Neutral Citation Number: [2024] EWCA Civ 1034

Case No: CA-2024-001586

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EAST LONDON FAMILY COURT
HH Judge Reardon
ZE23C50238

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 September 2024

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

- -

Y, V AND B (FACT-FINDING: PERPETRATOR)

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- -

John Tughan KC and Deborah Piccos (instructed by **TV Edwards LLP**) for the **Appellants, by their children's guardian**
Mark Twomey KC and Isabelle Watson (instructed by **Local Authority Solicitor**) for the **First Respondent**
Shiva Ancliffe KC and Caroline Croft (instructed by **Powell Spencer and Partners**) for the **Second Respondent**
Deborah Seitler and Rabia Mir (instructed by **Gary Jacobs and Co**) for the **Third Respondent**

Hearing date: 3 September 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE BAKER:

1. The question arising on this appeal is whether the judge at the end of a fact-finding hearing in care proceedings erred in law and/or was wrong in failing to identify the perpetrator or possible perpetrators of serious injuries sustained by a nine-month-old child.

Legal principles

2. A fact-finding hearing in care proceedings is focused on establishing whether the threshold for state intervention in the life of a child is crossed. Under s.31(2) of the Children Act 1989,

> "A court may only make a care order or supervision order if it is satisfied-
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm;
>
> and
>
> (b) that the harm, or likelihood of harm, is attributable to-
>
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him; or
>
> (ii) the child's being beyond parental control."

3. This appeal concerns the second condition in s.31(2), the "attributability" condition.

4. In the early years after the implementation of the Act, the prevailing view was that, for this condition to be met, the court had to be "satisfied by evidence that the significant harm suffered by the child is attributable to the care, or absence of care, given to the child by the parent against whom the order is sought" (per Wall LJ in *Re G (A Minor) (Care Order: Threshold Conditions)* [1995] Fam 16 at page 20). In *Lancashire County Council v B* [2000] AC 147, however, the House of Lords endorsed a broader interpretation. In that case, the trial judge had been unable to determine whether non-accidental injuries sustained by a child had been inflicted by her parents or by her child-minder. His decision to dismiss the application for a care order because the attributability condition was not satisfied was overturned by the Court of Appeal whose decision was upheld by the House of Lords. In his speech, Lord Nicholls of Birkenhead said (at page 166):

> "The phrase 'care given to the child' refers primarily to the care given to the child by a parent or parents or other primary carers. That is the norm. The matter stands differently in a case such as the present one, where care is shared and the court is unable to distinguish in a crucial respect between the care given by the parents or primary carers and the care given by other carers.

> Different considerations from the norm apply in a case of shared caring where the care given by one or other of the carers is proved to have been deficient, with the child suffering harm in consequence, but the court is unable to identify which of the carers provided the deficient care. In such a case, the phrase 'care given to the child' is apt to embrace not merely the care given by the parents or other primary carers; it is apt to embrace the care given by any of the carers."

5. Lord Nicholls continued:

> "I recognise that the effect of this construction is that the attributable condition may be satisfied when there is no more than a possibility that the parents were responsible for inflicting the injuries which the child has undoubtedly suffered. That is a consequence which flows from giving the phrase, in the limited circumstances mentioned above, the wider meaning those circumstances require. I appreciate also that in such circumstances, when the court proceeds to the next stage and considers whether to exercise its discretionary power to make a care order or supervision order, the judge may be faced with a particularly difficult problem. The judge will not know which individual was responsible for inflicting the injuries. The child may suffer harm if left in a situation of risk with his parents. The child may also suffer harm if removed from parental care where, if the truth were known, the parents present no risk. Above all, I recognise that this interpretation of the attributable condition means that parents who may be wholly innocent, and whose care may not have fallen below that of a reasonable parent, will face the possibility of losing their child, with all the pain and distress this involves. That is a possibility, once the threshold conditions are satisfied, although by no means a certainty. It by no means follows that because the threshold conditions are satisfied the court will go on to make a care order. And it goes without saying that when considering how to exercise their discretionary powers in this type of case judges will keep firmly in mind that the parents have not been shown to be responsible for the child's injuries.
>
> I recognise all these difficulties. This is indeed a most unfortunate situation for everyone involved: the child, the parents, the child-minder, the local authority and the court. But, so far as the threshold conditions are concerned, the factor which seems to me to outweigh all others is the prospect that an unidentified, and unidentifiable, carer may inflict further injury on a child he or she has already severely damaged."

6. Lord Nicholls returned to this topic in *Re O and another (Minors) (Care: Preliminary Hearing), Re B (A Minor)* [2003] UKHL18, [2004] 1 AC 523, observing at paragraph 31:

> "When the facts found at the preliminary hearing leave open the possibility that a parent or other carer was a perpetrator of proved harm, it would not be right for that conclusion to be excluded from consideration at the disposal hearing as one of the matters to be taken into account. The importance to be attached to that possibility, as to every feature of the case, necessarily depends on the circumstances. But to exclude that possibility altogether from the matters the judge may consider would risk distorting the court's assessment of where, having regard to all the circumstances, the best interests of the child lie."

7. It is therefore possible in cases of non-accidental injury for the attributability condition to be satisfied without identifying the person who inflicted the injury. But it is well established that a court should where possible endeavour to identify the perpetrator. The standard of proof for identifying a perpetrator is the balance of probabilities: *Re C (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] AC 11; *Re S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17, [2010] 1 AC 678.

8. The reasons for identifying the perpetrator were explained by Baroness Hale of Richmond JSC giving the judgment of the Supreme Court in *Re S-B*:

> "36. …. The main reason is that it will promote clarity in identifying the future risks to the child and the strategies necessary to protect him from them. For example, a different care plan may be indicated if there is a risk that the parent in question will ill-treat or abuse the child from the plan that may be indicated if there is a risk that she will be vulnerable to relationships with men who may ill-treat or abuse the child.
>
> 37. Another important reason is that it will enable the professionals to work with the parent and other members of the family on the basis of the judge's findings."

A further reason was articulated by Wall LJ giving the judgment of the Court of Appeal in *Re K (Children)* [2004] EWCA Civ 1181 at paragraph 56 (in a passage endorsed by the Supreme Court in *Re S-B* at paragraph 38):

> "…we are also of the view that it is in the public interest that children have the right, as they grow into adulthood, to know the truth about who injured them when they were children, and why. Children who are removed from their parents as a result of non-accidental injuries have in due course to come to terms with the fact that one or both of their parents injured them. This is a heavy burden for any child to bear. In principle, children need to know the truth if the truth can be ascertained."

9. In *Re S-B*, Baroness Hale continued (at paragraph 40):

> " …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."

10. As to the standard of proof required for someone to be found to be in the pool of perpetrators, Baroness Hale, endorsing the earlier statements in the Court of Appeal in *North Yorkshire County Council v SA* [2003] 2 FLR 849, said (at paragraph 43):

> "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."

11. More recently, guidance on how a judge should approach the task of identifying whether someone is in the pool of perpetrators was given by Peter Jackson LJ in *Re B (Children; Uncertain Perpetrator)* [2019] EWCA Civ 575. At paragraph 46, he explained the purpose of the concept of the pool in these terms:

> "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."

At paragraph 49, he gave guidance which has been followed in subsequent cases:

> "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 … 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'."

12. Finally, Peter Jackson LJ added these further observations which have some relevance to the present case:

> "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.
>
> 52. Lastly, as part of the court's normal case-management responsibilities it should at the outset of proceedings of this kind ensure (i) that a list of possible perpetrators is created, and (ii) that directions are given for the local authority to gather (either itself or through other agencies) all relevant information about and from those individuals, and (iii) that those against whom allegations are made are given the opportunity to be heard. By these means some of the complications that can arise in these difficult cases may be avoided."

13. At one point, it was suggested that a court in care proceedings should "not strain to identify a perpetrator". That suggestion has now been disavowed: *Re A (Children) (Pool of Perpetrators)* [2022] EWCA Civ 1348. Thus the straightforward position is as summarised by King LJ in that case at paragraph 34:

> "The unvarnished test is clear: following a consideration of all the available evidence and applying the simple balance of probabilities, a judge either can, or cannot, identify a perpetrator. If he or she cannot do so, then, in accordance with *Re B* [2019], he or she should consider whether there is a real possibility that each individual on the list inflicted the injury in question."

The background to this appeal

14. The three children, all girls, who are the subject of these proceedings are hereafter referred to as Y, now aged 13, V, aged 12, and B, who is much younger having been born in July 2022. Their parents have separated and, at the time of the events which led to these proceedings, the three girls were living with their mother. The father took the elder girls out on occasions but only had contact with B at the mother's home. It was the parents' evidence that the mother and B had never spent the night apart.

15. On 1 June 2023, B then aged nine months, was brought to hospital by her mother and was found to have sustained a number of serious injuries. The medical evidence about the injuries put before the judge was uncontested. In summary the injuries were as follows.

    (1) A left-sided parietal bone fracture with associated acute soft tissue swelling to the left side of the skull, a small left-sided subdural bleed, a left-sided sub-arachnoid bleed, and a small focus bleed in the left posterior fossa. The skull fracture was less than two weeks old and, on the basis of the swelling, the likely date for the injury was between 22 May and 1 June 2023. The cause of these injuries was a significant impact to the left side of the head.

    (2) A cortical cleft, or laceration, into the temporal lobe probably sustained before 19 May 2023 and caused by a significant force. This was described as a significant traumatic brain injury.

    (3) Healing fractures to the front and side of the left 5th and 6th ribs which were between three weeks and three months old at the date of the skeletal survey carried out in hospital on 8 June 2023, so therefore probably sustained between 8 March and 18 May. They were probably caused by a compressive force such a squeeze by adult hands.

16. The view of the medical expert witnesses (who were not challenged and therefore not called to give oral evidence) was that, whilst it was conceivably possible for all three injuries to have been sustained in one incident, it was likely that they had been sustained in at least two incidents. All of the injuries involved traumatic force over and above normal handling of a nine-month-old child. The rib fractures were likely to have caused pain to the child at the time but once the acute pain had settled a carer who had not witnessed the incident might not have noticed anything was wrong. Similarly, such a carer might not notice the pain the child was suffering from the skull fracture, although the swelling on the scalp, which would have developed within, at most, 48 hours would have been obvious to anyone handling the child's head. The cortical cleft, however, would probably have led to changes in B's behaviour for a period of hours and possibly days after the injury was sustained.

17. The constellation of injuries suffered by the child was very serious. This Court was therefore relieved to be told that B has made a good recovery and it is not thought she will suffer any long-term disability.

18. Following B's admission to hospital, a child protection investigation was instigated. B, when still in hospital, was taken into police protection. The mother was arrested, interviewed by the police, and bailed. The local authority started care proceedings.

Interim care orders were made on the basis of plans under which Y and V have lived with their aunt and B, after her discharge from hospital, has lived with her paternal grandmother.

19. The proceedings were allocated to HH Judge Reardon. Initially, the case was listed for a 14-day fact-finding hearing, with a number of eminent expert medical witnesses instructed. But at a case management hearing on 13 February 2024, the time estimate was reduced to 5 days after the mother indicated (as recorded in recitals to the order made following the hearing) that she did not seek to challenge the expert evidence and that she was not contending that the injuries were caused by either Y or V.

20. The fact-finding hearing took place over five days in March 2024, with evidence being given on the first four days and the judge delivering an ex tempore judgment on the fifth day. It was the local authority's case that the injuries were inflicted deliberately or through negligent handling and that the mother was the perpetrator. The mother's response recorded in the threshold document was that she had never harmed B, that she did not know how the injuries were caused, and that there was a real possibility that they could have been caused accidentally when the mother was not present. In her written evidence, the mother described various visits from and to various family members, referring to brief periods when she had not been present with B. It was the mother's case, however, that she was not aware of B sustaining her injuries during any of those periods.

21. At the appeal hearing, we were told that, prior to reading her judgment, the judge had announced her decision. I infer from the transcript of the exchanges between the judge and counsel following judgment that she may have taken this course at the request of the mother's counsel. Counsel's note was that the judge said words to this effect:

> "if the mother did not cause them [the injuries], she should have known who did".

This was, however, not included in the transcript of the judgment subsequently prepared and approved by the judge.

22. In her well-structured and clear judgment, the judge summarised the background, the applicable legal principles, and the evidence given in the expert reports and by the treating clinicians. She then considered the parents' evidence. Of the mother's evidence, the judge recorded that she had given no explanation for the injuries and that:

> "alongside the absence of an explanation, and more puzzling, in my judgement, was a lack of curiosity about the injuries to B and very little sense that she had been trying herself to find out how they had been caused."

The judge observed that:

> "giving every possible allowance for the cultural and language barriers that I recognise are present in this case, I had the strong sense from the mother's evidence that she was holding back from giving a full and truthful account to the court."

The judge described the father's evidence as "very troubling", in particular his anger directed at the treating clinicians. She observed:

> "The father's anger towards professionals did not sit easily with what seemed to me in contrast to be a passivity and a lack of curiosity about the issue of how B had sustained her injuries. He seemed curiously to be less emotionally invested in that issue."

23. The judge concluded that the mother had noticed the swelling on B's head on the evening before her hospital admission and had subsequently lied in her evidence that she only noticed it shortly before taking the child to hospital. The judge added, however, that a possible explanation for the lie was that she felt ashamed about the delay in seeking medical attention and that it would therefore be taking the issue too far to rely on the lie as evidence of guilty knowledge.

24. The judge then considered evidence which had only been disclosed shortly before the start of the hearing after an interrogation of the parents' mobile phones. This had revealed that the father had sent a text to the mother on 21 May saying "I am on my way to see B" and that, on the following day, the mother, or someone using her phone, had searched for the local hospital. The local authority suggested that these pieces of evidence indicated that a shaking incident had occurred around 21 May which led to the rib fractures and cortical cleft. The judge considered the parents' evidence about the events of that period, concluding:

> "Although I am deeply troubled about this series of events, and I am sure that neither parent has given a complete and accurate account, this evidence is not sufficiently secure for me to make a finding that B's injuries occurred around this time, still less a finding that either or both parents were involved in causing them."

25. The judge recorded the positive evidence about the mother's care of the children, noting that there was "no evidence of particular stressors in the home", that the children "presented as happy and well cared for", and that "all observations of B with her mother suggest a warm and close parent/child relationship." She reminded herself of the risk and protective factors which case law had proposed as a framework for considering the evidence in this sort of case, and observed:

> "The factors do not all point in the same way, but the balance very much falls towards the protective end of the spectrum in this case. That forms a substantial body of evidence which decreases the likelihood that the mother herself was the perpetrator of the injuries."

26. The judge then considered the possibility that the injuries were caused by one or more incidents that went unwitnessed by the mother and of which she was unaware. In this context, she took into account the nature and severity of the injuries which, according to the medical evidence, strongly suggested that they had been caused by more than one memorable event. Furthermore, it was likely that B would have shown some sort of behavioural response, in particular to the brain injury, which an attuned primary carer such as the mother was unlikely to have missed. The judge concluded that "all of this

evidence reduces any possibility that B could have been injured without her mother being aware."

27. The judge found that the injuries were inflicted deliberately or through reckless use of force. She then considered the issue of perpetrator in the following two paragraphs.

> "72. As to the identity of the perpetrator, I am unable to make a positive finding that the mother herself caused the injuries. Partly that is because I have taken into account all of the surrounding evidence that shows the mother as a gentle and loving parent. I find myself in this position also because I am quite clear that the court has not been given a full and complete account in this case of what happened in B's life over the relevant period.
>
> 73. I do make a finding that the mother knows how the injuries were caused and has chosen not to tell the truth. That finding, in my view, is inescapable. To make that finding is not to reverse the burden of proof but to acknowledge that the weight of the evidence leads to a conclusion that it is not realistically possible that these injuries could have been sustained without the mother being aware. The threshold criteria are met on that basis."

28. Finally, the judge considered an application made during the hearing by the local authority to amend the findings sought in the light of the father's evidence to include a finding of failure to protect. The judge declined to make such a finding, holding that to do so would raise issues of procedural fairness as the father had had limited notice of it. She added, however, that her observations about the father's lack of credibility were likely to be of significant relevance at the welfare stage and would require consideration in forthcoming professional assessments.

29. Following delivery of the judgment, an exchange took place between the judge and counsel. That exchange has been transcribed and was cited extensively in submissions to us. The following passages are of particular relevance to this appeal.

30. In the course of the discussion with counsel, the following exchange took place between the judge and Mr John Tughan KC representing the children through their guardian:

> "Counsel: …that touches on a point I wanted to raise, which is that your Honour having found these were inflicted injuries and that the perpetrator could not be identified your Honour has not said, "Pool".
>
> Judge: I know, but that is because I was not-- no pool was identified.
>
> Counsel: So that is deliberate that?
>
> Judge: Yes.
>
> Counsel: Yes.

Judge: Yes.

Counsel: Might we just think about that?

Judge: I mean, it only makes sense, does it not, if you have a list, otherwise it is mother or someone else and mother knows. I suppose it is a, it is a pool but without anyone else identified to go in it. I do not think it matters very much in that I do not think, unless you tell me I am wrong, I do not think your concern is about what finding I have made. I suppose what you are wondering is whether I put the father in the pool, but I do not think I can do that.

Counsel: Your Honour, I do think that is problematic …."

31. After a short break, the hearing resumed and the following, more lengthy, exchange took place:

"Counsel: So the legally problematic position is to find an inflicted injury, to say, "I cannot identify a perpetrator", and then not go on to identify a pool. And I think—I suggest that that is problematic and we-- one way or another, and I am not angling for a particular result on behalf of the children, but I think my clarification document or skeleton when it comes will say that is problematic legally because you cannot have, you cannot have a pool of one because that avoids the test for perpetrators higher than the pool test, as your Honour is well aware, and you cannot put-- make someone a perpetrator on the lower test for [the] pool. And you cannot have a pool-- an open-ended pool either. We have to identify the list and then knock off the people in order to keep them in the pool, as is in *Re B* case in the legal note, which I am struggling to find but was in the legal note that we-- that the local authority filed. Shall I stop there because I may be gabbling late in the week? Your Honour, I apologise.

Judge: Okay, that was not quite what I expected you to be saying. If you will forgive me I am less troubled by that. I think I can see my way through that. Where I am more troubled-- where I was more troubled about is the position of the father. I thought about this quite a lot, and I think this has arisen because of the way that the evidence appeared.

Counsel: Absolutely.

Judge: So----

Counsel: Absolutely.

Judge: -- there is a big procedural fairness point here, and I worked my way through it as best I could.

Counsel: Yes, indeed.

Judge: And----

Counsel: Can I suggest an answer?

Judge: On that point?

Counsel: Well, if the answer-- if your Honour-- if it is accepted that our base position is correct that you cannot have inflicted without perpetrator or a pool and your Honour wants to look at the pool, then the father's team must be given time.

Judge: Well, accept-- do I though? I mean, I have got-- because then I have got to think about whether I reopen this or open up the evidence again, which nobody asked me to do, and I would take quite a lot of persuading to do, I think. What is wrong with a finding that the mother either inflicted it or knows who did?

Counsel: Well----

Judge: What is wrong with-- what is problematic about that?

Counsel: -- mother inflicted, mother inflicted is what we closed on, so I will obviously say there is nothing wrong with that. Knows that we did without the perpetrator finding means that there is no perpetrator or pool, and this is wrong.

Judge: So what-- but again keeping it, keeping it on the reality rather than the----

Counsel: Yes. Thank you, I am trying.

Judge: The reality is----

Counsel: And I am sorry.

Judge: You see what I am quite clear about is what I actually found, yes, which is that the mother either inflicted or knows who did. So that I am, I am clear about and comfortable with. Why do I need then to say, "And there is a pool of unidentified people"? It just seems to be very artificial.

Counsel: So, your Honour, one of the things I am terribly conscious of is that I am not in any way trying to cross-examine the court, but what your Honour has just said is actually a really important clarification for me, that you found that the mother inflicted or knows who did, because my note is that I am unable to identify that the mother was the perpetrator, but know-- but mother does know how caused (sic), and so---

Judge: Yes.

Counsel: I have no difficulty-- I would not even be on my feet if we were just dealing with your finding-- your Honour's finding that the mother knows. Not problematic in any way. It is the absence as I, as I had received it. I may be wrong in which case your Honour's clarification will clear this up this afternoon now.

Judge: Okay, well it is probably me, yes, not being clear enough in the way I express it, because you know I am doing this from notes.

Counsel: I do.

Judge: So I am clear in my mind and I put-- and I may well not have been clear enough. Yes, I can-- I think I can see."

After studying her notes, the judge said

"Judge: Right, that is-- what I-- my note of what I said, and this is where I tried to simplify it as far as possible after Miss Croft's request, is I have not been able to identify a perpetrator. I have made a finding that if the mother did not cause the injuries herself she knows how they were caused and has failed to tell the truth to the court. That was certainly meant – and I can see how it may not have come across clearly enough, although I tried – it was certainly meant to include the possibility of the mother as perpetrator, and again similarly

> at the end of my judgment that was what I had intended to do."

32. In the order made following the hearing, it was recorded that the court had found the threshold criteria pursuant to s.31(2) satisfied, although no schedule of findings was appended to the order. The court made various case management directions for the welfare stage of the proceedings, including for an expedited transcript of the judgment.

33. Unfortunately, and for reasons that are unclear to me, the transcript was not produced for nearly three months. It was then approved by the judge and distributed to the parties. On 25 June, the local authority solicitor sent an email to the judge, copied to the other parties, seeking clarification on behalf of the children's solicitor about what she described as "the finding … about the mother potentially being a perpetrator" in the transcript of the post-judgment exchanges did not appear in the transcript of judgment which had been distributed. For that reason, the parties asked whether the transcript of judgment they had received was the final version. The judge replied by email the same afternoon:

> "Yes, this is the approved version of the transcript. I thought about the points raised in the discussions post-judgment when I was approving the transcript, and the wording in paragraphs 72 and 73 is the wording I intended."

34. On 5 July, the local authority solicitor sent a further email to the judge, copied to the other parties, stating:

> "I am instructed to seek further clarification with regards to the findings made in order to progress the case. We understand that a finding was made that the mother knows how the injuries were caused (para.73). However, we invite you to clarify for the purpose of the finalisation of the findings in the judgment and for the forthcoming assessments if you have found that the mother is in a pool of perpetrators consisting of the mother and an unnamed person who is known to the mother and the mother has lied to the court about that person OR whether your finding is that the mother did not cause the injuries but does know who did and she has lied to the court about that person?"

The judge immediately responded:

> "Dear all
>
> I don't agree that further clarification is appropriate. The findings I made are set out in paragraphs 72 and 73. Neither of the alternatives in the email below is an accurate summary of the findings I made."

The appeal

35. The guardian filed a notice of appeal, advancing the following five grounds:

(1) Having correctly concluded that the injuries were inflicted, the judge was wrong to refuse to identify a perpetrator or a "pool" of perpetrators. Alternatively, if the judge has identified a pool of perpetrators, then it is a pool of the mother and a hypothetical other person and that is neither borne out on the factual evidence or allowed in law.

(2) The court was wrong to find that the mother was not the perpetrator.

(3) The court was wrong to find that an unidentified hypothetical person known to the mother inflicted the injuries.

(4) The judge compartmentalised her approach to the facts.

(5) The judge went "off piste" in that she made findings that were not sought by any party. The conclusion that the judge ultimately arrived at was neither explored in evidence nor in submissions and no party had notice of this possible outcome.

36. Responses were filed by the other parties under paragraph 19(1) of Practice Direction 52C. The local authority supported the application for permission, the mother opposed it, and the father adopted a neutral position. Permission to appeal was granted by Macur LJ on 5 August 2024.

37. In oral submissions, Mr Tughan leading Ms Deborah Piccos ultimately distilled his argument into the single proposition that it was impossible to understand the judge's decision. In her judgment, she had found that the injuries were inflicted deliberately or through reckless use of excessive force; that the mother had given no explanation for the injuries, and that it was not realistically possible that the injuries could have been sustained without the mother being aware. Yet at the conclusion of the judgment, she had refused to find that the mother was the perpetrator and failed to identify any list or pool of possible perpetrators. This outcome conflicted with the judge's repeated statement at several points during the post-judgment exchanges that the mother was a possible perpetrator.

38. No other person was identified as a possible perpetrator. No party suggested even a possible perpetrator beyond the mother, who had sole care of the children throughout the relevant time periods. The identification of another person who is known to the mother alone was not grounded in any evidence before the court. It was simply not open to the court on the evidence heard to invent a hypothetical third party. Thus, if, as the judge said during those exchanges, her finding "was certainly meant to include the possibility of the mother as perpetrator", her decision was flawed because it amounted in effect to a finding that there a pool of one, an outcome which, as Peter Jackson LJ explained, was not open to the court in these circumstances.

39. Mr Tughan submitted that the judge had failed to undertake the exercise identified by Peter Jackson LJ in *Re B*. If she had gone through that exercise, she would have seen that, having concluded that the injuries were inflicted, there had to be either a perpetrator finding or a pool finding, otherwise the threshold criteria would not be met.

40. The guardian's fundamental case on appeal was the judge was wrong not to find that the mother was the perpetrator and that this Court could safely and properly substitute such a finding. Mr Tughan submitted that she had gone astray because she wrongly

analysed the evidence in compartments, instead of considering each piece of evidence in the context of the rest of the evidence. If she had interwoven the medical evidence with the lay evidence as opposed to embarking on the linear exercise that was undertaken, she would have arrived at the obvious conclusion that the injuries were inflicted by the mother. Furthermore, her error would have been avoided had she given the parties the opportunity to make submissions on the finding she was considering.

41. In support of the appeal, Mr Mark Twomey KC, leading trial counsel Ms Isabelle Watson on behalf of the local authority, identified the important points as being that (1) the medical evidence was not disputed; (2) no alternative potential perpetrator was advanced by any party; (3) there was no evidence upon which the court could conclude that any other person had perpetrated these injuries or that there was a real possibility that another person had done so; and (4) the judge's findings on disputed and undisputed facts, but for her approach to identifying a perpetrator, are all otherwise beyond reasonable challenge. In those circumstances, he submitted that the judge was simply wrong to make no finding against the mother, whether that she was the perpetrator or that there was a real possibility that she was. Her failure to make such a finding will have a direct impact on the welfare evaluation. On the current findings, the court would not be able to consider the possibility that the mother harmed the child, only that she has not been honest about what has happened. This latter finding is relevant to her capacity to care for her children, but it is a different form of risk altogether. It is not a risk of direct perpetration of physical injury. Mr Twomey cited the observation of Hayden J in *Lancashire County Council v M and others* [2023] EWHC 3097 (Fam) paragraph 63:

> "Declining to identify a perpetrator, where the evidence establishes it, is not merely erring on the side of caution, it is a failure to exercise the duty imposed by law."

42. Mr Twomey described it as a "a puzzling feature of the case" that the judge (in paragraph 72 of her judgment) identified the mother's lack of a full and complete account as an exculpatory factor so that, ultimately, it was a reason for not making a finding against the mother when such a finding is routinely seen as evidence implicating a suspected perpetrator. Having found that the mother was always with the child and that the injuries were inflicted deliberately or recklessly, there being no evidence of any other person possibly causing the injuries, the judge was bound to find that the mother was the perpetrator. The local authority joined the guardian in asking this Court to substitute a finding to that effect.

43. On behalf of the mother opposing the appeal, Ms Shiva Ancliffe KC leading Ms Caroline Croft submitted that the judge's decision that she could not make a finding that the mother had caused the injuries was permissible, open to her on the evidence and neither internally inconsistent nor contradictory. The local authority had elected to put its case solely on the basis that the injuries were inflicted by the mother but had not satisfied the judge to the requisite standard that the mother was responsible.

44. This is not a case where the mother was the only carer or person who had the opportunity to cause the child's injuries. The mother had made it clear that there had been periods when she had not been present when B was in the care of other people. At no stage of the proceedings, including the fact-finding hearing and the lead up to it, did any of the other parties seek to further explore those periods or call or adduce evidence

about those times when the mother was not present, despite the way that the mother's case had always been put. She did not refuse to identify a perpetrator of the injuries – she was simply unable to do so as she was not satisfied that the mother was the perpetrator and neither the local authority (nor the guardian) had put evidence before the court as to whether B could have been injured when her mother was not present. The judge was not able to consider a pool of possible perpetrators because of the way in which the local authority case had been put. This was not a case where the judge went "off piste" in making her findings. She simply declined to make the findings which the local authority was seeking.

45. Ms Ancliffe conceded that "the judge did express herself poorly" during the post-judgment exchanges with Mr Tughan, pointing out that in reading the transcript of these exchanges it should be borne in mind that it had been a long week. But Ms Ancliffe emphasised that what she said in her finalised transcript is her judgment, determined in the cold light of day, not at the end of a busy and tiring week and away from the heat of immediate exchange.

46. In the alternative, Ms Ancliffe submitted, if the appeal was allowed, the right course would be to remit the case for consideration of whether any partial or full rehearing is required. She contended that this Court is not in a position to make a finding that the mother was the perpetrator, or a possible perpetrator, of the injuries.

47. The father adopted a neutral position on the appeal, reiterating that he has not been involved in any of the injuries and has no knowledge of how they were sustained. He sought a pragmatic solution to enable assessments to progress and final decisions taken about the children's future.

Discussion and conclusion

48. These proceedings have been ongoing for nearly fifteen months. It is obviously an urgent priority that final decisions be taken about the children's future care without any undue delay. It is therefore with great regret that I conclude that the case cannot proceed on the basis of the judge's findings and must be remitted to another judge for rehearing.

49. My regret is even greater because, reading the judgment up to paragraph 72, one cannot fault the judge's sensitive and sensible approach. But her failure to make any finding as to the perpetrator of B's injuries, and her decision that the case could safely proceed on the basis of her limited findings in paragraph 72 and 73, were, with great respect, wrong in law.

50. Although it is not invariably necessary for the perpetrator, or pool of possible perpetrators, of non-accidental injuries to a child to be identified for the attributability condition in s.31(2) to be satisfied, it is in most cases important for the court to do so if it can for the reasons set out by Baroness Hale in *Re S-B*. All of the reasons for identifying the perpetrator or the pool of possible perpetrators identified by Baroness Hale in *Re S-B* arise in this case. "It will help to identify the real risks to the child[ren] 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[ren] in the long run."

51. The judge was wrong to conclude the fact-finding stage in this case, in which a young child has sustained serious non-accidental injuries on more than one occasion, without

either finding on a balance of probabilities that a named person was the perpetrator or finding that persons (named or unnamed) were in the pool of perpetrators. It is impossible to ignore her repeated statements during the post-judgment exchanges with counsel, culminating in the clear statement after consulting her notes that her finding was "certainly meant to include the possibility of the mother as perpetrator". There is nothing in the approved transcript of the judgment, or in her later emails, to indicate why the judge declined to make that finding which during exchanges with counsel she had indicated she had certainly meant to make.

52. This was precisely the sort of situation where a judge should follow the disciplined approach prescribed by Peter Jackson LJ in *Re B* – identify a list of possible perpetrators (including named and, where appropriate, unnamed persons); consider whether the local authority has proved on a balance of probabilities that a person was the perpetrator; if not, identify those persons on the list in respect of whom there was a real possibility that they were the perpetrator. If she had taken that course, it is unlikely that the judge would have gone astray.

53. I agree with Mr Twomey's submission that, on the current findings, the court making final welfare decisions about the children would not be able to consider the possibility that the mother harmed the child, only that she has not been honest about what has happened. This latter finding is relevant to her capacity to care for her children, but it is a fundamentally different form of risk from that which arises if the mother is the perpetrator, or a possible perpetrator, of the injuries. Further, the judge did not explain how her finding that the mother knew how the injuries were caused but chosen not to tell the truth established the attributability condition. She may have concluded that the mother was present on one or all of the occasions when the child as injured and failed to protect her. Or she may have concluded that the mother was not present when the child was injured on the first occasion but realised that she had been injured and failed to protect her on the subsequent occasion or occasions. Or she may have concluded that, although she could not make a finding that the mother failed to protect the child prior to the injuries being inflicted, the fact that she "knows how the injuries were caused and has chosen not to tell the truth" meant that there was a likelihood of B suffering significant harm in future. The professionals tasked with carrying out a risk assessment will be at a loss to know the factual basis on which they are required to assess the risk of future harm to B in her mother's care. Furthermore, the judge did not explain how her finding about the mother's culpability in failing to disclose what she knew about the cause of the injuries sustained by B, aged 9 months, led her to conclude that the threshold criteria were satisfied in respect of the two much older children. In short, although her findings may have been sufficient to cross the threshold, they were plainly insufficient to equip the court to make decisions about the children's future welfare.

54. It is unclear why the judge, with her great experience in this area of the law, took this course. One must be careful not to base a decision on appeal on undue speculation about what was in the judge's mind but not spelt out in the judgment. It is, however, clear from the exchange between the judge and Mr Tughan after judgment that the judge was troubled by the father's position. She had "thought about this quite a lot", an issue had arisen "because of the way that the evidence appeared" (meaning, I infer, the late disclosure of the mobile phone evidence), and there was "a big procedural fairness point here". It is conceivable that her concerns about the lack of frankness in the parents'

evidence left her unable to make a finding that the mother was the perpetrator but concerns about the unfairness arising from the late disclosure of evidence meant that she was unable to conclude whether or not there was a real possibility that anyone else was the perpetrator. Given the embargo on a pool of one, she declined to make any finding as to perpetrator, concluding that the threshold was crossed because the mother knew but failed to say how the injuries had been inflicted.

55. The local authority had only sought a finding that the mother was the perpetrator. The alternative finding that the identity of the perpetrator could not be established on a balance of probabilities but there was a real possibility that the mother or another person was the perpetrator was never canvassed during the evidence or in submissions. It is well established that a judge "is not required slavishly to adhere to a schedule of proposed findings placed before her by a local authority" but may, if there are good reasons, make findings of fact which are not sought by the local authority, provided "(a) that any additional or different findings made are securely founded in the evidence; and (b) that the fairness of the fact finding process is not compromised" (per Wall LJ in *Re G and B (Fact-Finding Hearing)* [2009] EWCA Civ 10 paragraph 16). In *Re A, B and C (Fact-Finding: Gonorrhoea)* [2023] EWCA Civ 437, an appeal was allowed against a finding that child had been infected as a result of an act of sexual abuse perpetrated by a mother and her partner acting jointly. That possibility was never raised by any party or the court until after judgment so neither the mother nor her partner had an opportunity to respond, either in evidence or argument. At paragraph 63 of my judgment in that case, I said:

> "It is axiomatic that a party against whom findings are sought in care proceedings is entitled to notice of the findings sought, the evidence on which they are based, and a fair opportunity to rebut them."

56. But the obligation to ensure the "fairness of the fact-finding process" is owed to all parties, including the local authority and the children. If the court in assessing the evidence forms a view that the evidence may support findings on a basis which has not been raised or considered during the hearing, it is incumbent on the court to address that possibility if the potential findings are material to the welfare decisions which it is required to make about the children. That may lead to an extension or even an adjournment of the hearing. But where the findings, if made, would have a material impact on decisions about the child's long-term care, the court cannot avoid considering them, whatever the inconvenience that may cause.

57. In the course of the post-judgment exchanges with counsel, Mr Tughan submitted that "if it is accepted that our base position is correct that you cannot have inflicted without perpetrator or a pool and your Honour wants to look at the pool, then the father's team must be given time." The judge retorted that, if she took that course, she would have "to think about whether I reopen this or open up the evidence again", adding that nobody had asked her to take that course and that before doing it she "would take quite a lot of persuading". At that point, apparently identifying an argument that such a course would be unnecessary, she said: "What is wrong with a finding that the mother either inflicted it or knows who did?" Having heard that apparent clarification, Mr Tughan understandably did not pursue the suggestion of re-opening the evidence or submissions. In the event, of course, the suggested finding that "the mother either

inflicted it or knows who did" was not included in the approved transcript of the judgment.

58. I fully sympathise with the judge's reluctance to contemplate re-opening the evidence or submissions. But if she considered that the evidence pointed to a finding that was relevant to the future welfare decision-making process, she should have addressed the issue fully, even if that meant extending or adjourning the hearing. In making this criticism, I am acutely aware that this Court has the benefit of time and fully-crafted submissions which the hard-pressed first instance judge in the family court rarely has. But that is why we have a Court of Appeal.

59. For the reasons set out above, I conclude that the appeal must be allowed on the first part of ground one.

60. The guardian and local authority invite this Court to substitute a finding that the mother was the perpetrator. That is not a course I would be prepared to take. Having heard the evidence, the judge was not prepared to make the finding and it would be quite wrong for this Court to reach a different conclusion having heard no evidence at all. With great reluctance, and if my Ladies agree, I would therefore remit the matter for a rehearing, listing it in the first instance before MacDonald J, the Presiding Family Judge, to determine allocation and perhaps give case management directions to ensure that the difficulties about late disclosure which blighted the first hearing do not recur.

LADY JUSTICE ELISABETH LAING

61. I agree.

LADY JUSTICE ASPLIN

62. I agree with Lord Justice Baker that the appeal must be allowed for the reasons he gives. I, too, have concluded with reluctance that this matter must be remitted for rehearing. We are not in a position to make the decision which the local authority and the guardian urge upon us. For my part, I hope that this matter can now be dealt with swiftly so that the future care of these children can be decided without further lengthy delay.