IN THE FAMILY COURT
SITTING AT LUTON
[2022] EWFC 130

No. LU21C03192

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 29 July 2022

Before:

MR JUSTICE NEWTON

(**In Private)**

B E T W E E N :

CENTRAL BEDFORDSHIRE COUNCIL — Applicant

- and -

(1) F
(2) D
(3) C
(4) R (by his Children's Guardian)
(5-6) THE CHILDREN
(by their Children's Guardian) — Respondents

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J U D G M E N T

(V i a M S T e a m s)

A P P E A R A N C E S

MS T. LEE QC and MS S. REDDINGTON (instructed by Pathfinder Legal Services) appeared on behalf of the Applicant.

MR D. HOWE QC and MS H. METTAM (instructed by Woodfines Solicitors) appeared on behalf of the First Respondent.

MR J. SHAW (instructed by Your Family Law Solicitors) appeared on behalf of the Second Respondent.

MR P. FROUD (instructed by Family Law Group Solicitors) appeared on behalf of the Third Respondent.

MS H. MARKHAM QC, MR M. WAN DAUD (instructed by Collins Law Solicitors) appeared on behalf of the Fourth Respondent (through the Children's Guardian).

MS A. MEUSZ (of David Barney Solicitors) appeared on behalf of the Fifth and Sixth Respondents (through the Children's Guardian)..

MR JUSTICE NEWTON:

1 On the afternoon of Monday, 1 February 2021, child B, born in 2020, was taken to hospital by ambulance. It was reported that he had sustained a fall and banged his head. He was at the time in the family living room under the apparent supervision of his older brother, who I shall refer to as A. No adult witnessed what occurred. It was reported by the mother, who I shall refer to as 'M', the Uncle who I shall refer to as 'U' and his partner, who I shall refer to as 'GF', all of who were in the next room, that they had heard a loud bang, and were on the scene within seconds, scooping B up from the floor. He quickly became profoundly unwell, he collapsed and his breathing became erratic. The emergency services were summoned, and the paramedics arrived remarkably quickly. He was bradycardic and deeply unconscious. He had seizures en route to the hospital.

2 A CT scan showed fluid collections over the right back and top of his brain and over the frontal lobes. An MR scan confirmed the collections, but also showed signs of vein injury over the brain, and blood inside the spinal canal. It also demonstrated a significant benign enlargement of the subarachnoid spaces, known as BESS. Eye examination identified innumerable bilateral and layered retinal haemorrhages. B had further seizures, but very fortunately rapidly improved and, in fact, was discharged into foster care just two weeks later.

3 The treating doctors concluded that B's injuries were disproportionate and not in keeping with the described mechanism of the family, that is falling from a standing height and a consequent impact to the head.

4 Those events occurred almost eighteen months ago. The children, because the court is concerned with three children, B above, but his older siblings C, born on 1 April 2019, and A born on 20 October 2006, all currently live with family members. A, in particular, has significant needs. He has demonstrably thrived in the care of his uncle. Perhaps, in contrast, to the care provided in 2020.

5 Whilst I have not been given any detail of the case, indeed any at all, it was heard over an extended period, as I understand it, before her Honour Judge Gargan, and there were difficulties which led to an appeal, I think in fact cross appeals. In any event, those appeals were allowed by consent by the Court of Appeal at the beginning of this year. This, therefore, is a re-hearing.

6 There are extensive documents in this case, and the court has had the benefit of well-known experts in their field. It is not unusual for the court to thank counsel for their assistance, but I especially wish to record the impressive professional conduct of those representing the parties for many reasons, not least the difficulties of the litigation history in this case, which has made the case, in some ways, more difficult. Their conduct has been exemplary in every way, and is reflected in the way the case has been managed and the sophisticated written submissions, which I have received at the conclusion of this case, and for which I am extremely grateful.

THE LAW

Burden and standard of proof:

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

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

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

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

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

11 The court must not reverse the burden of proof. If a respondent fails to prove an affirmative case they have set up by way of a defence, that does not of itself establish the applicant's case. In such circumstances the question for the court is not 'has the alternative explanation been proved?', but 'in the light of the possible alternative explanation, can the court be satisfied that the applicant has proved its case on the balance of probabilities?': **Re X (Children) (no 3) [2015] EWHC 3651**. The burden of disproving a reasonable explanation put forward by the parents falls on the local authority (see §10 **S (Children) [2014] EWCA Civ 1447.**)

12 As His Honour Judge Clifford Bellamy, sitting as a Deputy High Court Judge, said in **Re FM (A Child: fractures: bone density) [2015] EWFC B26,** at §122:

> *"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."

13 In **Lancashire County Council v D, E [2008] EWHC 832 (Fam)** Charles J stated the following:

> *"35. A natural progression of reasoning is to consider first what injuries there are, then to consider whether they were inflicted, and thus the range of possible causes.*
> *Those steps are not conducted by reference only to the medical opinion, albeit that there may often be no other relevant evidence as to the existence of injuries and consequent illness. Causation is different because as to that an important factor is the consideration of how, when and by whom an injury could have been inflicted becomes a necessary part of the analysis.*
>
> *To take an easy example: if a well-reasoned medical analysis leads to a conclusion that a child's airways were blocked at a particular time, but it can be shown from a video, or third party personal surveillance that no one did or could have blocked the child's airways during that period, that conclusion has to be revisited. I make this point because in my view at times the approach of both the local authority and the Guardian in this case came perilously close to an approach which, on the basis of the expert medical evidence, proceeded on the basis that: 'R' was the victim of a shaking injury because the medical opinion was that this was the most likely cause of his injuries, and the relevant exercise was to consider whether, given their care, and thus the opportunity they had to so injure 'R', the parents could show that they did not injure him."*

14 The inability of a parent to explain an event cannot be relied upon to find an event proved. See **Re M (A Child) [2012] EWCA Civ 1580** at §16 – the view taken by the Judge was:

> *"Absent a parental explanation, there was no satisfactory benign explanation, ergo there must be a malevolent explanation. And it is that leap which troubles me. It does not seem to me that the conclusion necessarily follows unless, wrongly, the burden of proof has been reversed, and the parents are being required to satisfy the court that this is not a non-accidental injury".*

15 Peter Jackson J in **Re BR (Proof of Facts)** [2015] EWFC 41 stated as follows:

> *"[7] The standard of proof is the balance of probabilities: Is it more likely than not that the event occurred? Neither the seriousness of the allegation, nor the seriousness of the consequences, nor the inherent probabilities alters this.*
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> 1. *Where an allegation is a serious one, there is no requirement that the evidence must be of a special quality. The court will consider grave allegations with proper care, but evidence is evidence and the approach to analysing it remains the same in every case. In my view, statements of principle (some relied on in this case) that suggest that an enhanced level of evidential*

cogency or clarity is required in order to prove a very serious allegation do not assist and may lead a fact-finder into error. Despite all disclaimers, reference to qualitative concepts such as cogency and clarity may wrongly be taken to imply that some elevated standard of proof is called for.

2. *Nor does the seriousness of the consequences of a finding of fact affect the standard to which it must be proved. Whether a man was in a London street at a particular time might be of no great consequence if the issue is whether he was rightly issued with a parking ticket, but it might be of huge consequence if he has been charged with a murder that occurred that day in Paris. The evidential standard to which his presence in the street must be proved is nonetheless the same.*

3. *The court takes account of any inherent probability or improbability of an event having occurred as part of a natural process of reasoning. But the fact that an event is a very common one does not lower the standard of probability to which it must be proved. Nor does the fact that an event is very uncommon raise the standard of proof that must be satisfied before it can be said to have occurred.*

4. *Similarly, the frequency or infrequency with which an event generally occurs cannot divert attention from the question of whether it actually occurred. As Mr Rowley QC and Ms Bannon felicitously observe:" Improbable events occur all the time. Probability itself is a weak prognosticator of occurrence in any given case. Unlikely, even highly unlikely things, do happen. Somebody wins the lottery most weeks; children are struck by lightning. The individual probability of any given person enjoying or suffering either fate is extremely low." I agree. It is exceptionally unusual for a baby to sustain so many fractures, but this baby did. The inherent improbability of a devoted parent inflicting such widespread, serious injuries is high, but then so is the inherent improbability of this being the first example of an as yet undiscovered medical condition.*
   Clearly, in this and every case, the answer is not to be found in the inherent probabilities but in the evidence, and it is when analysing the evidence that the court takes account of the probabilities.

5. *It would of course be wrong to apply a hard and fast rule that the carer of a young child who suffers an injury must invariably be able to explain when and how it happened if they are not to be found responsible for it. This would indeed be to reverse the burden of proof. However, if the judge's observations are understood to mean that account should not be taken, to whatever extent is appropriate in the individual case, of the lack of a history of injury from the carer of a young child, then I respectfully consider that they go too far. Doctors, social workers and courts are in my view fully entitled to take into account the nature of the history given by a carer. The absence*

of any history of a memorable event where such a history might be expected in the individual case may be very significant. Perpetrators of child abuse often seek to cover up what they have done. The reason why paediatricians may refer to the lack of a history is because individual and collective clinical experience teaches them that it is one of a number of indicators of how the injury may have occurred. Medical and other professionals are entitled to rely upon such knowledge and experience in forming an opinion about the likely response of the individual child to the particular injury, and the court should not deter them from doing so. The weight that is then given to any such opinion is of course a matter for the judge. In the present case, an adult was undoubtedly in the closest proximity to the baby whenever the injuries occurred and the absence of any account of a pain reaction on the baby's part on any such occasion was therefore one of the matters requiring careful assessment".

16 In **Re BR** case, Peter Jackson J sets out a list of risk factors and protective factors that might assist the court in assessing the evidence it hears in cases of alleged inflicted injury. At §18 he says *"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".*

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

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

18 In **Swansea County Council v MB & Ors [2014] EWHC 2842 (Fam)** Moor J stated:

> ***"[27]*** *There have been numerous first instance authorities that confirm this approach. Bracewell J observed in Re B (Threshold Criteria: Fabricated Illness) [2002] EWHC 20 (Fam); [2004] 2 FLR 200 at Paragraphs 24 and 30 that:-"Although the medical evidence is of very great importance, it is not the only evidence in the case. 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.*
>
> ***[28]*** *The expert evidence does not sit in a vacuum nor is it to be interpreted in isolation from the other evidence. Even if an expert says that that there are a number of possible explanations for some occurrence, it is still open to the court to find on the evidence as a whole which is the probable explanation (see, for example, Re B (Non-accidental injury)[2002] EWCA Civ 752). Charles J said in A County Council v K, D and L:-"…it is the court that is in the position*

to weigh the expert evidence against its findings on the other evidence and thus, for example, descriptions of the presentations of a child in the hours or days leading up to his or her collapse, and accounts of events given by "carers"…properly reasoned expert medical evidence carries considerable weight but, in assessing and applying it, the judge must always remember that he or she is the person that makes the final decision."

19 Aikens, L.J in **Re J (A Child) [2015] EWCA Civ 222**) confirmed the following principles, later relied upon by Sir James Munby, P in **Re A (A Child) [2016] 1 FLR 1 (FD)**

> *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:*
>
> > *ii) If the local authority's case on a factual issue is challenged, the local authority must adduce proper evidence to establish the fact it seeks to prove. If a local authority asserts that a parent "does not admit, recognise or acknowledge" that a matter of concern to the authority is the case, then if that matter of concern is put in issue, it is for the local authority to prove it is the case and, furthermore, that the matter of concern "has the significance attributed to it by the local authority."*
> >
> > *iii) Hearsay evidence about issues that appear in reports produced on behalf of the local authority, although admissible, has strict limitations if a parent challenges that hearsay evidence by giving contrary oral evidence at a hearing. If the local authority is unwilling or unable to produce a witness who can speak to the relevant matter by first-hand evidence, it may find itself in "great, or indeed insuperable" difficulties in proving the fact or matter alleged by the local authority but which is challenged.*
> >
> > *iv) The formulation of "Threshold" issues and proposed findings of fact must be done with the utmost care and precision. The distinction between a fact and evidence alleged to prove a fact is fundamental and must be recognised. The document must identify the relevant facts which are sought to be proved. It can be cross-referenced to evidence relied on to prove the facts asserted but should not contain mere allegations ("he appears to have lied" etc.*
> >
> > *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. Even if that is demonstrated, adoption will not be ordered unless it is demonstrated by the local authority that "nothing else will do" when having regard to the overriding requirements of the child's welfare. The court must guard against "social engineering,"

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.

Judicial approach to evidence

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

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

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

22 When considering the 'wider canvas' of evidence the following section of the speech of Lord Nicholls in **Re H and R (Child Sexual Abuse: Standard of Proof) [1996] 1 FLR 80** remains relevant.

"[101B] I must now put this into perspective by noting, and emphasising, the width of the range of facts which may be relevant when the court is considering the threshold conditions. The range of facts which may properly

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

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

Expert Evidence

24 Whilst of course appropriate attention must be paid to expert evidence Charles J in **A County Council v KD and L [2005] 1 FLR 851** §39- 44 observed:

"*It is important to remember i) that the roles of the court and expert are distinct and ii) that it is the court that is in the position to weigh the expert evidence against the findings of the other evidence. The judge must always remember that he or she is the person who makes the final decision*."

25 Where the evidence permits, and subject to the need to give its reasons for disagreement, the court may come to a conclusion which is contrary to a body of expert evidence (**Re B (Care: Expert Witnesses) [1996] 1 FLR 667**.

26 The court needs to ensure that each expert keeps within the bounds of his or her own expertise and defers where appropriate to the expertise of others: **Re S [2009] EWHC 2115 Fam**, Mrs Justice Eleanor King (as she then was).

27 As Mr Justice Ryder (as he was) observed in **A County Council v A Mother and others [2005] EWHC Fam 31***:*

"A factual decision must be based on all available materials, ie. Be judged in context and not just upon medical or scientific materials, no matter how cogent they may in isolation seem to be."

28 Dame Elizabeth Butler-Sloss identified the following important considerations in **Re U (Serious Injury; Standard of Proof)** following the decision **in R v Cannings**:

a. the cause of an injury or episode that cannot be explained scientifically remains equivocal
b. recurrence is not in itself probative
c. particular caution is necessary in any case where the medical experts disagree, one opinion declined to exclude a reasonable possibility of natural cause
d. the court must always be on guard against the over dogmatic expert, the expect whose reputation is at stake or the expert who has developed a scientific prejudice

e. the judge in care proceedings must never forget that today's medical certainty may be disregarded by the next generation or experts or that scientific research would throw light into corners that are at present dark.

29 The findings made by the judge must be based on all the available material, not just the scientific or medical evidence; and all that evidence must be considered in the wider social and emotional context: **A County Council v X, Y and Z (by their Guardian) [2005] 2 FLR 129**.

30 This was expressed as; "*the expert advises, and the judge decides"* in **Re Be (Care: Expert Witnesses)** [1996] 1 FLR 667

31 In **A Local Authority v K, D and L [2005] EWHC 144 (Fam), [2005] 1 FLR 851** Charles J referred to the important distinction between the role of the Judge and the role of the expert (see §39), saying: *"(a) That the roles of the court and the expert are distinct, and (b) That it is the court that is in the position to weigh the expert evidence against its findings on the other evidence, and thus for example descriptions of the presentation of a child in the hours or days leading up to his or her collapse, and accounts of events given by carers."*

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

33 In **Re JS [2012] EWHC 1370 (Fam)** Baker J enunciated numerous principles to be applied in such cases including as follows:

> *"Fourthly, when considering cases of suspected child abuse the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. As Dame Elizabeth Butler-Sloss observed in Re T [2004] EWCA Civ 558 [2004] 2 FLR 838 at 33*:
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> "*Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."*
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> "*Fifthly, amongst the evidence received in this case, as is invariably the case in proceedings involving allegations of non-accidental head injury, is expert medical evidence from a variety of specialists. Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. The roles of the court and the expert are distinct. It is the court that is in the position to weigh up expert evidence against the other evidence (see* **A County Council & K, D, & L [2005] EWHC 144 (Fam)***; [2005] 1 FLR 851 per Charles J). Thus there may be cases, if the medical opinion evidence is that there is nothing diagnostic of non-accidental injury, where a judge, having considered all the evidence, reaches the conclusion that is at variance from that reached by the medical experts…."*

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

34 In **Oldham MBC v GW & Ors [2007] EWHC 136 (Fam)**Ryder LJ stated as follows:

*"*100. *It may be that in due course the opportunities that exist in family proceedings for case management, issue identification and dispute resolution hearings can be developed to further enhance the scrutiny of experts' evidence by the court prior to the ultimate resolution of the issues in a case at a full hearing. For example, there may be merit in considering the approach of the courts in the United States of America as derived from* ***Daubert v. Merrell Dow Pharmaceuticals Inc*** *(1993) 509 US 579. But at the end of the day whether it be during case management, issues resolution or at a contested hearing the court must engage in the process described by* ***Stuart-Smith LJ in Loveday v Renton [1990] 1 Med LR 117 at 125:****"In reaching my decision a number of processes have to be undertaken. The mere expression of opinion or belief by a witness, however eminent, … 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*."

Lies

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

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

37 In **H-C (Children) 2016 EWCA Civ 136** at §97 to 100 of the decision of Lord Justice McFarlane (then) states:

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

"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate.

Secondly it must relate to a material issue.

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

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

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

100. One highly important aspect of the Lucas decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the "lie" is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in Lucas, where the relevant conditions are satisfied the lie is "capable of amounting to a corroboration". In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of R v Middleton [2001] Crim.L.R. 251. In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt."

38 More recently the Court of Appeal, leading judgment of Macur LJ in the matter of **A, B and C (CHILDREN) [2021] EWCA Civ 451** discussed witness lies and the Lucas direction, observing as follows:

> *"54. That a witness's dishonesty may be irrelevant in determining an issue of fact is commonly acknowledged in judgments, and with respect to the Recorder as we see in her judgment at [40], 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. ...*
>
> *56. In Re H-C (Children) [2016] EWCA Civ 136 @ [99],* McFarlane LJ, as he then was *said*: *"99 In the Family Court in an appropriate case a judge will not infrequently directly refer to the authority of Lucas in giving a judicial self-direction as to the approach to be taken to an apparent lie. Where the "lie" has a prominent or central relevance to the case such a self-direction is plainly sensible and good practice. 100 ... In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt."*
>
> *57. To be clear, and as I indicate above, a 'Lucas direction' will not be called for in every family case in which a party or intervenor is challenging the factual case alleged against them and, in my opinion, should not be included in the judgment as a tick box exercise. If the issue for the tribunal to decide is whether to believe X or Y on the central issue/s, and the evidence is clearly one way then there will be no need to address credibility in general. However, if the tribunal looks to find support for their view, it must caution itself against treating what it finds to be an established propensity to dishonesty as determinative of guilt for the reasons the Recorder gave in [40]. Conversely, an established propensity to honesty will not always equate with the witness's reliability of recall on a particular issue.*

58. That a tribunal's Lucas self-direction is formulaic, and incomplete is unlikely to determine an appeal, but the danger lies in its potential to distract from the proper application of its principles. In these circumstances, I venture to suggest that it would be good practice when the tribunal is invited to proceed on the basis , or itself determines, that such a direction is called for, to seek Counsel's submissions to identify: (i) the deliberate lie(s) upon which they seek to rely; (ii) the significant issue to which it/they relate(s), and (iii) on what basis it can be determined that the only explanation for the lie(s) is guilt. The principles of the direction will remain the same, but they must be tailored to the facts and circumstances of the witness before the court."

Credibility

39 The court's assessment of the parents and other carers of the child is very important. As Baker J (as he then was) said in **Re JS [2012] EWHC 1370:**

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

40 Jackson J (as he then was), referred in **Lancashire CC v. The Children, M & F [2014] EWHC 3** to 'the impact of 'story creep'

> ". . . *a 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 record-keeping or recollection of the person hearing that and relaying the account. The possible effects of delay and repeated questioning upon memory should also be considered as should be the effect of one person of hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be an unnatural process – a process which might inelegantly be described as 'story-creep' may occur without any necessary inference of bad faith."*

41 Commenting on the assessment of credibility, Mostyn J in **Lancashire County Council v R [2013] EWHC 3064** said:

> *"The assessment of credibility generally involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. With every day that passes the memory becomes fainter and the imagination becomes more active. The human capacity for honestly believing something which bears no relation to what actually happened is unlimited. Therefore contemporary documents are always of the utmost importance".*

42 King LJ in **Re A (A Child) [2020] EWCA Civ 1230** referred to the need for a balanced approach to the significance of oral evidence said:

> *"41. The court must, however, be mindful of the fallibility of memory and the pressures of giving evidence. The relative significance of oral and contemporaneous evidence will vary from case to case. What is important, as was highlighted in Kogan, is that the court assesses all the evidence in a*

manner suited to the case before it and does not inappropriately elevate one kind of evidence over another."

43 More recently, Peter Jackson LJ **in B-M (Children: Fact Finding) [2021] EWCA Civ 1371** [§§28-31] stated that:

> *"28. Of course in the present case, the issue concerned an alleged course of conduct spread across years. I do not accept that the Judge should have been driven by the dicta in the cases cited by the Appellants to exclude the impressions created by the manner in which B and C gave their evidence. In family cases at least, that would not only be unrealistic but, as I have said, may deprive a judge of valuable insights. 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."*
>
> *29. Still further, demeanour is likely to be of real importance when the court is assessing the recorded interviews or live evidence of children. Here, it is not only entitled but expected to consider the child's demeanour as part of the process of assessing credibility, and the accumulated experience of listening to children's accounts sensitises the decision-maker to the many indicators of sound and unsound allegations.*
>
> *30. None of this will be news to specialist family judges and in future I would hope that in conventional family cases any submissions that unduly labour arguments based upon the dicta that I have been considering will receive appropriately short shrift.*
>
> *31. As to the fallibility of memory, the dangers are again familiar to working judges, as are the problems of suggestibility in children"*

Identification of the perpetrator of injuries

44 When seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators is whether there is a likelihood or a real possibility that he or she was the perpetrator (see North Yorkshire County Council v SA [2003] 2 FLR 849).

45 In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injury to be identified both in the public

interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judge should not strain to do so (see Re D (Children) [2009] 2 FLR 668, Re SB (Children) [2010] 1 FLR 1161.)

46 Where there are more than two possible perpetrators, there were clear dangers in identifying an individual simply because they were the likeliest candidate, as that could lead to an identification on evidence that fell short of a probability. Although the danger did not arise in that form where there were only two possible perpetrators, the correct question was the same, if only to avoid the risk of an incorrect identification being made by a linear process of exclusion, (See **Re B (A Child) [2018] EWCA Civ 2127**)

47 Further to the Supreme Court decision in **Re S-B (children) (non-accidental injury) [2009] UKSC 17,** the Court should determine the following in order:

> Whether any of the injuries were caused non-accidentally.
>
> If they were whether the Court is able to identify the perpetrator on a balance of probabilities. The Court should not strain to identify the perpetrator. [§34 of Re S-B]

48 A finding on the balance of probabilities was preferable to no finding at all for many reasons, the main one being that it would promote clarity in identifying future risks to the child and the strategies necessary to protect the child from them. A finding would also enable the professionals to work with the parent and other members of the family. Furthermore, there would be long-term benefits for the child in knowing the truth, if it could be ascertained. [§36-38]

49 If the Court cannot identify a perpetrator or perpetrators, it is still important to identify the pool of possible perpetrators. Sometimes this will be necessary in order to fulfil the 'attributability' criterion. If the harm has been caused by someone outside the home or family, for example at school or in hospital or by a stranger, then it is not attributable to the parental care unless it would have been reasonable to expect a parent to have prevented it. Sometimes it will desirable for the same reasons as those given above. It will help to identify the real risks to the child and the steps needed to protect him. It will help the professionals in working with the family. And it will be of value to the child in the long run. [§40]

50 If the evidence is not such as to establish responsibility on the balance of probabilities it should nevertheless be such as to establish whether there is a real possibility that a particular person was involved.

51 When looking at how best to protect the child and provide for his future, the Court will have to consider the strength of that possibility as part of the overall circumstances of the case. The test is not whether the person can be excluded as a perpetrator. [§43].

<u>Failure to protect</u>

52 Guidance as to appropriate approach is set-out in **Re LW 2019 EWCA Civ** and **Re GLT 2019 EWCA 717**, in the following terms:

> *Re LW 2019 EWCA Civ*
> *"61. On the facts of the present case however, these unattractive personality traits and/or controlling personality of GL…putting together GL's beaviour*

in the home with his aggression on two ocasssions a number of years apart on adult men outside the home, do not go anywhere near supporting a causative link such that the mother ought to have known that GL presented a risk of physical abuse to L or the twins….

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

63. Such findings where made in respect of a carer, often the mother, are of the utmost importance when it comes to assessments and future welfare considerations. A finding of failing to protect can lead a Court to conclude that the children's best interests will not be served by remaining with, or returning to, the care of that parent, even though that parent may have been wholly exonerated from having caused any physical injuries.

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

53 In *Re G-L-T (Children: Care Proceedings)* [2019] EWCA Civ 717 Lady Justice King again cautions against such findings being an adjunct to findings of non-accidental injury:

[72] I repeat my exhortation for courts and local authorities to approach allegations of 'failure to protect' with assiduous care and to keep to the forefront of their collective minds that this is a threshold finding that may have important consequences for subsequent assessments and decisions.

[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.

THE BACKGROUND

54 The mother has four children, although as I have already said, I am only concerned with three. The eldest, who is in fact adult, has been a witness. B, was born on 22 April 2020, at thirty-three weeks gestation. As a result of his prematurity, he was kept in hospital until 6 May. His progress post-discharge was good. He was found to have a heart murmur, but in all other respects was apparently well. B's brother, A, has a genetic abnormality, but it is of no consequence as far as his physical and emotional development is concerned.

55 On 1 February 2021, the mother and the three children were all at home. It was an unremarkable day. The children had had lunch at about one o'clock, and the maternal uncle and his partner called, seeking help with some flowers. The mother is a part-time florist. The adults were in the kitchen and very close-by, that is just feet away, the children were in the living room. A was watching a film, his brother C who was asleep on the sofa, and B was crawling around on the floor.

56 The mother, it seems, as far as I can understand it, asked A to keep an eye on B. At some point, the uncle went out to get some wrapping for the flowers, passing through the living room and some minutes later, the adults heard a loud bang followed by a loud cry. It is reported that B was pulling himself up against the sofa, and fell matchstick-like to the floor, that is to say without breaking his fall or indeed bending. The uncle was first in the room, and picked B up from the floor, passing him swiftly to his mother. B stopped crying and then collapsed, he clenched his fists, arched his back, stiffened, his breathing slowed, it became laboured and erratic. He then went limp, his eyes half-open. Understandably, the family summoned the emergency services and as I have indicated, the paramedics arrived very quickly at 3.07pm.

57 A was bradycardic, pale, and unconscious. He had a seizure in the ambulance and at hospital. He was examined and intubated. An emergency CT scan demonstrated acute chronic subdural and extradural haemorrhages. He was, therefore, transferred to specialist care at Addenbrookes.

58 An MRI scan illustrated bilateral haemorrhagic collections and subdural collections in the spine. An ophthalmological examination revealed extensive bilateral deep retinal and pre-retinal haemorrhages, too numerous to count, and retinal splitting. The impression was of a severe trauma, and not in keeping with the reported accident.

59 On 4 February, a CT scan confirmed the subdural haemorrhage. On 5 February 2001, he continued to have some short seizures and was irritable. The following day, 6 February, he had a noticeable squint. A skeletal survey demonstrated no abnormality. Very happily, despite his severe and life-threatening symptoms, B has made a rapid, and as far as one can tell, a full recovery.

THE EXPERT EVIDENCE

60 Dr Keenan, expert haematologist, found no abnormality of the blood clotting system.

61 Dr Oates, Consultant Paediatric Radiologist at the Birmingham Children's Hospital, and well-known to the court, found –

(1) Low attenuation subdural fluid collections, which could have been acute blood mixing with cerebral spinal fluid, an acute traumatic effusion, or a chronic subdural fluid collection. He did not favour a chronic collection.

(ii) He confirmed that B has a marked prominence of subarachnoid space, that is to say benign enlargement of the subarachnoid spaces (BESS). Whilst stretching of the briding veins as a result can occur, as can subdural haematomas with less force, it was not likely, and he did not think it was likely that the enlargement caused the multicompartmental subdural hematomas nor the spinal subdural hematomas, so ultimately he concluded that it was not diagnostic. The thrust of his evidence was that it was much more a question of degree.

(iii) He concluded (both as a result of his experience and also from the literature) that in a small number of children, this condition can predispose them to shallow, solitary, subdural and usually unilateral hematomas, however, though open to the hypothesis of severe BESS and having regard to the considerable amount of blood, believed it would be very unlikely to have caused such extensive subdural bleeding overlying the surface of the brain and also in the spinal cord.

(iv) He could identify no radiological evidence for a predisposition to intracranial or spinal bleeding. He told me that there was no known link between BESS and spinal bleeding but that there has been very little research in this area.

(v) Considering all factors together, radiologically, excluding the ophthalmological findings, and taking into account the complexity of the situation, I had in mind here the BESS, he thought on balance the most likely explanation here was traumatic, non-accidental injury. He did not accept that a low-level fall, a matchstick fall, would cause such extensive bleeding, especially it seems in respect of the subdural spinal bleeding, which he considered very unlikely, but importantly he could not exclude it.

(vi) He acknowledged that in some cases, of which this might well be one, it was not always possible to provide a proper or determinative explanation.

62 I was impressed by Dr Oates' evidence. He is a confident, experienced, clear witness, firm in his conclusions, neither dogmatic nor didactic. Nonetheless, open to the contentions that this case may be an unexplained outlier having regard, in particular, to the severe BESS.

63 I turn next to Professor Fielder, an expert ophthalmologist, a consultant since 1977, although not, I think, in clinical practice for the last thirteen or fourteen years. He previously held the post of senior vice president of the Royal College of Ophthalmologists and has a very extensive and impressive curriculum vitae, which includes a wide involvement in published research. All experts deferred to Professor Fielder on the issues of ophthalmology, yet his conclusions proved to be in some ways the most important and controversial in this case, providing a tipping point in relation to many of the experts. Whilst emphasising the need for multidisciplinary assessment, he described the extensive retinal haemorrhages in both retinae.

64 There was no history of significant trauma. He identified macular schisis and the beginning of perimacular folds, which he described as “only being associated with severe trauma”. He was concerned about them in this context, and that there was no alternative suggestion. In the absence of a medical condition, or in the absence of evidence of an accidental trauma, severe non-accidental trauma was the most likely, indeed, he said very likely to be the cause of A's retinal haemorrhages. Non-accidental trauma accompanied with a considerable degree of force.

65 Professor Fielder in evidence sought support for his opinion, with that of Dr Oates, and also others whom he had consulted. The “consensus opinion” he told me, was that such injuries were the result of a rapid acceleration, deceleration force, and the described trauma, that is falling from standing, was not a plausible explanation for the ophthalmic injuries. The presence of macular changes reduces the differential diagnosis to trauma. Putting it, for him at least, at the top of the list. A source of some inquiry was the assertion that whilst retinal haemorrhages may be linked to cases of BESS, he could find no causal link between BESS and retinal haemorrhages, indeed, he stuck resolutely to the view that a matchstick fall could not cause the injuries identified in B.

66 Professor Fielder was taken to a number of papers. The PIATT paper describes an association between BESS and retinal haemorrhages. Professor Fielder did not take the view that this was helpful –

1. The paper did not reveal a causal link between BESS and low-level falls.
2. He considered the suggested theories, the hypothesis associated with BESS and raised intracranial pressure were speculative, and
3. The findings he described in the paper he said were nowhere near as severe as in the present case.

67 A different paper from APOS (with which Professor Fielder is associated, I think as an editor), he also distinguished, partly on the grounds of the difference in severity of the injuries, but also because it did not have the input of a consultant ophthalmologist of his level. That seemed to be a matter of some significance to him. He considered some of the assertions were just wrong or speculative and, in any event, went too far in suggesting the retinal haemorrhages were secondary to the intracranial pathology. He did eventually, however, acknowledge that the paper was thought-provoking.

68 I was struck by Professor Fielder's later comments that over the last year, that is to say between when he prepared his reports and the first hearing before the Circuit Judge and now, he had thought a lot about this case because "he was so worried about it". He had spoken to "foremost authorities" on abusive head trauma, who told him that BESS had not been established as a cause of retinal haemorrhages. I confess, I was troubled about that area of the evidence, not least of course because those “opinions” were not before me, but also it seemed to me that he had sought comfort (as well as confirmation) of his own conclusions. They were not, as I have said, before the court, I do not understand how these meetings arose. I do not know what sort of discussions took place between those experts, but it is an aspect which is troubling, that is to say the combination of Professor Fielder himself being worried about it and seeking support as he had, I think, from the conclusions from Dr Oates and from others. Whilst Professor Fielder's opinions are based on experience and literature, he was keen to suggest to the court that it should look at the literature in isolation of his own opinions, and so I have done that too.

69 A legitimate area of inquiry (the mechanism for causation of retinal schisis), led to Professor Fielder explaining that the causes of retinal haemorrhages and retinal schisis were not all known.

70 The aspect of BESS was explored at some length. It is not in doubt that BESS may be associated with retinal haemorrhages, but as he told me, it is very much in doubt that there is a causal link between BESS and the retinal haemorrhages. He gave an example of a storm

blowing fruits from a lemon and an orange tree. The orange tree, as he explained, not being responsible for causing the lemon tree to lose its fruit. I confess, whilst I understand the point he was making, I did not think that the analogy was particularly helpful, and I am not at all sure that it was useful in the context of this case.

71 I conclude that whilst there is a link between BESS and retinal haemorrhages, he was not able to explain it to me, and I was surprised with that background that he discounted there being or, indeed, any possibility of there being any causal link of relevance to this case between the two.

72 I must record my surprise when subsequently Professor Fielder found it difficult to bring to mind the anatomy of the eye, and it was only after counsel explored a paper in relation to how CSF was present in cases of BESS, that is to say how there is a flow of fluids into the optic sheaf, that was he finally to recollect it. Professor Fielder dismissed the findings of Dr Lynn, who had examined B earlier as unreliable. He was resistant, I concluded, to consider physiological causes.

73 Although Professor Fielder said he had been worried about the case he was, I am afraid, rather conspicuously resistant to being prepared to consider, let alone even weigh, other possibilities even if he thought they were remote or remote outliers. That is especially so since, in the papers, it is clear that there is evidence that retinal haemorrhages have and do occur in situations where the mainstream view might suggest otherwise. Professor Fielder followed the mainstream view, which I completely understand. It is a completely respectable stance to take, but he was not, I thought, prepared to contemplate anything else. Indeed, I thought beyond cautious of alternative possibilities.

74 Professor Fielder was rather dismissive of, for example the paper by Fibrin Hanson, Wester and Haltburg, because none of the authors had the status of a specialist ophthalmologist and relied, as I understand him, on the work and help of other ophthalmologists when undertaking the study.

75 That paper does provide an alternative explanation for the presence of retinal haemorrhages other than inflicted injury. I am less concerned about the relevant merits of the status of those involved in the study or, indeed of the study itself, but more concerned about the ability to keep an open mind. A theme developed, just as it did in relation to BESS and the retinal haemorrhages. The paper made an important point that retinal haemorrhages and intracranial pathology are often very highly associated, but it was Professor Fielder’s view that did not prove a causal link. The acceptance of the association was one thing, but he was unable to give any reasoning, to help the court at least, as to what connection that there is or might be, which is relevant to my consideration.

76 Overall, I am concerned that despite Professor Fielder's evidence that severe trauma is required to cause macular schisis and perimacular folds, there were a lack of other injuries that might be associated with significant trauma.

77 Overall, there can be no doubt at the level of expertise and vast experience that Professor Fielder brings to this case. Whilst he held on determinedly to the traditional prospective and, indeed, he may be right to do so, as I have made clear twice already I had an anxiety about parts of his evidence that he was simply not sufficiently open-minded to reflect on the circumstances of B's case and how that might impact on any diagnostic evaluation.

78 Dr Cartlidge, a specialist Consultant Paediatrician, has been a consultant for twenty-seven years and someone who is very familiar to the court in these difficult cases. He concluded that on the basis that B had pulled himself up to standing against a sofa (as all the evidence strongly suggests he was capable and did), then –

1. The combination of the markedly enlarged subarachnoid space, and the impact from the purported fall, could explain the intracranial subdural bleeding and the acute traumatic effusion.
2. The enlarged subarachnoid space did not render B vulnerable to intraspinal subdural bleeding, but in his experience intraspinal bleeding could be caused by a low-level fall.
3. He deferred to Professor Fielder in respect of the retinal haemorrhages, though has had experience of a family court finding them to result from a low-level fall.

79 B had a large head, because of the enlarged subarachnoid spaces, that it was not possible to determine whether the subdural fluid collections were acute or chronic, but the evidence favoured the former. Those effusions would have been sustained at the same time as the acute subdural bleeding, i.e. explicable on the basis of a single event. He considered the causes of subdural bleeding, such as perinatal or cranial malformation, Ehlers-Danlos syndrome, enlargement of the subarachnoid space and metabolic disorders.

80 Radiologically, as to timing he deferred here to Dr Oates and Calisto and the fact that the subdural bleed was up to seven to ten days old, and the findings, again, he said supported a single event. Clinically, the features of subdural bleeding might include altered consciousness, pallor, floppiness, impaired breathing and vomiting shortly after the causal event. The symptom severity is primarily determined by the extent of the parenchymal brain injury. B had no other hypoxic ischemic injury, and no other parenchymal brain injury.

81 It was the reliance on Professor Fielder's unwavering opinion that led Dr Cartlidge to conclude that the shaking event was a more likely causation than the fall described. I was especially struck by the answer he gave in cross-examination to Mr Howe, QC,

> "Professor Fielder's evidence was that macular schisis and perimacular folds really only ever occur in high force trauma, so do you agree there is a disconnect with Professor Fielder's opinion in relation to all those other features you might expect to see if there was an event of such significance, another unusual aspect of this case"

Dr Cartlidge responded,

> "I hate to disagree with Professor Fielder, I've got a lot of respect for him, but I agree with you."

82 Dr Cartlidge is a highly respected witness, very well-known to and respected by the court and as I would have anticipated, he approached each area individually and together, with considerable and customary care. He is a powerful, moderate, and thoughtful witness. Science is evolving. He has the experience, as has the court, to examine closely situations where the explanation does not, necessarily, match the injury. More so where there is little evidence other than to suggest that there has been an accident. I rely upon his evidence.

83 Mr Calisto is a Consultant Paediatric Neurosurgeon from the John Radcliffe Hospital in Oxford, and an honorary senior clinical lecturer at Oxford University. He continues a long tradition of excellence in this field from that hospital. I had not heard him give evidence before. He originally deferred giving evidence because he was unwell, and came back later to assist the Court when he had recovered. His contribution was worth waiting for. He concluded –

1. There were mixed density subdural collections and signs of vascular injury involving the veins between the cerebral convexity and the inner skull, and extensive layering of subdural blood within the dependent aspect of the spinal canal. B's BESS was severe.
2. Under normal circumstances, the type of reported fall would unlikely explain the injuries documented on B's scans and his clinical presentation, which appears to be in keeping with moderate to severe encephalopathy. Abusive head trauma, he therefore said, was in his view a more plausible cause.
3. If putting aside the spinal bleeding and retinal bleeds, however, one takes into account –

    (a) the possible effect of B's severe degree of BESS on lowering the injury threshold.

    (b) the sizeable acute subdural bleed on a background of raised intracranial pressure from BESS and possible previous subdural hematomas, which hypothesis is supported by excessive head growth and multiple injuries and,

    (c) seizures (and I bear in mind here what he said about decompensation and the squint), then the head trauma involving a lesser degree of energy than very vigorous shaking, could account for B's injuries, or at least the intracranial subdural collections and vein damage and his clinical presentation.

4. Considering the above, he said that it was difficult to say how much the injury threshold could have been lowered by BESS and, therefore, the reported mechanism would be, or could be, compatible or whether more force was required. That is to say, he considered whether or not he had fallen or might have had a "push" at the same time.

84 In evidence, it became much clearer that the lowering of the injury threshold in a case of severe BESS is indeed a very significant factor, not just in isolation, but also in terms of ordinary activity which can play a part. Dr Calisto gave simple examples of a child being on a swing or an ordinary baby bouncer. He accepted that in severe cases of BESS, the presence of subdural hematomas is no reliable indication that an abusive incident had occurred. His evidence in relation to that was that bleeding can occur at lower forces when it is present.

85 He did not conclude that the matchstick fall alone would explain B's symptoms, but if he had previously had similar minor falls, and those had occurred on a regular basis, that it was possible. There could be an element of raised intracranial pressure and those injuries would be increasingly exacerbated by further insults.

86 He gave evidence about a number of factors that would, or could, lead to a possible conclusion of accident, that is to say the matchstick fall, if all were present and accepted. However, it seemed to me, having listened to his evidence, that each individually and together were themselves variable factors which were difficult to assess and evaluate. Their presence or otherwise, or their effect or otherwise, could be a matter of considerable variation or even conjecture.

87 Mr Calisto was a most impressive witness. It struck me several times during the course of his examination and cross-examination that he combined those rare qualities of a high degree of clinical experience, excellence and learning with an appropriately open mind. He is very obviously able, discussing each aspect and the foundation of either clinical experience and/or learning, and was able to contrast and comment on the two. For example only, in considering the blood in the spinal column, Mr Calisto said that it was not possible to say whether it was caused by a direct bleeding or had tracked down, but he was able to discuss (in-depth) the strength and weaknesses of the arguments for and against. For example, Mr Calisto was able to bring in the Choudhary paper, which had been relied on by Dr Oates. They were all good examples of the considerable persuasive force and strength of Mr Calisto's evidence, and just how they applied to this case. It was impressive and I rely on it. He brought to this case a depth and intelligence which is invaluable.

THE LAY EVIDENCE

88 U was visiting the mother, with his partner, for the mother to prepare a bunch of flowers. He went outside to get some wrapping, I think from the car, and said the mother and his partner remained in the kitchen. When he returned, B was on the floor by the television. He went back to the kitchen. Some minutes later he heard a thud and rushed through. B was on the floor. He said initially his feet were nearest to the sofa. He picked him up and dialled 1-1-1 and then 9-9-9. A was still on the sofa in the same position as he had been earlier when he passed through the room twice. He had not visibly moved.

89 In relation to A, he said that it was easy to read his mood, that he wears his emotions, as it were, on his sleeve. On that day, he was neither bad-tempered nor frustrated. The more pressed he was about his actions and what he did that day, the more obvious it was that he was an entirely truthful witness. The important evidence, actually, is what he observed passing through the living room, out of the car and back again, and where A was on those two occasions and when he went back into the room to pick up B, he having had his fall.

90 His partner, GF, was also an impressive witness. Quite how she ever, realistically, was placed in the pool of perpetrators is difficult to follow. It has had the unfortunate effect of her, needlessly in my view, not being able to complete her competence and her PGCE. She has not had much to do with A and I do not think he acknowledged her that day. The important part of her evidence was that she confirms what U says as to where (and how) A was sitting on the sofa. He did not react at all when she passed , when she passed through, he was doing as he had done previously, simply watching the film. She described the really horrible loud thud. She confirmed the evidence, both of U and the mother. It is true, in relation to a number of witnesses, that the description of the noise which brought them back into the living room was different or had changed, but I do not think there is anything in that. Such evidential differences are entirely normal in these circumstances. GF was an impressive witness. She was, perfectly obviously, telling the truth.

91 S is the uncle and A's carer. I found his forthright evidence compelling. He is a very strong advocate for A, in whose care he has thrived. He reacted very strongly to the suggestion that he had in some way colluded with members of the family. He was very plain and

straightforward in his views. I think it is entirely likely that A will have heard him say what he said and would, in any event, have picked up, as it were, the views of the family generally. I do not think there was anything underhand in what he said. He struck me as an entirely straightforward, straight-talking man, who was so obviously truthful.

92 M spent some time, inevitably, talking about that day. Essentially, the three children were unattended in the next room, albeit extremely close-by only just steps away from where she was. She accepted that she had not perhaps, with the benefit of hindsight, been paying as much close attention to them as she should be. She was chatting from the kitchen, the television was on, and there was rather more going on than was normal, and clearly her attention was distracted by the flowers that were being arranged for her brother and his partner.

93 I thought M was trying to do her best. She requires assistance and is under unimaginable pressure. She has been questioned so many times about what happened, now well over a year ago, so there were, undoubtedly, differences and inconsistencies in her account. In my view, they are less instructive, having regard to the number of occasions the mother has had to try and explain what she remembers. It must be difficult to remember what she remembers and what she does not, in fact, remember.

94 The number of differences identified are obviously relied on by the Local Authority. They are set out very helpfully in the written submissions, but I am not convinced that in this case they have any forensic utility, and they are, of course, but one factor.

95 I do not find the evidence even begins to suggest that anything happened earlier, and that mother was somehow covering up all the evidence, suggesting that whatever occurred moments before everybody went into the living room when B was on the floor crying. The evidence, actually, is that A was calm that day. The mother was distracted but it seems that at the relevant time, A remained in the same place, sitting on the sofa, watching the television and was consistently calm. It seems to me that I cannot really conceive how the mother realistically could be in the pool of perpetrators. Her evidence was coherent and clear, and I think she was an entirely truthful witness, and was doing her best to tell me what she could remember.

96 It is submitted that the descriptions of the bang to B's head on the floor have evolved during the course of the case. That is certainly true, but if one bothers to think about it for a moment, it is entirely likely that that being the causative mechanism, what occurred this baby to collapse so catastrophically, and has led to the family thinking over what occurred and such variations in description are entirely predictable and of no great utility.

97 What of A himself? I determined at an earlier hearing that he would not give evidence in this case. I have reconsidered all the material that is now available to me, and I remain strongly of the conclusion that was entirely the correct decision, and nobody now suggests otherwise. I bear in mind the evidence before the court, the very helpful expert assessment of A and of his functioning. There is no doubt that A can have problems of emotional regulation, but each witness has consistently said on that day he was calm, he is a boy who wears his emotions, his moods on his sleeve. That day he was calm and there is no suggestion of anything different. Indeed, so calm that he was pretty disengaged from the comings and goings. Of course, it is not unknown for a sibling to give another a “push” in the wrong direction, but there is absolutely nothing here to support that conjecture, nor less of a shake. Indeed, as I have said, the evidence points otherwise. The evidence of his uncle in particular would suggest that could not be a mechanism.

DISCUSSION

98 Whilst on the face of it there is a consensus on the medical evidence, there are significant and relevant highly unusual features in this case. Inevitably, where medical experts disagree, the court must bear in mind the rubric that today's medical certainty may be discarded by the next generation of experts, together with the hypothesis that causation must not be dismissed just because it is unusual. The court must always exercise considerable caution when considering the significance of expert opinions, particularly where a condition or a combination of conditions is unusual. Unusual, rare, or unknown conditions do exist, and it is sometimes not possible to identify what is not known or understood. What has been described in so many cases as a known unknown.

99 Particular scrutiny is required here, where the medical witnesses agree that B's case is unusual, and where even the firmest of witnesses have been worried about this case. That characteristic, undoubtedly heightens the need for the most careful and cautious scrutiny, with particular attention being paid to the possibilities that the injuries individually or collectively might result from an unusual or an unknown cause. That is particularly so where the medical evidence is only one part of the evidence. As there is no direct evidence of inflicted injury, that diagnosis may be just as much a hypothesis and just as contentious as an unknown cause or hypothesis. Self-evidently, of course, it is not for the mother or members of the family to prove anything.

APPROACH AND CONCLUSIONS OF THE MEDICAL WITNESSES

100 I have already recorded the thrust of each witness. Each of the doctors gave evidence appropriate to their professional standpoint. Each are specialists within their own discipline and respected the frontiers of their knowledge and expertise. Generally, each, I thought, were willing to acknowledge the perspectives of the others and possessed a good knowledge of the science and research of their own, but also beyond their specialities. I do bear in mind that each deferred to other opinions and were clearly affected by the conclusions of Professor Fielder in the field of ophthalmology. Equally, it would be too easy when reaching conclusions to look at each piece of evidence in isolation, that is to say in a linear way. However, it is important to look at each piece of evidence separately and together. I am satisfied that, generally, the medical witnesses did not arrive at their conclusions by a process of exclusion, and did try to put the ophthalmological evidence to one side if they could, although it was plain that each were affected by it.

101 This case remains difficult and unusual, and I have taken my time to reflect on the extremely helpful and thought-provoking submissions that have been made in relation to the medical evidence and the evidence generally. The submissions have been invaluable to my conclusions. Where I have recorded elements of an individual's evidence, this judgment cannot reflect the full nuanced detail of the scientific opinion, especially as the court has reflected upon scientific papers and opinions.

MY FINDINGS ON THE MEDICAL EVIDENCE

102 This is an unusual case. There is on one perspective, a difference of view between the professional witnesses. Firstly, benign enlargement of the subarachnoid spaces and subdural bleeds. They are significant and unusual factors in this case. Ultimately, I have concluded that the evidence is far from clear cut. All the witnesses accepted that a severe BESS, which had previously been an unidentified mechanism of how subdural haemorrhages occur, is not in doubt but there is significant debate as to the severity and extent, that is to say whether they are shallow, unilateral or extensive or bilateral.

103 There has been debate about the presence or otherwise of chronic subdural bleeds. Those, I think I mentioned, Dr Cartlidge for example favoured just one event. There is a danger in oversimplifying the evidence. I have in mind what Mr Calisto told me. I am conscious that having regard to the qualifications that they made, nonetheless both he and Dr Cartlidge (and, to some extent, Dr Oates too), acknowledged that the injury threshold is lowered, even to the extent that routine activities, such as the baby swing, could cause damage and could be the source of bleeds. Here too is the relevance of what is known, or not known, about otherwise routine household activities and the effect that may have on B, causing damage and doubly pertinent, of course, if chronic subdural hematomas were already present.

104 Dr Oates took the more traditional radiological view, that a low-level fall would not likely cause such extensive bleeding. He included that the spinal bleeds which were an important feature for him, whereas Dr Cartlidge and Mr Calisto concluded that the bleeds in B's brain could be explained by the severe BESS and a low-level fall. Whilst Dr Oates was less persuaded, both Dr Cartlidge and Mr Calisto considered that B's case could be described as a rare outlier, and I conclude that that wider perspective is more likely, more persuasive.

105 In relation to the spinal bleeds, the experts differed. Dr Oates said that tracking down the spine was unlikely, given that just a trace of blood was seen in the posterior fossa, and he had only identified bleeding in the spinal cord. I was more persuaded by the evidence of Dr Cartlidge and Mr Calisto, indeed more strongly persuaded, because both of them have had experience; Dr Cartlidge in other cases and Mr Calisto on viewing MRI scans after he performed brain surgery. There was little research on the tracking of blood, but without any hesitation I prefer and rely particularly on the evidence of Mr Calisto, who has the direct clinical experience. I do not discount tracking, despite the limited blood in the fossa, but it does not have the diagnostic significance attributed to it by Dr Oates.

OPTHOLMOLOGICAL EVIDENCE

106 It is strongly submitted by the Authority that I conclude, contrary to the appearance of divided opinion, that the experts agree, taking everything into account, that abusive head trauma or, at least undisclosed trauma, accounts for B's symptoms. Despite trying to put aside the evidence of Professor Fielder, each expert obviously deferred to him and their opinions were obviously affected by his. As Dr Cartlidge so candidly put it, it was the eye injuries which led him to conclude that a shaking mechanism was the more likely mechanism as opposed to the fall. He was obviously troubled by the disconnect between the injuries to the eye, apparently symptomatic of abusive trauma, and the other features one might expect to see in such a severe traumatic incident, and which were so noticeably absent.

107 Professor Fielder was very clear in his opinion on the connection between macular schisis, splitting of the retina where blood pushes up behind the retina, and perimacular folds, that is where there is a splitting to the edges of the retina, and very significant trauma caused by a shake. Oddly, it is not known how this occurs. Professor Fielder is a foremost expert in his field. He gave evidence from a traditional standpoint. However, this is an area which is developing all the time. He has not been in clinical practice for a long time although, of course, has had a very active role in the reviewing of current and previous literature.

108 As I raised earlier, there were a number of aspects which troubled the court, not least the association between BESS and retinal haemorrhages. He could not explain why, especially since in relation to the PIAT paper, for example, there were other aspects which I thought required discussion if not explanation.

109 I am sorry to say, but I think there were some moments when Professor Fielder lost his way a bit in terms of mechanism and physiology. Although he resolutely hung onto the traditional view. I am not saying he was wrong, but I am anxious about his reluctance to entertain in this obviously unusual case, the possibility of, or the relevance of, the explanations given. That was well illustrated by the inquiry into how the cerebral spinal fluid was able to flow into the optic sheath. I was additionally troubled and concerned by his reliance on others, whether it be within this case or those outside this case, from whom he had sought support or confirmation.

110 Professor Fielder clearly founded his views on well tried, well experienced traditional perspectives, but as I say, I felt he was reluctant to consider other possibilities which might be suggested both in research papers and by the facts of this case and in particular his hypothesis given the light of the absence of other injuries. I do not think he was prepared to think more openly as some of the other witnesses, Dr Cartlidge for example and Mr Calisto, and consider the wider possibilities. As a result of that, I have concluded that I should view his evidence in that perspective.

111 Having considered all the relevant medical evidence, and weighing each aspect, both individually and together, without hesitation I find that inflicted injury is clearly one of the differential diagnoses. B's case is, however, difficult and unusual, given B's previously unidentified BESS which may well have played a part in contributing to, or even causing, his injuries and the connection between BESS and retinal haemorrhages known but not understood.

112 With that background, I turn to the evidence of the family. That evidence is strongly determinative of my conclusions, taken in the context of the medical evidence and conclusions. The only reported account is of a matchstick fall to the floor. I have already given a short precis of the accounts from each of the family members. Much is made of what was said by the mother, and of the many inconsistencies in her account, on the basis that consistency equals truth. For example, as I have already recorded, different descriptions of the noise as B's head hit the floor and of the variations in that description.

113 There is no evidence that the mother was directly responsible for whatever it was that led to B's collapse and, indeed, I reject any idea that the injury occurred earlier and was somehow disguised by the mother. There is simply no evidence, no foundation for that. Indeed quite the reverse. What is relevant, is that A was calm that day. He was behaving normally and as far as any recollection is reliable, was in the same place, unmoved, at the relevant times. U's evidence is important. He was closest in terms of setting and observation to what occurred before and after. Significantly, he was clear A remained on the sofa watching the television, in the same position. U seemed to one a careful, truthful witness.

114 Whereas the fall of itself, which was unusual (in so much as it caused the extensive injuries which occurred) might have been exacerbated by a push, there is no evidence that is the case either, it is entirely speculative. I thought, having regard both to the witnesses and GF in particular, who confirmed what her partner and the mother said about when they all rushed into the room, as the Court listened to them it seemed to me that, despite having repeated it no doubt many times, it had a sense of immediacy and truth. It was not rehearsed. Indeed, that was the more obvious the longer each was in the witness box. The mother, in particular, is not a sophisticated person. I doubt very much that she would have been able to hatch some sort of rather elaborate cover within the seconds of the emergency as it unfolded before her, with B being very obviously profoundly unwell and the emergency services being called. It does not seem to me to be remotely likely.

115 A was not known to be aggressive to, or to bully, his brother. He has had behavioural issues which are well set out in the papers. I have concluded, having regard to his position and the atmosphere in the home, it is unlikely that any further mechanism was involved, for example, by R pushing his brother. I bear in mind, of course, the evidence of Detective Constable Bailey and Mr Gallimore.

116 I have heard evidence from a considerable number of family witnesses, as well as all those I have already recorded. These family members' evidence was addressing a sense, a feeling or a perception, that at various stages something unusual had happened or a change of dynamic that in some way A had been briefed, or put up to what he had said about what happened that day, even coerced or manipulated to say something. It is, as I say, rather difficult to see how that really could have occurred, or when it would have occurred, having regard to what he has said right from the outset. The mother is not a sophisticated person and really, what A has had to say has never really altered.

117 It is contended that A's letter, which is quite a sophisticated document, was written "under influence". Yet it mirrors exactly what he has been saying throughout. I particularly highlight that view is strongly supported by the unvarnished evidence of his uncle, whose evidence the court found very persuasive. Whilst I am confident that A has heard and will, no doubt, to some extent have assimilated the family perspectives, one which is understandable in the circumstances, he has, in fact, remained pretty consistent.

118 Finally, I turn to the aspect of neglectful parenting. The background to that is that it is clear that in relation to A, he does require special care, as has been the case over a number of years.

119 The mother acknowledges that she should have been watching B that day but every parent recognises, with the benefit of hindsight, that there are occasions when juggling day-to-day activities or minor distractions, that an accident can occur, and how a parent feels responsible for that occurring. Actually, the presence of the mother in the sitting room, had B fallen, would probably have made no difference whatsoever. She was juggling a lot of day-to-day activities that day, and it is clear she was distracted by the floral arrangement.

120 I conclude, having regard to what occurred that day, and the mother's own acknowledgement, that such distraction as there was, is insufficient to trigger section 31. B was, after all, just feet away from his mother.

121 I do bear in mind that the mother's approach to the care of A was somewhat passive. It is clear that although there are a number of different perspectives, the mother's care of A was very different to the care he has received since he had been with his uncle, and in which he has thrived in a new school. I am confident that A will need to continue that path, as the mother herself told me.

122 Bringing all the strands together, I have concluded, on the descriptions of the family and the doctors, Mr Cartlidge and Mr Calisto in particular, that it is more likely than not that a fall accounts for the terrible injuries which B sustained that day.

123 In conclusion, I find that the subdural bleeds to the brain and the spinal bleeding had an accidental cause, and that the ophthalmic injury remains unexplained. I do not therefore find that the threshold triggers are activated in this case, either by causation or by omission.

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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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