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Case number: OX19C00095

IN THE FAMILY COURT SITTING AT OXFORD

IN THE MATTER OF THE CHILDREN ACT 1989 AND IN THE MATTER OF D, E and F

Date: 9th November 2020

Before: HHJ Vincent

Between:

OXFORD COUNTY COUNCIL

Applicant

And

A mother

Respondent mother

And

A father

Second Respondent father

and

D, E and F
(by their guardian SIMON SMITH)

Third – Fifth Respondent children

Helen Little, instructed by Oxfordshire County Council
Frances Harris instructed by Dawson Cornwall, solicitors for the Respondent mother
Chloe Wilkins instructed by Oxford Law Group, solicitors for the Second Respondent father
Emma Gatland instructed by Reeds Solicitors for the children

JUDGMENT

Hearing date: 12 October 2020

Introduction

1. Proceedings were issued in July 2019 following discovery that the parents' youngest child F had sustained serious injuries in the first six weeks of his life. Following a fact-finding hearing in February 2020, I handed down a judgment in which I found, to the standard of a balance of probabilities, that:
   - F had sustained ten costovertebral rib fractures which were caused on 7 June 2019;
   - F sustained a fracture to his femur caused on 27 June 2019;
   - these fractures occurred when F was in his father's care and were caused by the way his father had handled him, using force which was excessive and far beyond what would be regarded as reasonable handling from a parent or carer.

2. I found that F had sustained two anterolateral rib fractures, at a different time from the costovertebral rib fractures, but it was not possible to make any findings about when or how they were caused. I found that neither the anterolateral rib fractures nor the costovertebral rib fractures were caused at birth.

3. With regard to events on 27 June 2019 I found that the father had sought to paint a different picture of events than the weight of evidence suggested, and that he did so because he was seeking to divert attention away from the time he had F in his sole care, trying to point towards occurrence of the injury at a different time, or by a different cause.

4. I did not accept the father's account of events on 7 June 2019 as reliable, and found that he must have been aware that an incident occurred when F was in his care that caused the significant change in his presentation. I found that had he given the mother a truthful and full account of what happened, F could have received prompt and appropriate medical attention.

5. Similarly, I found that the father's failure to give a full and reliable account of events on 27 June 2019 led to a delay in F receiving medical attention.

6. I made findings based on the expert evidence I read and heard, that F did not have any metabolic bone condition such as osteogenesis imperfecta, that would explain his fractures, nor did he have Ehlers Danlos syndrome or any variant of it, nor any other genetic condition that could rationally be attributed as having a part to play in causation of his fractures.

7. The proceedings have taken an exceptionally long time to conclude. The fact-finding hearing was delayed because permission was granted for expert evidence to explore the possibilities of F having a genetic predisposition to sustaining fractures, and it was not possible for all the experts to prepare their reports and a fact-finding hearing listed

before the end of 2019. The first available date for the fact finding in 2020 was in February. Thereafter, the impact of the pandemic has caused some problems in getting assessments completed, but the process of working out what assessments were needed in the particular circumstances of this case in itself took longer than one would have hoped.

8. In the event there was a psychological assessment of the mother and father by Dr Jonathan Dowd and following that, in accordance with Dr Dowd's recommendation, a neuropsychological assessment by Professor Lovejoy. The father had hydrocephalus as a child which has continued to affect him into adulthood. In addition a referral to the local NHS Family Assessment and Safeguarding Service has been made and they have produced a plan of work they intend to carry out with the family. Dr Dowd recommended the father to undergo a course of Cognitive Behavioural Therapy, to help him understand how his responses to stress could be more appropriately managed (than by immersing himself in music or requiring headphones).

9. Throughout the whole proceedings all three children have remained in the care of their parents at home. The parents have been observed to provide loving, consistent and attuned care to their children. The family has been incredibly well supported by committed and loving grandparents on both sides, who have selflessly given up their time, and accepted massive changes to their lives in order to supervise and support the parents in their care of their children. All three children are thriving, in good health and all their physical, educational and emotional needs are currently being met to a high level.

10. F remains at home under an interim care order. The older two children are not subject to any public law orders.

11. The local authority's risk assessment is dated 15 September 2020, prepared by F's social worker JS, allocated to the case in February 2020. Her final evidence was filed on the same date.

Parties' positions at final hearing

12. The local authority invites the Court to make a twelve-month supervision order in respect of F. It is proposed that the supervision order would be underpinned by a written agreement that provides that the parents would continue to work openly and honestly with professionals, father's care of F would remain supervised and responsibility would fall on the mother to ensure this was the case. The agreement also provides that the parents are to engage with support services, particularly FASS.

13. The parents do not oppose the local authority's plan, although they consider that six months would be sufficient for the supervision order. Neither parent accepts the Court's findings in respect of the two separate episodes of rib fractures and maintains that they still believe them all to have been caused at birth. Both parents accept that the father

probably caused the fracture to F's femur, but their acceptance is only partial, because it is based on a belief that the injury must have been caused by some unknown accident of which the father was completely unaware.

14. The parents do not accept a number of issues raised by Dr Dowd and the father says that he does not intend to have the Cognitive Behavioural Therapy that Dr Dowd has recommended.

15. The parents have raised some issues with the FASS proposals for assessment and in particular do not wish the older children to form part of the assessment.

16. Despite their reservations, the parents have said they will co-operate with FASS. They have gone to all meetings with professionals they have been asked to attend, and have worked with the children's social worker very well, despite the extremely challenging circumstances that the pressure of such prolonged proceedings has brought to bear on them.

17. The children's guardian finds himself unable to make a recommendation in respect of the local authority's care plan. In his final report he says this:

'I have given careful thought to all the evidence in this case and I am struggling to see how the risk to F has been reduced when we still have a situation where the parents do not accept the findings of the Court. I am concerned that the parents seem to dispute the evidence of those professionals who highlight issues with the parents i.e. Dr Dowd and FASS. I am concerned that at this stage there does not seem to be a commitment from the parent to work with the recommendations made by professionals. I am concerned that there has been a minimisation of the significant injuries caused to F.'

18. In his final analysis the guardian concludes that a twelve-month supervision order would not offer F protection. I think there is a typo in his next sentence and he means to say that the parents would <u>not</u> be compelled to co-operate with the supervision order. He then goes on to note that *'they have already indicated there are certain aspects to the plan they will not work with.'* The guardian considers the option of a full care order with F remaining at home, but again suggests that if F is at home the parents will only co-operate to the extent they wish to, and the guardian then says that he does not see how the risk to F would be reduced.

19. The guardian concluded that he was unable to make a recommendation to the Court on any order. He says in his report:

'My view is that I would have been in a better position to make a recommendation if the parents did accept the findings and were able to bring themselves to engage fully with the services recommended by the professionals. In the face of all the evidence the parents' position remains a concern to me. I therefore am unable to assist the Court any further.'

20. At IRH I was invited to conclude proceedings by giving a short ex tempore judgment approving the local authority's plan for a supervision order in respect of F and giving a decision on whether the supervision order should last for six or twelve months.

21. I did not regard the decision as straightforward and needed more time than was available to me at the IRH (which took place remotely) to consider it. I therefore reserved judgment.

22. I have considered all recent evidence, including the local authority's risk assessment and final evidence, parents' statements (in response to the judgment and their final evidence). I have read the reports of Dr Dowd and Professor Loveday and correspondence from FASS.

JS, social worker

23. JS notes that the parents have in her words struggled to accept how the injuries occurred, but notes that they have engaged well with professionals and have complied with the safety plans and agreements made in respect of F. She reviews the expert reports and then gives evidence of the situation on the ground, noting that F has been provided with attentive and sensitive parenting, that he is a happy and affectionate baby who loves being cuddled, and relies on both his parents for comfort and reassurance. She describes the process by which agreements have been made, and the father's intention to take part in baby groups with F if he were allowed.

24. JS sets out the realistic options for final orders and gives reasons for concluding that a supervision order rather than a care order would best meet F's needs.

Dr Jonathan Dowd

25. Dr Dowd is a consultant forensic psychologist. He found the father's personality traits were associated with a high need for attention and a willingness to behave problematically in order to source and secure it. He identified these traits as approaching clinical significance, and potentially therefore in need of clinical intervention. In his opinion the father's tendency to self-focus upon his own emotional needs could be regarded as having the potential to reduce parental focus on children and their needs at particular times. Secondly, Dr Dowd found the father to present with *'raised levels of social desirability'* and a resulting tendency to overly promote himself in order to seek positive appraisal. Dr Dowd said the father's levels of social desirability were *'at the highest level possible to be assessed.'* Thirdly, in his opinion, the father presented as having an avoidance stress coping style (a very high score compared to others generally). Dr Dowd considers this may result in his response to difficult, stressful or upsetting situations being less than effective and/or timely.

26. In these ways in Dr Dowd's opinion, the father's psychological characteristics have the potential to affect his parenting ability. Dr Dowd's conclusions would appear to be consistent with the fact-finding judgment, in that I found the father did present as very focused on his own physical and emotional needs, that he was vulnerable to stress, particularly from noise, and when stressed, could at times feel overwhelmed.

27. Dr Dowd did not consider that the father poses an intentional or direct risk of harm to his child as a result of his psychological characteristics. I did not read that as saying that he does not pose a risk of harm at all, but that the risk was an indirect one, in that the father's psychological make up was one where he was at risk of becoming so preoccupied with his own emotional needs that he might lose sight of a child's needs, albeit it would not be his intention to put any child at risk of harm.

28. Dr Dowd recommended further assessment on the basis that the father's physical difficulties due to the hydrocephalus, reported over many years, may well have the potential to impact upon his emotional and psychological functioning to the degree that his focus on his children's needs could at times be compromised.

29. So far as the mother is concerned Dr Dowd notes that the mother does not agree with the Court's conclusions that her husband caused the rib fractures and although she accepts in theory the idea that F's leg was fractured at some stage while he was in his father's care, she thinks while he was carrying him in a sling on the way to nursery, she does not accept the findings that the father's evidence was unreliable or untruthful and Dr Dowd reported that, *'she remains adamant that she cannot envisage her husband causing harm to any of their children and offers a contradictory position by suggesting that he would in no way cause harm whilst also accepting that he was responsible for causing his son's serious leg injury albeit unintentionally.'*

30. In Dr Dowd's assessment, while this does not necessarily increase risk, it makes it more difficult to manage, because the mother may be less willing to remain observant for risks emerging, or to respond to them appropriately. The mother is reported to have said to Dr Dowd that she has no concerns whatsoever about her husband handling F in the future whether supervised or unsupervised. He described her opinions as being, '*resolutely held and she rejected any suggestion that she should alter her position simply to offer false reassurance to professionals.'*

31. The mother said she was not planning to have another child, but if she did she may well adjust how father interacted with a newborn, not because she identified a risk of harm, but to avoid repercussions, for example involvement with social services.

32. Dr Dowd concluded that the mother requires greater understanding and insight in relation to her husband's hydrocephalus, another reason for his recommending a further expert report.

33. In conclusion Dr Dowd wrote, *'there is consideration within clinical practice that considers it possible for parents who have been considered to have harmed their children to continue caring for them despite an unwillingness to accept blame. Generally certain conditions are considered necessary for this to be successful. These may include the parents acknowledging that professionals have legitimate concerns given the medical evidence and the findings of the court, parents being prepared to work with social care professionals openly and honestly and being willing to adjust their parental practices as considered necessary. They generally must be willing to accept high levels of professional support of monitoring of their parenting and also be able to benefit from a credible support network.'*

34. The parents do not accept Dr Dowd's opinions and have highlighted a number of areas where they challenge both the facts upon which he relies and the conclusions he has drawn. However, given that they do not seek to oppose the local authority's final care plan, they did not ask Dr Dowd to give evidence so that he may be cross-examined.

Professor Loveday

35. Professor Loveday is a psychologist with a specialism in neuropsychology, and in particular the neuropsychological profile of people with hydrocephalus.

36. She says the father presents as typical of an individual with well-managed, early diagnosed hydrocephalus. She described him as high functioning and said:

    '[the father's] neuropsychological profile has been fully summarised in this report. He is a man of average intelligence, with a normal processing speed, good levels of attention and no recorded impairment in general executive function. He does show some impairments in working memory and list recall but he has adapted well to these, and in any case they would not impact on his ability to parent his child safely. To put it into context, in the domains in which his memory is impaired, it is no worse than that of a healthy high-functioning 65 year-old.'

37. She did not identify any neuropsychological difficulties that would pose a risk to a child. I did not read this as a statement that the father could not therefore be regarded as posing a risk to a child, but that the father's behaviour that caused the injuries cannot be explained as a consequence of his hydrocephalus.

38. Dr Loveday suggested that the father may have more of a tendency towards confabulation and contamination of memories, whereby people with a patchy memory unknowingly fill the gaps with plausible answers, and could be more easily suggestible than others. She also said that he could be more easily overwhelmed by an overload of information than others.

FASS

39. FASS identified that the parents are able to accept the Court's judgment when it was favourable to the father, but not the findings that he had injured his son. FASS has not identified any shift in the parents' ability to acknowledge the harm that their son has experienced.

40. FASS identifies a need for the older children to be involved in a narrative of events which should involve acknowledgment that F was hurt and 'that people believe' his father was responsible for the injuries.

41. I understand this in part to be an opportunity for parents to demonstrate acceptance of the Court's findings but it also seems to be suggested that it might in time minimise risk. If the older children understand that if their father is feeling overwhelmed and stressed then this can present as a risk to their younger brother, they would be able to report to their mother or signpost to their father if they thought that might be the case. D and E are seven and five years old at the moment and the parents are very concerned at the idea they might be involved in 'policing their father's behaviour'.

42. While I can understand the need for a narrative the older children can understand, I too would have significant concerns if it were the case that they were being invited to notice times their father was stressed or overwhelmed, associate it with a risk of harm to them or their younger brother, and report it to their mother.

Father's statement

43. In his final statement the father says that he does not accept he caused F's rib injuries and that he cannot imagine them having happened any time other than at birth. He says that he accepts that he *'unintentionally caused the leg fracture to F through my readjustment of him in the sling that was simply too loose on 27 June 2019.'* He invites the Court to watch video evidence of F on 7 June 2019 and consider further factual information he now puts forward about his own mental state on that day which he suggests would lead me to reconsider my conclusions about F's presentation on that day and my findings that he sustained rib fractures. He suggests that the cross-examination of him was not fair given the comments made by Professor Loveday about how he should be supported to give his best evidence, and urges the Court to reconsider elements of the fact-finding judgment. However, there has been no application for permission to appeal, nor any application to me to re-open the fact-finding.

44. There is then a large section of challenge to Dr Dowd's conclusions and the father seeks to emphasise that, contrary to what he understands Dr Dowd to have said, he does have a number of strategies in place to manage his stress levels.

45. Even accepting that the witness statement is responding to a number of different assessments of the father, it does come across as very focused on him, his responses, his perspective, his day to day life and needs, and wanting to set the record straight about all of these issues. It does not contain very much about the father's understanding of what he needs to do to ensure that his children are kept safe from harm. It does not acknowledge that F suffered a series of very serious injuries. Even on the father's account that he now puts forward, that F's leg fracture must have occurred while he adjusted him in his sling, the impression given is that he does not see anything too much to worry about. The medical evidence was that F was handled with excessive force in order for the fracture to occur. Even on his own case the father simply did not notice that his child had sustained a fracture, but he does not appear to acknowledge that this in itself is an area where he might need to improve his abilities to notice how he is handling his child, to notice responses, and to identify when a baby is crying in great distress so that he should take action.

46. The father states that he will not be able to agree to any CBT because Dr Dowd has not had proper regard to all his existing stress coping strategies, and he does not accept that he needs therapy. Secondly, he interprets Dr Loveday as saying he should not be overwhelmed and that to do FASS and CBT is to expect too much of him on top of his work and childcare commitments.

Mother's statement

47. The mother sets out her concerns about the process by which FASS were instructed and some parts of their recommendations, but does confirm her commitment to work with them nevertheless. She queries whether FASS could reasonably assess whether the father is able to modify his responses when overwhelmed in front of the children because she says that neither she nor either sets of grandparents, who have been involved in supervising the father, have ever seen him overwhelmed.

48. Like the father, the mother spends some time in her statement responding to the judgment and in particular the findings that the father had a tendency to become stressed or overwhelmed which she says has been made too much of, and that the pressure upon the father of having to come up with an explanation for F's injuries may have caused his memory to have become contaminated by leading questions, or ideas being suggested to him. She explains that while she accepts the Court proceeds on the basis of the findings made, she herself remains of the view that his rib fractures were caused at birth.

49. She confirms that she has had no concerns at all about the father's care of F or their other two children, but that she will stick to the terms of any order.

Analysis and conclusions

50. Acceptance of the Court's findings or at least acknowledgement of some level of risk is generally expected - of at least the non-perpetrating parent - where the Court has made findings that a parent has caused injuries to a child in their care.

51. Such acceptance is not a precondition to children remaining in their parents' care, but the extent (or otherwise) of acknowledgment forms part of the overall canvas and feeds into any risk assessment.

52. As in all cases, the decision I make must be made with the children's welfare as my paramount consideration and having regard to all the factors on the welfare checklist. When considering the range of orders that I might make I must consider in a holistic way all the realistic options for the children and that any order must be necessary and proportionate.

53. I have had regard to all the evidence in this case and in particular the risk assessment and final evidence of the social worker.

54. There is in my judgement a need for an order to manage the continuing risk that father presents to a young baby in his care, in circumstances where there is continuing and significant minimisation of the injuries that F sustained, and the father's role in causing them. At best the father was oblivious to his child having sustained very serious injuries as a result of the way he handled him, and failed to respond to his child's distress. At worst he is actively concealing a darker truth of having inflicted those injuries.

55. The mother has shown herself to be a very able parent, loving, attuned and capable of meeting all her children's needs to a high level. She has supervised the care her husband has given to F effectively, and kept to the written agreements, even though she does not consider supervision is necessary.

56. The children are doing well, and have received good care from them and are thriving at home and at school. Since July 2019 none of the children has sustained any injury or presented with any sign to suggest that they have suffered or at risk of suffering significant harm. They are dearly loved children growing up in a home where they feel loved, safe and well cared for. Their welfare requires that they are enabled to remain in the care of their parents providing that can be safe.

57. Despite holding a view that the father does not present any risk to any of his children, the parents have been willing to work with the local authority at every stage and have complied with all written agreements. They have in no uncertain terms expressed the view that while they do not regard intervention as necessary, they understand the consequences of the judgment and will continue to abide by any written agreement. To that extent it is arguable that they are proceeding in an honest and open way, and that the measures in place are robust, because there has been full and frank discussion about them, willingness to listen on both sides and to formulate a workable plan. Perhaps it

could be said that this approach enables better risk management than of a parent who says they acknowledge responsibility because they have a sense that is what is required of them, but secretly has no intention of following through.

58. The parents are extremely well supported by a network of family, friends, school and nursery.

59. The parents have agreed to attend the sessions with FASS, who have carried out an assessment and have concluded that despite the parents' position, they would be able to work with the family for the purpose of reducing risk.

60. A care order at home would not in practical terms achieve anything different from the supervision order, and would still be dependent upon parental engagement with the local authority's plan for success.

61. I cannot compel the father to undergo cognitive behavioural therapy. It may be that following further work with FASS he reconsiders, for example if this sort of work is identified as a necessary means for him to progress towards caring for his youngest child unsupervised, or if he himself considers it may be helpful to him. However, I do not consider that the fact that he has not yet embarked on CBT and has no intention to, should prevent me from making a final order, having regard to all the circumstances.

62. I have considered all the factors on the welfare checklist, and the range of orders available to the Court. I have been troubled by the same concerns as the children's guardian in this case and that he has not felt able to make a recommendation to the Court. However, having regard to all the evidence I am satisfied that I should approve the local authority's final care plan and conclude these long-running proceedings with a twelve month supervision order.

63. I find that this plan best meets F's welfare needs by preserving his relationship with his parents, siblings and wider family but manages the risk presented by a father I have found to be responsible for his injuries.

64. In coming to my conclusion, I have had particular regard to the risk assessment and final witness statement of the social worker. These documents are comprehensive, balanced and insightful. The written agreement between the local authority and the parents has been worked on carefully, following full and frank discussions and I am satisfied that the parents feel able to comply with it. The agreement is underpinned by a strong working relationship between the social worker and the parents, all of whom deserve some credit for finding a way through a difficult situation, to a place of mutual respect and trust. In addition the parents are extremely well supported by a wider family, educational and social network.

65. I appreciate that twelve months for a supervision order is a long period of time given proceedings started some fifteen months ago. However, six months is in my opinion too short where the FASS work which I regard as crucial is not due to start for another three months. I understand that providing things go well the written agreement is likely to be revised throughout the period of the supervision order so that the level of intervention from the state is reduced.

66. I hope that the ending of these proceedings will relieve the parents from some of the stress that they have been under, and I wish them well for the future.

HHJ Joanna Vincent
Family Court, Oxford

Draft judgment sent by email: 2nd November 2020
Approved judgment: 9th November 2020

Annex: fact-finding judgment

Case number: OX19C00095

IN THE FAMILY COURT SITTING AT OXFORD

IN THE MATTER OF THE CHILDREN ACT 1989 AND IN THE MATTER OF D, E and F

Date: 18th February 2020

Before: HHJ Vincent

Between:

OXFORD COUNTY COUNCIL

Applicant

and

a mother

First Respondent

and

a father

Second Respondent

and

D, E and F (by their children's guardian SIMON SMITH)

Third – Fifth Respondents

Margaret Styles instructed by Oxfordshire County Council
Jonathan Sampson instructed by Dawson Cornwall, solicitors for the First Respondent mother
Janet Mitchell instructed by Oxford Law Group, solicitors for the Second Respondent father
Emma Gatland instructed by Reeds Solicitors for the children

JUDGMENT

Hearing dates: 10th, 11th, 12th, 13th, 14th and 18th February 2020

Introduction

1. These proceedings concern three children; D, who is six and a half, E who is four and half, and their baby brother F, who is nearly nine months old.

2. The proceedings were issued on 3rd July 2019, following F's admission to hospital on 28th June 2020 when he was five and a half weeks old with an acute spiral fracture of his left femur. Scans of his body were carried out and revealed that he had previously sustained ten posterior rib fractures; six on the right and four on the left side. In addition two possible anterolateral rib fractures on the right third and fourth ribs were identified.

3. Before F's injuries were discovered all appeared to be entirely well in the family. The parents have a long-standing and secure relationship in which they share the burden and pleasures of caring for their children, share housework, shopping and cooking and are supportive of one another's needs. D and E are happy and healthy children and there have never been any concerns about their health, development, or general well-being.

4. The family moved to Oxfordshire from London in early 2019. The father was working three days a week for [*name redacted*] but since just before F was born has taken a year's parental leave. The mother qualified as a social worker in [*country name redacted*] with a view to obtaining the job she now has, [*redacted*]. She works full-time, returning to work a month after F's birth. She is highly valued by her employers who are happy to give her the flexibility to work from home four days a week and to travel one day a week into London.

5. The discovery of F's fractures has caused devastation to the family. They are fortunate in being supported by grandparents on both sides and local friends they have met through E's nursery and within the community into which they have moved. F is subject to an interim care order but has remained in the care of his parents throughout these proceedings, although supervised by one or other of the children's grandparents. The older children were initially subject to interim supervision orders but these were discharged by consent at the end of August last year.

6. Since proceedings were issued the parents have been observed to continue to give to their children loving, attentive and attuned care of a high standard.

7. This fact-finding hearing comes over six months since proceedings were issued. Delays arose because further information was needed before applications for the instruction of relevant medical experts could be made, then they needed time to prepare their reports. The hearing was listed as soon as possible after the date for filing of the expert evidence.

Findings sought

8. Essentially the local authority pleads that F's injuries were inflicted non-accidentally by one or other of his parents, in that they were caused by force which would be regarded as outside normal or appropriate handling of F. It is pleaded that the adult who did not cause the fractures failed to protect the children from the perpetrator, and that both parents have failed to give a true account of how F's injuries were caused.

9. The parents remain mystified that their baby has suffered so many injuries of this severity. They both believe that the rib fractures were most likely to have been caused at birth, which for them was a traumatic experience. They have described the midwife and doctor pressing heavily down on the mother's abdomen during labour, they understood them to be attempting to push F towards the birth canal so that a monitoring device could be attached to his head. They have no idea how the anterolateral rib fractures or femoral fracture were caused, but suggest that F must have some as yet unidentified weakness in his bones that makes him more liable to sustaining fractures. They both strongly deny having done anything to cause their child harm.

10. Shortly after F's injuries were identified the father put forward an explanation that when walking to school to collect E from nursery on 27th June, carrying F in a sling, he collided with a bus stop and this could have caused F's leg fracture. That explanation is no longer relied on as CCTV footage showed that there had been no encounter with a bus stop. However, on returning home from that walk to nursery, F was very significantly distressed and could not be consoled. His parents acknowledge that he is likely to have sustained a fracture injury on that day.

11. The parents have recalled a day when they took F into central London, 7th June, and the father has recounted an incident when he says a fellow passenger wearing a backpack on their front barged into him. Both parents recall that F was distressed and unsettled after they got off the tube train and remained so for the rest of the day.

The law

12. Mr Sampson has set out in his closing submissions a detailed summary of the law which helpfully has been agreed by all other representatives.

13. He took me to the case of *Rhesa Shipping Co SA v Edmond and Another: The Popi M [1985] 1 WLR 948* and the case of *Re JS [2012] EWHC 1370 (Fam)* in which Baker J set out the approach the Court should take to fact-finding, as follows:

> *36. ... First, the burden of proof lies with the local authority. It is the local authority that brings these proceedings and identifies the findings they invite the court to make. Therefore the burden of proving the allegations rests with them.*
>
> *37. Secondly, the standard of proof is the balance of probabilities (**Re B [2008]***

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

"If a legal rule requires the facts to be proved (a 'fact in issue') a judge must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1."

*38. Third, findings of fact in these cases must be based on evidence. As Munby LJ, as he then was, observed in **Re A (A Child) (Fact-finding hearing: Speculation) [2011] EWCA Civ 12**:*

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

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

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

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

*41. Sixth, in assessing the expert evidence I bear in mind that cases involving an allegation of shaking involve a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bringing their own expertise to bear on the problem. The court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others (see observations of King J in **Re S [2009] EWHC 2115 Fam**).*

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

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

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

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

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

45. Finally, when seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators is whether there is a likelihood or a real possibility that he or she was the perpetrator (see North Yorkshire County Council v SA [2003] 2 FLR 849. In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injury to be identified both in the public interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judge should not strain to do so (see Re D (Children) [2009] 2 FLR 668, *Re SB (Children)* [2010] 1 FLR 1161).

14. Mr Sampson emphasised, referring *Lancashire v R [2013] EWHC 3064 (Fam),* that there is no burden upon a parent to satisfy the Court that the injuries were accidental. I remind myself of the case of *Re M (fact-finding hearing: burden of proof)* [2012] EWCA Civ 1580, the Court of Appeal warned against the dangers of inferring that because the parents had not given an explanation for an injury, the real explanation must be a sinister one.

15. He reminded me that 'today's medical certainty may be tomorrow's uncertainty in light of new research or understanding or, put another way, the boundaries of medical science are not only ever-expanding but doing so in ways which increase understanding of

alternative causes (be it force, mechanism or underlying susceptibility) such that what is viewed as a remote statistical possibility today may be a real possibility tomorrow.'

16. He has referred me to a number of cases including *Re L (Care: Assessment: Fair Trial) [2002] 2 FLR 730*, and *Lancashire CC v R & W [2013] EWHC 3064 (Fam)*, reminding me that the Court must carry out a full and thorough examination of the environment in which the child was injured and a careful consideration of alternative causes, remembering that a Court cannot and should not conclude, in the cases of a series of improbable causes, that the least improbable is nonetheless the cause of the event.

17. The Court must apply the standard of a balance of probabilities and that does not change according the inherent probability or improbability of an event occurring. Per Peter Jackson LJ in *BR (Proof of Facts) [2015] EWFC 41 (*paras 3 & 4):

'The court takes account of any inherent probability or improbability of an event having occurred as part of a natural process of reasoning. But the fact that an event is a very common one does not lower the standard of probability to which it must be proved. Nor does the fact that an event is very uncommon raise the standard of proof that must be satisfied before it can be said to have occurred.

Similarly, the frequency or infrequency with which an event generally occurs cannot divert attention from the question of whether it actually occurred. As Mr Rowley QC and Ms Bannon felicitously observed:

"Improbable events occur all the time. Probability itself is a weak prognosticator of occurrence in any given case. Unlikely, even highly unlikely things, do happen. Somebody wins the lottery most weeks; children are struck by lightning. The individual probability of any given person enjoying or suffering either fate is extremely low." I agree. It is exceptionally unusual for a baby to sustain so many fractures, but this baby did. The inherent improbability of a devoted parent inflicting such widespread, serious injuries is high, but then so is the inherent improbability of this being the first example of an as yet undiscovered medical condition. Clearly, in this and every case, the answer is not to be found in the inherent probabilities but in the evidence, and it is when analysing the evidence that the court takes account of the probabilities'.

18. Drawing my attention to the Lucas direction, Mr Sampson also referred me to the words of McFarlane LJ (as he then was) in *Re H-C [2016] EWCA Civ 136*:

"One highly important aspect of the Lucas decision, and indeed the approach to lies generally in the criminal jurisdiction, needs to be borne fully in mind by family judges. It is this: in the criminal jurisdiction the 'lie' is never taken, of itself, as direct proof of guilt. As is plain from the passage quoted from Lord Lane's judgment in Lucas, where the relevant conditions are satisfied the lie is 'capable of amounting to a corroboration.' In recent times the point has been most clearly made in the Court of Appeal Criminal Division in the case of R v Middleton [2001] Crim.L.R. 251. 'In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should, therefore, take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt".

19. I have been cautioned against attaching to much weight to discrepancies in accounts between witnesses or from one witness at different times. Per Mostyn J in *Lancashire v R (supra):*

> *"The assessment of credibility generally involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. With every day that passes the memory becomes fainter and the imagination becomes more active. The human capacity for honestly believing something which bears no relation to what actually happened is unlimited."*

20. And from Peter Jackson J (as he then was) in *LCC v The Children (2014) EWHC 3(Fam) [9]:*

> "T*o these matters I would only add that in cases where repeated accounts are given of events surrounding injury and death the court must think carefully about the significance or otherwise of any reported discrepancies. They may arise for a number of reasons. One possibility is of course that they are lies designed to hide culpability Another is that they are lies told for other reasons. Further possibilities include faulty recollection or confusion at times of stress or when the importance of accuracy not fully appreciated, or there may be inaccuracy or mistake in the record keeping or recollection of the person hearing and relaying the account. The possible effects of delay and questioning upon memory should also be considered, as should the effect on one person of hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be unnatural – a process which might inelegantly described as "story creep" – may occur without any inference of bad faith*".

21. The Court should in the first instance identify a perpetrator of injuries if it can do so. If the Court is unable to do this then the Court will move to consider which of the adults with care of the child in the relevant timeframe should fall within a pool of possible perpetrators. Per Peter Jackson LJ in *B (A Child)* [2018] EWCA Civ 2127 at paragraph 21:

> *"In what Mr Geekie described as a simple binary case like the present one, the identification of one person as the perpetrator on the balance of probabilities carries the logical corollary that the second person must be excluded. However, the correct legal approach is to survey the evidence as a whole as it relates to each individual in order to arrive at a conclusion about whether the allegation has been made out in relation to one or other on a balance of probability. Evidentially, this will involve considering the individuals separately and together, and no doubt comparing the probabilities in respect of each of them. However, in the end the court must still ask itself the right question, which is not "who is the more likely?" but "does the evidence establish that this individual probably caused this injury?" In a case where there are more than two possible perpetrators, there are clear dangers in identifying an individual simply because they are the likeliest candidate, as this could lead to an identification on evidence that fell short of a probability. Although the danger does not arise in this form where there are only two possible perpetrators, the correct question is the same, if only to avoid the risk of an incorrect identification being made by a linear process of exclusion".*

22. I bear all this in mind. In addition, I have reminded myself of two additional cases.

23. In Re S (A Child) [2014] EWCA Civ 25, Ryder LJ considered the use of the terms accidental and non-accidental injury:

The term 'non-accidental injury' may be a term of art used by clinicians as a short hand and I make no criticism of its use, but it is a 'catch-all' for everything that is not an accident. It is also a tautology: the true distinction is between an accident which is unexpected and unintentional and an injury which involves an element of wrong. That element of wrong may involve a lack of care and/or an intent of a greater or lesser degree that may amount to negligence, recklessness or deliberate infliction. While an analysis of that kind may be helpful to distinguish deliberate infliction from, say, negligence, it is unnecessary in any consideration of whether the threshold criteria are satisfied because what the statute requires is something different namely, findings of fact that at least satisfy the significant harm, attributability and objective standard of care elements of section 31(2).

The court's function is to make the findings of fact that it is able on the evidence and then analyse those findings against the statutory formulation. .... If, as is often the case when a clinical expert describes harm as being a 'non-accidental injury', there is a range of factual possibilities, those possibilities should be explored with the expert and the witnesses so that the court can understand which, if any, described mechanism is compatible with the presentation of harm.

The threshold is not concerned with intent or blame; it is concerned with whether the objective standard of care which it would be reasonable to expect for the child in question has not been provided so that the harm suffered is attributable to the care actually provided. The judge is not limited to the way the case is put by the local authority but if options are not adequately explored a judge may find a vital piece of the jigsaw missing when s/he comes to look at all the evidence in the round.'

24. In respect of the allegations of a failure to protect, I have regard to a recent case of Re L-W (children) [2019] EWCA Civ 159 in which the Court of Appeal overturned a finding of failure to protect where it had not been shown that on the particular facts of that case, the mother should have identified a risk to the child. The Court of Appeal found the evidence of the perpetrator's behaviour in the home and his two past incidents of aggression did not go anywhere near to supporting a causative link such that the mother ought to have known he presented a risk of physical abuse to L or her other children. At paragraph 40, the leading judgment refers to earlier cases:

40. In Re J (A Child) [2015] EWCA Civ 222, the Court of Appeal approved guidance earlier given by Sir James Munby P (as he then was) in Re A (A Child) [2015] EWFC 11, 2015 Fam Law 367. Lord Justice Aikens summarised the Re A principles. Of relevance to the present case he said as follows:

"56. [v] It is for the local authority to prove that there is the necessary link between the facts upon which it relies and its case on Threshold. The local authority must demonstrate why certain facts, if proved, "justify the conclusion that the child has suffered or is at the risk of suffering significant harm" of the type asserted by the local

authority. "The local authority's evidence and submissions must set out the arguments and explain explicitly why it is said that, in the particular case, the conclusion [that the child has suffered or is at risk of suffering significant harm] indeed follows from the facts [proved].

[vi] It is vital that local authorities, and, even more importantly, judges, bear in mind that nearly all parents will be imperfect in some way or other. The state will not take away the children of "those who commit crimes, abuse alcohol or drugs or suffer from physical or mental illness or disability, or who espouse antisocial, political or religious beliefs" simply because those facts are established. It must be demonstrated by the local authority, in the first place, that by reason of one or more of those facts, the child has suffered or is at risk of suffering significant harm…"

……..

64. Any Court conducting a Finding of Fact Hearing should be alert to the danger of such a serious finding becoming 'a bolt on' to the central issue of perpetration or of falling into the trap of assuming too easily that, if a person was living in the same household as the perpetrator, such a finding is almost inevitable.'

Evidence

25. I have read the contents of the bundle which includes F's medical records, notes from treating clinicians, expert medical reports, a number of statements from the parents and police disclosure which includes transcripts of interviews, and a selection of images from the parties' phones. I heard oral evidence from four medical experts instructed within these proceedings, and from each of the parents.

Expert evidence

26. The experts in the case were:

- Dr Savage, Consultant Paediatric Radiologist;
- Dr Croft, Consultant Paediatrician;
- Professor Dhavendra Kumar, Consultant in clinical genetics and genomic medicine;
- Professor Nicholas Shaw, Consultant Paediatric Radiologist.

27. All the experts had reviewed all relevant medical notes and the other reports. There was broad consensus between them, each deferring to the particular expertise of another where relevant, and their conclusions can be summarised as follows:

- The radiology shows no underlying bony weakness. While this is not determinative of the issue in itself, it is a significant element of diagnosis of such conditions as OI (osteogenesis imperfecta, EDS (Ehlers-Danlos Syndrome), and brittle bones caused by Vitamin D deficiency amongst other things;

- There are no radiological features consistent with Osteogenesis Imperfecta or EDS and a panel of genetic testing (including comprehensive screening at the request of

Kumar) has not identified an abnormality in any of the known genes that have been identified to cause this. It is extremely unlikely that F is affected with either condition;

- Dr Savage noted research into fractures in the population of those with variants of OI, identifying that limb fractures are the most common, although rib fractures are known to occur, (albeit costovertebral fractures are still highly specific for non-accidental injury in infants). However, in one study of sixty-eight children diagnosed with OI, none of them diagnosed within the first year of life were reported to have rib fractures at initial presentation;

- It is (per Professor Shaw) '*extremely unlikely'* that F had any underlying metabolic bone condition, owing to the above tests and radiology and, while F's Vitamin D level measured at 39 nmol/L was insufficient (less than 50nmol/L), it was not clinically deficient (in which case it would have been less than 25nmol/L). F's level of insufficiency is well above the level known to be associated with *any* fractures. While there is no record of F's Vitamin D level at birth, it is unlikely to have changed significantly over a period of five weeks. F's x-rays show no radiological features of rickets and there are no biochemical changes consistent with rickets. Professor Shaw's conclusion is that F's Vitamin D level '*is not relevant in the causation of the fractures';*

- By analysing the healing responses of the various fractures, Dr Savage is able to give a view about the likely timeframes in which they were caused. Fractures heal by the process of periosteal new bone formation which progresses and consolidates to form callus (soft callus which then hardens over a period of weeks), with the fracture line becoming less visible over time. The initial periosteal reaction generally becomes visible around a week after the fracture in the majority of cases (the accepted range is a minimum of 5 days and a maximum of 11 days before periosteal reaction is visible). The peak time of hard callus becoming apparent is around four weeks.

- F sustained an angulated, displaced spiral fracture of the shaft of the left femur. There was no periosteal reaction seen on x-rays taken on 28th June 2019 nor on those taken six days later (4th July 2019). That means it could have occurred up to around 10 days before 4th July, i.e. from 24th June 2019. However the presence of soft-tissue swelling on 28th June 2019 suggests the fracture most likely occurred in the 48 hours before the first x-rays were taken. This is consistent with the parents' evidence that F became symptomatic in the afternoon of 27th June;

- The fractures at the costovertebral junctions on the right 3rd, 4th, 5th, 6th, 7th & 8th ribs and on the left 2nd, 3rd, 4th, 5th ribs are radiologically similar in appearance, so it is likely they were sustained at or around the same time. There are the beginnings of callus formation seen on x-rays on 1st July, confirmed by CT scan on 2nd July, which indicates to Dr Savage that these fractures are 'at least 10 days old and most likely 14 days old'. 14 days before 1st July was 17th June. However, Dr Savage says they could have occurred earlier, because callus formation takes place over a period of weeks. The earliest these fractures could have occurred is the day F was born, five and a half weeks before;

- The CT scans taken 2nd July 2019S showing the fractures of the antero-lateral right 3rd and 4th ribs show faint periosteal and endosteal new bone formation visible. Later radiographs or CT scans show that the callus has not yet developed. This suggests to Dr Savage that these two fractures were caused at a <u>different</u> time from the other ten rib fractures, most likely between 5 and 20 days before the CT scan. So he gives a window of between 12th June and 27th June 2019;

- The force required to cause both sets of rib fractures would be likely to be compressive (although Dr Croft in oral evidence suggested they could be caused by a blow rather than a grip or pressure, this was a departure from his report and this quetsion is particularly within Dr Savage's expertise) and would be outside normal handling - assuming normal bone density. The level of force (per Dr Croft) cannot be gauged accurately. Dr Savage would say that it was '*excessive';*

- The force required to cause the femoral fracture would, again be excessive and outside normal handling. Again it cannot be quantified;

- I note here that an expert can give some guidance as to the level of force required to cause a fracture – excessive, outside normal handling of a child – but they cannot give evidence as to the extent of the force, nor of the motivation behind that force. Experts can assist the Court by highlighting research and their own experience of injuries found to have been inflicted abusively or non-accidentally. However, it is ultimately for the Court as fact-finder to consider whether or not labels such as 'abusive', 'inflicted' or 'non-accidental' may be applied, having reviewed all the circumstances of a case;

- Manual pressure by the midwife during birth via the mother's abdomen is highly unlikely to have caused *any* and in any event *these* posterior rib fractures due (among other things) to the cushioning effect of the mother's abdominal wall / muscles, the amniotic sac, and the likely position of the baby (bottom uppermost);

- Rib fractures during the birth process are now known to occur however they are exceedingly rare. There are no known cases of costovertebral fractures of the ribs at birth, and no known cases of this number of rib fractures at birth. Studies have shown that in the very few cases of rib fractures at birth there was at least one risk factor present; usually a combination of a large baby and a difficult delivery. Neither factor was present in F's case. His birth took a long time from induction but although he was delivered by forceps, the description from the maternity notes is of an uncomplicated assisted delivery, the baby born within two pushes, a well baby at birth and no evidence of trauma to the chest or anywhere else on ante-natal examination. None of the experts consider obstetric trauma at birth to be a realistic explanation for the costovertebral rib fractures. In any event, this would not explain the presence of the antero-lateral fractures, nor could the femoral fracture possibly have been caused at birth;

- The mechanism for the femoral fracture is not entirely agreed. Dr Savage would say that a torsional element is required, such that some form of twisting motion (whether against a grip or simply the fixed point of the femur into the hip) is required. Dr Croft advises that a blow or direct force without specific twisting could cause it. He accepts

the possibility on the basis that information collectively held about abusively caused fractures is variable and not always reliable;

- There was also disagreement between Dr Croft and Dr Savage as to whether the number of rib fractures indicate a greater level of force. Dr Savage advises that the '*multiplicity of the posterior rib fractures is… an indicator of force'*. Dr Croft disagreed, noting again there is no peer-reviewed evidence to support this;

- A fracture would immediately cause pain. In Dr Croft's opinion, *'if a baby of this age had any sort of trauma likely to cause a fracture this would be extremely memorable to his carer and would be described in precise and convincing detail at the time of admission to hospital'.* F would *'probably would have cried at the time of each fracture or fractures for a variable length of time and after that, he would have been in pain or unsettled when the fracture was disturbed.'* Dr Croft says it is difficult to say whether a parent who had not caused the fractures would be aware that there was something wrong with his chest. *'He probably would have been crying for a period, and he may have been restless or been reluctant to feed and may have had discomfort when he was handled. However, the natural history of these fractures is not well understood, as they are usually abusive, and thus usually no reliable history is available.';*

- An underlying condition such as OI would mean that less force (including normal day to day handling) would be sufficient to cause the fractures found, however, the child would still suffer the same level of pain and it would be expected that they would immediately exhibit signs of pain and distress such that their carer would know something was wrong.

- The panel of genetic tests run is not 100% accurate, although it is a near as one can be (within 1%), when excluding known genetic markers linked to the known variants of OI (per Professor Kumar in oral evidence). A full panel test (including both parents) would be required to fully test for any further underlying issue;

- The variants of OI known to science remain, in all likelihood, incomplete and have yet to be fully identified and understood (per Professor Kumar in oral evidence).

Evidence of the mother and father

28. The mother has given two statements in these proceedings and been interviewed twice by the police.

29. The father has given three statements and also been interviewed twice by the police.

30. The few weeks after giving birth inevitably pass by in rather a hectic haze. There was a lot going on for this family. F had been induced and his parents had been up through the night waiting for labour to start and it was nearly twenty-four hours since [admission] that he was born. The mother thereafter had a urinary infection for which she required three courses of antibiotics. Because the parents have separate bedrooms, she was the one getting up every two to three hours in the night with F to feed him. F she said was quite difficult to feed - he had trouble latching on and then after feeding had to be held upright for a while and could take an hour to settle. At the time they

attributed this to colic, something which they had experienced with both their older children. The mother would usually take him into her bed between 11pm and 1am if he woke and was unsettled and he would stay in bed with her until morning. She said she co-slept with her other children and did not have any issues.

31. The mother said in evidence all this made her feel more tired but *'as a mum of three you can't really go to bed'.* However, she said sometimes she carried on, sometimes she needed a bit more rest and the father took over. They had the needs of their two other children to meet, D had not been given a primary school place on their move to Oxfordshire so was being home-schooled, and E was at nursery in the afternoons only, four days a week. They had busy family lives, in the month after F's birth they had organised a birthday party for E, taken the family to London to stay with the father's parents and also to [*redacted*] to stay with them and his brother. On the weekend of F's admission to hospital it was D's birthday, they had planned a party for her and the maternal grandmother had arrived to stay for the weekend on the evening of Wednesday 26th June.

32. So far as the particular events following F's admission into hospital and the involvement of social services was concerned, the mother explained that at the time she was worried about F, what treatment he needed, making arrangements for the other children to get to school, calling her work, dealing with social services, her lawyers then having to appear in Court. It would be understandable if she could not remember the exact timings of conversations or that she did not absorb every detail of what was said to her at various times over this period.

33. Notwithstanding, I found the mother's recollection for detail to be generally impressive, she was frank when she said she could not remember and did not strain to fill the gaps or explain away apparent inconsistencies or omissions.

34. She described her and her husband as working together 'hand in hand' to look after their children. However, she has done the night feeds when all her children were babies and if they cannot sleep they go to her room. In the six months since they moved to Oxfordshire, the father was staying with his parents in London from Wednesday evening until Saturday evening. He looked after D and E for one night during that period of time when the mother had to stay up in London for work, but apart from that, none of the children had ever spent a single night away from their mother in their lives, until she and F spent the night in hospital following diagnosis of his fracture.

35. When he was about six months the father was diagnosed with congenital hydrocephalus. This was treated by insertion of a shunt draining the excess fluid down to his stomach. It was revised in 1992, when the father was 18 but he has not had any ongoing treatment for this. When he was a teenager for a period of six years or so he had suspected episodes of epilepsy – about one or two a year - but never received a formal diagnosis. These spontaneously resolved by 2004 and he stopped taking the medication that he had been prescribed. Since then he has suffered from headaches which I understand them to have sought medical advice for at around the time the mother was pregnant with D, but there does not seem to be any diagnosis or treatment and this is a condition the father manages. He explained to me that he remains sensitive to noise in daily life but this does not appear to be due to any medical condition but to experiences as a child living

with a younger brother who has autism. He manages this by using noise cancelling headphones.

36. The mother explained that around the time she was pregnant with D they had moved into separate bedrooms. Because of his headaches the father was finding it easier to sleep in a more upright position with his head resting against the headboard. He was finding that he was very sensitive to the mother's breathing and snoring and that due to pregnancy she was having to get up a bit more often in the night. They decided to move to separate rooms and have maintained that arrangement. They continue to share a close and loving relationship, this arrangement developed out of sensitivity to one another's needs rather than any underlying disagreement or distance between them. In the new house the father has use of the whole top floor, which contains a master bedroom, en suite bathroom and another room which he calls his studio and the mother refers to as his 'man-cave'. He plays Playstation, has music recording equipment up there and a TV. Once the children are in bed the parents tend to spend the evening together there watching TV (after F was born if he had not gone to bed then he would be there too) then at around 10.00 or 10.30 the mother would go to bed (taking F with her) and the father would stay up for another hour or so watching TV or YouTube videos. She said he would often fall asleep on the sofa in one room then later move across to the bed. She said that he was having headaches four or five times a week at that time and this meant that he would often need to sleep in the day time so as not to be grumpy. Even when maternal grandmother came to stay, this arrangement was maintained, with father retaining use of two bedrooms and a bathroom on the top floor and maternal grandmother on a mattress downstairs with the children.

37. The parents agree that there was one evening when F had fallen asleep upstairs in the room in which the father sleeps. The parents agreed that the mother would go to bed leaving F there. The father took care of F and returned him to the mother in the early hours of the morning. He is not sure of the time, the mother thinks it was around 3am or 4am because she remembers the luxury of having had six hours sleep.

38. The mother took only a month or so of maternity leave with her older children. The father took two weeks with D and no time off for E as he had just started a new job, although he was working part-time by then. When they were in London they had help from a childminder so that if the mother was working and the father was not, the childminder was there to care for the children alongside him. They were in the process of recruiting a new childminder for F. The mother's first day back at work in London was on 20th June, although she went in late as the father had asked her to stay and speak to someone who was coming round to look at the boiler. On 25th June the father was again looking after the children but they had the new childminder for the day. He went for a walk with F to a café while she looked after the other children. When she returned the mother said everything seemed, fine, the father was tired from looking after all three children but not more than one would reasonably expect.

39. D and E were exclusively breastfed by their mother. F found it difficult to latch on at an early stage and so within a week or so his mother started expressing milk enabling him to feed from a bottle. This meant that his father was involved in more of the feeds from an earlier stage than he had been with the older two.

40. The mother has made clear that the family arrangements were reached by them over a period of years, that she has always felt fully supported by the father, they worked well as a team and did not argue. There were no tensions about money or arising out of the move – they were and remain positive about their decision to leave London, even despite these proceedings – or anything else.

41. The mother described, and the father acknowledged when it came to his evidence, that he finds travelling on public transport stressful. Where she can relax and ignore people, reading a book, he cannot relax and gets easily annoyed by people playing music, being too loud or getting too close to him. She told me that it was 'like work' for him and would make him cross. After they got off the tube she says he would talk 'unusually long about it', and even if he was only talking for about five minutes about what had made him irritated that was 'too long for me' – she tended not to pay too much attention. When he came home from work he would tell her about it. The father told me that he did find commuting difficult to cope with – the crowds, the tunnels, the noise, particularly the central line where the trains make a loud high-pitched noise. To manage this he wears his noise cancelling headphones and listens to podcasts.

42. The father was often overcome with emotion when giving his evidence. The understandable strain of the proceedings was evident. He is devastated to be accused of hurting his son whom he adores. His family is the source of all his pride and happiness and he told me that as a child because of the difficulties he experienced stemming from his early diagnosis of hydrocephalus, he never thought that he would have a degree, a career, a family, own a home, yet he has achieved all this. As a consequence he says he appreciates his blessings all the more and derives great pleasure from family life. He was tearful to reflect upon the difficulties he had as a child and was apparently similarly tearful when telling Dr C [*the treating clinician*] about this.

43. In his first interview the father told the police that he was very nervous, not having been interviewed by the police before, and that he had in the past suffered from epilepsy which was brought on by the repeating of the same questions and going through things in circles. He was asked directly whether this had any impact on his memory and he said no. Subsequently the father said in his witness statement that his hydrocephalus meant that he can become tired needing additional rest and that his 'memory recall can also be limited, especially if tired'. In the second interview he was asked directly about this and gave no comment. The mother was asked about this by the police and in cross-examination and said that he might tend to be unclear about timings but only to a little extent – he might be an hour or so out – but she could not think of examples of him having difficulties with his memory.

44. When giving oral evidence he was nervous and it was clear that at times he felt under pressure from being asked repeatedly (though fairly and methodically) about the specific details of what he said had happened and when, and that at times this pressure led him simply to repeat that he did not know and he could not remember. A number of times we took a break to allow him to recover himself as it was clear he was overwhelmed and not giving his best evidence.

45. However, these moments apart, it was evident that he is an intelligent man, was well able to understand the questions put to him and to give clear and straightforward answers about his life, his work, and the pattern of family life over the years. However,

with regard to the events in the weeks leading up to proceedings, many of the answers he gave were inconsistent, either with what he had said earlier in his oral evidence, or inconsistent with his written evidence, what he had said in police interview or was reported to have said to treating clinicians. When put to him that what he was saying made no sense or was substantially different from others' recollections or his own previous statements, he was unable to give any convincing explanation for the reason why there were so many contradictions and discrepancies in his evidence. Of course the context is of a routine but busy family life and nobody could reasonably be expected to recall the timing and details of every feed, every sleep, and whether F was particularly settled or unsettled on any particular day. However, even allowing for this, and the pressure the father evidently felt at giving evidence, compared to the mother, his evidence was uncertain, inconsistent, changeable and at times not credible. I found him to be a much less reliable witness than her.

46. A significant example of this is his evidence about what became referred to as 'the bus-stop incident'.

47. F's mother is absolutely clear and has been consistently clear – to treating clinicians, social workers, the police, and in her evidence to the Court – that F's leg was injured at around the time on Thursday 27th June when his father took him out in a sling to collect E from nursery. She has no idea how this happened but she is clear that F was generally ok when he left, although unsettled as he was being helped into his sling, and by the time he came back he was screaming a high pitched scream and even if soothed and settled by her, as soon as she moved, he started crying again.

48. F did eventually settle to sleep and it was not until the next day – Friday 28th - that his parents took him to hospital. They were not able to give any explanation to the doctors about what had happened although the father said he thought it might have been the sling. The consultant they saw was apparently dismissive of this and said that slings don't cause fractures.

49. On the Saturday afternoon the father told the mother in a phone call that he thought maybe he had collided with a bus stop when out walking with F and this could have caused the fracture. The mother has only a hazy recollection of this conversation and thinks she didn't really take it in with all that was going on.

50. On Sunday 30th June it was D's birthday party. X [*name redacted*], the friend who had walked with him to nursery, came round with her family. In a statement she gave to the police she recounts how the father was racking his brain to identify a cause for the injury, going over everything that had happened, but he did not mention any collision with the bus stop.

51. On Monday 1st July the father and mother met with Dr C at the hospital. Her note records *'dad recalled when putting F in sling for the third walk that day he was unsettled going in, worse afterwards. Was walking with a friend, recalls being pushed/stumbling [?into] bus shelter, thinks he caught his right arm [demonstrated this] – could this have caused a problem?'*

52. The father met with a social worker later that day and reported that F had been unsettled in his sling and became more upset after he had brushed past a bus shelter. He said he

caught the edge of his arm as he passed the bus shelter and that he was uncertain whether he caught F's leg or not.

53. On Monday evening he went to X's house and asked her if she could remember him colliding with the bus shelter, she recalls him saying *'I felt it so it must have hurt him too'.* However she said she had no memory of it.

54. The father's account of the incident developed over time. On Tuesday 2nd July the social worker accompanied the father on the school run and he showed her the bus shelter, she took a photo of him standing next to it with the sling on, and he told her that he had a bruise on his right shoulder from the collision. X was there again and said to the social worker that she had no recollection of the father coming into contact with a bus shelter. Her memory is that F was already crying when she met the father on the way to school and that his crying could distinctly worse when they were outside the nursery class.

55. In his own private notes to help him focus and remember made on 2nd July and later shared with his mother, the father describes *'bashing my right inner shoulder on the glass',* with X on his left. He describes F starting to scream louder than before.

56. The parents met with Dr R on 4th July. The history recorded was that *'father walked into a bus stop and knocked himself on the upper right side of his chest. He said he also felt a big knock on to his abdomen. F was reported to start screaming after that event.'*

57. In his police interview on 5th July the father described trying to give some space to X who was on his left hand side, and in doing so that he 'nudged' into the bus stop, *'we were walking, and I nudged into the bus stop, um, I hurt my inner shoulder quite – I felt it like a funny bone. It was quite painful, but I didn't think anything of it. He didn't make any extra noises until we hit the – until we got to the corner. This is where the nursery is. When we got to the corner ,he started crying a high screeching crying noise. … I thought it was reflux.'* A bit later he added that he felt something soft hit him, but didn't think anything of it at the time. Further on, he said, he felt the collision as *'pins and needles in his arms'* .. and *'a soft oomph in my belly area .. obviously from the impact of the baby, so it was quite a hard impact because it was a really painful zap in my arm'.* He clarified that the pain was worst in his shoulder.

58. The bus stop in question is very close to a convenience store which has CCTV cameras outside. The police obtained CCTV footage of the relevant time and it reveals that in fact the father never did catch, brush against, bash, nudge, walk into, or otherwise have contact with the bus shelter on Thursday 27th June.

59. The parents were shown the CCTV by the police and interviewed for a second time on 20th July 2019. The father chose largely not to comment.

60. In his second witness statement the father said that he did absolutely recall bumping his shoulder and tummy in a recent walk to nursery but must have been mistaken as to the date. He said that under pressure to provide an explanation and dealing with the shock of the discovery of F's injuries he reported what he thought was a plausible explanation but he realises he must have been mistaken. He suggests that his long-standing condition of hydrocephalus could have affected his recollection.

61. His wife recalled that following these second police interviews they sat in the car and had talked about the CCTV and the father had told her that he thought he had bumped into a bus shelter a day or two before.

62. In Court the father was asked when giving evidence in chief whether there had ever been any bus shelter incident and he said no there had not. But later in his evidence he moved back towards the position in his witness statement, and apparently consistent with what he had told his wife, that he thought there had been a time he had bumped into a bus shelter but he could not recall when it had happened.

63. If the father had brushed his arm against a bus stop on the way to nursery and not really thought much of it at the time, then one can see how it might take a day or two to recall. However, the story developed over the course of days to a dramatic and memorable incident, with more and more details added every day, even after his friend X had told him she had no memory of it. I remind myself of the Lucas direction and accept that in the circumstances in which he found himself the pressure of providing an explanation that would be acceptable to professionals is huge. I understand that pressure might apply as powerfully to a parent who has no idea how an injury was caused as to one who knows the true explanation is they were at fault. So the fact that the father put forward this explanation and then developed it, and embellished it, cannot lead directly to an inference that he must have known of and is hiding a more sinister explanation. However, it undermines the evidence that he has given to the Court and his reliability as a witness.

CCTV footage

64. I was shown this footage on the afternoon of the first day of evidence. It is clear that, contrary to father's various accounts, he did not collide with a bus stop when F was in the sling.

65. The father is first seen on the footage as he is passing the bus stop. He has quite a lilting walk – the mother when she was describing him at one point put her hands out and swayed slightly side to side to describe him walking without a care. As he walks towards the camera the father has a phone in his left hand and is holding it out and is cheerfully chatting to his friend, another parent at the nursery. He is wearing large headphones pushed up on the sides of his head above his ears.

66. The sling is on extremely loosely, it looks much too big for a newborn. The belt is fastened very low - around the father's hips - and both the shoulder and side straps are extremely loose so that F is both sitting very low in the sling and positioned very low against his father's body – at waist level. It may be that because the sling was so low that this caused the father's walk to be more lilting than normal, to counter the way that F swings from side to side in the sling, but whatever the reason, the effect is that he is moving around quite a bit. The father's hands are out by his sides, not supporting his son. It is obvious to me that this is not a conventional way to wear a sling. This was evidently noticeable to the policemen who watched the CCTV with each of the parents. Dr C asked to see the sling, and saw a photo of the father wearing it with F in it about two weeks before. She noted in her report that it was *'a very loose fit and could slide sideways across [the father's] trunk, and that he wore it in a relatively low position with*

F against his upper abdomen, rather than his chest. It also looked a little large for F and parents explained that F would sometimes tip to one side i.e. more of his leg would slide out of the sling.'

67. In her statement to the police, the family friend X said, *'there is no chance I would use this carrier for my children. I have used baby carriers of my own, these appear to offer much more support. I have a memory that a good position for a baby in a carrier would allow me to kiss their head. The carrier used by the [parents] was much looser than this. The first time I saw the carrier it appeared to be too big. I noticed that F appeared very curled up within the seat, it looked too big for him. F was not carried close to his parents, they certainly would not be able to kiss his head. F was not held in a fixed position he was very laid back with his head further away from the carrying person than his lower body. He could easily be bounced around when being carried.'*

68. I have seen another photo of F in a sling and agree with X's and Dr C's comments.

69. Dr Croft was shown this CCTV but felt the quality of the image was not good enough for him to form any opinions about it. From his point of view he saw nothing remarkable in the positioning of the sling or F within it.

70. Another disc shows the father standing with a group of parents outside the nursery end of the school. The father is initially standing still then walks forwards towards the classroom as seen in earlier footage, his hands by his sides. While the parents wait outside he waits outside but can be seen to jig up and down, this time he has his attention on F. At one point he leans forward, swooping down to scoop up F and hold him close to his chest in his arms. On the return journey he continues to hold F in this way, and is seen on the next disc walking back past the convenience store and the bus stop, F held in his arms against his chest but with the sling still on.

7th June

71. This date is significant because it falls within Dr Savage's window for causation of the rib fractures (although he puts the most likely date for these about ten days later) and is a time when the parents report that F became distressed after an incident reported by the father and could not be consoled by them, continuing to cry on and off for the whole day.

72. F was eighteen days old. The whole family were staying with the paternal grandparents in [London]. The parents took F with them to central London, they planned to get a passport for him at the [*redacted*] Embassy and also to visit their respective places of work.

73. They set off from [*redacted*] taking an overground train to Paddington, which took about fifteen minutes. From Paddington they walked to the mother's place of work – about ten minutes - but when they got there realised they had forgotten the signed photos of F that were needed for the passport application. They returned to Paddington, back to [*redacted*] and the father waited with F while mother went back to the grandparents' house to get the photos. They came back to Paddington and because they had an appointment with the Embassy, made their way straight there. They took a tube from Paddington to Piccadilly Circus then taking a connecting tube to Hyde Park

Corner. They walked from there to the [*redacted*] Embassy in [*redacted*], and then from there I think went back to Hyde Park Corner, back to Piccadilly Circus and walked to the father's place of work in [*street name redacted*]. They then accidentally took a bus going the wrong way but ended up in Marble Arch - which was not a disaster as they then took the tube to Lancaster Gate - from where they walked to the mother's place of work and from there, back to Paddington and [*redacted*].

74. F was with his father in the sling for the whole day. Although he says he would normally wear his noise cancelling headphones to travel on the tube, the father told me he was not wearing them on this occasion because he was with the mother and they could talk to one another.

75. The first time they got to Hyde Park Corner both parents describe the tube as being very crowded. They are not entirely clear where the other was sitting, but the father remembers he was with F up by the double doors in the centre, sitting next to the glass partition. He remembers the mother sitting further down the carriage, closer to the single doors. There were a lot of people standing.

76. The father has described that they both left through the single door and that as he went to leave the carriage a traveller wearing a backpack on his front stepped forward and 'bashed' into him. To Dr C (on 4th July) he said that, *'they reached the station and were trying to exit the tube onto a very crowded platform, via the single door at the end of the carriage. Someone trying to get into the train bumped into father front on, and impacted on F in the sling. This person was wearing a 'backpack' on his front and it was this piece of luggage which father thought had hit F'.*

77. Dr C thought the brunt of the impact would have been taken by F's head and bottom, and that the bash described was not consistent with the compressive force one would expect to have caused rib fractures.

78. In his police interview of 5th July the father was clear that he had got off the train first. He said, *'as I walked off the train, one of the small doors .. I had a big collision, a hard collision with a backpack. So, someone had a backpack on their front .. and they slammed into me as I walked off the train .. and I remember telling [mother] how frustrated I was with public transport and then how people were inconsiderate .. I didn't think much of it but then F started really crying a lot.*

... I was coming off the train ... and the backpack had just bashed right into me like the backpack was on the front, bashed straight into me ... it winded me .. and then I was just frustrated .. I just said to [the mother] that public transport is hard'.

79. This is similar to the account in his first witness statement, 18th July

'When I stepped off the train with F, a man bashed into my front with some force. It even winded me slightly as it was such a big bash. This was in the early afternoon in Hyde Park. I remember the incident as I was very upset with how inconsiderate people can be and F became immediately distressed following the incident ... Despite best efforts I struggled to settle F for the entire trip to London. Even when standing in the tunnel as it was raining, he was squealing. A lady at the station asked if everything was

ok and whether we would like to sit down. F was moaning and crying until we got to the embassy and even then he was still unhappy.'

80. In her witness statement the mother said that it was she who got off the train first and did not see an incident but remembered the father telling her that someone had bumped into him. When asked in cross-examination the mother recalled that she had got off the tube first. She said the platform was very busy and she had realised she needed to buy a pen to fill in the passport forms. She recalled the father being a few seconds behind her and that he said some idiot had swung into him. By the time they got up the escalators F was crying and while it was not as high pitched as the cry on 27th June, the normal ways of consoling him did not work. She had to buy a pen then was filling in the forms holding them up against the wall. A lady came up to them, noticing F's distress, and offered to find them a seat but by then they were ready to go. The mother recalls that they went to the embassy and he was unhappy, 'screaming as in the tube station' and then she breast fed him and he settled for a bit but generally speaking he was not too happy, crying the whole day. I have been shown a photo of the three of them outside the father's place of work and F's eyes are full of tears and his brow furrowed. He is in the sling, much higher up on his father's chest than in the CCTV images and the belt is worn a little higher. His father is holding him with his left arm and it looks as though he is lifting the sling up as he does so, as F's bottom and legs do not appear to be in the base of the sling. The mother recalled that when they finally got to her workplace at the end of the day, F was still not happy and one of her colleagues tried to reassure her by saying 'it's the witching hour', a comment that stuck in her mind as she had not heard it before.

81. She said in her oral evidence she had no real memory of the father telling her about the rucksack, but thinks he may have done. She told me he goes on a lot about public transport and at the time she had other things in her head.

82. I would accept that the father could have got off the train before the mother – often the swell of people standing up and from further down the carriage go first, followed by people sitting in the seats closer to the door. However, that is not her recollection, and if she was behind him one would have expected her to see the backpack incident in which case it would be odd for him to have told her about it rather than to say words to the effect of 'did you see that?!'

83. The father's evidence was a little unclear about whether the collision happened on or off the train but the general sense I got was that he was still on the train but very close to the doors. He said the doors were about to close, he was in a queue of people leaving the train and the platform was full with people waiting to get on. He said the person with the backpack on his front was rushing to get on. With crowds of people described both in and out of the train, and accepting that he and the backpacker are moving in opposite directions, it is hard to envisage a situation in which he and F are struck head-on with such force that he became winded. If this collision happened as he describes, then F must have been struck extremely hard and it is very surprising that the father was not immediately worried that he had been badly hurt.

84. However, the father's recollections of the incident were centred on his irritation with other passengers rather than any concern about F might have been hurt. This is consistent with what the mother seems to have understood from the father - she did not

understand from him that F had been involved in any collision. According to the father they continued up the escalator and he never suggested to her that F had been struck, or that they should take F out of his sling and check him. Even when F continued to cry for the rest of the day, the father does not seem to have offered this incident as an explanation. On father's case the mother was still in the tube when it happened, on mother's evidence she was a few seconds ahead. In either case, it is odd that she was not aware of something out of the ordinary having happened. Even if she did not see anything, the father says he was winded, one might expect him to take a few seconds to catch his breath. But she cannot remember anything out of the ordinary, just the father complaining about the tube as he normally did.

85. I am unable to conclude whether or not the father did have a collision with a person wearing a backpack on their front. However, having regard to all the evidence I have heard on this issue, my conclusion is that if it happened at all it was very minor, did not involve F, and the father has exaggerated and embellished the details over time. Had F been struck with such force by a backpack that his father was winded, he would have mentioned that to the mother immediately or at some point during the afternoon. It may be that this explanation was developed by the father in response to pressure to provide an explanation for the cause of F's fractures. Again, I remind myself that a finding that he has not been completely truthful does not necessarily mean he is covering up a more sinister explanation. It does however once again undermine the reliability of his evidence to the Court.

Father looks after F at night

86. Neither parent can recall the date, but both can remember that one evening they were upstairs at the top of the house watching TV with F and he fell asleep on the sofa. The mother thinks perhaps when F was about three or four weeks old. When the mother went to bed at around 10 or 10.30 p.m. the father suggested that rather than take F with her as usual, she leave him sleeping on the sofa and he would do the next feed. The mother told me that as usual F woke up for a feed two or three hours later, that she understood the father gave him a bottle of expressed milk and then at about 3am or 4am when F woke again the father brought him down to her for his next feed.

87. The father said that no, he had stayed awake the whole time with F, watching him sleep. He said that F slept all the way through until 3am or 4am at which point he brought him downstairs, gave him some milk then took him into the mother. I thought he said that he had kept a bowl of hot water upstairs ready to put the refrigerated bottle in but think I misunderstood his evidence as presumably that hot water would have cooled over the period of five or six hours. He said that having fed F he brought him to his mother and she fed him again but this was a top-up feed, he had not, as she recalled, told her that he had fed F at around midnight or 1am.

27th June 2019

88. Maternal grandmother had arrived to stay with the family on the evening of 26th June. On the morning of 27th June the father got up after the children and their mother and grandmother had breakfast. F was a bit unsettled in the morning. His father took him out in the sling to the supermarket, the mother says this was to calm F down, the father says he was going anyway to get some butter. He says F was happy, a bit unsettled at

one point but the father thought he was hungry (as in his witness statement and account given to the strategy meeting). The mother says that F seemed uncomfortable all day and cried, could be soothed but then in ten minutes or half an hour would be crying again. They dropped E at nursery in the car for 12.30 pm then drove into town to do some shopping, returning home at about 2.20 p.m. The mother then did some home school work with D, the father took F upstairs to change his nappy. Mother reported that F was again unsettled at this point and the father was comforting him upstairs.

89. Contrary to what the mother reports about F both that day and in general, the father said in evidence that F was fine at this point and that he had absolutely no difficulties in changing F's nappy, F did not make any sort of fuss.

90. The mother's consistent evidence is that since birth F always hated having his nappy changed, hated being placed on his back and would always scream.

91. There is a discrepancy in the evidence about what happened in the forty-five minutes or so that F was upstairs with the father.

92. In his witness statement he says after changing F's nappy he watched YouTube for a bit with F lying on his tummy asleep. In his statement he says he then came downstairs about 3.10 p.m. ready to leave with F at 3.20 p.m to collect E from nursery. This is consistent with the father's recollections in a note on his phone and shared with his own mother by text message on Friday 28th June, save that he says he came down at 3pm. In his first police interview this evidence is repeated, *'[mother] did some work with D. I went upstairs and changed F's nappy at approximately 2.30 p.m. and then watched YouTube. F was lying on my tummy throughout.'* He referred to a photo remarking, *'this clearly shows F was showing no signs of distress. I returned downstairs at approx. 3.10 p.m'.*

93. Close to the time the mother's reports were consistent with this. At the strategy meeting she said that while she was doing schoolwork with D the father was upstairs with F, she assumed he was lying with F on his chest but she hadn't seen this. In her first police interview she said that the father had gone upstairs to change F's nappy and she stayed in the kitchen.

94. In their oral evidence the mother and father portrayed a different picture. The father told me that he had changed F's nappy that he had been singing to him, F fell asleep in his arms and then he gently manoeuvred himself backwards so that he was lying flat on the bed with F on his tummy. He exhibited a text message from him with a photo of F asleep on his chest and a message to mother timed 3.06 p.m. saying 'want to come up stairs xxx'

95. The mother said in oral evidence that in fact she had gone upstairs, remembered that it was remarkable that she had seen F asleep on his father's chest just like in the photo and they had shared a cuddle, and then they all went back downstairs together. She was questioned more closely about this and it was pointed out to her that she had never mentioned this before in any previous statement. Pushed to remember further details she struggled as to whether or not they had brought F down with them, she thought perhaps they might have put him in his cot to see if he would carry on sleeping but on his waking, the father went up to get him and they decided he should go on the nursery

run. There is conflicting evidence about whether mother was cooking, or working, and whether she asked the father to take F because he liked going for walks or because he was particularly unsettled.

96. In his oral evidence the father also recalled that the mother had come upstairs and that they had cuddled lying on the bed then as he moved to get up F had woken up and then he had brought him downstairs. This account is not found in any of the reports made by the parents nearer to the time, even though they were specifically asked to clarify this.

97. Both the mother and the maternal grandmother were clear in their written evidence, and the mother clear in her oral evidence that at the time they were helping the father get F into the sling he was not settled, although again, not to an unusual level of distress. The maternal grandmother remembers specifically that the reason the father was taking F to nursery was because he was restless and it was thought he would calm down.

98. All the records made near to the time suggest that F was crying and upset at the time he was put into the sling. Dr C noted that F was crying before being put in the sling. The hospital notes record the parents as saying that F was unsettled from the moment he was placed in the sling. The strategy meeting notes record that F was unsettled in the sling and the father reported he cried all the way to nursery. This is consistent with what he said to Ciara McShane the social worker, that F was crying from the point of being put in the sling.

99. However, the father subsequently gave a different account. In his first police interview the father said that F was '*a bit moaning … nothing too substantial .. refluxing a lot.'* Later on he said, *'he was happy … he wasn't crying.'* In his first witness statement he said that when they left for nursery, F was *'still happy and settled.'*

100. X is clear that when she met the father and F on her road on their way to nursery he was already crying. She recalls saying, *'wow, I've never heard him cry before'.* She recalls F crying the whole way to nursery but his cries becoming much louder when they arrived at the school.

101. The father's evidence to me was more consistent with what he said to the police, that F was moaning but not crying as they left. He described him 'refluxing' which he said was a bringing something up and swallowing down action, about fifteen times a minute – he demonstrated with a sort of repeated breathless gulping action. The father had his headphones on for the first minutes of walking – he told me he usually speed-walks to nursery listening to a podcast - and appears to have pushed them up on his head when he met X about a minute or two into the journey.

102. The mother is absolutely clear in her mind that something happened to F on that walk. She has maintained this view to doctors, social workers, to the police and in her witness statement. She said to me that she was quite clear that the injury happened when the father 'was out and about' although she could not imagine that he hurt F intentionally. When recounting a conversation between them when she was at hospital she said the father had been tearful and she thought he felt very guilty, because 'he knew that F got hurt while F was in his care.' She told me that E had once fallen from his changing table and she had felt very guilty and unhappy that this happened to her, even though it

was not her fault, and she felt this was how the father was about F's leg having been hurt.

Conclusions and analysis

103. In this case a number of possible explanations for F's fractures have been considered. I must remember that excluding those explanations one by one does not mean that the last theory standing therefore must be accepted as the 'answer'. Similarly, there is often a temptation to find an answer, a coherent narrative, in cases where the evidence is sometimes unclear, sometimes inconsistent and sometimes points in different directions. I must be disciplined in surveying the whole canvas, examining each piece of evidence in its context and in relation to the whole, and not ignoring those pieces of the evidence which do not fit. The burden remains at all times upon the local authority to prove the allegations it pleads and the standard remains a balance of probabilities. I may conclude that I am suspicious, or speculate as to how matters might have unfolded, but I can only find an allegation proved if I am satisfied that it is more likely than not that it happened, having had regard to all the evidence I have read and heard. That may mean that ultimately the Court has failed in reaching a conclusion about the causation of F's fractures and has failed to answer the central question posed. However, if not satisfied to the standard of a balance of probabilities, then however unsatisfactory that may be, that must be the result.

104. I am satisfied to the standard of a balance of probabilities that F sustained the ten costovertebral rib fractures at a different time to the two anterolateral rib fractures (I accept Dr Savage's evidence that these were indeed fracture injuries where initially they were only suspected). It would appear to be more likely than not that the anterolateral rib fractures were sustained at a different time to the femoral fracture, because the beginnings of a healing response was visible on those rib fractures on the scans whereas the femoral fracture was plainly within its acute phase.

105. The evidence is overwhelmingly against a conclusion that the costovertebral rib fractures could have been caused at birth, for the following reasons:
- Rib fractures at birth are exceptionally rare and ten rib fractures at the costovertebral junction unheard of. Even in babies with OI Dr Savage was unaware of any cases in which a baby had presented with a history of a fractured rib in its first year of life;
- In those rare cases where rib fractures at birth have been recorded have involved one or more of the risk factors of large babies and difficult births, in particular the baby getting stuck in the birth canal. None of those risk factors are present in this case. The notes record an unremarkable delivery, although it is right to note that it was a long time from induction to labour;
- the mechanism described by the parents of doctor and midwife pressing down on the mother's abdomen has been carefully considered by the experts in this case, and they have rejected it as implausible;
- F presented as a well, healthy baby with no indication at birth of injuries to the chest or for example issues with breathing which one might expect if he had just sustained ten broken ribs;
- His parents had taken him to the general practitioner when he was nine days old. Their concerns on that occasion were that he had a lump on the right side of his head and they were concerned it was getting bigger. The father's particular concerns were noted given his own history of hydrocephalus. The GP notes read, *'baby*

feeding well, no vomiting, no fevers, no abnormal movements of limbs or eye movements, .. no other concerns about baby.'

106. The evidence is overwhelmingly against a conclusion that F's fractures were in some way related to some as yet unidentified genetic or other vulnerability in his bones that medical science has yet to discover.

107. In the course of skilful cross-examination, Professor Kumar was encouraged to reflect upon all that has been discovered in his field in the past ten years, most noticeably the discoveries associated with the genome project, and to think of what more is yet to be discovered. If F and his siblings and parents took part in further genetic testing then more detailed information about them would be available. However, that does not lead me to question the reliability of the tests that have already been carried out, in circumstances where the results are in keeping with both the clinical picture and what has been identified on the radiographs and CT scans.

108. I am satisfied to the standard of a balance of probabilities that F does not have any metabolic bone condition that would explain the presence of his fractures nor that he has Osteogenesis Imperfecta nor Ehlers-Danlss syndrome or other genetic condition that could rationally be attributed as having a part to play in the sustaining of his fractures.

109. I have come to this conclusion principally relying upon the evidence of all the experienced consultant experts in this case but in particular the conclusions of the specialists Professor Shaw and Professor Kumar. I note that the experienced team at the [redacted] hospital also took a detailed history, ran tests and came to the same conclusions.

110. In addition Professor Kumar and Dr Croft emphasised that a child who is more susceptible to fractures as a result of some bone vulnerability will still be caused pain and show a reaction that would mean the event would likely be memorable to his carer. The parents' explanation of F's birth being a cause of the fractures is consistent with their witnessing what they thought was significant pressure exerted on him, but F's presentation at birth is not consistent with him having sustained ten rib fractures. The parents have not been able to describe any memorable event that is consistent with F sustaining the injuries he received.

111. Both parents have described F as a child who from birth did not like to be placed lying down on his back, who screamed when he had his nappy changed, and they found it much easier to settle him to sleep lying on his tummy than on his back. His mother has described how from birth he liked to feed 'upright', or to be held in an upright position and for this reason they used the sling much more than putting him in a pram. They thought this was down to colic. I appreciate this is what they now remember, but note that at the time they did not identify anything particularly different to their experience with the older children, both of whom they describe as colicky babies. When examined by doctors at birth no concerns were identified. Further, F was examined by a doctor again when he was nine days old because the parents were concerned about a lump on his head and in particular whether he might have hydrocephalus. The notes made at the time found him well and no concerns of this sort were noted. All this points against F having sustained any fracture injuries at birth.

112. I note Dr Savage's view that while the window for causation of these fractures extends back to birth, his view is that it is more likely to be around two weeks before presentation at hospital.

113. There are no descriptions of incidents, even minor in nature, that might explain how these fractures could have been sustained. The explanations given by the father of colliding with a bus stop and with a person wearing a backpack barging into him on the tube are not thought by the treating clinicians nor the experts to be incidents which would be consistent with either the rib fractures nor the femoral fracture respectively – even in a child with OI or other bone vulnerability - and in any event the bus stop explanation is now abandoned.

114. No treating clinician or expert has suggested there should be any concern about the mother's co-sleeping with F and she has not reported any incident of him crying or her rolling into him or falling out of bed or similar. There is no evidence of F being in significant distress such that one might expect him to have suffered an injury at a time where he had been co-sleeping with his mother in the minutes or hours beforehand.

115. She had a minor incident in the car on 18th June when she did an emergency stop but while she felt a bit shaken by this, F was reported to have remained cosy and comfortable in his baby car seat at all times, quite undisturbed.

116. The parents have described two noticeable dates on which F was unusually distressed and could not be consoled. One is the day before the fractured femur was discovered, the other is the trip to London including the backpack incident. Having regard to all the evidence, I am satisfied to the standard of a balance of probabilities that F sustained the costovertebral rib fractures at some point on 7th June and that he sustained the fractured femur at some point on 27th June.

117. I have not been able to identify a likely date that the anterolateral fractures were caused and deal with them later in the judgment.

Conclusions in respect of 7th June 2019

118. Having considered all the evidence very carefully the conclusion I have come to, and that I am satisfied has been established to the standard of a balance of probabilities, is that the ten costovertebral rib fractures were caused when F was in his father's care during the day on 7th June 2019, and that those fractures were caused by the way his father handled him.

119. I have regard to Ryder LJ's words in *Re S.* I cannot say whether the father was negligent, careless, reckless or whether this was deliberate infliction, although my own view is that the injury is likely to have occurred because the father was at the time overwhelmed by his own discomfort and stress at being on the tube, lost sight of his baby's needs, and at some point gripped him too tightly around the chest. To that extent it could be described as a loss of control but I think it extremely unlikely that the father had or exhibited any feelings of anger or rage towards his son at this time.

120. I have reached this view having had regard to all the evidence, but the following factors were of particular weight:

(a) F's presentation from immediately after they left the tube was of a baby who had been injured. He was significantly distressed, such that a transport worker approached them to ask if they needed help. His mother described him as screaming and screaming and none of the things she did to console him had any effect. Although he settled at times, it is clear that this continued for the whole day. I have thought about whether the fact of being in a sling for such an extended period and perhaps picking up on a certain level of stress from what on any view was a fairly hectic day could account for this presentation. However, it was commonplace for F to be in the sling for extended periods and the parents were busy and active. They describe his presentation as something much more out of the ordinary than that;

(b) The father's account of the backpack collision is unconvincing as an explanation for the fractures. If F was hit as the father described, I would have expected the father to immediately have been concerned for F's welfare and to have told the mother of his concerns. Instead he said something to her about the rudeness of the other passengers;

(c) The father finds travelling on the tube extremely stressful. It is hard work for him. He told me of the heat, the crowds and the noise on that day. Where normally he wears noise-cancelling headphones he was without them. They had already been to Paddington station twice, then on two crowded tube trains, and dealt with crowds at Piccadilly Circus. He described sitting down with people standing up very close to him and all around, the central area between the double doors was so full that he could not use that door to get out even though it was closest to him;

(d) F was in the sling which was too big for him and which the father was in the habit of wearing quite low. Sitting down on the tube it is inevitable that the belt would have risen up increasing the slack in the sling. The father told me that he sat with his legs apart and F between his legs, holding him under his bottom. He told me that when he stood up he was holding him in his arms. I asked where were his hands and arms and he said at first *'around him',* then, *'the sling .. I've got my hand on the sling but my hand would go inwards to hold him',* so inside the sling. The description is hard to make out but the impression that I formed is that where normally one would expect a child in a sling to be nestled against the chest of their parent and therefore secure and insulated from the movement of the tube, F was hanging much lower and was therefore less secure. I cannot say whether his father gripped him tightly at a point when sitting down, as he stood up to leave or whether walking along the length of the tube. I doubt that he meant to cause him any harm. However, I consider that it is likely to have been shortly before exiting the carriage**.** In my judgment the father is likely to have known that something had happened to cause F to cry out. Whether or not the father did encounter another passenger with a backpack, I do not think he seriously thought this had caused an injury to F or he would have mentioned it immediately to the mother;

(e) The expert evidence and that of the experienced treating clinicians is that it would take a compressive action of significant force to cause this number of fractures. Dr Savage and Dr Croft are both clear that outside saying the force expected would be outside of normal handling, they are unable to give an indication of the level of force required. There is an infinite range of levels of force that could cause a fracture.

Where babies are grabbed by the ribs and violently shaken by carers in fits of anger it is a combination of the grip and the movement that can cause the fracture, but the grip is not necessarily vice-like. A sudden grab round the ribs to stop F slipping to one side or the other in the loose sling, or hands held around the chest with constant or increasing pressure while the train is moving, could in my judgment be described as outside normal handling of a three week old baby, without being anywhere close to violent infliction of injury.

Conclusions in respect of 27th June 2019

121. I am satisfied to the standard of a balance of probabilities that the father was responsible for the fracture to F's leg which occurred on 27th June. I am unable to say exactly how or exactly when this fracture was caused, whether by rough or careless or reckless handling at a time when the father was caught up in his own thoughts and was not paying sufficient attention to the needs of his son, or whether something happened when the father was taking care of F.

122. I am unable to say whether this injury was caused in the forty-five minutes or so before leaving for nursery or in the minute or two before the father met. If the fracture was initially stabilised by being held in the sling it would appear that the pain became increasingly worse through repeated movement as his father walked to nursery and therefore that F was in a state of extreme distress by the time he returned home.

123. The reasons that I have come to this conclusion are as follows:

(a) F's presentation on 27th June is one of discomfort and being unsettled. Given that I have found that he sustained ten rib fractures which were still in the process of healing at that stage and that he had also likely recently sustained two further anterolateral rib fractures, this sort of presentation is not surprising;

(b) The picture changed dramatically during the course of the walk to the nursery and on a balance of probabilities I find that this is because his increased level of distress was in response to the serious break in his thigh bone which was being moved about constantly;

(c) the father's evidence about the events of this afternoon has shifted and changed and was ultimately inconsistent and not credible. The bus stop explanation started as a question – my arm brushed against the bus stop could this be something? Over a course of days it progressed to an account of a much more dramatic event, with again a direct head-on blow to F that was of such force that the father felt an 'oomph' in his abdomen and still apparently felt a strong feeling in his shoulder and down his arms that resulted in bruising. The father's suggestion that he must have got the days muddled up is not convincing;

(d) I accept that a person may create a false account in circumstances where they feel under pressure to provide an acceptable explanation to professionals, and it does not necessarily indicate guilt. However, having spoken to X who told him that this did not happen, the father must have at the least been unsure, but instead pressed on, adding more and more detail to the story as he went along. He is not a reliable witness;

(e) The father's account of the forty-five minutes or so he was with F before leaving to go to nursery contrasts with the weight of the evidence from others. I do not think he has given a reliable account and is likely to have missed out some details. The mother's evidence is that he had been unsettled all day, corroborated by maternal grandmother. Her evidence is also that the father took F at that time specifically to settle him. She has reported a number of times that F hated having his nappy changed and that he always screamed. The weight of all the evidence is that F was not settled and was extremely unhappy from the point of being put in the sling. Yet the father has maintained that there were no issues throughout all this time, that F was happy, no issues with the nappy change, and that F lay on his tummy while he watched YouTube. This evidence was added to in Court by both parents when they suggested that in fact the mother had come upstairs, seen F settled and they had a cuddle. The father told me that he had not been watching YouTube but singing to F. I consider the contemporaneous accounts to be more reliable and I consider the parents are mistaken in this new memory. The details added after the event by the father would seem to suggest that these forty-five minutes were particularly happy and calm. That is out of step with the evidence that F never settled for more than half an hour that day, always screamed when having his nappy changed in any event, and had specifically gone upstairs with his father at 2.30 p.m. because he was unsettled;

(f) The CCTV of F in the swing shows him too low down, his head away from his father's chest, swinging from one side to the other at his father's hip level. His father is not paying attention to him, not supporting him and appears to be oblivious to his crying, which on X's account and his contemporaneous accounts persisted all the way through the walk albeit getting worse when they go to the nursery. In the initial stages of the walk the father had his headphones on and said to me that he may have adjusted F. The parents told Dr C that he would slip from one side to the other in the sling;

(g) Again I have regard to the medical experts and the evidence that more than usual force was required to cause this fracture but that the level of force cannot be gauged. I prefer the evidence of Dr Savage which I note is consistent with the opinion of the treating consultant, that a spiral fracture is most likely caused where there is torsion. When changing a baby's nappy or putting a baby's leg into the leg of a babygro, a parent may often grab a baby's leg by the shin, twist it round slightly so as to open the legs (frog legs) and push back towards the hip. This is normal handling of a baby. If done roughly or with excessive force, then it can be seen how this might cause a spiral fracture of the femur. The hip is a fixed point and the femur bone bows as it is pushed, it is in a slightly twisted position, and if sufficient force is applied, it could snap. If a child is carried in a sling and falls suddenly to one side, a parent grabs them by their leg and pushes them upwards, then again it is entirely plausible that movement may be in a twisting motion, the weight of the baby produces force from an opposing direction and the femur bone bends and then snaps;

(h) I am unable to say whether either of these events or some other mechanism occurred. The medical evidence is clear that any person handling the baby at such

an instance would immediately know that they had handled them with excessive force and that some form of injury had been sustained;

(i) F was in the father's sole care immediately before he exhibited signs of significant distress, of a different order of what they had seen before. The father has in my judgment sought to paint a different picture about F's presentation than the weight of the evidence would suggest. In my judgment he has done so because he is seeking to divert attention away from the time that he had F in his sole care and in identifying the bus-stop incident, tried to point towards occurrence of the injury at a different time or by a different cause;

(j) The wider context is that although the father presented as very experienced and hands-on, in fact he had comparatively little experience of handling newborns because he was around less when the other two were tiny and he had never been involved in feeding them day or night. He painted a very idealised image of family life and shared parenting, but also had significant needs of his own to have time on his own, to not be exposed to noise, stress, to have enough to eat, to stay up very late at night, but to have enough sleep, to be creative, to take exercise twice a day. All these needs are difficult to maintain in a household of three children and a baby exhibiting a high level of need;

(k) In all the circumstances, although I am unable to say how, I am satisfied to the standard of a balance of probabilities that he caused this injury by inappropriate handling of his son.

The Anterolateral fractures

124. I suspect that these fractures were caused on a separate occasion. They might have been caused on the night that the father had F alone. However, there is insufficient evidence to lead me to a conclusion to the standard of a balance of probabilities. There is no convincing evidence to place that night within the window when Dr Savage considers the fractures were caused and no other evidence as to F's presentation around the time that might suggest fractures were sustained. It would seem likely that F was suffering from symptoms related to them on 27th June, but that does not help me as to their causation. In the circumstances I make no findings about when or how these two fractures were caused.

Failure to protect

125. I am satisfied that the mother had no part to play in the causation of any of F's fractures.

126. I have regard to the case of L-W and I am satisfied that there is nothing that she could or should have known, nor any steps she might have taken differently so as to prevent F from sustaining these fractures.

127. I am satisfied that the mother could not reasonably have known that F had sustained fracture injuries on 7th June and therefore I do not criticise her for a failure to seek medical attention for him at that time. In light of F's symptoms on the afternoon of 27th June and that he settled overnight, I consider it reasonable for her to have waited until

first thing on Friday morning before seeking medical attention. I note that the initial medical opinion was of possible sepsis rather than a fracture.

128. I do consider that the father is at fault on 7th June for failing to give to the mother a truthful and full account of what happened. I find that he must or ought to have been aware of a change in F's presentation when on the tube and he should have expressed his concerns to the mother immediately. If she had known, she would not have allowed F to be carried all round London in a sling for the rest of the afternoon, and is likely to have sought medical attention for him. As to 27th June, I accept the medical evidence that any carer looking after F ought to know something had happened. F was in the father's care but he has not been able to give a full or reliable account of events. As a consequence there was a delay in F receiving medical attention on both dates.

129. Where I have found that there were two separate incidents of injuries sustained in the care of the father, and that he has not given a true and accurate account of what happened, it could be argued that it is more likely than not that those injuries were inflicted deliberately.

130. However, I have not been able to form that conclusion to the standard of a balance of probabilities, in the particular circumstances of the case. Firstly, because there is to my mind a consistent element across both injuries of F being placed in the sling for long periods during the days in question. The sling was obviously a poor fit for him and not properly secured to his father and it may well have contributed to the injuries he sustained. Secondly because the injuries occurred when the father was either in a public place or in a household with others around. Thirdly, there is no evidence of him losing control of his temper either around the time concerned, or ever, with the mother, his children, professionals or at all. The father has successfully parented his older children and is in a secure, loving and mutually supportive relationship with his wife. I have found that he has not given a full and accurate account of events but I am unable to say whether this is because he is lying outright and knows of a more sinister explanation or whether he is just a very poor witness, struggles to notice things in the first place and thereafter to recall details.

Findings

131. On the schedule of findings I find 1 proved, am unable to reach conclusions about paragraphs 2 and 3. As to 4 I find that no organic or medical cause has been identified for F's fractures, that the cause was infliction of force outside normal or appropriate handling (I omit the word 'non-accidental') and that no adequate explanation as to an accidental cause of any of the injuries has been provided by the parents. As to 5 I find that the injuries were perpetrated by the father. For reasons given I find that paragraph 6 in respect of a failure to notify others of his actions constitutes a failure to protect and that this has led to unnecessary medical intervention for F.

Next steps

132. It will be for the parties to reflect upon this judgment. It has been pointed out to me a number of times during this hearing that these parents are in all respects wonderful, loving parents, who despite the pressures that these proceedings have brought, continue

to devote themselves to the needs of each of their children. I fully accept this about both parents. I do not consider that any of my findings are inconsistent with this.

HHJ Joanna Vincent
18th February 2020
Family Court, Oxford