Neutral Citation Number: [2020] EWFC 112

Case No: ZC19C00482

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 18/12/2020

Before :

MR JUSTICE KEEHAN

- -

Re DC (A Child: Non-Accidental Injury)

- -

Between :

London Borough of Southwark	**Applicant**
- and -	
GH	**1st Respondent**
-and-	
IJ	**2nd Respondent**
-and-	
DC	**3rd Respondent**
(A Child through his Children's Guardian)	
-and-	
KL	**Intervenor**

- -

Mr D Woodward-Carlton QC and Mr O Millington (instructed by **the Local Authority**) for the **Applicant**
Mr J Tughan QC and Ms T Vindis (instructed by **Charles Paulin & Co**) for the **1st Respondent**
Ms S King QC and Mr K Gordon (instructed by **Wainwright & Cummins LLP**) for the **2nd Respondent**
Mr G Lafazanides (solicitor) for the **3rd Respondent**
Mr J Sampson QC (instructed by **Reeds Solicitors**) for the **Intervenor**

Hearing dates: 30th November - 18th December 2020

- -

Approved Judgment

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

....

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

The Hon Mr Justice Keehan :

Introduction

1. In these public law care proceedings, I am concerned with one child, DC who was born on 7th March 2019 and is 1 year and 9 months of age. His brother, EF, tragically died on 22nd July 2019, aged 18 months.

2. The parents of both children are GH, the first respondent, and IJ, the second respondent. DC's father was believed to be KL, who was the mother's partner. However, DNA test results confirmed that IJ was in fact DC's father. At the hearing on 11th September 2019, IJ was joined as a party and became the second respondent and KL was discharged as the second respondent and made an intervenor.

3. On the evening of the 9th July 2019, EF suffered a catastrophic head injury. He was taken to King's College Hospital A&E after the intervenor had telephoned the emergency services. He reported to staff at the hospital that EF had had a seizure. A CT scan showed significant brain swelling and EF was placed in an induced coma. EF died as a result of his injuries on 22nd July 2019.

4. The London Borough of Southwark issued these public law proceedings on 18th July 2019 and DC was made the subject of an interim care order on 26th July 2019. The first fact-finding hearing was heard on 29th June 2020. Following the mother's successful appeal on 24th July 2020, the matter was remitted for a re-hearing before me.

5. The children's guardian in these proceedings is Christine Holleran. DC is currently living with the maternal grandparents.

Background

6. The mother and father first met in November 2013 and started a relationship in February 2014. Throughout this period, the parties continued to live at their respective parents' homes. In December 2016, they became engaged when the father proposed to the mother. The mother became pregnant in July 2017 and EF was born on 15th January 2018.

7. The mother moved to her own flat in South London in April 2018. She met the intervenor on a dating app in May 2018 and started a relationship with him after a few weeks. She continued her relationship with the father and spent the weekends staying at his home with EF.

8. The mother fell pregnant again in July 2018. Both the father and the intervenor were under the impression that they were the father of the unborn child. The intervenor accompanied the mother to her first scan whilst the father was with the mother for the second scan. When the intervenor discovered that the mother had continued her relationship with the father, he underwent a DNA paternity test in August 2018. The results were received on 12th October 2018, which confirmed that the intervenor was the father.

9. In October 2018, the mother moved into a new flat in South London and shortly afterwards the intervenor moved in with her. The mother stopped staying with the father

on weekends for most of the time. A new care arrangement for EF was agreed between the parents where he stayed three days a week in the father's sole care, from Thursday to Saturday. This arrangement remained in place until April 2019.

10. The father continued to believe that he was in a relationship with the mother until December 2018, when she eventually sent him the DNA results that stated the intervenor was the father of the unborn child. The father had hoped to get back with the mother in January 2019 and had asked the mother's parents for permission to marry her. However, by February 2019 he had accepted that their relationship was over.

11. DC was born on 7th March 2019 and EF stayed with the father for the first three weeks so that the mother could focus on her new-born baby.

12. Concerns started to be raised by both parties about bruising and marks found on EF from September 2018. On 2nd September 2018, the mother sent photographs of mild scratches and bruising on EF's legs to the father. He explained that this had occurred whilst EF had caught his legs on the edges of a coffee table. Bruising to EF's forehead was also documented in November 2018, a possible explanation was that EF might have banged his head against the bars of his play pen when in the father's care.

13. On 7th January 2019, EF was injured when in the care of the intervenor. He reported that whilst playing with EF in the flat, EF tripped and fell and bumped his head. A photograph was sent to the mother depicting a bruise next to EF's eye.

14. On 14th March 2019, a photograph of a bruise to EF's forehead was sent by the mother to the intervenor. A possible explanation for this bruise was given by the father. He stated that there had been an occasion where EF was playing with this cousin in the living room and he tripped and fell, catching his head on the table.

15. All parties agreed that a worrying pattern of unexplained bruising started after DC was born. On 6th April 2019, EF was returned to the mother by the father after being in his care. On 10th April 2019, the day before EF was supposed to go back to his father, the mother took a photograph of extensive linear bruising to EF's ribs. She sent the photograph to the father along with the following message:

> "I hope you don't think I'm trying to accuse you because I'm not. I'm just worried about EFs health & safety. Because if a professional was to see that neither I or you would be able to see him again. I just want to keep him home to keep an eye on him & also help regulate his bowels from the constipation. It's know ones faults so don't think it's urs. I am really sorry."

16. On 16th April 2019, the mother sent a picture of two red marks on EF's back to the intervenor. He replied:

> "Geez I didn't think it was gonna be that bad. We really need to just keep EF in the same room as us until at least the meeting."

17. EF was seen by a health visitor on 16th April 2019. No concerns were raised and there is no note of any discussion about bruising.

18. On 18th April 2019, the father had contact with EF after having not seen him for 12 days. He took photographs of bruising that could be seen on both of EF's cheeks.

19. EF was registered at a local nursery on 8th April 2019. He stopped going on 30th April 2019: the mother reported that she was no longer able to afford it.

20. On 26th April 2019, the mother took a photograph of bruising to EF's right cheek and scratches to his face. She sent the photograph to the father and the paternal grandfather. Discussions took place between the parents and the mother suggested that the injuries could be due to EF scratching his face.

21. The mother sent two photographs to the father on 5th and 7th May 2019 that showed the marks on EF's back. Unusually, the marks appeared to be getting worse and looked like they had developed into a lesion. The mother and the father exchanged text messages on 7th May 2019 regarding the injury, with both parties expressing concern.

22. On 9th May 2019, EF had an appointment with his GP and both parents attended. Concerns were raised about his bruising and constipation. He underwent blood tests to determine if the bruising was linked to any underlying health condition.

23. A further bruise to EF's cheek was seen in a photograph dated 11th May 2019 on the intervenor's telephone.

24. A family meeting was held in May 2019. The purpose of the meeting was to discuss how to improve the communication between the parents because the contact arrangements had broken down. The issue of EF's bruising was also discussed, and concerns were raised by the paternal family. The parents subsequently attended mediation in June 2019 where contact arrangements were eventually agreed. Concerns around bruising were also raised at mediation.

25. On 25th May 2019, the father took a photograph of a bruise to EF's cheek. The mother explained that this was an injury that he had sustained by walking into a door frame of her flat. A few days later the mother expressed concern to the maternal grandmother and sent her the following text:

> "Because of the amount of marks EF has on his face n I still cannot even explain half of them. EF is a happy child however seeing it all makes me feel like I'm incapable of keeping him in harmed."

26. The maternal grandmother sent back a long message which concluded:

> "…So don't knock yourself too much about it, people have up days, down days but just be very careful. There is accidents and there is accidents. If he continues getting hurt, it's not about him being clumsy, its about the fact that he is maybe not getting proper supervision. Continue to keep an eye on him and hopefully as he gets a bit older he will snap out of it. Alright, UV was the same but I made sure I looked after him to the point where he hardly had any bruises, he had some but wasn't so intense. So just be mindful, alright."

27. On 29th May 2019, the mother took photographs of further bruising to EF's cheek, nose and forehead. No explanation was given by the mother, father or intervenor regarding these injuries.

28. On 7th June 2019, EF's blood test results came back normal. The mother texted the maternal grandmother who raised concerns that the bruising was unexplained. The maternal grandmother, who is a social worker, advised the mother that if this continued then there was a risk that EF might be removed by social services due to neglect. She repeated her advice about staying vigilant and increasing EF's supervision.

29. Despite these concerns, EF sustained more bruising to the left side bridge of his nose on 8th June 2019 whilst in the care of the intervenor. He sent a text to the mother informing her what had happened:

> "I'm so depressed cos I feel like whenever I look after him and play with him to make life easier for you it gets harder because I'm stupid and get him excited and then he falls over and hurts himself"

30. On 21st June 2019, the intervenor sent more photographs to the mother. They showed a bruise, swelling and scratch to the forehead above EF's left eye.

31. On 9th July 2019, EF spent the morning and afternoon in his mother's care. The intervenor returned from work at 5.00pm. The mother left the flat at around 7.50pm to go to a dance class, leaving both EF and DC in the intervenor's sole care. Shortly after the mother had left, the intervenor sent her the following text:

> "Yeah we are all good I'm the only one awake"

32. At 8.55pm, the intervenor telephoned emergency services stating that EF had collapsed. The ambulance arrived at 9.10pm and EF was taken to King's College Hospital, accompanied by the intervenor. The paramedics reported that EF had been in and out of seizures for 40 minutes prior to arrival at A&E. Upon arrival, he was given immediate treatment for dilated pupils and was rushed into CT. The CT scan revealed significant brain swelling and acute subdural bleeding. EF underwent two decompressive surgeries overnight which were unsuccessful. He was then placed into an induced coma.

33. On admission, doctors noticed the following on EF's body: petechial spots on the forehead and around the eyes, red marks around the nostrils and the back of the left ear, a red mark on his left cheek and a red mark on his left shoulder.

34. Following EF's admission to hospital, a family arrangement was made whereby DC was placed with the intervenor's parents.

35. On 10th July 2019, a strategy meeting was held at the hospital attended by the police, children's services and medical professionals. The medical opinion was that EF's injuries were non-accidental. Following the meeting, the intervenor was arrested for Grievous Bodily Harm with intent. Both the intervenor and the mother were interviewed by the police.

36. On 11th July 2019, DC underwent a child protection medical. No concerns were raised regarding his physical health.

37. Care proceedings were issued on 18th July 2019 by the local authority and DC was made the subject of an Interim Care Order on 26th July 2019.

38. Tragically, EF died as a result of his injuries on 22nd July 2019. The intervenor was arrested on 23rd July 2019 on suspicion of murder. The mother was also arrested on suspicion of causing or allowing the death of a child. The parties were subject to bail conditions which included no direct or indirect contact between them. On 23rd October 2019, the local authority was informed that the bail conditions had been removed with both the mother and intervenor still under investigation.

39. As doubts had been raised by the father regarding the intervenor's paternity of DC, further DNA testing was undertaken of the intervenor and father. On 14th August 2019, the test results confirmed that the father was DC's biological father. DC was moved to the care of the maternal grandparents on 26th September 2019 where he has remained ever since.

40. On 29th June 2020, shortly before the start of the initial fact finding, the intervenor filed an updating statement. He changed his account and stated that EF had not been well and had been acting strangely when he had arrived back to the flat after work on the day of the incident. He suggested that EF must have suffered a serious injury whilst in the care of the mother in the afternoon, as well as the fall that he had witnessed in the evening. The mother filed a statement in response challenging this new account. She said that EF had been well all day, and up until she had left him in the intervenor's care that evening.

41. The first fact finding hearing commenced on 29th June 2020 and was stayed by the Court of Appeal on 21st July 2020. The court heard from all the witnesses except the intervenor. During that hearing, the mother and the intervenor confirmed that they had continued their relationship throughout the proceedings and had recently become engaged.

42. The matter was remitted for a rehearing before me following a successful appeal.

The Law

43. There are a number of legal principles that I need to apply when determining whether and, if so, what findings of fact I should make in this matter.

44. The burden of proof lies with the local authority. It is the local authority that brings these proceedings and identifies the findings they invite the court to make. Therefore, the burden of proving the allegations rests with them.

45. In family proceedings there is only one standard of proof, namely the balance of probabilities. This was described by *Denning J in Miller v Ministry of Pensions* [1947] 2 All ER 372: "If the evidence is such that the tribunal can say: "We think it more probable than not", the burden is discharged but, if the probabilities are equal, it is not.

46. In *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2008] 2 FLR 141, Baroness Hale, while approving the general principles adumbrated by Lord Nicholls in *Re H and Others*, expressly disapproved the formula subsequently adopted by courts to the effect that 'the more serious the allegation, the more cogent the evidence needed to be to prove it'. Baroness Hale stated:

> "[70] My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under s 31(2) or the welfare considerations in s 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.
>
> [71] As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future."

47. The inherent probability of an event remains a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred: Common sense, not law, requires that in deciding this question regard should be had, to whatever extent appropriate, to inherent probabilities – per Lord Hoffman in *Re B* at para. 15.

48. The burden of disproving a reasonable explanation put forward by the parents falls on the local authority (see §10 *Re S (Children)* [2014] EWCA Civ 1447).

49. The inability of a parent to explain an event cannot be relied upon to find an event proved, see *Re M (A Child)* [2012] EWCA Civ 1580 at paragraph 16 – the view taken by the Judge was:

> "that absent a parental explanation, there was no satisfactory benign explanation, ergo there must be a malevolent explanation. And it is that leap which troubles me. It does not seem to me that the conclusion necessarily follows unless, wrongly, the burden of proof has been reversed, and the parents are being required to satisfy the court that this is not a non-accidental injury"

50. Findings of fact in these cases must be based on evidence. As Munby LJ, as he then was, observed in *Re A (A Child) (Fact-finding hearing: Speculation)* [2011] EWCA Civ 1.

> "[26] It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation."

51. Peter Jackson J, as he then was, in *Re BR (Proof of Facts)* [2015] EWFC 41 said, at paragraph 15-17:

> "[15] It would of course be wrong to apply a hard and fast rule that the carer of a young child who suffers an injury must invariably be able to explain when and how it happened if they are not to be found responsible for it. This would indeed be to reverse the burden of proof. However, if the judge's observations are understood to mean that account should not be taken, to whatever extent is appropriate in the individual case, of the lack of a history of injury from the carer of a young child, then I respectfully consider that they go too far.
>
> [16] Doctors, social workers and courts are in my view fully entitled to take into account the nature of the history given by a carer. The absence of any history of a memorable event where such a history might be expected in the individual case may be very significant. Perpetrators of child abuse often seek to cover up what they have done. The reason why paediatricians may refer to the lack of a history is because individual and collective clinical experience teaches them that it is one of a number of indicators of how the injury may have occurred. Medical and other professionals are entitled to rely upon such knowledge and experience in forming an opinion about the likely response of the individual child to the particular injury, and the court should not deter them from doing so. The weight that is then given to any such opinion is of course a matter for the judge.
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> [17] In the present case, an adult was undoubtedly in the closest proximity to the baby whenever the injuries occurred and the absence of any account of a pain reaction on the baby's part on any such occasion was therefore one of the matters requiring careful assessment"

52. He then set out a list of risk factors and protective factors that might assist the court in assessing the evidence it hears in cases of alleged inflicted injury. At paragraph 18, he said:

> "In itself, the presence or absence of a particular factor proves nothing. Children can of course be well cared for in disadvantaged homes and abused in otherwise fortunate ones. As emphasized above, each case turns on its facts. The above analysis may nonetheless provide a helpful framework within which the evidence can be assessed and the facts established".

53. The judge must decide if the facts in issue have happened or not. There is no room for finding that it might have happened. The law operates a binary system in which the

only values are 0 and 1, per Lord Hoffman in *Re B* at para. 2. This applies to the conclusion as to the fact in issue (e.g. did it happen; yes or no?) not the value of individual pieces of evidence (which fall to be assessed in combination with each other).

54. When carrying out the assessment of evidence regard must be had to the observations of Butler-Sloss P in *Re T* [2004] EWCA (Civ) 558:

> "[33] Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the Local Authority has been made out to the appropriate standard of proof."

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

> "[101B] I must now put this into perspective by noting, and emphasising, the width of the range of facts which may be relevant when the court is considering the threshold conditions. The range of facts which may properly be taken into account is infinite. Facts including the history of members of the family, the state of relationships within a family, proposed changes within the membership family, parental attitudes, and omissions which might not reasonably have been expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child, and unsatisfactory parental responses to complaints or allegations. And facts, which are minor or even trivial if considered in isolation, taken together may suffice to satisfy the court of the likelihood of future harm. The court will attach to all the relevant facts the appropriate weight when coming to an overall conclusion on the crucial issue."

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

57. The process by which the facts are judicially determined is further complicated for the potent reason Leggatt J (as he then was) set out in Gestmin *SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm) (15 November 2013), [paragraphs 15-21] in relation to testimony based on memory:

> "An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of

> psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate."

58. Leggat LJ additionally made the following observations as to demeanour in *R (on the application of SS) (Sri Lanka) v The Secretary of State for the Home Department* [2018] EWCA Civ 1391:

> "36. Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge".

59. That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval:

> "I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help."
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> …
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> 40. This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is

> that skilful questioning can expose inconsistencies in false stories."

60. The findings made by the judge must be based on all the available material, not just the scientific or medical evidence; and all that evidence must be considered in the wider social and emotional context*: A County Council v X, Y and Z (by their Guardian)* [2005] 2 FLR 129. This was expressed as the expert advises and the judge decides in *Re Be (Care: Expert Witnesses)* [1996] 1 FLR 667.

61. In *A Local Authority v K, D and L* [2005] EWHC 144 (Fam), [2005] 1 FLR 851 Charles J referred to the important distinction between the role of the judge and the role of the expert (see paragraph 39), saying:

> "(a)that the roles of the court and the expert are distinct, and
>
> (b)that it is the court that is in the position to weigh the expert evidence against its findings on the other evidence, and thus for example descriptions of the presentation of a child in the hours or days leading up to his or her collapse, and accounts of events given by carers."

62. These comments were developed by Charles J in a lengthy section in the judgment in Re K, D and L by a review of the relevant case law in the area. For present purposes, the court may find it useful to consider two short passages from that judgment:

> "[44] …in cases concerning alleged non accidental injury to children properly reasoned expert medical evidence carries considerable weight, but in assessing and applying it the judge must always remember that he or she is the person who makes the final decision;"
>
> "[49]…In a case where the medical evidence is to the effect that the likely cause is non accidental and thus human agency, a court can reach a finding on the totality of the evidence either (a) that on the balance of probability an injury has a natural cause, or is not a non accidental injury, or (b) that a local authority has not established the existence of the threshold to the civil standard of proof ;"

63. The conclusion reached by Charles J (following his judicial summation of the relevant case-law in this area) is to be found at paragraph 63, where he said:

> "I am therefore able to reach a conclusion as to cause of death and injury that is different to, or does not accord with, the conclusion reached by the medical experts as to what they consider is more likely than not to be the cause having regard to the existence of an alternative or alternatives which they regard as reasonable (as opposed to fanciful or simply theoretical) possibilities. In doing so I do not have to reject the reasoning of the medical experts, rather I can accept it but on the basis of the

> totality of the evidence, my findings thereon and reasoning reach a different overall conclusion."

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

65. The court is not precluded from making a finding that the cause of harm is unknown. The judgment of Hedley J in the case of *Re R (Care Proceedings: Causation)* [2011] EWHC 1715 (Fam) sets this out:

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

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

67. So far as the identification of perpetrators is concerned, that issue was considered in detail in the Supreme Court case of *Re S-B* [2009] UKSC 17. The standard of proof with respect to any such identification is the balance of probabilities:

> “34. The first question listed in the statement of facts and issues is whether it is now settled law that the test to be applied to the identification of perpetrators is the balance of probabilities. The parties are agreed that it is and they are right. It is correct, as the Court of Appeal observed, that Re B was not directly concerned with the identification of perpetrators but with whether the child had been harmed. However, the observations of Lord Hoffmann and Lady Hale, quoted at paragraph 12 above, make it clear that the same approach is to be applied to the identification of perpetrators as to any other factual issue in the case. This issue shows quite clearly that there is no necessary connection between the seriousness of an allegation and the improbability that it has taken place. The test is the balance of probabilities, nothing more and nothing less. ”
>
> 35. Of course, it may be difficult for the judge to decide, even on the balance of probabilities, who has caused the harm to the child. There is no obligation to do so. As we have already seen, unlike a finding of harm, it is not a necessary ingredient of the threshold criteria. As Lord Justice Wall put it in *Re D (Care Proceedings: Preliminary Hearings)* [2009] EWCA Civ 472,

> [2009] 2 FLR 668, at para 12, judges should not strain to identify the perpetrator as a result of the decision in Re B:"If an individual perpetrator can be properly identified on the balance of probabilities, then ... it is the judge's duty to identify him or her. But the judge should not start from the premise that it will only be in an exceptional case that it will not be possible to make such an identification."

68. Where a perpetrator cannot be identified, the Court should seek to identify the pool of possible perpetrators on the basis of the "real possibility" test:

> "40. As to the second, if the judge cannot identify a perpetrator or perpetrators, it is still important to identify the pool of possible perpetrators. Sometimes this will be necessary in order to fulfil the "attributability" criterion. If the harm has been caused by someone outside the home or family, for example at school or in hospital or by a stranger, then it is not attributable to the parental care unless it would have been reasonable to expect a parent to have prevented it. Sometimes it will desirable for the same reasons as those given above. It will help to identify the real risks to the child and the steps needed to protect him. It will help the professionals in working with the family. And it will be of value to the child in the long run.
>
> "41. In *North Yorkshire County Council v SA* [2003] EWCA Civ 839, [2003] 2 FLR 849, the child had suffered non-accidental injury on two occasions. Four people had looked after the child during the relevant time for the more recent injury and a large number of people might have been responsible for the older injury. The Court of Appeal held that the judge had been wrong to apply a "no possibility" test when identifying the pool of possible perpetrators. This was far too wide. Dame Elizabeth Butler-Sloss P, at para 26, preferred a test of a "likelihood or real possibility"."
>
> "42. Miss Susan Grocott QC, for the local authority, has suggested that this is where confusion has crept in, because in Re H this test was adopted in relation to the prediction of the likelihood of future harm for the purpose of the threshold criteria. It was not intended as a test for identification of possible perpetrators."
>
> "43. That may be so, but there are real advantages in adopting this approach. The cases are littered with references to a "finding of exculpation" or to "ruling out" a particular person as responsible for the harm suffered. This is, as the President indicated, to set the bar far too high. It suggests that parents and other carers are expected to prove their innocence beyond reasonable doubt. If the evidence is not such as to establish responsibility on the balance of probabilities it should nevertheless be such as to establish whether there is a real

> possibility that a particular person was involved. When looking at how best to protect the child and provide for his future, the judge will have to consider the strength of that possibility as part of the overall circumstances of the case."

69. In *B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575, Peter Jackson LJ stated:

> "46. Drawing matters together, it can be seen that the concept of a pool of perpetrators seeks to strike a fair balance between the rights of the individual, including those of the child, and the importance of child protection. It is a means of satisfying the attributable threshold condition that only arises where the court is satisfied that there has been significant harm arising from (in shorthand) ill-treatment and where the only 'unknown' is which of a number of persons is responsible. So, to state the obvious, the concept of the pool does not arise at all in the normal run of cases where the relevant allegation can be proved to the civil standard against an individual or individuals in the normal way. Nor does it arise where only one person could possibly be responsible. In that event, the allegation is either proved or it is not. There is no room for a finding of fact on the basis of 'real possibility', still less on the basis of suspicion. There is no such thing as a pool of one.
>
> 47. It should also be emphasised that a decision to place a person within the pool of perpetrators is not a finding of fact in the conventional sense. As is made clear in Lancashire at [19], O and N at [27-28] and S-B at [43], the person is not a proven perpetrator but a possible perpetrator. That conclusion is then carried forward to the welfare stage, when the court will, as was said in S-B, "consider the strength of the possibility" that the person was involved as part of the overall circumstances of the case. At the same time it will, as Lord Nicholls put it in Lancashire, "keep firmly in mind that the parents have not been shown to be responsible for the child's injuries." In saying this, he recognised that a conclusion of this kind presents the court with a particularly difficult problem. Experience bears this out, particularly where a child has suffered very grave harm from someone within a pool of perpetrators.
>
> 48. The concept of the pool of perpetrators should therefore, as was said in Lancashire, encroach only to the minimum extent necessary upon the general principles underpinning s.31(2). Centrally, it does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown. This is why it is always misleading to refer to 'exclusion from

> the pool': see Re S-B at [43]. Approaching matters in that way risks, as Baroness Hale said, reversing the burden of proof.
>
> 49. To guard against that risk, I would suggest that a change of language may be helpful. The court should first consider whether there is a 'list' of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so: Re D (Children) [2009] EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is should A or B or C be placed into the 'pool'.
>
> 50. Likewise, it can be seen that the concept of a pool of perpetrators as a permissible means of satisfying the threshold was forged in cases concerning individuals who were 'carers'. In Lancashire, the condition was interpreted to include non-parent carers. It was somewhat widened in North Yorkshire at [26] to include 'people with access to the child' who might have caused injury. If that was an extension, it was a principled one. But at all events, the extension does not stretch to "anyone who had even a fleeting contact with the child in circumstances where there was the opportunity to cause injuries": North Yorkshire at [25]. Nor does it extend to harm caused by someone outside the home or family unless it would have been reasonable to expect a parent to have prevented it: S-B at [40].
>
> 51. It should also be noted that in the leading cases there were two, three or four known individuals from whom any risk to the child must have come. The position of each individual was then investigated and compared. That is as it should be. To assess the likelihood of harm having been caused by A or B or C, one needs as much information as possible about each of them in order to make the decision about which if any of them should be placed in the pool. So, where there is an imbalance of information about some individuals in comparison to others, particular care may need to be taken to ensure that the imbalance does not distort the assessment of the possibilities. The same may be said where the list of individuals has been whittled down to a pool of one named individual alongside others who are not similarly identified. This may be unlikely, but the present case shows that it is not impossible. Here it must be shown that there genuinely is a pool of perpetrators and not just a pool of one by default."

70. Where there are multiple injuries sustained at different times the court must consider separately the question of who the perpetrator of each injury is. If the court is able to identify the perpetrator of one injury, the question would then arise as to the extent to which the court is entitled to rely upon that finding in order to identify the perpetrator

of other injuries. That issue was considered by the Court of Appeal in *Re M (A Child)* [2010] EWCA Civ 1467. Wilson LJ (as he then was) said:

> "37 The first basis of the cross-appeal is the father's responsibility for the October event. Is it likely, asks Miss Hodgson on behalf of the mother, that, within the space of less than seven weeks, the partial suffocation of a baby is caused by one parent and yet injuries to his body are, or even just may be, perpetrated by the other? It is certainly not unknown for judges to give a negative answer to that type of question and, by reference to it, to proceed to identify the perpetrator of a second non-accidental injury. When they do so, their reasoning is – in my view – in principle valid . . . "

71. In *R v B County Council ex parte P* [1991] 2 All ER 65 (at 72J), [1991] 1 FLR 470 at 478, Butler-Sloss LJ observed that a court presented with hearsay evidence has to look at it anxiously and consider carefully the extent to which it can properly be relied upon. When assessing the weight to be placed on hearsay evidence the Court may have regard to the matters set out in section 4 of the Civil Evidence Act 1995 even in cases (such as this one) where the Civil Evidence Act does not strictly apply.

72. Section 4 of the Civil Evidence Act reads:

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

73. The rule of *R v Lucas* [1981] QB 720 was adopted in the family courts in *A County Council v K, D and L*. The principle is that if the court concludes that a witness has lied about one matter it does not follow that he has lied about everything. A witness may lie

for many reasons, for example out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure.

74. In the criminal courts a lie can only be used to bolster evidence against a defendant if the fact-finder is satisfied that the lie is deliberate, relates to a material issue and there is no innocent explanation for the lie.

75. In the case of Re: H-C (children) [2016] EWCA Civ 136 Lord Justice McFarlane, as he then was, said this at paragraphs 98-100:

> "98. The decision in R v Lucas has been the subject of a number of further decisions of the Court of Appeal Criminal Division over the years, however the core conditions set out by Lord Lane remain authoritative. The approach in R v Lucas is not confined, as it was on the facts of Lucas itself, to a statement made out of court and can apply to a "lie" made in the course of the court proceedings and the approach is not limited solely to evidence concerning accomplices.
>
> 99. In the Family Court in an appropriate case a judge will not infrequently directly refer to the authority of R v Lucas in giving a judicial self-direction as to the approach to be taken to an apparent lie. Where the "lie" has a prominent or central relevance to the case such a self-direction is plainly sensible and good practice.
>
> 100. One highly important aspect of the Lucas decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the "lie" is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in Lucas, where the relevant conditions are satisfied the lie is "capable of amounting to a corroboration". In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of R v Middleton [2001] Crim.L.R. 251.
>
> In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt."

Medical Experts' Evidence

76. The court heard from a number of medical experts at the first fact finding hearing. They were not required to give evidence at this hearing. I have considered both their written and oral evidence which has been transcribed. I have read the transcripts carefully. Some of the oral evidence was not transcribed as certain audio files were not able to be retrieved. I am, therefore, grateful for the agreed notes of the missing oral evidence prepared by counsel.

77. The medical experts can be categorised into three categories:

    i) Court appointed medical experts:

        a) Dr Croft, Paediatrician;

        b) Dr Johnson, Paediatric Radiologist;

        c) Professor Sellar, Neuroradiologist;

        d) Dr Cary, Pathologist;

        e) Mr Jayamohan, Paediatric Neurosurgeon; and

        f) Dr Keenan, Paediatric Haematologist.

    ii) Experts instructed by the police:

        a) Dr Marnerides, Perinatal and Paediatric Pathologist;

        b) Dr McParland, Paediatric Pathologist;

        c) Professor Mangham, Histopathologist; and

        d) Professor Al-Sarraj, Neuropathologist.

    iii) Treating Clinicians:

        a) Mr Aclimandos, Ophthalmology Consultant;

        b) Dr D'Silva, PICU Consultant;

        c) Dr Sa'addedin, A&E Consultant;

        d) Dr Shamoun, Paediatric Registrar; and

        e) Jennifer Ives, Paediatric Nurse.

Experts' meeting

78. The experts' meeting was held on 11th June 2020. It was attended by Professor Sellar, Dr Cary, Dr Croft and Mr Jayamohan. The meeting was held before the parties were made aware of the intervenor's revised account. There was consensus on the following:

    i) a fall was a theoretically possible mechanism, but it was an unlikely explanation for many reasons;

    ii) the probable mechanism for the injuries was likely to be a combination of shaking and impact. One or the other could not be ruled out;

    iii) there was a clear and sudden change to the brain and a time estimate of a couple of hours was compatible with this change.

iv) if the court did find that the child was well when the mother left at 8pm, then the injury would likely have happened after 8pm and not before;

v) not able to be definitive about either the scar on the back or the scratches on the leg.

Dr Cary

79. Dr Cary's view in his final post-mortem report was that EF's death was due to complications arising from a head injury characterised by a widespread volume subdural haemorrhage. He stated that although it was very occasionally possible to get a fatal subdural haemorrhage accidentally in a domestic environment, in this particular case it was inherently unlikely as the reported fall was from a standing height of 85cm. The nature and extent of the damage to the eyes made this particularly implausible. Although retinal haemorrhages may be seen in accidental head trauma, the fall would have to have been from a substantially greater height. In his opinion, the totality of the medical findings was explicable on the basis of inflicted head trauma such as being thrown onto a carpeted floor.

80. A final addendum report was produced to address the change in the intervenor's account and the possibility of a blood clotting disorder. Dr Cary concluded the following:

> "In my opinion on the balance of probabilities a blood clotting abnormality does not account for the pathological findings in relation to head injury in this case. Over and above this the other findings such as facial bruising at presentation and past bruises are much more typical of abusive injuries, as described, than spontaneous bruising with an underlying blood clotting disorder. Furthermore, a blood clotting disorder could not account for the abrasion injury to the ear nor the area of historic trauma to the thoracic spine. The further statement of KL does not cause me to alter my opinions. Whatever did or did not happen prior to impact with the carpeted fall it would still constitute a low-level fall in a domestic environment."

81. In his oral evidence, he was asked to consider the evidence that the first respondent had given regarding a deteriorating head injury with seizures for 40 minutes. Dr Cary stated that he would not have expected an injury 4-5 hours earlier. The seizures in the ambulance were a common early manifestation of brain injury and a good marker of proximity to a serious trauma to the brain.

82. Under questioning from mother's counsel, Dr Cary stated a lucid interval was unlikely with this type of brain injury with a low volume subdural haematoma. He also stated that it was incredibly difficult to produce fatal force in a domestic environment. He agreed with Mr Jayamohan that some form of impact was likely.

83. Dr Cary said that the appraisal of a platelet disorder was vanishingly rare. In these types of cases, it was usually not possible to exclude a whole range of rare disorders. In any event, the three invasive surgical procedures without obvious problems supported the absence of a bleeding disorder.

84. When questioned about the bruising, Dr Cary expressed caution relating to the cause of soft tissue injuries. However, where injuries were observed between the head and the point of the shoulders ("the triangle of safety"), he said it would be concerning if there was no adequate explanation.

Dr Marnerides

85. In Dr Marnerides' report, his view was that EF's death was due to a traumatic brain injury of impact type. In his oral evidence, he said he could find no natural disease to account for death and deferred to Professor Al-Sarraj regarding the effect of the impact.

Professor Sellar

86. In his report, Professor Sellar opined that EF's CT scan showed acute subdural blood in multiple sites which were less than 10 days old. He could not find any features of rare metabolic or inherited diseases. He concluded:

> "The combination of subdural haemorrhages in multiple sites with accompanying encephalopathic changes in the absence of any documented accidental trauma is suggestive of non-accidental injury."

87. In his oral evidence, he agreed that an impact was likely but also suggested that there had been some shaking, given the pattern of a multi-compartmentalised subdural haematoma. He identified an area of disagreement relating to whether there were widespread subdural haematomas rather than one haematoma which had spread.

88. According to Professor Sellar, the retinal haemorrhages suggested a major brain trauma. He suggested that the presentation observed at the hospital could have come in a matter of 1-2 hours. This fitted with the proposition of something more serious than a standing fall. Given the black brain observed (half of the brain that was not working), he would have been very surprised if EF was conscious after the impact and stated that he certainly would not have been playing with his toys.

89. As the scan took place at 10.12pm and the emergency services were called at 8.55pm, this fitted with the mother's account of seeing EF behaving normally when she left approximately at 7.50pm.

Mr Jayamohan

90. Although in his initial report, Mr Jayamohan suggested that if EF had stiffened up and fell backwards, then a fall of that type could be associated with the injuries seen, this opinion was given before the intervenor's changed account.

91. In response to Dr Keenan's report and the suggestion of a blood disorder, Mr Jayamohan said the following:

> "There remains the possibility that EF may have had an abnormal clotting profile. If this is the case, it may have increased the amount of bleeding in the subdural space. If very severe, then I would need to consider spontaneous bleeding as a possibility. However, whatever the level, it would not explain

> the same-sided brain swelling, nor would just the blood explain the clinical history and progress. There remains in my opinion a further contribution from a trauma – and this remains impact to explain the brain findings, more than a shaking injury."

92. Mr Jayamohan addressed the intervenor's updated statement in a second addendum report. He said that he had very little belief that this was a realistic proposition and concluded it very unlikely for there to have been two separate impacts to cause EF's brain findings.

93. During the course of his oral evidence, Mr Jayamohan was asked to consider a paper that had been sent on behalf of the intervenor. It described a study into double impact injuries suffered by American footballers. He did not accept the relevance of the paper given EF's age and the type of mechanisms involved. He had never seen this level of brain injury from low level impact. He said that he had treated thousands of children and considered hundreds of papers and had never come across a standing fall causing this type of injury.

94. He said that descriptions of EF playing and walking after the supposed first impact were not consistent with the brain injury seen. He described the notion of two causative events as a clinical stretch. When questioned about the mechanism of the injury, he said he would be extremely surprised if the injury sustained had been caused by just a shake.

95. Regarding Dr Keenan's evidence, Mr Jayamohan suggested EF had a functional clotting system as otherwise the surgeon would have commented on any unusual bleeding.

Dr Croft

96. On balance, Dr Croft considered that the head injury was inflicted. His reasoning was that there were various other injuries typical of abuse. These included the extensive ocular injuries, cervical nerve trauma and haemorrhage in the spinal canal. His view was that the injury was very likely to have occurred on the night EF was admitted to hospital. As EF's blood clotting tests showed a mildly raised international normalised ratio (INR), he recommended that a paediatric haematologist be consulted. Dr Keenan was instructed as a result.

97. In relation to the soft tissue injuries, he considered some to be inflicted whilst for others he was not able to say. The bruises he considered to be particularly indicative of inflicted injury were those to the face, ears, abdomen and the back.

98. In his final addendum report, he concluded:

> "Considering the experts' meeting and description of severe brain injury as well as the many soft tissue injuries typical of abuse, I consider that even if a platelet disorder had been present it probably would not have caused the complex pattern of injury, eventually fatal. Dr Keenan could be asked whether to his knowledge such platelet disorders have been known to cause fatal head injury after a low-level domestic fall. I do not consider

that KL's report provides new insight into the cause of the injuries."

99. In his oral evidence, Dr Croft confirmed that the head injuries seen were highly unlikely to have been caused by falling from a standing height. He deferred to the other experts regarding the likelihood of impact but felt that there were features of shaking. He stated that there was rarely a lucid interval with this type of brain injury. He agreed with Mr Jayamohan's view that there was a real proximity between the injury and rapid neurological decline.

100. Dr Croft confirmed his view as expressed in his report that small and especially bilateral facial bruising was very typically seen in abused children. Furthermore, he did not consider that EF would have had the strength to cause bruising by striking himself in the face with a toy. Neither did he consider that the facial injuries were caused during neurosurgery. However, he did express caution about interpreting and commenting upon bruises seen in the non-professional photographs taken by the father, the mother and intervenor.

Professor Al-Sarraj

101. In his report Professor Al-Sarraj considered that the subdural haematoma had to be considered traumatic in origin due to a lack of evidence for other explanations. He advised that the impact on the head that caused the subdural haematoma could have resulted from an inflicted injury or a fall. In the latter case, rather than a simple fall it would have to be caused by a significant impact that would lead to higher magnitude of acceleration and deceleration of the brain.

102. The focus of his oral evidence was on the findings of bleeding in the spine. In short, he agreed that given the length of time from presentation at hospital to death, it was not possible to draw firm conclusions regarding the spinal and dorsal root ganglia findings.

Professor Mangham

103. Professor Mangham was asked to look at a potential fracture to EF's femur. He concluded that although he could not be certain whether the abnormality in the distal metaphyseal / diaphyseal junction represented a healing classic metaphyseal lesion (CML), on the balance of probabilities it was more likely to represent a healing CML than not. This was because it was difficult to find an alternative explanation for the abnormality.

104. In relation to the spinal cord, he concurred with Professor Al-Sarraj. Conclusions were uncertain given the length of time that EF was in hospital before his death.

Dr Johnson

105. In relation to the femur, Dr Johnson also noted an irregularity of the distal left metaphysis. From a radiological perspective, he concluded that there was no fracture and what could be seen on the images were normal features of growth in a child. He deferred to Professor Mangham as to the presence or absence of a fracture as he accepted that in some cases what appeared to be normal variants of growth on x-rays may be a fracture. He was not required to give oral evidence.

Dr Keenan

106. Dr Keenan reported that the results of EF's results of the PFA screening test were in the range seen in the severe platelet function disorders, Glanzmann's thrombasthenia and Bernard Soulier Disorder. Both conditions were very rare and seen in 1 in 1,000,000 of the general population. The definitive test to diagnose or exclude both disorders was not performed as no blood clotting tests could be performed after death. As these conditions were very rare, it followed that even with this single abnormal result it was still probable that these conditions were not present and that there was no explanation for the bleeding seen in EF.

107. In his oral evidence, Dr Keenan confirmed that platelets tests were not particularly reliable and produced false positives. It was more probable that the result was a false positive. He was more cautious about the conclusion that as there had been no obvious problems during invasive surgery: this was further evidence of a reduced chance of a bleeding disorder.

Dr McPartland

108. Dr McPartland concluded the following when analysing the retinal haemorrhages:

> "The ocular findings would also be consistent with traumatic head injury, with the predominance of left sided pathology being consistent with greater injury to the left side of the head."

109. Whilst giving her oral evidence, she confirmed that the findings were consistent with traumatic head injury, and the ophthalmological findings were a more extensive pattern than would be expected from a low-level domestic fall. Regarding the mechanism of the injury, she could not say more than it was a severe movement trauma. The type of injury seen in EF (optic nerve sheath haematomas) was also more common in abusive head trauma injuries than accident impact. As no papilloedema were found, this was a contra-indicator for Terson's syndrome which had been raised as a possibility by Mr Aclimandos.

Mr Aclimandos

110. In his written evidence, Mr Aclimandos was of the view that as scattered haemorrhages along both retinas were found, these were not typical of shaking but more likely secondary to the sudden rise in intracranial pressure, known as Terson's syndrome. The key issue in Mr Aclimandos' oral evidence was the cause of the raised intracranial pressure. Although the acceleration and deceleration process identified by Dr McParland was consistent with significant impact injury, he did not know of an impact injury that would cause this sort of retinal haemorrhaging.

Lay Evidence

111. The court heard from three members of the intervenor's family at the first fact finding hearing. The intervenor's brother, QR, denied having an unfavourable view of the mother when questioned by her counsel. He did agree that the intervenor and the mother's relationship had at times been a source of tension in the family, as at the beginning they had felt that the mother was using the intervenor. He confirmed that he

thought the mother had been controlling and that the intervenor had been out of his depth. He expressed surprise at their engagement. Overall, he felt that the intervenor had been a very good stepfather and he had been impressed by the intervenor's interactions with EF. He described the intervenor as a gentle person who had a lot of self-control. He was not a violent person prone to losing his temper.

112. The intervenor's sister, OP, wrote a lengthy statement, which provided a great deal of detail on her family's experience with the mother. She had not had a first positive impression of the mother as like her brother, she had felt that the intervenor was being used by the mother. An example she gave was when EF had been left in the intervenor's care whilst the mother had gone to get her nails done. Another example was that the intervenor had to go out and get basic necessities for EF such as nappies whenever he went round to the mother's flat.

113. OP also criticised the mother for not taking care of EF when she was staying at the intervenor's family home. She stated that on several occasions, the mother left EF alone in the lounge without telling anyone. On another occasion, the mother had left EF on his own on the landing whilst she had gone to have a bath. OP also told the court that she had had to go out and get food for EF one evening as the mother had not fed EF.

114. Unsurprisingly, she gave a far more positive impression of the intervenor. She said that as a family, they were all very close to the intervenor. He had taken to parenting naturally and he had a very loving relationship with EF. She did not think that the intervenor was capable of hurting a child and she felt that he had been manipulated by the mother. Her view was that the intervenor had given an incorrect first account as he was protecting the mother. She denied putting any pressure on him to change his story and said that he had confided in her after speaking to his solicitors.

115. When questioned by the mother's counsel about this sudden and late change in account, she said that the intervenor had told her that he had lied in his original statement and wanted to give a true account. She had assisted him in writing the new account as he had been too upset to do it himself. When he had returned home on the 9th July 2019, the intervenor told her that he had been surprised that EF had not come running to the door as he usually did. EF had been propped up against the wall in the bedroom and his eyes had been glazed over. When questioned by the intervenor, the mother had told him that EF was just tired. OP said that the intervenor had told her that EF's legs had been making jerking movements.

116. Regarding the incident itself, the intervenor had told her that he was in a separate room to EF feeding DC. He heard a noise coming from the living room and as he went into the doorway, he saw EF fall on the floor, landing on his head and shoulders.

117. The intervenor's mother, MN gave evidence at the first hearing and before me. Like her other children, she had initially not warmed to the mother, especially when she found out that the mother had continued her relationship with the father whilst in a relationship with the intervenor. She gave similar examples to OP when describing the mother's parenting of EF. On one occasion she had even told the mother not to use her house like a hotel. Her relationship with the mother improved after the birth of DC.

118. She described her son as besotted with the mother. He was a very loyal person who had been trying to protect his family. He had loved EF as his own child and had not treated

him any differently to DC. She also denied that the family had put any pressure on the intervenor to change his account. She did not think that her son would lose control and said that if he was stressed, he would normally just pace up and down or walk away. She said that she had not extensively questioned the intervenor about the incident as she found it too distressing.

119. It did not seem to me that she had been told the full extent of the bruising that EF had suffered during the course of 2019. The one that had upset her the most was the bruising to the ribs. The intervenor had been concerned about the injury and had rung her to discuss it. She could not remember if they had discussed any other bruising but thought that this might be because the other injuries could be explained as everyday bruises commonly found in toddlers. She expressed shock at the police photographs of the flat and said that when she had been around it had not been as messy.

120. I also heard from ST, the maternal grandmother. This was the second time that she had given evidence. When questioned about the bruising to EF's ribs, she said that she had told the mother to seek medical advice as soon as she was sent a photograph. When asked if she was surprised by the mother waiting a month before going to her GP, she admitted that she would have gone about it differently, although she was under the impression that the mother had, at least, called 111.

121. ST said that she had started to get worried when she saw that EF had more bruising on his face. She confirmed that she had not known the full extent of the bruising. She had been under the impression that the intervenor was not looking after EF alone. She had not even known that the intervenor had been living at the mother's flat. When she had seen the intervenor interact with EF, she was complimentary about his parenting. Along with her husband, she saw the mother and EF on average 2-3 times a month, so she had relied on the mother to tell her what was happening with EF.

122. In cross examination, the mother told the court that she and the intervenor had ended their relationship in August 2020, shortly after the first fact finding hearing. She confirmed that she had changed her position regarding the incident on 9th July 2019. At the first fact finding hearing, although confusingly filing a statement stating that the intervenor was responsible for the injuries, she had said in evidence that she was keeping an open mind. She had even sent a text to the intervenor on 1st July 2020 saying that he had done nothing wrong. However, after further reflection and considering the totality of the evidence, she told me that she now definitively believed that the intervenor had caused the fatal head injury.

123. I did not find the mother to be a reliable witness. She accepted that she had told numerous lies throughout these proceedings. She had lied to the father about the full extent of her relationship with the intervenor. She had not told her mother that the intervenor was living at her flat. She had continued the relationship and seen the intervenor in the summer of 2019, in breach of her bail conditions. She had also lied to the police about the number of times that EF had been in the sole care of the intervenor.

124. At the first hearing, the mother had said that the more serious bruising had happened in the father's care. When questioned before me, she seemed to maintain this position but also said that the intervenor was responsible for the bruising that had happened in his care. Although she said that the intervenor had progressed as a parent, she accepted that he had also sent her a number of emotive texts expressing his frustrations with

parenting. He could at times be quite sensitive and on one occasion she had seen him punch a wall and on another a door. The mother agreed that she had been under financial strain in 2019 and had asked to borrow money on multiple occasions from friends and family. On reflection, she said that there had been a number of red flags regarding the extent of the bruising and she conceded that she had taken an unacceptable risk leaving EF in the intervenor's sole care.

125. The mother agreed that a worrying pattern had started from April 2019. However, she did not take responsibility for the majority of bruises seen on EF:

i) she said she had seen bruising to EF's ribs on 6th April 2019, the day that EF was returned by the father to her care. She said that she had raised this injury with the father on Facetime telephone calls on 7th and 9th April 2019, before sending the photograph to him on 10th April 2019. She could not explain why she had waited four days to send the father a photograph of the bruising. Neither could she explain why the father had not texted her about the bruising until after 10th April 2019;

ii) she first saw the mark on EF's back on 8th April 2019. She said that she informed the father on a WhatsApp call the following day. She could not give a credible explanation for why she had only taken a photograph of the marks a week later on 16th April 2019 and then only sent a photograph to the father on 5th May 2019. She could not explain why she did not mention the back injury whilst discussing the rib bruising with her mother and the father on 10th April 2019. Neither could she tell me why there were no records of the back injury in the nursery notes nor the health visitor notes despite having raised the injury with them. Although she claimed she had phoned 111 for both the back and bruises, no record of a phone call could be found;

iii) she said she had not caused the bruises seen in photographs taken by the father on 18th April 2019. She accepted that these could not have been caused by EF hitting himself with toys, a reason she had given to the police, and that the intervenor had EF in his care on 17th April 2019;

iv) she denied causing the bruise to EF's cheeks and scratches to his nose seen in the photograph on 26th April 2019. She denied that these could have been caused by her grabbing his cheeks;

v) she could not give an explanation for the bruises seen on EF's cheeks on 11th, 25th and 29th May 2019. She agreed that they could not be caused by EF walking into doorframes. She agreed that EF had spent time in the intervenor's sole care before these dates;

vi) the bruise seen to the side of EF's nose on 8th June 2019 was caused whilst EF was in the intervenor's care. She had accepted his explanation that it had been caused whilst EF had fallen over whilst playing with the intervenor. She had been on a night out with her friends when it happened; and

vii) she said that he injury seen on EF 's forehead on 21st June 2019 had occurred in the intervenor's care. EF had been playing with his toy truck, caught his leg and then fallen face first on the carpet.

126. The only injury that the mother seemed to accept had occurred in her care was a mark seen on EF's left shoulder when in hospital. She said that this had happened when EF had been alone in the sitting room. Whilst reaching for the Wii controller on a shelf, the Wii console and a cup of batteries had fallen down and she believed that this had hit him on the shoulder. When questioned why she had subsequently told the father that the mark had been caused by EF lying on a toy, she gave the unlikely response that this had also occurred a few days later on exactly the same spot on EF's shoulder. Regarding the other injuries seen in the hospital, the mother denied that they had happened in her care.

127. In her evidence, the mother was clear that on 9th July 2020, EF had been well during the day. Although there were some discrepancies in her different accounts given to the police and the hospital about the detail of that day, this could be explained by her state of shock and remembering details after the event. She said that EF had his nap from 1.00pm until 4.00pm. When the intervenor came back from work at 5.00pm, she was halfway feeding EF. EF heard the door and ran up to greet the intervenor. EF was then on his iPad until his bath time at 7.00pm. When she said goodbye to him at 7.50pm, she left him on his iPad watching Paw Patrol.

128. The first account she heard about the incident was when the intervenor called her and asked her to come to the hospital. The intervenor told her that EF had had a seizure. He had been with EF in the living room playing with him. He had gone to the bedroom to check on DC as he had started crying. When he came back to the living room, he saw EF tumbling and then falling on the floor. The mother agreed that the intervenor had then told her a different account at the hospital. In this account he had heard a thud in the next room before entering it and had seen EF tense before falling. She said that she had questioned the intervenor about this, and he had told her that he had heard a thud first. She could not explain why she had added more detail about that day during her second interview with the police on 23rd July 2019.

129. In his evidence, the father spoke movingly about EF. He told the court that EF was one of those children that left an impression on you. He remembered fondly his smile, laughter and cheekiness. He said that EF had been a very happy boy and a joy to be around.

130. Regarding his relationship with the mother, he said that it had ended in February 2019. He became aware of the intervenor when he had moved in with the mother in her new flat in October 2018, but the mother had told him that he was a friend who stayed in a separate room. The mother had originally told him that he was DC's father and had only sent him the scan saying that the intervenor was the father in December 2018. He had hoped to save their relationship by asking her parents for permission to marry him in January 2019.

131. He had first become concerned about EF's bruising in November 2018 and had agreed with the mother that they needed to start documenting the bruises so that a record could be kept. He said the bruises recorded on 2nd September 2018 and 14th March 2019 had happened in his care. He accepted that EF would bang his head against the bars of his play pen and that this could be a potential explanation for the bruises recorded on 7th and 9th November 2018. He had not noticed any bruising on EF on 6th April 2019. The first time he was told about the bruising to the ribs was when the mother had sent him a photograph on 10th April 2019, citing this as a reason for EF to not go to the father's

care the following day. The mother had not told him about the bruising during phone calls on 7th and 9th April 2019, those conversations had been about constipation and the mother contacting his daughter's mother. He had not seen any photograph of the marks on EF's back until 5th May 2019.

132. A family meeting had been held in early May 2019 to discuss disagreements around EF 's care. His family had brought up the issues with bruising which the father says were dismissed by the mother and the paternal grandfather. He had been worried about the bruising seen on EF in May and June. When questioned why he had not reported this to social services, he said that he had been worried that the mother would stop his contact with EF. He expressed regret about this and felt that with the benefit of hindsight, he had not been sufficiently protective of his son.

133. The father's recollection of the account given by the intervenor regarding EF's injury on 9th July 2019 was that at the hospital the intervenor had said that he had heard a thud before going into the living room and had seen EF having a seizure.

134. Unlike both parents, the intervenor had not given evidence at the first hearing, so this was his first time in the witness box. He said that his relationship with the mother had started in May 2018. A few weeks later, he had introduced her to his parents. He had not been aware that the mother had continued her relationship with the father and had been upset when he had found out that there were doubts around DC's paternity. He had organised the paternity test himself. When the results had come back, he had been upset by the mother's reaction to the news that he was the father. He told me that he had been besotted with the mother. He had been desperate to make their relationship work. As a result, he had not been able to see that she had treated him badly. The relationship ended in August 2020 as he had not been aware of the extent of the mother's unfaithfulness until he had heard all the evidence at the first fact finding hearing. He felt that he had been strung along by the mother.

135. The intervenor said that both him and the mother had been under financial pressure and had at times struggled with the care of two young children. Despite this, the period leading up to EF's death had been the best time of his life. Under cross examination, he admitted that he was a sensitive person. He often exaggerated his feelings in texts to the mother and could become quite emotional if she did not respond to his messages. He said that he had acted immaturely during certain periods. However, he was not the type of person who would lose his self-control or his temper with the two children.

136. He no longer sought to blame the father for any of the unexplained bruising seen on EF from April onwards. He had been told by the mother that the more serious bruising had happened in the father's care. He had believed her as she had convinced him, and it was easier to place the blame on the father. Upon reflection, he felt that the mother was in fact responsible for most of the bruising. He agreed that the mother's explanations about EF hitting himself with toys or running into doorframes were not possible after hearing the medical evidence.

137. An agreed schedule of care detailed that the intervenor had been alone with EF on at least 15 occasions. When pressed by counsel for the local authority, he admitted that this was incorrect. He estimated that it had been closer to 30 occasions.

138. The intervenor said the following on the injuries sustained by EF after April 2019:

i) he was with the mother when they saw the bruising to EF's ribs. He could not remember if it was on 6th April 2019. He agreed that it would be strange if they had waited four days before discussing it with other people. He remembers phoning his mother shortly after to discuss it and sent her a photograph of the bruising on 11th April 2019. As the injury had not occurred in his care, he believed that it must have happened in the mother's care;

ii) he does not remember the first time he saw the injury to EF's back but remembered that he had seen it after the rib injury. The mother had sent him a photograph of the back on 16th April 2019 and he had commented on it, he thought it might be shortly before that date. Again, he believed that the marks must have happened in the mother's care;

iii) regarding the bruising seen on EF's cheeks and forehead in April and May 2019, he admitted that EF had been in his care shortly before those injuries were recorded. However, they had not happened under his supervision. A possible explanation for some of the bruises might be that the mother had grabbed EF's cheeks when taking objects out of his mouth;

iv) the bruise seen to the side of EF's nose on 8th June 2019 was caused whilst EF was in his care. He had been playing in the hallway of the flat, EF had caught his foot on a shoe, tripped and bumped his head. He had subsequently sent a photograph of the bruise to the mother; and

v) the bruise on the 29th June 2019 happened when EF was playing on his tractor, tripped and fallen on his face on the carpet. His recollection was that both him and the mother had been present when this had happened.

139. Regarding the bruises seen on EF in the hospital, he suggested that the marks seen on the nose might have occurred when he was trying to open EF's mouth so that he did not bite his tongue, whilst waiting for emergency services on 9th July 2019. Apart from the mark on the shoulder explained by the mother, he did not know how the other bruises had happened. Overall, he agreed that the state of the flat was a mess and not a safe environment for two young children.

140. I did not find the intervenor's account of the incident on 9th July 2019 convincing. The first account that he gave to emergency services, staff at the hospital and the police was that when he had come back from work, EF had been well. He had been playing with his toys and running around the house before the mother went out to her dance class. He changed his account a year later before the first fact finding hearing. The reason he gave for this was that he had been trying to protect the mother.

141. His revised account set out in his lengthy statement of 29th June 2020, stated that when he got back from work, EF had in fact been visibly unwell. EF appeared lethargic and was not responsive when eating his food. Before the mother left for the dance class, he had put EF in his cot. He noticed that EF was acting unusually, lying on his back with his mouth slightly ajar. One of his legs was making a jerky movement. He repeatedly asked the mother if something was wrong with EF, but she said that nothing unusual had happened that day. Before she left, the mother placed EF on the bed, propping him up against the wall. The intervenor described EF as being unsteady on his feet and staggering towards him. He placed him on the sofa of the living room, propped up.

Whilst feeding DC in the bedroom, he heard a dragging noise from the living room. As he walked into the room, he saw EF's head impact the floor. He called emergency services and attempted to rouse EF by pinching his leg and rubbing his chest.

142. In his statement of 29th June 2020, the intervenor did not make any reference to the initial accounts he had given the 999 operator, the paramedics or the police. During his oral evidence, however, and for the very first time, he asserted that in the brief moment between EF's catastrophic collapse and him telephoning the emergency services, he said he decided to lie about EF's condition that evening. Instead of saying that EF had been unwell from the time he arrived at the mother's home from work (his revised account), he decided to say that EF had been well, playing with his toys and running or walking about the flat prior to his collapse. He explained that he had decided to lie to protect the mother because, he said, he feared she had done something to EF before he had come home.

143. There are a number of problems with this second revised account:

i) the intervenor, despite being warned of the potential adverse consequences, could give no explanation for why this second revised account had not been set out in his statement of 29th June 2020;

ii) far from protecting the mother, the intervenor needed to give an explanation for his initial accounts to the emergency operator, the paramedics and the police because these were contrary to and contradicted his first revised account;

iii) in his statement dated 29th June 2020, the intervenor had asserted that in describing EF as well on the evening of 9th July 2019, he had been following the mother's lead and gave the account that the mother had given to the family at hospital on the night of EF's admission. This explanation is contrary to the reason the intervenor gave for lying to the paramedics and the police; and

iv) as Mr Tughan QC, leading counsel for the mother, put to the intervenor it would have been a despicable act to have misled the emergency services about EF's condition prior to his collapse. The intervenor agreed. Whatever adverse findings I may make about the intervenor, I do not find him to be a young man who would behave in such a fashion.

144. Under cross-examination by Mr Tughan QC, the intervenor could not answer why he had told the emergency services and the hospital staff that EF had been well before his collapse. Neither could he explain why he had sent a text message to the mother shortly before the accident, informing her that the children were well. He could not explain why he had given different accounts of EF's fall to the paramedics. He could not say why he had not called 111, if EF had appeared so visibly unwell. His explanation for the different accounts of what he was reported to have said about hearing a thud and then seeing EF on the floor were not credible. He admitted that he had been texting his brother that evening about wanting to relax and play video games.

145. Although the intervenor had considered the medical evidence, his explanation for the catastrophic head injury to EF appeared to be that an incident must have happened before he returned from work, when EF was in the sole care of the mother.

Analysis

146. I am immensely grateful to all counsel and to the advocate for the children's guardian for the very comprehensive written closing submissions which were filed on behalf of each party. I have read all of them with care and have them in mind when undertaking my analysis of the evidence and in determining the findings of fact I should make in this case.

147. The medical evidence in respect of EF's catastrophic collapse on 9th July 2019 is agreed by the relevant expert medical witnesses. There is no realistic possibility that:

i) EF suffered a traumatic insult to his brain earlier in the day and his collapse in the evening followed after a low-level fall shortly before he collapsed;

ii) EF experienced a lucid interval after he had sustained serious damage to his brain. The consensus is that he would not have been remotely normal after he had sustained his head injuries and would not have been able to walk around or play with his toys; and

iii) EF's Factor VII deficiency had any bearing or impact on his brain injuries. Doctor Croft considered the deficiency was mild. Doctor Keenan considered whether there was evidence that EF suffered from the extraordinarily rare blood disorder of Glanzmann's thrombasthenia or Bernard-Soulier Disorder. On balance he opined they were not present. Moreover, EF underwent three surgical procedures and none of the surgeons reported any bleeding abnormality.

148. Accordingly, on the basis of the expert medical evidence and of all the evidence in this case, I am satisfied on the balance of probabilities and find that:

i) EF sustained ultimately fatal head injuries in the evening of 9th July 2019;

ii) he did not experience a lucid interval and his collapse would have followed immediately or very shortly after he had sustained the head injuries;

iii) there is no natural disease or disorder and there is no accidental explanation or cause for the head injuries sustained by EF; and

iv) the head injuries were inflicted by an abusive act which included impact onto a yielding surface with or without an element of shaking.

149. The father was a very measured witness of whom I formed a very favourable impression. He was plainly a loving and devoted father who greatly loved caring for EF. He was and is devastated by the tragic death of EF. The father told me that not a day goes by when he does not think about EF and what more he could and should have done to protect him.

150. The father accepted in his evidence before me that four bruises or marks seen on EF were or could have been sustained in his care namely:

i) scratches to his left leg seen on 2nd September 2018;

ii) a bruise or cut to his forehead seen on 7th November 2018;

iii) a mark on his forehead seen on 9th November 2018; and

iv) a small scab on his forehead seen on 14th March 2019.

151. The father denied he had inflicted these injuries and offered an explanation or a possible account as to how these injuries were sustained. They are all in areas of the body where young toddlers often sustain injury. I accept the father's evidence. On the balance of probabilities, I am satisfied and find that all of the bruises, marks or cuts were accidental injuries and were not inflicted. In all of the circumstances no question of a failure to protect arises.

152. In early April 2019, extensive linear bruising of EF's abdomen, over his ribs, was noted by the mother. She claimed she had seen them on the day EF was returned to her care having spent a period of staying contact with his father, namely 6th April 2019. She said she had tried to contact the father by telephone but had only been able to do so the following day. On this occasion she claimed to have a video call with the father during which she showed him the bruising to EF's abdomen. The father denied receiving a video call from the mother or being shown this bruise.

153. It is agreed that on 10th April 2019 the mother sent a photograph of the abdomen bruise to the father and to the maternal grandmother by WhatsApp message. In the days following the father sent messages to the mother enquiring how EF was doing. I am satisfied and find that the father sent these messages after he received the photograph on 10th April 2019 because this was, as he asserted, the first time he had been made aware of this bruise. It follows that I do not accept the mother's evidence that she told the father about this bruise and showed it to the father on 7th April 2019. The mother was unable to explain why she would have waited for four days before taking a photograph of this bruise and/ or waited four days before sending the photograph. The only explanation is that the mother was seeking to blame the father for this injury. She asserted in her evidence that it had been sustained when EF was in the care of the father. It had not.

154. The local authority sought a finding against the father that he failed to protect EF in respect of the multiple soft tissue injuries he had sustained especially between April and early July 2019. It is agreed that there was an increase in the frequency and/ or the severity in respect of the soft tissue injuries sustained by EF over this period of time. The father was concerned about these injuries when he saw them and when he was told about them by the mother. He had had regular discussions with the mother about what steps they could take to prevent EF receiving so many bruises. He was deceived by the mother, as I find, into believing that the mother had sought medical advice (save I accept that EF was eventually taken to have blood tests to exclude an organic explanation for the bruises). He attended a family meeting to discuss why EF had sustained so many bruises.

155. The father did not refer the matter to social services because he feared the mother would stop him having contact with EF. With the benefit of hindsight perhaps he should have done so, but the father was not privy to all of the stresses and pressures upon the mother and on the intervenor. EF died through no fault of his father. In all of the circumstances of this case I do not consider it fair, necessary or humane to make a finding that the father failed to protect EF in respect of the soft tissue injuries.

156. The mother's evidence was, I regret, wholly unsatisfactory from the start to the end. She lied serially and on serious issues throughout her evidence. I have pondered what was her motivation or her reasons for lying. I have, unusually, not being able to understand or divine the reasons, save that I am clear there are no innocent reasons. Mr Tughan QC sought to persuade me that the mother was young and made many mistakes, as she herself had said in evidence. Maybe so, but that does not begin to explain why she has lied across a broad range of issues and to so many people involved in her life and in this case.

157. By way of example only, I set out the principal lies told by the mother:

i) the mother had lied when she asserted, she had first noticed the rib bruise on 6th April 2019;

ii) she had lied when she claimed to have shown the father this bruise during a video call on 7th April 2019;

iii) in her oral evidence she claimed it was the abdomen bruise she noticed when EF returned from his father's care on 6th April 2019, whereas in her first statement she asserted it had been the lesion on the small of EF 's back that she had seen on his return;

iv) she lied when she claimed to have discussed EF's bruises with his nursery (there is no record of any such conversation) nor was any bruising to EF's abdomen notice when he attended on 8, 9 and 10th April and when on each occasion staff had changed his nappy;

v) she lied when she claimed that on 16th April 2019 the health visitor had examined EF and had seen the bruise to his abdomen and a lesion on the small of his back (there is no reference in the health visitor's records or the medical records of any such examination or of any injuries seen);

vi) she lied about having called 111 in respect of the bruising (there is no record of such call on her or the intervenors' mobile telephones);

vii) she lied when she said she had taken EF to her previous GP practice (there is no record of any such attendance);

viii) save for taking EF for a blood test in May 2019, she lied about having previously sought medical advice from health professionals;

ix) on 7th June 2019 she lied in a text to her mother when she asserted that EF had not sustained any bruises for three weeks when she knew he had. She accepted this was a lie but could not initially give a reason and then said that she did not want her mother to worry;

x) on 4th July 2019 the mother sent the father a message to say that EF had a bruise on his shoulder caused by him landing on a toy. In her oral evidence at the first fact finding hearing, the mother had accepted this was a lie. In her oral evidence at this hearing she asserted it was not a lie. She explained that EF had first injured his shoulder when he pulled a Wii control unit off a shelf and that some

days later, he had fallen onto a toy and sustained another bruise in exactly the same spot on his shoulder. This account, especially in light of her admission during the first hearing, is beyond credible; and

xi) she had claimed that some of EF's facial bruises had been caused by him hitting himself in the face with his toys or that he had walked into a door frame. The intervenor said he had never seen EF sustain bruises by either of these mechanisms. Doctor Croft considered both explanations to be implausible. I find they were, and the mother was lying.

158. The mother had a number of issues in her life which caused her great stress and pressure:

i) her financial circumstances were dire forcing her to borrow money from friends and family. KL's family members had bought the weekly food shopping for the mother and the intervenor;

ii) nevertheless, the mother joined two online betting sites in June 2019;

iii) she had DC, a new born baby to care for and experienced sleepless nights or, at least, nights where she had broken sleep and was tired;

iv) albeit a delightful little boy, EF was a lively inquisitive child who, the mother accepted, was often a challenge to care for. As the mother said in evidence, left to his own devices he would destroy the home;

v) as is evident from messages sent to her mother and to close friends, in mid-2019, the mother thought she was failing as a mother and felt she was close to a breakdown;

vi) she did not enjoy her employment;

vii) she had to deal with an emotionally extremely needy partner in the intervenor;

viii) their relationship was not a satisfying one for the mother, as evidenced by her reactivating a dating app on her mobile telephone in June 2019; and

ix) the strain in their relationship is further evidenced by the mother contacting former friends and acquaintances around this time. They included a man with whom she had not had contact for about a year. He had previously expressed a sexual interest in the mother. The mother could not give any satisfactory explanation as to why she had sought to re-establish contact with this man or other former friends and acquaintances.

159. The intervenor also had a considerable number of issues which caused him a great stress and placed him under considerable pressure:

i) although, ordinarily, a mild mannered and gentle young man, he was- as he accepted- an emotionally fragile person;

ii) he was utterly besotted with the mother and was desperate for their relationship to succeed unlike his previous relationship. The breakdown of that relationship had upset him and caused him considerable anguish;

iii) he wanted- he needed- to have a perfect relationship and a perfect family life;

iv) his messages to the mother in late 2018 and through the first half of 2019 are expressed in very emotional terms where he wanted and needed her attention and he wanted and needed her to express her love for him;

v) he had difficulties regulating his emotions which were graphically illustrated by his messages to the mother when he expressed his frustration and despondency at receiving a number of fixed penalty notices for driving offences in late 2018;

vi) more pertinently, perhaps, he sent many messages to the mother, especially in early/mid 2019, in which he expressed his frustration and disappointment at his failings in caring for EF and DC;

vii) despite having employment, he too was in financial difficulties;

viii) he too suffered sleepless or broken night's sleep with DC and found EF's behaviour at times challenging;

ix) the mother observed that, at times, the intervenor often appeared to forget that EF was only a toddler and was overly boisterous with him; and

x) from time to time, especially in the period April to July 2019, when the number of occasion when the intervenor cared alone for the boys increased, he struggled with caring for both of them as was evident from messages sent to the mother (e.g. DC has been crying for hours nonstop).

160. Further to all of this, the police scene of crime photographs and police body camera videos demonstrate that the family home was in an extremely cluttered and chaotic state. There were multiple instances in the physical circumstances of the flat which plainly presented hazardous risks to a lively young toddler like EF.

161. The intervenor was, I regret to find, an extremely unsatisfactory witness. I am satisfied on the balance of probabilities and find that he too lied throughout most of his evidence given at this hearing.

162. As I have set out above, whilst ordinarily a mild, pleasant and engaging young man, about whom the maternal grandmother had commented positively on, he was an emotionally fragile, needy and in my judgment, vulnerable young man. He struggled and struggles with regulating his emotional responses to life.

163. Both the mother and the intervenor accepted and admitted that:

i) their relationship had continued after EF's admission to hospital on 9th July and after his death on 22nd July 2019;

ii) they continued their relationship in breach of police bail conditions that they must not have contact with each other; and

iii) their relationship continued until August 2020, but they had concealed this continuing relationship from the court, from the local authority and from the children's guardian.

164. One of the more bizarre features of this case is what occurred at or before the first fact finding hearing:

i) the intervenor filed and served a statement which was a complete volte face on all of his previous accounts of the events of 9th July and in which he asserted that EF had been unwell when he returned home from work that evening;

ii) he now said, for the very first time, that EF had appeared unusually different and unwell;

iii) his case was that the mother must have seriously harmed EF during the course of the day which, for whatever reason, led to his catastrophic collapse when in his sole care;

iv) the mother responded to this statement by filing a statement on 1st July 2020 in which she asserted in no uncertain terms that it was the intervenor who had inflicted the catastrophic brain injuries to EF which resulted in his death on 22nd of July;

v) there then followed two utterly remarkable events. First, the mother, on the self-same day her statement had been filed and served sent a message to the intervenor saying, in terms, that she would defend him to the end and that he had done nothing wrong. Second, she subsequently said in her oral evidence at the first fact finding hearing that she did not believe what had been asserted in her statement of 1st July 2020 that it was the intervenor who had inflicted the fatal injuries to EF; and

vi) throughout all of this they remained in a relationship.

165. They said the relationship ended in August 2020 some weeks after the Court of Appeal had stayed the fact-finding hearing. The intervenor told me that he wanted to end their relationship because, having listened to the evidence at the first fact finding hearing, he had only then learned or realised the extent of the mother's unfaithfulness to him with the father. There was no reference to the fact that the mother, on his case, had inflicted serious and ultimately fatal injuries on the child whom he purported to love nor to the fact that the mother, on his case, had inflicted serial and serious soft tissue injuries and/ or lesions on EF.

166. The mother told me that she had the sense that the intervenor had wanted to end the relationship in August and so, to make matters easier for him, she had suggested they should end their relationship. This is the man who at one stage in July 2020 and again at this hearing she said was the person who had fatally injured her child and, on her account, had inflicted soft tissue injuries and a lesion on her elder son.

167. In the case of oral closing submissions Mr Tughan QC said he was instructed by the mother to express the grief she experiences every day at the death of EF. It may be the mother is an exceptionally reserved individual who hides her emotions from everyone,

although that is not borne out from various messages she sent to her mother and to her close friends. I simply note that those emotions were not evident throughout the mother's evidence before me nor in her actions and behaviour as described in paragraphs 162 to 165 above.

168. The traumatic, tragic and entirely avoidable death of a young and joyful toddler did not feature at all in the decision of the mother and the intervenor to separate. Neither did the future care of the surviving child, DC, who will in the future have to deal with the death of his older sibling.

169. The intervenor said that living with the mother and the boys was the best time of his life. This may now be his perception of early/ mid 2019. I am satisfied, however, that view does not reflect the reality of EF's life in his mother's home. He was a little boy who needed his mother's love and attention and who became upset when she left the home without him. He had had to cope with having a rival for his mother's affection and attention, his baby brother. DC. EF was, I regret to find, suffering physical harm in his mother's home. Both of his carers in that home, the mother and the intervenor, were struggling to cope with their lives and were under increasing pressure living in a small, cluttered and chaotic household.

170. On the night of 8/9th July 2019, neither the mother nor the intervenor had much restful sleep because DC woke several times to be fed. Both were tired. The intervenor had been at work all day before returning to the mother's home at about 5pm. It is clear from the messages passing between the intervenor and his brother, QR, that the intervenor's plans had been to relax and play computer games with his brother. First, however, he had to attend to EF and DC.

171. On the basis of the expert medical evidence, set out in the context of all the evidence available to the court, which I accept, there was no episode of inflicted trauma or injury to EF prior to the mother leaving the flat shortly before 8pm.

172. I am satisfied on the balance of probabilities that the intervenor lost control and injured EF by striking his head on a yielding surface. This abusive act may or may not have included an element of shaking. I cannot be more precise about the circumstances or reasons why the intervenor lost control nor precisely how he harmed EF, because he has chosen not to disclose the details.

173. I am fortified in coming to that clear conclusion and finding by the lies subsequently told by the intervenor about the events of the evening of 9th July 2019. Up until his statement of 29th June 2020, it had been his account that EF was perfectly well when he returned from work. It was only after all the expert medical evidence was available that he changed his story. The expert medical evidence was clear that EF had sustained a very traumatic head injury which had led to his almost immediate catastrophic and ultimately fatal collapse. There was only one possible perpetrator, the intervenor. However, rather than accept he had had a sudden and momentary loss of control and had injured EF, he embarked on producing a false account. He changed his account from EF being well when he got home to EF being unwell and lethargic for one reason only, to raise the possibility that some abusive act had been perpetrated by the mother before he had returned from work and which was the cause of EF's collapse later that evening in his care.

174. When inventing his false account, the intervenor failed to deal in his statement with the accounts he had given to the emergency operator, the paramedics and the police that EF had been well, playing with his toys and walking about the flat, just prior to his collapse. He sought to remedy this omission in his oral evidence by claiming that after having tried to rouse EF after he had collapsed and before telephoning the emergency services, he decided to lie and to say EF had been well to protect the mother. This is a lie.

175. The intervenor could not give any explanation as to why this second revised account was not set out in his statement of 29th June. This second revised account was not in any sense intended to protect the mother. It was solely intended to protect the intervenor by opening up the possibility of an earlier traumatic event in which EF was injured when he was not at home.

176. In her evidence the mother accepted she should not have left EF alone with the intervenor and that she should have taken matters more seriously. She accepted she had failed to protect EF. I agree and I so find.

177. On the basis of the expert medical evidence, most particularly the reports and evidence of Doctor Croft, I am satisfied on the balance of probabilities and I find that the following bruises, marks or lesions are inflicted injuries and were not sustained accidentally:

    i) the linear bruise to EF's abdomen (paragraph 5.b.vi of the local authority's Schedule of Findings Sought and paragraph 97 of Doctor Croft's report);

    ii) the lesion on the lower back (paragraph 5.b.x and paragraph 99);

    iii) the red mark on EF's left ear (paragraph 5.a.i and paragraph 105);

    iv) the petechial rash on both orbital areas and on his forehead (paragraph 5.a.iv and paragraph 106);

    v) the bruise on EF's left shoulder (paragraph 5.a.viii and paragraph 107);

    vi) the bruising around EF's right ear (paragraph 5.a.iii and paragraph 113);

    vii) the two small bruises around his mouth on the right side of his face (paragraph 5.a.vii and paragraph 115); and

    viii) the three small bruises to the left side of EF's face, one above the ear and two on the cheek (paragraph 5.a.ii and paragraph 116).

178. It was submitted on behalf of the mother that if I found that the intervenor inflicted the head injuries on EF, then, it being inherently unlikely that two different carers were abusing a child, I should find that the intervenor was the perpetrator of all of the inflicted soft tissue injuries. In contrast the local authority submitted that I could and should find that certain bruises were inflicted by the intervenor and the balance were inflicted by the intervenor or the mother.

179. The submission of the local authority relies on the court accepting the evidence of the mother and the intervenor that on any one occasion there was or there was not a bruise

or mark on EF when he was in the care of the mother or the care of the intervenor. I accept that the intervenor agreed that some bruising was sustained when EF was in his sole care. He gave an account of an accidental cause for each of them. I also accept that the mother and the intervenor are agreed that some of EF's facial bruises identified upon his admission to hospital were not present when the mother left home on the evening of 9th July 2019 to go to the dance class. Indeed, I am reliant on both of them to have given truthful accounts about how and when the April to July 2019 bruises were sustained.

180. In light of my earlier findings about the many lies told by the mother and the intervenor, I have no confidence whatsoever that I have been told the truth about how any of the April to July 2019 bruises, marks or lesions were sustained. In response to the mother's submission in respect of identifying the perpetrator of these injuries, I am satisfied on the balance of probabilities and so find that the mother has told so many lies, to so many people on so many occasions about EF's bruising and other soft tissue injuries, that I do not accept a word of her evidence on these issues. There is no innocent reason or explanation given by the mother for any of these lies.

181. The mother was under considerable stress and pressure at this time; of the same order as the stress and pressure under which the intervenor was living. As she herself said, in terms, in messages to her mother and to her close friends she was not coping and she was close to breaking point. She found EF's behaviour challenging. In these circumstances a loss of control would be unsurprising. Accordingly, I am satisfied and find that there is a real possibility the mother and/ or the intervenor caused some or all of the inflicted soft tissue injuries.

182. In the context of EF's death, it might be thought that the soft tissue injuries are relatively trivial. They are not. They are indicative of the abusive care EF had to endure in the last three months of his life. Many, for example, the abdominal bruise and lesion on his back, howsoever caused, are likely to have been extremely painful.

183. The number of bruises and marks sustained in the period of April to early July, aside from those I have found to be inflicted, are so numerous, even in the case of a lively toddler, that I am in no doubt and find that the mother and intervenor failed to protect EF.

Conclusion

184. I am completely satisfied and find that the intervenor caused EF's inflicted head injuries on the evening of 9th July 2019 which resulted in his death on 22nd July 2019. The intervenor chose not to give the court an honest account of the events of the evening of 9th July 2019 when EF was in his sole care. Accordingly, I do not know how he inflicted EF's catastrophic head injuries but, on the basis of the expert medical evidence, I am satisfied his injuries resulted from impact onto a non-yielding surface with or without an element of shaking.

185. The mother accepted and I have found that she failed to protect EF from the intervenor.

186. I have no hesitation in accepting the father's explanation for the four bruises EF sustained when in his care. The father had no reason to suspect or believe that the intervenor would fatally injure EF. He is now consumed with grief for the loss of his

much-loved young son and with guilt that he had not done more to protect him. I am satisfied and find that there was nothing more he reasonably could or should have done. I make no adverse findings against the father.

187. As set out above, many of the bruises sustained by EF between April and early July 2019 were seen immediately after he had been in the sole care of the intervenor. I had considered making a finding that he inflicted these injuries on EF or that some were sustained as a result of a serious failure to protect EF in the chaotic conditions of the mother's home. However, I have found the mother serially and seriously lied to the court throughout her evidence. Many of those lies related to the bruises sustained by EF. Unusually I have not been able to discern any reason or reasons for her multiple lies, other than I am satisfied there is no 'innocent' reason.

188. The mother, like the intervenor, was under enormous emotional, psychological and financial pressure. She plainly had the opportunity to inflict injuries to EF which resulted in one or more of the various bruises. In the premises I have found that there is a real possibility that she or the intervenor is the perpetrator of the inflicted soft tissue injuries sustained by EF in the period of April to early July 2019. To put the matter another way, I am not satisfied that I could or should exclude the mother from the pool of perpetrators of the bruises sustained by EF. Accordingly, I am satisfied and find that the mother and the intervenor are both in the pool of perpetrators for those bruises which I have found are more likely than not to be inflicted (i.e. non-accidental) injuries.

189. I have found that the mother and the intervenor failed to protect EF in respect of those bruises he sustained which I have not found to be inflicted.

190. The intervenor is discharged as a party to these proceedings. At the welfare hearing I will have to determine the arrangements for the future care of DC based on my findings of fact and the further assessments which will now need to be undertaken.