Neutral Citation Number: [2022] EWCA Civ 1348

Case No: CA 2022 001028

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT READING
His Honour Judge Moradifar (sitting as a Judge of the High Court)
RG21C00484

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2022

Before:

LADY JUSTICE KING
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE BIRSS

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RE A (CHILDREN) (POOL OF PERPETRATORS)

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Aidan Vine KC and Paul Murray (instructed by **Barrett & Thomson**) for the **Appellant** (Father)
Nick Goodwin KC and Mavis Amonoo-Acquah (instructed by **the Local Authority**) for the **first Respondent** (Local Authority)
Lorraine Cavanagh KC and Saiqa Chaudhry (instructed by **Rayat Solicitors LLP**) for the **second Respondent** (Mother)
Tom Wilson (instructed by **Fairbrother & Darlow**) for the **third Respondent** (Children's Guardian)

Hearing date: 13 September 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 11:00am on 17 October 2022.

Lady Justice King:

Introduction to the Appeal

1. This is an appeal against orders made in care proceedings on 21 April 2022 by HHJ Moradifar sitting as a Deputy High Court Judge. The judge made a series of findings against the parents of a baby, 'A', who following an incident in the early hours of the morning of 3 April 2021, had sustained life-threatening injuries whist in the care of her parents. The Appellant ("the father") called for an ambulance upon finding A struggling to breathe and with limited consciousness. Once admitted to hospital A was found to have:

    i) Partially asphyxiated as a consequence of there being a large quantity of blood-soaked tissue lodged in her larynx and pharynx;

    ii) Multiple rib fractures;

    iii) Bilateral metaphyseal long-bone fractures; and

    iv) Cystic lesions with blood staining within the parafalcine frontal lobes of her brain.

2. The judge's findings of fact can be summarised as follows:

    i) The mother forced tissue paper into A's throat in order to obstruct her breathing. The act of respiratory obstruction was deliberate and could have been fatal. Following emergency surgery and two blood transfusions, A spent two months in hospital;

    ii) The parents colluded to present a false account to the court in relation to the circumstances of the injury;

    iii) In addition, A suffered chronic brain injuries following a traumatic head injury which injury had been inflicted before 26 March 2021;

    iv) The brain injuries were inflicted by either the mother or the father;

    v) A suffered metaphyseal fractures of the radius, the ulna, both femurs and both tibias as well as fractures to six of her ribs;

    vi) The metaphyseal fractures were the product of at least three separate applications of force and the rib fractures of at least two applications of force. The injuries were inflicted on at least two different dates between 13 March 2021 and 24 March 2021;

    vii) Each of the fractures was deliberately inflicted by the mother and/or the father;

    viii) The perpetrator failed to seek timely medical attention for A once injured;

    ix) In the event that all of the injuries sustained by A were caused by one parent, the other parent had failed to protect her;

x) Following the events of 3 April 2021, the father, if not the perpetrator, failed to maintain an open mind about the risks to A which were posed by the mother.

3. The mother has not sought to challenge any of the findings made against her by the judge. It follows that the finding upon which this appeal proceeds, is one that the mother deliberately inflicted the final, life threatening, injury to A.

4. The issues before the court are: (i) whether the judge erred in his application of the law in relation to uncertain perpetrator cases and, as a consequence, was in error in finding that the father was within the pool of possible perpetrators in relation to the earlier fracture and head injuries sustained by A; and (ii) was the judge wrong to find that he, the father, had colluded with the mother and, if he was not the perpetrator, had failed to protect A from his mother?

The Family Background

5. The second Respondent ("the mother") and father are related. The father moved to the United Kingdom from his country of origin more than 15 years ago. The father has built a good life in this country and is justifiably proud of the success he has achieved through his employment. A marriage was arranged between the parents and took place more than 5 years ago. After the marriage, the mother moved to live in this country with the father.

6. In relation to the mother's background, there is within the papers an undoubted and significant contradiction. The mother's evidence is that she is highly educated to post-graduate Master's level and that she worked as a teacher in her country of origin before relocating to England. This evidence, however, sits uncomfortably with the fact that, for the purposes of this litigation the mother was assessed by a psychologist as being in the 'extremely low range of adult intellectual ability'. The mother, as a consequence, required at trial the support of an intermediary. Frequent breaks were necessary given her difficulties in following the evidence. I should be clear that this assistance was separate from, and unrelated to, the provision of an interpreter for the mother who does not speak English.

7. This inconsistency, which may arguably have been of some importance, does not feature in the judgment, which at paragraph [5] simply refers to the mother as a graduate who had taught for five or six years in her country of origin.

8. Upon moving to this country, the mother did not work outside the home. In time she gave birth to twins. At the beginning of 2021, when the twins were not of school age, the mother, again, gave birth to twins. The babies were extremely premature, being born at between 28 and 31 weeks' gestation. The babies remained in hospital for a month before they were discharged home. The father had paternity leave and by bolting on some additional leave, did not have to return to work until after the twins were discharged home from hospital. After his return to work, as set out below, whilst the father remained an involved father, the majority of the care of the four children was undertaken by the mother.

9. On the day when A was re-admitted to hospital, her corrected age, taking into account her prematurity, was one week.

Summaries of the Law

10. Attached to the judge's judgment was a 26-page document entitled "Summary of the Applicable Law". This was a document prepared by Mr Vine KC and his junior Mr Murray and agreed by the other parties. The judge referred to it as a "comprehensive analysis of the applicable legal principles" and attached the final agreed document to his judgment. This court was told that it is not an uncommon practice for counsel to submit an agreed note of the relevant law in this way, the intention being that the judge then, as here, adopts its contents in its entirety.

11. Whilst I fully appreciate the value of such a document to a busy circuit judge, a measure of circumspection is in my view necessary in its use. First, a document which sets out lengthy citations from cases is unwieldy and may contain much which is unnecessary. Simply setting out any significant principle with a reference to the relevant part of the judgment in question will ordinarily be sufficient. Secondly, the judge in his or her judgment still needs to identify and apply the principles of law relevant to the issue, or issues, before him or her. A boiler-plate incorporation of the established law in the form of an attachment to a judgment does not, without analysis in the judgment, help the reader to understand whether, and if so how, the law was applied to the facts and circumstances of the case before the judge.

12. Other than to incorporate Mr Vine's document, the judge made no further reference to the law. On one level that may not be surprising where a specialist family judge, such as this judge, is dealing with a relatively straight forward finding of fact case where a brief reference to the burden and standard of proof may well be sufficient and I am not suggesting that such a judge should 'reinvent the wheel' in each judgment he or she writes. In this case, however, once the judge had, following his careful and thorough analysis of the medical evidence, made findings of inflicted injuries of various ages, the difficult issue of identifying the pool of perpetrators became central to the case.

Uncertain perpetrator cases:

13. In *Re B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575, [2019] 2 FLR 211 ("*Re B: 2019")*, Peter Jackson LJ clarified the proper approach in respect of uncertain perpetrator cases and the concept of a pool of perpetrators.

14. At paragraph [46], he "state[s] the obvious" by highlighting that the concept does not arise either where the allegation can be proved to the civil standard against an individual in the normal way, or where only one person could possibly be responsible.

15. Peter Jackson LJ went on at paragraph [48] to emphasise that the concept of a pool of perpetrators does not alter the general rule as to the burden of proof and that it is for the local authority to show, in respect of any potential perpetrator, that there is a real possibility that that person had inflicted the relevant harm before they are placed in the pool.

16. Having emphasised these parameters, Peter Jackson LJ at paragraph [49] ("paragraph [49]") went on to set out the proper approach to be applied in every case:

> "[49]….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'." *(my italics)*

Relevance of 'strain'

17. At paragraph [49] Peter Jackson LJ, by reference to *Re D (Children)* [2009] EWCA Civ 472 (*"Re D")*, said that the judge should not strain to identify the perpetrator. In the course of submissions, Elisabeth Laing LJ queried the relevance of the phrase "*but not strain"* found in paragraph [49]. What, she enquired, did it add to the requirement of the application of the balance of probabilities as the standard of proof? Further she questioned whether the inclusion of such a phrase might not lead to a risk that it could be interpreted as permitting, or encouraging, a judge to place a person in the pool of potential perpetrators in a complex or evidentially difficult case rather than making a finding as to perpetration on the balance of probability. Elisabeth Laing LJ's enquiry led to consideration being given to the origin of this expression, one which is routinely used in relation to pool of perpetrator cases.

18. The starting point is *Re K (Non-Accidental Injuries: Perpetrator: New Evidence)* [2004] EWCA Civ 1181 (*"Re K").* Wall LJ, giving the judgment of the court, said at paragraph [55] that "As a general proposition we think that it is in the public interest for those who cause serious non-accidental injuries to children to be identified, wherever such identification is possible." Wall LJ stated a second proposition at paragraph [56] that there is a public interest in children having the right as they grow up to "know the truth about who injured them when they were children, and why." This judgment set out the proper approach for judges in these cases, an approach which remains unchanged 14 years later; namely that it is in the public interest for those who inflict injuries on children to be identified whenever possible.

19. The question of the appropriate standard of proof to be applied when seeking to identify such a perpetrator was considered by the House of Lords in *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 All ER1 ("*Re H").* The same issue came before the House of Lords again in *Re B (Care Proceedings: Standard of Proof) (Cafcass Intervening)* [2008] UKHL 35, [2009] 1 AC 11 (*"Re B")*. Baroness Hale, giving the lead speech, disapproved a formula which had been adopted by many courts following the speech of Lord Nicholls in *Re H,* to the effect that the more serious the allegation, the more cogent would be the evidence needed to prove it. Baroness Hale said at paragraphs [70], [71] and [72] that she would "announce loud and clear that the standard of proof 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".

20. Lord Hoffmann in his concurring judgment in *Re B* endorsed this restatement of the law and at paragraph [15] deprecated the approach which had grown up in family cases that where a serious allegation was made, the court should apply a "heightened standard of proof". He said: "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not."

21. Lord Hoffmann went on in the same paragraph to say:

> "…..If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator."

22. Unfortunately, this last observation was subsequently taken somewhat out of context and in some courts, was regarded as importing a *requirement* for a court to determine who was the perpetrator wherever there were two alternative possible perpetrators.

23. This wrong turning on the part of some courts came before the Court of Appeal in *Re D (Children)* [2009] EWCA Civ 472, *("Re D").* The Court of Appeal was faced with an appeal where the judge had approached the case on the basis that, where there were two potential perpetrators the court had to consider whether the evidence was sufficiently strong against one in order to diminish the possibility that it was the other who was the perpetrator, and that "on the authorities the court should do so rather than leave an unsatisfactory state of uncertainty".

24. Wall LJ at paragraph [11] rehearsed the propositions he had set out in *Re K* (see paragraph [18] above) and expressed the view that there was nothing inconsistent between those two propositions and the approach of the House of Lords in *Re B.* It was in the following part of Wall LJ's judgment that, so far as I have been able to ascertain, the reference to "straining" to identify a perpetrator is first seen. Wall LJ said at paragraph [12]:

> "Nothing in *Re B*, in our judgment, requires the court to identify an individual as the perpetrator of non-accidental injuries to a child, simply because the standard of proof for such an identification is the balance of probabilities. If such an identification is not possible – because, for example, a judge remains genuinely uncertain at the end of a fact finding hearing, and cannot find on the balance of probabilities that A rather than B caused the injuries to the child, but that neither A nor B can be excluded as a perpetrator - it is the duty of the judge to state that as his or her conclusion. *To put the matter another way, judges should not, as a result of the decision in Re B, and the fact that it supersedes Re H, strain to identify the perpetrator of non-accidental injuries to children. If an individual perpetrator can be properly identified on the balance of probabilities, then for the reasons given in Re K it is the judge's duty to identify him or her. But the judge should not*

> *start from the premise that it will only be in an exceptional case that it will not be possible to make such an identification*. There will inevitably be cases - of which this, in our judgment, is one – where the only conclusion which the court can properly reach is that one of the two parents – or both - must have inflicted the injuries, and that neither can be excluded." (*my italics)*

25. These observations made by Wall LJ in *Re D* were unequivocally endorsed a little later by the Supreme Court in *S-B (Children)* [2009] UKSC 17 *("S-B Children").* In that case, the judge at first instance had not asked herself which parent was responsible for causing injuries to a child. Instead, she listed the various factors she had taken into account in relation to each parent. Then, "in order to help further assessments", she expressed the view that it was 60% likely that the father had injured the child and 40% likely to have been the mother. Baroness Hale said at paragraph [35]:

> "35. Of course, it may be difficult for the judge to decide, even on the balance of probabilities, who has caused the harm to the child. There is no obligation to do so. As we have already seen, unlike a finding of harm, it is not a necessary ingredient of the threshold criteria. As Lord Justice Wall put it in *Re D (Care Proceedings: Preliminary Hearings) [2009] EWCA Civ 472, [2009] 2 FLR 668* , at para 12, judges should not strain to identify the perpetrator as a result of the decision in Re B :
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> > 'If an individual perpetrator can be properly identified on the balance of probabilities, then … it is the judge's duty to identify him or her. But the judge should not start from the premise that it will only be in an exceptional case that it will not be possible to make such an identification.'"

26. Baroness Hale went on at paragraph [40] to say that if a judge cannot identify a perpetrator, it remains important to identify the pool of possible perpetrators. She endorsed the view of the Guardian in the case that it was "positively unhelpful" to have the sort of indication by way of percentages as had been given in that case.

27. The statement by Wall LJ in *Re D* and taken up by Baroness Hale in *S-B (Children)* of the maxim that a judge should not strain to identify a perpetrator has, it would seem, since that, become an adjunct to the direction that the standard of proof is the simple balance of probabilities.

28. Looking back to *Re D* it can be seen that Wall LJ first used the expression in order to neutralise the misinterpretation of Lord Hoffmann's speech in *Re B* as having imposed a requirement to identify a perpetrator in all circumstances. The need for such a correction was demonstrated by the fact that the pendulum had swung so far that some judges, far from considering only the balance of probabilities, were looking at the percentage likelihood of each of the possible perpetrators having been responsible for causing injuries to a child in circumstances where they were otherwise unable to identify the perpetrator to the appropriate standard of proof.

29. Since that time, the formula may well have served as a convenient counterweight to any temptation on the part of a judge to seek to make a finding at all costs, no doubt as a consequence in part of Wall LJ's "two propositions" in *Re K,* but also because of the undoubted protective advantage of being able to identify a perpetrator and of being able to exonerate an innocent parent.

30. The question now is, what purpose, if any, does the maxim that a judge should not strain to identify a perpetrator serve, given that in the intervening 14 years the law in relation to perpetrators, certain and uncertain, has become clear and well established, and bearing in mind the words of Lord Lloyd (*Re H (Minors) (Sexual Abuse: Standard of Proof*) [1996] AC 563, [1996] 1 FLR 80) quoted in *Re B* at paragraph [63] that "There is a danger that the repeated use of [the] words will harden into a formula which, like other formula … may lead to misunderstanding"?

31. In answering that rhetorical question, it is worth also noting that the Supreme Court has been unequivocal in its condemnation of an approach by courts which allows for any form of gloss being added to a legal test.

32. For example, in *Re B (A Child)* [2013] UKSC 33, [2013] 2 FLR 1075, the Supreme Court unanimously rejected any gloss on the test set out in CPR 1998, r 52.21(3)(a) that an appeal is to be allowed where the decision of the lower court was "wrong". The approach in the earlier case of *G v G (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965, [2014] 1 FLR 670 that the test to be applied to a review of a first instance determination based on an evaluation of the facts was whether the finding was "plainly wrong" was, it was said, "inapt". Lord Wilson said at para [44] that "it is generally better to allow adjectives to speak for themselves without adverbial support". The test, he said, is simply was the evaluation "wrong?".

33. The evaluation of the facts which will enable a court to identify the perpetrator of an inflicted injury to a child will be determined on the simple balance of probabilities and nothing more. Having considered the matter afresh in the light of Elisabeth Laing LJ's observation, I am of the view that to go further and to add that the courts should not "strain" to make such a finding is an unnecessary and potentially unhelpful gloss which has outlived its usefulness and which was directed at a different issue as set out in paragraph [24] above.

34. I suggest, therefore, that in future cases judges should no longer direct themselves on the necessity of avoiding "straining to identify a perpetrator". The unvarnished test is clear: following a consideration of all the available evidence and applying the simple balance of probabilities, a judge either can, or cannot, identify a perpetrator. If he or she cannot do so, then, in accordance with *Re B (2019)*, he or she should consider whether there is a real possibility that each individual on the list inflicted the injury in question.

Application of Re B: 2019 to this case:

35. Whilst paragraph [49] together with the following 3 paragraphs of that judgment are recited in the Summary of Law attached to the judge's judgment, nowhere within the body of the judgment does he refer to *Re B: 2019* or undertake the analysis as set out at [49].

36. On a proper application of paragraph [49] to the issue of the identification of the perpetrator of the older injuries, the judge had to determine:

    i) Whether there was a list of people who had the opportunity to cause the injury. Here it is common ground that there was a list of two, namely the father and the mother;

    ii) Whether he was able on the balance of probability, to identify the actual perpetrator. In this case it has not at any stage been suggested that the evidence would permit such a finding to be made in relation to the father alone. The question for the judge was whether such a finding could be made to the proper standard of proof in respect of the mother;

    iii) If, and only if, the court was unable to make such a finding to the appropriate standard of proof, should he have resumed his scrutiny of the list and in respect of each person on the list, considered whether there was a real likelihood or possibility that one of those individuals inflicted the injury/injuries. In this case this meant, could the judge be satisfied that there was a real possibility that the father was the perpetrator of the older injuries? If so, the father was a possible perpetrator with all the serious consequences which follow from such a finding.

37. Mr Goodwin KC, on behalf of the local authority, accepts that the approach of the judge to this difficult area was not "formalised or disciplined" and so, he submits, it is necessary and appropriate to look further within the totality of the judgment in order to establish whether the judge had fallen into error in his approach. That he had applied the proper approach can, Mr Goodwin submits, be drawn from two critical paragraphs in the judgment which are set out at paragraph [41] below.

38. Mr Wilson, on behalf of the Children's Guardian, acknowledges that the judge could have engaged further with the gravity of his finding against the mother and of its relevance to the question of whether he could identify a perpetrator of the other injuries. Mr Wilson also accepts that the judge could have, but did not, expressly factor into his reasoning that the father had, on the day A was re-admitted to hospital, acted protectively and had, by his immediate actions in dialling 999 and giving CPR, saved A's life.

39. Mr Wilson submits that whilst the judge's analysis could have been fuller and that whilst there was undoubtedly material upon which another judge may have felt able to find that the mother was responsible for all the injuries to A, the judge's reasoning was on balance adequate and the judge, he submitted, was therefore entitled to conclude that it would be "straining too far" to make a positive finding against the mother. Consequently, Mr Wilson submitted, there remained a real possibility that the father was responsible for the older injuries. In my judgment the submission of Mr Wilson highlights the danger of the addition of the "should not strain" rubric to the requirement that the identity of a perpetrator is made by reference to the balance of probabilities without more.

40. It is undoubtedly the case that the judge took great care with this lengthy and detailed judgment, a judgment given following a complex and difficult trial where the parents gave him little or no help to enable him to understand the true dynamics of the

household. It is with considerable reluctance that I cannot agree with the submission of either the local authority or the Guardian, that if the reader steps back and looks at the judgment as a whole, the judge's analysis and route taken by him to his finding that the father is properly in the pool of perpetrators is sufficient and cannot be said to be wrong.

Analysis of the judge's approach to 'pool of perpetrators'

41. The two critical paragraphs in the judge's judgment are as follows:

> "91. As I have observed earlier in this judgment, the parents have each given little evidence that has been helpful or realistic. Unlike the events on the day A was re-admitted to hospital when A was in the sole care of her mother, she, together with her siblings was jointly cared for by her parents since she was discharged from the hospital. The intracranial injuries and the fractures were caused in at least two separate incidents. Having found that these were inflicted injuries, the only individuals who could have caused the injuries were the parents. There is no reliable direct evidence that would allow me to distinguish between the parents and come to a view about which of them may have inflicted these injuries. Therefore, as I am invited by the father, I must consider the inherent improbability of the father causing these injuries in the context of the wider canvass *[sic]* of the evidence and my findings about the events on the day A was re-admitted to hospital. This argument is developed attractively on behalf of the father and points to several reasons as to why it would be inherently unlikely that the father inflicted these injuries.
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> 92. The probability of an event must be assessed against the evidence that is before the court. It is only when that probability reaches the requisite evidential threshold that the court will be permitted to make a finding. Some events are so improbable, that when considered against the weight of the evidence, it will be excluded as a possibility. In my judgment this does not extend to the arguments that are advanced by the father in this regard. The only feature distinguishing the parents' possible involvement in causing A's fractures and intracranial injuries are my conclusions about the events on the day A was re-admitted to hospital. Otherwise, the parents present as equally loving and devoted parents with no previous concerns about either of them. There is an innate attraction to concluding that the mother was responsible for the events on the day A was re-admitted to hospital. However, such an approach would be flawed in the absence of evidence that would support such a conclusion. One can speculate many scenarios in which one parent may be responsible for earlier injuries and the other for the later. To identify the mother as the sole perpetrator would be straining too far beyond what is evidentially sustainable and would be based on no more than

> speculation or conjecture. In my judgment, the evidence that is before me can only conclude that there remains a real possibility that either or both parents were responsible for causing A's fractures and intracranial injuries."

42. The judge completed the first of the steps set out in paragraph [49] in that he properly identified the individuals on the list as "the only individuals who could have caused the injuries were the parents". Unfortunately, rather than then moving on to consider whether the mother or the father had, on the balance of probability, inflicted the earlier injuries, the judge approached it from the other end of the telescope, namely was it so improbable that the father had inflicted the older injuries that he should be excluded as a possible perpetrator?

43. The judge said at paragraph [91] that there is "no reliable direct evidence that would allow me to distinguish between the parents and come to a view about which of them may have inflicted these injuries". There are two difficulties with this approach: (i) in my view the proper approach is not to seek to distinguish as between the possible perpetrators in order to see which one inflicted the injuries. Rather the proper approach is to consider each individual separately in order to determine whether that individual can be found on the balance of probabilities, to be the perpetrator; further (ii) contrary to the judge's finding, there is in my view "reliable, direct evidence" capable of distinguishing the parents, namely the "direct" evidence (which had become a finding of fact) that the mother had inflicted the devastating life-threatening injuries to A on the day A was re-admitted to hospital.

44. In my judgment, the judge's approach to the submission that it was inherently improbable that there were two perpetrators was wrong. Had the judge considered the evidence against each parent individually rather than considering whether it so improbable that the father had inflicted the older injuries such that he should be excluded as a possible perpetrator, that submission would have found its proper place in the analysis.

45. Had the judge specifically considered whether the mother had inflicted the earlier injuries, the matters he would have taken into account would have included the following matters:

    i) The weight to be given to evidence is, in general, a matter for the trial judge. However, here the mother had inflicted the injuries on the day A was re-admitted to hospital. The judge properly identified this as the most significant difference between the parents. But in my view he did not confront the consequences of the difference and carry them through in his reasoning. As discussed below, the injuries suffered by A on several occasions were typical of several serious losses of parental control in a domestic setting, with the last occasion being the most dangerous of all. When investigating the earlier injuries, the fact that the mother had been shown to be capable of a catastrophic loss of control just two or three weeks later demanded an adequate reflection in the court's reasoning and is not a matter upon which expert evidence would be required.

    ii) The judge's finding at paragraph [96] that the mother had a "highly dysfunctional parent child relationship". This important finding was not fully

reflected in the judge's analysis and sits uneasily with his conclusion that, save for the events on the day A was re-admitted to hospital', "the parents present as equally loving and devoted parents";

iii) The balance of care as between the parents. The judge said at paragraph [91] that A was "jointly cared for by her parents since she was discharged from the hospital". In my judgment such a statement does not reflect the reality of the situation on a day-to-day basis once the father returned to work. It is undoubtedly the case that the father was an involved father as he was keen to demonstrate in his evidence and was accepted by the judge. It was however common ground, as was confirmed to this court, that when the father returned to work after his paternity leave he was working five days a week. Whilst he visited home during the day on occasion (when the mother took the older twins to, or collected them from, nursery), the judge found at paragraph [7] that that would be for only about 10 or 20 minutes before he returned to work. The evidence before the judge was that the older twins did not always go to nursery. The mother, therefore, was doing most of the caring for the four children on her own during the working day. Further, the sleeping arrangements were that the mother slept in one bedroom together with the babies and one of the older twins, whilst the father slept in a different room with the other older twin. Although the father sometimes "helped" the mother with night feeds, it was, and is accepted, that by far the greater part of the care of the children during the nights was undertaken by the mother.

iv) It followed that the mother was the primary carer of 3+ year old twins and premature twins whose corrected age on the day A was re-admitted to hospital was still only one week.

v) Whilst the various injuries inflicted on A over the relevant period were different (fractures as well as a head injury), they were each, as the local authority accept, the types of injury which are seen borne out of frustration and loss of control by a parent. In this case, the final assault was one of the utmost seriousness; an assault now being investigated by the police as an attempted murder. This characterisation of the various injuries is a feature which should be factored in, more especially given the judge's finding that the mother had a dysfunctional relationship with A;

vi) The inherent improbability that there were two perpetrators. Baroness Hale said in *Re B* at paragraph [70] that "The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies". It follows that when deciding on the relevance if any of the inherent improbability of there having been two perpetrators of the appalling sequence of injuries inflicted on this new born baby, the court needs to consider all the surrounding circumstances. For example, in this case it would appear from the evidence before the judge that there were no factors which would tend to indicate that this may be a case where there are two perpetrators by reference to the sort of chaotic household where the evidence discloses the misuse of drink, drugs and/or the existence of domestic violence within the home. Secondly of relevance is the highly appropriate and protective actions taken by the father in the early hours on the day A was re-admitted to hospital, actions which, it is acknowledged by all, saved A's life.

46. Had the judge adopted the approach set out in *Re B* and considered by reference to all the evidence, whether he could make a finding in relation to the mother rather than whether he could exclude the father, he may, or may not, have found the mother to have been the sole perpetrator of the injuries to A. If, having analysed all the evidence, the judge had concluded that he could not make such a finding, then and only then should he have turned to consider whether there was a "real possibility" that the father had inflicted the injuries. A finding that a person who was responsible for the later injuries was also responsible for the earlier ones cannot, in my judgment, be described as a speculation.

47. The judge did not consider the question of whether the mother had inflicted the earlier injuries as a discrete stage of the process. Reading paragraphs [91] and [92], it seems to me that his conclusion that there was a "real possibility that either or both parents were responsible" for the older injuries was based substantially on the fact that the judge had felt unable to exclude the father on the basis submitted by counsel, (namely that it was inherently improbable that he had caused the older injuries) together with the fact that the father would have had the opportunity to have inflicted the injuries as a "joint" carer.

48. In my judgment such an approach did not adequately take into account all the background and evidence before the court.

49. In those circumstances, notwithstanding the great care taken by the judge and his willingness to respond to the various requests made to him to clarify this part of his judgment, I am of the view that the finding that the father is in the pool of potential perpetrators cannot stand and the case will, unfortunately given the inevitable delay, have to be remitted for a rehearing as to perpetration.

Collusion and Failure to Protect

50. As noted above, the judge also made findings that in the event that he was not a perpetrator, the father had colluded with the mother, had failed to protect A and had failed to maintain an open mind as to the risks the mother posed.

51. In granting permission to appeal on 14 July 2022, I observed that there was in my view, "considerably less strength" in an appeal against these findings. That remains my view and had the appeal been limited to these findings, now having heard the submissions of Mr Goodwin KC on behalf of the local authority, I think it unlikely that I would have favoured allowing the appeal. The matter is however now to be remitted for the issue of perpetration of the injuries to be relitigated. This will inevitably mean that evidence which relates directly to the issue of the state of knowledge and actions of any non-perpetrator will be adduced and considered by the judge. It is inappropriate in those circumstances for this court to tie the hands of the tribunal hearing the case in relation to any aspect of the analysis. I would therefore propose to allow the appeal also in relation to Grounds 6 to 8 and to set aside the judge's findings in relation to the same.

Conclusion

52. The appeal will accordingly be allowed on all grounds and remitted to a different judge for a rehearing only as to perpetration of the head injuries and fractures and the

state of knowledge and actions of any non-perpetrator.

Elisabeth Laing LJ:

53. I have concluded, with regret, that I cannot agree with King LJ's analysis of paragraphs 91 and 92 of the judgment, when they are read in the context of the judgment as a whole. In paragraph 36 of her judgment, King LJ lists the issues which the Judge should have considered, and the order in which he should have considered them. I consider that, in substance, the Judge did follow those steps in the right order.

54. He started by asking himself who could have inflicted the earlier injuries (paragraph 91 lines 1-8). A was in the sole care of her mother at the relevant time on the day A was re-admitted to hospital, but was being cared for by both parents before that, and '…the only individuals who could have inflicted these injuries were the parents'. There was no reliable direct evidence which would enable him to distinguish between them. So he asked, and answered, the first question listed by King LJ, as she accepts.

55. The next passage (in lines 11 to 16 of paragraph 91 and lines 1-7 of paragraph 92) is, in my judgment, an aside, and not part of the core of the Judge's reasons. In that passage he considered, and rejected, the father's argument that it was inherently improbable that the father had inflicted the earlier injuries. The fact that this passage interrupts the three questions which the Judge was required to ask and answer does not, in my judgment, make his approach to those three questions flawed, as, in this passage, he was dealing with an argument which is logically distinct from those three questions.

56. In lines 11-20 of paragraph 92, the question he asked himself was whether he could find, on the evidence, that the mother inflicted the earlier injuries (that is, King LJ's second question; as she acknowledges, no-one suggested that there should be such a finding against the father). He decided that he could not. He did not, in those lines of paragraph 92, refer again to the standard of proof. The context of this passage is his discussion, earlier in paragraph 92, of what is required to make a finding on the balance of probabilities, He observed that it was possible to speculate 'many scenarios in which one parent may be responsible for earlier injuries and the other for the latter [sic]'. To identify the mother as the sole perpetrator 'would be based on no more than speculation and conjecture'. I note that this was not a case in which there was expert evidence about any likely connection, or lack of connection, between infliction of the later, and of the earlier, injuries, which could or should have been factored into this stage of the analysis. The Judge, as he said, could do no more than speculate, because of the lack of any reliable direct evidence. In other words, in substance, what he was saying was that he could not find on the evidence that the mother had inflicted the earlier injuries.

57. In the last few lines of paragraph 92, the Judge concluded that 'there remains a real possibility that either or both of parents were responsible' for the later injuries. So, he asked and answered King LJ's third question. It is true that this is the statement of a conclusion, but, in the light of the evidence which the Judge had considered at length, it is a conclusion which, I consider, was plainly open to him on the evidence.

58. It is important to bear in mind that paragraphs 91 and 92, which were the focus of the argument, are only part of the Judge's careful assessment of the evidence as a whole.

Against that background, I have considered the factors listed by King LJ in paragraph 45 of her judgment. She acknowledges that two of the factors ((i) and (ii)) featured in the reasoning of the Judge, but criticises him for not giving them enough weight.

i) As I have already said, there was no expert evidence in support of factor (i). The Judge, who, I assume, is experienced in this field, rejected, in paragraphs 91 and 92, the father's submission that it was inherently improbable that he was the perpetrator of the later injuries. So he considered this point expressly. He also said that it was possible to speculate about 'scenarios in which one parent may be responsible for earlier injuries and the other for the latter [sic]'.

ii) The premise of paragraph 96 is that one parent was responsible for all the injuries. But, quite apart from that, factor (ii) is not materially different from factor (i).

iii) The Judge's picture of the balance of care was based on the father's evidence of his significant involvement in that care. The weight to be given to that evidence, which the Judge referred to in paragraph 88 of the judgment, was a matter for him.

iv) Factor (iv) is related to factor (iii).

v) Factor (v) is, in substance, similar to factors (i) and (ii).

vi) I do not consider, for what it is worth, that it is inherently improbable that there were two perpetrators. Nor, more importantly, did the Judge (see paragraph (i), above). There was, as far as I am aware, no expert evidence to that effect. The Judge was aware of the protective actions of the father on 3 April (see, eg paragraph 87 of the judgment).

59. I share King LJ's reservations about any appeal against the Judge's findings of a failure to protect and of collusion. Those findings were open to the Judge on the evidence, for the reasons which he gave.

60. For those reasons, I would have dismissed the father's appeal.

Birss LJ:

61. I agree with the judgment of King LJ.