Case No: BH20C01206

IN THE FAMILY COURT SITTING AT BOURNEMOUTH

Courts of Justice
Deansleigh Road
Bournemouth
BH7 7DS
Date: 23 April 2021

Before:

HIS HONOUR JUDGE DANCEY

- -

Between:

Bournemouth, Christchurch and Poole Council	**Applicant**
- and -	
A mother A	**1st Respondent**
-and-	
A father B	**2nd Respondent**
-and-	
A child C	**3rd Respondents**
(by her children's guardian Zoe Hambleton-Lord)	

Helen Youings (solicitor **BCP Legal Services**) for the **Applicant**
Adam Langrish (instructed by **Preston Redman**) for the **1st Respondent**
Hayley Manser (instructed by **Richard Griffiths & Co**) for the **2nd Respondent**
Sarah O'Hara (instructed by **Battens**) for the **3rd Respondent**

Hearing date: 9 April 2021

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JUDGMENT

His Honour Judge Dancey:

Introduction

1) On 24 November 2020 the mother (A) was settling her 10 month-old daughter (who I will call C) for a nap. As she stroked the right side of C's head the mother felt a lump. It was not immediately visible because C is blessed with a mass of curly hair and was asymptomatic. The mother took C straight to the emergency department at Poole Hospital where a CT scan revealed a significant depressed right parietal skull fracture about 30mm in diameter and depressed by 5-6mm.

2) At the time the mother, who is 17, lived with her parents (MGM and MGF), brother MU1 aged 19, sister MA aged 14, and brothers MU2 aged 12 and MU3 aged 9. The father, who was also 17 at the time, now 18, lived with his mother and visited C regularly.

3) The family was not known to social services before 24 November 2020 save for a brief period at the end of 2018 when they were involved with the mother, then 14 or 15. There are no other appreciable concerns about the parenting received by C. There have been positive parenting assessments of the parents who have co-operated fully with professionals. This is a single-issue case – was C's injury inflicted, accidental or unexplained.

4) The initial threshold criteria set out the initial medical investigations, the three possible explanations then put forward by the mother (set out at paragraph 9 (a), (b) and (e) below), the timing at that point of 7 days and the potential pool having opportunity during that period and, absent a clear explanation, the need to consider inflicted injury.

5) The local authority sought an interim care order which was granted on 2 December 2020. C was placed with her paternal grandmother who was to supervise any contact between the father and C. On 16 February 2021 C was moved to a foster placement in the care of her parents following a hearing before HHJ Simmonds.

6) The father moved out of the placement on 7 March 2021 following tensions between him and the mother (a decision the local authority regards as child-focussed). He continues to have regular positive contact with C.

7) The court appointed expert paediatric radiologist Dr Olsen dated the injury to up to 10-12 days before presentation at hospital on 24 November, while paediatrician Dr Rylance, also appointed by the court, felt it was more likely from analysis of the haematoma that it occurred within the 24-48 hours before presentation.

8) Based on the longer timescale the potential pool of perpetrators comprises 10 people - everyone from the maternal household, both parents and the maternal great grandparents. The shorter timescale narrows the pool to the maternal household excluding MU1 - 6 people, including 3 children.

9) The parents have put forward a number of possible explanations:

    a) 4 weeks earlier, a fall from her pushchair falling on her face and bumping her nose;

    b) a fall from a sofa onto the hardwood floor (and possibly the corner of the fireplace hearth) while with MU3 on 18 November (although initial threshold refers to MA);

    c) contact with the handle of an X-Box controller

d) falling onto the hair clip she was wearing;

e) banging her head while moving around in her high-chair (and when wearing the hair-clip);

f) hitting her head on the wardrobe next to a bed;

g) falling onto a dummy.

10) Dr Rylance and Dr Olsen discount these explanations as mechanisms (c)-(f) do not explain the depressed fracture and, although falls onto the corner of the fireplace or handle of the X-Box controller might fit the injury, they are considered unlikely to have happened accidentally.

11) So Dr Rylance concludes that it is more likely that the injury was non-accidental (to use his terminology).

12) A fact-finding hearing was directed, starting on 19 April with a time estimate of 5 days.

13) At a pre-trial review on 22 March it was clear that the parenting assessments were positive. Photographs of the fireplace had not at that point been seen by Dr Rylance and I directed that he should see them and reply to further questions. Bearing in mind the burden on the local authority to prove inflicted injury, the width of the potential pool (including a number of children who might have to be intervenors), I invited the local authority to consider carefully, in light of any further expert evidence, whether there was any forensic advantage in pursuing findings of inflicted injury.

14) I adjourned the pre-trial review to 09:30 on 9 April when I had only 30 minutes available before starting a busy list.

15) On 6 April 2021 the local authority filed amended threshold criteria reflecting the expert medical opinion before concluding:

d) *The medical evidence suggests, on balance, that the injury was more likely to have been inflicted than to have happened as the result of an accident.*

e) *The timing and mechanism of the injury is unexplained and there is insufficient evidence to identify how the injury was caused and/or by whom.*

f) *On occasions* [C] *was left in the care of one or more of her maternal aunts and uncles who are also children without any supervisions, for example:*

- *On or about 14 November 2021* [sic], [C] *was in the care of* [MA] *when she slipped while climbing on to* [MA]. *When she slipped, she banged either her elbow or her head;*
- *On or about 18 November 2021* [sic], [C] *was in the care of* [MU3] *when she fell backwards off the sofa, banging her head on the hardwood floor.*

If this were to continue to happen, there is a risk that [C] *could suffer further significant physical harm.*

16) In summary therefore, despite the expert opinion that the injury was more likely to have been inflicted, the finding sought is of unexplained injury but with risk of future harm as a result of inadequate parental supervision.

17) Ahead of the hearing on 9 April the local authority filed a case summary in which they said they took the view there was no forensic advantage in holding a fact-finding hearing and they no longer wished to pursue findings about how C's injury was caused

or who caused it. Although the experts had discounted the explanation put forward, there was, the local authority said, insufficient evidence to narrow the pool of perpetrators. It was felt this was a case where lack of parental supervision had led to C being injured by a person or persons unknown. Parenting assessments were positive, as was a special guardianship assessment of the maternal grandparents, so a family placement looked likely.

18) The local authority, represented by Ms Youings, were clear that it was not seeking to withdraw the care proceedings and wished to complete its assessments in order to assess whether a public law order is needed or whether continued involvement under a CP or CIN plan is more appropriate.

19) This position was supported by the parents, the mother represented by Mr Langrish and the father by Ms Manser.

20) However, Ms O'Hara on behalf of the guardian pointed out that the expert evidence indicated that the injury was inflicted and, even if the pool was wide and included children, that did not avoid the obligation on the court to determine what happened, even if it was only to find that the injury was inflicted by persons unknown. Ms O'Hara referred me to the decision of the Court of Appeal in *Re GC* [2020] EWCA Civ 848 in support of the guardian's position.

21) In light of the importance and complexity of the issue I was being asked to decide and the lack of time available either to hear fuller submissions or make a considered decision, I directed written submissions and reserved judgment, fixing a further hearing on 23 April when that judgment could be handed down.

Applicable legal principles

22) The starting point is the relevant part of section 31(2) of the 1989 Act setting out the threshold criteria based on significant harm:

> (2) A court may only make a care order or supervision order if it is satisfied—
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
>
> (b) that the harm, or likelihood of harm, is attributable to—
>
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; …

23) So, in a case of obvious injury, the local authority has the burden of proving on balance that the significant harm is attributable to unreasonable care.

24) The local authority need not prove that the injury was caused by the parents – it would be enough to show, for example, that they (or another carer) exercised inadequate supervision as a result of which the child suffered unintended injury (including at the hands of minor siblings).

25) The burden of proof must not be reversed, although the court may draw reasonable inferences from relevant evidence and have regard to inherent probabilities and improbabilities in deciding whether a fact is proved.

26) It is also important that medical opinion is considered in context. Dr Rylance considers that non-accidental (ie inflicted) injury is more likely because of the absence of credible explanation. That is a binary approach which risks reversing the burden of

proof. If the court has to make findings it will do so having considered all the evidence, including its impression of the witnesses and the wider context, and decide whether the local authority has satisfied the court that on balance the injury was inflicted, whether the court accepts an explanation put forward or whether the injury simply remains unexplained, because the court does not accept in the wider context, taking into account inherent probabilities, that it is more likely than not that the injury was inflicted notwithstanding lack of clear explanation.

27) On behalf of the father Ms Manser refers me to paragraphs 26-31 of the decision of Ryder LJ in *Re S (Child)* [2015] EWCA Civ 25 concerning the purpose of fact-finding hearings in public law cases:

> *"26) ... Aside from the local authority's misunderstanding about the nature and extent of the findings they sought and those made by the court, the case raises yet again issues of case management relating to split hearings which ought to be addressed given that the social care context was missing from the consideration of the pool of perpetrators and from any consideration of factors that may have caused secondary facts to be found from which an inference of primary fact could have been made.*
>
> *27) It is by no means clear why it was thought appropriate to have a 'split hearing' where discrete facts are severed off from their welfare context. Unless the basis for such a decision is reasoned so that the inevitable delay is justified it will be wrong in principle in public law children proceedings. Even where it is asserted that delay will not be occasioned, the use of split hearings must be confined to those cases where there is a stark or discrete issue to be determined and an early conclusion on that issue will enable the substantive determination (i.e. whether a statutory order is necessary) to be made more expeditiously. The reasons for this are obvious: to remove consideration by the court of the background and contextual circumstances including factors that are relevant to the credibility of witnesses, the reliability of evidence and the section 1(3) CA 1989 welfare factors such as capability and risk, deprives the court of the very material (i.e. secondary facts) upon which findings as to primary fact and social welfare context are often based and tends to undermine the safety of the findings thereby made. It may also adversely impinge on the subsequent welfare and proportionality evaluations by the court as circumstances change and memories fade of the detail and nuances of the evidence that was given weeks or months before.*
>
> *28) I ought to emphasise for the avoidance of doubt that although parallels can be drawn between the use of fact finding hearings in public and private law children proceedings, the appropriate and measured use of fact finding hearings in private law proceedings which are often safety cases, for example involving recent domestic abuse between parents, are not the subject of this court's consideration in this judgment. An example of this court's guidance in relation to those proceedings can be found in <u>In the matter of C (Children)</u> [2009] EWCA Civ 994. In private law proceedings it is the court that is defining an aspect of parental responsibility in its determination of the arrangements that are put in place for the child and findings of fact are appropriate, where necessary, to inform that process by reference to the factors in section 1(3) of the 1989 Act and in particular where safety issues have arisen which justify the*

court's interference with the article 8 ECHR rights of the family members. In public law children cases where a care order is in issue, the court is being asked to sanction an agency of the state, namely the local authority, being permitted to exercise parental responsibility for a child. The jurisdiction in the court to undertake that task has to be based upon the existence of facts (primary and / or secondary) that satisfy the threshold in section 31 CA 1989. Accordingly, concessions or findings of fact relevant to the threshold question will always be necessary in public law cases alongside such further findings of fact as are necessary to inform the welfare evaluation.

29) It ought to be recollected that split hearings became fashionable as a means of expediting the most simple cases where there was only one factual issue to be decided and where the threshold for jurisdiction in section 31 CA 1989 would not be satisfied if a finding could not be made thereby concluding the proceedings (see Re S (A Child) [1996] 2 FLR 773 at 775B per Bracewell J). Over time, they also came to be used for the most complex medical causation cases where death or very serious medical issues had arisen and where an accurate medical diagnosis was integral to the future care of the child concerned. For almost all other cases, the procedure is inappropriate. The oft repeated but erroneous justification for them that a split hearing enables a social care assessment to be undertaken is simply poor social work and forensic practice. The justification comes from an era before the present Rules and Practice Directions came into force and can safely be discounted in public law children proceedings save in the most exceptional case.

30) Social work assessments are not contingent on facts being identified and found to the civil standard (see, for example Oldham MBC v GW & PW [2007] EWHC 136 (Fam), [2007] 2 FLR 597 and Re S (Sexual Abuse Allegations: Local Authority Response) [2001] EWHC Admin 334, [2001] 2 FLR 776 per Scott-Baker J at [34] and [35]). That is the function of the court not a social worker (Dingley v Chief Constable of Strathclyde Police [2000] UKHC 14 per Lord Hope of Craighead at [120] and [122]). Social work assessments are based upon their own professional methodology like any other form of professional risk assessment. In care cases, an appropriate social work assessment and a Cafcass analysis should be undertaken at the earliest possible opportunity to identify relevant background circumstances and context. In so far as it is necessary to express a risk formulation as a precursor to an analysis or a recommendation to the court, that can be done by basing the same on each of the alternative factual scenarios that the court is being asked to consider (see, for example, In the matter of W (Children) [2009] EWCA Civ 644 at [33]).

31) It may be helpful to highlight the fact that a decision to undertake a split hearing is a case management decision to which Part 1 of the Family Procedure Rules 2010 [FPR 2010] and Pilot Practice Direction 12A 'Care, Supervision and Other Part 4 Proceedings: Guide to Case Management (the PLO)' apply. A split hearing is only justifiable where the delay occasioned is in furtherance of the overriding objective in rule 1 FPR 2010, that is:

a) as a consequence of active case management by the court which includes in accordance with rule 1.4:

"(a) setting timetables […],

(b) identifying at an early stage […] the issues,
(c) deciding promptly (i) which issues need full investigation and hearing and which do not; and (ii) the procedure to be followed in the case;
(d) deciding the order in which issues are to be resolved;
[…]
(i) considering the likely benefits of taking a particular step justify the cost of taking it;
(j) dealing with as many aspects of the case as it can on the same occasion;
[…]; and

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

b) in accordance with the child's welfare having regard to the timetable for the child within the meaning of that concept in para [5] of pilot PD12A; and

c) in accordance with the timetable for proceedings within the meaning of that concept in para [5] pilot PD12A."

28) The approach set out here is consistent with *Re T* [2004] EWCA Civ 558 where Dame Butler-Sloss P stressed the need to consider the totality of the evidence and to avoid compartmentalising it.

29) The decision I am making is not whether to give the local authority permission to withdraw their application for a care or supervision order but a case management decision pursuant to FPR 1.4 (a) what issues the court should decide (in particular a finding of inflicted injury) and (b) whether there remains a need to hold a fact-finding hearing to decide those issues.

30) Ms O'Hara relies on Baker LJ's judgment in *Re GC (A Child) (Withdrawal of Care Proceedings)* [2020] EWCA Civ 848 setting out the approach to applications by the local authority to withdraw care proceedings. Although *Re GC* relates to withdrawal of proceedings, the approach is useful when considering withdrawal of allegations in the context of continuing proceedings :

"16) Under rule 29.4(2) of the Family Procedure Rules 2010, a local authority may only withdraw an application for a care order with the permission of the court. … We were only referred to one case in which the provision has been considered by this Court, in the early days of the Act – London Borough of Southwark v B [1993] 2 FLR 559 in which at page 573 Waite LJ set out the following approach:

"The paramount consideration for any court dealing with [an application to withdraw care proceedings] is accordingly the question whether the withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned. It is not to be assumed, when determining that question, that every child who is made the subject of care proceedings derives an automatic advantage from having them continued. There is no advantage to any child in being maintained as the subject of proceedings that have become redundant in purpose or ineffective in result. It is a matter of looking at each case to see whether there is some solid advantage to the child to be derived from continuing the proceedings."

This approach is consistent with s.1(5) of the Act, which provides that:

> *"where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."*

17) Since then, the provision has been considered by judges of the Family Division in a number of cases at first instance, in particular in A County Council v DP and others [2005] EWHC 1593 (Fam) (McFarlane J, as he then was), Redbridge London Borough Council v B and C and A [2011] EWHC 517 (Fam) (Hedley J), Re J, A, M and X (Children) [2014] EWHC 4648 (Fam) (Cobb J), and A Local Authority v X, Y and Z (Permission to Withdraw) [2017] EWHC 3741 (Fam) (MacDonald J). The latter three cases were decided following the implementation of the Family Procedure Rules 2010 which, unlike their predecessors, include the overriding objective in rule 1.1.

18) For my part, I would endorse the approach evolved in these first instance decisions, which can be summarised as follows.

19) As identified by Hedley J in the Redbridge case, applications to withdraw care proceedings will fall into two categories. In the first, the local authority will be unable to satisfy the threshold criteria for making a care or supervision order under s.31(2) of the Act. In such cases, the application must succeed. But for cases to fall into this first category, the inability to satisfy the criteria must, in the words of Cobb J in Re J, A, M and X (Children), be "obvious".

20) In the second category, there will be cases where on the evidence it is possible for the local authority to satisfy the threshold criteria. In those circumstances, an application to withdraw the proceedings must be determined by considering (1) whether withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned, and (2) the overriding objective under the Family Procedure Rules. The relevant factors will include those identified by McFarlane J in A County Council v DP which, having regard to the paramountcy of the child's welfare and the overriding objective in the FPR, can be restated in these terms:

> *(a) the necessity of the investigation and the relevance of the potential result to the future care plans for the child;*
>
> *(b) the obligation to deal with cases justly;*
>
> *(c) whether the hearing would be proportionate to the nature, importance and complexity of the issues;*
>
> *(d) the prospects of a fair trial of the issues and the impact of any fact-finding process on other parties;*
>
> *(e) the time the investigation would take and the likely cost to public funds.*"

31) The facts in *Re GC* were not dissimilar to those in the present case. The 8 month-old child's grandmother noticed a swelling on the child's head and prompt medical attention was sought, revealing a small displaced fracture of the right parietal bone. No explanation was forthcoming at the time, although falls from bed and onto a toy were put forward later. An interim care order was made under which the child was placed

with the mother in a mother and baby placement (where they remained at the time of the appeal). A neuro-radiologist and paediatrician (again Dr Rylance) could not exclude possible explanations but thought them unlikely. The local authority sought and obtained permission to withdraw in the face of opposition by the child's guardian, who appealed (the local authority not opposing the appeal).

32) Baker LJ concluded that looking at the medical evidence alone as available to the judge at the case management hearing, it was not possible to conclude that the test for permission to withdraw was satisfied. As said in *Re T* and by Charles J in *A County Council v K,D & L* [2005] EWHC 144 all the evidence must be considered, with expert evidence being weighed in the context of all the other evidence and, as Baker J (as he then was) had himself observed in *Re S (A Child) (Care Proceedings: Surrogacy)* [2015] EWFC.99

> *"It cannot be over-emphasised that it is the judge, not an expert or group of experts, who has the responsibility of making the findings in family cases involving allegations of child abuse. Only the judge hears the totality of the expert evidence, including cross-examination by specialist counsel which often, as in this case, brings to the fore issues that are less apparent from the written reports. Only the judge considers all the expert evidence together, and has the opportunity to identify strands and patterns running through that evidence. And only the judge is able to consider all of the evidence – including expert medical evidence and the testimony of family members and other lay witnesses."*

33) Baker LJ regarded this as a paradigm example of a case where a judge needed to hear all the evidence, assess the truthfulness, accuracy and reliability of lay witness evidence, evaluate the medical opinion evidence, tested in cross-examination and in the context of the totality of the evidence and not reach a conclusion of the basis of written evidence alone. It was impossible to say at that stage, as the judge had found, that the local authority had insufficient evidence to cross threshold (so giving permission on the basis that the case fell into the first category).

34) The judge had, said Baker LJ, to consider the factors identified by McFarlane J in *A Local Authority v DP* (supra) at paragraph 24:

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

35) Baker LJ said it was clear that the fact-finding had to go ahead as the outcome was plainly of "enormous relevance" to future care-planning. It is not apparent from the judgment whether there had been assessment of the parents and wider family or, if so, whether that assessment was positive. To that extent the facts in *Re GC* may be distinguishable from the present case.

36) In considering its position, the local authority had in mind the decision of Mr Darren Howe QC, sitting as a deputy High Court Judge in *Re BB (Care Proceedings) (Mid-Trial Dismissal and Withdrawal of Allegations)* [2021] EWFC 20 to which I had referred the parties at the hearing on 22 March. This was a case with very different facts, involving a number of children who had made allegations against a number of family members of sexual abuse. At the conclusion of the local authority case in the fact-finding hearing applications were made by the respondents to dismiss or limit the allegations. Nearly all the professional witnesses had accepted breaches of ABE Guidelines to a greater or lesser degree and that the manner of questioning had or may have influenced responses by the children.

37) Invited by the court in *Re BB* to review its position, the local authority sought permission to abandon a number of findings, withdrawing its allegations entirely against one respondent.

38) Mr Howe QC referred to the decision of Sir Mark Hedley in *AA v 25 others (Children) (Rev 2)* [2019] EWFC 64 concerning the correct approach to what might be called summary dismissal of proceedings and the inquisitorial role of the judge:

> *"36) I have come to the conclusion that the correct modern approach to this is to be found in the case of Re T G (Care Proceedings: Case Management Expert Evidence) [2013] 1 FLR 1250.*
>
> *37) Paragraphs 24 to 28 are expressed in the typically trenchant language employed by the then President, Sir James Munby, and I have in particular in mind paragraph 27 where he says this* [repeating what he had said in *Re C (Children)* [2012] EWCA Civ 1489, a private law case]*:*
>
> > *"In this connection, that is to say dealing with evidence, I venture to repeat what I recently said in Re C (Children Residence Order. Application Being Dismissed at Fact-Finding Stage) [2002] EWCA Civ 1489. These are not ordinary civil proceedings, they are family proceedings where it is fundamental that the judge has an essentially inquisitorial role, his duty being to further the welfare of the children, which is by statute his paramount consideration. It has long been recognised, and authority need not be quoted for this proposition, that for this reason a judge exercising the family jurisdiction has a much broader discretion than he would in the civil jurisdiction to determine the way in which an application should be pursued. In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. He may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without any need for oral evidence. He may decide to hear the evidence of the applicant and then take stock of where the matter stands at the end of that evidence.*
> >
> > *The judge in such a situation will always be concerned to ask himself: Is there some solid reason in the interests of the children why I should embark upon, or having embarked upon, why I should continue exploring the*

matters which one or other of the parents seeks to raise? If there is or may be a solid advantage for the children in doing so, then the enquiry will proceed, albeit it may be on the basis of submissions rather than oral evidence, but if the judge is satisfied that no advantage to the children is going to be obtained by continuing the investigation further, then it is perfectly within his case management powers and the proper exercise of his discretion so to decide and to determine that the proceedings should go no further."

39) Examples given by Sir Mark Hedley where the exceptional use of the summary jurisdiction might be appropriate included the situation where medical evidence in an injury case changing substantially during a trial revealing a benign causation which required no explanation by the parents.

40) Mr Howe QC also referred to the judgment of Peter Jackson LJ in *Re H-L (Children: Summary Dismissal of Care Proceedings)* [2019] EWCA Civ 704, a case where the judge had summarily dismissed care proceedings against the wishes of the local authority and guardian because of delay and based on a false premise regarding timing of attributability, and where the appeal was allowed in trenchant terms:

> "*46) The judge erred in law by failing to recognise that the threshold for intervention was plainly crossed on the basis that at the date of the issue of proceedings both children were likely to suffer significant harm arising from the clear evidence about the very worrying injuries to Nina, for which one or other of her parents might, when the evidence was heard, be shown to have been responsible. He was in no position to prejudge that matter, and wrong to do so. …. He should have affirmed that the threshold is to be approached from the perspective of the children, not from the perspective of the parents, one of whom may have been responsible for Nina's injuries. He should have appreciated that delay in bringing proceedings, however lamentable, cannot of itself be determinative of the threshold. He should have realised that the fact that injuries are unexplained does not make them irrelevant, but rather raises an unassessed likelihood of future harm, aptly described in the local authority's submissions to the judge as "a live risk." Rather than seeking to cast doubt on the analysis undertaken by this court in Re S-W [2015] EWCA Civ 27, by which he was bound and which was and remains authoritative guidance on the summary determination of public law care proceedings, he should have applied it. He should particularly have cautioned himself against terminating the proceedings when that course did not have the support of the Guardian, nor any written analysis from her. He should ultimately have seen the absurd impracticality of this unprecedented outcome, and the inappropriateness of private law proceedings as a surrogate forum for child protection. The injuries to this child cried out for investigation and the law, far from preventing it, positively demanded it*."

41) Mr Howe QC decided that the application for dismissal should only be allowed if he concluded that he was at that point in a position, having heard only the local authority evidence, to determine that there was *no* [original emphasis] forensic purpose to be serve by hearing further evidence, alluding to Sir Mark Hedley's example of the injury case collapsing. Given the expectation in family cases that parents and interveners will give evidence to answer allegations, the need to hear all the evidence, tested by cross-

examination, and only being in a position to make safe findings having done so, the Judge refused the application.

42) In considering the separate question of exercising case management powers to exclude certain allegations from further consideration Mr Howe QC explored the treatment of an allegation that is withdrawn and undetermined in the context of a binary system. Is it simply to be ignored or is it taken into account in the broad canvass of evidence? In the present case the local authority do not seek permission to withdraw its application for a care or supervision order entirely. While the indication is that the local authority will not seek public orders, they present an amended threshold based not on inflicted injury but unexplained injury caused by inadequate parental supervision. If the local authority are permitted to proceed in that way it must be on the basis that the injury to C was not inflicted.

Submissions against fact-finding

43) The local authority and the parents combine to argue against a fact-finding hearing (or at least a separate hearing), making the following points:

a) applying *Re GC*, Ms Manser on behalf of the father submits this case falls into the first category of cases;

i) although the medical evidence suggests non-accidental injury absent explanation, the court is not confined to expert opinion and must consider totality of the evidence;

ii) when considering the totality of the evidence, including any reasonable inferences, it is 'obvious' the local authority could not prove threshold:

- there is no history of local authority intervention with C;
- immediate medical intervention was sought;
- there is nothing to suggest the parents are trying to hide matters;
- parenting assessments are positive;
- the local authority say but for this injury they have no concerns;
- observations by medical professionals of care by the parents and family members at the hospital raised no concerns;
- absent common features such as domestic abuse, substance misuse or mental health issues, the court lacks sufficient evidence to draw an inference of inflicted injury;
- there is no evidence of significant harm other than the skull fracture or any harm beyond the natural consequence of day-to-day risks in a newly mobile infant;
- the parents and wider family have engaged and worked well with the local authority;

b) if the case falls into the second category in *Re GC:*

- a fact-finding hearing is unlikely to yield a sufficiently clear answer how and by whom the injury was caused given the size of the pool (including children) and the likely inability of the court to narrow the pool;

- how much further then would that take the court and the proceedings and how does an inconclusive finding promote C's welfare;
- this was an isolated incident with the social care context evidencing low risk of harm;
- there are no local authority concerns about the parents' ability to care;
- although there are areas identified where support could be given to the family they are not significant and could be met under a CIN plan and the local authority would not seek public law orders;
- C has already been united with her mother not-withstanding absence of any determinations and with no concerns since, despite constant observation since presentation to hospital;
- it is likely C will remain with one of both of her parents and, even if the exact cause of the injury could be established, it is not necessary, looked at holistically, for a finding to inform a risk assessment;
- it is clear there is a close attachment and bond between C and her parents;
- wider family assessments point to a healthy and safe wider family dynamic both on maternal and paternal sides of the family;
- the turmoil and impact on C, her young parents and wider family of continuation of the proceedings and delay;
- the need to join a wide range of potential interveners (including children) and to ensure a fair trial for them all – potentially 12 parties, three of whom would need their own litigation friends;
- the lack of need for, and disproportionality of proceeding with, a fact-finding hearing having regard to the overriding objective to secure a just welfare outcome;

c) at the highest, say the local authority, this appears to have been a one-off incident which, although involving severe injury, seems to have resulted in no lasting damage with no distress on presentation at hospital and no signs of C being wary around anybody in the potential pool of perpetrators;

d) this is not a question of 'fudging' threshold for the local authority is saying it does not feel it can discharge the evidential burden on it to establish threshold – indeed it is obvious (says the father) that they cannot do so;

e) if it is decided a fact-finding hearing is necessary a split hearing is not necessary (applying the dicta of Ryder LJ in *Re S*):

- there is no stark and discrete issue that needs prior determination;
- because of the need to consider the totality of the evidence, the positive assessment evidence in respect of the parents and the maternal grandparents and great-grandparents to be before the court as this positive evidence would be central to determining the likelihood of the injury being inflicted or unexplained;

f) on the question (which I raised) what it would be better for C to know as she grows up, the local authority says it would be better for her to come to understand that she was hurt but the cause was unexplained as it could be more damaging for her to understand that she was (potentially) deliberately injured by an unknown member of her family (especially given the size of the pool on which her suspicion might fall).

Submissions in favour of fact-finding

44) On behalf of the children's guardian, Ms O'Hara makes the following points:

a) the combined expert view is that it is probable that C suffered a significant trauma beyond normal or even rough handling;

b) in the absence of credible explanation, the injury was more likely than not to have been inflicted;

c) someone within the family has, therefore, not given an honest account about what happened probably during the 24-48 hour window before presentation;

d) this was a serious injury and the 3D images of C's skull make for sobering viewing;

e) this is a far from unique situation – in many cases there remains a pool of potential perpetrators which may result in otherwise blameless carers go on to resume care of the child, albeit with monitoring and supervision;

f) the guardian feels serious unease at the local authority's proposal to abandon findings and public law orders and a plan to return C to her mother's care under no more than a CIN plan;

g) fundamental to this concern is that C suffered a significant head injury in the care of her family which cannot be 'swept under the carpet';

h) it is fundamental to her welfare to protect C from the risk of this, or similar, happening again;

i) how can such risk be assessed or managed without a finding whether this was an inflicted injury;

j) there is clear forensic purpose in testing the medical evidence to determine the most likely time frame for the injury, whether it could have happened in one of the ways described by the family, clarity of mechanism, likely force used and whether there could be an accidental explanation;

k) without hearing from the carers we cannot know whether further light will be shed on what happened;

l) the complexities of the case (including that some potential interveners may be children) should not of itself interfere with the duty on the court, the local authority and the guardian to protect a vulnerable baby who has, based on untested medical evidence, probably suffered familial abuse;

m) the guardian would support hearing the medical evidence at least and taking stock at that point although, in fairness to the respondents, they should have the opportunity of giving their accounts;

n) once that is done the court and the professionals would be in a far better position to assess risk and required levels of support and supervision, even if a perpetrator cannot be identified.

Discussion and analysis

45) Adopting the *Re GC* approach, it is clear to me that this case does not fall within the first category of cases. It cannot possibly be said, in my view, that it is obvious that the local authority is unable to prove threshold given:

a) the untested medical opinion is that this was probably an inflicted injury absent credible explanation (and that is not at this stage to reverse the burden of proof, merely to raise a case that requires a response);

b) absence of local authority involvement, other concerns coupled with otherwise good parenting (and good assessment) may make likelihood of inflicted injury less inherently probable but do not necessarily entitle an inference that this was not an inflicted injury, at least not one that is obvious.

46) My analysis therefore falls under the second category, requiring consideration (1) whether not pursuing a finding of inflicted injury will promote or conflict with the welfare of the child and (2) the overriding objective and, to repeat from paragraph 20 of *Re GC*, the following restated factors:

a) the necessity of the investigation and the relevance of the potential result to the future care plans for the child;

b) the obligation to deal with cases justly (to which I would add: having regard to the welfare issues involved, in accordance with the overriding objective);

c) whether the hearing would be proportionate to the nature, importance and complexity of the issues;

d) the prospects of a fair trial of the issues and the impact of any fact-finding process on other parties;

e) the time the investigation would take and the likely cost to public funds.

47) Based solely on the available evidence at the moment it seems to me likely that:

a) the court should at least be able to make a finding whether the injury was inflicted, accidental or remains unexplained and the likely time frame;

b) the court is unlikely to be able to make a specific finding about mechanism;

c) there is a high probability given the absence of other concerns, that the court will be unable to identify a perpetrator and will end up with a pool, quite possibly including other children, based on any finding as to time frame.

48) I base my analysis on those assumptions.

49) The critical question, it seems to me, is whether a finding whether the injury was inflicted without being able to identify an individual perpetrator will benefit assessment of risk/support/child protection needs, is necessary for those purposes and is proportionate.

50) If the court is to proceed with findings as to causation of the injury then:

a) it is difficult to see how that could be done by a staged process involving hearing just the medical evidence and then taking stock without first joining all potential interveners so they too can test the evidence;

b) I agree with the submission that the court must hear all the evidence, including evidence of assessments, if it is to avoid compartmentalising the injury and a separate fact-finding hearing on the discrete issue of injury is not therefore appropriate;

c) that said, if a finding of inflicted injury were made, the local authority may well need to re-assess the question of risk and require an adjournment for that purpose;

d) in the context of such a hearing it is of course possible that medical evidence might be given admitting the possibility of benign cause not requiring evidence from the parents and the question of permission to withdraw could then be reconsidered;

e) the process described would require the joining of interveners, including at least three children requiring litigation friends;

f) it may be possible to ask the experts to consider whether they can confidently limit the time frame further with a view to limiting the potential pool and number of interveners (provided that can be done fairly to those who would remain in the pool who might wish to argue for a longer time frame);

g) the question is likely to arise whether any child intervener should give evidence requiring assessment of competence, support and the *Re W* factors;

h) given the likely number of interveners, I would anticipate a hearing lasting 2-3 weeks with consideration being given to how that is conducted (attended/hybrid/remote) given the likely numbers involved and need for continued social distancing even after 21 June 2021.

51) If the answer to the critical question is yes, the complexities or difficulties ensuring a fair trial for all in the pool should be no barrier to the court making such findings as it can, unless the conclusion is that a fair trial is simply not possible.

52) While I have great respect for the concerns expressed by the guardian, my conclusion is that C's welfare and the overriding objective do <u>not</u> require me to make a finding about how the injury happened. I have decided that for the following critical reasons:

a) Given (a) the lack of other concerns, including absence of domestic abuse, substance misuse or mental health issues, and (b) the positive assessment of the parents and their engagement with the local authority and (c) the fact that C has remained with her parents, more recently her mother, it is highly unlikely that a pool finding which does not identify either parent as perpetrator will make any significant difference to outcome.

b) It is difficult to see quite how a causation finding in the context of a wide family pool could meaningfully inform risk assessment where the child is to remain with the parents or one of them (or the maternal grandmother under a special guardianship order):

i) it may be said that greater parental supervision is required and should be monitored – this assumes the injury was not caused by the parents themselves but by a child in the family or when C fell without being in the presence of anybody;

ii) where there is a wide pool, who within that pool is to supervise whom;

iii) if the supervision is external to the pool, is it to be suggested that such supervision needs to be extended to all contact between everyone in the pool and C and, absent any ongoing concerns, how long should that supervision continue?

c) The position might be different if anybody was pursuing a case, in the event of inflicted injury, for placement of C outside the family (or to one of the few family members not in the pool) but I do not understand anybody to be putting such a case, including the guardian at this stage.

53) Further reasons are:

a) I do not consider it necessary for C to know how the injury happened and agree it could be more damaging for her as she grows up to hold suspicions about nearly all the family within which she lives than understanding the injury simply as being unexplained.

b) Given the limited value to risk assessment and outcome I do not consider the extensive exercise I have described as proportionate use of resources.

c) For parents as young as these, and potential child interveners, the burden of a lengthy fact-finding process and the likely unsatisfactory outcome of remaining unidentified as perpetrator but remaining within the pool of suspicion are very significant factors going to the question of proportionality.

54) Accordingly, I agree that the local authority may amend their threshold criteria to remove the allegation of inflicted injury and that a fact-finding hearing is no longer necessary.

Post-script

55) Having handed down this judgment at the hearing today (23 April) the following points arise:

a) The guardian accepts my decision and agrees with the plan set out below.

b) The local authority takes the view that without a finding of inflicted injury it cannot meet threshold under s 31(2) and will in due course seek permission to withdraw their application for care and supervision orders.

c) In the meantime, the interim care order in respect of C should be discharged on the basis that the mother is content to remain in placement with C under section 20 and will continue, as she has done throughout, to co-operate with the local authority..

d) Acknowledging that C suffered a serious injury and that the experience of care proceedings has been difficult for all concerned, the local authority do not want to simply ‘walk away’ from the situation and will provide ongoing support. They will consider whether that can be done best under CIN or CP plans or whether to ask the court to make a family assistance order under section 16 of the 1989 Act.

e) A transition plan will be worked out over the coming days with a view to the mother and C returning home before 7 May with the allocated social worker observing mother and C in the home..

f) The local authority will file a final report by 7 May to which the parents will respond.

g) As the parents are now separated I may be asked to make a child arrangements order regarding the father's contact with C although, as I pointed out, the no order principle applies and consideration should be given to agreeing arrangements, with the assistance of mediation if necessary, rather than asking the court to make orders that are not needed and may not be better for C (or the parents).

h) I have listed a further, hopefully final, hearing on 17 May when these remaining matters will be addressed.

i) Nobody has any objection to publication of this judgment on BAILII.

56) That concludes this judgment.