

Case No:

**IN THE FAMILY COURT AT CHESTER
IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF H [a young age]**

BEFORE HER HONOUR JUDGE HESFORD

BETWEEN:

A COUNCIL

Applicant

-and-

MOTHER

1st Respondent

-and-

FATHER

2nd Respondent

-and-

H

(BY HIS CHILDRENS GUARDIAN)

3rd Respondent

-and-

THE INTERVENOR

FACT FINDING JUDGMENT

“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.”

Representation

Ms Ross For A Council
Ms Bate For the Mother
Mr Sanders For the Father
Ms Deans For the Child via his Guardian
The Intervenor appeared in person

Her Honour Judge Hesford:

1 INTRODUCTION

1. This judgment concerns H, a very young boy. The intervenor is mother's new partner.
2. I have not set out all the evidence which I have read and heard but have highlighted particularly relevant matters. Nevertheless all evidence has been considered and taken into account.
3. This judgment is structured as follows:

Section 1: Introduction

Section 2: The proceedings

Section 3: The nature of the hearing and case management

Section 4: The parties positions

Section 5: The local authority evidence, threshold and findings sought

Section 6: The mother's evidence

Section 7: The intervenor's evidence

Section 8: The father's evidence

Section 9: Submissions

Section 10: The legal principles regarding fact finding

Section 11: Additional Analysis

Section 12: Findings and Decision

2 THE PROCEEDINGS

4. The application before the court is the local authority's application for a care order which was issued in 2023.
5. This is a finding of fact hearing with the Court tasked with determining whether H has suffered non-accidental/inflicted injuries and if so, then to determine the perpetrator of the injuries if possible. Depending upon my findings (if any) and the parties' positions thereafter, I will consider the welfare of H at a future hearing.
6. On [a date], a referral was received from H's nursery raising concerns about bruising above his penis, by his testicles, on his right hip and on his left arm,

such bruising noticed when he was having his nappy changed. A child protection medical examination was undertaken the following day. It was not known how the bruising occurred and the medical view was that 'on the balance of probability, these injuries are consistent with Non-Accidental Injury.'

7. H had been in his mother's care during the preceding days; his mother's partner and his two children had also been present. They were unable to account for H's injuries.
8. H was placed in the care of his father, who had not been present during the timeline of when the bruises were thought to have occurred and he has continued to reside with his father at the home of the paternal grandparents. By agreement no interim care order was made at the first hearing as H was safe. All mother's time with H has been fully supervised by either father or his parents. This has included father staying overnight at mother's home with H on two nights per week. The local authority has supported the family via a Child in Need plan.
9. This is a single-issue case, the cause of the physical injuries to H are the only findings sought by the local authority. The family was not known to Children's Services prior to the index event.

3 THE NATURE OF THE HEARING AND CASE MANAGEMENT

10. This case was initially allocated to HHJ Pates but reallocated to HHJ Hesford in his absence. The hearing took place as an attended hearing over 3 days including submissions and judgment.
11. I had the unique opportunity of seeing the mother, father, intervenor and medical expert give evidence (the latter remotely) and to form my own opinions about their evidence and credibility. It was extremely useful to do so.

4 THE PARTIES POSITIONS

12. The Local Authority seek findings against the mother in relation to the injuries.
13. The mother denies causing any of the injuries and submits that they were all accidental in nature. She seeks for H to be rehabilitated. My decision and any findings which I make may impact upon the precise arrangements for this.
14. The intervenor denies causing any of the injuries.

5 THE LOCAL AUTHORITY CASE & FINDINGS SOUGHT

15. The Local Authority sought the following findings:

- 1. Between [dates] H sustained the following injuries:-*

(ii) Injury one – 5cm x 6cm bruise on left upper arm. The bruise is irregular in shape and is a fading bruise. There is a blueish discolouration seen in some part of the bruise. This bruise is on the upper arm and is on an exposed part of the body.

(iii) Injury two - there is a 5cm x 1cm pink coloured linear bruise on the right hand- this is present horizontally along the wrist

(iv) Injury three - 7cm x 3cm bluish bruise on the right side of the hip, it is in the crease of the groin in a protected area.

(v) Injury four - A 4cm x 2cm bruise on the right groin in front of the pubis. This bruising is on the pubic bone area. It is in a protected area of the body. The bruising is significant, irregular in shape and is blueish in colour

(vi) Injury five - A blueish bruise affecting the whole scrotum anteriorly and posteriorly bilaterally with sparing of the penis.

(vii) Injury six-- 2 bruises on the left side of thigh which are very small and round in shape. 2x1cm and 2x5cm approximately

2. The injuries above were caused by blunt force trauma inflicted with a degree of force

3. At the time injury 5 was inflicted, H was in significant discomfort and was showing signs of distress. H would have cried out in distress and that would be noticed

4. The injuries were inflicted by the mother.

5. The child, H, has no underlying health condition causing or rendering him more susceptible to the injuries he sustained.

16. In closing submissions, the local Authority indicated that they no longer sought findings in relation to injuries (ii) and (iv) – the wrist and the thigh injuries. Nevertheless, since this issue was addressed in full in the hearing I will address the evidence.

17. The mother and intervenor have responded to the threshold. The timeline confirms that H was in his mother's care at the time these injuries occurred, also present were the intervenor and his two young children, L and S. All three children had slept in the same bed. Mother and the intervenor stated they were woken by L the following morning, saying that H was upset and could not move; H was apparently found to have his arm trapped under the mattress and they pulled him out. This was given as a possible explanation for the injury to H's upper arm as well as Mother providing an alternative explanation of it possibly resulting from her grabbing H's arm as he jumped from the sofa later that morning. It is further submitted by mother that S was unwell and had a disrupted

night's sleep, possibly kicking out in her sleep and L has since stated that he knelt on H during the night.

18. The Local Authority have filed a detailed forensic chronology of events with information gleaned from the papers in the bundle.
19. There are photographs of most of the injuries in the bundle save for injury 5, but this is described by the previously allocated social worker, who also observed the bruising, as follows, "*When H was examined on the bed for the medical, I observed that the bruising extended between his legs from his scrotum to his bottom. This bruising was dark blue in colour.*". This bruising is also referred to by Dr D within the strategy discussion "*His penis is fine, but his scrotal sack is completely blue all the way round to the back as well*".

The Nursery Evidence

20. This shows that mother informed the nursery that H had a bruise in his nappy area caused from a fall, "*he's been in the wars*"... "*There has been 4 accidents at home at the weekend, H is so clumsy and hurts himself all the time, he bruises easily. H has been beating himself up all over the place*". Mother's explanation for the arm bruise was him being stuck behind the bed and having to force his arm out. In relation to the groin, she stated that her partner's children played rough with H and maybe F kicked him in bed. Then "*H fell off the couch yesterday and he has also hurt his lip*".

The Medical Evidence

Dr NC - Speciality Doctor in Community Paediatrics

21. Dr C performed the initial Safeguarding Child Protection Medical. Mother confirmed that H had no bruises as of [a date]. She heard nothing on the baby monitor of any concern. Her addendum report confirmed that H did not have any bleeding disorder.
22. Dr C was of the opinion that the "*significant injuries affecting different parts of the body*" and "*not consistent with the explanations given*". "*There is no plausible explanation for this pattern and distribution of injuries that could have occurred accidentally. It is very concerning that H has sustained injuries to his pubic area and scrotum as these are protected areas... A child would be in pain and cry out if they sustained such an injury as it would require a degree of force. On the balance of probability, these injuries are consistent with Non-Accidental Injury.*"
23. Further, "*following the Strategy meeting held today, it was discussed that H's mother had proposed a mechanism of action that may have caused the injury to his left arm. Mother has told the police that H was jumping on the sofa and was about to fall off and hit himself on the coffee table, so she grabbed his arm, to*

stop him from falling. Mum did not present this explanation during the Child Protection medical despite showing me a photograph on her mobile phone of the injury on his left arm and being directly asked how that had occurred... The bruising to the left upper arm is extensive... It would require a degree of force to cause such an injury and a grab to the arm would not cause such extensive bruising and tissue damage.”

Dr Cleghorn - Consultant Paediatrician

24. Dr Cleghorn has filed one report and also an addendum. She briefly addressed some general issues concerning bruising dating, patterns and force. In summary, the accounts provided by the mother and intervenor could not be ruled out, nor could the possibility of inflicted injury. The report ruled out any relevant or underlying health condition. Dr Cleghorn confirmed that it is possible to bruise with minimal trauma if there is a clotting disorder. That is not the case here. She offered limited comment on the issue of force other than reference to petechiae.
25. Dr Cleghorn directly addressed the bruising in the context of the mother’s potential explanations:

21.1 Injury 1 – bruising to upper left arm: *“Mother has reported this may be from one of two possibilities – either from pulling the arm out when it was caught under the mattress or from grabbing Hs arm when he fell. It is unlikely that the bruise would be caused by the arm being caught between the mattress and the wall unless there was some forceful impact in addition to this. Bruising would not be expected to be caused by pulling the arm out unless there was forceful grabbing of the arm, more than might be expected to free an arm, or if there was a forceful impact against something while the arm was being pulled out. I think that while this is a possible cause it is less likely.*

The alternative explanation from mother is that she grabbed and swung H round when he fell on the sofa. Again, a forceful grabbing of his upper arm would be a possible cause of the bruising and if the court accepts this explanation then it is an appropriate explanation for the bruising. I cannot exclude an inflicted injury which would involve forceful contact with an object.”

21.2 Injury 2 – bruising to right hand/wrist: *“There was a bruise on the right hand along the wrist line which is a bony area and is described as linear. There are no clinical images of this bruise but it is identified on the body map completed by Dr C as curving below the thumb in the crease of the wrist. Linear bruises are seen more often in inflicted injuries, however from the diagram I have seen, it is possible this could be from an accidental impact of some description during active play. Mother’s description of H’s arm being caught under the mattress and needing to be pulled out could also have caused this bruise if the*

wrist impacted against a firm edge while being pulled out. I cannot, however, exclude an inflicted injury.

21.3 Injuries 3, 4 & 5 - bruising to hip, scrotum and groin area: *The groin and scrotum are unusual areas for bruising whether a child is wearing a nappy or not. This area tends to be a protected area and is not commonly bruised in active play, even when that play includes rough play with siblings or peers.*

There is a report that L said that he had knelt on H's groin in the night while trying to get a drink and that H had cried. I understand that L was 6 at the time. It is not clear to me whether the position of the children in bed was always what was shown in the photograph, ie. H next to the wall and the other children on the outer part of the bed relative to him, in which case it would be difficult to understand why L might need to kneel on H to get a drink. However, if they were in the position where H was between L and his drink, then I would not expect a young child kneeling on H to cause the bruising either to the groin or to the scrotum. I think this is an unlikely cause for the bruising.

There was also a suggestion that there may have been a kick to the scrotum and or groin from one of the other children present. L and S are reported to have been 6 and 4 respectively at the time of the injuries. A kick to the scrotum from one of the children could lead to bruising but I would not then expect it to cause bruising in the groin area. In my opinion, this would require more than one impact, would have been painful and that H would have woken up and been distressed. There is recall that S had a disturbed night with coughing and the children were generally unsettled until about midnight but no description of any distress from H until the following morning. Therefore while it is possible that the bruising was from repeated impacts from one or both of the other children in the night, I cannot exclude the possibility that this was inflicted in some other way at another time.

21.6 Injury 6 - bruising to left thigh: *“Research evidence states that bruising to the thigh is more likely to be inflicted, however from a clinical perspective I have seen isolated bruises on the front or side of thighs (one or two) from active play. It is therefore possible that these bruises are from active play.”*

26. Dr Cleghorn confirmed that a child who was bruised would cry out or be distressed as it would be painful and that this would be noticeable but afterwards, the bruise may not cause distress unless it was tender when touched.

Live evidence:

27. Dr Cleghorn's live evidence was in line with her written evidence and accordingly I will address it only briefly.

28. She reminded the court that H was a mobile [young age]-year-old child and active children will have accidents, sometimes unwitnessed. Bruising in children could be extremely variable. The bruising to the arm (Injury 1) would require either a forceful impact, impact against an edge or a forceful grab. It would not be caused by merely releasing a trapped arm out from beside the bed unless force was used. A forceful gripping/grab and swing of the arm in line with the mother's explanation of catching H before he fell into the coffee table could be an appropriate explanation. In relation to the wrist (Injury 2) she stated that she could not say either way if it was more likely to be accidental or non-accidental, and whilst it was a linear bruise, children can impact things when falling. There were no additional features with the thigh bruising (injury 6) such as petechiae and she was happy that this was more likely to be accidental.
29. The groin and scrotum area injuries were treated together (injuries 3, 4 and 5). There was likely 2 or more impacts as there were separate sites, it was not a single kick for example, unless both feet were used. Kneeling or standing on the scrotum as mentioned by L could be ruled out as a cause. She confirmed that S, aged 4, kicking out at H in the night could easily cause the bruising which had occurred – it was a viable explanation. If not that, then it was a forceful impact with an object. H would have woken and been distressed. The thigh bruises (injury 6) were likely to be accidental in nature, since H was an active mobile child.

6 THE MOTHER'S EVIDENCE

30. The mother has filed 2 statements. In her first statement she deals with her two explanations as to how the first injuries may have occurred. In relation to H's reactions, she states that on the first occasion (pulling out of the bed) H "*did cry but was not hysterical. He did seem a little lethargic but this didn't last long... (he) was not in any distress following this*" and in relation to the second occasion (arm grabbing when H was falling) "*H did tell me it hurt him*". No explanations are provided for the second, third or sixth injuries and accordingly no account of any distress or otherwise. So far as the groin injuries are concerned "*H again did not show any distress from this the next day when I was changing his nappy*". In general, "*H never shown any signs of real distress, only crying for a short time after he had trapped his arm in the bed. I have attached photographs which show H that weekend, playing normally without showing any distress or discomfort.*"

Live Evidence

31. The mother gave evidence in a confident manner and was appropriately emotional. I have borne in mind that English is not her first or natural language (although spoken excellently) and also that there may be cultural differences. Her live evidence was in line with her written evidence and she expanded when

asked to. Since her live evidence was in line with her written evidence, again I will address only the most pertinent points.

32. She remained unaware of the cause of any of the injuries and offered no new explanations. Her upset at being accused of deliberately hurting H was clear. She explained that she was not the type of person to concentrate on details and timelines, weekends blended together. She had not given much thought to the cause of the injuries until the matter became more involved as she had thought they were not significant. H was not showing distress and apart from the upset when extracted from the bed and when she had grabbed his arm, she had seen no undue distress. He was a lively and active [age]-year-old, as challenging as any other toddler. He was always climbing and running, clumsy and getting scrapes and bruises. She was pressed hard on whether she had been frustrated and lashed out in frustration and she denied this. She gave clear explanations and examples for how she coped with a clingy and anxious [age]-year-old child's tantrums and her evidence at no time seemed to be contrived or anything other than honest. Indeed I considered her to be a truthful witness and whilst perhaps an inexperienced new mother, she clearly evidenced age-appropriate coping mechanisms and skills for managing H's behaviour and showed no frustration with the forensic and detailed line of questioning. She was polite and respectful throughout even when accused of deliberately hurting H.
33. She had been aware of S's upset due to illness on the Friday evening but had not heard H wake up and cry out on the baby monitor in the night when she and The intervenor were asleep. She indicated that she may not have heard one brief cry out but thought she would have woken for a longer period of crying. In the morning L woke them, telling them that H was stuck and crying. She did not hear him crying. She did not fully see the intervenor release H as she was standing behind. She had not mentioned grabbing H's arm to stop him falling until the police interview as she had just thought it was a normal weekend and she was not thinking clearly about it at the time and so much had happened after. She had taken photos to send to the father as she could not get hold of him. It is clear from the text messages that photos are often exchanged between them and they have an excellent working relationship. She had not noticed the bruising underneath as she had simply not looked, the shredded nappy was clean. She had just seen the bruising as one and H was not showing any distress.
34. She had not told the police of H's tantrum and crying behaviour over the weekend and it was clear from her evidence that this was due to it being natural, common, "he shifts moods very easily" and she was dealing with it appropriately – in simple terms it was clear that she meant that it was not a problem and not unusual, there was no need to tell the police. I accept this, it is entirely credible. I

also accept her evidence that she and the intervenor had not colluded. I accept her evidence – she was a credible and honest witness.

7 THE INTERVENORS EVIDENCE

35. The intervenor filed one statement. He had helped to get H out from where he was trapped under the mattress. In summary he did not see the majority of the injuries save for the groin bruising when this was pointed out to him by the mother. H did not show any distress. He confirmed that F had told him about being restless in the night and L had said that he may have stood on H in the night.
36. The statement also contains details of a text message sent by the father to mother referencing kicking H “in the dick” as a joke. This message is also referred to in the forensic chronology where father texts mother stating “*Have you tried kicking him in the dick??*” in response to mother’s comments about H’s mood and behaviour. He is supportive of the father.

Live Evidence:

37. The intervenor was an impressive witness. He was calm, thoughtful and showed considerable understanding of the parents and parenting in general. He has 2 children of his own and the “terrible twos” and tantrums was very familiar and normal to him. H’s behaviour was nothing unusual. He was obviously loyal to the mother but also clear that if he had any concerns, he would have acted upon them. He had never seen her hit or kick out at H nor had she made jokey comments about harming him. Again his live evidence reflected his written statement and I will address it only briefly. He had no concerns that mother had injured H deliberately and considered her to be an excellent mother. He was not concerned that mother had not been worried about the bruising as H was fine, his demeanour was the same as usual. They had not colluded. He himself had not looked at or seen H unclothed save for a bath time with bubbles and chaos and when the mother showed him, they each looked after their own children in the main.
38. He would not have woken in the night if H had cried out, he was asleep from midnight, in a deep sleep as he was very tired. When removing H from being stuck in the bed he replied “I’d like to think I was cautious but H was trapped” and they were unaware for how long or how he was trapped. He cried when he saw help coming. H’s nappy had been ripped off to one side and was hanging down diagonally.
39. He had not witnessed the incident when mother caught H to stop him falling into the coffee table.
40. I accept the evidence of the intervenor as being credible.

8 THE FATHER'S EVIDENCE

41. Father filed two statements. He is excluded from any potential pool of perpetrators and his evidence was not directly relevant as to causation of the injuries. He has never seen mother behave in any way as to cause him concern with H, the same applied to the intervenor.

Live Evidence:

42. Father was calm in his evidence and regretted the tone of his text message about “kicking H in the dick”, a phrase which he has historically used as dark humour. He clearly has a good relationship with the mother and as a result of these proceedings he has been able to see the Intervenor’s behaviour frequently too. It remains a supportive blended family unit, indeed originally, he would stay over night at the mother’s property to facilitate further contact until some life changes for himself. He has no doubts as to the mother’s ability to parent H and no cause for concern. He has seen mother frustrated by H but she has dealt with it reasonably and not shouted at him. He too has seen and dealt with H’s tantrums, H can have tantrums on and off all day.

9 SUBMISSIONS

43. I heard submissions and I have carefully considered these when coming to my conclusions and writing this judgment even if I do not specifically address all points made. Very briefly they state the following:

Local Authority: The injuries to the thigh and wrist were not pursued. Mother had minimised H’s tantrums, been frustrated, behaved oddly after the injuries by talking about dinner and provided no clear explanations. In short, I should make the balance of findings as sought.

Mother: Submitted that the Local Authority had failed to satisfy the burden of proof either that the injuries were non-accidental in nature or that they were caused by the mother.

The Guardian invites me not to find that the injuries were non-accidental in nature, the Local Authority had failed to satisfy the burden of proof.

10 THE LEGAL PRINCIPLES REGARDING FACT FINDING

44. The legal framework resolving the schedule of findings sought is now well settled and I will set out a summary here. All has been applied.

45. The core principles are summarised by Baker J (as he then was) in Re JS [2012] EWHC 1370 (Fam) and approved in many cases since.

“36. In determining the issues at this fact finding hearing I apply the following principles. First, the burden of proof lies with the local authority. It is the local authority that brings these proceedings and identifies the findings they invite the court to make. Therefore, the burden of proving the allegations rests with the local authority.

37. Secondly, the standard of proof is the balance of probabilities (Re B [2008] UKHL 35). If the local authority proves on the balance of probabilities that J has sustained non-accidental injuries inflicted by one of his parents, this court will treat that fact as established and all future decisions concerning his future will be based on that finding. Equally, if the local authority fails to prove that J was injured by one of his parents, the court will disregard the allegation completely. As Lord Hoffmann observed in Re B:

"If a legal rule requires the facts to be proved (a 'fact in issue') a judge 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."

38. Third, findings of fact in these cases must be based on evidence. As Munby LJ, as he then was, observed in Re A (A Child) (Fact-finding hearing: Speculation) [2011] EWCA Civ 12: "It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation."

39. Fourthly, when considering cases of suspected child abuse the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. As Dame Elizabeth Butler-Sloss P observed in Re T [2004] EWCA Civ 558, [2004] 2 FLR 838 at 33:

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

40. Fifthly, amongst the evidence received in this case, as is invariably the case in proceedings involving allegations of non-accidental head injury, is expert medical evidence from a variety of specialists. Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. The roles of the court and the expert are distinct. It is the court that is in the position to weigh up expert evidence against the other evidence (see A County Council & K, D, & L [2005] EWHC 144 (Fam); [2005] 1 FLR 851 per Charles J). Thus, there may be cases, if the medical opinion evidence is that there is nothing diagnostic of non-accidental injury, where a judge, having considered all the evidence, reaches the conclusion that is at variance from that reached by the medical experts.

41. Sixth, in assessing the expert evidence I bear in mind that cases involving an allegation of shaking involve a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bringing their own

expertise to bear on the problem. The court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others (see observations of King J in Re S [2009] EWHC 2115bFam).

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

43. Eighth, it is common for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear and distress, and the fact that a witness has lied about some matters does not mean that he or she has lied about everything (see R v Lucas [1981] QB 720).

44. Ninth, as observed by Hedley J in Re R (Care Proceedings: Causation) [2011] EWHC 1715vFam:

"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."

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.

45. Finally, 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. In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injury to be identified both in the public interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judge should not strain to do so (see Re D (Children) [2009] 2 FLR 668, Re SB (Children) [2010] 1 FLR 1161)."

46. In Lancashire County Council v C, M and F (Children; Fact Finding Hearing) [2014] EWFC 3, Jackson J, after citing Baker J above, added this:

“To these matters, I would only add that 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”.

47. In *Re A (Children) (Pool of Perpetrators)* [2022] EWCA Civ 1348, King LJ re-emphasised that judges should apply the simple balance of probability standard when determining whether it is possible to identify a perpetrator from a list of those who could be responsible. In coming to a conclusion each person should be considered individually by reference to all of the evidence. Glosses such as 'straining' to identify a perpetrator should be avoided. 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.”*
48. In *Re A (A Child)* [2020] EWCA Civ 1230, the limitation of oral evidence was once again highlighted and the courts warned to assess all the evidence in a manner suited to the case before it, and not to inappropriately elevate one kind of evidence over another.
49. In *Re H-C (Children)* [2016] EWCA Civ 136 the Court of Appeal reminded judges in family cases of the proper approach to witnesses who tell lies as originally set out in *R v Lucas* [1981] QB 720. There are many reasons for this which do not denote guilt, for example, fear, shame, loyalty, panic and distress. An innocent person may lie to bolster their case. A lie should never be considered as direct proof of guilt. In criminal proceedings, to be capable of amounting to corroboration a lie must be deliberate, relate to a material issue and be motivated by a realisation of guilt and a fear of the truth. The same principle applies here. This point was emphasized again in *Re A, B and C (Children)* [2021] EWCA Civ 451.
50. In *Re L-W (Children)* [2019] EWCA Civ 159 the Court of Appeal overturned a finding of failure to protect, where it had not been shown that on the particular

facts of that case, the mother should have identified a risk to the child. Lady Justice King stated:-

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

51. Such findings were made in respect of a carer are of the utmost importance when it comes to assessments and future welfare considerations. A finding of failing to protect can lead a Court to conclude that the children's best interests will not be served by remaining with, or returning to, the care of that parent, even though that parent may have been wholly exonerated from having caused any physical injuries.
52. Any Court conducting a Finding of Fact Hearing should be alert to the danger of such a serious finding becoming 'a bolt on' to the central issue of perpetration or of falling into the trap of assuming too easily that, if a person was living in the same household as the perpetrator, such a finding is almost inevitable. As Aikens LJ observed in *Re J*, "nearly all parents will be imperfect in some way or another". Many households operate under considerable stress and men go to prison for serious crimes, including crimes of violence, and are allowed to return home by their long-suffering partners upon their release. That does not mean that for that reason alone, that parent has failed to protect her children in allowing her errant partner home, unless, by reason of one of the facts connected with his offending, or some other relevant behaviour on his part, those children are put at risk of suffering significant harm. This professional and realistic approach allowed the Court to focus on what was, in reality, the only live issue, namely; was GL's history of violence sufficient to lead to a finding of failure to protect upon the mother's part?" Similar points were made in *G-L-T (Children)* [2019] EWCA Civ 717.

11 ADDITIONAL ANALYSIS

53. I have considered all the evidence which I have read, watched and heard and it has all been taken into account in performing my analysis.
54. The standard of proof required to identify the perpetrator or perpetrators of H's injuries is the balance of probabilities and if I am able to identify the perpetrator to that requisite standard it is my duty to do so. H has a right to know who injured him and needs to know the truth, if possible.

55. Of course I remind myself that the experts are to guide and assist the court and I should of course consider the whole canvas of evidence.
56. I will address each injury individually in line with the burden and balance of proof, but I have of course considered the whole picture as well.
57. H is a young boy, at the time of the incident was in the phase known as the ".....", he has constant tantrums and is very mobile, developing and exploring his environment. In the words of the intervenor, he is "hulking around". He runs everywhere, has even potentially injured his wrist at the hospital playing. He gets scratches and bruises. He is a typical toddler and the parental stresses are normal, but there is no evidence of any failure to appropriately parent him, in fact the opposite is evidence.
58. The evidence from the parents and intervenor sets out a very supportive and mutually beneficial scenario of childcare arrangements, indeed it is both unusual and impressive to see such a level of co-operation. There is also, from both statements and live evidence a clear sharing of mutual respect. Neither father nor the intervenor believes that the mother had deliberately caused these injuries to H and indeed they are firmly of the opinion that she would not do so. I found their evidence to be entirely credible and there is no evidence before me to suggest otherwise.
59. The medical expert was clear that the mother and / intervenor have offered explanations which could explain the injuries and which were entirely plausible and she was unable to say that they were non-accidental in nature.
60. It is entirely feasible that the mother and the intervenor slept through H crying out in the night even with a baby monitor. Indeed they were asleep in the morning when L woke them to say that H was trapped and had been crying. The intervenor had been "dead to the world".
61. The fact that mother has offered alternative and later explanations to the police and not mentioned other things is not in itself suspicious. She is not, as she said, a detail person and to them it was a normal weekend with nothing significant until the call from the nursery. Parents often spend time searching their minds for events which could have caused injuries in these cases, it is not uncommon to remember something later. I do not consider that she was covering up or being dishonest.
62. Also of relevance in my judgment are the facts that the mother offered to take H to stay with his father on the Sunday night and took him to the nursery on Monday. Many parents who had injured their child would be more likely to hide away and prevent others seeing the effects. That did not happen here – the mother was open with the father and nursery and did not seek to hide any

injuries. This also supports her proposition that she did not think they were serious in any event.

63. For me to be satisfied that the mother has caused these injuries to H deliberately in line with the case of the Local Authority I need to find that she has lost control and deliberately assaulted H in some manner on at least 3 occasions (two to groin and one to arm) by lashing out in frustration or some other manner. There is no evidence whatsoever to suggest that she would behave in such a manner, indeed all the evidence I have seen and heard points to the exact opposite – she is a calm, patient and loving mother who would not harm her child. Her demeanour in the witness box was entirely appropriate.
64. In addition to the evidence of the father and the intervenor, there is additional evidence of the excellent relationship between H and his mother. The evidence from the nursery in the Health Visitor's report is that "*H was well presented and there was a close and loving bond between H and Mum Mother*". The nursery themselves have never had concerns previously. Additionally, when considering propensity there has never been any police involvement with the family at all and nor was there any prior involvement with [a different] Local Authority regarding the intervenor and his children. Indeed the Local Authority's own evidence in their SWET of November 2023 and in the Parenting Assessment reveals entirely positive relationships and a clear bond between mother and H.
65. In short, the submissions by the Local Authority that mother has deliberately harmed H, with frustration or otherwise are completely untenable and are rejected. There is no evidence that mother has any propensity to such violence.
66. It is not my role to decide and set out precisely in what manner these injuries occurred, it is my role to assess the evidence and decide whether I am satisfied that the Local Authority have satisfied the standard and burden of proof that these injuries were caused deliberately by the mother and that they were inflicted injuries (schedule of findings number 4).
67. (ii) Injury one – 5cm x 6cm bruise on left upper arm. The bruise is irregular in shape and is a fading bruise. There is a blueish discolouration seen in some part of the bruise. This bruise is on the upper arm and is on an exposed part of the body.

The opinion and medical evidence from Dr Cleghorn was, in conclusion, that the injury to the upper arm would not have been caused by H being stuck in the bed or by merely pulling H's arm out from where it was said to be trapped at the side of the bed. To cause the bruise there would also have needed to be a forceful grab or gripping of the arm or contact with a hard surface. Mother's evidence was that she had not removed the arm herself, but that it was done by the intervenor and she did not fully see what he did as she was behind him. From the

intervenor's evidence it was clear was that he was very concerned at the position in which he found H in the bed, trapped, on the edge of tears and in pain and he freed him as soon as possible. He was unable to remember how he had achieved this and had mentioned "hindsight" when asked if he had been cautious not to rip H out and answered (approximately) that "I would like to think I was cautious but he was trapped" and added that they didn't know how long he had been trapped. I interpret this as it being possible therefore that he was rougher than he recalled or would have usually been in view of the circumstances. If additional force was used than this would concur with Dr Cleghorn's potential explanation of a forceful grab or grip when extracting him being a feasible explanation for the arm bruises.

Dr Cleghorn was also of the opinion that a forceful grab or gripping of the arm as described by the mother when she stopped H from falling into the coffee table could have caused the bruising and she considers this to be an appropriate explanation.

I have already set out my impressions of the live evidence and my assessment of the parents and the intervenor's credibility. I have 2 incidents described, either or both of which could have caused the bruising according to the expert evidence. I have no evidence of any deliberate harm being caused to H from a kick or other force.

The evidence of the Local Authority does not satisfy the burden and balance of proof, there is no evidence that this injury was inflicted by mother or any other party and accordingly I find that this was not an inflicted injury but was on the balance of probabilities an accidental injury.

68. (iii) Injury two - there is a 5cm x 1cm pink coloured linear bruise on the right hand- this is present horizontally along the wrist

Not pursued, but no finding of non-accidental harm would have been made if it had been pursued based on the evidence

69. (iv) Injury three - 7cm x 3cm bluish bruise on the right side of the hip, it is in the crease of the groin in a protected area

See for injury 3 – injuries 3, 4 and 5 have been considered together

70. (v) Injury four - A 4cm x 2cm bruise on the right groin in front of the pubis. This bruising is on the pubic bone area. It is in a protected area of the body. The bruising is significant, irregular in shape and is blueish in colour

This was not non-accidental in nature and was not deliberately inflicted by the mother or any other party and was likely caused accidentally by S in her sleep due to her restlessness and illness in accordance with the clear evidence of Dr

Cleghorn, the mother and intervenor. There is no other tenable explanation provided. It is not accepted that the mother has deliberately caused these bruises.

71. (vi) Injury five - A blueish bruise affecting the whole scrotum anteriorly and posteriorly bilaterally with sparing of the penis.

As for injury 4

72. (vii) Injury six-- 2 bruises on the left side of thigh which are very small and round in shape. 2x1cm and 2x5cm approximately

Not pursued Not pursued, but no finding of non-accidental harm would have been made if it had been pursued based on the evidence. Accepted as accidental by Dr Cleghorn

12 FINDINGS AND DECISION

73. I make no findings of either non-accidental harm or against the mother or Intervenor, having applied the civil burden and standard of proof and considered the entirety of the evidence. The Local Authority have not discharged the burden placed upon them.

HHJ Hesford

Date 21 June 2024