SHERIFF APPEAL COURT

[2024] SAC (Civ) 29

Sheriff Principal G A Wade KC
Appeal Sheriff F Tait
Appeal Sheriff C M Shead

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL G A WADE KC

in the appeal in the cause

under section 163(1)(a)(i) of the Children's Hearings (Scotland) Act 2011

by

HO

Appellant

against

EMMA SCRIMGER, Locality Reporter Manager on behalf of the Principal Reporter

First Respondent

and

DM

Second Respondent

Appellant: Allison, advocate; Rutherford Sheridan Ltd
First Respondent: Flannigan, solicitor; Anderson Strathern LLP
Second Respondent: Sturdy, solicitor; Livingstone Brown Ltd

25 June 2024

Introduction

[1] An application was made by the Locality Reporter Manager ("the reporter") to the summary sheriff at Aberdeen Sheriff Court, under section 93(2)(a) and 94(2)(a) of the

Children's Hearings (Scotland) Act 2011 ("the 2011 Act"), in respect of the child, who we will refer to as Kyle, for a determination on whether a ground of referral was established.

[2] The ground of referral was that, in terms of section 67(2)(b), a schedule 1 offence had been committed against Kyle. The schedule 1 offence in question, at the time the matter was referred to the summary sheriff, was an allegation of assault by HO against Kyle. The statement of facts in respect of the ground of referral narrates that Kyle was born on 6 February 2022. The reporter offered to prove at statement of fact 2 that:

> "On or around 28th May 2022, [Kyle] was assaulted by being shaken by [the appellant] and as a result sustained the following injuries:
> (a) bleeding in the space between the outer and middle layers of the covering of the brain;
> (b) bleeding in the retina of both eyes; and
> (c) bleeding around the spinal cord."

[3] The reporter asked the summary sheriff to conclude from these findings that the necessary requirement for the assault to have caused bodily injury had been established.

[4] Before the children's hearing neither HO nor DM, the parents of Kyle, accepted that the ground of referral was established. The matter was therefore referred to the summary sheriff. The main issue for the summary sheriff to determine was one of causation. Two disputed matters of law arose in the course of the proof:

(i) whether it was fair for the reporter to amend statement of fact 2 after the proof had concluded; and

(ii) whether a paediatrician led by the reporter could give hearsay skilled witness evidence of a consultant radiologist?

[5] The summary sheriff allowed both the amendment and the hearsay skilled witness evidence. Thereafter, she determined that the ground of referral was established. HO appeals against the summary sheriff's determination in respect of the two disputed issues

noted above and, in turn, the ground of referral (as amended) being established. DM, the father, does not oppose HO's appeal and adopted her position.

Background

[6] On 28 May 2022 Kyle had been woken by his mother, HO, who fed him as normal. During the morning Kyle was unsettled with persistent crying. DM had remained in bed all morning. Kyle was in the care of HO. Around midday HO woke DM because Kyle would not stop crying. DM tried to soothe him. While being held by DM he noticed that Kyle had moments of lost consciousness, became unresponsive with glazed eyes, was gasping and made a strange cry. His parents called the emergency services and travelled to Aberdeen Royal Infirmary. Due to suspicions being raised, a child protection medical examination was undertaken by paediatricians. Kyle was noted to have:

(i) a 1cm scratch on the back of his left thigh and a 2cm circular bruise below his left kneecap;

(ii) an increased head circumference; and

(iii) a raised soft spot and a downward gaze indicating raised intracranial pressure.

[7] Kyle underwent a CT scan on 28 May 2022. That CT scan was reviewed by Dr Sethi, a consultant radiologist. On 29 May 2022, Kyle underwent a further child protection medical examination by Dr McDonald, a paediatrician, who confirmed the observations made on the previous day. An MRI scan was also taken and reviewed by Dr Sethi. The CT scan showed Kyle to have bilateral subdural haematomas with blood of different density, indicating blood of different ages, on Kyle's brain. The blood was found in the interhemispheric fissure and over the posterior fossa. This is more commonly associated with abusive head trauma than with accidental trauma. The MRI scan confirmed the

finding of bilateral subdural haematomas of varying ages and thrombosed bridging veins with no other abnormality. Kyle also presented with a subdural haematoma overlying the lumbosacral spine which is again highly suggestive of abusive head trauma.

[8] An ophthalmology examination was also undertaken, which disclosed that bilateral retinal haemorrhages involving different layers of the retina were also present. Again this is consistent with abusive head trauma.

[9] Kyle was placed into foster care following his discharge from hospital. Subsequently, between 14 and 15 June 2022, HO disclosed to DM that she had shaken Kyle and was concerned that she had caused his injuries. DM contacted social services. On 15 June 2022, HO disclosed to a social worker that she had shaken Kyle on at least one occasion, and possibly a second occasion a few weeks previously. HO was then questioned by police on 15 June 2022. In the course of questioning, she admitted to shaking Kyle on a couple of occasions.

[10] On the basis of the available evidence, the reporter referred the matter to a grounds hearing before the children's hearing on 7 July 2022. As both HO and DM opposed the ground of referral the children's hearing referred the matter to the summary sheriff for determination.

The proof

[11] The reporter led evidence from DM, the social worker, police officers and Dr McDonald. The summary sheriff also heard the recording of the police interview of HO on 15 June 2022 and read the transcript of that interview. The reporter elected not to cite Dr Sethi, nor for that matter the ophthalmologists, to speak to the findings they had made

following their medical examinations of Kyle. However, the findings of the three specific areas of injury were recorded as agreed facts in the joint minute of admissions.

[12] Prior to Dr McDonald giving evidence, an objection was made by counsel for HO. His objection was two-fold:

(i) no CV had been lodged outlining her qualifications and experience (an objection which was not later insisted upon); and

(ii) Dr McDonald did not have the necessary experience to assist the court in relation to the issue of causation.

[13] The summary sheriff heard Dr McDonald's evidence under reservation. During the course of her evidence, Dr McDonald gave evidence of discussions she had with Dr Sethi, in particular his interpretation of the results from the CT scans and MRI scan taken of Kyle. Dr Sethi's comments were of particular relevance to the issue of aged blood present in Kyle's brain. This is indicative of injuries having been sustained on more than one occasion. Subsequent to the proof, counsel for HO revised his objection to Dr McDonald's evidence; he now contended that Dr McDonald could not give hearsay evidence of fact and opinion. In particular, Dr McDonald's evidence as to Dr Sethi's opinion was not admissible. As Dr McDonald had admitted in evidence that she was not qualified to interpret neuroradiological imaging, any opinion evidence from her on the interpretation of the CT scans and the MRI scan was not admissible nor was her hearsay evidence of Dr Sethi's interpretation of the scans.

[14] The summary sheriff held that it was not open to counsel for HO to amend the terms of his original objection. His revised objection came too late. In any event, even if it were not too late, she considered that Dr McDonald's evidence, including the hearsay evidence of Dr Sethi's opinion of the CT scans and MRI scan, was admissible.

[15] Upon conclusion of the reporter's evidence, HO elected not to lead any evidence. Thereafter, the reporter sought to amend statement of fact 2 (quoted above at para [2]). Firstly, the reporter sought to amend statement of fact 2(a) to read "bleeding of different ages and in different areas of the brain." No objection was taken to that amendment and it was allowed. Secondly, the reporter moved to amend statement of fact 2 by deleting "On or around 28 May 2022" and replacing it with "On 28 May 2022 and on at least one other occasion between 1 April 2022 and 28 May 2022". This amendment was opposed by HO and DM. The summary sheriff stated it was competent for the statement of grounds (including both the ground of referral and statement of facts) to be amended on the application of any party or on the sheriff's own motion, at any time: Child Care and Maintenance Rules 1997, rule 3.48. The summary sheriff did not consider the amendment caused material prejudice to either parent. The amendment was based on evidence given by HO in her interview to the police on 15 June 2022. She had admitted to shaking Kyle on two occasions; not just one. Further, the summary sheriff considered that the suggestion that HO might have led evidence as to who had care and control of Kyle in the period between 1 April 2022 and 28 May 2022 had she known the reporter proposed to put a second allegation of assault before the summary sheriff was without merit. HO had elected not to give evidence due to the potential of criminal proceedings against her. In addition, DM had given evidence as to who had care and control of Kyle for nearly all of the period that the reporter now sought to include in her amendment. No challenge had been made by HO in cross-examination to that evidence. On that basis the amendment was allowed.

[16] Thereafter, on the basis of the evidence led, the summary sheriff held that the reporter had established the ground of referral.

The stated case

[17] The questions posed in the stated case are:

i. Did I err in permitting, at the stage of submissions, amendment of statement of fact 2 in the terms amended?

ii. Did I err in treating as admissible the evidence of Dr McDonald in relation to the neuroradiological imaging results?

iii. Did I err in treating as admissible opinion evidence given by Dr McDonald as to causation of the injuries found?

iv. *Esto* the answer to 2 and/or 3 is in the negative, in arriving at the conclusion that there was no other explanation for the injuries, did I fail to address a material part of Dr McDonald's evidence, namely her evidence that the assessing Paediatric Radiologist was neither asked nor gave an opinion on whether the injuries could have been caused during the child's birth?

v. Was I entitled to infer that the appellant possessed the necessary *mens rea* for the crime of assault from the primary facts found by me?

vi. Was there sufficient evidence before me to allow me to conclude that the appellant had assaulted the child on an occasion between 1 April 2022 and 28 May 2022, being an occasion prior to the acute injuries found on 28 May 2022?

vii. Was there sufficient evidence before me to allow me to conclude that the appellant had shaken the child on 28 May 2022, thereby causing the acute injuries found?

Submissions for the appellant

Amendment

[18] It was competent for the summary sheriff to amend the ground of referral and statement of facts at any time: Child Care and Maintenance Rules 1997, rule 3.48. However, the summary sheriff's exercise of discretion was not unfettered. In allowing an amendment, the summary sheriff had to consider Article 6 of the ECHR. Any proof concerning whether the grounds of referral are established is conducted with the statement of facts narrated in relation to the grounds of referral in mind. They inform both parties as to the scope of the dispute; they affect the evidence to be led and objected to at proof. If amendment of the grounds of referral or statement of facts may result in a case being established to which a party had not been called to respond at the outset of the referral, then all parties must be afforded an opportunity to be heard on whether the proposed amendment should be allowed: *TC* v *Authority Reporter* 2014 Fam LR 72 per Sheriff Principal Scott QC at para [30]. The summary sheriff had followed that course of action. As a consequence, no criticism was made of the procedure she followed; criticism was only made of the manner in which she exercised her discretion.

[19] The reporter's amendment came at the latest possible moment. The reporter had led all of her evidence. Upon conclusion of the reporter's case, HO chose not to lead any evidence. It was only after that stage that the reporter moved to amend. The amendment sought to introduce a new and distinct allegation of assault on a different occasion at a different time, causing different injuries from those arising from the assault originally alleged in the statement of facts. By way of analogy, it was argued that amendment to an indictment in solemn procedure or a complaint in summary procedure was not permissible

where it changed the character of the offence: *McCafferty* v *HM Advocate* 2020 SCCR 105 per Lord Justice General (Carloway) at para [17].

[20] The allowance of the reporter's amendment meant HO had to then answer a second allegation of assault, even though the proof had concluded. The evidence which the reporter relied upon for the amendment had been available to her before proof. No reason had been given to explain why the amendment was not made before the proof. Had the reporter done so, HO would have been able to give instructions and receive advice on:

(i) whether objection was to be taken to any evidence regarding injuries to Kyle prior to 28 May 2022;

(ii) whether to object to the leading of the police interview of HO on 15 June 2022;

(iii) whether HO should give evidence herself; and

(iv) whether to lead evidence of any other party responsible for Kyle's care during the alleged period of assault.

[21] In the circumstances, allowance of the amendment was unfair. The summary sheriff erred in allowing it.

Admissibility of expert evidence

[22] The sole medical witness led by the reporter was Dr McDonald. An objection was made to her evidence. When initially made, the basis for doing so was to criticise whether she had sufficient expertise to provide an opinion. By the time of submissions, the objection was that Dr McDonald was not qualified:

(i) to provide an interpretation of the CT scans and MRI scan; and

(ii) to provide an opinion on causation of the injuries identified on the CT scans and MRI scan.

The individual who was qualified to provide such evidence was Dr Sethi; however, the reporter had not called him as a witness. In the event, the reporter led evidence from Dr McDonald as to what Dr Sethi's opinion was with regard to the CT scans and MRI scan.

[23] The summary sheriff erred in holding that the objection based on whether Dr McDonald was sufficiently qualified to provide an opinion on the CT scans and MRI scan came too late. Expert evidence is either admissible or it is not. The timing of an objection to the admissibility of expert evidence is therefore irrelevant. It remains the duty of the decision-maker to test the evidence of the expert and assess whether it is in fact admissible: *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59 per Lord Hodge at paras [38], [44] and [59].

[24] The summary sheriff failed to apply the test in *Kennedy* and consider whether Dr McDonald could, properly, provide hearsay skilled witness expert evidence of what Dr Sethi had observed in the CT scans and MRI scan. Had she considered the evidence properly, the summary sheriff ought to have realised that allowing such evidence would prevent the court from performing its proper function to scrutinise the admissibility of expert evidence. In the absence of the attendance of the maker of the hearsay opinion, the court cannot assess whether the maker of the hearsay opinion is, in fact, qualified to give the opinion. It cannot assess whether the opinion is based upon a reliable body of knowledge or experience without hearing the basis for the opinion from the expert. It cannot establish whether the witness has assessed and presented the evidence impartially without having the evidence presented from the originating source. If the court is to be taken as having a positive duty to ascertain the admissibility of expert evidence before relying upon it, then the court must hear from the witness itself, whether via affidavit or on parole. In this case, it was not possible to form any view on whether Dr Sethi's

interpretation of the CT scans and MRI scan as to the aging of the injuries or potential causation could be accepted and relied upon without hearing from him directly. The evidence given by Dr McDonald as to his opinion was *"bare ipse dixit"*: *Kennedy* (*supra*) at para [48].

[25] Separately, there was the question of the fairness of permitting reliance upon such hearsay evidence. The court is required to consider:

(i) whether there is a good reason for the non-attendance of a witness and, consequently, for the admission of the absent witness's untested statements as evidence;

(ii) whether the evidence of the absent witness is likely to be the sole or decisive basis for the determination of the facts in issue; and

(iii) whether there are sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to a party as a result of the admission of the untested evidence and to ensure that the hearing, judged as a whole, is fair: *Al-Khawaja* v *UK* (2012) 54 EHRR 23; *Schatschaschwili* v *Germany* (2016) 63 EHRR 14 and *JS* v *Children's Reporter* 2017 SC 31.

[26] In the circumstances of this case, no explanation was given for the reporter's failure to lead Dr Sethi. His evidence was the sole basis upon which the CT scans and MRI scan could be interpreted and, in turn, the sole basis of evidence regarding the age of the blood injuries to Kyle's brain. His evidence was determinative of whether the ground of referral was established. There were no obvious counterbalancing factors to balance the prejudice to HO in allowing the hearsay skilled witness evidence of Dr Sethi.

[27] The practice of permitting hearsay skilled witness opinion evidence would be a slippery slope. It effectively would mean that a party who elected to lead a hearsay statement of a skilled witness would be in a better position than one who led the skilled witness because they could prevent any scrutiny of the underlying opinion by either any other party or the court. That would be perverse and would give rise to absurd results.

[28] *M* v *Kennedy* 1993 SC 115 did, *prima facie*, present HO with a difficulty in her submission that Dr McDonald could not give evidence of Dr Sethi's opinion; however, it was argued that *M* could be distinguished from the facts and circumstances of this appeal.

[29] Firstly, in *M* the sheriff accepted that the expert witness could give evidence of the opinion of a colleague, because they themselves had sufficient experience and qualification to provide an opinion on the same issue: *M* per Lord President (Hope) at 118I to 119C. By contrast, Dr McDonald had explicitly conceded at proof that she could not provide an opinion on the CT scans and MRI scan.

[30] Secondly, there was no speculation in *M* as to what an expert witness not called might say; however, at the proof before the summary sheriff, Dr McDonald was invited to speculate on what Dr Sethi's opinion would be. It was submitted that *M* stated such speculation by an expert witness was inappropriate: *M* at 119E-F.

[31] Thirdly, a key issue in *M* was whether the opinion of the expert witness who was led by the reporter had had their opinion influenced by the expert witness who had not been called. If not, then there was no issue; however, the First Division set out in *obiter* remarks that matters might be different if the evidence of the expert witness who was led had had their opinion altered by the other expert witness who had not been led: *M* at 120A. Dr McDonald's entire evidence on the imaging was based on what Dr Sethi had told her. The position in this appeal was, therefore, distinguishable from *M*.

[32] Question (iv) of the stated case concerned a discrete issue contained in Dr McDonald's evidence. She confirmed in cross-examination that Dr Sethi was neither asked nor gave an opinion on whether Kyle's injuries could have been caused during the child's birth; however, she speculated that Dr Sethi would not have attributed Kyle's injuries to child birth. No weight could properly be attached to that evidence.

[33] The reporter's submission that the court, in the event it finds that Dr McDonald's hearsay evidence of Dr Sethi's opinion on the imaging showing bodily injury to Kyle prior to 28 May 2022 is inadmissible, should instead hold that an offence was committed under section 12(1) of the Children and Young Persons (Scotland) Act 1937 lacked any basis. No such submission had been made within the reporter's note of argument, nor was there any citation of authority for such a position. Moreover, the court did not have the benefit of the summary sheriff's analysis on this point.

[34] The court was invited to answer questions (i), (ii), (iii) and (iv) in the affirmative; to decline to answer question (v) as not insisted upon; and to decline to answer questions (vi) and (vii) as unnecessary.

Submissions for the second respondent

[35] DM adopted the submissions of HO in full.

Submissions for the reporter

Amendment

[36] Parties were agreed it was competent for the statement of grounds, including both the ground of referral and statement of facts, to be amended on the application of any party

or on the summary sheriff's own motion, at any time. Where parties diverged was over the exercise of the summary sheriff's discretion.

[37] Where an appeal is taken against a decision involving the exercise of discretion, it is not the function of an appeal court to interfere with the summary sheriff's exercise of discretion merely upon the ground that the appeal court would have exercised the discretion differently. An appeal court may intervene if satisfied that the decision-maker at first instance did not exercise discretion at all; or that in exercising it they misdirected themselves in law; misunderstood or misused the evidence or the material facts; took into account an irrelevant consideration; failed to take into account some relevant consideration; or if the conclusion is such that, though no erroneous assumption of law or fact can be identified, the decision-maker at first instance must have exercised their discretion wrongly: Macphail *Sheriff Court Practice* (4th ed) at paragraph 18.159 - 18.160.

[38] The critical issue was whether HO was unfairly prejudiced by the allowance of the amendment. The summary sheriff allowed parties to make submissions. She considered the nature of the amendment, the effect on the proceedings and the potential prejudice to HO were it to be allowed. Having done so, the summary sheriff concluded:

(i) that the proposed amendment did not cause material prejudice to either of the parents;

(ii) that the proposed amendment did not materially change the case or depart substantially from the statement of facts originally put to the parents; and

(iii) that this was not a situation where a case had been found against HO which she was not asked to answer, but was instead a small clarifying amendment, reflecting the evidence known to all parties prior to proof.

[39] The purpose of the amendment was to reflect the evidence as it was heard before the summary sheriff. The reporter accepted she could have made the amendment prior to proof. The reason for the lateness of the amendment was that the reporter wished to see if HO chose to give evidence as that would affect what was proven at the proof and in turn any possible amendment made by the reporter.

[40] HO's submissions on amendment to an indictment in solemn procedure or a complaint in summary procedure were irrelevant. These are civil proceedings of a unique character. It was inappropriate to make reference to criminal proceedings in civil proceedings of this nature: *McGregor* v *D* 1977 SC 330 per Lord President (Emslie) at 336; *W* v *Kennedy* 1988 SC 82 per Lord Sutherland at 85 and *S* v *Locality Reporter Manager* 2014 Fam LR 109 per Lady Smith at paras [7] - [8].

[41] The circumstances of this appeal were similar to those in *KH* v *Children's Reporter* [2016] SC GLA 18. In *KH*, following the conclusion of the leading of evidence and the reporter's submissions, the sheriff was invited by the reporter to amend the statement of facts. The amendment was opposed by *KH* on the basis that to allow it would be prejudicial and, in any event, the amendment was not based on fact. The sheriff in *KH* allowed the amendment; the changes to be made had been spoken to in the evidence and it was not prejudicial to allow the amendment given the particular stage in the proceedings.

[42] *KH* appealed. Their appeal was refused by Sheriff Principal Scott QC. Whilst it may have been unfortunate that the factual material which was the subject of the amendment had not been incorporated into the original grounds for referral, the reporter was entitled to make the motion to amend at the stage they did; the proposed amendment was designed to reflect evidence already led and uncontroverted by or on behalf of *KH*; the other parties did not table any opposition to the proposed amendment; and the sheriff was entitled to

consider and determine the motion subject always to having heard parties' submissions thereon: *KH* at para [52].

[43] *KH* and her advisers could have sought to lead further evidence following the allowance of the amendment on the basis that they required to deal with material led in the course of the proof in respect of which no prior notice had been given. That opportunity was not taken up by *KH* or her advisers. For those reasons, Sheriff Principal Scott QC refused to hold that the sheriff had erred in allowing the amendment: *KH* at para [53].

[44] HO could have chosen to lead further evidence following the allowance of the amendment by the summary sheriff, but chose not to. No criticism can be made of the manner in which the summary sheriff dealt with the motion, standing *KH.*

[45] In the event the court was minded to answer question (i) alone in the affirmative, the reporter opposed HO's motion to remit and for the matter to be heard of new before a different sheriff. Even if it was considered by the court that the summary sheriff erred in allowing the amendment, there still remained sufficient evidence to establish the ground of referral in its original form. The appropriate course would be to remit to the summary sheriff and direct her to hold the ground of referral established.

Admissibility of expert evidence

[46] An objection to a particular question must be made at the time when the point arises; failure to do so may give rise to an inference of acquiescence in the leading of the evidence. A party may be entitled to found on evidence to which no timeous objection has been taken: Macphail *Sheriff Court Practice* (4th ed) at paragraph 16.84. The summary sheriff was correct to find the objection based on hearsay came too late as that objection was not tendered in advance or during the evidence.

[47] Even if the objection had not been tendered too late, the summary sheriff was correct in finding that it still would have fallen to be rejected. Hearsay evidence of fact or opinion is not inadmissible: section 2(1) and 9 of the Civil Evidence (Scotland) Act 1988. There was no material prejudice to HO in allowing Dr McDonald to give hearsay evidence about the matters reported to her by Dr Sethi and the other medical experts. Dr McDonald's report and witness statement were lodged in advance of proof. Upon consideration of those, it was open to HO to cite Dr Sethi if she wished to challenge his interpretation of the CT scans and MRI scan.

[48] The case of *JS* was distinguishable from the present case. The reporter contended the following three propositions could be taken from *JS*:

(i) that a party in proceedings under part 10 of the 2011 Act has a right to be given an adequate and proper opportunity to challenge and question a witness against them;

(ii) when that right is infringed, the summary sheriff must consider the three questions in the *Al-Khawaja* test to determine what they should do to ensure that the parties to the proceedings receive a fair hearing; and

(iii) it is for the party that seeks to rely on evidence of a witness that cannot be questioned to justify their reliance on this evidence with reference to the *Al-Khawaja* test.

[49] The facts and circumstances of this appeal were analogous to *M* v *Kennedy (supra*). If the other parties had wished to challenge the evidence of Dr McDonald it was open to them to cite either Dr Sethi or another expert to do so: *M* at 119G - 119I. HO had been given such an opportunity. She had the opportunity to cite Dr Sethi to give evidence, but had elected not to exercise it. Accordingly, there was no basis for HO to argue that there

had been an infringement of Article 6 of the ECHR nor was there any need to apply the *Al-Khawaja* test. Even if that was incorrect, the summary sheriff had applied the *Al-Khawaja* test and still considered Dr McDonald's hearsay skilled witness evidence admissible.

[50] As to the criticism directed at the summary sheriff by HO, under reference to *Kennedy* v *Cordia (Services) LLP*, the CT scans and MRI scan were not the only adminicles of evidence relied upon by the summary sheriff to establish causation for the injuries sustained by Kyle on 28 May 2022; however, the reporter conceded that the only evidence to establish causation of bodily injury as a result of any assault prior to 28 May 2022 was Dr Sethi's interpretation of the CT scans and MRI scan via Dr McDonald.

[51] If this court found that Dr McDonald could not give hearsay skilled witness evidence of Dr Sethi's opinion, then the reporter accepted that she could not prove statement of fact 2(a) as amended; however, in that eventuality, the reporter submitted that for the period prior to 28 May 2022 there was sufficient evidence to allow this court to hold, in the alternative, that there had been an offence committed under section 12(1) of the Children and Young Persons (Scotland) Act 1937.

[52] In respect of question (iv), Dr McDonald was examined during evidence as to the potential for a birthing injury to have caused bleeding to Kyle's brain. In re-examination Dr McDonald clarified that the potential for a birthing injury as having been the cause of the child's injuries was not discussed with Dr Sethi because it would be "such an atypical thing". A potential birth injury was not raised as a concern by Dr Sethi. No concerns were raised by Kyle's parents following his birth. The medical record of his delivery noted no significant concerns following his birth. No medical or expert evidence was led by HO that the injuries could have been or were likely caused during the child's birth. The summary sheriff accepted Dr McDonald's evidence that Kyle's injuries were not consistent with having

suffered an injury at birth. The assessment of the evidence and the weight to be attached were matters for the summary sheriff alone.

[53] The reporter moved the court to: answer questions (i) - (iv) in the negative; questions (v) - (vii) in the affirmative; refuse the appeal and remit to the summary sheriff to proceed as accords.

Decision

[54] The common thread running through this appeal is whether the procedure adopted by the summary sheriff was fair to HO. Although there were seven questions posed in the stated case, question (v) relating to the sufficiency of evidence to establish the *mens rea* of assault was no longer insisted upon. The answers to questions (vi) and (vii) are dependent upon the approach taken to the first four questions. Therefore the appeal focusses upon whether the summary sheriff should have allowed the reporter to amend the statement of facts at the point of submissions being made and after the evidence had concluded and whether the objections to the admissibility of parts of the evidence of Dr McDonald, the only medical witness adduced by the reporter, were timeous and well founded.

[55] Before answering these questions it is important to remember that, in terms of section 25 of the Children's Hearings (Scotland) Act 2011, every decision maker dealing with matters relating to children in terms of the Act, which expressly includes the court, must have regard to the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration. While the sheriff has a duty to ensure that the evidence is fairly tested and the proceedings ECHR compliant, the higher courts have been at pains to emphasise the levels of harm which can be done to children as a result of protracted proceedings. *B* v *G*, 2012 SC (UKSC) 293; *S* v *L*, 2013 SC (UKSC) 20. It is

through this lens and primarily with regard to the welfare principle, that the exercise of the summary sheriff's discretion should be tested.

[56] Throughout the appeal counsel for HO sought to draw analogies with the criminal law both in relation to the circumstances in which amendment of a charge is permitted and in relation to the admissibility of hearsay evidence. We find this approach to be of limited assistance. As was made plain by Lord President Emslie in *McGregor* v *D* 1977 SLT 182 at page 185 proceedings in referral proofs are *sui generis* and governed by a self-contained code of procedure contained in the Act and the Rules. The sheriff is constrained to follow the normal principles of evidence in summary civil proceedings with the important proviso that the interests of the child are not to be thwarted by an over-rigid application of the rules of evidence or procedure. The interests of the child will always require that the truth be established and rules of evidence and procedure which are designed to achieve that end will be followed (cf Norrie *Children's Hearings in Scotland* 4th edition paragraph 8-24.)

[57] This case is unusual because the starting point is the clear and unequivocal admission from HO that she shook Kyle on one occasion prior to 28 May 2022 and also on or about that date. That admission was made in various forms to DM, the social worker and to the police. In the course of her police interview she demonstrated her actions and these are described by the summary sheriff at para [96] of her stated case as being "vigorous and severe shaking of [Kyle] from side to side". Rather than looking for a mechanism which could have caused the injuries with which Kyle presented, the sheriff was being invited to find that there was evidence of bodily injury which had been caused by the actions of HO and accordingly that a schedule 1 offence had been committed.

[58] It should be borne in mind that the purpose of the proceedings before the sheriff is to determine whether there is a factual basis justifying intervention by the children's hearing.

In order to find the ground of referral established only one such offence resulting in bodily injury need be proved. Once any dispute about whether such a ground applies has been resolved by the court the door is opened for the children's hearing to examine whether or not it is necessary for the protection, guidance, treatment or control of the child to make a compulsory supervision order over the child.

[59] Putting aside the issue of amendment or admission of the hearsay evidence of Dr Sethi via Dr McDonald, if the summary sheriff had refused to allow the amendment and proceeded on the original statements of fact to the effect that there had been an assault on 28 May 2022 which caused bodily injury, we are of the opinion that she would have had an abundance of evidence from which to draw that conclusion on the balance of probabilities. In the first place, she had the admissions of HO herself. Secondly, this was accompanied by the evidence of DM who observed his son (who had been otherwise well, who had fed normally hours previously and had previously shown demonstrably normal development) suffering a brief, resolved, unexplained event ("BRUE") involving a period of unconsciousness and gasping for air. This necessitated immediate attendance of emergency medical services and admission to hospital creating a temporal link between whatever HO had done earlier and his condition a few hours later. Thirdly, the summary sheriff relied on the observations on admission to hospital which were noted by Dr McDonald and also countersigned by Dr Mayo. Dr McDonald is an Associate Specialist in Paediatrics within the child protection team at Royal Aberdeen Children's Hospital. She has been registered with the GMC since 1989, some 35 years. As the summary sheriff notes at para [62] Dr McDonald has carried out around two to three child protection examinations per week over a 15 year period. She had not relied entirely on either the ophthalmology, MRI or CT scans, albeit the findings of these were agreed in the joint minute. She has relied on her own examination of

Kyle while he was in hospital. In particular, she noted his increased head circumference compared to a measurement taken on April 2022, his raised fontanelle and sun setting of his eyes. She noted him to appear vacant and attributed that to possible seizures. The haematomas on the brain, spine and retina which are agreed to have been present, are known to professionals such as Dr McDonald to be part of an established triad of injuries strongly suggestive of abusive head trauma. She, therefore, relied on her own professional experience and a combination or jigsaw of factors to express the opinion that this was a deliberately inflicted, intracranial injury either with or without injury to the skull or face which usually involves acceleration/deceleration/rotational movement of the head (para [77] of the stated case). That is precisely what HO admitted to having done and demonstrated on the video, which Dr McDonald viewed.

[60] On that basis, we conclude that the summary sheriff would have been entitled to find that on the balance of probabilities the original ground before her was established on the basis of the unamended statement of facts and without relying on the hearsay evidence of Dr Sethi as to causation. The result would have been exactly the same for Kyle in that in terms of section 108 of the 2011 Act the sole ground would have been established and the summary sheriff would have required to direct the reporter to arrange a children's hearing. In the course of the proceedings it was made clear to us that Kyle has now been returned to the care of both parents albeit with some requirement for supervision in relation to HO.

[61] Thus while this appeal may raise some interesting issues, particularly regarding hearsay of experts, it is entirely academic in so far as the outcome for the child is concerned.

Amendment

[62] The parties are both in agreement that amendment of the grounds and the associated statement of facts is competent at any time; Child Care and Maintenance Rules 1997 rule 3.48. This is clearly a matter within the discretion of the summary sheriff. However, HO contends that this is not an unfettered discretion.

[63] We do not find any of the reasons advanced by the reporter for the failure to amend at an earlier stage to be persuasive. All parties were aware of the content of the police interview and the evidence of the social workers in advance of the proof. All parties had access to the medical evidence and Dr McDonald's report which made reference to the findings of older blood on the brain, indicative of more than one assault. There is no good reason why the reporter failed to amend in advance of the proof. Realistically any opposition at that stage would have had little chance of success. The question for this court is whether the amendment was such that real prejudice did arise.

[64] The approach of this court to appeals based on the exercise of discretion is discussed in Macphail *Sheriff Court Practice* (4th ed), paragraph 18.159-18.160. In short, the Sheriff Appeal Court will only intervene if satisfied that the exercise of the discretion was wrong. The summary sheriff provides her reasons for allowing the amendment at paras [15-20] of her stated case. There is some force in the argument that the evidence of an earlier incident of shaking comes from the mouth of HO herself. It is, therefore, somewhat disingenuous to suggest that she did not know about it or could not reasonably have expected that information to be elicited in the course of the proof. The evidence was not objected to. There was no attempt to redact the police statement or HO's statement to Ms Walger, the social worker, as might have been expected if opposition were to be mounted as to its admissibility. The evidence was therefore at large for the summary sheriff to consider. It

had a significant bearing on the welfare of the child and the summary sheriff was bound to take that into consideration.

[65] We do not find the analogy with amendments to indictments or complaints helpful. Firstly, those decisions turn on fairness to the accused in the context of establishing guilt or innocence. That is quite a different matter from determining whether on the balance of probabilities a child suffered bodily injury as a result of vigorous shaking on more than one occasion which HO admitted. In any event, it cannot be said that the character of the offence upon which the ground is founded has changed. It is still an assault by shaking. What has changed is the frequency of that occurrence. If the analogy with criminal proceedings has any bearing at all, witnesses will regularly give evidence that something happened on more than one occasion and amendments to charges are made to include the word "repeatedly" meaning more than once. That simply brings the charge in line with the evidence. It is consistent with providing any subsequent children's hearing with a true and accurate picture from which to make their decisions about the care of the child.

[66] We are not persuaded that if the amendment had been made earlier the tactical decisions in relation to the conduct of the proof would have been materially different. HO did not give evidence because of the potential to prejudice any criminal proceedings which may be brought. That consideration would have remained. The suggestion that evidence might have been led about others who had care of Kyle in that period is of little moment given the amendment was largely as a result of HO's admission that she herself had shaken him and her demonstration of how that was done. DM also gave evidence about who had had care of Kyle since his birth and confirmed that after these periods the child exhibited no ill effects.

[67] We are satisfied that having given parties an opportunity to address her on the proposed amendment the summary sheriff complied with *TC* v *Authority reporter* paragraph 30. There has been no procedural irregularity. While not condoning the lateness of the amendment it is clear that this was an important aspect of the evidence emanating from HO herself. The lack of earlier objection to evidence of the pre 28 May 2022 incident and the inevitable consequence that the supporting facts would otherwise give an incomplete account of the evidence adduced, having regard to the welfare principle, justify the summary sheriff's decision. We shall therefore answer the first question in the negative.

Admissibility of expert evidence

[68] The second and third questions ask whether the summary sheriff erred in treating as admissible the evidence of Dr McDonald in relation to the neuroradiological imaging results and her opinion evidence in relation to causation of the injuries found. These two questions turn on the expertise of Dr McDonald and to what extent she could rely on the evidence of Dr Sethi, who was not himself called to give evidence but with whom she had spoken and discussed his findings and opinion.

[69] In the course of the proof the objection was simply that Dr McDonald did not have the necessary experience to give evidence on causation of the injuries because, by her own admission, she was not qualified to interpret the CT or MRI scans. Subsequently and before us, this objection was expanded and reformulated into an objection as to the fairness of admitting the hearsay evidence of what Dr Sethi had told Dr McDonald in relation to the finding of aging blood on both the CT and MRI scans. While we accept that this articulation of the objection differed from that made in the course of the proof and is technically too late,

it remains for the court to consider the proceedings as a whole and to decide whether the reliance on hearsay was fair in the whole circumstances of the case.

[70] As a starting point, it is conceded that in terms of section 2 of the Civil Evidence (Scotland) Act 1988 evidence shall not be excluded solely on the grounds that it is hearsay. A statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible and facts can be found established notwithstanding the evidence upon which that finding in fact is based is hearsay. That provision applies to both evidence of fact and opinion.

[71] It is agreed in para [3] of the joint minute of admissions that the examinations of Kyle following his admission to hospital on 28 May 2022 disclosed bilateral subdural haematomas, a subdural haematoma overlying the lumbosacral spine and bilateral retinal haemorrhages. Perhaps surprisingly there is no criticism in the note of appeal or indeed in HO's written submissions in relation to admissibility of the hearsay evidence of the ophthalmologist. The summary sheriff accepted evidence leading to the conclusion that HO shook the child on at least two occasions, one being prior to 28 May 2022 and one being on or about that date; that on 28 May 2022 the child was observed by DM as unconscious and gasping for air, which was, by reasonable inference, shortly after the alleged shaking as demonstrated by HO; various medical professionals including Dr McDonald observed him to be suffering a "BRUE" on admission to hospital with physical signs consistent with head trauma, such as the sun setting of the eyes, the increased head circumference and bulging fontanelle. In light of all of this evidence we reject the submission that Dr McDonald was not qualified to conclude that Kyle's physical presentation was caused by the physical

trauma to which he had been subjected. The temporal link to the incident on 28 May 2022 is established by the acute presentation on emergency admission.

[72] The approach urged upon us by counsel for HO would, at least in relation to the original ground, require the summary sheriff and indeed us to completely ignore Dr McDonald's expertise as a senior paediatrician with many years' experience in child protection simply because she cannot, by her own admission, directly interpret the unchallenged and agreed findings of multiple haemorrhages on the CT and MRI scans, because this is not her specialist discipline.

[73] Over five paragraphs in her witness statement Dr McDonald described her experience, her daily involvement with child protection, her role in education in this area and her significant experience as an expert witness. She went on to describe in detail her own findings on examination of Kyle and explained why those observations, in conjunction with the undisputed findings on the scans, lead her to the conclusion that the injuries were strongly suggestive of abusive head trauma. At paragraphs 19-23 of her statement she brought all of the evidence together and concluded that the mechanism of vigorous shaking demonstrated to the police and as shown to her was "outwith what people would consider safe" and would "have been suffice to have caused the injuries" sustained. She was able to explain that the medical assessments carried out by the professionals involved in Kyle's care excluded underlying medical causes and that where no accidental explanation is offered abusive head trauma is considered most likely.

[74] Finally at para [38], Dr McDonald explains that her opinion was given under reference to the relevant chapters of the Royal College of Paediatrics and Child Health Child Protection Companion which is the online resource provided by the Royal College of Paediatrics and Child Health. We are, therefore, satisfied that Dr McDonald is appropriately

skilled in her field. This statement and the associated report dated 3 August 2022 were available to HO well in advance of the proof.

[75] Having regard to *Kennedy* v *Cordia (Services) LLP* para [44] we are, therefore, satisfied that Dr McDonald's evidence was necessary to enable the summary sheriff to determine the issues before her. She had an overarching role in bringing together the various pieces of evidence from the experts in other disciplines and collating it in a comprehensive format using her own expertise and the appropriate online tool. While she did not have experience to interpret imaging herself, she deferred appropriately to those who did. That was only one part of a complex picture to which only someone with her understanding of child protection and abusive head injury could speak. There was no suggestion of any lack of impartiality and her reference to the approved online resources demonstrates that her evidence was underpinned by a reliable body of knowledge. We are, therefore, satisfied that the four stage test in *Kennedy* v *Cordia (Services) LLP* is met. In so far as the appeal relates to Dr McDonald's expertise in this area, it must fail.

[76] The wider question posed is what if anything the summary sheriff ought to have made of the hearsay evidence of Dr Sethi and the fact that he was not called by the reporter and therefore immediately available for cross examination by HO. The submission is that Dr Sethi's opinion was decisive to the determination of a causal link between the shaking and the bleeding on the brain both prior to 28 May 2022 and on that date.

[77] For the reasons already given, we do not consider that Dr Sethi's evidence was essential to establishing causation between Kyle's presentations on 28 May 2022 and the incident earlier that day. There was an admitted assault and significant injuries were detected to the brain and eyes which Dr McDonald could temporally connect with the shaking from her own experience and expertise. What she could not do was interpret the

CT scans herself and had to rely on Dr Sethi to tell her that there was evidence of blood of different ages present on the brain. The reporter conceded that without the evidence of Dr Sethi delivered by Dr McDonald there was no evidence of bodily injury associated with the pre 28 May 2022 incident or incidents. We are satisfied that this concession is well made as none of Dr McDonald's own observations on that day or during Kyle's subsequent stay in hospital could have informed her of that.

[78] In this regard, it is suggested that the admission of hearsay was unfair because Dr Sethi was not called by the reporter. However, we are not persuaded that the three stage test in *Al-Khawaja* and *Schatschaschwili* is engaged. This is a situation in which Dr McDonald, as a paediatrician with a specialism in child protection, would inevitably have to have a working knowledge of related disciplines and the published material on traumatic head injury some of which may not be within her specific area of expertise. Having regard to *M* v *Kennedy* 1993 SC 115, to which reference was made by Lord Hodge at paragraph 59 of *Kennedy* v *Cordia (supra),* it is clear that it is not always necessary and, in most cases is undesirable, to lead all of the medical witnesses involved in the case. The result of leading too many experts has been recognised to elongate proceedings unnecessarily, adding to costs and most importantly delay in conclusion of proceedings which are of their nature anxious for the child and parents.

[79] In *M* v *Kennedy,* the appellant criticised the reporter for failing to lead evidence of two doctors who had examined a child at the centre of the proceedings and instead for relying on the evidence of a consultant paediatric neurologist (Dr Day) who had carried out an intimate examination of the child. It was submitted 1) that Dr Day had not herself had any previous experience of such an examination 2) that Dr Drummond, who had conducted the examination with Dr Day, was not adduced as a witness by the reporter and 3) that

Dr Day's conclusions had been influenced by her discussions with Dr McEwan, the consultant gynaecologist, who had not been called to give evidence. The Inner House held that the sheriff was entitled to accept Dr Day's evidence, and it was not necessary for Dr Drummond and Dr McEwan also to be led as witnesses, stating,

> "In our opinion the reporter was entitled in these circumstances to leave it to the other parties to call Dr Drummond to give evidence if they wished to know what she had to say. A balance must be struck between leading too little evidence and too much. The purpose of sec. 1(1) of the 1988 Act is to make it unnecessary for evidence to be led if its purpose is simply to corroborate a fact spoken to by another witness whose evidence can be accepted as credible and reliable. Care should be taken to avoid leading more skilled medical witnesses than is necessary, having regard to the evidence which they can give and to their experience. There was no need in this case for Dr Day to be corroborated and the reporter's decision not to call Dr Drummond is to be commended if he thought that she could add nothing to Dr Day's evidence."

[80] What is required is a sufficient basis for concluding that Dr McDonald had the competence and sufficient relevant experience to come to the conclusions she did given what the summary sheriff and indeed we know about her extensive experience in this area. Following *M,* the position might have been different if Dr Sethi's views were known to have differed from those provided by Dr McDonald but HO has not identified any basis upon which to challenge either Dr Sethi's finding of aged blood on the brain or his conclusion that this was suggestive of a previous incident of trauma. In this case, as in *M*, it was open to HO, who had known for a very long time in advance of the proof what the evidence of Dr McDonald would be, to call Dr Sethi for herself; a course urged by the Inner House in a decision by which this court is bound.

[81] As noted there was no suggestion that there was any basis on which to challenge either his expertise or his findings. Thus calling him as a witness would appear neither to have added to the reporter's case nor undermined it. As the Inner House observed care should be taken to avoid leading more skilled medical witnesses than is necessary.

[82] The reporter submitted that looking at the decision of the summary sheriff there had been no infringement of HO's right to a fair hearing brought about by reliance on this hearsay evidence. Where hearsay is relied on by one party what is required is that the other party must have an adequate and proper opportunity to challenge and question a witness whose evidence is relied upon by another party. That was satisfied in proceedings such as the present by the ability of HO to call the witness if so advised. We agree with that submission. In this case counsel for HO elected not to call the witness nor was any attempt made to lead evidence to cast doubt on the reliability of Dr Sethi's evidence. In an adversarial system such as ours where parties have the right to call any witness they want to (at least within reason) it makes no sense to suggest that HO was deprived of the opportunity to challenge the witness. She had that opportunity and declined to take it. On that basis there would be no need to apply the three stage test discussed in *Al-Khawaja* and *Schatschaschwili* the decisions of the Grand Chamber to which reference was made in the submissions.

[83] If we are wrong in respect of that point we should go on to consider the submission in the light of *JS* v *Children's Reporter* 2017 SC 31 and the decisions of the ECHR which were considered therein. In *JS* the Inner House accepted the submission that the three step approach in *Al-Khawaja* was a helpful tool of analysis in deciding whether the hearing had been fair. That was notwithstanding the fact that the relevant decisions of the ECHR on which that submission rested were criminal cases in which every accused has the right set out in Article 6(3)(d). That is a right which lies at the heart of HO's argument and yet it is not a right on which she is entitled to rely since these are civil not criminal proceedings. The Inner House noted that difference at para [33] but nevertheless accepted counsel's submission that it made no difference to the argument he was presenting.

[84] The approach of the Inner House is set out at para [36] where the Court said:

> "It will not necessarily be unfair to admit an untested statement in the absence of the witness but reliance on a statement which cannot be tested raises a question about fairness which the court requires to determine by reference to the answers to three questions."

Applying that approach we can deal briefly with the three questions:

(i) we are satisfied that there was a good reason not to call the witness as far as the reporter was concerned given the approach taken by the Inner House in the case of *M* due regard being given to the need not to lead unnecessary evidence. The evidence was capable of being given by Dr McDonald as part of her overall expression of opinion and it was not obvious then or now what difference calling Dr Sethi would have made.

(ii) it is difficult to conceive of the impugned evidence being the sole or decisive basis for the finding that the child was assaulted to its bodily injury having regard to the way that expression has been interpreted by the Grand Chamber. We have already explained that Dr Sethi's evidence was not necessary to that overall conclusion. It is conceded his evidence was necessary to show that the second assault on the child caused bodily injury. If his evidence were to be left out of account the summary sheriff would have been entitled to hold that HO had assaulted the child on two occasions one of which resulted in bodily injury. The overall conclusion would have remained the same.

(iii) In relation to the counterbalancing factors counsel was able to point out that Dr McDonald lacked the same expertise as Dr Sethi and was only able to explain what he had told her. Thus he was able to submit that there was a question to be considered about the reliability of that evidence. It needs to be

> borne in mind that it was open to HO's advisers to precognose Dr Sethi, instruct their own expert and to lead evidence to undermine Dr Sethi's findings. Had they wanted to call Dr Sethi they could have done so. Even if the point was not obvious until the motion to amend was made it was open to counsel to make a motion to adjourn the hearing to pursue such lines of inquiry. He did not do so. We were not informed of any steps which had been taken between the date of the summary sheriff's decision and the hearing of the appeal to investigate the matter with a view to showing that reliance on that small but important part of the evidence was or even might have been prejudicial to the interests of HO.

[85] As the Grand Chamber made clear the purpose of asking the three questions is to help determine whether the hearing viewed in the round was fair. As the Inner House pointed out the answer to any one of the questions is not determinative of that issue. In the context of this case we have given our answers and on that basis we have no hesitation in rejecting the submission that the hearing was rendered unfair by virtue of the summary sheriff's reliance on the hearsay evidence. However, even if we were wrong in our approach to the first question we would still have reached the same conclusion. The decisions taken by agents and counsel shaped the evidence which was available to the lower court. Those decisions were deliberately taken. That being so it is difficult to see how HO can complain that she was denied a fair hearing when she had declined to take the opportunity to challenge directly the evidence which she now maintains was the sole or decisive basis for the critical finding.

[86] As the Inner House said the hearing can only be fair if the parties are given some opportunity to test the evidence. There was ample opportunity for HO to ensure that the evidence was tested by taking some or all of the steps we have described.

[87] In summary, in our view no question of unfairness arises. The hearsay evidence of Dr Sethi was *prima facie* admissible and in so far as his evidence about the aging of the blood was decisive to the issue of bodily injury occurring pre 28 May 2022, HO has not indicated any potential line of cross-examination or alternative medical opinion which would undermine him. For these reasons, we consider that the summary sheriff was correct to allow this evidence to be admitted and relied upon and her reasoning at para [57] of the stated case cannot be faulted. Questions (ii) and (iii), therefore, fall to be answered in the negative.

Failure of the summary sheriff to address a material part of Dr McDonald's evidence, namely her evidence that the assessing paediatric radiologist was neither asked to nor gave an opinion on whether the injuries could have been caused by child birth

[88] This forms question (iv) in the stated case and in our view has no merit. The summary sheriff specifically addresses Dr McDonald's evidence on this matter and her reasons for accepting it at paras [75]-[95] of the stated case. The child was born healthy and developed appropriately. There was no evidence that ventouse delivery caused the kind of injuries sustained by Kyle. Dr McDonald was able to say from her own experience that the suction cup can cause bruising or even a haematoma between the scalp and the outer surface of the skull but not intracranial or brain injury. Where Dr McDonald did not consider herself sufficiently expert to opine, she was careful to say so. Had HO wished to put this in issue it would have been incumbent on her to lead evidence of such a possibility. It is not

for the reporter to exclude all possible mechanisms, especially when faced with such unequivocal evidence of how the injury was sustained emanating from HO herself. This question also falls to be answered in the negative.

[89] Question (v) is not insisted upon and standing the answers to questions (i)-(iii) there is sufficient evidence to conclude that HO had assaulted the child on an occasion between 1 April and 28 May 2022 being an occasion prior to the acute injuries found on 28 May 2022. This comes from the photograph of Kyle on 20 May 2022 which was referred to in evidence and showed bruising which could not be explained given that he would not have been mobile, together with the admissions to the police of a prior incident and the CT and MRI scans showing blood of differing ages and indicative of more than one episode of trauma. Question (vi) can be answered in the affirmative.

[90] Finally, question (vii) can be answered in the affirmative for the reasons already narrated and arising from Kyle's presentation on admission and examination by Dr McDonald and Dr Mayo, the injuries agreed in the joint minute and the testimony of Dr McDonald explaining why, in her professional opinion, the injuries were likely to have been caused immediately prior to his admission to hospital.

Disposal

[91] In summary, the summary sheriff did not err in allowing statement of fact 2 to be amended. The evidence from Dr McDonald setting out her own opinion was clearly admissible; for the reasons provided, her evidence regarding Dr Sethi's opinion was also admissible thereby providing sufficient evidence to establish that bodily injury was occasioned to Kyle prior to 28 May 2022.

[92] Therefore, we answer the questions in the stated case as follows:

i. No

ii. No

iii. No

iv. No

v. Not insisted upon

vi. Yes

vii. Yes

[93] We will refuse the appeal and remit the case to the summary sheriff with a direction to proceed as accords in terms of section 163(10) of the 2011 Act.

[94] We find no expenses due to or by any party.