can get the other left arm, and she got as far as the right arm, erm, but, you know, the - it's quite a think suit. [sic]

73. As with the Mother this is a different explanation from getting out of a pram and indicates removing the arm from clothing. When the Father was cross-examined he said he “didn’t understand the significance [of this point] and the important part was whether it was lifting out or in to a pram suit”. That explanation is consistent with a message sent by the Father to his brother on 25 December 2023 in which he said “I think she [Paternal Grandmother] was taking her vest off” [J492]. When cross-examined on behalf of the Paternal Grandmother the Father explained that one reason why he may have misunderstood the mechanism was because the focus on 24 December 2023 was C1’s health, there was no discussion of the incident with Paternal Grandmother on 24 December 2023 and on 26 December 2023 the focus was again C1’s health and he agreed he knew Paternal Grandmother was worried about the incident (the inference being he did not want to probe further). When the Paternal Grandmother gave evidence she said the focus on 26 December 2023 was “how is it getting on...by then I’d gone in to shut down and didn’t want to talk about it as I’d get upset”. This evidence is consistent and credible.

74. He was also asked about the reference at hospital to “they were too warm” ([I514]); he said that was him referring to the fact they were too warm inside on arrival with him earlier in the day.

75. He was also asked about the inconsistency with the reference to the Paternal Grandmother calling him (in the initial account to police and in the interview) and said that was incorrect and he said his mother had called (rather than his father, which he says is the correct information) because “the topic was regards to my mum” which I understood him to mean the important piece of information in his mind was that it was his mother who had caused an injury and he was not focused on who made the phone call to him. That was corrected in his third statement ([C251/4]).

76. In his first statement he described checking C1 later in the day and “she did not seem to be in any discomfort” [C43/33]. In oral evidence he clarified he did not “examine” her, he held her and comforted her. In his police interview he said he “was kind of feeling around the, the arm area...just having a little, you know, a little play around with it...and she didn’t seem in pain at all” [J34f]. I set out in more detail below the evidence given to police about symptoms.

77. The Father exhibited a photo said to have been taken on 25 December 2023 which shows C1's right arm being raised up without apparent discomfort [C69]. He was asked about the failure to show this photo or the video that the Paternal Grandmother had sent him on 24 December 2023 showing C1 moving her right arm without apparent discomfort (see below and [C238]). There was a suggestion that the video has been deliberately concealed by the Father. First, there was no evidence of it being found on his phone and second he told the police he may have deleted it (police interview [J38ab]). In relation to the first point counsel for the Father makes the fair point that there is no report on how the messages that have made their way into the bundle from police disclosure came to be downloaded by the police and there is at least one error apparent on the face of the that disclosure in that in the section that is supposed to be messages between the Father and the Paternal Grandfather there is in fact a message that appears to have been sent to the Paternal Grandmother's email account via iMessage (at [J620]).

78. When cross-examined on behalf of the Mother it was put to him that the fact he mentioned the video when asked by the police suggested he was not trying to hide the video. I agree with that.

79. This concern also needs to be considered in the context of the Father being interviewed at a time when it was believed C2 had also suffered fractures in relation to which the Father offered an explanation that he might have caused the injuries to C2 by way of a rather odd burping manoeuvre.

80. In any event, the Father gave what I found to be a credible explanation that whilst he did not know whether he was given an opportunity to share the video and photo at hospital, "I don't know after the diagnosis of fracture that it was needed, it was then, transpired she was not okay and had a fracture". I can see the layperson's logic of an understanding that a video apparently showing she was okay when in fact she appears to have suffered a fracture would not be of assistance to diagnosis. It is of course important to perpetration but that was not the focus of the treating clinicians.

Paternal Grandmother

81. The Paternal Grandmother's initial account to police was (my emphasis):

[J58]

We were getting ready to take them out in the pram. They have got like a pram suits that they have to wear. I was placing this pram/body suite on to C1 and was pulling her arm though [through?] and she began crying...I was just trying to get this body suit on to her. I was just trying to pull the arm through. I was being careful, I can't believe what's happened. [sic]

82. In her police interview there was a different description (my emphasis):

[J35e]

I was getting C1's pram, so I put the legs in and the arm in, and then I wanted to get the last one in, and this was how it was, her arm was there, like this, but she wouldn't push it through like that. So, I went to help her and guide it through that arm. Then I just give this one a little push here just to - well, it's not even - it was just like a sort of guide your elbow like you would with me. I'm just, you know, I literally it was like that and I said, come on, C1, we've got to get this arm out [demonstrating out of the cuff end of the sleeve], and they, you know what they're like, they're really tight at the end. Come on, we'll get this through, and she was starting to whinge. So, I said, look, we'll push it through like that. And she, she cried out and immediately...

83. She was also asked about C1's presentation before the incident described and the Paternal Grandmother could not recollect anything unusual when she had removed C1's suit on arrival [J35m-J35n] which she confirmed in her statement ([C221/10], [C222/12] and [C222/14]).

84. In her subsequent witness statement she said:

[C223]

18. I then decided to try and help guide the whole arm through because it seemed to be stuck near the top of the sleeve - it was slightly bent at the elbow meaning that arm would not pass through the sleeve properly. I reached down to her with my left hand outside the pram suit and at the back of her right arm above the elbow and pulled her arm towards me, to straighten it and get it to pass down the sleeve. I started doing this with small pressure but when suddenly her arm was still not straightening I used more firm pressure. I could feel her arm felt like a tiny stick and immediately the resistance of the garment ended and C1's arm straightened. When I gave my initial account to the police on 28th December 2023, when the police officers visited my home, I explained that I was worried that I had twisted something - i.e. in a twisting motion as I pulled her arm across her body to straighten it. I know that, when being interviewed under caution by the police on 31st December 2023, I said that I "guided" her arm and gave it "a little push". I don't know why I used the word "push" when in fact I pulled the arm towards me, as I demonstrated in my police interview. I was standing over C1 with her lying on her back on the sofa so I would not be able to push her arm into the sleeve and would have had to use a pulling

motion to achieve this. In hindsight, I accept that I used more force than a “little push” and I do think now that I should have stopped, taken her arm out of the sleeve and started again...

19. I must have used too much force to get C1’s arm down the sleeve as she immediately cried out with a yell of pain; it was a different cry to her normal baby cry.

[C224]

22. While I awaited Paternal Grandfather’s return with CB, I cuddled C1 by putting my arms around her and holding her right arm tight against her body and thus keeping it immobile. C1 quietened quickly from the loud pain cry but this was replaced with a kind of quiet, light sobbing cry.

25. I dressed C1 again, including buttoning up the top part of the Babygro. I decided to leave C1’s right arm out of the sleeve of the pram suit but still inside it, zipped up, for her comfort and warmth. C1’s arm was thus held straight and tight against her body. While I did these things C1 did not make any sounds of discomfort or pain.

85. The Paternal Grandmother exhibits a video she says she took at 15.03 which shows C1 moving both her arms without apparent discomfort.

86. In oral evidence she said:

You’ve got to pull, try and get the arm to straighten, I couldn’t as arm up here so doing this [demonstrated pulling on her right arm]
--

As soon as I touched, pulling towards me I could feel <u>stick bone</u> and she immediately cried out and Paternal Grandfather said what the heck have you done

I said I’ve done something awful and her arm was swinging freely
--

87. I later asked if what she felt (the “stick bone”) could have been the pram suit seam which she denied. She described the suit as about half an inch thick and I asked if she agreed she would have had to have been applying quite a lot of pressure to feel the bone through the skin and the padding of the pram suit. She agreed. I find this a very important piece of evidence. Her recollection of feeling the bone is the sort of memory that does not require a reconstruction of what force or movement was undertaken, it appears to be a clear, distinct recollection and it does demonstrate significant force being applied. However, when cross-examined on behalf of the Guardian she denied she was gripping the arm, she was “applying pressure with finger tips” and whilst she accepted using more force than she normally would she was not agitated or in a hurry and her demonstration of the movement in court again seemed quite benign.

Others

88. When the Paternal Grandfather gave evidence he was initially quite defensive and antagonistic to the questions although I acknowledge that is consistent with anxiety about the process, fear of the possible outcome of proceedings and a natural feeling of antipathy towards the Local Authority who bring the application. During the course of his evidence that presentation diminished and to his credit as the evidence proceeded he became more reflective and thoughtful.

89. In his statement to the police he described C1 crying out, “a pain cry” [J35ay] and in his witness statement describes his back being turned at that point so he did not witness the cause [C214]. In his oral evidence the cry was described as one not heard from C1 before and probably not from anyone else. He said that Paternal Grandmother “told me that she was just trying to put C1’s arm into the pram suit sleeve, and it was a bit stuck so that it was difficult to get the arm into the sleeve, so she had to give it a bit of a tug” [C214/11] and “It looked as though C1’s arm had gone floppy” [C215/12].

90. There was a marked inconsistency in relation to the initial report of his comments to police and his evidence now (my emphasis):

[J58]

Paternal Grandmother was placing C1 down into the pram and was struggling with the arm and C1 began crying. The pram is tight and with the bodygrow it makes it tighter. The bodygrow suits are big and the kids are growing into them, this makes it harder when getting the children into the pram. You have to be careful and sort of guide the arm in.

91. In answer to Local Authority questions he said “I think the reference to pram should be reference to sleep pod” and the police had made a mistake. He observed there was a further mistake in that they referred to the outer garment as a “sleeping bag” which it was not. However, that correction came after he had read the police note and confirmed it was accurate; he then gave a different answer to the Paternal Grandmother’s questions saying the reference to “pram” should in fact have been to “pram suit” and he had earlier been “confused”. There was also the following exchange with counsel for the Guardian who referred the Paternal Grandfather to his statement at [C215/13] which records “CB asked what had happened and then placed C1 back on the snooze pod”:

Q You’ve now added to that that you heard CB ask what happened and Paternal Grandmother said just trying to put C1’s arm into pram suit, that’s not information in the witness statement, which is the accurate version, did you hear Paternal Grandmother respond to CB and did she give an explanation?

A She would have done

Q [Reminded of earlier warning not to give evidence of “would have done” but what was actually heard/seen] Only if you have a clear recollection, do you have a clear recollection of Paternal Grandmother explaining to CB

A No, I don’t have a recollection

92. That reversed the earlier evidence and potentially undermines his other evidence. I do not criticise him for this because he is attempting to recall something in forensic detail which happened many months ago, was traumatic and when experienced was not expected to form part of this investigation; it is nonetheless relevant to the view I take of his evidence more broadly.

93. He gave credible evidence of the Paternal Grandmother saying that she had to give the arm a “tug” after he had turned around, within 30 seconds of hearing the cry.

94. He was questioned about the possibility of some collusion between 24 December 2023 and his first encounter with the police later on 28 December 2023. In answer to the Local Authority’s questions he said he thought he had had no warning the police would attend that evening until they arrived. He was taken to apparent telephone communication between himself and the Father at [J637-J638] but could not remember the content of the calls, initially thinking it was about the need to care for the parents’ dog but then (when I said I had understood that having been discussed on 27 December 2023) saying he could not remember the content. It was suggested the calls must have included a discussion about the police possibly becoming involved because a subsequent text message from the Father said “Let me know if the police do come and speak” [J624]. When questioned on behalf of the Father he was asked, effectively, if the calls might have been primarily about C1’s injury and the discovery of what then were thought to be healing fractures to C2 and their possible cause and he tended to agree. It is really quite impossible for me to be satisfied on the balance of probabilities that the calls were about possible police involvement let alone some plan to mislead the police in answer to any questions they may later ask.

95. CB's evidence is that on 24 December 2023 she examined C1 at the Paternal Grandparents' request. She says she used to be a trained nurse, C1 was initially crying but settled and did not appear to be in any discomfort in her right arm when she "felt very gently down" it [C193/6-9]. Her oral evidence was that at no point in undressing C1 did she flinch or "guard" by which she explained she meant the muscles going hard to limit the sensation of pain; she explained a very careful process of undressing (legs first, then left arm to "give more options to move her" and "careful in undressing her not to cause her pain or discomfort" and wanting it "to be a calm experience to help her to become calm"); she said that she did not remember having to move the right arm to undress C1; when feeling down the arms she was "trying not to cause pain or discomfort"; over the course of her attendance C1 gradually calmed such that by the end "she wasn't distressed anymore, she was quite calm" and "wasn't upset or distressed during the process of re-dressing"; in particular the checking of the arms was demonstrated as a gentle stroking down and "not palpating or moving the wrist or bending her arm". Whilst at times, particularly towards the end of cross-examination, there was some (at times very extended) hesitancy I found CB to give evidence in a careful, thoughtful and apparently reliable manner. The only aspect of her evidence that caused me any concern was her recollection of when she was first told of the Paternal Grandmother's explanation of how an injury might have been caused.

96. SH, a nurse, visited the Paternal Grandparents on 24 December and the Paternal Grandmother explained a concern about C1 having cried and shown discomfort. SH moved C1's right arm and she did not seem to be showing any signs of discomfort and reassured the Paternal Grandparents and suggested they "keep a close eye on her" [C171/9]. SH was not available to attend court so the evidence has not been tested by cross-examination.

Overnight 24 December 2023-25 December 2023

Paternal Grandfather

97. When the Paternal Grandfather gave evidence he recollected attending the parents' home on the evening of 24 December 2023 where each of Mother, Father, him and his wife shared a bottle of Champagne but he said, and I accept as plausible given the modest quantity of alcohol, the parents "did not appear to be under the influence" and he "had no concerns about the Mother and Father then or in leaving the Children in their care".

Mother

98. The Mother continues the chronology in her first statement saying that the Father and her “had an argument that night” as he had drunk too much, he was belligerent and he grabbed her arm and then slept downstairs [C54/10]. She elaborated on that in the course of cross-examination describing the Father coming in at some point after the last feed and before 01.08 on 25 December 2023 offering to help. She said she told him she did not need help and to go away “you’ve had too much to drink”. She thought he was drunk because he was swaying and did not go away. She was lying on the bed and “reached down to pick up a muslin I’d dropped” when the “Father grabbed me by the right arm and held it up by the side of my head” whilst she was cradling C1 in her left arm.

99. She also described that being preceded by a discussion about the plans for Christmas Day which caused her to be frustrated and upset but she said she and the Father were both “calm”. There followed a series of messages she sent the Father:

[J699]

24 December 2023 22.58

Mother: If you think I want to spend the day hanging around this house with you getting drunk and being awful and them screaming all day it's a no from me. What is so wrong with being looked after, fed etc and having other people help us out all day?! Genuinely do not understand what your issue is.

[J107]

25 December 2023 01.08

Mother: PLEASE stop slamming the door and shouting. You are scaring the children and the neighbours will be hearing all of this.

[J104]

25 December 2023 10.29

Mother: You've said yourself you're not safe to look after the children at night

100. She was cross-examined about this by counsel for the Guardian, she was asked why the message was sent at all at that time, she felt she was being argumentative; she was asked if something had happened overnight that prompted the message and she denied it.

101. In her second statement the Mother explains:

[C244/13]

When Father has said that he was not safe to care for the children at night, it was because he was exhausted and overwhelmed and not because he thought he would have harmed them.

102. The Father said in his third statement:

[C254]

25. The text message saying I do not trust myself with the children has been taken out of context. It was a comment borne out of a genuine belief that Mother knows more about their different needs, their feeding times, changing times, and so on, and I was just not as good as she was. I think I was lacking in confidence about my ability to be as good a parent as I saw Mother being.

103. In oral evidence he also said it was a reference back to a message he sent:

[J134]

19 December 2023 02.41

I can't come up yet. I didn't sleep until after 1pm. It'll be dangerous of me to look after them with such little sleep xxxxx

104. The reference to 1pm, he said should be 1am which in context appears credible.

105. The messages continued:

[J103]

25 December 2023 10.33

Mother: You also get drunk and nasty way too frequently and call me a cunt at the drop of a hat. Who does that?

[J102]

25 December 2023 10.43

Mother: It is unfair and untrue to say that nobody is taking it into account. I have been walking on eggshells and dreading every night that drink as I know I'll end up paying.

106. The Mother's credibility in relation to the events of the evening of 24 December 2023 was tested in cross-examination. She originally said that when the Paternal Grandparents dropped the Children back in the afternoon they shared a bottle of Champagne (consistent with the Paternal Grandfather's evidence) and she later had 1-2 glasses of wine or sparkling wine but as to Father "I don't know, not tracking it, I believe he just drank from the Champagne bottle, he may have had another alcoholic drink, if he did it would have been beer". That contrasted with her later evidence that "I remember thinking he was drinking some alcohol throughout that evening" but she could not clearly remember what it was. When I asked her about that she said the latter explanation was correct. Given that she later thought he was drunk it is possible in fact he had drunk substantially more than she was prepared to concede initially.

107. In cross-examination her evidence was that in all the time from 23 to 25 December 2023 when the Children were in the care of the Father she did not hear anything unusual, did not hear either of them "screaming unusually".

108. She also said that in the aftermath of the purported injury by the Paternal Grandmother no family member examined C1, "they were always gentle, they knew about the incident and knew we were a bit concerned and they were taking extra care, more than normal" with minimal movement of the arm.

Father

109. Of the evening of 24 December 2023 generally the Father said:

[C44]

39. That evening Mother and I argued. In the course of that argument I was obnoxious to Mother and I grabbed her arm. I hugely regret that argument and my actions. I am embarrassed that I behaved in that way and I am remorseful.

40. Both of us had had a couple of drinks at home that evening and that contributed to my behaviour, but I take responsibility for what I did.

110. When cross-examined on behalf of the Guardian the Father accepted he took over care of the Children in the early hours, that would normally have been at 04.00 but he could not remember the time. He was asked about his "loss of control" in assaulting the Mother overnight. He agreed he did not "have proper control" of his movements, that his "decision making was completely impaired at that point" and that after the assault he "carried on with slamming doors and shouting". He had said he struggled to remember the handover of care at 04.00, he had frequently previously suffered "blackouts or memory loss from alcohol use" but denied his hazy recollection was because he was drunk.

Expert evidence

Radiological

111. Dr Oates' evidence on causation was (my emphasis):

[E44]

The oblique nature of the humerus fracture suggests that there has been a significant degree of rotational forces centred on the right humerus. However, while an infant sustaining a fracture is always a very concerning event (in the absence of clear history of accidental trauma), in my opinion a solitary non-displaced humerus fracture (as the type seen) is not suggestive of a highly aggressive act with overwhelming levels of force and may potentially occur accidentally in the appropriate context.

[E57]

However very importantly, this mechanism (i.e. twisting) would have to be in conjunction with a significant and inappropriate level of force...

112. Having watched the Paternal Grandmother's demonstration in police interview he said:

[E82]

I do not get the sense of a very significant level of force, but I believe the twisting/pulling mechanism of removing the arm may be compatible (if in conjunction with a significant force) to produce the fracture as seen.

[E120]

I should add, in this context, I believe the key issue to sustain the fracture is that somehow the lower arm was forcibly "separated" (placed under stress) from the upper arm region i.e. either side of the fracture site. In theory this may be by either a pulling or pushing action from the

standpoint of person responsible for the action but ultimately this resulted in a pulling action (from the perspective of the child) being imposed on the lower aspect of the arm relative to the upper arm.

...

However, I would like to reiterate, while a humerus fracture can never be considered an innocuous injury in an infant, and would likely require an inappropriate force, I do believe it is possible to occur in the scenario as described by Paternal Grandmother. I believe this is particularly the case as she seems to accept that she used rather more force than she has intended, all be it accidentally.

113. In the course of cross-examination he confirmed more than once that the mechanism described by the Paternal Grandmother was consistent, in particular the described mechanism given by her at [C223/18] would be concordant with the injury. He was clear that there had to be some twisting component but “there does not need to be a huge amount of that, just not completely perpendicular [to the bone]”. He was asked if the absence of overt reference to twisting in the first part of paragraph 18 could still be consistent and he said he agreed, “things happen quickly, the Paternal Grandmother did not get the spirit level out” whether twisting was perceived it was still required.

114. As to force he gave some very helpful oral evidence about his use of the phrase “would likely require an inappropriate force” to put this into context:

A It's difficult to quantitate force but the action of dressing a child, an infant is a common everyday event, we don't see oblique fractures very often so the forces must be outside the normal spectrum of handling of a child.

Fracture of humerus in a child is not routine so force must be outside the spectrum.

Q Would it be right to say all that is required with that mechanism is a force above that which you would typically see but not necessarily inappropriate

A ...it has to be outside normal handling, not a normal level of force

115. Dr Oates discounts the Father's explanation of a burping manoeuvre causing injury "unless it was coupled with a significant and inappropriate level of force" [E58].

116. In relation to pain response in cross-examination he said that if the arm was moved post injury it would likely trigger a pain response but it depended on the extent of movement. The fracture is shown as un-displaced in the radiograph of 27 December 2023 but minimally displaced the following day. Dr Oates' evidence was that it is unlikely it became displaced prior to 27 December and reset and a displaced fracture would be, in general terms, expected to be more painful than un-displaced.

117. In his evidence in chief he referenced the development of periosteal changes on the x-rays between 27 and 28 December 2023 and when cross-examined by the Mother he was asked about the relevance of that to dating and said:

I thought carefully about the dating of the injury and slightly uncomfortable so specific but reason I could be was the really clear distinction between the appearance between 27 and 28/12/23 when I could see periosteal changes and that's quite an unusual scenario for radiologist.

118. The reason it was unusual was because it was rarely demonstrated in sequential x-rays and I understood him to mean it assisted greatly in the dating of the injury. He was asked if a fracture after 24 December 2023 was highly unlikely and he again referred to the periosteal change demonstrated and said "If the fracture was on 25 December 2023...I cannot say with certainty that it didn't happen but I do believe it is unlikely, possibly very unlikely". I understand all advocates to agree a summary of his evidence in this respect was that the fracture "most likely pre-dates 25 December 2023".

Paediatric

119. In relation to mechanism Dr Robinson's oral evidence was that he accepted the compatibility of the fracture with Paternal Grandmother's description of her actions on 24 December 2023, he accepted the immediate aftermath was partly compatible with the fracture (the scream of C1 and the reported inability to use the arm) but did not accept the later examination by CB, SH and the Father was compatible [E119].

120. Dr Robinson's written evidence was (my emphasis):

[E101]

If on the evening of 24.12.23, C1 was moving her arm as normal with no pain this would negate against the actions of the grandmother having caused a humeral fracture .

The fact that on 25.12.23 she had no pain and was using her arm properly suggests that a fracture had not occurred up to this time.

If C1 was changed by parents on 24.12.23 after the pram-suit event with no crying and normal movement and was fine on 25.12.23 an injury is unlikely to have occurred up to that point in time.

[E102-E103]

Grandmother reported she gently guided the right arm from her elbow to get it into the sleeve. C1 cried out straight away, her right arm had gone floppy.

Those actions if done gently are unlikely to have caused a fracture. If done with force in a momentary loss of control, a fracture could have occurred. The aftermath of crying and not moving her arm are consistent with a fracture or soft tissue injury having occurred

A soft tissue injury (muscle/ligament) may be very painful with a transient loss of function.

Both SH and CB examining the infant soon after the event found no discomfort or loss of function.

That would be inconsistent with a fracture having occurred. On the balance of probabilities the grandmother's actions caused a painful but minor soft tissue injury but not a fracture.

[E104]

The grandmother's actions may have included a rotational element but her reported actions and rapid resolution of symptoms favours a soft tissue injury not a fracture.

[E105]

Opinion

... There is no account of an event that could have led to the humeral fracture.

[E123]

1 Paternal Grandmother describes actions that could potentially have led to a non-displaced oblique fracture of the right humerus. The initial scream then an inability to use the affected arm are consistent with this.

2 However it is highly unlikely that soon after the described event, examination (CB) was normal, C1 had stopped crying and was able to grip fingers. That would be inconsistent with a fracture having occurred. She would not have tolerated an examination as described.

3 Paternal Grandmother subsequently dressed C1 with no concerns and Father reported no pain or discomfort on his review. SH (nurse) found no pain or discomfort on examination with none observed at 5pm when C1 was dressed. Videos as above taken after the event show C1 content and moving her arms without or discomfort.

4 The above features are inconsistent with the aftermath of an arm fracture where pain on movement/examination and a reluctance to use the arm are expected (first report page 22).

If the accounts of grandparents are accepted, features described negate against the actions of the grandmother causing a fracture.

121. This evidence was explored at length in cross-examination and he summarised his evidence at the end of cross-examination on behalf of the Father saying there was a credible account of an accidental event that could have led to fracture but 3 examinations thereafter (CB, SH and Father) did not elicit the expected pain response but there was an expected pain response on examination on admission in that the admission note records (my emphasis):

[I529]

R arm not moving at fingers, wrist, elbow or shoulder. No visible deformity but crying ++ when moved.

122. In answer to a question from the Father about CB's report of examination to the police [J457] he agreed it is a "fair assessment" to say it was not a clinical examination, it was "a limited examination" and he agreed the need "to be cautious about placing too much weight on that" and later, when asked if the examination was "no more than gentle touching that would not elicit a pain response" he said "it depends how it is done" but "SH moved the arm and that would cause discomfort in the aftermath of a fracture" and "CB said she removed clothing and that would have caused severe distress" and "they were not nothing, the clothes removed and feeling around the arm [by Father] I would expect pain and distress in the aftermath of the fracture".

123. He also relied upon a video taken at 15.03 on 24 December 2023 [C238] which I have viewed and appears to show spontaneous movement of the right arm, including upper arm, without apparent distress. Although the movement was more limited than the left he said that was not unusual in infants. He said a majority of infants would hold the arm "limply by side"; a different response is not impossible but he had not seen it. He made reference to Farrell et al (Paediatrics January 2012) (see further below). In answer to a question from the Mother he said that a child could be comforted within a relatively short period of time post-fracture if the limb was kept still and that a carer might consider any crying there was as related to a pre-existing problem rather than attributing it to what turned out to have been a fracture such that "the pain response is not as accentuated as what I generally see in the aftermath of fractures".

124. He was referred to the triage note on attendance:

[I559]

ED Triage - Patient in Pain: No

125. He commented that the baby was likely being held at that point so that would not be inconsistent with a fracture (or suggestive therefore of an unusual pain response).

126. He did however acknowledge a possible unexpected lack of response on the Trauma and Orthopaedic team ward round on 28 December 2023 (my emphasis):

[I497]

Seen with mum and dad. C1 sitting on mum's lap, child not distressed. Parents state she is feeding normally.

O/E alert, not distressed, moving fingers of right hand, NV intact, able to extend wrist and fingers.

127. He agreed that was at a time when paracetamol had not been administered for 6 hours (see drugs chart [I621]) and the first record of the arm being immobilised was not until 29 December 2023 (see [441]). I asked him about whether he could rule out the fracture occurring as described by the Paternal Grandmother notwithstanding the apparent lack of pain response later that day and he accepted, quite properly, that “nothing is impossible” but he had never observed it. He earlier said “the aftermath is not always as we expect...it’s certainly the case infants differ in response to pain. If the radiological window is correct then the inability to use the arm is a sign of injury but the pain response is not as we would normally see”. In relation to Farrell he caveated his response by saying it was a study of mean age children of 3.7 years (plus or minus 1.6 years) not infants but 9% of carers did not report crying after an extremity fracture and 12% reported normal limb use post-fracture. He later provided the paper and the paragraph he was referring to appears to be:

However, our data demonstrate that a notable minority of children do not follow the pattern of expected behaviors. This finding is highlighted by the 9% of children who did not cry initially, 12% who continued normal use of their injured limb, and 15% who had no external sign of injury.

128. He concluded saying “I wouldn’t exclude it [fracture on 24 December 2023 and abnormal pain response and some movement evidence on video] but from clinical experience it would be highly unusual”.

129. On re-examination by the Guardian he was asked about fractures with the combination of lack of pain response and not showing lack of movement in the immediate aftermath (i.e. on 24 December 2023) yet lack of movement and expected pain response recorded a few days later (i.e. on admission 27 December 2023 [I529]) and said “that would not be clinically possible. Farrell has shown a small proportion who do not cry but no forensic information that tells us the child suddenly exhibited symptoms”.

Conclusions

130. There seem to be the following alternatives:

- a) The arm was fractured by Mother or Father before C1 was left at the Paternal Grandparents;
- b) The Paternal Grandmother caused the fracture on 24 December 2023;
- c) The Father inflicted the fracture in the early hours of 25 December 2023 whilst under the influence of alcohol, having assaulted the Mother, and he used the coincidence of his mother’s concern she had caused an injury to the same arm to hide his act;

- d) The Father inflicted the injury as above at (c) and he and his parents have colluded together to invent the purported injury to C1 by the Paternal Grandmother to hide this; or
- e) The injury was caused by the Mother or Father between 25 December 2023 and 27 December 2023.

131. I have no hesitation in ruling out injury prior to the purported incident with the Paternal Grandmother on 24 December 2023, i.e. scenario (a) above. That is consistent with the paediatric evidence, there is no evidence of a particularly difficult night on 23-24 December 2023, the Paternal Grandparents did not identify any abnormality prior to the incident with Paternal Grandmother and unless the Paternal Grandmother was colluding with one or both parents it would be a remarkable co-incidence for the Paternal Grandmother to think she had injured the right upper arm which had in fact already been fractured by one of the parents. I do bear in mind the possibility that the reason for C1's reported distress as the Paternal Grandmother was inserting her right arm into the pram suit was because it was exacerbating an earlier injury, this would mitigate the co-incidence but that would also be inconsistent with the reported and immediately prior presentation at the Paternal Grandparents. Further, it is unlikely the Father would have taken the Children to the Paternal Grandparents if one of the parents had known C1 had suffered a serious injury at their hands; it would open up the possibility of discovery. On balance this scenario is implausible.

132. Similarly I rule out scenario (d); it does not sit well with CB and SH having been invited to check over C1 during the day, this would have preceded the injury. The parties were not cross-examined on this scenario and in the course of evidence counsel for the Local Authority agreed there was insufficient evidence to put this case.

133. There are 2 particular difficulties with scenario (b). The first is the force that would have been required by the Paternal Grandmother's action because whilst the mechanism is plausible the demonstrated force as seen by the experts was not. Her evidence as to force was quite muddled. She told the police of a "little push" [J35e], in her statement she said it was a pull and used more force than a "little push" and that she could feel the arm as a tiny stick [C223], she told me of feeling a "stick bone" notwithstanding that the padding on the suit was thick but then told counsel for the Guardian the movement did not involve gripping and the demonstrated movement showed modest force. The second is what might be abnormal response to injury (a lack of crying and apparently normal movement). I will consider this in more detail below.

134. The difficulty with scenario (c) is that it relies on the site where the Paternal Grandmother thought she had injured C1 matching the actual site of injury later perpetrated by the Father. I note there is no greater likelihood of a parent fracturing a limb by pulling it if they lost control as compared to slapping, throwing, dropping or shaking which might cause a non-limb fracture, bruising or a head injury. I also note, but discount as being barely credible, the possibility of the Father deliberately choosing to inflict injury to the same place he perceived an earlier soft tissue injury had been suffered as a way of avoiding later detection: it would have required a degree of pre-meditation (as opposed to loss of control) and whilst there are messages suggestive of some malice towards the Children (“A banshee”, “you hate it / them”, “I hate them”) there is no prior evidence of that manifesting as a physical act against a child such as an unexplained bruise or witnessed act and the context of the messages is of a parent struggling to come to terms with sleep loss. I caution myself against attaching too much weight to short messages written in haste and saying such things is quite different from acting upon them.

135. Accordingly, the probability of soft tissue injury at one site and a fracture perpetrated at the identical site is low. On behalf of the Father I was also reminded of the lack of evidence, both in contemporaneous messaging between the parents and subsequently, of the Mother hearing anything abnormal when the Children were in the care of the Father although as I pointed out she may have been asleep and I found the suggestion that she would have been expected to wake up not one supported by the evidence.

136. The difficulty with scenario (e) is Dr Oates’ evidence which in particular relied on the unusual feature of seeing the development of periosteal changes which assisted in more accurate dating. That said, the evidence of the reported presentation on 25 December 2023 is suggestive on the paediatric evidence of no injury (no particular concerns reported on Christmas Day by JD [J466], Maternal Grandfather [J468] and Mother’s sister [J481]).

137. Returning to scenario (b) in more detail: As regards the apparently minimal force used by the Paternal Grandmother on demonstration I acknowledge the difficulty of demonstrating what happened both in police interview under caution (because of the jeopardy of the situation) and 8 months later in court (because of the passage of time). However, her reference to feeling the “stick bone” through the padded suit points the other way and I bear in mind the report of an unusual cry immediately afterwards. I also bear in mind neither expert is able to evidence the force necessary empirically (it would be unethical to test). Dr Oates said a “highly aggressive act with overwhelming force” [E44] is not required although “significant and inappropriate force” is [E77]. Of note Dr Robinson’s evidence was that on balance Paternal Grandmother’s actions caused “a painful but minor soft tissue injury” [E103]. I am reassured of the difficulty of interpreting demonstrations by the fact that I would struggle to see how the force the Paternal Grandmother demonstrated in court could even have caused a soft-tissue injury and of course she would at least sub-consciously not be wanting to injure her solicitor when she did demonstrate it. As Dr Oates said in his oral evidence in answer to a question from the Guardian’s counsel “it is really difficult to communicate levels of force” and he added “to interpret that”. I accept that.

138. I have considered if the Paternal Grandmother might be consciously or sub-consciously closing her mind to the possibility the parents, more particularly her son, might have later inflicted injury because of the horror of the consequences and instead she has focused on how it must have been her that caused the injury. I remind myself of the distress evidenced in the aftermath; she gave that evidence and she said that by 26 December 2023 she had “shut down”, Paternal Grandfather gave evidence of her distress [C214/11] as did CB [C193/4] and the Father. All that points to a genuinely shocking incident for the Paternal Grandmother on 24 December 2023 not an innocuous incident subsequently elevated in importance. That does not rule out the possibility of a nasty soft tissue injury caused by her but her having elevated that still further to “backfill” what must have happened. Counsel for the Guardian also pointed to the creep of evidence she gave about the force she used (from little push to pull to having used greater force). That would be consistent with Dr Robinson’s evidence:

[E111]

A minor soft tissue injury (muscle/ligament) can be acutely painful at the time with transient loss of function and discomfort...

139. I have considered Dr Robinson's evidence in relation to the apparently settled nature of C1 between 24 and 27 December 2023. This might be mitigated by the evidence of minimal handling of C1 by CB and the family generally prior to admission on 27 December 2023. More importantly, in relation to the video taken on the afternoon of 24 December 2023 I note Dr Robinson does not rule out fracture and an unusual response which might be consistent with the findings of Farrell which might also be consistent with the ward round note from the Trauma and Orthopaedic team on 29 December 2023 where C1 was reported to be "not distressed" [I497] yet the arm was not splinted in any way until later that day [I441]. However, Dr Robinson was clear that an intermittent expected response was not within his clinical or forensic experience (i.e. immediate cry and reduced movement then abnormal response then response on examination on 27 December 2023).

140. C1's response does require more detailed analysis and I bear in mind that more proximate evidence is generally more reliable before memory is re-written on each re-telling and I particularly bear in mind there may be a tendency on the part of the parents to paint a picture of a well-baby to ameliorate concern they failed to take action; the Father was explicit on this, it was the reason he lied about symptoms in his first statement.

141. On 4 January 2024 Paternal Grandfather reported an initial unusual cry to the police [J35ay]. In police interview on 31 December 2023 the Paternal Grandmother reported crying straight away, a sudden cry, with the arm going limp [J35q]. That is consistent with Dr Robinson's evidence that:

[E105]

An infant will scream out often in a manner not heard previously by a carer.

The carer may comment on the unusual cry.

142. At hospital on 27 December 2023 it was recorded, presumably from what the parents told the hospital, that “Since Christmas eve parents have noticed C1's R arm just hangs by her side” [1529].

143. On 29 December 2023 in interview the Mother told the police she was “aware that the arm was still floppy” and on 26 December 2023 was aware the arm was still “a bit floppy” and she was not presenting as “being in huge amounts of pain” implicitly therefore in some pain [J0f]. The Father told the police in his interview on 28 December 2023 “it was potentially, a bit, erm, floppy” [J34f] and “she probably was a little bit more, I don't know, restless than normal” [J34k]. I set this evidence out in more detail below under Allegation 5.

144. It would follow that (absent the video at 15.03) there may not in fact have been an abnormal response to pain at all, rather the parents have sought to minimise it; the Father concedes this. The video is of course just part of the overall evidential canvas.

145. From all the evidence I conclude that if the Paternal Grandmother did fracture C1's arm accidentally, there is no evidence of surrounding circumstances that would support a finding she did it in anger or in a state of loss of control.

146. I also conclude, agreeing with the Guardian, there is a paucity of evidence of the Mother losing control and inflicting the injury at any stage. Whilst there is evidence of lack of sleep there is no other evidence that would support such a finding.

147. I am left with scenario (b) (Paternal Grandmother on 24 December 2023), scenario (c) (Father on the night of 24-25 December 2023) and scenario (e) but limited to Father (Father between 25 and 27 December 2023). The only evidence of an incident that could have caused a fracture is in relation to scenario (b). The evidence that tends to undermine that first, inadequate force, is explicable having regard to the limitations of demonstration and second, unusual response, is explicable on the basis of C1 being an outlier or fitting the normal profile but with minimised reporting. Whilst scenario (c) and (e) are possible they present the marked difficulty of the injury site being the same as on 24 December 2023 and I find it implausible the Father would have the presence of mind to inflict injury at the same site knowing he could later try to blame his mother.

148. Accordingly, I am drawn to conclude the Local Authority, upon whom the burden rests at all times, have not proved C1's carers non-accidentally inflicted a fracture on C1 and rather the Paternal Grandmother caused the fracture accidentally.

1: A non-observer would see C1 was distressed and recognise a reluctance to use her limb

149. On admission the parents are reported to have told the hospital that “Since Christmas eve parents have noticed C1's R arm just hangs by her side. Today she has seemed uncomfortable/unsettled” [1529]. Dr Robinson's evidence was (my emphasis):

[E105]

An infant will scream out often in a manner not heard previously by a carer.

The carer may comment on the unusual cry.

A crack or 'give' may be heard or felt as the bone fractures or joint dislocates.

Crying and distress may continue for some minutes

Longer if the fracture is displaced when movement causes agonising pain.

The infant will be reluctant to use the limb which is held limply.

(pseudoparalysis).

If comforted and kept still with no pressure placed on the fracture, pain may be controlled whilst any movement of the affected limb exacerbates discomfort for at least 72 hours depending on severity.

During this period the infant will be reluctant to use the limb as above.

Symptoms may be reduced if pain relief is given.

A perpetrator or observer will be aware that excessive force had been applied and be on the 'look out' for injury. An infant's distress and reluctance to use the limb in the aftermath will also be appreciated. A non-observer will see the infant/child distressed and most likely recognise a reluctance to use the limb.

150. His oral evidence was that a non-observing carer would be “likely to see increased fractiousness” in the child but would not know there had been a fracture and there was “no obvious swelling or bruising”.

151. Although the Mother’s response to the allegation was that she “did not notice that C1 was more unsettled/distressed” and the Father denies the allegation (the Paternal Grandmother accepts it) that is not really entirely consistent with the evidence which I will address further below in relation to allegation 5. I am satisfied this allegation is proved on the evidence of Dr Robinson and the parents and Paternal Grandparents themselves.

5: Mother, Father and/or Paternal Grandmother failed promptly to seek medical attention for C1 from the point that the injury was sustained

152. The Father accepts this allegation. It is denied by the Mother and Paternal Grandmother.

153. The Mother told the police (my emphasis):

[J0f]

Okay, so that was Christmas Eve. Erm, as, you know, as, as it was Christmas, as the day went on Christmas Day and Boxing Day, we were monitoring it very closely, and C1 wasn't in any - she was in no more - her, her behaviour was exactly the same. You know, she was neither more distressed or less distressed. She didn't seem to be in any pain. We changed her baby grows several - how-, however many times a day - two or three times a day - as usual. We were doing it a bit more gently I suppose, 'cause we were aware that the arm was still floppy, but because she wasn't, erm, presenting as being in huge amounts of pain, erm, we just, you know, rightly or wrongly - wrongly probably now - but rightly or wrongly, we chose to just to keep an eye on it, and then Boxing Day, because the arm was still floppy, erm, or a bit floppy, erm, even though she wasn't in pain, obviously, we weren't going to ignore it, so that's, so that's when we decided, right, tomorrow morning we need to, we need to head to the hospital to get it looked at.

[J0k]

You know, yes, the arm did look a bit floppy. Perhaps it was naïve of all of us not to have done anything more, but because she seemed absolutely fine, erm, you know, pain-wise, discomfort-wise, distress-wise, erm, we just decided to just to, yeah, just to keep a close eye on her.

154. I note that this account to police differs from her first witness statement (about a month later) in which says she first noticed C1 not moving her arm “late on the afternoon of the 26th December 2023” [C52/4].

155. She continued in her statement that:

[C52]

5. C1 had been checked on the same day by Father’s parents’ neighbour, CB, who I believe was a district nurse and worked as a Matron/ health visitor. They were told to keep an eye on it. On the 24th of December 2023, Father’s brother’s friend, who is an orthopaedic nurse had come over to drop some Christmas presents, at Father’s parents’, sent by Father’s brother as she was in [] visiting family. The friend also checked C1 and assured Father’s parents that she could not see any injury and to not worry about it. She also said that in her opinion she would not take C1 to A and E.

6. I accept that I did not take C1 to the hospital or the doctors on the 24 of December 2024 as I was reassured by the information passed along. The neighbour and the family friend were both medical professionals and I was following their advice. I had checked C1 when she had come back to us and did not notice any injury to her.

156. In her oral evidence she said that “she cried a lot during that period and it’s possible that I didn’t notice that it was specifically related to the arm” but by 26 December 2023 she had “confirmed to myself there was something not quite right having had a subconscious niggling concern something was not quite right”.

157. The Father said:

[C44/38]

That evening [24 December 2023] C1 was using her arm and moving it as normal, she did not appear to be in pain, and was as happy as she is normally.

158. In his oral evidence he said she was actually “favouring left over right arm” which was missing from his statement.

159. In his police interview he said (my emphasis):

[J34f]

So, er, we, we went to my parents-in-law for Christmas Day, and, erm, she was okay. I mean, again, it was potentially a little bit, a bit, erm, floppy.

[J34k]

..so I think that - I'm just trying to think where we were on the 24th. Erm, yeah, that evening, erm, she probably was a little bit more, I don't know, restless than normal, erm, so, you know, I had a feeling that, you know, she's probably a little bit - she was probably a little bit more upset or something, you know, so may-. But I think it might have been the trauma from the thing, or something like that, erm, but again, got to the 25th, got to Christmas Day, and she was fine...

...

... but I, I just felt maybe the, I just felt maybe she - the arm didn't look as, I don't know, strong as the left arm.

160. That differs from his first witness statement:

[C45/48]

At no point [on 25 December 2023] did I think that C1 was in pain or not using her arm properly.

161. He continued in his statement:

[C46/50]

At about 4pm [on 26 December 2023] I was looking at C1 and I thought that she was using her arm a bit less freely.

162. He corrected that in his third statement:

[C251]

5. My description of C1's presentation from 24-27 December was not accurate. She was not fine. She was clearly favouring her left arm and she was, again, not sleeping well. At no time

did it even cross my mind that her arm might be fractured. I thought it was a minor injury that would resolve. Clearly, I was wrong about that, and I accept that. I accept I should have sought medical attention for her on 24 December.

...

7. I would repeat, however, that I was an inexperienced parent who was severely sleep-deprived. My experience of parenting C1 was that she was usually hard to settle, especially at night; she was experiencing reflux for which she was receiving Gaviscon and, sometimes, Calpol, as advised by the GP, specifically for her reflux. In the days between 24-27 December she continued to be unsettled, sometimes in pain and distressed, but I assumed that was a continuation of her reflux symptoms...

163. It is clear from the record of presentation at hospital and police interviews that there was still evidence of an injury, the floppy arm, on Christmas Day and Boxing Day.

164. The Paternal Grandmother's evidence is:

[C257]

6. Whilst I do accept that I did not take C1 to the hospital on 24th December 2023, Paternal Grandfather and I did seek advice from two qualified medical professionals on the day - one of which, CB, within a matter of moments after it happened. I trusted their advice that C1 appeared to be okay and also that the hospitals were really busy so it would be best not to go. I did, however, take on board what they both said about keeping a close eye on C1 and seeking medical attention if needs be. Paternal Grandfather and I passed that advice on to Father and Mother.

165. She also exhibits a video taken at 15.03, as noted above, which appears to show normal movement.

166. CB's written evidence was that "I did say if she did appear to be in pain or discomfort then they should at that time seek medical attention" [C193/11] and she confirmed that in oral evidence. I am not sure that significantly undermines the parents/Paternal Grandmother's case as there is no evidence of pain and discomfort as distinct from floppiness or lack of use although I do accept both may be the result of pain or discomfort, but it might be said to be a counsel of perfection to link floppiness to pain in the absence of crying.

167. The Paternal Grandfather's evidence, in support of the assertion hospitals were busy, told me that he receives twice daily news updates by email from the local paper which included "don't go to the [local] Hospital...an article that said keep away.

168. Dr Robinson's evidence is:

[E112]

14 [At] 2 months, reluctance to use a limb should have prompted medical care. Failure to have done so is considered neglectful (medical neglect).

169. My conclusion is that some unusual behaviour was noted on 24 December 2023, the parents and Paternal Grandmother were re-assured by CB in particular that day and coupled with concern about attendance at the local Accident and Emergency Department I am not satisfied the Local Authority have proved the failure to seek further medical advice that day was unreasonable. However, stepping back this was a baby who had plainly suffered some injury at the hands of the Paternal Grandmother which caused her such concern as to call a neighbour and symptoms (at the very least floppiness) continued to be present on the most contemporaneous documentary evidence on 25 and 26 December 2023 yet formal medical attention was not sought until 12.49 on 27 December 2023 [I514]. There were perhaps three options open to the parents: attend at hospital, make a GP appointment or call NHS 111. The first and second options may have been difficult, perhaps as regards a GP appointment impossible but the last was always an available option. When assessing the extent of concern I am entitled to take into account the Father's admission: he was in fact so concerned that in retrospect he accepts threshold is met by reason of the failure to seek medical attention. That, coupled with what I have said above and Dr Robinson's evidence, leads me to conclude the parents unreasonably failed to seek medical attention from 25 to 27 December 2023; having been re-assured on 24 December 2023 they could not reasonably continue to rely on that when there was no apparent improvement.

170. I do not make a finding against the Paternal Grandmother. She cannot reasonably be said to bear a responsibility for seeking medical advice save in the immediate aftermath of the injury and whilst C1 was in her care at which point she had re-assurance from CB.

171. In closing submissions the Father accepted threshold was met on the basis of a failure promptly to seek medical attention for C1. As noted above I have found the parents behaved unreasonably in failing to seek advice from 25 to 27 December 2023. I have to ask if that failure caused or was likely to have caused C1 to suffer significant harm. The harm that might arise is pain. The likelihood of that is high: even at its lowest on the police interview evidence there was ongoing floppiness, an indication of a reluctance to use the arm likely arising from pain or discomfort. This was an infant demonstrating reduced movement in a fractured arm which evidences significant harm.

6: The parents administered Calpol to C1 in the period after they were aware that she had hurt her arm

172. This is denied by the Mother (she said in cross-examination she was “not-confident” it was used but she was not aware of it”) but it is admitted by the Father in his response to the allegations ([A183]) but when he gave oral evidence he said he did not remember giving Calpol between 20 and 27 December 2023 and after being taken to the GP record at [I228] which does not indicate the GP advised Calpol for reflux he said “I don’t remember giving Calpol” and the response to allegations was “an oversight”.

173. There is a screenshot of messages taken at 01.22 on 25 December 2023 found on Mother’s phone:

[J489]

N/A – Did [] have Calpol?

09:22 – Yep, at 6am.

174. The Mother and Father say this was a message exchange on 20 December 2023 following an injection on 19 December.

175. The Father says the administration of Calpol on 24 December was “because of her reflux, not the injury” [A183] although his oral evidence about the administration of Calpol thereafter was equivocal.

176. I cannot see how, if there was administration of Calpol after 24 December 2023 that would meet threshold. Even on a cursory consideration the administration of Calpol was not contrary to the manufacturer’s recommendation.

7: The Father would administer Calpol beyond the recommended dosage as a response to the Children “being in pain and crying lots”

177. The Mother’s response is that she “advised father against it”. The Father denies the allegation.

178. The Local Authority rely upon messages between the parents on 20 December 2023:

[J125-8]

Mother: Did they have Calpol.

Father: Yep, at 6am

Mother: I said seven at the very earliest

Father: I know, but she was in pain and crying lots

Mother: So you overdose an [] week old baby because you’re stressed

Mother: It's every four to six hours FOR A REASON

Mother: And [] had some at 0315

...

Mother: You DO NOT know better than the people who make it, prescribe it and the NHS. You may hate C1 with all your being but you have no right to meddle with their health

Mother: DO NOT GIVE [] ANY MORE

Father: I didn't meddle with their health. I thought I was doing the right thing.

Mother: You just wanted to shut [] up

...

Father: Hmm, I didn't, but at 4am, forgive me if I didn't hear what you said about calpol being administered by you at 3.15

179. In oral evidence Dr Robinson agreed that such administration as is demonstrated here (1 hour short of the recommended time) "would not put the child at risk of significant harm".

180. I accept the allegation but limited to 20 December 2023 based on this evidence; there is no other evidence of excess medication. I accept Dr Robinson's evidence that there was no risk of significant harm.

9: The Father's drinking is excessive and problematic

181. Both parents deny the Mother walks on eggshells and dreads every night that the Father drinks because she knows that she will "end up paying" and both deny the Father's drinking is excessive and problematic.

182. The Local Authority rely upon the following messages:

[J699]

24 December 2023 22.58

Mother: If you think I want to spend the day hanging around this house with you getting drunk and being awful and them screaming all day it's a no from me. What is so wrong with being looked after, fed etc and having other people help us out all day?! Genuinely do not understand what your issue is.

[J103]

25 December 2023 10.33

Mother: You also get drunk and nasty way too frequently and call me a cunt at the drop of a hat. Who does that?

[J102]

25 December 2023 10.43

Mother: It is unfair and untrue to say that nobody is taking it into account. I have been walking on eggshells and dreading every night that drink as I know I'll end up paying.

183. It is also relevant that the Mother described the Father as drunk when he assaulted her on the night of 24-25 December 2023.

184. The parents' case unravelled in the course of cross-examination. The Father's evidence was that from mid-December to Christmas Day he was drinking "a few beers a night and at the weekend 6-8 cans" and was drunk "4 nights out of 7, every other night". The Mother's evidence was that he was abusive when he had too much to drink, she agreed his behaviour became "obnoxious, aggressive or abusive". From mid-December to Christmas day his episodes of drunkenness were "more frequent than before mid-December".

185. When cross-examined on behalf of the Local Authority the Father said "for the large part" he was in control when drunk, the implication being not always, later there was this exchange:

Q You weren't very drunk at the point you went upstairs and assaulted her

A I wasn't paralytic, I was unsteady on my feet and argumentative

Q And you were in control were you

A Yes

Q So could you explain your controlled decision making and deciding to assault

Mother

A I didn't answer correctly, I was out of control

186. On this evidence I find the Father's drinking was problematic; his admission of being out of control and argumentative when drunk on the night of 24 December 2023 supports the Mother's evidence that his drunkenness tended to result in obnoxious, aggressive or abusive behaviour.

187. I have some difficulty finding his drinking was excessive as I do not really know what is being alleged. His hair strand test reported on 15 March 2024 covering the period of "a number of months...typically more than 6 months" [E73] would probably have covered the period in the lead up to Christmas 2023 and was reported as not demonstrating excessive consumption [E72].

10: The Mother felt the need to apologise to the Father for the "noise" made by C1

188. The Local Authority rely upon the following message:

[J11]

22 December 2023 23.23

She's had another burp, a cuddle, is on her front and is hysterical. Sure she'll calm down but sorry about the noise atm [] 😞 xxxx

189. In her second statement she said:

[C244]

I did not apologise to Father because of the noise made by C1 because I was worried about his reaction or because I thought that C1 needed to be apologised for. It was more because of the impact of the lack of sleep was having on us and even more so on Father, due to him having to work.

190. There is really no reason to doubt this explanation. I accept the message was sent but do not accept it is evidence of the parents struggling to control their emotions, frustrations and behaviour in the context of parenting as alleged.

11: The Children have been scared by the Father slamming doors and shouting

191. The Local Authority rely on the following messages:

[J124]

20 December 2023 10.10

Your constant anger, aggression, shouting, swearing and general hate is really exhausting

[J119]

20 December 2023 22.59

Mother: Please stop slamming doors. You're embarrassing yourself.

[J116]

21 December 2023 22.51

Mother: Why are you shouting so loudly when I am just following basic advice? Why do you (yet again) think you know better than the experts?

[J107]

25 December 2023 01.08

Mother: PLEASE stop slamming the door and shouting. You are scaring the children and the neighbours will be hearing all of this.

[J101]

25 December 2023 10.44

Mother: You said you were only going for two hours today so I'm sure she'll survive. She'll probably enjoy a break from you yelling at the top of your voice and slamming the doors so hard you wake the neighbours up.

192. In her second statement the Mother says “I suspected that the noise of a door banging would have made the children scared, which is why I asked Father to stop doing it the few times he did.” [C245/14].

193. My conclusion, based on the contemporaneous message at 01.08 on 25 December 2023, is that the Children were in fact scared by the Father slamming the door and shouting on at least once occasion.

8: The domestic abuse is evidence of a domestically abusive relationship and the Children have been exposed to this

194. The parents accept the majority of the allegations relied upon with the exception of allegations 9-11 above on which I have made findings that the Father’s drinking was problematic and the Children were scared by the noise of a slamming door and shouting on 25 December 2023 and the further exception that the Father did not accept the Mother had asked him to be gentle when handling the Children on several occasions as opposed to once. It is not proportionate to make a finding either way on this last point and I proceed on the basis it was once only.

195. The Father does not accept ongoing abuse but does accept the Children were exposed to it on 24 December 2023.

196. In summary, what is accepted is that in May 2022 the Father bit the Mother when they were on holiday when she was pregnant; and again whilst they were on another holiday he grabbed her wrist to prevent her from leaving the room when he was snoring and on 24-25 December 2023 when she was feeding C1 he also grabbed her; and his drinking resulted in a tendency to be obnoxious, aggressive or abusive; and he was actually abusive after getting drunk on the evening of 24 December 2023. In cross-examination the Mother said that she considers she was a victim of domestic abuse from the Father, it was physical and verbal and it escalated after the birth of the Children. She sent a message to him consistent with that evidence (my emphasis):

[J102]

25 December 2023 10.41

I have taken it into account SO MANY times and bitten my tongue when you have been awful to me. I have actually never been so scared of you since I have these past two months. The anger, aggression, hate, name calling etc has been really, really scary, mean and unjustified.

197. When cross-examined on behalf of the Local Authority the Mother accepted at least a risk of harm if not a risk of significant harm (see below).

198. Given the admissions and my findings there is clear evidence of domestic abuse by the Father. The Local Authority have satisfied me this put the Children at risk of significant harm, in particular relying upon the assault of the Mother on 24-25 December 2023 whilst feeding C1.

199. For the avoidance of doubt there is no evidence of abuse by the Mother to the Father and I do not make that finding.

12: The Mother has failed to protect the Children

200. The Local Authority allege a failure to protect “from the Father’s abusive and uncontrolled behaviours”, in particular relying on the message at 01.29 on 25 December 2023 following the Father’s assault of the Mother, failure to report abuse and failure to support a police investigation.

201. In her second statement the Mother says:

[C243/10]

I did not report matters to the police and I accept that I did not co-operate with a police investigation. I had given him a warning about his behaviour, and I believed I could manage it. I recognise that his behaviour was unacceptable.

[C245/15]

I do not accept that I failed to protect the children. I had made clear to Father that his behaviour was not acceptable and that I would call the police if he behaved like this again. There has not been any repeat of any incidents since December 2023 and I feel very safe at home.

202. In her oral evidence she said her focus was on the Children at the time and “I felt that I needed to be able to speak to the Father to get to the bottom of what happened and I didn’t feel that not co-operating was harming the children.”

203. She was particularly asked about the admitted assault on the night of 24-25 December 2023. She said she did not feel scared after the Father left the room even though she “could hear some clattering around going on, the slamming of the door and shouting” and the assault “felt like the crescendo of the argument was over”.

204. She agreed in cross-examination that if she had allowed the Father to care for the Children in the early morning of 25 December 2023 (i.e. after the assault and evidence of the Father having been drinking) then “potentially” they would have been at risk of harm but she could not remember when the handover was. She did say she “didn’t feel it was inappropriate to leave them with him...if I’d felt it was stupid I wouldn’t have done so”.

205. There were also these exchanges:

Q 24/12/23 you knew he struggled with caring for the Children A At times he could become frustrated with it Q Overwhelmed, angry A At times Q At times expressing hatred towards them A He did Q You repeated his phrase in a message “I hate this, I hate them” [J125] A Yes
Q And then overnight 25-26/12/23 you give him care of the Cs A Most likely at some point throughout the night Q J706-J707 where at 22.56 you are saying just need to not do a nappy change before he comes up so he was going to come up and assume care of the Children in the night A Yes Q Next morning you message him... Q Because he’d been left on his own for hours at that time A Some hours, yes Q A man who lost control to the point when he assaults you when feeding a [] week old baby A I wasn’t concerned at that stage, no
...
Q You’ve also seen him being rough with the Children and shouting

A When Father shouted at C2 I as soon as he said it I expressed to him how out of order that was and how it wasn't C2's fault he was crying and he's just a baby but I didn't have to intervene, I was berating him for what he'd done but not intervening

Q He was drinking and that was making matters worse

A At times, yes

Q In all of that you're trying your best to look after 2 young children, must have been difficult

A Yes

Q At times you've said never had a concern about him being a risk to Cs but this was a man sleep deprived, often drunk and physically and verbally aggressive and controlling you

A At times yes but that was a snapshot, not a whole picture of the 2 months

Q He's stopping you from doing things, he grabs you

A Yes

Q If Children are caught up in that, a domestic abuse incident between the two of you they'd have been at risk of significant harm

A They'd have been at risk of harm, yes

206. Taken on its own it is difficult to see the incident on the night of 24-25 December 2023 as justifying immediate action, the Mother gave a warning she would call the police if it was repeated. However, when taken with the build up to this incident it becomes more borderline. I bear in mind it was Christmas, there were additional pressures (seeing family, the Father being around more because he was not working) and I also take into account the enormous pressure both the Mother and Father were under in dealing with two very young children. It might have been that the Mother would have followed through on the warning had there been a repeat of the Father's actions after Christmas but these proceedings intervened. I find that the Father has minimised his behaviour (on his admission) and it is apparent the Mother has sought to do so too, the full picture only really emerging in the cross-examination of both parents. That will be a matter for a subsequent welfare analysis and reminding myself of *G-L-T* I must be careful not to elevate that to a threshold finding.

207. Since I have found the fracture not to have been caused by the Father it cannot be said that was the significant harm the Mother should have protected the Children from. There is no evidence at all of harm to the Children from domestic abuse. There were three incidents of physical violence spaced apart (one at which C1 was present), I do not downplay their significance, but I cannot be satisfied that together with the Father's drunkenness this was sufficient to alert the Mother to a risk of significant harm to the Children such that she should have acted differently and, perhaps, separated from the Father or reported his behaviour to the police.

13: Threshold

208. I have found threshold is met in relation to the parents' failure to seek medical attention from 25 to 27 December 2023.

209. I have found threshold is met in relation to the Father's domestic abuse of the Mother.

210. The Local Authority invited me to take account of the Father's admitted dishonesty in relation to C1's presentation as set out in his first statement [C43] as going to threshold. I am satisfied this meets the threshold test. Threshold must be met as at the date of protective measures, which in this case was 29 December 2023 when the parents signed an agreement for the Children to be accommodated pursuant to section 20 Children Act 1989, but evidence after the event is relevant to its assessment at that time. The Father has demonstrated a willingness not to tell the truth about a serious matter (C1's symptoms) in order to protect himself. That is likely to impact the care given to the Children not being that which it would be reasonable to expect giving rise to a risk of significant harm because the Children's welfare cannot be properly or fully assessed by professionals.

Conclusion

211. I have set out a summary of my findings at the outset of this judgment and they form part of the judgment.