Neutral Citation Number: [2022] EWFC 13 (Fam)

Case No: NG21C00169

IN THE FAMILY COURT
SITTING AT NOTTINGHAM

60 Canal Street
Nottingham
NG1 7EJ

Date: 8 March 2022

Before:

MR JUSTICE MOSTYN

- -

Between:

RL	**Applicant**
- and -	
Nottinghamshire CC (1)	
CS (A child by her Guardian) (2)	**Respondents**
and	
DS (1)	
TL (2)	
Nottinghamshire University Hospital NHS Trust (3)	
Dr JT(4)	**Interveners**

- -

Cyrus Larizadeh QC and Michael Bailey (instructed by **GT Stewart**) for the **Applicant**
James Cleary (instructed by **Nottinghamshire County Council**) for the **First Respondent**
Chris Wells (instructed by **Rotheras Solicitors**) for the **Second Respondent**
The First Intervener appeared in person
The Second Intervener appeared in person
Luke Berry (instructed by **Browne Jacobson**) for the **Third Intervener**
Briony Ballard (instructed by **the Medical Defence Union**) for the **Fourth Intervener**

Hearing date: 21 February 2022

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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.

.....

MR JUSTICE MOSTYN

The court gives permission for this judgment to be reported in this form. However, in no report of this judgment may the child, her parents, her special guardian, or any other person anonymised in this judgment, be identified. Breach of this prohibition will amount to contempt of court.

Mr Justice Mostyn:

The application

1. I have before me an application by RL ("the mother") dated 10 August 2021. It seeks:

> "A rehearing of the fact-finding heard on 13-17 June 2016 before Recorder Reading at the Family Court in Nottingham in relation to her daughter C."

2. 5½ years ago, when C was only 6 months old, the Recorder found on the balance of probability that a bruise to her right cheek, a bruise to her left cheek and a fracture to the 7th posterior left rib were inflicted non-accidentally either by the mother or by the child's stepfather DS.

3. The finding was therefore a "pool finding". Neither the mother nor DS was individually found on the balance of probability to have inflicted any injury. Had such a finding been made the law would treat it as a certainty: see *Re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] AC 11 at [2] per Lord Hoffmann. But a mere pool finding carries with it no such weight. It cannot, of itself, found a prediction of likelihood of future harm to another child by either the mother or DS: *In re J (Children) (Care Proceedings: Threshold Criteria)* [2013] 1 AC 680.

4. The application for a rehearing asserts the mother's belief that the fracture was caused during the skeletal survey which took place on 11 January 2016. It claims that the survey was carried out in breach of guidelines laid down in 2009 and 2012. The application was silent about the possibility of the fracture being a consequence of osteogenesis imperfecta ("OI") and said nothing at all about the bruises.

5. OI was mentioned for the first time in a position statement of the mother's counsel, Mr Bailey, dated 6 October 2021. He referred to a letter sent on 27 November 2018 to the maternal grandmother, the child's special guardian, from the divisional director at Nottingham University Hospitals. The letter stated that, following a complaint by the mother, the hospital had commissioned an external review of children with rib fractures. It went on to say:

> "The bony injuries were consistent with either non-accidental injury or problems from a metabolic bone perspective, and the review team would have expected the courts to have considered whether screening for Type 1 collagen defect should have been carried out, particularly if indicators had been discovered in the family history or there had been further fractures. The presentation is not inconsistent with that seen in other cases of osteogenesis imperfecta (OI) has been the final diagnosis, but bruising, which was present on admission is not typical in such cases."

The letter concluded by confirming that no tests for OI were undertaken at the time (early 2016) because there were no clinical signs warranting them.

6. The possibility that C suffered from OI is now the main ground relied on by the mother although such ground has never been formally incorporated into the application by an amendment. I have treated the application as having been amended to incorporate it. In my opinion in any future case an application of this nature should be formally amended to include any later ground that is relied on.

Background

7. C was born on 6 December 2015 without complications. The mother took the child home on 8 December 2015. There were no reports of any cause for concern about C from midwives or health visitors.

8. On 31 December 2015, the mother and DS took the child to see the GP, Dr JT, the fourth intervener, at his surgery because of what appeared to be an eye infection with a discharge which was making it difficult for the child to open her left eye. Dr JT examined the child, prescribed some eye drops, and told the mother and DS to return if the child did not improve.

9. On 4 January 2016, the mother and DS took the child back to the Dr JT's surgery because her eye appeared have worsened. Another GP in the surgery arranged for the child to be admitted to hospital for investigation of the eye infection. The child was admitted to Queens Medical Centre Hospital, which is part of Nottingham University Hospitals NHS Trust ("the Trust"), the third intervener.

10. At the hospital on 8 January 2016, an operation was carried out to remove a cyst from the child's left eye.

11. On 9 January 2016, the mother and DS were preparing to take the child home when a nurse noticed a bruise on the child's left cheek. It was reported to Dr DW, a consultant paediatrician, who asked the mother and DS whether they had an explanation for the bruising. It was recorded in Dr DW's written report dated 14 January 2016 that the response of the mother and DS was that the bruise had been present since the child's admission to hospital. The child remained in hospital overnight.

12. On 10 January 2016, Dr DW carried out a child protection medical examination of the child. He identified a bruise on the right cheek about 0.5 cm in diameter with a skin abrasion overlying it and a further bruise on the left cheek which had expanded from 1 cm to 1.5 cm since the previous day. There were no other marks or injuries to any other part of the child's body.

13. A skeletal survey was carried out on the morning of 11 January 2016. The survey revealed one injury, a healing fractured collar bone, which appeared to have occurred at, or soon after, the child's birth.

14. On 12 January 2016, the child was discharged from hospital to the care of the mother and DS with the involvement of the maternal grandmother subject to an agreement that the child would not be left alone with any one of them.

15. A further chest X-ray was performed on the child on 26 January 2016. This revealed a healing fracture of the posterior left 7th rib.

16. A multi-agency meeting was held on 27 January 2016. The mother raised the question of whether the rib fracture might have been caused by coughing when the child suffered from bronchiolitis or whether it might have occurred during the skeletal survey on 11 January 2016.

17. On 1 February 2016, Nottinghamshire CC ("the LA") instituted care proceedings in respect of the child. The LA sought findings that the following non-accidental injuries had been caused to the child by the mother, DS, and the maternal grandmother:

    i) A bruise to the right cheek 0.5cm in diameter, with horizontal skin abrasion overlying it;

    ii) A bruise to the left cheek 1.5cm in diameter;

    iii) A fracture to the 7th (neck of) posterior left rib inflicted between 31 December 2015 and 11 January 2016; and

    iv) A fracture to the right clavicle on an unknown date nearer to birth.

    The pleaded grounds further alleged a failure to protect in that there had been a failure to report the cause of, or any concerns about, the injuries.

18. The fact-finding hearing took place over four days before the Recorder from 13 June 2016 to 17 June 2017. The Recorder handed down a written judgment on 17 June 2016. The Recorder made findings that either the mother or DS had caused, non-accidentally:

    i) A bruise to the right cheek 0.5cm in diameter, with horizontal skin abrasion overlying it;

    ii) A bruise to the left cheek 1.5cm in diameter; and

    iii) A fracture to the 7th (neck of) posterior left rib between 31 December 2015 and 11 January 2016.

19. No findings were made in respect of the causation of the injury set out at paragraph 17 (iv), or as to the failure to protect allegation. Nor were any findings made against the maternal grandmother. She was exonerated.

20. Neither the mother nor DS has ever made an application for permission to appeal the Recorder's findings. I was told by the maternal grandmother that the mother was advised by her then counsel that there were no grounds for seeking permission to appeal.

21. On 26 June 2016, an IRH took place before Her Honour Judge Clark. At that hearing, a special guardianship order was made in respect of the child in favour of the maternal grandmother. That order effectively concluded the care proceedings (although no order has ever been made specifically dealing with the application for a care order).

22. The special guardianship order remains in force. I am told that the child is well-settled with the maternal grandmother. I understand that the mother and DS, who are no longer in a relationship, both spend time with the child on a regular basis. That contact is supervised by the maternal grandmother.

23. On 10 August 2021, the mother made the re-hearing application which is now before me.

24. His Honour Judge Reece has given directions to prepare for this hearing:

    i) On 7 October 2021 he granted permission to DS and the maternal grandmother to intervene in the proceedings, made further case-management orders, and listed the application for further directions on 21 February 2022.

    ii) On 1 November 2021 he granted permission to Dr JT to intervene and gave the necessary consequential directions.

    iii) On 24 November 2021 he directed that his order of 7 October 2021 and the mother's application dated 10 August 2021 be disclosed to the solicitors representing the Trust.

25. On 21 December 2021, the mother made an application for the instruction as a SJE of a consultant paediatrician, Dr Patrick Cartlidge, to consider the bundles prepared for the fact-finding hearing and the current proceedings and to provide a report addressing:

    - the possible cause(s) of the relevant injuries;
    - the likely timing of each injury;
    - what, if any, symptoms would have been apparent to a carer who had been present at the time(s) of the causative event(s);
    - what, if any, would be apparent to a carer who had not witnessed the causative event(s);
    - whether he recommended an opinion from an expert from another discipline to assist with addressing the foregoing questions; and
    - setting out an overview of the relevant medical research and literature.

    That application is before me.

26. On 10 January 2021, an order was made permitting the Trust to intervene in the proceedings.

Legal principles

27. Under the general law the mother's application would face being barred by issue estoppel, a sub-set of the doctrine of res judicata (the other sub-set is estoppel per rem judicatam). The doctrine is a rule of substantive law, and not merely a procedural rule: *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 at [25] per Lord Sumption. In my opinion this distinction is of some importance as a number of the family cases to which I refer below incorrectly assume that the doctrine is merely a rule of procedure.

28. The essential features of issue estoppel are that the issue is the same in the second proceedings, and that the parties (or their privies) are identical. See, for example, the

recent decision of the Court of Appeal in *Allsop v Banner Jones Ltd (t/a Banner Jones Solicitors) & Anor* [2021] EWCA Civ 7 at [44(iv)(c)] per Marcus Smith J. If the issue is the same, and the parties are the same, then, subject to limited exceptions, the applicant is barred from relitigating the issue.

29. The rule has been described by Lord Wilberforce as one of "high public importance". Lord Bridge of Harwich has described it as being of "fundamental importance". Lord Carnwath has described it as a "principle of general public concern." Such is its importance that it applies across the board, in both criminal and civil proceedings. In the civil sphere it applies in both private and public law proceedings. As will be seen, it applies in divorce, financial remedy and child maintenance proceedings. In *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273 Lord Bridge stated at p289:

> "The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims '*interest reipublicae ut sit finis litium*' and '*nemo debet bis vexari pro una et eadem causa*'. These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law."

In *R (on the application of DN (Rwanda)) v Secretary of State for the Home Department* [2020] UKSC 7 Lord Carnwath cited that passage and stated at [47]:

> "It is clear from the passage quoted above that the case did not rest on any peculiarity of planning law, but was based on a principle of "fundamental importance" in both private and public law, **unless excluded by the particular statutory scheme**. Nor is there anything to suggest that the principle is one-sided, in public law any more than in private law. It may be invoked by either party, public or private. Indeed, the two Latin maxims quoted by Lord Bridge make clear that it is a principle of general public concern, quite apart from the particular interests of the parties, public or private." (Emphasis added)

30. However, 25 years ago in *Re B (Children Act Proceedings: Issue Estoppel)* [1997] Fam 117 at 127, Hale J held that the strict doctrine of issue estoppel can rarely, if ever, apply in children's cases. That case was not in fact directly about issue estoppel because the parties were not the same in both sets of proceedings. The subsequent proceedings had a different mother and different children. The actual question was whether the father was bound by a finding of sexual abuse in relation to other children made in the earlier proceedings. The previous finding was plainly admissible; the real question was the weight that should be given to it and how much further evidence, if any, should be allowed in relation to forensic examination of those events. The case was thus concerned with a rule of evidence (admissibility of the prior judgment) and procedural case management powers (the extent of further evidence about those events). In terms of ratio decidendi it had nothing to do with the rule of substantive law expressed in the doctrine of res judicata.

31. Nonetheless, Hale J commented extensively on the place of the doctrine in children's cases. She cited (at 127) *B v Derbyshire County Council* [1992] 1 FLR 538 where Sir Stephen Brown P stated at 545:

> "I find it very difficult to conceive of any situation or circumstance in which the … doctrine of res judicata could be applicable, but it is impossible to consider every hypothetical set of circumstances which might come before a court. However, in the context of care proceedings, it is most unlikely ever to be applicable."

32. Although there were cases pulling in the opposite direction (e.g. *Re S, S and A (Care Proceedings: Issue Estoppel)* [1995] 2 FLR 244, 248 per Wilson J) Hale J was persuaded that the doctrine had no place in children's cases because of the inquisitorial nature of the proceedings, citing (at 126) the well-known decision of *Thoday v. Thoday* [1964] P 181 where Diplock LJ stated at 197:

> "'Estoppel' merely means that, under the rules of the adversary system of procedure upon which the common law of England is based, a party is not allowed, in certain circumstances, to prove in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff or defendant in an action. If the court is required to exercise an inquisitorial function and may inquire into facts which the parties do not choose to prove, or would under the adversary system be prevented from proving, this is a function to which the common law concept of estoppel is alien. It may well be a rational rule to apply in the exercise of such an inquisitorial function to say that if a court having jurisdiction to do so has once inquired into the truth of a particular allegation of fact and reached a decision thereon, another court of co-ordinate jurisdiction in the exercise of its own discretion should not re-embark on the same inquiry, but should accept the decision of the first court. But this is a different concept from estoppel as hitherto known in English law. It will be interesting to watch its development in future cases …"

I draw attention to the statement of Diplock LJ that estoppel is part of the rules of our "adversary system of procedure". However, as explained by Lord Sumption, it is more correctly to be seen as a rule of substantive law.

33. Nonetheless, in reliance on this passage, Hale J held (at 127) that:

> "…the courts' inquisitorial function means that the strict doctrine of issue estoppel can rarely, if ever, apply in children's cases …"

34. Although Hale J maintained that the doctrine of res judicata should not apply to children's cases, she accepted that instances where a rehearing would be allowed would be rare, citing (at 124) *Re S (Discharge of Care Order)* [1995] 2 FLR 639 where Waite LJ stated at 646:

> "Such instances are bound, in the nature of things, to be extremely rare. The willingness of the family jurisdiction to relax the ordinary rules of issue estoppel … does not originate from laxity or benevolence but from the recognition that where children are concerned there is likely to be an infinite variety of circumstances whose proper consideration in the best interests of the child is not to be trammelled by the arbitrary imposition of procedural rules. That is a policy whose sole purpose, however, is to preserve flexibility to deal with unusual circumstances. In the general run of cases the family courts … will be every bit as alert as courts in other jurisdictions. The maxim 'sit finis litium' is, as a general rule, rigorously enforced in children cases, where the statutory objective of an early determination of questions concerning the upbringing of a child expressed in section 1(2) of the Children Act 1989 is treated as requiring that such determination shall not only be swift but final.".

I draw attention to Waite LJ's characterisation of issue estoppel as a mere example of "procedural rules", capable of being arbitrarily imposed.

35. In my respectful opinion the inquisitorial nature of a proceeding is not a good reason to disapply this rule of fundamental importance.

36. *Thoday* was a divorce case, and from the very inception of judicial divorce in 1858 the process was mandated by the terms of the statute to be inquisitorial: see sections 29 and 30 of the Matrimonial Causes Act 1857. But that did not mean that the general law concept of estoppel was cast aside in such inquisitorial proceedings. On the contrary, the rule was rigorously applied. An early example was *Finney v Finney* (1868) LR 1 P & D 483 where a wife had petitioned for judicial separation on the ground of cruelty. The charges were defended by the husband. The court found that they were not proved and dismissed the petition. The wife then set up the same charges of cruelty coupled with adultery in a subsequent petition for dissolution. The Judge Ordinary, Sir James Wilde (later Lord Penzance) held that she was estopped from doing so. He stated:

> "But the questions of fact raised in this case are precisely the same as those which were inquired into and determined in a previous suit in this very court. In both suits the husband is charged with the same matrimonial offence, that of cruelty. That issue having been tried, and found in the husband's favour in the former suit, the wife now seeks to have it tried over again, and it is argued that she is entitled to reiterate those identical charges, because she has tacked on to them a charge of adultery. I think that cannot be allowed. According to the practice of every court, after a matter has once been put in issue and tried, and there has been a finding or a verdict on that issue, and thereupon a judgment, such finding and judgment is conclusive between the same parties on that issue. In all courts it would be treated as an estoppel. There is abundant reason why, in this court especially, the same questions should not be tried over again. In most cases the trials are at the cost of the husband, and the Court ought not to allow a wife to persecute a husband as she could do if she were

> allowed to repeat charges which have once been found against her. The allegations of cruelty must be struck out of the petition."

So, the inquisitorial nature of the proceedings did not prevent the application of the estoppel in that case. Equally in *Thoday* itself, Diplock LJ accepted and applied the law of estoppel. He held that no estoppel per rem judicatam arose as the wife was alleging a different matrimonial offence in the second proceedings (constructive desertion) to that which she had pleaded in the first (cruelty). No issue estoppel arose because the judge in the earlier proceedings had not made sufficiently precise findings to be able to say that a given issue had been decided in an identifiable way. All he had done was to decide that the wife had not established the matrimonial offence of cruelty she alleged. Thus Diplock LJ concluded his judgment:

> "It is, in my view, very desirable that in cases of this kind, where a failed case of cruelty may be later followed by a case based on actual or constructive desertion, judges should state their findings on each of the issues. But it was not done in this case and consequently, in my view, no "issue estoppel" arises either."

Therefore, notwithstanding Diplock LJ's doubts, it is clear that in this paradigm of an inquisitorial process – a defended divorce – the general law concept of estoppel is fully applicable.

37. I would also venture the respectful opinion that, so far as Diplock LJ's doubts are concerned, there would be no substantive difference between an estoppel preventing an issue from being re-litigated in adversarial proceedings and an alternative rule for inquisitorial proceedings preventing a previously decided issue from being re-litigated. It is true that the former is a rule of substantive law (although, as I have stated, Diplock LJ treats it as a rule of procedure) while the inquisitorial alternative would be an unyielding procedural rule based on the principle that a rehearing would be an abuse of process as explained by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541. But the effect of the two rules would be exactly the same.

38. In *Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447 the Court of Appeal was principally concerned with the procedural question of how in continuing proceedings a challenge to a finding of fact might be made. Could it only be by way of appeal? Or could an application be made to the court of first instance? Jackson LJ held that the latter course was permissible. He held at [30] that on such an application to the court of first instance the principles in *Re B*:

> "… [would] apply equally where there are later proceedings about the same child and where there are later proceedings about another child of the same parents. The issue will only arise where it is suggested that there is further evidence that might make a difference."

Thus, *Re B* would apply in a true issue estoppel situation where the later case not only had the same parties but precisely the same issue as had been previously litigated.

39. At [40] Jackson LJ placed reliance on what he saw as the fundamental change in the statutory landscape wrought by the creation of the Family Court and the enactment (by

s.17 of, and Schedule 10 to, the Crime and Courts Act 2013) of s. 31F(6) Matrimonial and Family Proceedings Act 1984. This empowers the new Family Court to vary, suspend, rescind or revive any order made by it. But this provision did no more than to give the Family Court effectively the same power in relation to its orders as the County Court (where most care proceedings were heard up to 2014) had possessed since 1846: see section 89 of the County Court Act 1846 and *CB v EB* [2020] EWFC 72 at [34]. This long-standing procedural power to set aside a judgment and order a new trial did not give the County Court judge a carte blanche; on the contrary, the power had to be exercised in accordance with the existing law: *Brown v Dean* [1910] AC 373, HL per Lord Loreburn LC at 375.

40. Jackson LJ's conclusion was that a challenge at first instance was permissible, albeit that it should be subject to a form of permission filter. This would be the first of three stages, where the court considers whether it will permit any reconsideration of the earlier finding: [49]. At [50(3)] he set out the test for permission:

> "…whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial; there must be solid grounds for believing that the earlier findings require revisiting."

In *Re CTD (A Child: Rehearing)* [2020] EWCA Civ 1316 at [4] Jackson LJ elaborated this test:

> "….at the first stage the applicant must show that there are solid grounds for believing that a rehearing will result in a different finding. Mere speculation and hope are not enough."

41. In my opinion this test, when correctly understood, is not (or should not be) materially different to that obtaining under the general law. It is important to understand that under the general law, notwithstanding a bar of issue estoppel, a party can exceptionally challenge an anterior judgment in fresh proceedings at first instance in certain clearly defined circumstances. The exceptions exist because the overriding consideration is that the application of an estoppel must be to work justice and not injustice. This salutary principle derives from *Carl Zeiss Stiftung v. Rayner and Keeler Limited (No.2)* [1967] 1 AC 853 where Lord Upjohn stated at p.947:

> "…all estoppels are not odious, but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

I note that this famous dictum was cited by Hale J in *Re B* at 128.

42. The authorities identify two types of case where justice provides an exception to an estoppel preventing re-litigation of the same issue between the same parties:

i) First, and obviously, an anterior judgment can be challenged on the grounds that it was fraudulently obtained: *Takhar v. Gracefield Developments Limited* [2019] UKSC 13, [2020] AC 450.

ii) Second, an anterior judgment can be challenged on the ground that new facts have emerged which strongly throw into doubt the correctness of the original decision. In *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 at 109 Lord Keith of Kinkel stated:

> "….there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result …"

This exception echoed the well-known decision of the House of Lords in *Phosphate Sewage Company Limited v Molleson* (1879) 4 App Cas 801 where Lord Cairns LC held that an anterior judgment can be challenged where additional facts had emerged which 'entirely changes the aspect of the case' and which 'could not with reasonable diligence have been ascertained before.' In *Allsop* at [26] the continuing validity of this exception was affirmed by the Court of Appeal.

43. It therefore seems to me that Jackson LJ's test of "there must be solid grounds for believing that the earlier findings require revisiting", ought to be interpreted conformably with these exceptions if a divergence from the general law is to be averted. This would mean that "solid grounds" would normally only be capable of being shown in special circumstances where new evidence had emerged which entirely changes the aspect of the case and which could not with reasonable diligence have been ascertained before. Such an interpretation would also be consistent with the powerful reasoning of Waite LJ referred to above where he said that the court will in the "general run of children's cases" rigorously ensure that no-one is allowed to litigate afresh issues that have already been determined. It would also chime with the alternative rule for inquisitorial proceedings proposed by Diplock LJ referred to above.

44. This interpretation would have the advantage of ensuring that family law is not seen as a rogue castaway marooned on a desert island conducting itself without regard to the norms of the rest of the legal universe. It would help to promote a perception that family law is part of, and not separate from, the general law. It would meet the criticism of Sir James Munby P in *Kerman v Akhmedova* [2018] EWCA Civ 307 at [21]:

> '"It is now eleven years since I observed in *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, paras 19, 21 (though, of course, at the time I was a mere *puisne*), that "the [Family Division cannot] simply ride roughshod over established principle" and that "the relevant legal principles which have to be applied are precisely the same in this division as in the other two divisions." In *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FLR 244, para 53, we said that, "The Family Division is part of the High Court. It is not some legal Alsatia where the common

> law and equity do not apply." And in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, [2013] 2 AC 415, para 37, Lord Sumption JSC observed that "Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different."'

45. For my part looking at the matter from first principles I cannot see any reason why the general substantive law of res judicata should not apply to children's cases. The policy reasons for having this rule of law were stated by Lord Wilberforce in *The Ampthill Peerage Case* [1977] AC 547 at 569:

> "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle which we find in the Act of 1858 is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

46. I can see no good reason why this universal rule of high public importance should not apply equally in a case concerned with a child's non-financial welfare. The rule would certainly apply in a children's case about maintenance, notwithstanding that the court's function in such a case is inquisitorial. Thus, in the (inquisitorial) children's case of *N v N (Child Maintenance)* [2015] EWHC 514 (Fam) Bodey J at [27] accepted that the doctrine of res judicata (issue estoppel) applied, fully analysed the case-law, and cautioned against a too liberal recognition of an exception on the ground of injustice, saying:

> 'The court has to guard very carefully indeed against using "justice" as a "get out of jail free card" in this sphere. Res judicata is a concept carefully honed over many years, based on

> the Latin maxims: *Nemo debet bis vexari pro una et eadem causa* and *Interest rei publicae ut finis sit litium*, "no-one should be vexed twice in the same matter and there should be finality in litigation". It applies if all the conditions for it are in place and one cannot contemplate some airy-fairy discretion to dis-apply it. The assertion and exercise of such a general discretion would lead to uncertainty and forensic chaos, together with much unnecessary expense.'

47. The rule would also unquestionably apply in civil proceedings where a child made a claim for damages. Why should it not apply in non-financial welfare proceedings concerning a child? To say that the latter proceedings would be inquisitorial and the former adversarial seems to me to be a distinction without a real difference, for the reasons I have given above.

48. It seems to me, where, as Lord Bridge has explained, the rule is of such "fundamental importance" in all fields of litigation, there would have to be extremely good reasons, based on very clear words in the governing statute, for a court to decide that it did not apply in a particular field. If this rule of fundamental importance applies across the board, in public and private law, in civil and criminal law, in divorce and financial remedy law, and in child maintenance law, what possible justification is there for a non-financial child welfare case to stand as a lonely exception? It is not as if, to use Lord Carnwath's language, the rule is explicitly "excluded by the particular statutory scheme". I cannot see anything in the Children Act 1989 that excludes the operation of the rule.

49. I naturally accept that Jackson LJ's test is binding on me. I completely agree that there should be a Stage 1 form of permission filter. I completely agree that on a rehearing application mere hope and speculation will never be enough to gain permission. I am merely suggesting an interpretative reconciliation between the solid grounds test and the general law such that solid grounds will normally only be demonstrated where either the fraud exception, or the special circumstances exception, is satisfied.

This case

50. The application as originally pleaded does not come anywhere near meeting the standard of 'solid grounds for believing that the original decision required revisiting'. Nothing in the application as pleaded identified any special circumstances where it could be said that new evidence had emerged which entirely changes the aspect of the case and which could not with reasonable diligence have been ascertained before. On the contrary, as originally formulated the only ground advanced was the mother's belief that the fracture was caused by an incorrectly performed skeletal survey. Yet, this aspect had been the subject of a specific finding by the Recorder. At [21] he wrote:

> "On behalf of the NHS Trust, Mr Roche called the two radiographic department staff who carried out the skeletal survey on C: VW, Paediatric Radiographer, and AS, Senior Radiographer, and also CW, Staff Nurse. Between them, in their written statements and their oral evidence, they gave an account of an x-ray session which was difficult and stressful, because, despite previous sedation, C woke up and cried, and, although

> she was comforted, Father was angry and disruptive, swearing and trying to stop the process. They explained how the process of the skeletal survey was routinely carried out, demonstrating with a doll, and denied that anything out of the ordinary had been done to C. They specifically denied that any pressure had been applied to C's chest. In cross-examination they rejected suggestions that the rib fracture might have been I accidentally caused during the skeletal survey."

And at [28]:

> The suggestion has been advanced that C's chest might have been compressed to restrain her during the skeletal survey and so her rib might have been accidentally broken. The necessary mechanism might have been present if that had happened, but there is no evidence at all that it did happen. None of the witnesses says that somebody pressed down hard on C's chest. The techniques for carrying out a skeletal survey, which were explained and demonstrated in Court, do not involve the application of any pressure at all to the child's chest. If Grandmother, a solicitor, or Father, who had promised to protect C, or Mother, had seen excessive force applied, one or all of them would have made an immediate complaint to the Hospital. But they did not.

51. This is a finding of primary fact, which would be virtually unassailable on an appeal, and a fortiori, is unassailable on an application for a rehearing. A mere belief that the Recorder has erred in assessing this evidence comes nowhere close to meeting the standard of new evidence that is needed in order to open the door to a rehearing.

52. In fairness, Mr Larizadeh QC did not pursue this argument in his submissions. He accepts that on the evidence before the Recorder these findings could not be impeached. Rather, he concentrated on OI, as I will explain.

Bruises

53. So far as the bruises are concerned, the Recorder's findings were:

> "32. I have anxiously considered the bruising. I was dubious about the expert witnesses' confident statements that bruising could only be caused by the application of more force than would be applied in the course of handling and moving a child. In particular I was unsure that Dr W had any research basis for his assertions about the degree of force required to cause bruises of the kind suffered by C. However, there is no evidence to contradict what Dr W says. His invitation to anybody who doubts him to try causing a bruise to himself may appear to be a trivial or facile answer, but it is a good way of demonstrating something which cannot be explained in words.

> 33. C suffered bruises which may well have occurred at the same time, on both sides of the lower part of her face. This was not over the jawbone or the cheekbone. Considerable force must have been required to cause these bruises. There is no way in which that could conceivably happen accidentally. In particular, holding the face to insert eye-drops, or to assist a doctor's examination, or bumping against Father's chest, or scratching with the baby's fingernails, or any other suggestion for an accidental cause must be rejected. None of them would involve the application of sufficient force to cause bruising. Pinching with the thumb and forefinger of an adult hand would be one way of doing it. Since no accidental cause can be conceived of, on the balance of probabilities I conclude that the bruises to both checks were non-accidental."

54. Again, these are primary findings of fact. Mr Larizadeh QC accepts that on the evidence before the Recorder those facts as found are unassailable.

55. I have explained above that nothing whatever was said about the bruises in the application as originally pleaded. The first emergence of what I will call the bruises ground was in the same position statement for the hearing on 6 October 2021, where it was said:

> "49 No consideration or reference has been made to the possibility that the bruising seen in C was the result of a number of persons handling her face over a short period of time: 31.12.15 (Dr T), 04.01.16 nurses, 08.01.16 (operative procedure) in addition to being handled by the mother, the step father and MGM when winding C after feeding. The possibility of compound bruising occurring at a sensitive site and scratches over sites already made sensitive by some bruising does not appear to have been explored. This would appear to fit well with a bruise that visibly grew larger over from the 8 to 9 January 2016.
>
> 50. The proposition that C still had left and right bruises and scratches from before the 4.1.16 was potentially inconsistent with C not having any residual marks or bruises from her rib being fractured by a two-handed squeezing mechanism before the 4.01.16.
>
> 51. NICE guidelines (last revised in March 2016) in relation to dating of bruising from colour are very clear, and cites the systematic review carried out by Maguire et al, 2005: "A bruise cannot accurately be aged from clinical assessment in vivo or on a photograph. At this point in time the practice of estimating the age of a bruise from its colour has no scientific basis and should be avoided in child protection proceedings"
>
> 52. It does not appear the NICE Guidelines or the Maguire paper was before the court.

> 53. Finally, in relation to bruising, I note that the platelets reading for C was 579 on the 5.1.16 and 771 on the 10 January 2016, where the normal range is 150-450. In his report, Dr W states at paragraph 104, that an "elevated platelet count can cause abnormal bleeding or bruising", but then does not go on to consider how this may have been applicable in C's case in particular given the increase in the levels from 5-10 January. At paragraph 131 of his report he simply states it is a common finding in babies with infection and it "cannot cause easy or abnormal bruising". He does not however state in terms that C's bruising was either "easy" or "abnormal". By the time of the 10 January reading, C had been treated with antibiotics at least since the procedure on the 4.1.16. For her to be still suffering from the effects of infection by the 10.01.16 with no medical staff making reference to this, seems a little strange. The issue of the raised platelets at the material time is therefore unresolved."

56. The bruises ground therefore was that the Recorder made his decision without the benefit of evidence about:

    i) The number of people who had handled C;

    ii) The inaptness of dating a bruise by its colour; and

    iii) The possibility that the elevated platelet count had led to easy bruising.

57. Mr Larizadeh QC's written and oral submissions elaborated these three elements. I cannot accept that there had been any material reliance on the old heresy that bruises can be accurately dated by reference to their colour. That canard had been shot down years before and it is inconceivable that any material reliance was placed on it either by Dr W or the court.

58. The elevated platelet count was a known fact at the time and Dr W specifically noted that "an elevated platelet count can cause abnormal bleeding or bruising". The Recorder no doubt took that into account as part of the whole sea of evidence but decided nonetheless that the bruises had been non-accidentally inflicted.

59. I am not satisfied that in relation to the bruises ground there are solid grounds for believing that the earlier findings require revisiting. On the contrary, I see the submissions made in this regard as being no more than mere hope and speculation. I agree fully with the written submissions of Ms Ballard for Dr JT. Dr JT would be subjected to considerable injustice were the bruises ground allowed to proceed.

60. In relation to the bruises the stage one leave test is failed whether I apply the general law test of special circumstances or a more liberal interpretation of 'solid grounds'.

The rib fracture

61. The mother's case on the rib fracture as elaborated in the skeleton, supplemental skeleton, and oral submissions of her counsel may be summarised as follows:

i) Having regard to the histopathological tests recorded in the Raynor paper:

> ' …it is difficult to see how Recorder Reading could have come to the conclusion that given evidence of early callus formation seen on the scan of 26.01.16, the fracture was likely caused within the 11 days prior to the skeletal scan on the 11 January 2016, as opined by Dr S. If that were the case then by the 26.01.16 what would be seen would not be early callus formation but callus bridging the fracture site and remodelling of the primary callus. Indeed, if the fracture was as early as the 31.12.15, what may have been seen on the 26.01.16 was formation of lamellar bone. Instead, what was identified by Dr W as "early callus" is seen between 0-14 days in histopathology, which comfortably dates back to the fracture having occurred on the 11.01.16.'

This again repeats, albeit with an appearance of medical support, the mother's oft-expressed belief that the fracture occurred at the survey.

ii) It is possible that C suffers from OI. As she displayed no clinical signs of this condition then, under the standards applicable in 2016 she was rightly not tested for the condition. But standards have changed, as a result of research.

62. In my judgment the mother's grounds concerning the rib fracture are convincingly rebutted by Mr Cleary's extremely well-written skeleton for the LA. In it he makes the following points:

i) The 2018 Raynor paper did not advance new scientific evidence about the dating of fractures. Rather, the fractures analysed in that paper were aged histologically using the technique explained of Klotzbach et al in their 2003 paper, supplemented by methods derived from three research papers published in 1994, 1995 and 2009. Thus, the Raynor paper was based on research that should have been well-known in 2016.

ii) The Raynor paper advanced a specialist histopathological evaluation of the fractures under study. It did not purport to provide an analysis of how fractures would appear in a radiological examination. This is particularly relevant given that the specialist histopathological evaluation could only be performed on a dead child, because deep samples were taken from the bones. No such histopathological examination could have been undertaken then of C's bones. The paper cannot cast doubt on the conclusions drawn by the experts and the court at the hearing from the available radiological evidence.

iii) However, the paper is noteworthy in that it refers to a study in which 95% of posterior rib fractures in the sample group were found to have occurred through 'non-accidental' means.

iv) There is nothing in the Raynor paper that provides the solid grounds for believing that the findings need to be revisited.

v) Similarly, the review conducted by the Hospital in 2018 referred to at [4] above does not provide the necessary solid grounds. The letter states that the review team would have expected the court to have 'considered' tests for a metabolic bone disease. But the issue of a metabolic bone disease was specifically addressed in the evidence of Dr W. Dr W set out the considerations in respect of a metabolic bone disease and concluded:

> "C's x-rays are reported to show normal bones with no evidence of inherited or metabolic bone disease. She does not have a history of other previous or subsequent fractures and I have not been provided with a history of a close relative with an inherited disorder causing easy or abnormal fracturing of bones. C's metabolic blood tests included a bone profile that showed normal calcium, phosphate and alkaline phosphatase levels. The normal alkaline phosphatase level excludes Ricketts as a possible cause of her fractures and this conclusion is supported by the finding of a normal vitamin D level. All this information makes it highly unlikely that C has an acquired or inherited disorder that caused or contributed to her clavicle and rib fractures. "

Therefore, the issue of a metabolic bone disease was properly considered in the proceedings. The evidence before the court was that it was highly unlikely. The mother did not seek to challenge this evidence.

63. Mr Cleary submits, and in this regard is supported by counsel for the interveners, that there is no fresh evidence which supplies the necessary solid grounds for believing that the finding should be revisited. No additional facts have emerged which entirely change this aspect of the case and which could not with reasonable diligence have been ascertained before.

64. The Recorder's primary finding that the rib fracture was not caused at the skeletal survey is, in my judgment, unassailable. The finding was made after the Recorder heard, and assessed the veracity of, the oral evidence of the actors. The Raynor paper does not provide any grounds, let alone solid grounds, to lead to a belief that the forensic process in relation to that issue should be allowed to be re-run 5 years after the event when memories will no doubt have seriously faded. If that were allowed to happen it would amount to the relevant actors being grossly twice vexed.

65. There is no care order in respect of C. Her grandmother, as special guardian, has enhanced parental responsibility under sec 14C(1)(b) of the Children Act 1989. It would have been possible for the special guardian to have arranged for tests to be performed on C to determine if she in fact suffers from OI. This was not done. Instead, the mother has applied, as stated above, for a paediatrician to undertake a comprehensive examination of C and to opine as to the cause of the relevant injuries and, inferentially, whether that cause was OI. This course, which one might describe as being Micawberish - hoping that something will turn up - simply cannot fit with either the general law, or even a most liberal interpretation of Jackson LJ's solid grounds test. Under the general law the applicant seeking to relitigate an issue decided adversely first time round has to demonstrate special circumstances, and those special circumstances will be, as Lord Cairns said, where additional facts have emerged which entirely change

the aspect of the case about the rib-fracture and which could not with reasonable diligence have been ascertained before. To make an application without such evidence in the hope that the court will authorise expert evidence which may, or may not, turn something up which casts doubt on the original findings is completely the wrong way of formulating a challenge. The very process adopted of itself demonstrates that the applicant does not have any solid grounds.

66. An additional factor in determining whether the case should be allowed to pass through the stage 1 filter is the objective of the applicant. In this case the applicant is not seeking to disturb the special guardianship order. At its highest, the mother's objective is to obtain a finding which in effect exonerates her so that she can unassailably argue that her contact to her daughter should be unsupervised and over-night. I have to say that this 'pool' finding against the mother over 5 years ago is unlikely to be of any great weight in the implausible event that the mother were to start fresh private law proceedings against her own mother for enlarged contact. The relationship between the mother and her own mother is entirely felicitous. I can see why the mother wants from a moral viewpoint to expunge the stigma of the adverse finding, but this would not in my judgment be a good reason to undo the finality of these long closed proceedings.

67. Let us imagine that the mother had another child. Would the pool finding be relevant in any future proceedings by a local authority against the mother in respect of that child? For the reasons stated above, the pool finding cannot of itself found a prediction of likelihood of future harm to that child by the mother. It can, apparently, act as a makeweight with other evidence, although I have to say that I cannot understand why the dissenting reasoning of Lord Wilson (supported by Lord Sumption) in *Re J (Children) (Care Proceedings: Threshold Criteria)*at [80] is not correct:

> "…if, for the purpose of the requisite foundation, X's consignment to a pool has a value of zero on its own, it can, for this purpose, have no greater value in company."

This scenario is so conjectural as to be irrelevant to my decision. However, were it to eventuate it is my opinion that the pool-finding is now so remote, and its evidential value so minimal, that it should be excluded from consideration in any future proceedings concerning a different child.

68. Nor is the change in medical practice, whereby testing for OI would now be more readily done, a solid ground for allowing a rehearing. In 2016 testing would only be done if a child were presenting clinical signs of the condition. Now, testing would be done, it would seem, based on mere suspicion. In medicine, standards are changing continuously. Yesterday's standard practices can become tomorrow's heresies. The spurious aging of bruises technique is a classic example. The court cannot contemplate cases being reopened years after closure in reliance on such changes unless the previous practice is now shown to be not merely arguably unsafe, but completely and categorically wrong.

69. I am not satisfied that in relation to the rib fracture there are solid grounds for believing that the earlier findings require revisiting. On the contrary, I see the submissions made in this regard as being no more than mere hope and speculation. There would be considerable injustice to Dr JT and to the staff of the Hospital Trust were the rib fracture ground to be allowed to proceed.

70. In my judgment in relation to the rib fracture the stage one leave test is failed whether I apply the general law test of special circumstances or a more liberal interpretation of 'solid grounds'.

71. For these reasons the mother's application is dismissed.
