Neutral Citation: **[2023] EWFC 186**

IN THE FAMILY COURT

SITTING AT THE DESIGNATED FAMILY CENTRE AT GUILDFORD

14th September 2023

Before:

HER HONOUR JUDGE LINDSEY GEORGE

Between:

Surrey County Council

- and -

LV

- and –

FM

- and –

A, B and C

(Children by their Children's Guardian)

Representation:

For the Local Authority Mr Michael Liebrecht (instructed by Surrey Legal department)

For LV Mr Jay Banerji (instructed by Child Law Partnership)

For LM Mr Chris Stevenson (instructed by Atkins Hope)

For the Children's Guardian Ms Manjit Dogra (instructed by Brighton and Hove Law)

Hearing Dates: 29th August – 4th September and 14th September

APPROVED JUDGMENT

This judgment was handed down in person on 14th September 2023 and subsequently anonymised. Copies of this version may be treated as authentic.

This judgment was delivered in private. The judge has given permission for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to dos will be a contempt of Court.

HER HONOUR JUDGE LINDSEY GEORGE:

1. Introduction

This is a fact finding hearing in public law proceedings brought by Surrey County Council (LA). They concern three children, A aged 4, B, aged 3, and C aged 8 months.

The children's mother is LV. Mother has been assessed by Communicourt (23rd August) as requiring an intermediary to support her in these proceedings. A ground rules hearing was conducted at the outset of the fact finding hearing and the court and legal representatives have endeavoured to put into practice the recommendations of Communicourt.

The children's father is FM. He has parental responsibility for all three children. The parents do not live together but prior to these proceedings they were in a positive co -parenting relationship and they remain on good terms.

The children are represented in these proceedings by their Guardian, Lauren Pascoe and their solicitor, Samantha Barker.

I am grateful to all the legal representatives who have worked very hard to make this fact finding effective, Mr Michael Liebrecht, counsel for the LA and his solicitor, Ms Fiona Inglis; Mr Jay Banerji, counsel for mother and her solicitor, Ms Emily Carter – Birch; Mr Chris Stevenson, counsel for father and his solicitor, Ms Maria Orme and Ms Manjit Dogra, counsel for the Guardian and the children's solicitor.

The hearing was originally listed as a "*rolled up*" hearing in order to minimise delay for the children and the parents. However, due to various delays and difficulties the hearing is a stand alone fact find and the welfare hearing is listed on 19th December for three days.

2. Background

C was born at the end of December 2022 at a hospital in Surrey. He had no complications and he and his mother were discharged on the same day with a brief overnight readmittance for jaundice on the next day.

On 10th January 2023 mother took C back to hospital to the Emergency Department. He had bruises on his face and his mother was worried about a possible lump on his head.

The Safeguarding Medical Report was written on 16th January 2023 by Dr. Q, Consultant paediatrician. He notes nothing of significant concern when C was brought into A&E save for:

Facial bruising:

> 1. 0.6 cm diameter, circular, reddish-purple bruise noted on the right alae nasi (wing of the nostril).
>
> 2. 0.2 x 0,4 cm linear, reddish-purple bruise noted just above the first bruise and below the right eye.
>
> 3. 0.4 cm diameter circular, reddish-purple bruise noted just below the right nostril on the upper lip.

He notes that, "*During the examination, it was noted that mum repeatedly asked if there was any swelling or injury to his head*". Nothing had been noted on examination, *"There was no obvious visible or palpable swelling over the scalp".*

The blood tests carried out on 10th January were all normal, *"...there was no indication from the blood tests that there was any underlying medical cause for the fracture or easy bruisability."*

C was admitted to the hospital for further investigations, given his very young age; unwitnessed bruises and the fact that he was non – mobile.

On 11th January a head CT scan was carried out with two reports provided. Both reports confirmed *"a left sided linear parietal skull fracture with no obvious intracranial bleed".* Some soft tissue swelling was also noted.

A skeletal survey was carried out on 11th January 2023. No further fractures were identified. The reports showed *"Approximately 3-4 cm linear un – depressed fracture of the left parietal bone extends to the sagittal suture with overlying soft tissue swelling."* No other bony injuries were identified and there was no evidence of "*brittle bone*" disease.

An ophthalmology assessment was also done on 11th January which was normal.

On 12th January 2023 an MRI of the skull and spine were carried out. Again, two reports were produced. The summary of these states,

> *"**Summary**: The MRI of the brain showed that there was a small amount of soft tissue swelling overlying the area of the fracture. There was also a small amount of intracranial bleed in the right frontal area which was consistent with small 'contre-coup' injury. On further discussions with the Paediatric Neuroradiologist, they explained that this injury was consistent with a traumatic injury that is likely to have occurred anytime in the preceding week before and including 11th January 2022. The radiologist felt that this injury was not compatible with birth related trauma."*

In view of the skull fracture, expert opinion was sought from another hospital, in London. No further investigations were required as C remained neurologically stable.

The Safeguarding Report concludes,

> *"Overall Clinical Summary:*
>
> *C presented with unwitnessed bruising to his face and underwent full safeguarding investigations which revealed that he had sustained a traumatic skull fracture, which according to the radiologist occurred anytime in the preceding week before and including 11th January 2022. The fracture was confirmed by skeletal survey and CT head scan. The MRI head scan confirmed that there was swelling overlying the fracture and a small bleed in the right frontal area suggestive of a 'contre-coup' injury. No other fractures or bruising was noted. There was no medical explanation found for his fracture from the investigations.*
>
> *Conclusion:*
>
> *There is an unwitnessed and unexplained traumatic skull fracture in this non-mobile infant."*

C was discharged on 16th January with the children remaining in their mother's care while being supervised by maternal and paternal family members. They have supervised contact at the weekend with their father.

On 16th January 2023 the police concluded their investigation and closed their file recording,

> *"From the paediatric consultant-*

"We can't rule out either accidental or non-accidental injury- this is the most common type of head injury regardless of what the cause is and the additional very small bleed on the other side of the head is consistent with the fracture and is part of the same traumatic head injury and NOT additional too, however as it is traumatic injury he radiologist feel that this cannot have occurred during the birthing process"

In lamens turn (sic) there has been trauma to the left side of the head (where the fracture is) and there is a corresponding bleed on the other side as the brain ricochets off the opposite skull wall during the injury being caused. It is impossible to judge the level of force required for this injury to be caused as it can be caused by minimal force, the fact there are no other injuries, such as other fractures/ injuries to the back of the eye, suggests may not have been much force required to cause this injury.

As such we cannot identify what has caused this injury and whether or not is an accidental or non-accidental however there are no other indicators of concern and mother and father have been consistent in that the baby was left alone with its older sibling for a couple of minutes and hen mother found baby out of his bouncer chair and in the arms of the older sibling who was trying to bottle feed the baby, The good news is that there are no side effects of the injury C has suffered and he is now medially fit to be discharged from hospital

From a police perspective we do not have enough to suggest that a criminal act towards C has occurred, his parents accounts are consistent and here is nothing further discovered at this time that increased our concerns that a deliberate harmful act has occurred against C

As such police will not take any further action regarding this matter and will now be filing this occurrence."

In accordance with safeguarding protocol a further skeletal survey was carried out on 23rd January 2023. There were no new fractures identified.

On 14th February Dr Q answered some questions regarding C's injury and in particular whether the explanation provided by mother that B picked up the baby could have caused the injury. The reply was, *"Given the above history, the detection of a parietal skull fracture does NOT fit in with this history*".

There was considerable delay in issuing proceedings. The LA did not issue until 3rd March when it sought an interim care order with a plan to separate the children from their family and place them in foster care. At the first hearing on 8th March, before Mr Recorder Banerjee no public law orders were pursued and mother remained caring for the children with supervision from family members. This has been a difficult time for all the family and they are to be commended for supporting mother and children and enabling mother to remain with the children.

The matter was first listed for a fact finding on 12th June. However, at the start of that hearing the local authority's representatives raised concern about mother's cognitive functioning and the hearing was adjourned to enable those inquiries to be made.

The matter was relisted for 5 days starting on 29th August.

3. Evidence

I have had the benefit of a full bundle of documents. I have heard oral evidence from Dr Fionnan Williams, Consultant Paediatric Neuroradiologist and Dr M. A. S. Rahman, Consultant Paediatrician and from both parents.

Although I heard the medical evidence first, I am going to deal first with the parents' evidence.

4. Mother

4.1 Background

Mother is a young mother. She had A when she was 17; she is now just 22 with three young children. She is no longer in a romantic/intimate relationship with father but until January 2023 they co-parented effectively with father helping with the home and child care. It is clear from their behaviour in court that they manage to have a supportive relationship.

It is agreed by all parties that mother has no substance misuse issues; generally, keeps the house immaculate; there is no domestic abuse in the relationship between herself and father and no issues of any significance with the LA although there was an incident in July 2022 when the parents had a row and police were called. That appears to have a been a one off. Further there was an incident when B slipped out of his baby bath support and under the water for a few seconds. No action was taken by the LA in respect of any historic incidents.

4.2 The Court directed ***cognitive and intermediary assessments*** of mother on 14th June 2023.

Mr Mike Crimes, Occupational Psychologist, provided his cognitive report on 4th July 2023. He concluded that mother falls within the Borderline range of cognitive ability, requiring support and assistance in certain areas. In particular she may need support for her low working memory and may have problems with more complex verbal and written instructions requiring specific support.

Mother was assessed by Communicourt on 23rd August as needing the support of an intermediary during the proceedings. The Court is grateful that Communicourt was able to provide an intermediary, Ms Tolan, for the course of the hearing and at short notice. The Court conducted a ground rules hearing and has implemented the recommendations as far as possible.

4.3 Presenting History to Professionals

(i) On 10th January 2023 at 14.12 C was triaged in the Emergency Department Paediatric section at East Surrey Hospital. The nurse notes,

> *"Mum has left baby in baby chair. She has gone to sterilise bottles in another room. When mum has returned bother (sic) 3 yrs. has moved baby on footstool and was trying to put bottle in babies (sic) mouth. C has not cried. Solid lump and Purle (sic) bruise on head."*

There were no physical concerns with C's presentation.

(ii) There are a number of Emergency Department notes recording what has been said. In one dated 10th January (14.51) it is recorded that "*she was concerned about a bump on the back left hand side of his head and a mark on his face beside his lip."* The report goes on,

"OE (on examination) … Head Mum concerned about a lump, left lateral to the occiput. This appears to be a hard bony area, possibly a normal variant for him. No redness, bruising or boggy swelling at this area. Not painful on palpitation"

(iii) In the Clinical Narrative it sets out the following account,

"HPC: At approx 12:15. Mum went in to the living room and found her 2 week old baby on top of the footstool with his 2yr old brother trying to give him a bottle. Mum reports that she was out of the living room for less than 5 minutes while she was washing the baby bottles. Before she left the room she had placed C in a bouncy chair but she did not strap him in, and his older brother who is two and has autism was in the room with him. She did not hear any crying nor any noise that made her concerned while she was out of the room. When she checked C over she was concerned about a bump on the back left hand side of his head and a mark on his face beside his lip. She states that he has been otherwise very well recently and there has been no illnesses at home. He has been feeding 3-4 ounces every 3-4 hours and he is PU and BO as normal."

This contains a little more detail than the initial summary.

(iv) Dr R records her conversation with mother in a note timed at 20.24 as follows,

"Reviewed by Dr R, CAU consultant.

History willingly given by Mum: She had just fed baby and left baby in bouncy chair (not strapped in) and left room for a few minutes to wash baby bottles. 3y sibling Caleb who has non-verbal autism was in the room with baby. Mum heard a quiet noise (not a cry, but a verbal noise from the baby) so went back in and saw baby had been moved to the padded mattress (Mum showed me a photo of this, taken on a different day ... it looks like a grey padded mattress without any coverings). B was trying to feed the baby with an empty bottle. Baby not crying or distressed but Mum noticed the mark on the face to the right side of the nose, and thought there could be a swelling on the head. She therefore brought the baby immediately to PED. Baby has behaved normally and continued to feed well.

Mum was very tearful during the consultation, and said more than once: "I'm so sorry, this is my fault, I shouldn't have left them together, I just want to be sure C is ok". Appeared genuine, polite and concerned for baby's best interests."

Dr R orders the further safeguarding work to be done due to the unexplained facial bruising and absence of witnesses to what happened.

(v) During the ward round on 11th January at 11.20 am it is recorded that mother was out of the room emptying bottles for less than 2 minutes when she heard a *"verbalisation (not a cry)"* ; "*sibling lifted C out of bouncy chair and onto soft footstool*". It is recorded that mother noticed marks on C's face next to his nose and saw a possible swelling on his head. She took him immediately to hospital.

In the same record it notes that Mum says it was *"all "her fault""* but notes that she responded appropriately to C; that on one occasion she left C on a pile of bedsheets on the edge of the bed and Dr Q stepped in to move him; and that mother repeatedly asked for the professionals to check the back and sides of C's head, despite "*being reassured that we could not feel any abnormal swelling or see any bruises*".

(vi) During the course of 12th January, the safeguarding process gets underway and mother is spoken to on a number of occasions. Nothing is said by her to change what has been said previously. She is adamant that she does not know what has happened to B.

(vii) In the discharge summary dated 16th January, it is noted,

> *"Mum found him on top of the footstool with his 2yr old brother trying to give him a bottle. Mum reports that she was had placed C in a bouncy chair but she did not strap him in, and When she checked C over she was concerned about a bump on the back left hand side of his head and a mark on his face beside his lip."*

4.3 Responses to Threshold

In her responses to threshold mother accepts the scope of the injuries but does not accept that the injuries were inflicted by her either deliberately or accidentally. She maintains that the only occasion they could have happened was on 10th January when she left C alone with B.

4.4 Evidence

Mother has filed a statement dated 7th March 2023. In addition, her solicitor has filed a statement exhibiting a number of videos and photographs of the bouncy chair, the padded footstool and the layout of the room.

She sets out her position as follows,

> *"4. My position with regard to C's injuries is as it has always been. I accept I left him in his bouncer seat for a few minutes, five minutes maximum, whilst I went to wash bottles. I accept he was not strapped in. I know now I made a mistake in not strapping C in and leaving him with B. The guilt I feel is tremendous and I will never make this mistake again.*
>
> *5. As I was coming back towards the room I heard a small noise from my baby (C has a very quiet cry). I came straight back in the room and found B had taken C out of his seat and placed him on a stool. The stool looks soft but it is in fact very firm. The flooring in the room is very hard laminate also. Underneath the laminate is hard porcelain tiles. B was trying to push a bottle in C's mouth and there were small marks by his nose. I could see that there was a small change to the shape of C's head. I was really worried. I have anxiety and do worry about my children's health so I took him straight to A and E. I hoped it was nothing to worry about at all, just like it had been when I thought there was a small swelling on B's head when he was 7 days old and I had that checked at hospital too. That turned out to be just the shape of his head and I was hoping it was the same for C too."*

Mother gave her evidence clearly and confidently. Her evidence was consistent with her written evidence and the accounts she gave at the hospital. She did not waver from those although in cross – examination both the LA and the Guardian questioned certain aspects of it. In particular.

(i) Whether she had ever left the baby alone with father. Mother was clear that she had not. She would take him to school when taking A either if they walked or went in the car with father. Father's evidence was pretty clear that he did not really do tiny baby care such as changing nappies or feeding. It was clear that he was more comfortable as they got older. He said he was hands on with B who

could be more challenging. Mother agreed with this.

(ii) When she made up bottles. Mother gave a very clear explanation of when and how she made up bottles, at the end of the day. She was then questioned as to why she would have been washing bottles at lunchtime on 10th. She explained that she could only sterilise 6 at a time and would do 6 at night and then others during the day. C was still very little and requiring a bottle on a 3/4 hourly basis and more than 6 bottles would be needed during the day.

(iii) She was asked about any time when she heard C cry out loudly. She said that C was a very good and quiet baby with a quiet cry. She denied ever hearing a loud cry and she said went back into the sitting room from the kitchen because she heard a noise from him – not a cry, more a moan. She said he was making little noises. She said that she would not have gone back into the sitting room at that stage but for hearing the noise – it was unusual.

(iv) When she went back in, she said she saw B standing over him with C lying on the end of the footstool with a bottle in his mouth. She said the first things she saw were the marks on his face and she felt his head and thought she felt a lump. She said she felt very certain there was a lump and that was when she shouted for father.

(v) She was also very clear that B was a strong little boy; liked to help with the shopping and would carry bags for them from the front door even if they were heavy.

Mother was clear in her evidence that if she had seen anything or been able to say what had happened, she would have said. She said that she always took the children to the doctor or hospital if there was something she was worried about and that if there had been an accident, she could not see that there would be any harm in saying what had happened.

I thought mother gave very credible evidence. She was not shaken on what had happened and her story has been consistent. I thought she was able to explain why she took certain actions – such as washing the additional bottles at lunchtime - in a realistic and credible way. This was a busy family and she took the opportunity to prepare the next set of bottles when she could.

I also thought she described B very well. Although he is non – verbal he was a little boy who was quite strong and wanted to "*help*". This image of B is one that is corroborated by the police who describe him as,

> *"B was a boisterous and friendly young boy who interacted with all professionals. He was very strong and was pushing and pulling adults around."*

Overall, I found mother to be a persuasive and largely credible witness who was trying to assist the court. She did not present to me as a witness who was trying to hide something or was practising a deliberate deception about what had happened to C. Her account has remained largely consistent throughout.

5. Father

Father has responded to threshold and provided a statement. He also gave oral evidence.

He confirmed that the parents are not in a relationship but co -parent the children to the extent that father is present in the house most days, although rarely stays over, generally only if there is something special happening, maybe once per month. Otherwise, he lives with his mother, or his sister. He would sometimes take B home with him if he was challenging, to give mother a break although he did not think that had happened in January 2023. He said that sometimes he would get to mother's before the children went to school, sometimes not. He was very clear that they got on well together as parents and friends and they were coping well with the children.

He said that when he did go to the family home he did not really care for C as he said he was *"too small*". He did not do nappy changing or feeding. He said it was always mother who was with the babies. He was very dogmatic in saying that he has never been alone with C although mother accepted that there would be times when he might be left in the living room with C when she used the bathroom or popped into the kitchen. It seems likely that father did not take any caring responsibility for C – that was mother's job. He took the pressure off mother by looking after B. He is also B's registered carer.

He said in the week running up to C being in hospital there was nothing unusual. He described C as a quiet and calm baby, a happy boy. He said that he was the *"best baby out of all three*".

On 10th January, father accepts that he was at home. He was upstairs doing some jobs for mother. He said he did not hear C cry although the tv was on. However, he said that if C had cried loudly/screamed he would have heard it. He did hear mother scream/shout for him and he ran downstairs, meeting her at the bottom of the stairs with C in her arms.

She told him that she had walked into the front room, B was trying to force a bottle into C's mouth and she thought there was a lump on his head. She said she would have noticed it if it was there before. Father said he thought it was the shape of his head but mother felt "*something had happened*".

Father was clear in his evidence that if mother had accidentally done something or had dropped the baby, she would have told him. He explained that mother went to hospital because although he thought C was fine, he did have a bruise on his nose and she went "*to be on the safe side*".

He was very frank and said that it would have been a lot less trouble for them to have said that an accident happened than to go through what they had been through but he told the Court that he was telling the truth and had not done anything to harm and he believed what mother had told him.

I thought father was a straightforward witness; although perhaps was too adamant that he was never with C on his own. However, I accept that he was not left in charge of C's care. He was pressed on whether he was alone when A was taken to school and denied that this was the case. In any event, she had only started school the day before on 9th January and both parents took her, they were consistent about this and it seems very likely that they would have gone together. On 10th their recollection was less good but both were clear that mother would have taken C to school and not left him with father. If she walked it would take about 20 minutes each way and if they went by car, it would take 5 minutes, so they would prefer to go by car with father which meant they would all go.

6. Other Family Members

No other family members gave written or oral evidence. The parents have been very well supported by their families during this very difficult time. Mother and the children have split their time between the Maternal Grandparents (MGPs) and the Paternal Grandparents (PGPs). It is clear that this is a close family and the parents and children would have seen them in the week leading up to 10th January.

There was significant questioning on behalf of the Guardian about time the children spent with them in the days leading up to 10th January. However, there is no suggestion that any of the grandparents did anything to harm C either accidentally or otherwise. They have been seen as supportive family members throughout the proceedings and have enabled the children to remain with their mother. No findings are sought against them.

Further, none of them has provided any evidence to cast doubt on the accounts provided by the parents. They must have discussed events over the last 8 months but there is nothing to suggest any further factual evidence about what happened.

7. Expert Medical Evidence

7.1 Dr Fionnan Williams, Consultant Neuroradiologist.

Dr Williams has provided a report dated 5th May 2023, together with answers to questions on 2nd June and 18th August.

Dr Williams has given very clear written and oral evidence on which he was not shaken in cross – examination.

He considers the CT scan to be of excellent quality. From the scan he is able to identify the soft tissue swelling which is a marker of blunt instrument trauma. He explains,

> *"Soft tissue swelling is a marker of blunt impact trauma. Soft tissue swelling of this type is more usual in impacts against hard, unyielding surfaces or objects or when the head is struck by hard implements. The force of the blow causes trauma to the layers of the scalp at the point of impact leading to bleeding and oedema in the muscle and fascial layers of the scalp."*

He goes on to explain that the soft tissue swelling will persist on imaging for 7-10 days in total. After 10 days no swelling will be visible. The swelling must therefore have occurred within the 7 to 10 days prior to 11th January.

Under the area of soft tissue injury there is a left parietal skull vault fracture which is linear running into the sagittal suture located in the middle of the skull. It is not depressed or significantly widened. Dr Williams goes on to explain,

> *"Skull vault fractures are also markers of blunt impact trauma. The bones of the skull vault do not heal in the same way as the long bones and ribs, and consequently it is not possible on imaging to date the skull vault fractures directly. The role of associated soft tissue swelling thus becomes highly relevant. The blow which caused a fracture will inevitably lead to soft tissue injuries in the overlying scalp. Thus, if there is soft tissue swelling overlying a fracture then we can say the blow which caused the fracture has happened within the preceding 7-10 days before the CT was acquired."*

Dr Williams explains that infant skull vaults do not fracture with minimal trauma. They are not seen arising from minor domestic impacts or rough play/rough handling. The force needed to cause them is considerable and would be inappropriate for small children if witnessed by an independent bystander.

The rest of the skull is normal.

In addition, he identifies a small amount of "*surface subarachnoid haemorrhage over the right frontal lobe*". He explains,

> *"This is a "contre-coup" injury. When the back of the head strikes a surface or is struck, the force of the impact causes the brain to move forward and to strike the interior of the skull vault anteriorly. This leads to bleeding at the point of impact."*

Again, given the nature of the image Dr Williams considers this to have occurred within the 10 day period leading up to 11th January.

He does not find any evidence of a contusion or bruise to the brain. There are no other matters of concern identified on the CT scan.

The MRI scan carried out on 12th January is also good quality. No further injuries were identified.

Dr Williams goes on to consider the alternative potential causes of the fracture and bleed.

(i) He says there is no ***naturally occurring explanation*** for the injuries – in his opinion they must have been caused by *"blunt impact trauma to the left side of C's head".*

(ii) This is not a ***birth related injury***. The birth was non – traumatic (insofar as any vaginal birth is non – traumatic). There were no concerns at the time of birth that he had any sort of head injury, nor was there any cause to believe that he might have suffered one. This is supported fully by the views of Dr Y, Consultant Paediatric Neuroradiologist at the hospital.

(iii) ***Accidental trauma***. Dr Williams explains that the overwhelming majority of accidental skull fractures in paediatrics occur in the setting of falls. There is no minimum height below which a fracture never occurs and above which one always does. The chance of a fracture reduces below 1 metre although may occur more readily if the head strikes a corner point.

Dr Williams considers that it is *"extremely unlikely that B was responsible or contributed to the injuries seen on imaging,"* given mother's account of what happened. In the answers to questions dated 2nd June he confirms this position, saying that it is extremely rare for such an injury to be caused by a young sibling as "*the vast majority of cases involve a level of force which such a young child would simply not be able to generate".* He goes on to say with regard to the level of force required, *"The experience and evidence we have is that such occurrences are very rare and the scattered reports of low level falls producing fractures are witnessed events of head first cranial impact trauma."*

In response to the further questions, Dr Williams remains of the opinion that if B dropped C it would be "*very unlikely to lead to a fracture and intracranial*

haemorrhage."

(iv) ***Non – Accidental Injury*** Dr Williams says that the images are "*evidence of blunt force impact injury to the posterior left parietal region of C's head".*

He goes on,

> *"The injuries were thus caused in an episode where the head struck a hard surface or object or was struck. In the absence of a satisfactory accidental explanation, the Court must consider whether this impact was the result of a deliberate act. Examples of mechanisms causing these injuries include forcibly throwing or forcing C against a hard surface or directly striking his head- for example with the clenched adult fist or an implement."*

In passing I note that it is not for the parents to provide *"a satisfactory accidental explanation*". It is for the LA to satisfy the Court that this is more likely than not a non – accidental injury.

7.2 Dr M. A. S. Rahman – Consultant paediatrician and Honorary Senior Lecturer

Dr Rahman has filed a report dated 27th July 2023 and answered questions dated 23rd August 2023.

(i) ***The facial bruises***

Dr Rahman says in his report,

"75. All the 3 bruises noted on C's face are very small and less than 1 cm

76. I cannot think of a non accidental mechanism inflicted by an adult that may produce such small bruises

77. The history provided by the mother about the sibling B (dob 30/4/20: Age 2 years and 9 months at the time of the medical on 10/1/23) holding a bottle to C's face and pressing hard may account for these bruises"

Minimal force would be required to cause the bruising and he is likely to have felt momentary pain which would have been unlikely to last more than a few minutes.

He was very clear in oral evidence that he could not say that the marks on C's face were non – accidental and could not think of any deliberate mechanism that would make the marks.

(ii) ***The skull fracture***

Dr Rahman is of the view *that "at 2 years and 9 months, B is extremely unlikely to be able to lift C and place him on the adjacent stool*." This remained his opinion in the answers to questions and having confirmed he had reviewed the layout of the room and in particular the bouncer, marble topped table and footstool. In cross – examination, Dr Rahman remained adamant that in his opinion it was very unlikely that a child of this age would be able to lift C. He could not see that B's

actions would cause a fracture even if he did lift him. In any event he would very likely have cried out loud.

He did not consider that if B had picked up C and dropped him or knocked him that the forces would have been sufficient to cause a skull fracture. He says the forces would need to be significant but cannot be quantified. However, in oral evidence he conceded that there was no minimum level of force to cause a skull fracture and the evidence on skull fractures in such young babies is limited, if babies present as well, they are not usually x rayed for good reason – they are not subjected to radiology. He accepted that there may be occasions where low level falls may cause fractures.

He considers the skull fracture to be unexplained but the explanation provided does not account for the fracture and he shares Dr Williams' view that the most likely cause is a fall from height or a direct impact to the head. He considers the skull fracture to be very suggestive of a non accidental injury.

The skull fracture is likely to have caused significant pain and C is likely to have cried out or screamed in pain. He would have probably cried for several minutes. It would have been obvious to a carer that there was an injury and C was hurt but not that they had caused fractures. Dr Rahman did not accept that any child of 3 weeks with a skull fracture would just moan. Their only means of communicating pain at that age is to cry.

8. The Law

I am very grateful to Mr Stevenson for providing a very full note of the law. I have cherry picked the aspects of it that seem most pertinent for this judgment.

8.1 Burden and Standard of Proof

Where the case it brought by the Local Authority it is for the Local Authority to prove its case – it has the burden of proving the allegations throughout the proceedings. The burden does not shift to the parents at any stage.

The Local Authority must prove its allegations on what is known as the balance of probabilities. This means that the Court must be satisfied that something is more likely than not to have happened.

In ***Re B*** Baroness Hale at paragraph 70 said:

> *"I…would announce loud and clear that that the standard of proof in finding the facts necessary to establish the threshold at s31 (2) or the welfare considerations at s1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegations 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".*

8.2 Evidence and the Broad Canvas

In ***Re A (Fact Finding: Disputed findings) [2011] 1 FLR 1817*** Munby LJ observed *"it is an elementary position that findings of fact must be based on evidence, including inferences that can be properly drawn from evidence and not suspicion or speculation".*

The Court's task is to make findings based on an overall assessment of all the available evidence. In the words of Butler-Sloss P in ***Re T (Abuse: Standard of Proof) [2004] 2 FLR 838***,

> *"Evidence cannot be evaluated and assessed separately 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".*

Lady Justice King in **A (Children) [2018] EWCA Civ 1718** stated that:

> *"57. I accept that there may occasionally be cases where, at the conclusion of the evidence and submissions, the court will ultimately say that the local authority has not discharged the burden of proof to the requisite standard and thus decline to make the findings. That this is the case goes hand in hand with the well-established law that suspicion, or even strong suspicion, is not enough to discharge the burden of proof. The court must look at each possibility, both individually and together, factoring in all the evidence available including the medical evidence before deciding whether the "fact in issue more probably occurred than not" (*Re B*: Lord Hoffman).*
>
> *58. In my judgment what one draws from* Popi M and Nulty Deceased *is that:*
>
> > *(i) Judges will decide a case on the burden of proof alone only when driven to it and where no other course is open to him given the unsatisfactory state of the evidence.*
> >
> > *(ii) Consideration of such a case necessarily involves looking at the whole picture, including what gaps there are in the evidence, whether the individual factors relied upon are in themselves properly established, what factors may point away from the suggested explanation and what other explanation might fit the circumstances.*
> >
> > *(iii) The court arrives at its conclusion by considering whether on an overall assessment of the evidence (i.e. on a preponderance of the evidence) the case for believing that the suggested event happened is more compelling than the case for not reaching that belief (which is not necessarily the same as believing positively that it did not happen) and not by reference to percentage possibilities or probabilities."*

8.3 Truth and Lies and the Assessment of Credibility

I turn now to the difficult issue that confronts judges in fact findings that not all witnesses are truthful all of the time. This was recognised in ***R v Lucas [1981] QB 720*** that "*if a court concludes that a witness has lied about a 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".*

In assessing credibility, the evidence of the parents and carers is of the utmost importance and they must have the fullest opportunity of taking part in the hearing. The court is likely to

place considerable weight on the evidence they give and the impression it forms of them. Given the fallibility of human memory and *"the human capacity for honestly believing something which bears no relation to what actually happened…contemporary documents are always of the utmost importance"* Mostyn J in ***Lancashire County Council v R & W [2013] EWHC 3064 (Fam).***

8.4 Perpetrators and Pools of Perpetrators

In ***Re S-B [2010] 1 FLR 1161*** Baroness Hale gave authoritative guidance on the approach to be taken where one or more individuals might be responsible for the harm to the child. First it is necessary to identify the pool of possible perpetrators and consider, when identifying that pool, whether there is a likelihood or real possibility that one of more of them might have inflicted the harm. She goes on,

> *"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. When looking at how best to protect the child and provide for his future, the judge will have to consider the strength of that possibility as part of the overall circumstances of the case."*

In ***Re B (Uncertain Perpetrator) [2019] EWCA Civ 575*** Jackson LJ helpfully distilled some useful and relevant principles as follows:

> *"So, to state the obvious, the concept of the pool does not arise at all in the normal run of cases where the relevant allegation can be proved to the civil standard against an individual or individuals in the normal way. Nor does it arise where only one person could possibly be responsible. In that event, the allegation is either proved or it is not. There is no room for a finding of fact on the basis of "real possibility", still less on the basis of suspicion. There is no such thing as a pool of one".*

In ***Re A (Children) (Pool of Perpetrators) [2022] EWCA Civ 1248***, King LJ considered the application of the guidance commonly invoked in uncertain perpetrator cases, that the court should not "strain" to identify a perpetrator. King LJ observed that, whilst "*the formula may well have served as a convenient counterweight to any temptation on the part of a judge to make a finding at all costs*" [29], there is a risk that the use of this formula over time has led to its incorporation into the legal test as a "gloss", a practice which has been expressly condemned by the Supreme Court [30]. King LJ concluded, therefore, that judges should no longer direct themselves not to "strain" to identify the perpetrator, and "*that to go further and to add that the courts should not 'strain' to make such a finding is an unnecessary and potentially unhelpful floss which has outlived its usefulness*" [33]. Instead:

> *"34. The unvarnished test is clear: following a consideration of all the available evidence and applying the simple balance of probabilities, a judge either can, or cannot, identify a perpetrator. If he or she cannot do so, then, in accordance with* Re B *(2019), he or she should consider whether there is a real possibility that each individual on the list inflicted the injury in question".*

8.5 Expert Evidence

In **Re B (Care: Expert Witnesses) [1996] 1 FLR 667** Ward LJ gave the following guidance as regards the evidence of expert witnesses:

> *"The expert advises but the Judge decides. The Judge decides on the evidence. If there is nothing before the court, no facts or no circumstances shown to the court which throw doubt on the expert evidence, then, if that is all with which the court is*

left, the court must accept it. There is, however, no rule that the Judge suspends judicial belief simply because the evidence is given by an expert."

Butler-Sloss LJ continued:

> *"An expert is not in any special position and there is no presumption of belief in a doctor however distinguished he or she may be. It is, however, necessary for the Judge to give reasons for disagreeing with experts' conclusions or recommendations. That, this Judge did. A Judge cannot substitute his own views for the views of the experts without some evidence to support what he concludes."*

8.6 Factors Relevant to Factual Framework

In ***Re BR (Proof of Facts) [2015] EWFC 41*** Peter Jackson J endorsed an analysis of relevant factors to be considered by the Court which had been prepared by counsel for the Children's Guardian from material prepared by the NSPCC, the Common Assessment Framework and the Patient UK Guidance for health Professionals. This identified both risk factors and protective factors.

9. Submissions

9.1 Local Authority

There is a somewhat wordy and lengthy schedule of proposed findings. I do not intend to follow it verbatim.

The scope of the injuries is agreed and as set out in paragraph 2 of the threshold document dated 25th May 2023 save that the skull fracture is not "*depressed*" and the sub-arachnoid bleed as described by Dr Williams was at the "*right frontal lobe*".

In short, the LA seeks a finding that on 11th January 2023 C was found to have suffered a blunt blow to the head or that his head struck a hard surface; that the injury was inflicted between 4th January when the health visitor saw C and 11th January when the injury was identified at the hospital.

The injury was either caused by an undisclosed accident or by non – accidental inflicted act. The LA was clear that inflicted can include reckless or careless behaviour, not necessarily deliberate. It conceded that there was no evidence of propensity that mother and/or father was likely to do it again and there were no social circumstances that would make non – accidental injury more likely.

Both parents could be in the pool of perpetrators. The LA contended that there is a real possibility that father could be just as responsible as mother. No other family members are in the pool. There is no suggestion that any of them looked after C on their own during the period leading up to 10th January.

The LA pointed to certain inconsistencies in the parents' evidence and aspects that seemed unlikely, such as father never being alone with C; them all going to school together instead of father caring for B and C on his own while mother went to school; the fact that initially he said there was no lump on C's head and then there was, so they should go to hospital.

In respect of mother the LA cast doubt on the mother's account of when she did the bottles; her suggestion that C might have momentarily lost consciousness. The LA also pointed to her anxiety at the hospital for the professionals to look at the child's head; the irony being that if she had not pressed the hospital they might have been discharged and the fracture

would not have been found. However, it supports the LA position that something happened that mother knew about.

The LA relies on the evidence of the medical experts to show that (i) it was unlikely that B could lift or move C; (ii) that low level falls/low impact knocks are unlikely to cause skull fractures; (iii) that C would have cried as a skull fracture is very painful.

With regard to the bruising the LA did not press its case in light of the evidence of Dr Rahman.

9.2 Mother

It is agreed by mother that the injuries were not likely to have been caused by a birth injury.

Mr Banerji on behalf of mother asks the Court to look at the whole picture. Mother's oral evidence was very convincing; given her cognitive issues, she is not a sophisticated witness; she is not lying and would not have hurt C on purpose. The Court is asked to accept that if mother had hurt C in an accident or knew what had happened, she would have said; she has done her best and that is all she can do.

The Court was asked to accept that there were a lot of unknowns – the impact required to cause a fracture in such young infants is, in reality, not known. Had mother not insisted, C would have gone home and the fracture would not have been identified, this must be the case with many others and with those who do not go to hospital in the first place.

She pressed the hospital because she thought she could feel a bump on the head but this was not where the fracture was – it was the occipital bone, not the parietal. Had she known what had happened she would have identified the correct part of the head.

It was suggested by Mr Banerji that if the bruises round the mouth were thought to have been caused by B, then it is more likely that the skull fracture was at the same time and it was unlikely to be anyone else.

Mr Banerji submitted that the findings sought by the LA are unlikely and in those circumstances the LA has not proved its case.

9.3 Father

On behalf of father, Mr Stevenson adopted what had been said for mother and submitted that on occasion the burden of proof could not be discharged as per King LJ in ***A (Children) [2018] EWCA Civ 1718***. While accepting that the medical evidence was clear it was only part of the evidence and the court needed to consider the wider canvas.

Dr Williams accepted that there was no height below which fractures could not be sustained; Mr Stevenson asked the court to consider that despite the experts stating that B could not generate the force they were unable to say what the force would be – it was clear that B was strong and thought he was stronger than he was.

He pointed out that there is no evidence of the parents trying to conceal what happened; none of the ***Re BR*** risk factors are present and there are many protective factors.

Mt Stevenson submitted that Dr Rahman cannot say that the bruising was non accidental and cannot consider a non accidental mechanism; he accepted that mother's explanation of B pushing the bottle into C's mouth as a possible explanation for the bruises; therefore, it follows, that that acceptance enhances the parents' credibility.

Insofar as father being a real possibility as a perpetrator, Mr Stevenson pointed out that he was a visitor to the home and mother's credible evidence was that he did not have care of C on his own except for very short periods and certainly not while she was out of the house. He points out that there is no evidence that the parents have colluded or changed their evidence. Father's evidence regarding the possible lump on the head or absence of such should not be seen as a significant inconsistency, nor the fact that he had seemingly not taken in what was in his written statement.

9.4 Guardian

On behalf of the Guardian Ms Dogra presented a balanced view, identifying a number of scenarios. If it was accidental, it could have been as described by mother, unwitnessed in another way or a witnessed and undisclosed accidental injury. Alternatively, it could be non – accidental.

Ms Dogra suggests that mother's account of a small moan might account for the reaction to the bruises round the mouth.

However, mother's account did not satisfy either of the medical experts for the skull fracture. In particular, the Guardian pointed to the expert evidence that C would have cried; that mother did not hear a cry and did not notice any change in presentation. In her submission mother and father cannot be correct as B was unlikely to be able to create sufficient force to injure C even if he could lift him.

However, the Guardian noted that there were no risk factors for C and questioned whether the Court could be satisfied that the LA had discharged its burden of proof. If it had, then father would be in the pool of perpetrators given the amount of time he spent at the house.

10. Discussion

10.1 Bruises

Dr Rahman was clear in both his written and oral evidence that he cannot identify a mechanism that would be non accidental. They are very small and he thought that mother's explanation might be a possible explanation for how they were inflicted.

There is no other explanation for the bruises and the LA was unable to advance any substantive evidence that these bruises could have been inflicted by either parent accidentally or non accidentally. The medical evidence does not support that and there is no other evidence apart from what mother says she saw.

10.2 Skull Fracture

The parents accept that C suffered the skull fracture identified on 11th January 2023 and the sub arachnoid haemorrhage over the right frontal lobe. They do not accept that either one of them caused it either deliberately, carelessly or recklessly or accidentally. In coming to a view on the causation of the skull fracture, the Court must consider all of the evidence before it, the wide canvas.

Dr Williams was clear that the soft tissue injury would be more usually caused by an impact against a hard, unyielding object or with the head being struck by a hard implement. In his view the force required is considerable and beyond "*minor domestic impacts*" or rough play. A fall might cause the injury and he accepted that there was no minimum height below which a fracture never occurs, although it is less likely below a metre.

This evidence raises issues for the Court. The level of force required is unknown for such young babies; the results of falls from infants is also unknown; many children who have falls will not attend hospital if they appear to be all right and those that do will not be subjected to an x-ray if they do not have any significant symptoms. It is unlikely that C would have been investigated if mother had not been so concerned about the lump to his head. The assessment of likely force in low level fractures where there are no or few symptoms appears to me to be uncertain from the evidence.

Dr Rahman was adamant that B would not be able to lift C. He has not seen or examined B; I am not even sure if he has any idea of his size or development. He was 2 years and 9 months; described by the police as strong and able to push and pull adults; he was described by his parents as able to carry shopping bags and large bottles of coke and perhaps having an inflated view of his physical abilities. I do not accept the evidence of Dr Rahman on this point. It seems to me at least a possibility that B would be able to lift C albeit not well or competently.

If B did move C, Dr Rahman was of the opinion that any force required to inflict the injury would be "*significant but cannot be quantified*". In his oral evidence he accepted that "*there was no minimum level of force to cause a skull fracture and limited evidence in young babies".* He also accepted that on occasion low level falls may cause a fracture.

This is all of a piece with Dr Williams' evidence that the level of force required to cause skull fractures in young babies is uncertain.

Dr Rahman was very clear that a skull fracture would cause a baby to cry out in pain as that was their only means of communicating at that age. It would be unlikely to be just a moan. He was not shaken in his evidence on that point.

The medical evidence must be considered against the evidence of the parents.

I found that their evidence was generally credible and any inconsistencies were not substantial or significant:

(i) Mother explained why she needed to go into the kitchen to wash bottles and left B and the baby together. It was obvious that where there is such a young baby more than six bottles would be needed each day and mother would need to wash and sterilise some during the day. Much was made of this by the LA in cross – examination but I do not consider that this was significant.

(ii) Father was very keen to say that he had never been alone with C. Mother was more realistic and accepted that there might have been very short periods when she was not in the room. However, I accept that she was the primary carer; father clearly did not see himself as responsible for the newborn baby and I accept did not have any significant time with C alone.

(iii) Again, there was much cross – examination about father being left in charge while mother took A to school. In the relevant period of time from 4th – 10th January, she only went back to school on 9th when everyone went to take her on her first day. Mother was very frank that if father was there on 10th they would have gone by car because it is quicker. It was also January. We did not look at the weather but it may have been more pleasant to go by car.

(iv) Mother was asked about C crying on 10th and she was clear that when she was in the kitchen doing the bottles, she did hear an unusual sound so returned to the

living room but she did not hear him cry in any significant way. Father was also asked about this and he was clear that he did not hear him cry loudly. He thought he would have done, although the tv was on.

(v) There seems to be some implicit suggestion that mother's emphasis at the hospital on an injury to C's head suggests that she knew something that she was not saying. However, the part of the head she was concerned with was not the part with the fracture. I think it is going too far to suggest that this mother would have focussed on the head but on a different part in order to obtain medical advice but to deflect from any suggestion that she knew about the possible injury. That would be too sophisticated.

In their evidence the parents questioned why they would lie about the cause of the injury. They were very clear that if they knew what had happened, they would have said. They felt that they would have had nothing to lose if it was an accident; they could have explained and avoided the proceedings.

In considering whether the parents are hiding information about what happened to C and making up a story to protect one or other of them I consider it very unlikely on the evidence. There is nothing in their evidence or in the cross – examination of them that suggests they have made up a story; there is no evidence that in the six months of these proceedings there has been any substantial inconsistency in the evidence they have presented; neither parent is particularly sophisticated and maintaining a lie that is consistent is hard.

There are none of the risk factors associated with possible non accidental injury such as domestic abuse, social isolation, lack of family cohesion, substance abuse or poor parent – child relationships and negative interactions. In fact, the opposite is the case, there are numerous protective factors including supportive families, stable family relationships, adequate housing, caring adults and community support through the wider family.

11. Findings

In making my findings I have considered the wide canvas of the evidence including the documents, expert evidence and the parents' evidence. I have balanced all the evidence and come to a view on the balance of probabilities always bearing in mind that it is for the LA to make its case and that the parents do not have to prove anything.

11.1 Bruising

Given the written and oral evidence of Dr Rahman, mother's description of B trying to feed C with a bottle and there being no other evidence presented by the LA to suggest that the bruises were non accidental or inflicted by one of the parents I do not find that the bruising was caused by either parent.

11.2 Skull Fracture

11.2.1 Timing

I find that C's injury took place between 4th and 10th January. However, I consider that the most likely date is 10th January. The other days were said to be without anything of note; the family saw other family members and there is nothing to suggest that there was anything of concern during that time. It seems that the trigger for mother was the marks on C's face and these seemed to be new. I do consider mother would have taken C to hospital if she had

noted anything on another day, she was very careful to seek treatment. She had already sought treatment for jaundice and constipation for C.

When B fell into the bath, she took him to hospital to be checked and explained what had happened.

It is of course possible that something occurred to cause the skull fracture on another day between 4th and 10th January. However, there is no evidence advanced as to when this might have been or any particular incident that would have been memorable to parents or family members. There is no positive case put forward for an alternative to 10th January. This is the LA case to prove and not for the Court to speculate.

11.2.2 Injury

The skull injuries were as described by Dr Williams.

11.2.3 Non – accidental inflicted injury

In Dr Williams' view this would have been a deliberate throw or punch to the side of the head. When I consider all of the evidence and take account of the risk factors and protective factors identified in ***Re BR (Proof of facts)*** it seems to me very unlikely that one of these caring, loving parents would have "*lost it"* so seriously as to have deliberately injured their three week old baby. Similarly, I am unable to find that they cared for C in a way that caused him injury due to recklessness or carelessness. There is no evidence to suggest that their care of the children is such as to place C at risk of such harm. I am not satisfied that the LA has proved on the balance of probabilities that one or other of the parents inflicted a non accidental injury on C.

11.2.4 Accidental Injury.

It follows that the injury must be some form of accidental injury.

(i) Witnessed accidental injury.

I am not satisfied on the balance of probabilities that the LA has proved that this injury was accidental and witnessed by one or other of the parents. There was no reason for them not to explain what had happened if it was witnessed; they did not know it was so serious when mother took C to hospital, so there was no need for them not to be truthful. They had no idea he had a fractured skull until the CT scan was done. Mother's story from the outset in the hospital was consistent; she did not seek to change it or embellish it. She did not arrive at the story when she found out that there was a serious injury to C. On 10th January at 20.24 Dr Ansell considered her to be *"genuine, polite and concerned for baby's best interests*".

(ii) Unwitnessed Accident

That leaves the Court to consider whether there was some other unwitnessed accident or whether something happened with B to cause the fracture. The court must take serious consideration of the medical evidence. Both Dr Williams and Dr Rahman consider it very unlikely that B could have caused the injury. In disagreeing with their evidence, I have taken account of the uncertainties around the force needed to fracture an infant's skull; of the possibility that B could have picked up C, albeit awkwardly and then may have dropped him or tripped and hit his head before getting him to the footstool and the acceptance by both of the medical experts that low level falls can cause skull fractures and that there is no level below which a fracture might not occur.

I have considered mother's clear evidence that there was no loud or distressed cry and Dr Rahman's evidence that a three week old baby would cry and would need to be comforted. Mother did notice an unusual noise and it may be that she has minimised the cry although she has been consistent that he did not cry. If B had a bottle in C's mouth that might have reduced any cry to the odd noise she heard. Either way, the noise she heard was sufficient to alert her to the fact that there was a problem.

12. Conclusion

In all the circumstances I do not find the LA's allegations proved, namely that the skull injuries were inflicted by mother or father or that this was a witnessed accident that the parents failed to disclose.

HHJ Lindsey George

Handed down on 14th September 2023