Neutral Citation Number: [2020] EWFC 40

Case No: LV19C02014

IN THE FAMILY COURT

Sitting Remotely

Date: 02/06/2020

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

A Local Authority	**Applicant**
- and -	
W	**First Respondent**
-and-	
R	**Second Respondent**
-and-	
S and L (By their Children's Guardian)	**Third and Fourth Respondents**

Mr Shaun Spencer (instructed by **Ms Elizabeth Emmington**) for the **Applicant**
Mr Nicholas Stonor QC and Kirsty Robinson (instructed by **Butcher & Barlow LLP**) for the **First Respondent**
Mr Damian Garido QC and Mark Steward (instructed by Susan Howarth Solicitors) for the **Second Respondent**
Ms Lisa Edmunds (instructed by BDH Solicitors) for the **Third and Fourth Respondents**

Hearing dates: 23 April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 2 June 2020.

THE HONOURABLE MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In these public law proceedings under Part IV of the Children Act 1989 the following issues fall for determination at this stage of the proceedings:

    i) Does the court have power at the case management stage to summarily dismiss disputed findings sought by a local authority against a parent in proceedings under Part IV of the Children Act 1989 independent of its case management powers under the Family Procedure Rules 2010?

    ii) If the court does have such a power, should it be exercised in the circumstances of this case?

    iii) If the court does not have such a power, should the court in any event decide and direct, pursuant to its case management powers under the FPR 2010, that it is not necessary for certain of the disputed findings sought by the local authority against the parents in these proceedings to be adjudicated by the court?

2. The applicant in the substantive proceedings under Part IV of the Children Act 1989 is the local authority, represented by Mr Shaun Spencer of counsel. The first respondent mother is W, represented by Mr Nicholas Stonor, Queen's Counsel and Miss Kirsty Robinson of counsel. The second respondent father is R, represented by Mr Damian Garrido, Queen's Counsel and Mr Mark Steward of counsel. The children who are the subject of these proceedings are W, born in 2019 and now one year old and L, born in 2018 and now two years old. The children are represented by Ms Lisa Edmunds of counsel through their Children's Guardian, Ms Anglim.

3. The proceedings have their genesis in a head injury sustained by S in June 2019. The local authority has wavered in respect of whether it seeks a finding in these proceedings regarding the causation of S's head injury, initially deciding that, in light of the conclusions set out in the reports from Professor David and Dr Stoodley, there was no real evidential basis upon which an allegation that S sustained an inflicted injury could be maintained. The local authority has now changed its position and has indicated definitively that it seeks a finding that the cause of S's head injury is either intentional suffocation by one or other of the parents, or was caused by some undisclosed event or circumstance known to the parents, for example co-sleeping/overlay but which is being withheld by them. These allegations are firmly disputed by the parents.

4. Within this context, the father now argues that the court has power, independent of the powers set out in the FPR 2010 and exercisable at this stage of the proceedings, to summarily dismiss disputed findings and that that power should be exercised in this case on the basis that the court can conclude now that the evidence filed cannot support those findings. Further, the father and mother argue that, in any event, it is not necessary or proportionate for there to be a fact finding hearing in relation to the causation head injury sustained by S. On 13 March 2020 I listed these issues for determination by way of a preliminary hearing. Having heard submissions remotely over a video link I reserved judgment and now set out my decision.

BACKGROUND

5. The family were known to the local authority prior to the commencement of these proceedings. Difficulties within the family are said to have included domestic violence, with the father alleged by the mother to have been controlling and abusive, inadequate housing provision, inconsistent engagement with professionals supporting the family, budgeting issues and lack of food. As a result of these concerns the children were made subject of a Child in Need plan.

6. At 0545hrs on 2 June 2019 S was admitted by ambulance to the Emergency Department at X Hospital. The parents provided an account stating that S was observed to have been awake in his Moses basket at 0010hrs and that when the parents next attended to L, who slept with her parents on an air bed, at approximately 0500hrs S was seen to be floppy and unresponsive and apparently not breathing. S was blue and his eyes were rolled back. An ambulance was called and paramedics observed S to be pale, floppy and grunting with ineffective breathing. S was stabilised in the Emergency Department and admitted to a High Dependency Cubicle.

7. Examination of S's body revealed no evidence of trauma and there were no bruises or other visible injuries. On 6 June 2019 S underwent an ophthalmology review, an EEG and an MRI scan. The ophthalmology review revealed no evidence of retinal haemorrhage. The EEG was reported as abnormal, with evidence of diffuse and cortical damage to S's brain. The MRI was reported as being grossly abnormal. The consultant paediatric neurologist reporting on the MRI considered that the appearance was consistent with a metabolic or mitochondrial disorder, that the features were not those classical of non-accidental injury but that non-accidental injury could not be ruled out as a possible cause of the features seen on the MRI. A CT scan showed no evidence of subdural haemorrhage. The results were discussed with the parents but the possibility of non-accidental injury was not raised with them.

8. On 7 June 2019, five days after admission, the parents asked to speak to a doctor and asserted to that doctor that in the early hours of the morning of 1 June 2019 S's Moses basket had been knocked over and S had fallen to the floor. The alleged incident was said by the parents to have involved a drunken friend of the father's kicking over S's Moses basket. The hospital contends that this was the first time the parents made mention of this alleged incident although both parents stated in their police interviews that they mentioned the alleged incident to the doctor when S was received at the Emergency Department (as Professor David points out, the notes of the Emergency Department doctors are very brief). Both parents accept that they failed to seek medical attention for S after the alleged incident with the Moses basket. On 7 June 2019 the parents gave consent for L to be accommodated pursuant to s 20 of the Children Act 1989. S was discharged from hospital on 17 June 2019 and he too was placed with L in foster care with his parents' consent.

9. On 13 June 2019 a report of the skeletal survey carried out on S identified no fractures, as did a repeat skeletal survey carried out on 21 June 2019. Reports were provided by S's treating clinicians dated 10 June 2029, 1 July 2019, 10 July 2019 and 27 August 2019. The provisional report dated 10 June 2019 indicated that S's treating clinicians were investigating the possibility of an underlying medical disorder but were unable at that stage to rule out non-accidental injury as a cause of the features seen on the MRI scan and in the EEG. They however, discounted a fall from a Moses

basket as the cause of the head injury to S. The subsequent reports indicate that genetic testing for mitochondrial disease has indicated no evidence of pathogenic variants that would confirm a diagnosis of mitochondrial disorder. Mitochondrial DNA disease results indicated no evidence of a mutation with further testing ongoing to screen the entire mitochondrial genome. Further, metabolic results received to date have returned as normal or with no evidence of an organic acid disorder. The urine amino acid screen detected "several unknown compounds" which may have been drug/diet related metabolites. A repeat urine sample indicated no abnormal purines or other endogenous compounds although the plasma / urine guanidinoacetate and creatine results were slightly unusual and repeat samples were taken.

10. Within the context of these proceedings, two expert reports have been directed pursuant to Part 25 of the FPR 2010. The first is from Professor David, Emeritus Professor of Child Health and Paediatrics at the University of Manchester and the second is from Dr Stoodley, Consultant Paediatric Neuroradiologist.

11. Professor David has provided a lengthy and detailed opinion on the injuries sustained by S. At the time he reached those conclusions it transpires that he was not in possession of all of the papers and he was asked to produce an addendum report. In his substantive and addendum report, Professor David reaches the following conclusions:

    i) The two possible causes of S's presenting symptoms are (a) a naturally occurring but poorly understood process that interfered with S's breathing and (b) one of his parents intentionally suffocated him.

    ii) It is difficult to find positive medical evidence to support (b) where the aetiology of the intracranial features is non-specific, including hypoxic ischaemic injury and metabolic abnormality, the inability to exclude medically non accidental injury is not positive medical evidence of inflicted harm, and the treating clinician's view that there was no necessity for further child protection medical examination implies everything possible was done to find medical evidence of inflicted injury without success. Professor David acknowledges that evidence of absence is not quite the same as absence of evidence.

    iii) Professor David's own analysis identifies a number of factors "which if anything point away from S's collapse having been an inflicted injury".

    iv) Professor David "cannot state dogmatically" that it is impossible that there was no significant head injury from the fall, but in his view it is highly unlikely.

    v) Professor David cannot exclude with certainty the possibility that the S's collapse was a totally unexpected and extraordinary delayed consequence of a very minor accident but considers this to be no more than a remote possibility.

12. Dr Stoodley's report, dated 21 January 2020, sets out the following conclusions in respect of the head injury sustained by S:

    i) There is no evidence of intracranial haemorrhage or abnormal surface fluid collection and no evidence of acute bleeding or spinal subdural haemorrhage.

ii) There is no evidence of any significant generalised brain swelling, no evidence of significant generalised curable swelling to the lateral ventricles, basal cisterns and the peripheral subarachnoid spaces appear normal.

iii) There are no abnormal metabolite peaks to suggest any underlying metabolic abnormality.

iv) The two main possibilities with respect to the causation of the brain injury are either an acute life threatening event (ALTE) or an episode of unintentional, such as overlaying, or intentional asphyxia, such as attempted smothering.

v) It is not possible to differentiate between these possibilities on the basis of the scan appearances.

13. As will be seen when I come to the submissions of the respective parties, whilst the father bases his application to summarily dismiss the disputed findings sought by the local authority with respect to the causation of S's injuries squarely on the state of the medical evidence and the assertion that there is "no possible basis on which such findings could be made" having regard to that medical evidence, the local authority and the Children's Guardian also highlight the following passage in Professor David's report:

> "...having analysed the problem as best one can the final task has been to see if there is sufficient medical evidence to assemble a coherent conclusion that is supported by the medical evidence. If there is insufficient medical evidence to complete the jigsaw or join the dots there needs to be a willingness (on my part) to admit defeat. By being able to take many other factors into account the Court may well be far better placed to complete the jigsaw".

14. Within this context, the local authority and the Children's Guardian submit that there are multiple other evidential matters that will also be relevant, and will fall to be examined by the court when it determines whether the local authority has proved on the balance of probabilities that the cause of S's head injury was either intentional suffocation by one or other of the parents, or was caused by some undisclosed event or circumstance known to the parents, for example co-sleeping/overlay, but which is being withheld by them. Making clear that I am making no findings at this stage of the proceedings, those factors prayed in aid by the local authority and the Children's Guardian as relevant to "completing the jigsaw" are as follows:

i) On the parents' account, S's fall from the Moses basket occurred late in the evening and as a result of extreme intoxication on the part of the father and his friend. The friend is said to have drunk over 20 pints and kicked the basket. The only witness was the father, who it is said was himself intoxicated by alcohol and cocaine.

ii) That alleged incident was, on the local authority's case, disclosed by the parents only some five days after S was admitted to hospital. There is a frank dispute of fact in this regard in circumstances where the parents assert they disclosed the incident in the Emergency Department. Expert opinion rules out the alleged incident as a likely cause of S's head injury.

iii) There is evidence that the father suffers from poor mental health. He has described a voice in his head that tells him what to do. A psychological assessment of the father records difficulties with anger (including the father stating that where he is unable to escape a situation his anger is triggered, with a consequent strong need or urge to cause physical harm), poly-substance misuse and that a complicating feature is a strong inclination towards fabrication, with the father having significant problems with fabrications and lying behaviours.

iv) There is evidence that both parents have misused cannabis and cocaine, leading them to neglect of the children's basic needs. The father now alleges that the mother is addicted to Tramadol. The father exhibits high levels of alcohol consumption.

v) There is evidence that the father has been involved in supplying cocaine from the family home as a result of his high levels of cocaine use, thereby exposing the children to risky individuals.

vi) There has been domestic abuse within the family home resulting in the police being called. The mother informed the Health Visitor that the father was abusive to her and the information provided by the police suggests that the domestic abuse included physical violence by the father.

vii) There is evidence that, within the context of his mental health difficulties, the father has demonstrated a significant level of aggression, has damaged the family home in temper (including on the mother's account punching the wall to the extent that it woke L) and has acted in an aggressive and abusive manner towards the mother. As recently as 19 March 2020 it is alleged that the father attempted to assault the mother (whilst in the company of the same friend it is said kicked S's Moses basket whilst heavily inebriated). The father has described getting angry every day and that anger is his easiest emotion. The father has stated that he is abusive and aggressive when drunk, with a tendency to be violent when under the influence of alcohol. The father has further stated that when angry he is unable to exit the situation and, if the situation involves a child, he will usually raise his voice and then break down and cry.

viii) There is evidence that the parents have neglected the needs of the children in several key welfare domains, including making themselves and the children intentionally homeless, failing to register S with a general practitioner, failing to provide L with a bed of her own and failure to provide sufficient food and formula for the children.

ix) Within this context, there is evidence that the sleeping arrangements for both children were contrary to professional advice, with S being permitted to sleep on his front and to use an adult size pillow as a mattress for his Moses basket and L being permitted to share an air bed with her parents.

x) There is evidence that the mother was adversely affected by S's cry, describing it as a high pitched scream that goes right through her.

xi) As at 10 May 2019, on the mother's account the father had ceased taking his medication and this was impacting on his behaviour.

xii) According to the mother, the father would state that he hated S and would threaten to throw S against a wall. On the night of the 1 to 2 June 2019 the mother has stated that the father made repeated statements that he hated S.

xiii) There is evidence that on the evening of 1 to 2 June 2019 the father had consumed eleven pints, with evidence that alcohol serves to disinhibit the father with respect to anger control.

xiv) The mobile phone evidence before the court indicates gaps in the communication traffic between the mother, the father and the father's friend who it is alleged kicked S's Moses basket during the material period. Whilst the parents make reference in their police interview to phone calls made in the period immediately prior to S being discovered moribund, no records exist of such calls. The father contends that he had use of three mobile phones, namely the one he surrendered for interrogation, a friend's phone and a further phone which was destroyed.

xv) Neither of the parents' phones demonstrate a 999 call being made (the transcript of the 999 call has yet to be obtained).

xvi) There is evidence that the behaviour of the parents during the period that S was critically ill raised suspicions, as did the father's vigorous and prolific account to the police in interview.

15. It is noteworthy that the father's submissions do not engage in any meaningful way with these aspects of the evidence when seeking to persuade the court that the evidence in this case is such as to justify the summary dismissal at the case management stage of these proceedings of the disputed findings sought by the local authority.

16. Finally by way of background, one other aspect of the expert evidence falls to be mentioned in the context of deciding whether, if such a power exists, it is appropriate to summarily dismiss the disputed findings sought by the local authority as to the causation of S's injury or, more conventionally, whether it is necessary to determine those allegations by reference to the provisions of the FPR 2010.

17. In his comprehensive expert report, Professor David places some reliance on the views of Professor Sir Roy Meadow. Professor David also relies on research of Professor David Southall. With respect to the work of Professor Meadow, having set out an extensive discussion of the debate that took place surrounding certain of Professor Meadow's views, Professor David concludes that:

> "Meadow's publication on unnatural sudden infant death, though the subject of several methodological and statistically (*sic*) difficulties which unfortunately infected most of his publications on inflicted injury, was (unexpectedly) particularly helpful in the case of S."

18. Within this context, Professor David states that, in this case, consideration of Professor Meadow's work, and in particular the eight factors identified by Meadow in his series of unnatural deaths, show that "simply put, the features of S's case match those of naturally occurring as opposed to unnatural sudden infant deaths". Within this context, in his addendum report Professor David lists as one of the factors against concluding that S suffered an inflicted injury as "S's case does not have the profile of an unnatural infant death as set out by Prof Meadow".

19. With respect to Professor David Southall, Professor David summarises Professor Southall's research as follows in his report:

> "The date of Southall and his colleagues who spent some years using covert video surveillance to detect 'imposed airway obstruction' or 'intentional suffocation', showed that these cases all followed a similar pattern in which repeated episodes led to repeated hospitalisations, sometimes going on for a prolonged period (months or more), leading eventually to the clinicians coming to suspect the cause of the illness episodes. It is true that very occasionally the episode 'went wrong, when a mother, trying just a bit too hard to convince the treating team that there really was something seriously wrong with the baby, would suffocate the child for longer than necessary to cause apnoea and loss of consciousness. The catastrophic end result of prolonged obstruction was brain damage resulting from lack of oxygen. This was fortunately a rare occurrence, but I have vivid recollection of one such case occurring on the paediatric ward at the old St Mary's Hospital in Manchester. At the risk of serious oversimplification, for the sake of brevity, the motivation for this behaviour was not to harm the child but was believed to be a form of attention seeking behaviour, the mother deriving 'support' from the extra medical attention given to a sick child".

20. Within this context, whilst not ultimately listed by Professor David in the list of factors set out in his addendum report as militating against an inflicted injury, in his substantive report, on the basis of the work of Professor Southall, Professor David concludes that "the single episode of collapse affecting S does not fit the usual profile of mothers who intentionally suffocate their infants".

SUBMISSIONS

The Father

21. Through Mr Garrido and Mr Steward, the father contends that, independent of the provisions of the FPR 2010, the court has power to summarily dismiss at the case management stage disputed findings sought by a local authority and denied by the parents in proceedings under Part IV of the Children Act 1989 and that the court should exercise that power in the circumstances of this case. Mr Garrido and Mr Steward submit that the power for which they contend is articulated in the analysis of Sir Mark Hedley in the case of *VBC v AGM and Ors* [2019] EWFC 64, drawing on the decision of the Court of Appeal in *Re TG (Care Proceedings: Case Management Expert Evidence)* [2013] 1 FLR 1250.

22. With respect to the circumstances in which the power for which they contend for may be exercised, Mr Garrido and Mr Steward seek to construe the power in relatively

wide terms, submitting that the court is able to summarily dismiss disputed findings sought by the local authority in circumstances where the court concludes at the case management stage that the evidence relied on by the local authority is not sufficient to sustain such a finding. During his oral submissions Mr Garrido contended that such a power to summarily dismiss disputed findings sought by a local authority in proceedings under Part IV of the Children Act 1989 at the case management stage falls to be exercised by the court undertaking a summary evaluation of the evidence before the court in order to decide whether that evidence can sustain the disputed findings sought.

23. As to this case, Mr Garrido and Mr Steward seek to draw a comparison between the situation they contend pertains in respect of the medical evidence in this matter and an example given by Sir Mark Hedley in the case of *VBC v AGM and Ors* of when the power to summarily dismiss proceedings may be used, drawing this court's attention to the following passage from *VBC v AGM and Ors*:

> "[67] The first was where you have a case of brain injury, and an alleged shaking case might be a good example, where the only question is the medical evidence in the case and where the medical evidence effectively collapses during the course of the case. It seems to me that, provided that collapse has revealed a benign causation which renders the parents' evidence otiose, it would be entirely appropriate for the court to intervene. That it rarely does is because almost invariably in those circumstances the local authority, with or without the intervention of the court, makes an application to withdraw."

24. Within this context, Mr Garrido and Mr Steward point to the fact that in this case both Professor David and Dr Stoodley identify two possible causes for S's head injury, namely a naturally occurring but poorly understood event or attempted inflicted suffocation, but also point up, in Professor David's case, his opinion that there is a lack of positive medical evidence for the latter possibility and, in Dr Stoodley's case, his opinion that it is not possible to differentiate between each possibility on the basis of the scans. Within this context, during his oral submissions Mr Garrido contended that the medical evidence means that there is "no possible basis on which findings could be made".

25. In these circumstances, Mr Garrido and Mr Steward argue that, where the local authority itself had previously taken the position that there is no real evidential basis for the findings it now seeks regarding the causation of S's head injury (Mr Garrido conceding that the principle of issue estoppel does not apply in this case), the court is in a position in this case, having examined the medical evidence, to conclude at the case management stage and prior to hearing the evidence in these proceedings that the local authority was correct in its initial position and to summarily dismiss the disputed findings relating to the causation of S's head injury. Mr Garrido and Mr Steward contend that the effect of the disputed findings being summarily dismissed at the case management stage will be that, on well-established binary principles, the matters to which they relate must be treated as never having occurred.

26. As I have noted, the father's submissions did not engage substantially with the non-medical aspects of the evidence listed above as relied on by the local authority and the Children's Guardian in opposition to the current application when seeking to persuade

the court that the evidence in this case is such as to justify the summary dismissal of the findings sought by the local authority at the case management stage of these proceedings. When pressed on the question of how the court should treat the other evidence before it when carrying out a summary assessment of the medical evidence contended for by Mr Garrido and Mr Steward, Mr Garrido appeared to submit that that evidence, including the statements of the parents and other evidential material, would likewise fall for summary evaluation.

27. Finally, in the alternative, on behalf of the father Mr Garrido and Mr Steward adopt the written submissions made on behalf of the mother and submit that, having regard to the provisions of the FPR 2010, it is neither necessary nor proportionate for the court to determine the disputed findings sought by the local authority concerning the causation of S's head injury.

The Mother

28. On behalf of the mother, Mr Stonor and Ms Robinson submit that the decision of the Court of Appeal in *Re H-L (Children: Summary Dismissal of Care Proceedings)* [2019] 2 FLR 388 (a case decided after *VBC v AGM and Ors* although in *Re H-L* the Court of Appeal was not referred to *VBC v AGM and Ors*) now casts doubt on the correctness of Sir Mark Hedley's conclusion that the modern approach to summary dismissal in the context of public law proceedings is that set out in *Re TG (Care Proceedings: Case Management Expert Evidence)*. Within this context, Mr Stonor and Ms Robinson contend that the question of whether the local authority should be permitted to pursue the disputed findings it seeks in relation to the causation of S's head injury falls to be determined on the conventional application of the court's case management powers under the FPR 2010 and by reference to the seminal decision of McFarlane J (as he then was) in *A County Council v DP, RS, BS (By the Children's Guardian)* [2005] 2 FLR 1031.

29. Whilst Mr Stonor and Ms Robinson submit that is not necessary and proportionate to conduct a fact finding exercise in relation to the causation of S's head injury, they were suitably realistic with respect to the strength of that submission in both their written submissions having regard to the evidence before the court. During the course of oral submissions, and whilst continuing, nominally, to support the submissions made by Mr Garrido and Mr Steward, Mr Stonor again realistically recognised that, applying the criteria set out in *A County Council v DP, RS, BS (By the Children's Guardian)*, there are, *prima facie*, powerful reasons for concluding that the court should consider and determine the allegations in issue in this case at a finding of fact hearing.

The Local Authority

30. On behalf of the local authority, Mr Spencer submits that there is a distinction to be drawn between the summary determination of disputed findings sought by the local authority at the case management stage and a case management decision that certain disputed findings are not to be litigated because the resolution of those factual matters would be a disproportionate exercise within the proceedings.

31. With respect to the question of summary determination of disputed findings, Mr Spencer submits that the court *does* have a power at the case management stage to

summarily dismiss disputed findings sought by a local authority against a parent in proceedings under Part IV of the Children Act 1989, independent of the court's case management powers under of the FPR 2010, to decide that it is not necessary or proportionate for those findings to be adjudicated. However, Mr Spencer submits that that power is to be construed *very* narrowly and is of no application in the circumstances of this case. Within this context, Mr Spencer points to the view expressed by Sir Mark Hedley in *VBC v AGM and Ors* that the power he identified in that case to bring public law proceedings to an end at any time before the conclusion of the final hearing is one that is "very narrow" in its application and confined to cases where a local authority is acting unreasonably or from malign intent, it ordinarily being the case that the judge should hear all the available evidence before applying the requisite standard of proof.

32. Within this context, Mr Spencer argues that the local authority's decision to pursue findings in this case with respect to the causation of S's head injury cannot be demonstrated to be borne out of *mala fides* or demonstrated to constitute an abuse of process requiring rectification by the court. Rather, Mr Spencer submits that the decision of the local authority to pursue the relevant findings is borne out of a further and careful review of the evidence in a case in which the cause of S's brain injury has not been unequivocally revealed by the written evidence and in which, in the circumstances, it cannot be argued that the parents' evidence is otiose. Rather, in such circumstances and where the case law clearly established that an important part of the court's consideration of the overall circumstances will be an assessment of the broad canvass of evidence (including the weighing of the expert evidence in the context of the evidence as a whole and examining the parents' descriptions of events and their credibility), Mr Spencer submits that there is a real necessity to hear and test the evidence of the parents in light of the equivocal medical evidence. As I have noted, in this regard Mr Spencer reminds the court again of the opinion expressed by Professor David in his report that:

> "...having analysed the problem as best one can the final task has been to see if there is sufficient medical evidence to assemble a coherent conclusion that is supported by the medical evidence. If there is insufficient medical evidence to complete the jigsaw or join the dots there needs to be a willingness (on my part) to admit defeat. By being able to take many other factors into account the Court may well be far better placed to complete the jigsaw".

33. Accordingly, Mr Spencer submits that, whilst it exists, the very narrow power to summarily determine disputed findings sought by a local authority in proceedings under Part IV of the Children Act 1989 has no application in this case and the question of whether the findings in question should be the subject of adjudication falls to be determined more conventionally by reference to the FPR 2010 and the decision of McFarlane J (as he then was) in *A County Council v DP, RS, BS (By the Children's Guardian)*. In this context, Mr Spencer submits that applying the principles set out in that decision it is plain that it is both necessary and proportionate in this case for the court to determine the local authority's allegations concerning the causation of S's head injury.

The Children's Guardian

34. Ms Edmunds on behalf of the children submits that the court does not have a power at the case management stage to summarily dismiss disputed findings sought by a local authority against a parent in proceedings under Part IV of the Children Act 1989 independent of the court's case management powers under the FPR 2010 to decide that it is not necessary for those allegations to be tried. In this regard, Ms Edmunds also relies on the decision of the Court of Appeal in *Re H-L (children: Summary Dismissal of Care Proceedings)*.

35. In any event, if a power to summarily dismiss disputed findings sought by a local authority against a parent in proceedings under Part IV of the Children Act 1989 exists independent of the court's case management powers under the FPR 2010, Ms Edmunds submits that that power is a strictly constrained one to be exercised only rarely and in exceptional circumstances. Within this context, she submits that such a power is not applicable in this case.

36. In the circumstances, and as argued by the local authority, and indeed the mother, Ms Edmunds submits that the appropriate analytical framework within which to consider the father's application is what Ms Edmunds describes as the more established and familiar discretionary route provided by the FPR 2010 and the factors set out by McFarlane J (as he then was) in *A County Council v DP, RS, BS (By the Children's Guardian)*. Within this context, Ms Edmunds joins with Mr Spencer in submitting that it is plain that it is necessary in this case for the court to determine the local authority's allegations concerning the causation of S's head injury. In particular, Ms Edmunds submits that the court is in the best position to piece the jigsaw together, the medical evidence is just one part of that jigsaw, there is a plethora of other relevant evidence that the court must consider alongside the medical evidence, that until the court has undertaken that exercise it cannot safely predict the evidential outcome, that it is clearly in the children's interests to ensure that a thorough inquiry is undertaken and until there is resolution of those facts it will prove near impossible to mount a properly understood welfare investigation.

LAW

The Fact Finding Exercise

37. As recognised by Sir Mark Hedley in *VBC v AGM and Ors* at [46] to [48], in considering the existence and ambit of any power to summarily determine a disputed question in proceedings under Part IV of the Children Act 1989, it is important to keep in mind the cardinal legal principles that govern such proceedings. Within this context, given the power contended for by the father is a power to summarily determine disputed findings of fact at the case management stage, it is important to hold in mind the now long established legal principles that govern the fact finding exercise in public law proceedings under Part IV of the Children Act 1989. These principles provide the proper context in which to consider the existence and ambit of the summary power contended for by the father:

    i) In care proceedings the court has to test the evidence and piece together the parts of the jigsaw in order to determine whether a clear picture emerges (*Re A (A Minor)(Retinal Haemorrhages: Non-accidental injury)* [2001] 3 FCR 262).

ii) The decision on whether the facts in issue have been proved to the requisite standard of proof must be based on all of the available relevant and admissible evidence including that from the alleged perpetrator and family members (see *Re I-A (Allegations of Sexual Abuse)* [2012] 2 FLR 837) and the wider context of social, emotional, ethical and moral factors (see *A County Council v A Mother, A Father and X, Y and Z* [2005] EWHC 31 (Fam) at [44]). This is sometimes referred to as "the wide canvas" (see *Re U (Serious Injury: Standard of Proof)* [2005] Fam 134 at [26]).

iii) Although the medical evidence is of very great importance it is not the only evidence in the case. The opinions of the medical experts will need to be considered in the context of all the evidence before the court as the court must consider each piece of evidence in the context of all of the other evidence (*Re T* [2004] 2 FLR 838 at [33]).

iv) Explanations given by carers and the credibility of those involved with the child concerned are of great significance. All the evidence, both medical and non-medical, has to be considered in assessing whether the pieces of the jigsaw form into a clear, convincing picture of what happened (*Re A (A Minor)(Retinal Haemorrhages: Non-accidental injury)* [2001] 3 FCR 262).

v) The court is the ultimate arbiter of fact and as such it is open to the court to accept or reject expert opinion on the basis of the all evidence. Expert evidence may favour an innocent explanation (or be equivocal or equidistant between innocent and sinister) but the judge, surveying the totality of the evidence, is still entitled to find that a child has suffered inflicted injury (*A Local Authority v K, D, & L* [2005] EWHC 144 (Fam), *Re M-W (Care Proceedings: Expert Evidence)* [2010] EWCA Civ 12 and *Re BR (Proof of Facts)* [2015] EWFC 41)

38. Finally, with respect to expert evidence, the court does not proceed by simply accepting that expert opinion at face value. In *Loveday v Renton* [1990] 1 Med LR 117 at 125 Stuart-Smith LJ observed as follows with respect to the court's task when evaluating expert evidence:

> "In reaching my decision a number of processes have to be undertaken. The mere expression of opinion or belief by a witness, however eminent, that the vaccine can or cannot cause brain damage, does not suffice. The court has to evaluate the witness and soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witness's opinion by examining the internal consistency and logic of his evidence; his precision and accuracy of thought as demonstrated by his answers; how he responds to searching and informed cross-examination and in particular the extent to which a witness faces up to and accepts the logic and proposition put in cross-examination or is prepared to concede points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether or not a witness is biased or lacks independence."

Purported Power Summarily to Dismiss Disputed Findings of Fact

39. It is important to be clear about the nature of the power contended for by the father in this case. Mr Garrido and Mr Steward submit that the court has a power within public law proceedings under Part IV of the Children Act 1989 and *independent* of its case management powers under the FPR 2010, to summarily dismiss disputed findings sought by a local authority at the case management stage. Accordingly, the issue before the court is not whether a court has power to summarily dismiss public law proceedings as a *whole* but, rather, whether a court has power, independent of the FPR 2010, to decide summarily at the case management stage that a given disputed finding sought by a local authority is incapable of proof on the balance of probabilities. Within this context, as I have noted, the father relies on the decision of Sir Mark Hedley in *VBC v AGM and Ors* as establishing that latter power.

40. In *VBC v AGM and Ors* the question that taxed Sir Mark Hedley was the extent to which the court has jurisdiction to bring public law proceedings as a whole to an end before the conclusion of the final hearing. Within this context, in *VBC v AGM and Ors* Sir Mark was required to determine an application to dismiss the local authority's case in a case concerning an alleged paedophile ring having heard the local authority's evidence, including oral evidence from two of the three complainants at the final hearing. Drawing on the observations of Sir James Munby in *Re TG (Care Proceedings: Case Management Expert Evidence)* [2013] 1 FLR 1250, which had their foundations in the private law case of *Re C (Children) (Residence Order: Application Being Dismissed at Fact Finding Stage)* and another private law case, *Re R (Family Proceedings: No Case to Answer)* [2009] 2 FLR 83, Sir Mark concluded that the correct modern approach to the summary dismissal of public law proceedings is that set out in *Re TG (Care Proceedings: Case Management Expert Evidence)* and that in public law proceedings the court does have an exceptional and sparing case management power to bring proceedings to an end at any time before the conclusion of the final hearing based on something which impinges on the integrity of the trial process or otherwise amounts to an abuse of the process of the court.

41. *Re TG (Care Proceedings: Case Management Expert Evidence)* [2013] 1 FLR 1250 the Court of Appeal (in which Hedley J (as he then was) was also a member of the constitution) was concerned with the question of whether a judge had correctly refused to grant permission for expert evidence. As I have noted, in the course of expounding on the nature and extent of the court's case management powers under the FPR 2010 Sir James Munby referred to his decision in *Re C (Children) (Residence Order: Application Being Dismissed at Fact Finding Stage)* [2013] 1 FLR 1089 at [14] and [15], in which he had observed, in the context of private law proceedings, that in an appropriate case the court may summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter.

42. Within the foregoing context, two matters fall to be noted with respect to the decision in *VBC v AGM and Ors* on which the father seeks to rely as establishing the power of the court, independent of the provisions of the FPR 2010, to summarily dismiss at the case management stage disputed findings sought by a local authority and denied by the parents in public law proceedings under Part IV of the Children Act 1989. First, Sir Mark Hedley was concerned with the question of the court's power to summarily dismiss public proceedings as a whole prior to the conclusion of an ongoing final hearing and not the question of a power to summarily dismiss certain disputed

findings at the case management stage. Second, Sir Mark's conclusions in *VBC v AGM and Ors* were reached by reference primarily to authorities dealing with the position in private law proceedings, rather than in public law proceedings concerning child protection.

43. Within this context, following the decision of Sir Mark Hedley in *VBC v AGM and Ors* the Court of Appeal decided *Re H-L (Children: Summary Dismissal of Care Proceedings)*, although, as I have noted, the Court of Appeal was not referred to *VBC v AGM and Ors*. In *Re H-L* Jackson LJ noted as follows at [10] regarding the applicability or otherwise of *Re C (Children)* in public law proceedings:

> "In terms of case management authority, I finally refer (but only for reasons that will become apparent) to the earlier decision of this court (Thorpe and Munby LJJ) in *Re C (Children)* [2012] EWCA Civ 1489. That was a private law case in which the judge had effectively stopped the proceedings having heard the applicant because he took the view that the application would inevitably fail and that there was no purpose in continuing. In giving the leading judgment, Munby LJ said at [18]: "It is pre-eminently a matter for the trial judge in a case of this sort to determine the form of procedure which will best meet the welfare needs of the children." I have to say that I do not regard that decision as being of assistance in the present case, and I note that Sir James Munby, a member of the court in both *Re C* and *Re S-W*, took a very different approach in the later case, no doubt because it concerned child protection and state intervention within a formal framework."

And, in this context, at [46]:

> "Rather than seeking to cast doubt on the analysis undertaken by this court in *Re S-W (Children) (Care Proceedings: Case Management Hearing)* [2015] EWCA Civ 27, [2015] 1 WLR 4099, [2015] 2 FLR 136, by which he was bound and which was and remains authoritative guidance on the summary determination of public law care proceedings, he should have applied it."

Conventional Case Management Powers

44. In *Re H-L (Children: Summary Dismissal of Care Proceedings)* the Court of Appeal was concerned with the probity of a decision to strike out care proceedings without conducting any investigation into how a child had come to be injured. In allowing the appeal, Jackson LJ noted as follows with respect to the ambit the court's case management powers in public law proceedings under the FPR 2010:

> "[5] In referring above to established case management practice, I mean in particular Part 12, Ch 3 of the Family Procedure Rules 2010 (FPR 2010) of which contains special provisions about public law proceedings. Part 12 is supplemented by the Guide to Case Management contained in Practice Direction 12A, which itself incorporates the Public Law Outline. This is not the occasion for a full survey of those provisions, but two points are of relevance to this appeal:

> (1) The provisions are a self-contained code designed to assist the parties and the court to deal with care proceedings justly and efficiently. Part 12 is a specific application to care cases of Part 1 (the Overriding Objective) and Part 4 (General Case Management Powers) and contains detailed provisions reflecting the spirit of those earlier parts of the Rules. Part 12 is therefore likely to contain all the powers that the court needs, making it unlikely that recourse to the more general procedural provisions will be necessary; at all events, in a case to which Part 12 applies the earlier provisions do not represent an alternative procedural regime.
>
> (2) Part 12 and the Public Law Outline are the most recent in a series of initiatives designed to achieve good, timely outcomes in care cases. They set out stages to the process, list matters to be considered at main hearings, promote judicial continuity and set timescales. The aim is to cut down on superfluous hearings, while maintaining some flexibility. So, r 12.25(1) provides for just one case management hearing with r 12.25(2) permitting a further case management hearing only where it is necessary. By r 12.25(4) the issues resolution hearing can itself be a final hearing, where it is possible for all the issues to be resolved. Extensions of time are closely controlled by s 32 of the 1989 Act, which specifically states that extensions are not to be granted routinely and are to be seen as requiring specific justification; this is reflected in r 12.26A. Seen overall, the system encourages and empowers strategic thinking within a standardised framework; indeed, it requires it. It is a deliberate move away from ad hoc case management under which cases often developed organically and without structure. It places very considerable demands on all participants, but that is what Parliament has required for the benefit of the children and families concerned; moreover, experience shows that non-compliance usually causes even greater difficulties."

45. FPR Part 1 provides as follows with respect to the court's overriding objective in family proceedings:

> "**The overriding objective**
>
> 1.1
>
> (1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.
>
> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that it is dealt with expeditiously and fairly;
>
> (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
>
> (c) ensuring that the parties are on an equal footing;
>
> (d) saving expense; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application by the court of the overriding objective

1.2

(1) The court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by these rules; or

(b) interprets any rule.

Duty of the parties

1.3

The parties are required to help the court to further the overriding objective.

Court's duty to manage cases

1.4

(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes–

(a) setting timetables or otherwise controlling the progress of the case;

(b) identifying at an early stage–

(i) the issues; and

(ii) who should be a party to the proceedings;

(c) deciding promptly –

(i) which issues need full investigation and hearing and which do not; and

(ii) the procedure to be followed in the case;

(d) deciding the order in which issues are to be resolved;

(e) controlling the use of expert evidence;

(f) encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

(g) helping the parties to settle the whole or part of the case;

(h) encouraging the parties to co-operate with each other in the conduct of proceedings;

(i) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(j) dealing with as many aspects of the case as it can on the same occasion;

(k) dealing with the case without the parties needing to attend at court;

(l) making use of technology; and

(m) giving directions to ensure that the case proceeds quickly and efficiently."

46. In addition, FPR Part 4 provides as follows with respect to the court's general case management powers:

"**The court's general powers of management**

4.1

(1) In this Part, 'statement of case' means the whole or part of, an application form or answer.

(1A) When the court is considering whether to exercise the power to strike out a statement of case, it must take into account any written evidence filed in relation to the application or answer.

(2) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(3) Except where these rules provide otherwise, the court may –

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);

(b) make such order for disclosure and inspection, including specific disclosure of documents, as it thinks fit;

(bb) direct that any proceedings in the High Court be heard by a Divisional Court of the High Court; (Rule 37.15(6)(b) makes specific provision in relation to Divisional Courts.)

(c) adjourn or bring forward a hearing;

(d) require a party or a party's legal representative to attend the court;

> (e) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;
>
> (f) direct that part of any proceedings be dealt with as separate proceedings;
>
> (g) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
>
> (h) consolidate proceedings;
>
> (i) hear two or more applications on the same occasion;
>
> (j) direct a separate hearing of any issue;
>
> (k) decide the order in which issues are to be heard;
>
> (l) exclude an issue from consideration;
>
> (m) dismiss or give a decision on an application after a decision on a preliminary issue;
>
> (n) direct any party to file and serve an estimate of costs; and
>
> (o) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective."

47. In the context of the issue before this court it is also important to note that the power under FPR r 4.4 to strike out a case by reason of there being no reasonable grounds for bringing or defending the application or the statement of case being an abuse of the court's process or otherwise likely to obstruct the just disposal of the proceedings or by reason of a failure to comply with a rule, practice direction or court order, is *expressly* excluded with respect to public law proceedings by r 4.4(1). Further, the authors of the Red Book note that, unlike the CPR, the FPR 2010 contains no power of summary judgment and that this omission was deliberate.

48. Within the foregoing context, and as Jackson LJ made clear in *Re H-L*, FPR 2010 Part 12 is a specific application to public law cases of Part 1 and Part 4 of the FPR 2010 and contains detailed provisions reflecting the spirit of those earlier parts of the rules. In this context, pursuant to FPR Part 12, rule 12.25(1)(c) in public law proceedings the court will conduct a case management hearing (CMH) with the objective, *inter alia*, of identifying the issues in the case that require adjudication. In *Re W (Care Proceedings: Functions of Court and Local Authority)* [2013] EWCA Civ 1227, [2014] 2 FLR 431 Ryder LJ (as he then was) observed as follows:

> "[72] ... It is the court which decides what the key issues are, that is the matters of disputed fact and opinion that it is necessary to determine in order to make the ultimate decision asked of the court."

49. Where the decision for the court, when identifying the issues, is whether or not to determine a disputed finding of fact the courts have, within the foregoing procedural framework, continued to apply the approach set out by McFarlane J (as he then was)

in the seminal decision of *A County Council v DP, RS, BS (By the Children's Guardian)* [2005] 2 FLR 1031. In that case McFarlane J held that, when deciding whether to order a fact-finding hearing in care proceedings, the following factors (which, as I observed in *A Local Authority v X, Y and Z (Permission to Withdraw)* [2018] 2 FLR 1121, in their totality embody the concepts of both necessity and proportionality) fall to be considered:

> "[24] The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise: (a) the interests of the child (which are relevant but not paramount); (b) the time that the investigation will take; (c) the likely cost to public funds; (d) the evidential result; (e) the necessity or otherwise of the investigation; (f) the relevance of the potential result of the investigation to the future care plans for the child; (g) the impact of any fact finding process upon the other parties; (h) the prospects of a fair trial on the issue; (i) the justice of the case."

50. In *Re F-H (Dispensing With Fact-Finding Hearing)* [2008] EWCA Civ 1249, [2009] 1 FLR 349 Court of Appeal endorsed this approach as being the correct analytical framework where the court is deciding whether to determine a disputed finding or findings of fact:

> "[26] There is no doubt that in family proceedings the court has a discretion whether to hear evidence in relation to disputed matters of fact with a view to determining them. In *A County Council v DP and Others* [2005] EWHC 1593, [2005] 2 FLR 1031, McFarlane J, at para [24], helpfully identified, by reference to previous authorities, nine matters which the court should bear in mind before deciding whether to conduct a particular fact-finding exercise. I have no doubt that, notwithstanding that in the present case a decision had been made in the exercise of such a discretion to arrange for the disputed facts, in relation in particular to the allegations against A, to be determined at the hearing fixed to begin on 7 April 2008, Her Honour Judge Hughes also even at that stage retained a discretion to decline to conduct it. Nevertheless in my view additional considerations fall to be weighed by a judge who is considering, at the outset of a prearranged fact-finding hearing, whether in effect to abort it. That judge should weigh, with appropriate respect, the previous decision that the exercise should be undertaken and should ask whether any fresh circumstances, or at least any circumstances freshly discovered, should lead her or him to depart from the chosen forensic course. Equally she or he should weigh the costs already incurred in the assembly of the case on all sides and the degree to which a refusal at that stage to conduct the hearing would waste them. Furthermore she or he should weigh any special features such as, in the present case, the facts that a girl then aged 16 had been shown the court room, that she had participated in discussions with the guardian as to the way in which she would prefer to give evidence and that she was thus expecting that she would imminently be giving oral evidence in some way or another, although the judge should not on the other hand ignore the girl's likely apprehension at that prospect. What needs, however,

> to be avoided at all costs is a sudden decision to abort the hearing in circumstances in which, later, the findings not then made might after all be considered to be necessary. So a judge in the position of Her Honour Judge Hughes on 8 April should in my view act most cautiously before putting the forensic programme into reverse."

51. Whilst that decisions in *A County Council v DP, RS, BS (By the Children's Guardian)* and *Re F-H (Dispensing With Fact-Finding Hearing)* predated the introduction of the FPR 2010, since the introduction of the FPR 2010 the courts have repeatedly endorsed the approach set out in *A County Council v DP, RS, BS (By the Children's Guardian)* (see for example *Re T (Case Management: Discharge of Party)* [2013] 2 FLR 795 at [17]).

DISCUSSION

52. Having considered carefully the helpful and comprehensive submissions of leading and junior counsel and having considered the evidence currently before the court, I have reached the following conclusions:

i) It is the court's case management powers under the FPR 2010 that govern the manner in which the court determines which disputed findings require determination by the court and which do not. It is not necessary or appropriate to look for a power to summarily dismiss a disputed finding of fact that exists independently of the court's case management powers under FPR 2010, whether grounded in the decision of *VBC v AGM and Ors* or otherwise.

ii) Pursuant to FPR r.12.25(c), the court is required at the case management stage of public law proceedings to identify the issues in the case as a specific application of the provisions of Part 1 and Part 4 of the FPR to public law cases, by which Parts the court is given power to determine which issues need full investigation and hearing and which do not and to exclude an issue from consideration.

iii) Within this clear procedural framework, the proper analytical framework for identifying at the case management stage whether a court should adjudicate on a particular disputed finding in proceedings under Part IV of the Children Act 1989 is that set out by McFarlane J (as he then was) in *A County Council v DP, RS, BS (By the Children's Guardian)*.

iv) In the particular circumstances of this case and on the evidence currently before the court, applying the requisite legal principles it would be wrong to direct, pursuant to the court's case management powers, that it is not necessary to determine the allegations made by the local authority regarding the causation of the head injury sustained by S.

My reasons for so deciding, with the consequence that the court *will* proceed to determine the allegations made by the local authority regarding the causation of the head injury sustained by S at the forthcoming finding of fact hearing, are as follows.

Power Summarily to Dismiss Allegations

53. Mr Garrido and Mr Steward seek to draw a distinction between a power of summary dismissal, for which they argue, and the power of the court under the FPR 2010 to decide that a disputed finding need not be adjudicated upon. I am however, satisfied that, contrary to those submissions, is not necessary or appropriate to look for a power to summarily dismiss at the case management stage a disputed finding of fact in public law proceedings that exists independent of the court's case management powers under FPR 2010, whether grounded in the decision of *VBC v AGM and Ors* or otherwise.

54. In *Re H-L*, the Court of Appeal made clear, albeit within a slightly different context to that arising in the present case, that a decision to determine summarily issues in public law proceedings is governed by the procedural rules set out in Part 12 FPR 2010 and not any alternative procedural regime. In this context, pursuant to FPR r.12.25(c), the court is required to identify at the case management stage the issues in the case, as a specific application of Part 1 and Part 4 of the FPR 2010 to public law cases, by which Parts the court is given power to determine which issues need full investigation and hearing and which do not and to exclude an issue from consideration. With respect to children proceedings, the FPR 2010 expressly prohibits the striking out of a statement of case in such proceedings and the FPR contains no power to order summary judgment.

55. I am satisfied that it follows from the decision in *Re H-L* that it is the court's case management powers under the FPR 2010 that govern the manner in which the court determines at the case management stage which disputed findings require determination by the court and which do not. Further, and within this procedural framework, I am likewise satisfied that the proper analytical framework for identifying, at the case management stage, whether a court should adjudicate on a particular disputed factual issue in proceedings under Part IV of the Children Act 1989 is that set out by McFarlane J (as he then was) in *A County Council v DP, RS, BS (By the Children's Guardian)*. That it is the principles set out in that case that are the principles that govern the decision whether or not to proceed to determine a particular issue of fact has been made clear repeatedly in the authorities decided since the judgment in *A County Council v DP, RS, BS (By the Children's Guardian)*.

56. These conclusions are entirely consistent both with the nature and purpose of public law proceedings, concerned as they are with the protection of children, and with the cardinal principles applicable to a fact finding exercise within those proceedings as summarised above. Within this context, the task of identifying in public law proceedings whether a disputed finding or set of findings should be determined is and must be, as demonstrated by the factors delineated by McFarlane J in *A County Council v DP, RS, BS (By the Children's Guardian)*, a multifaceted one. Further, the approach set out in *A County Council v DP, RS, BS (By the Children's Guardian)* is sufficiently flexible to encompass cases where the disputed findings demonstrably lack an evidential basis, in which case the requirement in *A County Council v DP, RS, BS (By the Children's Guardian)* to consider the evidential result would tend in such a case to lead to a conclusion that the disputed allegation should not be adjudicated upon. Likewise, where the disputed findings are borne out of *male fides* on the part of the local authority, the requirement in *A County Council v DP, RS, BS (By the Children's Guardian)* to consider the justice of the case would likewise tend in such a

case to lead to the conclusion that the disputed allegation should not be adjudicated upon.

57. Within this context, I am entirely satisfied that to seek to carve out a bare power of summary judgment with respect to disputed findings of fact in public law proceedings existing outside the FPR 2010 is both unnecessary, having regard to the court's existing case management powers, and inappropriate, having regard to the nature of public law proceedings and the legal principles applicable to the process of fact finding therein. The procedural framework provided by the FPR 2010 and the principles articulated in *A County Council v DP, RS, BS (By the Children's Guardian)* are far better suited to deciding whether, in the context of public law proceedings, a disputed finding or set of findings should or should not be determined by the court.

58. Finally, and for the avoidance of doubt, I make clear that I do not consider the decision in *VBC v AGM and Ors* to be authority for the existence of the power contended for by Mr Garrido and Mr Steward, namely the power to summarily dismiss disputed findings at the case management stage. Sir Mark Hedley was not concerned in *VBC v AGM and Ors* with the question of deciding, at the case management stage, whether a disputed finding or group of disputed findings should or should not be summarily determined. Rather, he was concerned with the power of the court in public law proceedings to decide to bring the proceedings as a whole to an end prior to the conclusion of an ongoing final hearing. It remains to be seen whether the analysis in *VBC v AGM and Ors* can survive the later decision of the Court of Appeal in *Re H-L* but that is not a question for this court. For the present purposes, it is sufficient to observe that the decision in *VBC v AGM and Ors* is simply not on point having regard to the nature and extent of summary power contended for on behalf of the father in this case.

Application of Conventional Case Management Powers

59. Within this context, and having regard to my powers under the FPR 2010, I turn to examine the factors set out in *A County Council v DP, RS, BS (By the Children's Guardian)* in determining whether to proceed to adjudicate on the disputed findings sought by the local authority as to the cause of S's head injury.

(a) Interests of Children and Relevance of Potential Result

60. I am satisfied that the determination of the disputed findings sought in respect of the causation of S's head injury is central to both the children's interests and relevant to the future plans for the care of the children, providing as it will a firm foundation on which professionals and the court can rest welfare decisions. There is a marked difference in the consequence for the welfare evaluation as between a finding of inflicted injury, a finding of accidental injury and a finding that the injury remains unexplained. Within this context, a decision as to whether the injury was deliberate, accidental or unexplained is not only relevant in that it will inform the care plan for the children and the welfare stage of these proceedings, but is also in each of the children's interests in that it has the potential to mean the difference between a plan of rehabilitation and a plan of permanency. Further, the determination of the disputed findings sought in respect of the causation of S's head injury will inform the ability of the parents to care for any future children they may have. Finally, and in addition, a resolution of the disputed findings will provide for S, and for L information that will

assist in due course to explain a major event with a lasting impact in each of their lives. It is in the interests of both children for the account of their personal history to be as accurate as possible. I agree that a conclusion one way or the other as to the disputed findings with respect to causation will assist the children in understanding the reasons they were taken into care and the welfare decisions that were taken for them.

(b) Timescales

61. Having regard to the matters that this court will in any event have to investigate were it to determine not to adjudicate the disputed findings on the causation of S's head injury and taking into account the busy nature of the court lists, I am satisfied that a decision to determine the disputed findings will not add appreciably to delay in this case.

(c) Cost

62. Once again, having regard to the fact that the court has already directed disclosure of the evidence relevant to the determination of the disputed findings and obtained jointly instructed expert reports in this matter, and having regard again to the fact that this court will be required to investigate other matters even were it to determine not to adjudicate the disputed findings on the causation of S's head injury, I am satisfied that determining the disputed findings will not add appreciably to the cost to the public purse of these proceedings. Within this context, any increase in cost that does occur is likely to be minimal.

(d) Evidential Result

63. With respect to the question of evidential result, in their submissions, Mr Garrido and Mr Steward characterise the evidence of Professor David and Dr Stoodley as meaning that there is no possible basis on which findings could be made regarding the causation of S's head injury. I am not able to accept that characterisation having regard to the well-established case law I have set out above that articulates the process the court must adopt with respect to making findings of fact in public law proceedings under Part IV of the Children Act 1989.

64. As made clear by the Court of Appeal in *Re U; Re B (Serious Injury: Standard of Proof),* the fact that the experts jointly instructed in public law proceedings consider the injury to be unexplained does not prevent the court, in an appropriate case and on the totality of the evidence before it, making a positive finding as to the causation of the injury in issue. Likewise, the fact that the experts jointly instructed in public law proceedings cannot identify, as between two or more possibilities, the cause of an injury to a child does not prevent the court making a finding on the *totality* of the evidence before it as to causation in an appropriate case. Indeed, Professor David recognises this much in his report when he makes clear that by being able to take many other factors into account the Court may well be far better placed to complete the jigsaw than he is. The approach articulated in *Re U; Re B (Serious Injury: Standard of Proof)* is particularly important where the cause contended for by the local authority may, in some cases, not be evidenced medically or not be capable of being so evidenced. For example, in this case Professor David makes clear that when

considering the issue of suffocation there are rarely any other *medical* indicators to reach this as a safe and evidenced based conclusion for an infant's sudden collapse.

65. Within this context, I am satisfied that the father's application proceeds on the misconception that if no definitive *medical* explanation can be offered for S's condition then the evidential result *must* be that court is precluded from making a finding as to causation. This is not the position in law. Rather, the authorities make abundantly clear that even where the only tenable conclusion on the medical evidence is that there is more than one possibility for the cause of the injuries or that the injuries are medically unexplained, the court may, having regard to the wider canvas and in an appropriate case, nonetheless conclude that parent was responsible for deliberately causing the injury.

66. In this case the wider canvass, as I have summarised above, incorporates a range of other evidential matters relevant to the disputed finding sought by the local authority, particularly in circumstances where explanations given by carers and the credibility of those involved with the child concerned are of great significance and fall to be considered carefully by the court. Within this context, in circumstances where the medical evidence is just one part of the evidential jigsaw and where there is a range of other relevant evidence that the court must consider alongside the medical evidence, until the court has undertaken the exercise of examining that evidence within the forensic crucible of a final hearing it would be entirely premature to conclude that the evidential result in respect of the disputed findings in this case will be that they will not be not made out to the requisite standard of proof.

(e) The Necessity or Otherwise of the Investigation

67. As I have already articulated, I am satisfied that the investigation of the disputed findings is necessary in this case to properly inform the welfare assessment in respect of both children in circumstances where there is a marked difference in the consequence for the welfare evaluation as between a finding of inflicted injury, a finding of accidental injury and a finding that the injury remains unexplained. An accurate factual foundation for the welfare assessment is particularly necessary in circumstances where the court is required to evaluate the future options for the children based, *inter alia*, on the extent to which those options are a proportionate response to the identified welfare needs of the children. Plainly, the source, nature and extent of the harm suffered by the children or that they are at risk of suffering will be one of the factors that will necessarily inform the assessment of proportionality.

68. Further, in this case I am satisfied that an investigation of the disputed findings sought by the local authority is also rendered necessary by reference to a particular feature of the medical evidence in this case. As I have articulated above, in his report Professor David relies on research conducted by Professor Sir Roy Meadow and Professor David Southall, identifying within that research certain matters that he then uses to inform his expert opinion on the question of causation. Within this context, I accept Mr Spencer's submission that the court will, in deciding what weight to attach to the expert medical evidence in this case within the context of the totality of the evidence before the court, need to examine carefully the reliance placed on research by Professor Sir Roy Meadow and Professor David Southall, whose professional integrity has been called into question in other contexts (as Professor David is at pains to acknowledge). This is not to pronounce one way or the other at this stage on the

probity of relying on such research in formulating an expert opinion, which reliance may or may not prove to be justified, but rather to point up a further factor that I am satisfied renders necessary in this case the investigation of the disputed findings as to the causation of S's injuries.

(f) The Impact of Any Fact Finding Process

69. I accept that determining the disputed findings of fact with respect to the causation of S's injuries will extend the length of the final hearing, and therefore will introduce a degree of delay as a longer hearing will take longer to list. However, that impact on the children of that delay must be balanced against the impact on the children of basing the care planning for the children and the court's welfare evaluation on an incomplete investigation into his head injury where the wider evidence raises significant question marks regarding the circumstances in which that injury was sustained. I am clear that the latter impact plainly outweighs the former.

(g) Prospects of a Fair Trial

70. There is no suggestion in this case that it is not possible to have a fair trial on the disputed findings with respect to the causation of S's injury. The parents are represented by highly experienced legal teams and have the benefit of both leading and junior counsel. The court has ensured that the local authority has clearly pleaded its case so that the parents are on proper notice of the allegations that they face. The court has also ensured that the parents have access to all of the evidence upon which the local authority relies to prove its case, the burden of proof at all times resting on the local authority. This is not a case where the court is looking into matters memories of which have been dulled by the passage of time or conducting a hearing in other circumstances that may threaten a fair trial. Within this context, I am satisfied that the parents will receive a fair trial with respect to the disputed findings.

(h) The Justice of the Case

71. Finally, I am satisfied that the justice of this case requires the court to determine the disputed findings. Where a child has been deliberately injured there is a public interest in identifying those who cause deliberate injuries to a child. Equally, where a child has not been deliberately injured, there is a public interest in the removal of unjustified speculation and suspicion that may have fallen wrongly on those who are not in fact culpable. These public interests belong to the children who are the subject of these proceedings as much as they do to the public at large, in addition to it being, as I have said, in each of the children's interests to have an accurate account of their respective histories. Further, this is not a case in which the local authority is seeking blindly, or by reason of malice, to pursue findings that have no evidential basis. Rather, having regard to the background of this matter the local authority properly brings the disputed findings before the court for determination. Within the foregoing context, and for the reasons set out under the other headings above, I am satisfied that the justice of the case requires the court to resolve the disputed findings with respect to S's head injury.

CONCLUSION

72. For the reasons set out above, rejecting the power contended for by Mr Garrido and Mr Steward and applying the settled legal principles I have articulated I am satisfied that it would be wrong to direct, pursuant to the court's case management powers, that it is not necessary to determine the allegations made by the local authority regarding the causation of the head injury sustained by S. In the circumstances, the court *will* proceed to determine the allegations made by the local authority regarding the causation of the head injury sustained by S at the forthcoming final hearing.

73. That is my judgment.