Neutral Citation Number: [2021] EWHC 48 (Fam)

Case No: **N**R19C01055

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2021

Before :

MR JUSTICE NEWTON

- -

Between :

A COUNTY COUNCIL	**Applicant**
- and -	
L	**1st Respondent**
- and -	
S	**2nd Respondent**
-and-	
E	**3rd Respondent**
(Through his Children's Guardian)	
-and-	
D	**4th Respondent**
(Intervenor)	
-and-	
P	**5th Respondent**
(Intervenor)	

- -

- -

Francesca Wiley QC and Katie Harris (instructed by Rebecca Anderson NPLAW) for the Applicant
Tina Cook QC and Sara Lewis QC (instructed by Wollens Solicitors) for the 1st Respondent
Professor Jo Delahunty QC and Eve Robinson (instructed by Fosters Solicitors) for the 2nd Respondent
Damian Woodward-Carlton QC and Suzy Shackleford (instructed by Kenneth Bush) for the 3rd Respondent through the Children's Guardian, Lorna Smith
Penny Howe QC and Fawzia King (instructed by FMW Law) for the 4th Respondent
5th Respondent In Person

Hearing dates: 22-26 February and 8-25 March 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE NEWTON

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

Mr Justice Newton :

1. On 23 September 2019, E, a baby boy, born on 31st May, was seen by a local medical practitioner for a routine appointment. The GP had serious concerns about the size of E's head and referred him for paediatric examination at the Norfolk and Norwich University Hospital. On admission E was found to have a large bilateral bleed in the skull. A skeletal survey raised no concerns. A bruise was also discovered to E's right thigh, measuring 3 cm x 0.5 cm. The injuries were not consistent with ordinary domestic handling, it was considered that they more likely arose from an inflicted injury. E was transferred for specialist care at Addenbrooke's Hospital on 25 September 2019, where he received a number of procedures to relieve the pressure to his brain. He was discharged into foster care on 18 October 2019. Later, on 9 December 2019 E was transferred to the care of the paternal grandparents. He continues to be well.

2. The local authority issued proceedings, and the first interim care order granted on 27th September 2019 has been renewed ever since. The mother and her partner were arrested and interviewed by the police.

3. This is a fact finding hearing which very unfortunately has been substantially delayed because of

    i) the Covid 19 pandemic, and

    ii) the further important investigations arising from the first advices of Dr Mecrow, consultant paediatrician, within these proceedings in May 2020, in relation to a potential misdiagnosis by the Norfolk and Norwich University Hospital (the NNUH), not in respect of the admission described above on 24 September 2019, but in respect to a previous admission on 27 July 2019, when E was taken by ambulance to the NNUH following apparent seizures and a loss of consciousness at home. He was detained for four days and then discharged home having been treated, erroneously, for a suspected milk intolerance. That previous admission which had not been the focus of any previous attention has become a principle focus of the hearing. Dr Mecrow concluded in his Report that E had sustained an acute encephalopathic episode in July2019.

4. There is a general consensus that E suffered bilateral supratentorial chronic subdural hematomas and a bruising to the anterior aspect of his right thigh in September. There is no consensus about E's diagnosis on 27 July 2019.

THE LAW

LEGAL FRAMEWORK

Burden of proof

5. In any fact-finding exercise the burden of proof of proving any allegation lies on the party seeking to prove the allegations. In this case it is the local authority that brings these proceedings and identifies the findings they invite the court to make. Therefore, the burden of proving the allegations rests with them. Those against whom allegations are made do not themselves have to provide an explanation or context for any disputed allegation or to prove that any allegation is false.

6. The burden of disproving a reasonable explanation put forward by the parents falls on the local authority (see Re S (Children) [2014] EWCA Civ 1447 where Macur LJ said at paragraph [10] –

> '… it was for the local authority (i) to disprove the possible explanations for injury, whether accidental or congenital and (ii) establish that, on the balance of probabilities, the whole of the evidence led to the conclusion that the injuries were non accidental rather than simply incapable of being explained otherwise.'

7. The burden of proof should not be reversed. There is no obligation on a parent to provide an explanation. If an explanation or hypothesis is put forward by or on behalf of a parent which is not accepted by the court, the failure to do so does not establish the local authority case. In Rhesa Shipping Co SA v Edmunds (HL(E)) [1985] 1 WLR 948 Lord Brandon said at pages 955G-956D –

> '…the late Sir Arthur Conan Doyle…describes…Mr Sherlock Holmes as saying to…Dr Watson: "How often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth?'…In my view there are three reasons why it is inappropriate to apply the dictum of Mr Sherlock Holmes, to which I have just referred, to the process of fact-finding which a judge of first instance has to perform at the conclusion of a case…
>
> The first reason is one which I have already sought to emphasise as being of great importance, namely, that the judge is not bound always to make a finding one way or the other with regards to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.
>
> The second reason is that the dictum can only apply when all relevant facts are known, so that all possible explanations, except a single extremely improbable one, can properly be eliminated…
>
> The third reason is that the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge

> to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden.

8. In Re BR (Proof of Facts) [2015] EWFC 41 Peter Jackson J, as he then was, said at [15]-[16] –

> '[15] … It would of course be wrong to apply a hard and fast rule that the carer of a young child who suffers an injury must invariably be able to explain when and how it happened if they are not to be found responsible for it. This would indeed be to reverse the burden of proof. However, if the judge's observations are understood to mean that account should not be taken, to whatever extent is appropriate in the individual case, of the lack of a history of injury from the carer of a young child, then I respectfully consider that they go too far.
>
> [16] Doctors, social workers and courts are in my view fully entitled to take into account the nature of the history given by a carer. The absence of any history of a memorable event where such a history might be expected in the individual case may be very significant. Perpetrators of child abuse often seek to cover up what they have done. The reason why pediatricians may refer to the lack of a history is because individual and collective clinical experience teaches them that it is one of a number of indicators of how the injury may have occurred. Medical and other professionals are entitled to rely upon such knowledge and experience in forming an opinion about the likely response of the individual child to the particular injury, and the court should not deter them from doing so. The weight that is then given to any such opinion is of course a matter for the judge.'

9. The concept of the pool of perpetrators does not alter the general rule on the burden of proof - see Re B (Children: Uncertain Perpetrator [2019] EWCA Civ 575. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown.

Standard of proof

10. The appropriate standard of proof is the civil standard of the simple balance of probability as confirmed by the House of Lords in Re B (Children) [2008] UKHR 35 per Lord Hoffman at paragraph [2] –

> 'If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The

> fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.'

11. This means that if the local authority or another party proves an allegation to this standard, that fact must be treated as having been established and will bear on all future decisions concerning the children. Equally, it means that if allegations are not proved to that standard, then they must be disregarded completely. However, it does not follow that a rejection of evidence mandates a judge to find that it is false; see Re M (Children) [2013] EWCA Civ 388.

12. The inherent probability of an event remains a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. Re B (Care Proceedings: Standard of Proof) [2008] UKHL 35, [2008] 2 FLR 131 In Lord Hoffman said at paragraph [15] –

> '[15] Common sense, not law, requires that in deciding this question regard should be had, to whatever extent appropriate, to inherent probabilities.'

13. However, it is not the case that the more serious the allegation, then the more cogent the evidence needs to be to prove it. In Re B (Care Proceedings: Standard of Proof) [2008] UKHL 35, [2008] 2 FLR 131 Baroness Hale said at paragraph [70] –

> '[70] My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under s 31(2) or the welfare considerations in s 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.'

14. There is therefore no logical or necessary connection between seriousness and probability. In Re B (Children) [2008] UKHR 35 at [72-73] Baroness Hale said –

> '[72] As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at

> all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.
>
> [73] In the context of care proceedings, this point applies with particular force to the identification of the perpetrator. It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied.'

Judicial approach to evidence

15. Findings of fact must be based on evidence not speculation; see Re A (Fact Finding: Disputed findings) [2011] 1 FLR 1817 at [26] Munby LJ (as he then was) said –

> '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.'

16. In Re B (Children) [2008] UKHR 35 at Baroness Hale said at paragraphs [31-32]

> '[31] … In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability.
>
> [32] In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other.

> Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking, a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof.'

17. The judge must decide if the facts in issue have happened or not applying the binary system made plain by Lord Hoffman in Re B (Children) [2008] UKHR 35 at paragraph [2]. This applies to the conclusion as to the fact in issue, not the value of individual pieces of evidence (which fall to be assessed in combination with each other).

18. The court must take into account all of the evidence and consider each piece of evidence in the context of all the other evidence and look at the overall canvas. Evidence should not be assessed in separate compartments. The judge must assess and evaluate the evidence in its totality; see Re T [2004] 2 FLR 838 where Butler-Sloss P said at paragraph [33] –

> '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 ... has been made out to the appropriate standard of proof.'

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

20. See also Ryder LJ in Re M (Children) [2013] EWCA Civ 388 at paragraph [6] –

> '[6] When any fact-finding court is faced with the evidence of the parties and little or no corroborating or circumstantial material, it is required to make a decision based on its assessment of whose evidence it is going to place greater weight upon. The evidence either will or will not be sufficient to prove the facts in issue to the appropriate standard. As has been said many times in one form or another, the judge is uniquely placed to assess credibility, demeanour, themes in evidence, perceived cultural imperatives, family interactions and relationships.'

21. However, in assessing and weighing the impression which the court forms of the parents, the court must also keep in mind the observations of Macur LJ in Re M (Children) [2013] EWCA Civ 1147 at [12], that –

> 'Any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behaviour in the witness box and to expressly indicate that they have done so.'

22. That need for caution and the dangers of over-reliance on demeanor (and the research base to support that danger) was echoed by Leggat LJ in Sri Lanka v The Secretary of State for the Home Department [2018] EWCA 1391 at paragraphs [40-41] –

> '40. This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skillful questioning can expose inconsistencies in false stories.
>
> 41. No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.'

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

> '[101B] I must now put this into perspective by noting, and emphasising, the width of the range of facts which may be relevant when the court is considering the threshold conditions. The range of facts which may properly be taken into account is infinite. Facts including the history of members of the family,

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

24. In Westminster City Council v M, F and H [2017] EWHC 518 (Fam) Hayden J said at paragraph [25] –

> '[25] The Local Authority must, ultimately, assess the manner in which it considers it can most efficiently, fairly and proportionately establish its case. The weight to be given to records, which may be disputed by the parents, will depend, along with other factors, on the Court's assessment of their credibility generally. Here, the reliability of the hearsay material may be tested in many ways e.g., do similar issues arise in the records of a variety of unconnected individuals? If so, that will plainly enhance their reliability. Is it likely that a particular professional e.g., nurse or doctor would not merely have inaccurately recorded what a parent said but noted the exact opposite of what it is contended was said? The reaction of witnesses (not just the parents), during the course of oral evidence, to recorded material which conflicts with their own account will also form a crucial aspect of this multifaceted evaluative exercise. At the conclusion of this forensic process, evidence can emerge and frequently does, which readily complies with the qualitative criterion emphasised in Re A (supra)…'

Evidence arising since the commencement of proceedings

25. In M (A Minor) (Care Order: Threshold Conditions) [1994] 2 AC 424 at 440 Lord Templeman clarified that even if the risk of significant harm has reduced or disappeared since protective measures were taken, this does not preclude the court from making a care order so long as the threshold was met at the time those protective measures were taken.

26. In Re G (Children) (Care Order: Evidence) [2001] EWCA Civ 968 at paragraphs [9-15] Hale LJ (as she then was) confirmed that although the time that threshold must be established is the time at which protective measures are taken, further developments or evidence which comes to light after that date may still be considered at the hearing.

Credibility, memory, recall and reconstruction

27. The evidence of witnesses and the explanations given by them are of the utmost importance and a clear assessment of their credibility and reliability must be made by the court. In the context of the consideration of a wide canvas of material in reaching the factual decisions in the case, investigations of fact should have regard to the wider context of social, emotional, ethical and moral factors. The assessment of credibility generally involves wider difficulties than mere 'demeanour', which is mostly concerned with whether the witness appears to be telling the truth as he or she now believes it to be. With every day that passes the memory becomes fainter and the imagination becomes more active. The human capacity for honestly believing something which bears no relation to what actually happened is unlimited. Therefore, contemporary documents are always of the utmost importance.

28. Every time a court has to assess 'memory' and 'credibility' it is faced with a difficult process and a sometimes almost impossibly difficult problem. In Gestmin SGPS v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) Leggatt J (as he then was), confirmed the importance of a proper approach to memory and eyewitness testimony –

> '[16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related)errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> [17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

[18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

> [21] It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.'

29. Gestmin was considered in R A (A Child) [2020] EWCA Civ 1230 by the Court of Appeal whereby they concluded that the Court must be mindful of the fallibility of memory and the pressures of giving evidence. Lady Justice King further observed that –

> [30] Inevitably in such cases, the oral evidence of the key protagonists, most often the mother and her partner, is highly significant. The case law has developed in a way designed to ensure that, whilst there is recognition of the fact that the oral evidence of lay parties is often critical, it also has its limitations; there are dangers in an over reliance by the judge on either demeanour, or upon the fact that a witness has told demonstrable lies.
>
> [41] The court must, however, be mindful of the fallibility of memory and the pressures of giving evidence. The relative significance of oral and contemporaneous evidence will vary from case to case. What is important, as was highlighted in Kogan, is that the court assesses all the evidence in a manner suited to the case before it and does not inappropriately elevant one kind of evidence over another.

Hearsay evidence

30. Hearsay evidence which must be considered in the wider context. Proper caution must be exercised in view of the fact that hearsay evidence has not been the subject of formal challenge in cross-examination.

31. In R v B County Council ex parte P [1991] 2 All ER 65 (at 72J), [1991] 1 FLR 470 at 478, Butler-Sloss LJ observed that –

> 'A court presented with hearsay evidence has to look at it anxiously and consider carefully the extent to which it can properly be relied upon.'

32. When assessing the weight to be placed on hearsay evidence the Court may have regard to the matters set out in section 4 of the Civil Evidence Act 1995 even in cases (such as this one) where the Civil Evidence Act does not strictly apply.

33. Section 4 of the Civil Evidence Act provides that –

> (1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
>
> (2) Regard may be had, in particular, to the following—
>
> (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
>
> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
>
> (c) whether the evidence involves multiple hearsay;
>
> (d) whether any person involved had any motive to conceal or misrepresent matters;
>
> (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
>
> (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

Expert evidence

34. In considering the evidence of an expert witness, the court must not confuse the functions of the expert and the judge whose roles are distinct. It is for the court to make the factual decisions based on all the available evidential material in the case, not just the scientific or medical evidence; and all that evidence must be considered in the wider social and emotional context; see A County Council v X, Y and Z (by their Guardian) [2005] 2 FLR 129.

35. If the court disagrees with an expert's conclusions or recommendations an explanation is required; see Re B (Care: Expert Witnesses) [1996] 1 FLR 667 and Re D (A Child) [2010] EWCA 1000.

36. 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.'

37. 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.'

38. In A County Council v K, D and L [2005] EWHC 144 (Fam) Charles J emphasised at paragraph [39] that the roles of the court and the expert are distinct, and that it is the court that is in the position to weigh the expert evidence against its findings on the other evidence. At paragraph [44] he noted that in cases concerning alleged non-accidental injury to children, properly reasoned expert medical evidence carries considerable weight, but in assessing and applying it the judge must always remember that he or she is the person who makes the final decision.

39. At paragraph [49] Charles J went on to make the following observations about the judicial function –

> 'i) The court has to take into account and weigh the expertise and speciality of individual experts and is often assisted by an overview from, for example, a pediatrician.
>
> ii) In a case where the medical evidence is to the effect that the likely cause is non accidental and thus human agency, a court can reach a finding on the totality of the evidence either (a) that on the balance of probability an injury has a natural cause, or is not a non-accidental injury, or (b) that a local authority has not established the existence of the threshold to the civil standard of proof.
>
> iii) The other side of the coin is that in a case where the medical evidence is that there is nothing diagnostic of a non-accidental injury (or human agency) and the clinical observations of the child, although consistent with non-accidental injury (or human agency) of the type asserted, is more usually associated with accidental injury or infection, a court can reach a finding on the

> totality of the evidence that on the balance of probability there has been a non-accidental injury (or human agency) as asserted and the threshold is established.
>
> iv) Such findings have to be based on evidence and findings of fact to the civil standard and reasoning based thereon.

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

Unknown and disputed cause

41. The court is not precluded from making a finding that the cause of harm is unknown. In Re R (Care Proceedings: Causation) [2011] EWHC 1715 (Fam) Hedley J said at paragraph [10] –

> '[10] ... there has to be factored into every case which concerns a disputed aetiology giving rise to significant harm, a consideration as to whether the cause is unknown. That affects neither the burden nor the standard of proof. It is simply a factor to be taken into account in deciding whether the causation advanced by the one shouldering the burden of proof is established on the balance of probabilities.'

42. The court must resist the temptation identified by the Court of Appeal in R v Henderson and Others [2010] EWCA Crim 1219 to believe that it is always possible to identify the cause of injury to the child.

43. In Re U (Serious Injury: Standard of Proof); Re B [2004] EWCA Civ 567, Butler- Sloss P explained at paragraph [23] that –

> 'i) The cause of an injury or an episode that cannot be explained scientifically remains equivocal.
>
> ii) Recurrence is not in itself probative.
>
> iii) Particular caution is necessary in any case where the medical experts disagree, one opinion declining to exclude a reasonable possibility of natural cause.
>
> iv) The Court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour propre is at stake, or the expert who has developed a scientific prejudice.

> v) The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark.

Lies

44. The court should be cautious when evaluating the evidence of a dishonest witness; see R v Lucas [1981] QB 720 –

> '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...The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just case, or out of shame or out of a wish to conceal disgraceful behaviour from their family.'

45. In Re A (A Child) (No.2) [2011] EWCA Civ 12 Munby LJ, as he then was, observed –

> '[104] Any judge who has had to conduct a fact-finding hearing such as this is likely to have had experience of a witness – as here a woman deposing to serious domestic violence and grave sexual abuse - whose evidence, although shot through with unreliability as to details, with gross exaggeration and even with lies, is nonetheless compelling and convincing as to the central core. It is trite that there are all kinds of reasons why witnesses lie, but where the issues relate, as here, to failed marital relationships and the strong emotions and passions that the court process itself releases and brings into prominence in such a case, the reasons why someone in the mother's position may lie, even lie repeatedly, are more than usually difficult to decipher. Yet through all the lies, as experience teaches, one may nonetheless be left with a powerful conviction that on the essentials the witness is telling the truth, perhaps because of the way in which she gives her evidence, perhaps because of a number of small points which, although trivial in themselves, nonetheless suddenly illuminate the underlying realities.'

46. In Re M (Children) [2013] EWCA Civ 388 Ryder LJ said at paragraphs [7-8] –

> '[7] A Lucas direction is a criminal direction derived originally from a case on corroboration, R v Lucas [1981] QB 720. It is used to alert a fact-finding tribunal, that is a jury in a criminal trial, to the fact that a lie told by a defendant does not of itself

> necessarily indicate guilt because the defendant may have some other reason for lying; that is, he may lie for innocent reasons. A witness may lie because she lacks credibility, or because she has an innocent motive for lying. If she lies about the key fact in issue, that is one thing; if she lies about collateral facts, that may be quite another. A judge of fact may not be able to separate out every fine distinction, but may nevertheless conclude that an allegation is proved, despite the fact the witness has lied about other matters.
>
> [8] This is often simplified in the circumstances of emotionally charged allegations remembered through the fog of distress and relationship breakdown as a core of truth surrounded by sometimes exaggerated and sometimes badly recollected or hazy memory. There may also be an overlay of deliberate untruth arising out of the anger and distress of the breakdown and/or the nature of the application before the court…'

47. In Re H-C (Children) [2016] EWCA Civ 136 the Court of Appeal confirmed that the Lucas approach applies in family cases. Thus, the court must first determine if the alleged perpetrator has deliberately lied, and then, if such a finding is made, consider why the party lied. McFarlane LJ stated –

> '[98] The decision in R v Lucas has been the subject of a number of further decisions of the Court of Appeal Criminal Division over the years, however the core conditions set out by Lord Lane remain authoritative. The approach in R v Lucas is not confined, as it was on the facts of Lucas itself, to a statement made out of court and can apply to a "lie" made in the course of the court proceedings and the approach is not limited solely to evidence concerning accomplices.
>
> [99] In the Family Court in an appropriate case a judge will not infrequently directly refer to the authority of R v Lucas in giving a judicial self-direction as to the approach to be taken to an apparent lie. Where the "lie" has a prominent or central relevance to the case such a self-direction is plainly sensible and good practice.
>
> [100] One highly important aspect of the Lucas decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the "lie" is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in Lucas, where the relevant conditions are satisfied the lie is "capable of amounting to a corroboration". In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of R v Middleton [2001] Crim. L.R. 251.

> In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt.'

48. In Re (1) A (2) B (3) C (CHILDREN) [2021] EWCA Civ 451 the Court of Appeal confirmed that while a Lucas direction was not required in every family case in which a party challenged factual allegations, it would be good practice, when such a direction was required, to seek Counsel's submissions to identify the following:

> the deliberate lie(s) upon which they sought to rely;
>
> the significant issue to which it/they related; and
>
> on what basis it could be determined that the only explanation for the lie(s) was guilt.

49. Macur LJ stated:

> " [57] If the issue for the tribunal to decide is whether to believe A or B on the central issue/s, and the evidence is clearly one way then there will be no need to address credibility in general. However, if the tribunal looks to find support for their view, it must caution itself against treating what it finds to be an established propensity to dishonesty as determinative of guilt for the reasons the Recorder gave in [40]. Conversely, an established propensity to honesty will not always equate with the witness's reliability of recall on a particular issue.
>
> [58] That a tribunal's Lucas self-direction is formulaic, and incomplete is unlikely to determine an appeal, but the danger lies in its potential to distract from the proper application of its principles. In these circumstances, I venture to suggest that it would be good practice when the tribunal is invited to proceed on the basis , or itself determines, that such a direction is called for, to seek Counsel's submissions to identify: (i) the deliberate lie(s) upon which they seek to rely; (ii) the significant issue to which it/they relate(s), and (iii) on what basis it can be determined that the only explanation for the lie(s) is guilt. The principles of the direction will remain the same, but they must be tailored to the facts and circumstances of the witness before the court."

Repeated accounts and possible reported discrepancies

50. Peter Jackson J (as he then was) in Lancashire County Council v. The Children and Others [2014] EWFC 3 stated that –

> '[9] … in cases where repeated accounts are given of events surrounding injury and death, the court must think carefully

> about the significance or otherwise of any reported discrepancies. They may arise for a number of reasons. One possibility is of course that they are lies designed to hide culpability. Another is that they are lies told for other reasons. Further possibilities include faulty recollection or confusion at times of stress or when the importance of accuracy is not fully appreciated, or there may be inaccuracy or mistake in the record-keeping or recollection of the person hearing and relaying the account. The possible effects of delay and repeated questioning upon memory should also be considered, as should the effect on one person of hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be unnatural a process that might inelegantly be described as "story- creep" may occur without any necessary inference of bad faith.'

Identification of perpetrator

51. It is in the public interest that those who cause non-accidental injuries should be identified; see Re K (Non-Accidental Injuries: Perpetrator: New Evidence) [2005] 1 FLR 285, CA.

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

53. The approach which should be adopted in relation to the identity of a perpetrator has been the subject of recent consideration by the Court of Appeal in Re B (Children: Uncertain Perpetrator [2019] EWCA Civ 575 where Jackson LJ reviewed the line of relevant authority and summarised the approach to be taken in 'uncertain perpetrator' cases as follows –

> '[46] Drawing matters together, it can be seen that the concept of a pool of perpetrators seeks to strike a fair balance between the rights of the individual, including those of the child, and the importance of child protection. It is a means of satisfying the attributable threshold condition that only arises where the court is satisfied that there has been significant harm arising from (in shorthand) ill-treatment and where the only 'unknown' is which of a number of persons is responsible. 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.

[47] It should also be emphasised that a decision to place a person within the pool of perpetrators is not a finding of fact in the conventional sense. As is made clear in Lancashire at [19], O and N at [27-28] and S-B at [43], the person is not a proven perpetrator but a possible perpetrator. That conclusion is then carried forward to the welfare stage, when the court will, as was said in S-B, "consider the strength of the possibility" that the person was involved as part of the overall circumstances of the case. At the same time, it will, as Lord Nicholls put it in Lancashire, "keep firmly in mind that the parents have not been shown to be responsible for the child's injuries." In saying this, he recognised that a conclusion of this kind presents the court with a particularly difficult problem. Experience bears this out, particularly where a child has suffered very grave harm from someone within a pool of perpetrators.

[48] The concept of the pool of perpetrators should, therefore, as was said in Lancashire, encroach only to the minimum extent necessary upon the general principles underpinning s.31(2). Centrally, it does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown. This is why it is always misleading to refer to 'exclusion from the pool': see Re S-B at [43]. Approaching matters in that way risks, as Baroness Hale said, reversing the burden of proof.

[49] To guard against that risk, I would suggest that a change of language may be helpful. The court should first consider whether there is a 'list' of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so: Re D (Children) [2009] EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is should A or B or C be placed into the 'pool'.

[50] Likewise, it can be seen that the concept of a pool of perpetrators as a permissible means of satisfying the threshold was forged in cases concerning individuals who were 'carers'. In Lancashire, the condition was interpreted to include nonparent carers. It was somewhat widened in North Yorkshire at [26] to include 'people with access to the child' who might have caused injury. If that was an extension, it was a principled one. But at all events, the extension does not stretch to "anyone who had even a fleeting contact with the child in circumstances where there

> was the opportunity to cause injuries": North Yorkshire at [25]. Nor does it extend to harm caused by someone outside the home or family unless it would have been reasonable to expect a parent to have prevented it: S-B at [40].
>
> [51] It should also be noted that in the leading cases there were two, three or four known individuals from whom any risk to the child must have come. The position of each individual was then investigated and compared. That is as it should be. To assess the likelihood of harm having been caused by A or B or C, one needs as much information as possible about each of them in order to make the decision about which if any of them should be placed in the pool. So, where there is an imbalance of information about some individuals in comparison to others, particular care may need to be taken to ensure that the imbalance does not distort the assessment of the possibilities. The same may be said where the list of individuals has been whittled down to a pool of one named individual alongside others who are not similarly identified. This may be unlikely, but the present case shows that it is not impossible. Here it must be shown that there genuinely is a pool of perpetrators and not just a pool of one by default.
>
> [60] [The concept of a] pool of perpetrators is a departure from the norm and every effort must be made to ensure that the departure operates in a principled way."

54. The issue for the court must be to consider whether the actual perpetrator can be identified on the balance of probability and the court should seek, but not strain, to do so; see Re D (Children) [2009] EWCA Civ 472.

55. Only if the court cannot identify the perpetrator to the civil standard of proof, should the court go on to ask whether there is a likelihood or real possibility that any of the people on the list, was the perpetrator or a perpetrator. Only if there is, should those people be placed into the 'pool'.

Threshold

56. In Re J (A Child) [2015] EWCA Civ 222 Aikens LJ set out the following fundamental principles at paragraph [56] –

> *'ii) If the local authority's case on a factual issue is challenged, the local authority must adduce proper evidence to establish the fact it seeks to prove. If a local authority asserts that a parent "does not admit, recognise or acknowledge" that a matter of concern to the authority is the case, then if that matter of concern is put in issue, it is for the local authority to prove it is the case and, furthermore, that the matter of concern "has the significance attributed to it by the local authority".*
>
> *iii) Hearsay evidence about issues that appear in reports produced on behalf of the local authority, although admissible,*

has strict limitations if a parent challenges that hearsay evidence by giving contrary oral evidence at a hearing. If the local authority is unwilling or unable to produce a witness who can speak to the relevant matter by first hand evidence, it may find itself in "great, or indeed insuperable" difficulties in proving the fact or matter alleged by the local authority but which is challenged.

iv) The formulation of "Threshold" issues and proposed findings of fact must be done with the utmost care and precision. The distinction between a fact and evidence alleged to prove a fact is fundamental and must be recognised. The document must identify the relevant facts which are sought to be proved. It can be cross-referenced to evidence relied on to prove the facts asserted but should not contain mere allegations ("he appears to have lied" etc.).

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

vi) It is vital that local authorities, and, even more importantly, judges, bear in mind that nearly all parents will be imperfect in some way or other. The State will not take away the children of "those who commit crimes, abuse alcohol or drugs or suffer from physical or mental illness or disability, or who espouse antisocial, political or religious beliefs" simply because those facts are established. It must be demonstrated by the local authority, in the first place, that by reason of one or more of those facts, the child has suffered or is at risk of suffering significant harm. Even if that is demonstrated, adoption will not be ordered unless it is demonstrated by the local authority that "nothing else will do" when having regard to the overriding requirements of the child's welfare. The court must guard against "social engineering".

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

The role of culpability in establishing the threshold criteria in s31 CA1989

57. In Re D (A Child) *(*Care Order*:* Evidence*)* [2010] EWCA Civ 1000, Hughes LJ (as he then was) highlighted the objective nature of the threshold test, noting that –

> '…it is abundantly clear that a parent may unhappily fail to provide reasonable care, even though he is doing his incompetent best'.

58. In Re B (A Child) Threshold Criteria) [2013] UKSC 33 Lord Wilson said at paragraphs [30] and [31] that, when establishing threshold, there is –

> 'no requisite mental element to accompany the actions, or inactions, which have caused or are likely to cause significant harm'.

59. In Re S (Split Hearing) [2014] EWCA Civ 25, Ryder LJ held at [19]-[21] –

> '[19] The term 'non-accidental injury' may be a term of art used by clinicians as a shorthand and I make no criticism of its use, but it is a 'catch-all' for everything that is not an accident. It is also a tautology: the true distinction is between an accident which is unexpected and unintentional and an injury which involves an element of wrong. That element of wrong may involve a lack of care and / or an intent of a greater or lesser degree that may amount to negligence, recklessness or deliberate infliction. While an analysis of that kind may be helpful to distinguish deliberate infliction from, say, negligence, it is unnecessary in any consideration of whether the threshold criteria are satisfied because what the statute requires is something different namely, findings of fact that at least satisfy the significant harm, attributability and objective standard of care elements of section 31(2).
>
> [20] The court's function is to make the findings of fact that it is able on the evidence and then analyse those findings against the statutory formulation. The gloss imported by the use of unexplained legal, clinical or colloquial terms is not helpful to that exercise nor is it necessary for the purposes of section 31(2) to characterise the fact of what happened as negligence, recklessness or in any other way. Just as non-accidental injury is a tautology, 'accidental injury' is an oxymoron that is unhelpful as a description. If the term was used during the discussion after the judgment had been given as a description of one of the possibilities of how the harm had been caused, then it should not have been; it being a contradiction in terms. If, as is often the case when a clinical expert describes harm as being a 'non-accidental injury', there is a range of factual possibilities, those possibilities should be explored with the expert and the witnesses

> so that the court can understand which, if any, described mechanism is compatible with the presentation of harm.
>
> [21] The threshold is not concerned with intent or blame; it is concerned with whether the objective standard of care which it would be reasonable to expect for the child in question has not been provided so that the harm suffered is attributable to the care actually provided. The judge is not limited to the way the case is put by the local authority but if options are not adequately explored a judge may find a vital piece of the jigsaw missing when s/he comes to look at all the evidence in the round.'

The Background

60. At the time of both admissions to hospital the mother was living with her new partner Mr D, and had been doing so since the early part of 2019, having commenced a relationship in the latter part 2018. The parents' relationship had ended before the birth of E, but the father maintained a relationship with his son and had a good relationship with Mr D.

61. Although there is dispute about it, the mother was referred to Children's Social Care prior to the birth of E because of concerns about her mental health. A Child in Need meeting on 3 July 2019 closed the case.

62. E was born on 31 May 2019 by ventouse extraction. E was healthy at birth and required no resuscitation, and was discharged home on 3 June 2019 in the care of the mother and Mr D.

63. E's development was uneventful save for a serious and life threatening incident which occurred on 27th July 2019, which I recount below.

64. I reproduce a summary below of some of the evidence raised by some of the witnesses, but I have not recorded all of the evidence, nor even referred to each witness, and it should not be thought that I have not taken all of the evidence into account. The live evidence and my interpretation of it has been strongly determinative of my conclusions

The Expert Evidence

Doctor Ian Mecrow Consultant Paediatrician

65. He concluded on a meticulous examination of the records that

i) whilst E's development was unremarkable (a well child) between birth and 27 July 2019.

ii) on 27 July 2019 E developed very significant symptoms (which whilst the hospital concluded were related to constipation/feeding/difficulty with cow's milk), were more likely than not (indeed he says virtually certain) to be seizures with episodes of apnoea (i.e. that he stopped breathing). He is described by both the mother and the ambulance crews as losing consciousness, all consistent

with encephalopathic illness. No mention by the hospital of unresponsiveness/unconsciousness nor of potential seizure activity is made in the discharge letter, simply vomiting associated with crying. Dr Mecrow in a careful analysis concluded that the full significance of E's symptoms had very regrettably been misinterpreted by the treating clinicians.

iii) So it was that Dr Mecrow raised the issue for the first time (in his first Report in May 2020). Taking account of other possibilities including a brief resolved unexplained event (BRUE), and a birth related subdural haemorrhage becoming chronic, he took the view that acute encephalopathy best explained E's symptoms on a "narrowly likely balance of probabilities" of abusive head trauma (there being no account of any accident) and that the subdural haemorrhages identified on the admission to hospital in September (as to which there is no debate) followed as a consequence of this.

iv) He did not conclude that the subdural haemorrhages were sustained as a result of birth.

v) He additionally raised the additional area of enquiry that E had an undiagnosed condition, a virus, or something arising within the hypermobile spectrum which might have caused the subdural haemorrhage with only minimal trauma, i.e. with normal handling, and that the 27 July 2019 episode was not as a result of encephalopathy and was therefore unexplained. Or that E had been the subject of abusive head trauma which subsequently became chronic.

66. Having regard to what has followed, and the shift in focus away from September and back to July 2019, I have taken the unusual step of including in this Judgment a passage from Dr Mecrow's Report which so well sets out his thinking and analysis:

> On the 27 July 2019, two days after the second review of E by his Health Visitor, he developed very significant symptoms which resulted in him being admitted to hospital. I have noted that the final diagnosis considered by the paediatricians who treated him at NNUH to have been related to either to constipation/feeding difficulty/cow's milk protein allergy. I have indicated that I disagree strongly with their assessment."
>
> Constipation, feeding difficulties and indeed cow's milk protein allergy are very common in small infants. I have never seen them present with episodes of repeated unconsciousness associated with abnormal movements and abnormalities in muscle tone.
>
> The significance of the description of symptoms by E's carers and the observations made by paramedic staff who appear to have noted that at one point E was unconscious with a Glasgow Coma Score of 3/15 appear not to have been fully appreciated by the clinicians who treated him.
>
> My opinion would be that this was a highly significant episode and that it is virtually certain that E was suffering with seizures.

In addition, (the mother) describes him as having episodes of apnoea (stopping breathing).

I have noted that it has not been possible to provide me with the transcript of a 999 telephone call made by carers on the 27 July 2019. It may be that this will give further detail of the account of E's symptoms noted contemporaneously by his carers.

With the information currently available to me, I believe that it is highly unlikely that E's symptoms at this time were the result of constipation, feeding difficulty or cow's milk protein allergy.

Instead, I would advise the Court that this was a serious illness with apnoea and unconsciousness and that a neurological cause for his symptoms was much more likely. I would therefore advise that the possibility that this episode was the result of an encephalopathic illness requires very careful consideration by the Court.

I would note that nursing staff in the course of his admission to hospital following this episode recorded that he continued to feed poorly. This would also be entirely in keeping with the idea that he had an encephalopathic illness from which he had largely recovered, but where some symptoms were persisting.

Unfortunately, as the full nature and significance of his symptoms had been misinterpreted by clinicians, E did not have neurological observations over this period, and it is therefore impossible to be clear whether or not his conscious level continued to be abnormal.

The nursing observations do not note other symptoms and there is no evidence of a fever to suggest that he had contracted an illness which might have accounted for the episode.

The possibility of other causes such as a viral episode or a Brief Resolved Unexplained Event (BRUE) (where the reasons for an episode of even serious symptoms such as collapse / unconsciousness cannot be fully established or explained) cannot be excluded.

However, my view is that an acute encephalopathic illness best explains the symptoms reported by his carers and noted by paramedics who attended him.

I would advise that this possibility – that there was an encephalopathic illness on 27 July as a result of an episode of abusive head trauma and that the subdural haemorrhages followed as a consequence of this - seems narrowly likely at a level of the balance of probabilities in my opinion. Otherwise ,

> it is not possible for me to account satisfactorily for this significant episode.

67. Dr Mecrow was concerned that there may have been negligent care by the NNUH in July 2019. Permission was obtained to disclose the medical evidence to the NNUH who put in train a Root Cause Analysis Investigation. The Report concludes :

> Brief Incident description – This baby was admitted aged 2 months with an unexplained episode of apparent losses of consciousness and abnormal movements followed by persistent vomiting. At the time this was diagnosed as Cow's Milk Protein Allergy. The baby was discharged after three days.
>
> At four months of age the baby was admitted with expanding head circumference and investigation revealed subdural effusions which were felt to be several weeks old and caused by abusive head trauma.
>
> In the following care proceedings, a court appointed expert paediatrician has opined that the event at two months was probably an encephalopathic episode and may have been an acute presentation of abusive head trauma at the time. The expert opinion is that this may have been one of, or the only, episode of head trauma suffered by this baby. Furthermore, the expert has given his opinion that the diagnosis of Cow's Milk Protein Allergy was unsupportable clinically, that appropriate investigations were not carried out, that the diagnosis of encephalopathy should have been considered, and that, collectively, this could constitute evidence of medical negligence.
>
> We agree with the expert that a diagnosis of either constipation or cow's milk protein allergy was inappropriate and that an encephalopathic episode was the likely cause of the presentation at 2 months. However, this conclusion is based on knowledge of the subsequent outcome. The presentation at 2 months had the characteristics of a Brief Resolved Unexplained Event (BRUE). Had this been considered at the time, the management and outcome of the admission might not have been different.
>
> While a case can be made that a neurological cause for the presentation at 2 months should have been considered and investigated, in our opinion it was not unreasonable not to consider this. There were a number of decisions that could have been improved, some system-wide problems in the filing of information, and some aspects of poor care but we do not agree that the medical care was negligent.

68. As a result, the NNUH were invited to participate in the proceedings (and did so in the earlier hearings) but chose not to appear in the main hearing or make any representations.

69. Although both in his report and in evidence Dr Mecrow was very careful to set out his workings and findings and the obvious shortcomings evidentially, he was subjected to a barrage of criticism, despite him repeating how difficult a case it was, and calmly reiterating the way in which he had approached his analysis, vigorously countering the suggestion that he was trying to persuade the Court to a particular perspective, which was so very obviously not the case. It was unfortunate, not because many of the areas were not perfectly proper areas of inquiry, but for its tone, manner and some of the contentions put to him; the contention that his report was unbalanced could have been aired more constructively. In fact, the more he was pressed in this manner the more I became persuaded that the contrary was true, and that Dr Mecrow really had stepped back and endeavoured to put all the pieces of information before him, as he put it, he had got the frame, but not necessarily all the jigsaw pieces. So, he did not exclude the "unknown", or bleeds resulting from birth, but considered both remote. He did not consider the evidence (of the ventouse cup delivery) suggested responsibility. He looked with some thoughtful care at the descriptions of the mother and the paramedics; in particular arching back, eyes pointing in one direction, twisting of limbs, description of him being stiff and limp, seizures and loss of consciousness. He considered the repeated episodes in the ambulance demonstrated that this was not a BRUE (and which he considered very unlikely).

70. Having taken the time to stand back and reflect on the whole of the evidence and the points made, Dr Mecrow was a powerful witness, cautious, measured, precise and careful. I did not consider that his evidence was dogmatic or didactic, quite the reverse. He remained firm in relation to the contentions put to him despite the manner of some of the interrogation which was I have concluded unjustified. I thought he brought together in a rational, coherent and balanced way the difficult differing considerations, and whilst remaining of the view that this is by no means a clear cut case, concluding that on balance E's head injuries were likely to have been inflicted on or around 27 July 2019. The September 2019 bruise, absent any explanation, was he concluded having regard to its size and position inflicted.

71. Professor Saggar is a well-known Consultant in Clinical Genetics, a senior lecturer in medicine with considerable experience spanning very many decades, and from whom the court has heard many times.

i) Having examined the medical records, he agreed with Dr Mecrow that the episode in July 2019 (a sudden collapse, repeated episodes of unconsciousness and limb shaking) was very suggestive of a neurological origin. He did not understand how the diagnosis (of constipation) was arrived at.

ii) He did not conclude that E had any genetic disorder relevant to the clinical findings.

iii) He noted that E had mild skeletal joint manifestations of a connective tissue disorder that would place him to be hypermobile spectrum of Ehlers-Danlos Syndrome (EDS), but at the very mild end, and not such that would result in a sudden and dramatic subdural haemorrhage leading to encephalopathy.

iv) There was no evidence to suggest a susceptibility to spontaneous bleeding or bruising.

v) In evidence he discussed the various possibilities put to him; There was no mutation associated with EDS or any other vascular tortuosity syndromes.

vi) He concluded that there was no basis for finding E had some genetic or physiological predisposition for injury. Any trauma causing injury would be known by a carer and would be outside the limit of normal or even rough handling

vii) E required no further genetic testing.

72. Mr Peter Richards is a well known Consultant Paediatric Neurosurgeon from whom the Court has heard very many times. This was his very last case in the Family Court, and it is right to record his immense contribution to this field and to countless difficult cases before the Courts over three decades. I am not embarrassed to record that he gave evidence in the very first head injury case I conducted as an advocate 30 years ago. His experience and wisdom in such cases will be an enormous loss to not just the medical and legal community, but to the countless children involved in such inquiries, in the endeavour to discover what has happened to them and how. He will be sorely missed.

i) Mr. Richards identified that E's bilateral supratentorial chronic subdural hematomas statistically had an 85% chance of being caused by non-accidental shaking (15% being caused by an unknown cause including birth trauma) but he could not say which category E fell into. No medical cause has been identified. The three other causes are birth, accident or inflicted trauma. There is no account of any memorable accidental mechanism. That therefore leaves:

a) Minor domestic trauma, when nothing is described.

b) Birth (it is not known if a birth related subdural haemorrhage can become chronic).

c) Forcible shaking.

ii) Whilst he was properly exercised by the lack of enquiry in July 2019, he examined with Professor Delahunty QC the features of that episode which he described as very, very, suspicious; "babies do not go into a coma for no reason." I acknowledge Mr Richards' discomfort with the 49/51 balance of proof which is applied by the Courts (and which I have heard him explain many times before).

iii) He could not exclude completely a birth related bleeding becoming chronic, indeed thought that if you looked hard enough there was likely to be birth bleeding in all births, given this birth, the more so. But concluded in E's case it was unlikely.

iv) He described the " July hypothesis" as speculative, raising suspicions (it's very, very suspicious), but in fact he agreed with Dr Mecrow's analysis and the significance of what occurred on 27 July 2019 and especially the carers' and the paramedics' descriptions, pointing out that the real challenge was that it was not investigated at the time by the hospital.

73. Professor Robin Sellar Consultant Neuroradiologist concluded that:

    i) E had widespread subdural collections, which in the absence of a memorable accidental event or injury were initiated by a non-accidental or abusive head trauma.

    ii) He agreed that E fell into the 15% group of infants described by Hobbs as indeterminate.

    iii) The subdural collections appeared to be different ages but that did not imply more occasions of trauma, just a predisposition to fresh bleeding.

    iv) There was no evidence for parenchymal injury (e.g. hypoxic ischaemic injury) often associated with inflicted trauma. There were no spinal collections.

74. In evidence he considered the events of 27 July 2019 presented a complex picture, he allied himself to Mr Richards' description as being very, very suspicious, relying more on the advices of Dr Mecrow and Mr Richards.

75. Whilst there was a chance that E had a subdural haemorrhage at birth, on the basis of Rooks (albeit a small sample) it was not more likely. Mr. Richards thought it very, very unlikely that a birth subdural had become chronic. He agreed it was not probable.

76. Taking all matters together Professor Sellar concluded that the subdural haemorrhages were caused by abusive head trauma.

77. Dr Keenan Consultant Paediatric Haematologist. His clear conclusions were:

    i) There is no abnormality of E's blood clotting system

    ii) Bruising and bleeding sustained by E occurred within a normal blood clotting system

    iii) No further investigation is required.

78. The acute Paediatric Consultant who examined E on 24 September recalled the difficulties in getting E brought to hospital, and some of the mother's unusual behaviours at hospital, repeatedly asking to go home, even to the extent that she was told that she was not allowed to leave the hospital.

79. She had a good recall of what had occurred (e.g. the mother mentioning that she had had mental health problems, M.E. and that E's care was divided into diurnal shifts). The mother was, she repeated, keen to return home.

80. E's GP, who knew the mother well, spoke to E's attendance at the surgery and some of the missed appointments. She referred E to the hospital.

81. The mother gave evidence over an extended period, and I do not underestimate the immense strain of doing so, nor of the pressure of these proceedings. Nonetheless, I am satisfied that the mother was able to give an accurate account of herself. She is a highly articulate and intelligent woman. The mother spoke of her mutually supportive relationship with Mr D, which I thought at best was idealised, and at worst simply

untruthful and inaccurate, as both her and his evidence demonstrated, and as was so powerfully illustrated by the text messages between them.

82. Pretty shortly into her evidence the mother quickly displayed who she is, impatient, volatile, confrontational, even aggressive, with an inability to control herself, and most significantly, highly manipulative, putting herself and the focus on herself centre stage. Such behaviours may have developed since childhood and have coloured the mother's perspectives and conduct; as early as 10 years of age the mother was in trouble, later having rages of temper, and suffering numerous detentions and exclusions. On almost every aspect of examination it was difficult to discern the truth.

83. There is no doubt that the mother's childhood was marred by high level of domestic abuse and drug misuse by her parents, details of which only emerging in her own mother's evidence, but the turbulence of her relationship with Mr D has been deliberately obfuscated and underplayed. Disagreements and arguments were such that they could be heard by the entire block of flats and were well illustrated by the text messages. The mother is quite simply unable to let any issue go, she is relentless in her rage. Every aspect was as I have said, I'm afraid, about her, not once did I detect a moments real thought, let alone empathy, for the position in which E finds himself.

84. A major area of evidence concerned the mother's health. She variously has been diagnosed as suffering from M.E., bipolar affective disorder, anxiety (for which she was prescribed medication), gastrointestinal disorder or IBS, as well as earlier anorexia, autism and serious anger issues. Yet it was still impossible to discern the truth. The mother revels in, and seeks attention, addressing some symptoms as behaviours, and vigorously denying others, strenuously contradicting previous recordings, giving alternative or contradictory information. All mirroring the mother's bizarre behaviour on 24 September, deliberately delaying attendance at hospital despite knowing (and being told) of the urgency of getting E examined, and then once there, being desperate to leave, only reluctantly staying after being told that she had no alternative.

85. The mother's ill health is a remarkable and prominent feature of the case. The mother is heroically self-interested and self-absorbed Ultimately, as in other areas, it has been impossible to determine where the truth in relation to the mother's health conditions begin and ends. The mother was apparently well when the relationship with Mr D started, yet by the time of her confinement with E she was sometimes confined to a wheelchair with thrush. The evidence was confused and contradictory, largely because the mother herself is now unable to tell. Memorably as the mother's impatience in the witness box rose, she threatened to sue counsel when being probed about her health., accusing counsel of being discriminatory, it was clearly a stance which she has frequently used before to good effect.

86. All of this is by way of background to the mother's relationship with Mr D, features which she very deliberately withheld from the authorities. Mr D has had a troubled past as I shall record later, but the speed at which he was installed as a support father figure and carer was extraordinary. Even more remarkable was the degree of responsibility and care entrusted to him. From birth Mr D appears to have undertaken the burden of child and household care, as well as caring for the mother. Knowing of Mr D's apparent fragile mental health and poor physical condition (subsequent to his addiction to crystal meths), essentially the mother was content to permit E's primary care to him. The dynamic of their unusual relationship is I am satisfied highly relevant to this enquiry.

87. Overall, the character and delivery of the mother's evidence was most unusual, much of the content and manner of her evidence was unexpected and illuminating.

88. Mr D gave evidence. He was not what I had expected, he was more open, reflective and thoughtful. He is younger than the mother, even now only 23, and has had a deeply troubled past, addicted to crystal meths at a young age, dealing in cocaine to fund his habit for more than three years, having dealings with dangerous people, including guns. He was sent away to Holland when he was 18 for his own safety and welfare, but the effects of the past which he had struggled to put behind him continue to intrude heavily on his daily life. He is addicted to cannabis. He has very low self- esteem and poor mental health and nervous anxiety. He agreed that by July 2019 his anger was not under control. He accepted that all of that (his age, mental health and drug addiction) was all kept from the authorities.

89. He met the mother by chance, he had arrived in the UK from the Netherlands, he had no money, save for a little from a few weeks seasonal work, was isolated and homeless, and found himself "sofa surfing" ultimately, at the mother's flat, by virtue of her lodger. Almost immediately he was made use of by the mother. Mr D did not work, he was funded entirely by the mother (and her mother, E's grandmother). The mother funded his food, his accommodation, his drugs, his gaming. I find that she manufactured the intensity of his fibromyalgia, just as she has with her own health. He was almost totally isolated and vulnerable through addiction. Whilst a "relationship" was established, it was highly unusual. Mr D told me, and the evidence demonstrates, that he had to do everything: domestic chores, caring for E, preparing bottles, keeping the place tidy, tidying up after the mother, as well as caring for her. There appears to have been an almost negligible sexual relationship. The mother had it seems total physical, emotional and financial control over Mr D.

90. Having listened carefully to Mr D it is easy to see why E's father Mr S describes her hold over him as "puppeteering". Mr D's evidence in relation to the quite remarkable conduct of this litigation was also highly revealing, this not being the first hiccup .The mother was unhappy about a statement filed by Mr D.. A new "amended" statement was filed. As a result of the mother's upset Mr D changed his lawyers, and his evidence, all, I find, at her behest.

91. Mr D's evidence was also remarkable, in that he did not shy away from his appalling past, nor his poor behaviours more recently, the verbal and physically violent behaviours and rows (at least in relation to objects), many in the presence of E. Smoking cannabis at night, and regularly up much of the night gaming, as well as ostensibly caring for E.

92. Mr D was a most unexpectedly good witness, plainly doing his best to be truthful. What shone through despite his difficulties, was his absolute blind loyalty to the mother, and a deep seated affection, commitment, understanding, and compassion for E.

93. Ms P, E's grandmother and an intervenor, and self-represented, the Court therefore had some opportunity to see something of her before she gave evidence. She had an unusual manner and delivery (which I thought at first might be nerves), almost as though we were exchanging gossip over coffee or tea. Ms P's evidence disclosed for the first time to a fuller extent the immensely impoverished home environment she provided to her three children, and not just in relation to domestic abuse and drugs, it underpinned the

behavioural legacies it has on all three of them to this day; including the continued acceptance, currency and culture of drugs as an integral part of their everyday lives. The grandmother thought nothing whatever of Mr D's addiction to cannabis (indeed even agreeing to become involved in the supply and delivery of cannabis to him), nor of the prominent part it plays in his or the lives of her other (adult) children. Her son, K, it appears has M.E., a paranoid personality disorder and schizophrenia and was living with his mother in September 2019 when E was admitted to hospital with a bruise, he having been in her care (but being returned early because of his behaviours) the weekend before. Ms P told me how K had stopped taking his prescribed medication, to the point that he required to be sectioned under the Mental Health Act. Her other son, S, (as has Ms P) has been involved in aggressive and hostile interactions with Mr D. He also takes cannabis. It is a family currency and way of life.

94. Ms P made much of the fact that she was self-representing and on her own, and whilst I don't underestimate her understandable nervousness and apprehension, she was able to ask sensible and very pertinent questions of all the witnesses (and many of them expert).

95. Overall, understandably Ms P was keen to give as good an account of herself, her daughter, and Mr D as she could. She could not, however, disguise her knowledge of the level of volatility in the household caring for E, a crucial factor which she hid from all the authorities. When pressed to answer the question, her reply, "I'm not sure it came to my mind at the time" illustrated so perfectly that the Court has not heard anything approaching the truth. She described obtaining cannabis for Mr D in hospital from her son, as though it was an everyday occurrence, as clearly it was. Ms P was selective in her memory, as she was in her evidence; she is clearly comfortable in that position, which is as superficial and misleading as it is unhelpful. She is totally loyal to, and complicit with, the mother and I am clear is just as happy as she to manipulate events as she thinks will benefit her and the mother best. When a difficult question was put to her, she unimpressively would either "forget" or claim to be "confused", both of which were clearly not the case. Her evidence in relation to the bruise was curious, she observed it the weekend before , but apparently said nothing. It was impossible to determine where the truth lay.Ultimately, I have concluded that her replies together with Ms P's unusual manner in the witness box, are each part of her own way of deflecting inquiry and gaining control, both of the topic and of the pace. Ms P, like her daughter, I have concluded was a poor witness, and I am afraid to say, controlling and manipulative.

Discussion

96. Whilst there was not substantial division between the medical experts, I bear in mind that today's medical certainty or opinion may be discarded by the next generation of experts. I also bear in mind that a hypothesis in relation to causation should not be dismissed just because it is unusual. So, I exercise considerable caution when considering the significance of experts' opinion that a case is unusual and where here there was no relevant examination at the point of inquiry and when it is suggested the primary injury occurred. Here it is contended, as just one example, that E's condition (in respect of the subdural bleeds) might have its origins at birth, or equally that he was a victim of an unknown condition or circumstance. It is obviously not always possible to know everything and if, as here, E's case is described at least as not usual, it heightens the need for careful and cautious scrutiny with particular attention being paid to the

possibility that the injuries may have their origins in that way, known or some other unknown cause. That is the more so since obviously the medical evidence is only one part of the evidence, and as there is no direct evidence of inflicted injury, so a diagnosis may be just as much a hypothesis, just as contentious, as an unknown cause. Self-evidently it is not for the mother or Mr D or Ms P to prove anything.

The approach of the medical witnesses

97. I have already recorded the thrust of each witness, but I take the whole of their careful nuanced scientific opinion into account. All the doctors gave evidence appropriate to their professional standpoint. All are specialists within their own disciplines, and conspicuously respected the frontier of their knowledge and expertise. Each, I thought, despite any suggestion to the contrary, was more than willing to acknowledge the difficulties in the case, the perspectives of others, as well as possessing a good knowledge of the science and research beyond their specific specialisations. Whereas Dr Mecrow in particular was criticised for his conclusions as at the events of 27 July 2019, the way in which both he and the other medical witnesses approached this issue strengthened, not weakened, his advices. Additionally, I bear in mind that it would be easy to suggest that instead of looking at the canvas overall, each piece of evidence is examined in isolation, but that could lead to entirely the wrong conclusion, by exclusion, whereas not just each witness, examiner, but the Court must endeavour to consider each piece of evidence separately and together,(this was pertinent in relation to the bruise) otherwise it becomes quite impossible to navigate in any meaningful way, let alone an analytical one, the different areas of inquiry.

98. Looked at in that way, I am completely satisfied that each medical expert was willing to, and did, consider all the available information, and not one of them arrived at their conclusion by a process of exclusion. I therefore assess the evidence of each witness and their opinions entirely on their merits. I have taken my time to reflect on the helpful and thought provoking submissions as well as the medical evidence. There is in fact a remarkable degree of unanimity between the medical experts from their differing and complementary disciplines. There can be no doubt that the failure of the Norfolk and Norwich Hospital to conduct a proper investigation into E's condition in July 2019 hampers the Court significantly.

Birth Trauma

99. Mr. Richards could not completely exclude bleeding arising at birth developing into chronic fluid. He would expect some bleeding at some births, possibly in all births. Considering all the possible mechanisms, he remained constant to the view that bleeding from birth was an option, but was unlikely, in fact very, very unlikely because E was well until 27 July 2019, and had the injury occurred at birth he would have experienced a more rapid head circumference growth. He was anxious to consider the move from the 25th growth centile at 2 weeks to 50-75th centile at 7 weeks, but it did not change his view. His strong advice was to focus on the July 2019 event, not the birth.

100. Dr Mecrow also considered birth related injury to be unlikely. He could not fully exclude a birth related haemorrhage going on to become chronic but considered that it would have been an exceptional event. E's head growth was plotted and was normal to

the end of July 2019. He considered birth trauma possible, even likely, but it would have resolved by 3 months, though it is possible it could have persisted.

101. Professor Sellar referred to the papers by Rooks and Hobbs, as did others; in all cases scanned at 3 months the subdural haemorrhages had disappeared; but he was the first to point out the weaknesses of the study.

102. At the experts' meeting each witness considered the possible causation of birth injury which whilst could not be completely excluded, was no more than a remote possibility, a theoretical possibility, but very unlikely. The studies referred to seem to me to have limited usefulness since the sample base or effective follow up was so limited, but they were referred to and relied on by each witness, and perhaps importantly were borne out by their extensive clinical experience.

103. So I conclude that whilst a theoretical possibility (even if E was in the arbitrary 15%), the evidence strongly suggests otherwise, and in any event could not account for, or fit with, E's condition on 27 July 2019, nor would such birth related injuries extend to September 2019.

Genetic Disorder

104. Whilst E has mild skin and joint manifestations of a connective tissue disorder that would fall into the very mild end of the hypermobile spectrum, Elhers-Danlos Syndrome (EDS), this would not explain the aspect of spontaneous bleeding or bruising.

105. No genetic mutation associated with EDS or other vascular tortuosity syndrome was identified. No other genetic mutation was identified.

E's collapse in September

106. There is no evidence that anything occurred in August or September which could explain the chronic subdural bleeds. Fresh blood of different ages was discovered on 24 September which could, and most likely is, explained by bleeding from chronic subdural bleeds. E was well at birth, and well until September, except importantly for the July hospital admission. All doctors were alert to the events in July which they endeavoured to evaluate, describing them as suspicious, speculative, very, very suspicious or narrowly likely on the balance of probabilities.

The July admission

107. E was not himself, he was crying and screaming and then would be silent, breathing quickly or not breathing, twisting his arms inwards or behind him, eyes pointing in one direction, going stiff then limp, the last 4 being highly indicative of seizures. The descriptions from the mother and Mr D are replicated by the ambulance crews who described 6 episodes with arm seizures, or arms locked in front and a left lateral gaze. Whilst in the ambulance E's Glasgow Coma score fluctuated widely, losing consciousness and then not. Dr Mecrow was particularly eloquent about this as proof which strongly pointed away from a BRUE, not just the description given by the mother, DM and importantly the paramedic crews, and the duration of the events; 7 minutes between episodes being unusual.

108. All experts agree that E's presentation on 27 July 2019 was consistent with a child who was neurologically very unwell, and that he was demonstrating seizure behaviour. Behaviour consistent with encephalopathy. I was very struck too by the careful weighing by the experts of other peripheral evidence, health checks, head circumference, weight, and general examination.

109. There is no dispute amongst the experts that E was displaying dramatic and significant neurological dysfunction in July 2019, evidenced by seizures and loss of consciousness.

110. There is no evidence of any other event which could begin to explain the presence of acute and subacute blood discovered in September, save for birth. No expert, even permitting the (remote) possibility of a birth related bleed, considered that it would still be present four months later, and in any event all the evidence in relation to E suggests otherwise.

111. Brief Resolved Unexplained Event (BRUE) or Apparent Life Threatening Event (ALTE). Dr Mecrow in particular considered this with considerable care. BRUE is generally a simple event. Reflux (diagnosed on 6/7/19) is commonly associated with breath holding or gasping for breath. It can briefly cause apnoea and could be a possibility here. Both he and Mr. Richards analysed that there can easily be confusion by a carer between a BRUE and or breath holding and unconsciousness. Mr. Richards was clear that such episodes result in parents taking their child to hospital, and the similarity in the symptoms (arching back and gasping) which might appear to be a seizure. Whilst I acknowledge the medical parameters of a BRUE, that description is in fact incompatible with the repeated nature of E's condition and the findings of the ambulance crew Glasgow Coma scores. That information may not have been fully available to the doctors at the hospital who wrongly (as they now assert) attributed E's symptoms to a gastric issue of some kind. I bear in mind too the consistency in description between the carers and the ambulance crew - apnoea, brief periods of unconsciousness, and abnormal limb movements.

112. I bear in mind here (as did Dr Mecrow), that something else may have caused seizure activity.

113. Unlike the medical experts, the Court has the great advantage of hearing E's carers and assessing their evidence in the round and hearing extended evidence about what was actually happening within E's home and the care being provided to him.

114. The bruise identified on 24 September 2019 on E's right thigh was large (4cm x 1 cm) even had it been sustained by an ambulant baby. Ms P claims to have seen it the previous weekend, yet it was not identified by the GP on 23rd September. Bruising is uncommon in non-mobile babies, especially where it does not lie over a bony prominence. Research points heavily to it being uncommon in young babies, as does clinical practice. The position of the bruise is uncommon. It needs to be seen in the light of the other concerns (if the bruise was identified on its own it would not of itself indicate inflicted injury).

115. Having considered all the medical evidence, I conclude:

i) That I have greater difficulty in adopting a conclusion that the medical findings are in whole or in part because of an unknown condition or conditions and have

their origins in E's birth. No one ruled it out, but the individual and unanimously collective view was that none of those applied here.

ii) That it is likely that there were several weeks between the first occurrence of a fresh subdural bleed and the chronic subdural haemorrhage declaring itself.

iii) No medical cause for the chronic subdural haemorrhages has been identified.

iv) That the Court should examine carefully (there being no reported trauma) of any occasion, if it occurred, where E suddenly lost consciousness, and it must be especially careful when following any "uncomfortable sequence of logic" to do so with an especially open mind.

v) That on 27 July 2019 E exhibited all the classic signs of trauma consistent with shaking, the descriptions of the mother, Mr D, and the ambulance crews aligning, and more likely fitting the symptoms of inflicted injury (as opposed for example a BRUE): apnoea, brief periods of unconsciousness, abnormal limb movements are all likely to have been the result of E suffering seizures as part of an encephalopathic illness.

vi) That until the July 2019 event E was a well child.

vii) That in the absence of an unknown medical condition and birth being an unlikely cause, and there being no account of any causative accident, on balance a non-accidental mechanism is more likely, that on 27 July 2019 there was an episode of abusive head trauma, a single forceful shake which later went on to become chronic.

116. With that background I turned to the evidence of the mother, Mr D and the grandmother Ms P, that evidence and my assessment of it has been strongly determinate of my conclusions.

117. The mother was a poor, evasive and unreliable witness, inconsistent in her accounts. She has been far from straightforward about the real dynamics and interplay of her relationship with Mr D, actively misleading professionals, all in common with the impossibility of determining the truth about her state of health. What is certain is that the mother is totally ego centric, viewing everything only from her own perspective. Having stepped back and thought carefully about her relationship with Mr D, the evidence supports the submission that Mr D, a vulnerable man, was affectively "recruited" with the support of the grandmother. He was provided with his needs, food, shelter, and drugs, and such is the force of the mother's character that he carried the burden of domestic and child care. He was at least enthralled to the mother, and in a real sense is enslaved to her; this is far more than a co-dependency, he is incapable of independent thought or action, as events from the text messages to the conduct of this litigation so amply illustrate.

118. What then of Mr D? I was surprised and quite impressed by the candour of his evidence; he did his best I thought to be truthful on all matters even when to his significant disadvantage, but he had to accept that there were times when he was completely consumed by the turbulent relationship with the mother, and other times when he had consumed a significant quantity of cannabis and which obviously affected

him. Of the three adults, only he demonstrated any real feeling, any real understanding of what it must have been like for E. There is no avoiding his understandable all too often expressions of frustration with the mother. He was expected it seems to do just about everything. He accepted he had an explosive and uncontrolled temper, and whilst much of the evidence emanates from the mother herself, nonetheless he acknowledges, openly, his part.

119. Reflecting on the recollections of the mother and Mr D in respect of July 2019, they were inevitably less than perfect, being recalled for the purposes of the Court proceedings more than a year later; and shocking incidents can be more difficult to recall, even close to the event. I have been troubled in a real sense that if E was injured that day, it is likely both the mother and Mr D do know who is in fact responsible, and Mr D cannot think nor speak any ill of the mother. If the mother really thought it was Mr D, as she has stated, subsequently being "understanding of his position", why would she be still be in a relationship with him and protect him? Conversely the same isn't quite true of Mr D who is in a real sense enslaved to the mother, and who appears to be incapable of believing that she could be capable of anything other than sensitive attuned care (even though he is recorded as expressing anxiety at the time). Those factors might point to responsibility lying with the mother. I am additionally troubled by the mother's conduct at the hospital, keen to escape their inquiry, as well as the inexplicable, and possibly telling delay in getting E to hospital in the first place, on one view suggesting that she had something to hide. Yet the Court cannot escape the uncontested evidence of both the mother and Mr D, as well as the assessment of the Court, that E was caught in the middle of an unpredictable, explosive, febrile and violent relationship where both his carers appeared unable to moderate their behaviours, and where his care took second place to the pressing needs of the adults. Whilst it appears that the grandmother may have visited that day in July, the evidence is at best very opaque.

120. So whilst I retain significant concerns about the evidence of the mother and was not unimpressed with the evidence of Mr D, in my judgment, ultimately I have concluded that E could just have easily been the victim of inflicted injury from his mother or Mr D (when events, his difficulties of self-control or drug taking overwhelmed him), or caught in the crossfire between them, and it is speculative and therefore impossible to say which of them was responsible. I deal with the grandmother below.

121. Putting all the evidence together

i) The evidence establishes that it is more likely that an event occurred in July 2019 which resulted in significant neurological trauma.

ii) On balance I find it was that event which became chronic and was seen on 24 September 2019, Dr Mecrow is to be praised for his careful and robust analysis which otherwise might not have established this relevant event.

iii) There is no reported mechanism for the injuries.

iv) E was injured either by a momentary loss of control or being caught in the crossfire between the adults who were caring for him. This applies to the bruise too. I reject the contention that Mr D was responsible through over jealous

horseplay, I think it much less likely having regard to my assessment of the 3 adults, and much more likely that one of them knows how this bruise occurred.

v) The mother and the grandmother have actively concealed the truth of what was occurring in the household.

122. I find therefore that the local authority has proved that it is more likely than not E was the subject of an abusive incident in July 2019 and an abusive bruise in September 2019.

123. I am unable to safely conclude which of the three adults was responsible for the bruise. Ms P claims to have noticed it, but for some reason said nothing, or she is wrong about the date or not telling the truth, E's carers claimed to be ignorant of it, having regard to my assessment of each them, any of them could have been responsible . The evidence of the visit by the grandmother in July 2019 is so unclear that I consider it to be speculative as to her potential responsibility for the head injury, and notwithstanding the collusive nature of this family, I have greater difficulty in accepting that she was or might be responsible, and I do not conclude that she was. I find that either the mother or Mr D were responsible for the head injury. However, the grandmother failed to protect E knowing perfectly well the febrile atmosphere in which E was being cared for.