Case No: PL16C00786

IN THE FAMILY COURT AT EXETER

NEUTRAL CITATION NUMBER: [2019] EWFC 60

Southernhay Gardens
Exeter
Devon EX1 1UH

Friday, 14 June 2019

BEFORE:

LORD JUSTICE BAKER

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF Q (A CHILD) (FACT-FINDING REHEARING)

BETWEEN: **PLYMOUTH CITY COUNCIL**

Applicant

- and -

ELIZABETH WILKINS (1)
ERIK VANSELOW (2)
Q (represented by the Children's Guardian) (3)

Respondent

CLAIRE WILLS-GOLDINGHAM QC and MARIE LESLIE appeared on behalf of the Local Authority
PAUL STOREY QC and **CAROLINE ELFORD** appeared on behalf of the Mother
NKUMBE EKANEY QC and **JONATHAN WILKINSON** appeared on behalf of the Father
CARLA FLEXMAN appeared on behalf of the child, instructed by the Children's Guardian

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JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The judge has given permission for the names of the child's parents to be published on condition that the child's name is not published, nor any information which is likely to disclose his present address. 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.

LORD JUSTICE BAKER:

1. This judgment is delivered at the conclusion of a hearing at which the father, Erik Vanselow, has asked the court to vary findings made by me in an earlier judgment in court proceedings under Part 4 of the Children Act 1989 concerning his son (hereafter referred to as "Q"), now rising three. In that judgment I found that Q had sustained a number of serious physical injuries, that one of those injuries relating to Q's eyes had been inflicted by his mother, Elizabeth Wilkins, that another series of injuries to his head had been inflicted by his father, and that in respect of some of the injuries I was unable to identify whether the mother or the father was the perpetrator.

2. Following my judgment, Ms Wilkins and Mr Vanselow stood trial at the Crown Court on offences relating to the injuries to Q. At the conclusion of that trial, the mother was convicted of a number of offences, including an offence under Section 18 of the Offences Against the Person Act 1861 of inflicting grievous bodily harm with intent relating to the head injuries which I had found had been inflicted by the father. The father was acquitted of all charges, including the charge relating to the head injury, that acquittal having been at the judge's direction after the prosecution had elected to withdraw the charge against him. The mother received a sentence totalling seven years' imprisonment.

3. The welfare stage of the Children Act proceedings remained outstanding pending the outcome of the criminal trial and indeed this court has yet to make a final decision as to Q's future, the issue now being whether he should remain with his current foster carers under a special guardianship order or be placed with his paternal grandmother and her husband who currently reside in Africa.

4. After the criminal trial, the father filed an application for a review of my findings of fact pursuant to the decision in *Re ZZ and Others* [2014] EWFC 9. That application was listed before Sir Andrew McFarlane, President of the Family Division, who on 27 March 2019 granted the application and directed that the ambit of the review and the review hearing itself be determined by me at a hearing listed between 3 to 14 June 2019. That hearing has duly taken place over the last fortnight, although, as I will describe, not in the way anticipated. This judgment is being delivered at the conclusion of that hearing.

Background

5. The background to the case is set out at length in my earlier judgment. I do not intend to set it out in quite the same detail here, although all the details of the case are within my mind at all times. In short, the background is as follows. The parents met at university and started living together in June 2014. The mother gave birth to Q by Caesarean section. From the outset there were difficulties. Both parents suffered from levels of depression for which they sought professional help. Their relationship came under pressure and there were frequent arguments and tensions. There were disagreements between them as to the care of the baby. Much of the care was undertaken by the father, in particular at night. In addition, the parents enlisted the help of friends to look after Q. A health visitor was allocated to the family and visited on a number of occasions, the first being on 13 July 2016. On that occasion, both parents were present. The mother told the health visitor about her history of depression and anxiety. The health visitor noted and recorded emotional warmth and gentle handling of the baby by the father who had Q on this chest throughout the visit. It was agreed that the family would receive an enhanced visiting service. The mother was allocated a course of counselling with the university counsellor which started at the beginning of August that year. In further health visitor visits, the father reported that he was doing most of the night time feeds and providing emotional support for the mother.

6. On the weekend of 5/6 August, the mother looked after Q by herself overnight. She sent text messages to the father indicating that she was feeling stressed and frustrated by difficulties in caring for the baby. The following day, 7 August, the father took Q

out for several hours to the park. During this trip, according to the father, Q cried in a way described as being "a little out of the ordinary" and continued crying relentlessly on the drive home. The father at that stage noted that there was blood on the baby's bib. The mother's account is that she remembers the father telling her via a text message that Q was "being a total nightmare and how he hated him." He also told her about the blood on the bib. When the father returned home, he telephoned 111, and, as a result, paramedics visited and advised that Q should be taken to hospital.

7. Thus in the early hours of the following morning the father took Q to hospital. The history given was that the baby had been crying all day and blood had been seen in his mouth. It was said he had been unwell for the past few days and had been difficult to settle and to feed and had vomited with blood stains. He was admitted to hospital and a lumbar puncture initially suggested he was suffering from sepsis. He was therefore started on intravenous fluids and antibiotics. The father stayed overnight and was present for the ward round the following morning. Further tests revealed no concerns and the doctors eventually concluded that the baby was suffering from a urinary tract infection. Q was eventually discharged home on 10 August.

8. On 15 August, the mother took Q to the GP where he was diagnosed as having thrush in his mouth. On 17 August, the health visitor carried out a six-week check. She assessed the mother using the Edinburgh Depression Scale as being mild to moderately depressed. The father spoke of tension because of the differences in the level of care provided by the two of them. The health visitor reported that the father was still sleeping downstairs on the sofa with Q nearby in his cot because the mother was not getting up at night to attend to the baby.

9. Meanwhile, the mother was continuing to attend counselling. At one session, she informed the counsellor that the father had suggested that Q should spend the first year of his life with his family in Africa. The counselling note suggested that the mother described the father as "emotionless" when proposing this and saying that she was deeply concerned about the prospect. This led the counsellor to record in her notes that she had "concern for the wellbeing of this baby." At the next counselling session, however, the mother seemed much more positive and reported the tensions had settled. She spoke more about her own upbringing and how she had been abused by her own

mother, and said that, as a result of that abuse she had had more broken bones in her body than anyone else in the county.

10. On 1 September, Q received his first set of immunisations from the practice nurse. The mother reported that she and the father had had a row about this because the father did not believe in immunisation. The mother alleged that the argument continued after she returned from the surgery, and that in the course of the argument the father had said that he hated her and Q, adding, "If I stay here, I will kill myself, you and Q." The mother alleged the father then left the property with some of his belongings. The father denied uttering the threat, but accepted that he had left after an argument. Later that morning the mother went to another counselling session, bringing Q with her on this occasion. The counsellor recorded that the mother was very distressed and told her that the father had said he was leaving her and had got up and left. The counsellor subsequently told the police that on this occasion she noticed that Q had scratches on his face. She asked the mother to see the health visitor about them and, because of her concerns about the mother's wellbeing, asked the duty counsellor to call the mother later to make sure that she had spoken to the health visitor as advised

11. That afternoon, the mother sent text messages to a friend reporting that the father had left, that the counsellor had said that she should not be alone and that the father had threatened to kill himself, her or Q. The mother sent other texts that afternoon suggesting that Q was having an adverse reaction to his immunisation. On that evening, she sent texts to her own mother in which she said that she did not think that Q would be so bad after his vaccinations, adding that she did not think she could cope if he was always like this. Later that evening, she texted her mother again saying: "His eyes are like bloodshot all over, the white is just red now from how hard he has been crying all day." She suggested that she would not go through with further vaccinations and when her mother urged her not to take that course, she replied, "I won't, but I'll make E (the father) be alone with him next time so he knows how bad it is. Ha ha."

12. The father, meanwhile, was working as a DJ that evening and stayed away from home. Early the following morning, 2 September, just before 6 am, the mother sent him a text

threatening to put Q into care and complaining about his leaving her when Q,in her words, "had been severely ill and relentless for 48 hours from his jabs." She then threatened to kill herself adding that she had nothing to lose anyway. The texts exchanged with the father continued and later that morning she sent a text saying, "Also I think Q has issues", followed by a text with three photographs of Q's face apparently taken around the same time, that is to say, shortly after 9 am on 2 September. Those photographs showed a faint linear scratch mark above the left eyebrow, two marks to the left of his left eye and subconjunctival haemorrhages in the corners of both eyes. The argument continued by text over the next hour or so. Later that morning the father returned home.

13. At the first hearing before me, it was the mother's case that a day or so later she saw the father shake the baby. She also told a friend by text that, "I swear I saw E shake him but feel so unstable and exhausted I'm not 100 per cent." Later that evening she sent a further text to the friend stating that the father realised that he might have shaken the baby and had taken the baby to hospital. At the first hearing before me, the father denied ever shaking the baby, stating that he and the mother noticed some redness in the baby's eyes and that he had therefore taken him to hospital. It was his case that the hospital told him that there were several possibilities for the red eyes and that there was no evidence of shaking. Evidence from the examining doctor confirmed that the hospital had concluded that there were no concerns about his eyes and had reassured the father. Whilst at the hospital, however, the father sent a text message to the mother in which he said that he had "explained everything to them regarding him and how I probably shook him, however they've done some minor checks with him and said he seems okay and no real issues for concern as yet." A few minutes later in response to a question from the mother, "What did they say about his eyes?" the father texted: "I mentioned my shaking but they said I'd had to aggressively shake him for it to be that, so far saying something he's allergic to".

14. The issue of shaking rose again a few days later when the couple took Q to the GP. The mother prompted the father to mention the issue when discussing Q's red eyes. The father's evidence was that he did raise it at the mother's prompting but was reassured by the GP that the rocking motion he had demonstrated could not have caused any injuries. The GP records refer to "small bilateral subconjunctival

haemorrhages" as part of the history given by the parents but makes no reference to the alleged shaking.

15. On 9 September, the father telephoned another GP. According to the medical records, he had told him that he had a new child and thought he was suffering "postnatal depression and a mixture of anxiety and anger". The notes recall that he had stated that he had thoughts of harming Q when he had a "high-pitched cry which was a trigger" but added that he "would not act as recognises this is not a logical approach to a time limited situation". He also reported that he had had thoughts of self-harm and suicide one to two weeks earlier, but had not acted on this because he knows it is "not a rational solution" and that his partner was already taking antidepressants and that "he would like to stay strong for her". He described feeling "helpless" and "has tried removing himself from the environment but it is not possible to escape." He said that he was not sleeping and his appetite was reduced.

16. In the medical notes, the doctor recorded her examination which was of course being carried out by telephone, but she noted there was nothing abnormal in the father's speech which she described as: "rational, logical, clear, comprehensive and with good insight". Her recorded diagnosis, however, was that he was suffering from "major postnatal depressive disorder". She agreed to refer him to psychological services and prescribed an antidepressant. In her subsequent statement to the police after Q was found to have sustained the injury described below, the GP said that in that consultation it felt like the father was taking a proactive approach to his symptoms and that he seemed very open and honest. As a result, she did not feel it necessary to put in any safeguarding for the baby. She did not feel the child was at risk. The father's evidence at the earlier hearing before me was that, while he was on the phone to the GP, the mother was listening in on the loud speaker and prompting him to mention suicide or self-harm as it could lead him to get the best help more quickly.

17. On the same day the health visitor paid a further visit. Both parents were present. There was no physical examination of the baby on this occasion. The father told the health visitor that he was feeling low. He said that he had contacted the GP as he thought he had postnatal depression. The health visitor's evidence about that was that the parents were "low and struggling".

18. The mother's evidence at the first hearing before me was that around this time an incident occurred in which the father threw Q onto a sofa. She also alleged that the father had abused the baby in other ways, describing how he had covered his face with blankets when he was crying, and that on one occasion he put the baby in a baby carrier and hung it from a door handle. The father denied ever behaving in that way.

19. The events of 22 September 2016 have been the subject of intense scrutiny in both the family and criminal proceedings and take up a significant proportion of the written evidence now available in various statements and the transcripts of all evidence given in both proceedings. In outline, what happened, or is said to have happened, can be summarised as follows. The couple fed Q at 1.30 am and then put him to sleep in a Moses basket. At 4 am, he woke and the father got up to give him a feed. In doing so, according to the father, he accidentally dropped Q onto the kitchen work surface. The father has given conflicting accounts of Q's condition after this alleged incident which I shall consider below. What is clear, however, is that he was unable to get Q to take much feed at this point and that Q remained unsettled. At some point around 6 am the mother got up to attend to Q, although there is again a conflict between the parents about the circumstances in which she got up. There is also a dispute as to whether the father told the mother at this stage about the "fall". He says he did, but the mother's case is that he did not tell her until much later that morning. The mother then went back to bed and did not get up until mid-morning. Soon after she got up, the father left the flat for an hour and a half. Shortly before he returned, the mother, having established in text messages that the father was about to return, left the flat to go to another counselling session, leaving Q in the flat in his bouncer and passing the father in the car park. It is the mother's case that it was during an exchange of texts while she was on the way to the session that the father first told her about the incident at 4 am. The counsellor noted that the mother seemed far more settled in this counselling session and that she reported that "the father had banged Q's head on the cupboard this morning by mistake. It was just a gentle bang but Q had cried".

20. It is the father's case to me now that after returning from the university he noted that Q was looking unwell and was paler in the face. He also noted that the redness on his head had extended over the whole of his forehead and that his head was quite swollen, soft to touch, with fluid underneath. At 13:40, the father carried out various searches on

the internet on his computer, including for "high pitched screaming like in pain" and "baby's head, random soft bits on head swelling". At 14:12, the father telephoned the surgery and asked to speak to the GP. According to the medical records, he mentioned a rash which would not disappear and raised the possibility of meningitis but did not mention either a bump or an accident. The GP called back. The father again did not mention any incident, but according to the GP described the baby as "having a rash which he said had been there for two or three days, had been sweating on his head and his behaviour had been abnormal". The GP's evidence was that he did not get any sense of urgency from the father. He advised the father to bring the baby to the surgery.

21. At this point, two friends of the parents sent a text saying they were on the way to see the baby. Shortly afterwards the mother arrived home and then the friends also arrived and stayed for a short while. In their police statements the friends reported noticing swelling on the right side of the baby's head. According to one of them, the father mentioned having bumped Q's head the night before to which the mother replied, "Oh, did you? I didn't know that". The parents then left to take Q to the surgery.

22. On examining Q at the surgery, the GP was extremely concerned about extensive signs of damage to Q's head which included a boggy swelling extending over the whole of Q's forehead and right temple up to the anterior fontanelle and a bruise measuring 2 to 3 centimetres behind the right ear. He therefore called 999 for an immediate ambulance response. Up to this point, the parents had offered no explanation for the bruising so the GP asked if he could have injured himself. It was at this point that the father said for the first time that he could have hit his head as he was reaching to get a bottle while preparing the feed during the night. The GP asked whether he meant that he had hit his head on the kitchen counter and the father confirmed that this might have happened. The GP did not think that this provided an explanation for the degree of injuries visible on the baby.

23. On arrival at the hospital, the baby was examined by Consultant Paediatrician, Dr A, who took the history from the parents. Radiological examination revealed extensive injuries including rib fractures of two ages, a skull fracture, a subdural haematoma and a collection of blood exerting pressure over the underlying brain with associated

swelling. Police and social services were informed and a full investigation instigated. The police investigation included gathering a large number of statements and interviews including of the father on 22 September, of the mother on 24 September and of both parents on 8 November 2016, although on the latter occasion both parents entered no comment responses. Subsequent examination of the father's computer found that in the early hours of 23 September he had conducted a Google search of flights out of a nearby airport and the live departure board.

24. On 27 September, the local authority filed an application under Section 31 of the Children Act in respect of Q. Those proceedings were allocated to me and listed for a first case management hearing on 20 October 2016 in which I made an interim care order together with various directions. On discharge from the hospital, Q was placed in the care of local authority foster parents with whom he remains. A series of case management hearings took place. Meanwhile, the parents were charged with a series of criminal injuries, offences relating to Q's injuries to which I return below.

25. The fact-finding hearing started before me on 20 March 2017. By that stage the parents' relationship had come to an end. The local authority's case at the outset was that Q's injuries had been sustained as a result of assaults inflicted intentionally or recklessly by either the mother or the father. The mother and the father each denied that he or she inflicted the injuries, denied any knowledge of how the injuries occurred and declared that he or she respectively sought to explore the possibility of whether the other parent was responsible. The local authority further asserted that the mother and/or the father failed to seek appropriate medical assistance upon becoming aware of the head injuries on 22 September. The mother denied this allegation and stated that she was unaware that the injury had taken place. On behalf of the father it was contended that, as soon as he became aware of the seriousness of Q's condition, he sought immediate medical assistance. The local authority further asserted that the mother and/or the father failed to take all reasonable steps to protect Q from the injuries. This allegation was denied by the father. The mother however accepted that she had failed to protect Q in that she had observed the father shake and throw him on the sofa, accepted that this was unacceptable behaviour and that she should have done something about it and expressed regret at not having done so.

26. The hearing was delayed for a number of reasons explained in my earlier judgment and it was not concluded until September 2017, at which point I reserved judgment. A number of witnesses gave evidence at various hearings before me in the course of that year, including of course the parents and a number of expert witnesses including, importantly, Mr Peter Richards, Consultant Paediatric Neurosurgeon. By the end of the hearing the position of the parties, excluding the guardian who adopted the neutral position, was as follows. The local authority case was that the injuries were all inflicted, that the court was not in a position to determine which of the parents was responsible for the rib injuries, that the mother was responsible for the bilateral subconjunctival haemorrhages inflicted between 2 and 5 September 2016, that the father was responsible for the head injuries inflicted on or before 22 September 2016, that the parents failed to seek appropriate medical assistance on becoming aware of the head injury and that both failed to take steps to prevent the injuries sustained by Q in their care. The mother's case was that all the injuries had been inflicted by the father, but, as previously stated, she accepted that she had failed to protect Q having seen him shake and throw the baby on earlier occasions. The father's case, as advanced by his counsel, was that he had no alternative explanation for the head injuries other than the incident when he had dropped Q on the work surface at 4 am on 22 September, that he did not advance a positive case that there had been another incident involving the mother capable of explaining the injuries, but he had no knowledge of how the rib fractures had been sustained and that the subconjunctival haemorrhages had been inflicted by the mother "in a situation in which she was highly stressed, profoundly distressed, anxious and alone with a baby".

27. On 25 October 2017, I handed down my judgment. I shall describe in greater detail later in this judgment the reasons for some of my conclusions, but in summary those conclusions were as follows:

(1) on a balance of probabilities, Q sustained the head injuries whilst in the care of the father around 4 am on 22 September;

(2) the head injuries cannot have been sustained in the incident as described by the father but instead were inflicted non-accidentally by the father;

(3) the father did not tell the mother about the alleged incident until some hours later;

(4) the mother did not observe during the morning that Q was unwell because she did not pay sufficient attention to him;

(5) each parent in different ways bore a shared responsibility for the delay in seeking medical attention for Q's head injuries;

(6) that delay which I described as catastrophic had contributed to the significant long-term damage which Q will suffer as a result of his injuries;

(7) the subconjunctival haemorrhages were sustained between the immunisations administered on 1 September and the time on 2 September when the mother sent photographs to the father and on a balance of probabilities were inflicted by the mother;

(8) the mother did not see the father shake the baby as alleged, but instead tried to persuade him that the subconjunctival haemorrhages were attributable to his shaking the baby and to tell the doctors about the shaking in an effort to divert attention from the fact that they had been inflicted by her;

(9) the mother's account of seeing the father throwing the baby on the sofa was fabricated with the aim of incriminating him as the perpetrator of the rib fractures;

(10) there was insufficient evidence for the court to reach any conclusion as to when the rib fractures occurred or as to whether they were inflicted by the mother or the father.

28. No party sought to appeal against any of my findings.

29. Initially it was anticipated that the criminal trial would take place shortly after my judgment was delivered. I therefore agreed to postpone a final decision about Q's

future care until after the trial, but gave directions for the carrying out of various assessments. In the event, the criminal trial was postponed on two further occasions. The welfare hearing started in the spring of 2018 at which the local authority proposed that Q be placed with his paternal uncle and aunt under a special guardianship order. For reasons which it is unnecessary to set out in this judgment, that hearing was adjourned without a final order and shortly afterwards the uncle and aunt withdrew their offer to care for Q. The welfare issue was then adjourned again until after the criminal trial and the local authority embarked on further assessments. Meanwhile, Q remained with his foster carers.

30. The criminal trial took place in September 2018 before His Honour Judge Johnson, the Recorder of Exeter. The indictment contained the following counts

- Count 1 against the mother: assault occasioning actual bodily harm (relating to the eye injuries);

- Count 2 against the father: causing grievous bodily harm with intent relating to the head injuries;

- Count 3 against the father: inflicting grievous bodily harm (alternative count relating to the head injuries);

- Count 4 against the mother: causing grievous bodily harm with intent relating to the head injuries;

- Count 5 against the mother: inflicting grievous bodily harm, alternative count in relation to the head injuries;

- Count 6 against both parents: causing or allowing a child to suffer serious physical harm, either causing Q to suffer serious physical harm or in the circumstances where they were, or ought to have been, aware that Q was at significant risk of serious physical harm, failing to take reasonable steps to protect him from that risk.

31. A larger number of oral witnesses gave evidence at the criminal trial than had attended the family hearing. The witnesses again included both parents and Mr Richards. At the conclusion of the evidence, however, the prosecution, for reasons to which I will return below, decided to withdraw counts 2 and 3 and the father was accordingly acquitted of those counts on the judge's direction. At the conclusion of the trial the mother was convicted by the jury on counts 1 and 4 and sentenced to seven years' imprisonment on Count 4 and 18 months concurrent on Count 1. The father was acquitted by the jury on Count 6.

32. I have been informed on several occasions by counsel appearing for the mother in the subsequent hearings before me that it is her intention to appeal against that conviction. To date, however no notice of appeal has been filed.

33. As stated above, on 6 December 2018, the father filed an application for a review/reopening of the findings of fact made in these proceedings. The details of his application were expressed in these terms:

> "The father seeks to review/reopen the findings of fact pursuant to *Re: ZZ and Others* [2014] EWFC 9. Findings were made against the father to the effect that he had deliberately inflicted serious head injuries that Q sustained, was with the mother in the pool of perpetrators in respect of the rib injuries, and with the mother responsible for the catastrophic delay in seeking medical advice for Q. In subsequent criminal proceedings based on the same facts and applying the higher criminal standard of proof, the father was acquitted by the jury on all charges against him. The mother was found guilty of having inflicted all the injuries Q sustained and of causing or allowing him to suffer physical harm. The father seeks the adverse findings against him to be set aside in view of the mother's conviction on the grounds that they are unsafe."

34. At a case management hearing on 11 December 2018, I made an order that the father's application be listed before the President of the Family Division to determine whether there should be a rehearing on the finding of fact hearing and any application relating to the interim care of, and contact with, Q. I gave extended directions for the hearing including orders for the transcribing of evidence from both proceedings. I provisionally listed a substantive hearing on dates in June 2019. The President duly conducted a further case management hearing on 1 March 2019 and then a substantive hearing on 27 March. The order made at the conclusion of the latter hearing included a recital:

> "Upon the court determining the first stage of the father's application in accordance with the criteria in *Re ZZ*, and upon the court considering that the matter should be reviewed by the original trial judge (Baker LJ)…" and under paragraph 2 of the order, that: "the father's application for review of the findings of fact made on 25 October 2017 is granted. The ambit of such review and the review hearing shall be determined by Baker LJ at the hearing currently listed from 3 to 14 June 2019".

The President gave further case management directions to facilitate the review hearing. In addition, he made orders relating to the final welfare decision concerning Q's future. By that stage, as indicated above, the options for Q's future had crystallised into two - either a special guardianship order in favour of his current foster carers or an order placing him in the care of his paternal grandmother and partner in Africa. The President joined the foster carers as respondents to the proceedings and directed the disclosure of court documents to the grandparents. Meanwhile, the father was continuing to have supervised access with Q. The mother, however, was unable to have contact due to difficulties arising out of her imprisonment.

35. At a further case management hearing on 30 April 2019, I decided after hearing submissions that the scope of the review hearing would be (a) to reconsider the evidence concerning the events of 22 September 2016 between 1 am and the time the child was presented at the GP later that day; and (b) to consider further submissions as to the cause and perpetrator of the rib fractures. It was agreed by the parties and the

court that the only live evidence to be given at the review hearing would be from the mother, father and Mr Peter Richards, the Consultant Paediatric Neurosurgeon. At the hearing the mother indicated through counsel that she did not wish to attend the rehearing in person but sought to appear via a video link. As recited in the order, I observed that it would be in the interests of justice for her to attend the hearing in person in order to give oral evidence, to hear and observe the other oral evidence, and to give instructions to her legal representatives. I gave final directions for the hearing.

36. The hearing and review application was listed for 10 days. The mother did not attend the hearing and I eventually agreed after further argument that she could give evidence via video link from prison. The first two days were allocated for reading, given the very extensive documentation which the court was required to read ahead of the hearing, including transcripts of the oral evidence and submissions from the earlier family and criminal proceedings which together exceeded 2,000 pages. The third day had been allocated for the oral evidence of Mr Richards, but in the event the parties decided that he was not required to attend thereby freeing that day for further pre-reading. On the fourth day, the father started his evidence, gave answers in chief to his counsel, Mr Ekaney QC, and was then cross-examined by Ms Wills-Goldingham QC for the local authority. Shortly after, Mr Storey QC on behalf of the mother began his cross-examination, however, the father abruptly left court and refused to return. I adjourned until the following morning, Friday, when I was told by his counsel that his solicitor had received an email in the early hours indicating that the father did not wish to continue his evidence and other comments which led his representatives to be concerned about his welfare. At their request I adjourned the case until the following Monday afternoon to allow them an opportunity to speak to the father.

37. The father attended contact with Q over the weekend. The contact note subsequently produced by the local authority recorded that the father presented as "happy and his usual loving self". The father did not however contact his solicitors and did not attend court when the hearing resumed on the Monday afternoon. After further unsuccessful attempts were made to speak to him, I agreed to adjourn again to allow his representatives one final opportunity to obtain the father's instructions. On the Tuesday morning, Mr Ekaney told me that his solicitors had received an email from the father sent at 3.30 am that morning indicating what Mr Ekaney described as "a level of

distress". The father stated that he did not feel he could do himself justice and that he required time to recover from what had happened over the last three years. He expressed concern about what he described as the aggressive nature of the questioning and, whilst apologising to the court, said he hoped that he would not be forced to attend given his current state. He expressed the view that his application should be "temporarily dismissed". After further discussion with counsel, I agreed to allow his representatives time to seek further clarification.

38. At this point his junior counsel, Mr Wilkinson, was finally able to speak to the father, the first occasion on which any of his representatives had been able to speak to him since he left court the previous Thursday afternoon. When the hearing resumed, I was told that the father was worried that continuing the hearing would be reliving the trauma that he had experienced during the earlier proceedings, that he did not intend to attend the hearing but that he did not wish it to continue in his absence. On that basis, Mr Ekaney applied for an adjournment of the father's application. He was unable to give a precise estimate of the length of the adjournment, but cautiously proposed a period of three months. The application was opposed by the other parties.

39. I refused the father's application for an adjournment. My reasons for doing so were, in summary, as follows. These proceedings have been continuing for nearly three years and it is essential for Q that they be concluded as possible. There was no evidence upon which this court could properly grant an adjournment. There was no medical evidence to support the suggestion that father was not able to attend court. The manner in which he had abruptly walked out of court during cross-examination and then refused to return, whilst at the same time attending contact without any problem, did not give the court any confidence that he had any legitimate reason for being absent.

The question then arose as to how the court should proceed, in particular whether the mother should be required to give further oral evidence as had been originally intended. Mr Ekaney on behalf of the father proposed that she should, but those representing the mother and the local authority opposed this course. I concluded that it would not be right to require the mother to give evidence. I accepted the submissions put forward by the mother and local authority that to do so would be unfair in all the circumstances, given that the father would not be giving his evidence. The reasons why I had initially

agreed that the parents should give further oral evidence at this hearing was that, in the light of the evidence given at the criminal proceedings, they could both be asked further questions falling within the scope of this review hearing as previously agreed and set out above, namely the events of 22 September 2016 and the perpetrator of Q's rib fractures. Given that I would not be hearing the father cross-examined on those matters, I concluded that it would be inherently unfair to require the mother to be cross-examined and would also risk distorting the forensic process. Furthermore, given the very considerable evidence from both already available to the court from the various proceedings, I accepted the submission that the forensic value of any further evidence would be limited, particularly given the length of the time that had passed since the events in question. Accordingly, the hearing continued on the basis of submissions only.

The Law Governing Review Hearings

40. It is well established that a family court considering an application for a review or reopening of findings of fact in these circumstances must adopt a three-stage process, first adumbrated by Charles J in *Birmingham City Council v H and others* [2005] EWHC 2885 (Fam) and endorsed by Sir James Munby in *Re ZZ* and applied as a number of subsequent cases including by Cobb J in *AD v AM (Fact-finding hearing) (Application for re-hearing)* [2016] EWHC 326 (Fam). I have read and considered those authorities and the other cases cited by counsel, but I consider it unnecessary to set out the case law in any detail. The salient points are as follows.

41. At the first stage of the three-stage process, the court considers whether to permit any reconsideration or review or challenge to the earlier findings. As Sir James Munby, President, observed in *Re ZZ* at paragraph 33:

> "One does not get beyond the first stage unless there is some real reason to believe that the earlier findings require revisiting. Mere speculation and hope are not enough. There must be solid grounds for challenge."

42. In this case, the first stage was considered by Sir Andrew McFarlane, President, at the hearing on 27 March this year when he concluded that there should be a review. At the second stage, the court determined the extent of the investigation and evidence concerning the review. As Sir James Munby observed in *Re ZZ* at paragraph 34, the scope of the review "will turn on the forensic context and the circumstances of the particular case". In this case, the second stage was determined by me at the hearing on 3 April 2019, when I delineated the scope of the review as set out above. At the third stage the court conducts the hearing of the review itself. At this stage, an evidential burden falls on those who seek to displace the earlier finding, but the legal burden of proof remains throughout at the outset, namely with the local authority, see McFarlane J (as he then was) in *Birmingham City Council v H and others* [2006] EWHC 3062 (Fam) at paragraphs 42 to 45, approved by Sir James Munby President in *Re ZZ* at paragraph 16. Sir James Munby summarised the approach in these words at paragraph 35 of *Re ZZ*:

> "There is an *evidential* burden on those who seek to displace an earlier finding - in that sense they have to 'make the running' - but the *legal* burden remains throughout where it was at the outset. The judge had to consider the fresh evidence alongside the earlier material before coming to a conclusion in the light of the totality of the material before the court."

Section 11 of the Civil Evidence Act 1968

43. Under the Civil Evidence Act 1968, Section 11(1) and (2):

> "(1) In civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court martial, there or elsewhere, shall, subject to (3) below [not relevant to this case], be admissible in evidence for the purpose of proving, where to do so is relevant to an issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is party to the civil proceedings; but no conviction other than a

subsisting one shall be admissible in evidence by virtue of this section.

"(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court martial there or elsewhere: (a) he shall be taken to have committed that offence unless the contrary is proved; and (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted shall be admissible in evidence for that purpose."

44. The scope and interpretation of section 11 was addressed by Lord Diplock in *Hunter v the Chief Constable of West Midlands Police* [1982] AC 529 at page 544D in these terms:

"Section 11 makes the conviction *prima facie* evidence that the person convicted did commit the offence on which he was found guilty. That does not make it conclusive evidence. The defendant is permitted by the statute to prove the contrary if he can. The section covers a wide variety of circumstances. The relevant conviction may be of someone who has not been made a defendant to the civil action and the action defendant may have had no opportunity of determining what evidence should be called on the occasion of the criminal trial. The conviction particularly of a traffic offence may have been entered upon a plea of guilty accompanied by a written explanation in mitigation. Fresh evidence not called on the occasion of his conviction may have been obtained by the defendant's insurers who were not responsible for the conduct of his defence at the criminal trial or may only have become available to the defendant himself since the criminal trial.

> This wide variety of circumstances in which section 11 may be applicable includes some in which justice would require that no fetters should be imposed upon the means by which a defendant may rebut a statutory presumption that the person committed the offence on which he has been convicted by a court of competent jurisdiction. In particular I respectfully find myself unable to agree with Lord Denning, Master of the Rolls, that the only way in which a defendant can do so is by showing that the conviction was obtained by fraud or collusion, or by adducing fresh evidence (which he could not have obtained by reasonable diligence before) which is conclusive of his innocence. The burden of proof of 'the contrary' that lies upon the defendant under section 11 is the ordinary burden in a civil action: proof on a balance of probabilities; although in the face of a conviction after a full hearing, this is likely to be an uphill task."

45. From this I note the following points are relevant to this case:

(1) the conviction is *prima facie* evidence that the convicted person committed the offence;

(2) the conviction is not conclusive and the convicted person is permitted to seek to prove the contrary;

(3) the standard of proof on the convicted person in those circumstances is the balance of probabilities;

(4) in practice, however, a person who has been convicted after a full hearing is likely to face an uphill task in proving he did not commit the offence;

(5) the section covers a wide variety of circumstances;

(6) no fetters should be imposed on a convicted person as to the means by which the statutory presumption may be rebutted.

46. In this case, when considering the weight to be attached to the conviction and to the evidence on which the mother relies to prove it is wrong, it is important to note the following features

(1) The criminal proceedings came after the civil proceedings. The issue of the weight to be attached to the conviction only arises in the context of the father's application for the court to set aside its earlier findings.

(2) Although the mother was convicted after trial, the father was acquitted of the offence on the direction of the judge after the prosecution decided not to proceed against him;

(3) This court had already conducted a comprehensive analysis of the evidence and reached its finding before the criminal trial;

(4) A significant point in the criminal proceedings was the prosecution's decision based on its assessment of the evidence. I will return to this point below, but it is clearly relevant to the weight to be attached to the conviction in these proceedings;

(5) This court is engaged in an inquisitorial process to determine findings of fact in order to facilitate future decision making for Q's welfare. It seems to me therefore that rules of court must be interpreted in the light of the paramountcy of the child's welfare.

47. I am not going to traverse the whole of the evidence in this further judgment. Instead, I shall consider the changes or developments in the evidence between the hearing in the Family Court and the criminal trial under the following five headings:

(1) Mr Richards' evidence;

(2) the father's evidence about the events of 22 September 2016;

(3) the mother's evidence about the events of 22 September 2016;

(4) the evidence about the rib fractures;

(5) the conviction and acquittal.

The Evidence of Mr Richards

48. As set out in my earlier judgment, the evidence of Mr Richards was an important factor in my eventual conclusions about the circumstances in which Q sustained his head injuries on 22 September 2016. At paragraph 65 to 67 of my judgment I said:

> "65 …. In his oral evidence, Mr Richards said that he would have expected the baby to have been distressed and crying from the point of injury until such time as the swelling caused the level of consciousness to fall. 'I would have expected at the point of injury that there would have been noise and the baby not settling, crying, distressed and particularly if the baby was handled in any way, and then when the brain swelled and the effect of the injury became worse, then the crying would have got less'.
>
> 66: In cross-examination Mr Storey took Mr Richards through the father's account to the police of what happened after the alleged fall onto the kitchen counter. He agreed with Mr Storey's suggestion that, from the beginning of the process, there was evidence consistent with encephalopathy. The high-pitched cry, the refusal to take milk, and later the father's account of how the child alternated between crying and lying quietly, staring and not following with his eyes. Mr Richards described him as being 'in the twilight zone between conscious and unconscious' and agreed with my description of how he was going in and out of consciousness and the more conscious he was, the more aware of the pain.

67: In oral evidence Mr Richards was asked about the consequences of a delayed presentation to hospital. He observed

> ‘if there were a delayed presentation, that could have been avoided. The difference that might have occurred is that the fundamentals of treating a head injury are to keep the patient full of oxygen and keep their blood pressure up and that's what earlier presentation in this case could have achieved. It would not have altered the dural laceration. It may or may not have avoided the need for surgery, because if those things could have reduced the swelling so the brain damage wasn’t extended, it might have made a difference, but if earlier oxygenation and correction of the anaemia had occurred, it might have reduced the severity of the underlying brain injury although you cannot be certain.’"

49. In short, it was Mr Richards' evidence that the account given by the father to the police in his initial interview on 22 September 2016 about the child's condition after the incident at 4 am that morning was a description of a child who had suffered encephalopathy; that the child would have been distressed and crying from the point of injury until the brain swelling affected the level of consciousness; and that the delay in seeking treatment increased the severity of the consequences of the brain injury.

50. His evidence about the interpretation of the father's description after the 4 am incident was brought to centre stage in the family hearing in the course of cross-examination by Mr Storey on behalf of the mother. The transcripts of his evidence before the Crown Court however show that neither leading counsel on behalf of the prosecution nor junior counsel on behalf of the mother pursued that line of question. Indeed, counsel for the mother asked Mr Richards no questions at all. So the jury's attention was never focused on the medical expert interpretation of the description given by the father of the child's condition after the 4 am incident.

51. It is right to note that Mr Richards was asked about the likely consequences of the fall or drop as described by the father. It was his evidence that "clinical experience would

be that a fall onto a kitchen surface of 20 to 30 centimetres would really annoy the baby but not cause any damage." That answer was deployed by those representing the father at the criminal trial and by the prosecution to support the contention that the child could not have sustained the injuries as a result of the fall as described by the father. But it seems that no one elicited evidence from Mr Richards to support the contention that the father's account of what had happened at 4 am was untrue because it was inconsistent with his description of the baby's conduct after the incident.

52. In argument before me, Mr Ekaney and Mr Wilkinson on behalf of the father sought to play down the significance of this submission by reference to an email exchange between the prosecution and Mr Richards in February/March 2018, i.e. during the period between the family hearing and the criminal trial. The officer in the case acting on instructions from the Crown Prosecution Service asked the following question:

> "In the family proceedings you were asked a series of questions about whether, in the light of the reported behaviour of Q between 4 am when Q was said to have been dropped by his father about a foot onto the kitchen worktop and his presentation with the serious injuries noted at the doctors and then at the hospital from 15:16, you thought that the injury could have occurred at 4 am, albeit not in the way described. That is if there had been a history given of a serious blow to Q's head at 4 am, would you have expected Q to have presented as he did some 11 hours later? Can you please confirm if that is a proper reflection of your opinion? Or would the presentation of injuries recorded by the GP/hospital be consistent (more consistent/equally consistent?) with a serious blow having occurred at a time later than 4 am?"

Mr Richards replied as follows:

> "You are dependent on an accurate description of his day by carers. I would consider that after his injury he would not have been completely normal. Given that he was described as not being completely [normal] during the day after 4 am and getting worse,

> this would be consistent with him deteriorating following the events of that night; however, his presentation at hospital would be equally consistent with a more recent event."

This led, I infer, in due course to the following exchange in Mr Richards' examination at the criminal trial by counsel for the prosecution:

> "Q. If the injury had occurred between 11.30 in the morning and midday, that would fit with what you had seen just as much as if it had been at 4 am."
>
> "A. Yes, but it's dependent on the history because whatever happens, the baby would not have been completely normal between the injury and the attendance at the GPs."

In other words, Mr Richards was saying that it was impossible to say from the child's clinical presentation alone at the GPs and subsequently at the hospital whether he had been injured at 4 am or later in the morning. As he said both in the email and in his evidence: "You are dependent on the description of his state given by his carers". It is to that aspect of the case that I now turn.

Father's evidence about 22 September 2016

53. The first accounts given by the father at the hospital and to the police on 22 September 2016 clearly indicated the child had sustained an injury after the incident at 4 am. I have set that evidence out in detail in my earlier judgment(see paragraphs 83 to 86). In the preliminary conversation with Dr A and the parents when the child was admitted to hospital, the father said that, after he dropped him on the counter, Q did not lose consciousness but was irritable and refusing to drink milk. His eyes were half open. He was not crying. At 9 am, when both parents were present, he did not look well. His colour had changed and his lips were almost purple. The father described him to Dr A as screaming throughout the day, eyes opened, not taking his feed.

54. In his first police interview later that day, the father gave a very detailed description of Q's condition during the day. After the incident at 4 am he described his condition in these terms:

> "I tried to console him for about an hour and then I tried to give him milk, but he was having none of it. Every time the teat touched his mouth, he just went into this high squeal crying, but it was continuous so rather than it being like every so often out of nowhere, it was continuous."

Then a little later when the child was in his bouncer he describes him as follows:

> "I was kind of monitoring him, seeing how he was doing then while he was there, while he was sat in his bouncer. I could see because generally he loves being in the bouncer. He wasn't himself at all because normally he will sit in there and be looking at you and sort of trying to interact and hitting the things around him on the bouncer, but he was just sort of sat there almost vacant, staring, if you will. He was not following me at all."

That is in the two to three hours after the alleged incident at 4 am. Then he put Q back in the Moses basket and the father's description continues as follows:

> "For like two or three hours kind of no sound. Nothing was coming from him and I found that quite weird, but then I noticed around 9, 9.30 he would be in that state and every now again squeal really loud and then be back into that state again, then really, really loud, then back into it again, almost like he was having a really bad dream, it seems."

55. In summary, therefore, the father in his interview was giving a very detailed account of the child's condition after the incident at 4 am consistent with a child with encephalopathy.

56. In his statement from the family proceedings, the father gave a somewhat different account. He said that Q did not cry after being dropped and took a small amount of feed. Later he had an upset cry and was fidgety. The father did not refer in that statement to a continuous high-pitched squeal whenever the child's mouth touched the teat. There was no reference to him looking vacant in the bouncer. There was no reference to his moving from having a loud squeal back into a silent state in the way he described in the first police interview. In his oral evidence in the family proceedings, his evidence was similar to that in his statement for these proceedings. He gave evidence that the child had been upset but not cried after the 4 am incident and that he had taken some but not all of his feed. "Other than the feed, there was nothing else really out of the ordinary." His oral evidence was that it was only after he returned to the flat later that day that he noticed that Q's lips had changed colour and that he had swelling round his head. Cross-examined by Miss Wills-Goldingham QC for the local authority, he said the child was not feeding normally but there was no other change. In particular, in his oral evidence in the family proceedings, he did not notice any difference in crying until he returned in the afternoon. Cross-examined by Miss Wills-Goldingham as to the discrepancies between his account in his evidence and what he had said to Dr A, he said: "It was my mistake. I was combining the days' activities into one history." When he was reminded that Dr A's notes had included the comment that "he says Q was screaming throughout the day," the father said:

> "Yes, so, and I know this sounds very naïve but I was giving an account of that, that time period so he cried a little bit earlier on in the morning but in the afternoon the cry was very, very distinct and I, I don't know why I said it was for the whole day. That, that's my mistake. He cried, the the cry I was describing, it was later on in the day."

57. He was then cross-examined by Mr Storey. He agreed that, at the time of his first interview by the police on 22 September at just after 9 pm, the events were very fresh in his memory. When asked to explain the discrepancy between his evidence and his account during that interview, he said that he

> "ended up merging a lot of the events of the day as one … because I felt so bad, so awful about what had happened at 4 am. I'd merged all these things together as a way of trying to describe how Q was."

A little later he said:

> "I was merging some of the events together and it's not until I really gave it a lot of thought that I was able to separate exactly when and where all those other incidents happened."

Later, he added,

> "I was trying to say all the things I could remember but knew for sure that I was quite confused about the exact details and timings."

58. As was accepted on his behalf at this hearing, that explanation, which has been labelled the "conflation explanation", only emerged in the course of cross-examination at the family hearing several months after Mr Richards had given evidence before me in that hearing. In my earlier judgment, I described this aspect of the father's evidence as particularly unconvincing. I concluded that the very detailed and specific account the father had given to the police in the interview at 9 pm on 22 September on the same day on which the injuries had been sustained about the child's condition had been much more reliable – the most reliable account – of the child's true state that day.

59. In his oral evidence at the criminal trial, the father's account of Q's condition on 22 September was substantially the same as the account given in his oral evidence at the family court hearing. He said that, after the 4 am incident, he tried to give Q a feed "which he didn't have much of." He checked him and there was nothing untoward. He was "a bit restless". He said that, when he left for the university, he had no concerns about there being anything seriously wrong. It was only when he returned that he really noticed anything wrong. Asked by his counsel to explain his account to the police in his interview on 22 September he said that he had

"combined two things there together … I hadn't really given it much thought. I just thought I'm trying to be as helpful as I can, these are the things that have happened."

60. Later he was challenged about this in the following exchange in cross-examination by counsel for the mother.

"Q. In this interview you told the police that, following the bump, there had been a marked change in Q's presentation, hadn't you?

A. Yes, and what I was describing there is overall. So, yes, that had happened, he was slightly more irritable than usual

Q. No, what you describe …

A. But it wasn't anything like what we came to see.

Q. What you're describing to the police is not overall, what you're describing to the police is specific. When you put the teat to his mouth to try and feed him, what happened, did you tell the police?

A. That he would scream and that was the combination of events I was seeing that afternoon.

Q. You have changed that since your account, fresh on 22 September, because you now realise the significance of high-pitched screaming shortly after 4 o'clock in the morning.

A. No, not at all.

Q. That is why you are now lying about what happened?

A. I'm not lying.

Q. That is why you have told your counsel and this jury that you have conflated the timings on this day.

A. No, I had done. It was a very stressful time, there was an awful lot going on, I don't know how Q is, I was worried about [the mother] as well, I was worried about myself, I certainly didn't understand the gravity of the situation. All I knew was something is clearly very wrong. Q is very unwell and I am still no closer as to knowing what happened or why he was looking like that."

61. It is important to note, however, as all counsel at this hearing accept to be the case, that the father was not challenged about this by the prosecution in cross-examination as is evident from the following exchange during that cross-examination:

"Q. And in your interview on the 22nd that the jury will remember watching, you talk about how Q had been. Now in your evidence to this jury, you say that that was a conflation of time, yes, that you merged everything into one. Is that right?

A. Yes.

Q. Because of the stress of the, of the moment.

A. Yes, there was --

Q. Yes?

A. Yes. A lot, a lot going on.

Q. And that the high-pitched scream and the distinct change in Q's head were only things that you were aware of on your return.

A. Yes.

Q. Yes. The red mark was only something you were aware of on your return, yes?

A. Yes.

Q. Prior to you going out for that hour and a half, what you are saying to the jury, is this right, that there was nothing noticeably wrong with Q?

A. Yeah, I just remember thinking at this time of the morning he can be difficult, he can be distressed and he doesn't always drink his entire milk bottle, so at that time I was just thinking, yes, this bump happened, but it …

Q. Yeah, no …

A: It …

Q. Answer …

A. Wasn't …

Q. The …

A. Significant.

Q. …at the time, yeah, when you went out, there was nothing notably differently wrong with Q?

A. Not that I can remember."

62. Later, the following exchange took place:

"Q. So you're pretty sure, though, aren't you, in your own mind that whatever happened at 4 o'clock in the morning wasn't what

had caused Q to behave in the way that he is now? In your own mind, you're pretty sure about that, aren't you?

A. Yes."

63. Instead of challenging the father about his account to the police and the discrepancies between that account and his subsequent accounts, the prosecution accepted his account of the injury in support of the case it was building against the mother. The focus of the prosecution cross-examination was on the father's failure to tell Dr A and the police that he had left the flat that morning leaving the mother alone with Q. It was the prosecution case that he had concealed that fact to protect the mother.

64. In submissions before this court, Mr Ekaney and Mr Wilkinson argue that one of the material changes between the family court hearing and the criminal trial was that, by the time of the criminal trial, the father had accepted and realised that the 4 am incident as described by him was unlikely to have caused Q's head injuries and as a result there was a shift in the focus of the inquiry from the 4 am incident to a more in-depth investigation of the events of later that morning. I do not accept, however, that there has been any material change at all in the father's case in evidence before the family court in September 2017 and his evidence to the jury in September 2018. On the contrary, his evidence before both courts was the same: that his account of Q's behaviour and conduct after the 4 am incident given in his police interview 17 hours later was inaccurate because he had conflated the symptoms seen during the morning. The only difference is that his account was rejected by this court but accepted in the criminal trial.

65. As stated above, I found this aspect of the father's evidence at the family home particularly unconvincing. I did not believe it. I concluded that he was telling the truth to the police in the interview of 22 September at 9 pm concerning Q's condition after the 4 am incident. Having read the transcripts of the father's evidence at both proceedings, and considering the submissions put before me, I can see nothing new in the father's evidence to cause me to revise that opinion. This is, of course, an aspect of the case where it might have been helpful to hear the father cross-examined again, but

his decision to absent himself from this hearing has meant there has been no further evidence.

66. Of course, this court does not look at evidence in isolation but rather considers it in the context of all the other evidence and, before I reach a final conclusion on these matters, I must consider that evidence. I turn next to the next aspect of the evidence which is the suggestion that there was a material difference between the mother's evidence about the events on 22 September.

The Mother's evidence about 22 September

67. The mother did not describe Q's behaviour and appearance on the morning of September in the same terms as the father. In my judgment I observed:

> "I find it very surprising that the mother did not observe during the morning that her baby was unwell. On the father's account, Q was manifestly demonstrating symptoms of encephalopathy and it is in my mind very difficult to understand why the mother did not realise that something was wrong."

My conclusion was as follows:

> "Having considered all the evidence however, I find that the explanation for this is that she simply did not pay sufficient attention to her baby that morning. On this point I accept her account that she did not look at the baby before she went out because she was in such a rush and did not pay much attention."

68. The mother gave evidence about the child's behaviour and state that morning at the Crown Court. It is submitted on behalf of the father that there are material differences in her evidence which should lead the court to a different conclusion as to when the head injuries were sustained and the identity of the perpetrator.

69. In this part of the case I have been assisted by a schedule prepared by Mr Ekaney and Mr Wilkinson setting out the mother's various accounts in her police interview on 8

November 2016, her statement in these proceedings on 12 December 2016, her oral evidence to this court in the earlier hearing and her evidence to criminal proceedings. As this is a crucial part of the father's case, I propose to set out in some detail the evidence, analysing whether there is the change as submitted on behalf of the father.

70. First, I consider the mother's evidence about Q's condition at 6 am on the morning of 22 September 2016 when she woke up. In her first police interview on 8 November 2016, the mother said:

- "At this time he was making small noises, not crying or anything, just sort of cooing."
- "He's making noises and things. I picked him up [to feed him] but he seemed to have absolutely no interest."
- "I was holding him and he was sort of like half, he was sort of closing his eyes but just sort of drifting so I thought oh well, if I put him back down I'm sure he will go back to sleep."

71. In her statement in these proceedings dated 12 December 2016 the mother said:

- "I remember hearing Q making whimpering noises and I went to make a bottle for Q."
- "I picked up Q and gave him a feed … but he would not take anything.
- "I noticed a slightly red rash in the centre of his forehead which looked like dry skin that he had had before."

72. In her oral evidence at the family proceedings, the mother said:

- "I couldn't hear him that clearly…. I knew he was crying because the monitor was going off."
- "I couldn't say for definite whether the cry was normal. It didn't seem unusual to me."
- "I picked him up and gave him a cuddle. At this point I think Q gave a sob like a baby sob."

- "When I put Q down he was making small noises but not actually crying, nothing memorable."
- "I tried to feed him for a few minutes but he didn't seem interested. He didn't look distressed and he wasn't crying."

73. At the criminal trial, the mother said about this period:

- "Q was not fully crying but enough like cooing and stuff that you could hear him."
- "I tried to give him some milk but he didn't really want it."
- "Q was not visibly upset nor screaming loudly."
- "I picked Q up and he was okay so far as I was aware."
- "I put Q back to bed and wouldn't have done so if I had many major concerns about his presentation." .

74. In my judgment there was no material difference between the description of Q at 6 am given by the mother at the criminal trial and her earlier accounts including her oral evidence at the family proceedings.

75. Next I consider the mother's account about Q's condition between 10 am when she got up and 11.20 when the father left the flat.

76. In her police interview on 8 November 2016, she said:

- "Q is in his bouncer chair thing. It looks all right. It wasn't anything out of the ordinary. I was popping in and out at the time."
- "Before I left I didn't get Q out of his bouncer cos he looked pretty comfy."
- "He was cooing, patting his -- he had those things that like hang on the bouncer so he was sort of playing with them, like."
- "I held Q when I first went down and had a cup of tea … and he seemed fine"."
- "The swelling to Q's head felt weird when I came back from counselling but not in the morning."

77. In her statement in the family proceedings the mother simply said this about this time:

- "I got up and found the father in the lounge on the sofa and Q was in his bouncer chair. I remember the father trying to feed Q and he did not want too much."

78. In her oral evidence in the family proceedings, the mother said:

- "I don't think I held Q at all that morning."
- "I didn't remember any strange noise while I was there."
- "I wouldn't have been able to see Q's eyes but I don't remember seeing anything strange about, like how late in the day he changed colour."
- "Q made occasional sounds but he certainly wasn't screaming constantly or anything like that."

79. At the criminal trial, the mother indicated that she did not disagree with what she had said in the police interview that she had held Q when she came down while she had a cup of tea. She accepted that she had told the police that Q was finally happy in his bouncer and playing with his toys.

80. Plainly, there was one change in the mother's oral evidence about that aspect of the case, namely that before the jury she accepted that she had held Q when she came downstairs for a cup of tea. That was in line with what she had said in her police interview but contrary to her oral evidence before me that she did not think she had held him at all that morning. In other respects, it seems to me that her evidence to the jury was not materially different from that she had given on other occasions.

81. Next I consider the period when the mother was alone with Q in the flat between about 11:20 and 12:37. In her police interview in November 2016, she said that Q "generally seemed all right when I left".

82. In her oral evidence in the family proceedings she said:

- "Q was upstairs in the bouncer in the bathroom with me for 45 minutes. He looked asleep."

- "Q might have made a couple of sorts of cry throughout the whole period but I don't remember him crying loudly or anything like that."

- "I brought Q downstairs when I came back down."

83. Now, looking at her evidence of the criminal trial, I have found some answers which do not appear in the schedule prepared by Mr Ekaney and Mr Wilkinson. In cross-examination by the prosecution, the mother described how she got ready in the bathroom to go out by herself. She said

    - that Q was in his bouncer,

    - that she thought she moved it around with her but was not certain

    - that she did not think she had tried to feed him – she thought that he was asleep, or "looked half asleep at the very least".

    - that she did not remember if he was making any strange noises.

    - I don't think I paid him attention. I'm rushing around. I've less time than usual. Showering was always a very long event. I usually take 45 minutes in the shower."

84. In my judgment there is no material difference in her various accounts about the period when she was alone in the flat.

85. Finally, there are her various accounts about Q's condition when she returned. I do not consider it necessary to set out those accounts in any detail because in my judgment they are broadly consistent. She describes something wrong with Q, that he was an odd colour, making an unusual high-pitched noise and that he had a lump or swelling on his head. Although some points are mentioned in some accounts but omitted in others, the differences are, in my judgment, not material.

86. Having analysed all that evidence, there are plainly a number of differences in the various accounts, as would be expected. The most significant in my mind is the mother's inconsistency about whether she held Q that morning. But the overall tenor of her evidence was the same. Q seemed okay to her that morning. She did not notice anything unusual about his condition until she returned from her counselling session.

87. On this issue, I find that, looking at her evidence overall, the state of that evidence is substantially the same as it was at the conclusion of the family proceedings. I have seen nothing in the evidence given at the Crown Court to disturb my conclusion about the mother's accounts as set out above. Once again, this is an issue on which it might have been helpful to hear further evidence from the mother to weigh it alongside all the other evidence, including the evidence given by the father had he returned to give it, but for the reasons stated above neither parent has in the event given oral evidence at this hearing.

Evidence about the rib fractures

88. I now consider an aspect of the case about which there was unquestionably fresh evidence at the Crown Court, namely some aspects of the case concerning the rib fractures.

89. The medical expert evidence before me established that Q had sustained ten rib fractures on at least two occasions. Nine of the fractures were estimated to have occurred four to ten days before the X-ray carried out on admission to hospital on 22 September and one of the fractures, to the right eleventh rib, was said to have been caused two to six weeks before that examination. I analysed the evidence about the fractures at paragraphs 100 to 105 of my earlier judgment. At paragraph 122, I concluded that there was no reliable evidence as to any occasion when the rib fractures had occurred or reliable evidence as to the circumstances in which they were inflicted. I found that there was insufficient evidence for the court to reach any conclusion as precisely whether the fractures had occurred or as to whether the perpetrator was the mother or father. I find that both remain within the pool of perpetrators.

90. In the criminal proceedings there were some fresh pieces of evidence which, it is said, impinge on my findings concerning the rib fractures. First, in the oral evidence of Dr Watt, Consultant Radiologist, he indicated that the time window for the earliest rib fracture which the experts previously had estimated to be two to six weeks prior to the examination on 22 September could be extended back to include 7 August 2016. This was unsurprising given the generally recognised view frequently expressed by expert witnesses that the timing of fractures from x-rays is an imprecise, inexact exercise. The effect of this change in evidence was that the window was extended to include 7 August, a period when the mother had in a series of text messages expressed stress and frustration about caring for Q and the date on which the father had taken Q out as described above to the park. As described at paragraph 10 in my earlier judgment, during that trip, according to the father, Q cried in a way which was "a little bit out of the ordinary", continued crying relentlessly and on the way home was found to have blood on his bib. The mother's evidence before me had been that during the trip the father had texted that Q was being a total nightmare and he hated him. Following this, as described at paragraph 11 of my earlier judgment I was told that the father had taken Q to hospital. I was shown medical records which recorded a history of Q crying all day and blood being seen in his mouth, that the hospital had been told that he had difficulty feeding for a day or so and had vomited with blood in the vomit.

91. Before the Crown Court the jury also heard evidence from Dr CA, consultant paediatrician which had not been adduced before me. This evidence was a cause of bleeding could have been the force or compression to the chest. It was therefore argued before me on behalf of the father that this was further evidence of the rib fractures being inflicted by the mother.

92. In the documents prepared for this hearing, those representing the father indicated that they sought to explore with the mother communications with the father over that weekend and other aspects of her behaviour that weekend and the extent to which the child's symptoms were indicative of the injury being inflicted by the mother. In the event, for the reasons explained, mother did not give evidence at the hearing and the father's evidence was incomplete. Neither parent has therefore added material evidence about this incident in oral evidence prior to this hearing.

93. Notwithstanding the absence of further evidence, it is submitted by Mr Ekaney and Mr Wilkinson on behalf of the father that there is evidence on which this court could properly conclude that the mother was responsible for the earliest rib fractures and by inference all the rib fractures. They rely on the following

(1) Dr Watt's evidence about the timing of the earliest rib fracture;

(2) Dr CA's evidence about the possibility that the blood seen on the bib and according to the hospital note in the baby's mouth could have been caused as a result of compression of the chest;

(3) the evidence of Dr Newman, which was available before me at the earlier family proceedings, that the subconjunctival haemorrhages sustained by Q in September, seen in September, and found by this court to have been attributable to the mother, could have been caused by compression of the chest and/or squeezing, i.e. the same mechanism as postulated by Dr CA as a possible cause for the blood seen on 7 August;

(4) the evidence of the mother's stress and frustration over that weekend as demonstrated by the text messages highlighted by Mr Ekaney;

(5) the fact that the mother was alone with Q overnight between 5 and 6 August;

(6) the fact that the mother did not go with Q and the father to hospital on 7 August;

(7) the mother's subsequent behaviour which Mr Ekaney and Mr Wilkinson characterised as an attempt to distance herself from Q so that any injuries found were attributable to father.

94. I accept that there was some new material evidence about some of these matters at the Crown Court and that it is a legitimate exercise to revisit the question of rib fractures as suggested by Mr Ekaney. I am quite clear, however, that the evidence taken as a whole does not warrant any finding that the mother was the perpetrator of the rib fractures for the following reasons.

(1) Although the blood on the bib and in the mouth seen on 7 August is consistent with chest compression as Dr CA described, it is not diagnostic of that. There are other causes of bleeding from the mouth, including direct injury to the mouth itself. So far as I am aware, chest compression was never suggested as a cause of bleeding at the time of the hospital admission.

(2) The blood was seen at the conclusion of a period when the child had been with the father.

(3) Both parents expressed a degree of frustration about Q in text messages during that weekend. The father, according to the mother, sent messages while he was out with Q at or around the specific period where the bleeding occurred.

95. In short, the course I am invited to take by Mr Ekaney and Mr Wilkinson would in my judgment be little more than speculation. Looking at all the evidence about the rib fractures in the context of all the other evidence and my other findings, I remain of the view that there is insufficient evidence to reach a conclusion as to when the rib fractures occurred or the identity of the perpetrator.

The conviction and acquittal

96. I have considered those parts of the evidence given at the Crown Court which, it is suggested, support the court changing its findings. I have found that taken separately none of those changes of evidence gives rise to the court taking that course. There were of course other matters inevitably about which new evidence was given at the Crown Court which is not before me in the family proceedings, for example, more

evidence about the mother's allegations about her disturbed childhood and further evidence about the mother's lifestyle between the family court hearing and the criminal trial. I do not understand it to be Mr Ekaney's case that those matters are material to the exercise on which this court is currently engaged.

97. Before reaching a final decision on the father's application, however, I must draw all the threads together and in particular return to the question as to the weight which should be attached to the outcome of the criminal trial and the conviction of the mother and the acquittal of the father in the light of Section 11 of the Civil Evidence Act 1968.

98. I have reached the clear conclusion. that in the circumstances of this case, notwithstanding the terms of section 11, the mother's conviction carries no significant weight for the following reasons.

99. First, it seems to me that the purpose of section 11 is principally to establish a rule to be applied in circumstances in which the criminal trial and conviction occur before the civil fact-finding process. I accept Mr Storey's submission that it cannot have been the intention of Parliament that a subsequent conviction would lead to a presumption that a prior contrary finding in civil proceedings would be overturned on appeal. As discussed above, the proper interpretation of section 11 is that the weight to be attached to a conviction in these circumstances will vary depending on all the circumstances. The proper approach in the circumstances of this case is not to rely on this conviction alone but rather to look behind the conviction at the evidence as we have done at this hearing.

100. Secondly, the outcome of the criminal case was heavily influenced by the course taken by the prosecution. The prosecution withdrew counts 2 to 3 against the father and the jury was directed by the judge to acquit the father on those counts. I accept of course that it was still open to the jury, notwithstanding its verdict on those counts, to have acquitted the mother on counts 4 and 5 if they were not sure of her guilt but, when considering at this hearing the evidential weight to be attached to the mother's conviction itself, it is to my mind plainly relevant that the conviction was entered in circumstances where (a) the case had originally been opened by the prosecution on the basis that Q's head injuries were inflicted either by the father or by the mother; (b) at

the end of the evidence the prosecution indicated that they no longer contended that the father was responsible, and (c) the judge directed the jury to acquit the father of those charges.

101. Thirdly, it is relevant when assessing the weight to be attached by this court to the conviction itself to consider the reasons why the prosecution withdrew counts 2 and 3 from the jury. Various reasons emerge from an illuminating email sent by counsel for the prosecution to the other lawyers in the case, (and also I note to the judge), in answer to a question posed by counsel representing the mother at the trial. She wrote as follows:

> "Perhaps the most fundamental thing that has changed in the evidence is [the father's] acceptance in his evidence that the 4 am incident did not cause the injuries; that his evidence about Q's behaviour that day was conflated in his interview, and in his explanation to the doctors (necessarily conflated the Crown say because he was trying to avoid spilling the beans that [the mother] had been alone with Q for an hour and a half); and thus, having finally come clean about that, that he was only aware of Q's deterioration in health once he returned from university.
>
> Some of that evidence had been given in the family proceedings but was not evidence in the criminal proceedings until given in court.
>
> That evidence [the father] now gives 'fits' with the evidence given by Dr Richards in relation to how the jury can judge the likely timing of the injury from the change in Q's behaviour, which also fits with the evidence given by [the mother] of Q being okay that morning. The cumulation of evidence therefore points to the facts/reasonable inference that Q had not been injured before the father went to university.

> With that change of evidence, the 'lie/omission' told by both [the father] and [the mother] in relation to [the mother] being in the flat on her own with Q, the Crown would say can only have been made by them for one reason. It does not seek to exonerate [the father], but it does seek to exonerate [the mother]. The question that we pose to the jury is 'exonerate from what?'
>
> Until [the father] accepted that the 4 am incident he described was not the cause, and until he gave more detailed evidence about Q's health, the Crown could not realistically exclude him as being the culprit. We now believe we can. With respect to [the father] there is in the Crown's view no longer a realistic prospect of conviction. Further to that we would add that the way both gave evidence, and in particular [the mother's] answer to questions both in respect of the incidents on 1 and 2 September and 22 September (and generally) has had an impact on the decision we have taken. Neither have ever been tested to the degree that they have been during this trial.
>
> Whether the Crown is right or not is, of course, ultimately a matter for the jury on the evidence they have heard."

102. There are a number of comments which could perhaps be made about that passage, but suffice it to say it is immediately apparent that the principal reason for the prosecution decision was that they accepted the father's account of having conflated a description of Q's condition between 4 am and the visit to the GP. In other words, the prosecution accepted the very account which I found particularly unconvincing. The weight to be attached by the court at this review hearing to the prosecution's assessment of that evidence is in my view very limited. In saying that, I stress that I am not criticising the prosecution for the course they took in the Crown Court proceedings, nor indeed am I criticising anybody else involved in the criminal process.

103. There is in my view considerable force in the observation by Ms Flexman on behalf of the guardian in closing submissions when she observed that there was no new evidence

of any relevance adduced in the criminal trial that would in itself merit a review of the family court findings. "Rather that the prosecution ran a narrative that was directly contradictory to the findings of the family court and the father joined in with that narrative." That narrative resulted in a conviction which has created the conflict between the two jurisdictions and driven the need for this review. Central to that narrative is a different assessment of the father's credibility. It is regrettable that he did not allow that issue to be further examined by finishing his oral evidence.

Conclusion

105. Drawing all the various threads together and considering the evidence from the criminal trial alongside the earlier material, I conclude on the totality of the evidence that my findings of fact remain unchanged. Having conducted what I hope has been a thorough and comprehensive analysis of the individual areas where it is asserted that there was a change of evidence, and having evaluated that alongside the fact and circumstances of the conviction in the context of the totality of the evidence, I adhere to my original findings as to the perpetrator of the head injuries and my findings that I cannot identify the perpetrator of the rib fractures. I have not, for the reasons explained at this hearing, heard oral evidence from the mother or the full oral evidence from the father, but this fact-finding process is now complete and I shall proceed to consider arrangements for Q's long-term future.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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