**LEGAL FRAMEWORK – FACT FINDING HEARINGS**

**Burden of proof**

1. In any fact-finding exercise the burden of proof of proving any allegation lies on the party seeking to prove the allegations. In this case 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. Insofar as any of the respondents seeks to prove an allegation, the burden equally rests with them to prove it. Those against whom allegations are made do not themselves have to provide an explanation or context for any disputed allegation or to prove that any allegation is false.[[1]](#footnote-1)
2. The burden of disproving a reasonable explanation put forward by the parents falls on the local authority: **Re S (Children) [2014] EWCA Civ 1447**, where Macur LJ said at paragraph [10]

*i. ‘… it was for the local authority (i) to disprove the possible explanations for injury, whether accidental or congenital and (ii) establish that, on the balance of probabilities, the whole of the evidence led to the conclusion that the injuries were non accidental rather than simply incapable of being explained otherwise.’*

1. The fact that (if in fact it be the case) a party fails to prove on a balance of probabilities an affirmative case that party has chosen to set up by way of defence does not of itself establish the local authority’s case, there is no obligation on that party to prove the truth of their alternative case.[[2]](#footnote-2)
2. In **Rhesa Shipping Co SA v Edmunds (HL(E)) [1985] 1 WLR 948** Lord Brandon said at pages 955G-956D –

*‘…the late Sir Arthur Conan Doyle…describes…Mr Sherlock Holmes as saying to…Dr Watson: “How often have I said to you that, when you have eliminated the impossible, whatever remains, however improbably, must be the truth?’…In my view there are three reasons why it is inappropriate to apply the dictum of Mr Sherlock Holmes to which I have just referred, to the process of fact-finding which a judge of first instance has to perform at the conclusion of a case…*

*The first reason is one which I have already sought to emphasise as being of great importance, namely, that the judge is not bound always to make a finding one way or the other with regards to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.*

*The second reason is that the dictum can only apply when all relevant facts are known, so that all possible explanations, except a single extremely improbable one, can properly be eliminated…*

*The third reason is that the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden.*

1. In **Re BR (Proof of Facts) [2015] EWFC 41** Peter Jackson J, as he then was, said at [15]-[16] –

*‘[15] … It would of course be wrong to apply a hard and fast rule that the carer of a young child who suffers an injury must invariably be able to explain when and how it happened if they are not to be found responsible for it. This would indeed be to reverse the burden of proof. However, if the judge’s observations are understood to mean that account should not be taken, to whatever extent is appropriate in the individual case, of the lack of a history of injury from the carer of a young child, then I respectfully consider that they go too far.*

*[16] Doctors, social workers and courts are in my view fully entitled to take into account the nature of the history given by a carer. The absence of any history of a memorable event where such a history might be expected in the individual case may be very significant. Perpetrators of child abuse often seek to cover up what they have done. The reason why paediatricians may refer to the lack of a history is because individual and collective clinical experience teaches them that it is one of a number of indicators of how the injury may have occurred. Medical and other professionals are entitled to rely upon such knowledge and experience in forming an opinion about the likely response of the individual child to the particular injury, and the court should not deter them from doing so. The weight that is then given to any such opinion is of course a matter for the judge.’*

**Standard of proof**

1. The appropriate standard of proof is the civil standard of the simple balance of probability as confirmed by the House of Lords in **Re B (Children) [2008] UKHR 35** per Lord Hoffman at paragraph [2] –

*‘If a legal rule requires a fact to be proved (a ‘fact in issue’), a judge or jury 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. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.’*

1. This means that if the local authority or another party proves an allegation to this standard, that fact must be treated as having been established and will bear on all future decisions concerning the children. Equally, it means that if allegations are not proved to that standard, then they must be disregarded completely. However, it does not follow that a rejection of evidence mandates a judge to find that it is false; see **Re M (Children) [2013] EWCA Civ 388**.

1. The inherent probability of an event remains a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. **Re B (Care Proceedings: Standard of Proof) [2008] UKHL 35, [2008] 2 FLR 131** Lord Hoffman said at paragraph [15] –

*‘[15] Common sense, not law, requires that in deciding this question regard should be had, to whatever extent appropriate, to inherent probabilities.’*

1. **Jackson J in Re BR (Proof of Facts) [2015] EWFC 41 at** Para 7

*"(2) Nor does the seriousness of the consequences of a finding of fact affect the standard to which it must be proved. Whether a man was in a London street at a particular time might be of no great consequence if the issue is whether he was rightly issued with a parking ticket, but it might be of huge consequence if he has been charged with a murder that occurred that day in Paris. The evidential standard to which his presence in the street must be proved is nonetheless the same."*

*"(3) 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. "*

*"(4) 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 observe:*

*“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.”*

1. However, it is not the case that the more serious the allegation, then the more cogent the evidence needs to be to prove it. In **Re B (Care Proceedings: Standard of Proof )[2008] UKHL 35, [2008] 2 FLR 131** Baroness Hale said at paragraph [70] –

*‘[70] My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under s 31(2) or the welfare considerations in s 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.’*

1. There is therefore no logical or necessary connection between seriousness and probability. In **Re B (Children) [2008] UKHR 35** at [72-73] Baroness Hale said –

*‘[72] As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not al all improbably, Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent’s Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions’ enclosure when the door is open, then it may well be more likely to be a lion than a dog.*

*[73] In the context of care proceedings, this point applies with particular force to the identification of the perpetrator. It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that is indeed what has happened to the child, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied.’*

1. In **Re A (A Child) [2015] EWFC 11**, the President sets out clearly the need for a Local Authority to adduce proper evidence to establish what it seeks to prove (at paragraph 9) and *highlights “the need to demonstrate why, as the local authority asserts, facts A + B + C justify the conclusion that the child has suffered, or is at risk of suffering, significant harm of types X, Y or Z”* (para 12).

**Judicial approach to evidence**

1. The President of the Family Division recently provided a summary of the law in relation to fact-finding in **Re Y (Children)(No.3) [2016] EWHC 503 (Fam).** Namely:
2. The judge must “survey a wide canvas” of evidence;
3. Expert evidence must be considered in the context of all the other evidence;
4. The evidence of the parents is “of the utmost importance” and the court must form “a clear assessment of their credibility and reliability”;
5. The equivalent of a Lucas direction (see paragraph 7, below) must apply to both parents and indeed the interveners;
6. The parents/carers do not have to prove anything – the burden rests exclusively upon the local authority – and the fact that a parent “fails to prove on the balance of probabilities an affirmative case that they have chosen to set up by way of defence, does not of itself establish the local authority’s case”; and
7. A parents’/carers qualities “are not, of themselves, any assurance that [they] would not have acted in the way alleged by the local authority”;
8. Findings of fact must be based on evidence not speculation; see **Re A (Fact Finding: Disputed findings) [2011] 1 FLR 1817** at [26] Munby LJ (as he then was) said –

*‘It is an elementary position that findings of fact must be based on evidence, including inferences that can be properly drawn from evidence and not suspicion or speculation.’*

1. In **Re B (Children) [2008] UKHR 35** at Baroness Hale said at paragraphs [31-32]

*‘[31] … In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without* prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability.

*[32] In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof.’*

1. The judge must decide if the facts in issue have happened or not applying the binary system made plain by Lord Hoffman in **Re B (Children) [2008] UKHR 35** **at** **paragraph [2]**. This applies to the conclusion as to the fact in issue, not the value of individual pieces of evidence (which fall to be assessed in combination with each other).

1. As noted above, the standard of proof with respect to any such identification is the balance of probabilities. In Re S-B [2009] UKSC 17 at para 35 it was held:

*“Of course, it may be difficult for the judge to decide, even on the balance of probabilities, who has caused the harm to the child. There is no obligation to do so. As we have already seen, unlike a finding of harm, it is not a necessary ingredient of the threshold criteria. As Lord Justice Wall put it in Re D (Care Proceedings: Preliminary Hearings) [2009] EWCA Civ 472, [2009] 2 FLR 668, at para 12, judges should not strain to identify the perpetrator as a result of the decision in Re B:*

*"If an individual perpetrator can be properly identified on the balance of probabilities, then ... it is the judge's duty to identify him or her. But the judge should not start from the premise that it will only be in an exceptional case that it will not be possible to make such an identification.”*

1. The court must take into account all of the evidence and consider each piece of evidence in the context of all the other evidence and look at the overall canvas. Evidence should not be assessed in separate compartments. The judge must assess and evaluate the evidence in its totality; see **Re T [2004] 2 FLR 838** where Butler-Sloss P said at paragraph [33] –

*‘Evidence cannot be evaluated and assessed separately 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 ... has been made out to the appropriate standard of proof.’*

1. The evidence of the parents and of any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them; see **Re W and another (Non-accidental injury) [2003] FCR 346**.
2. See also Ryder LJ in **Re M (Children) [2013] EWCA Civ 388** at paragraph [6] –

*‘[6] When any fact-finding court is faced with the evidence of the parties and little or no corroborating or circumstantial material, it is required to make a decision based on its assessment of whose evidence it is going to place greater weight upon. The evidence either will or will not be sufficient to prove the facts in issue to the appropriate standard. As has been said many times in one form or another, the judge is uniquely placed to assess credibility, demeanour, themes in evidence, perceived cultural imperatives, family interactions and relationships.’*

1. However, in assessing and weighing the impression which the court forms of the parents, the court must also keep in mind the observations of Macur LJ in **Re M (Children) [2013] EWCA Civ 1147** at [12], that –

*‘Any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behaviour in the witness box and to expressly indicate that they have done so.’*

1. That need for caution and the dangers of overreliance on demeanour (and the research base to support that danger) was echoed by Leggat LJ in **Sri Lanka v The Secretary of State for the Home Department [2018] EWCA 1391** at paragraphs [40-41] –

*‘40. This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth[[3]](#footnote-3). One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.*

*41. No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influence by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.’*

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

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

1. In **Westminster City Council v M, F and H [2017] EWHC 518 (Fam)** Hayden J said at paragraph [25] –

*‘[25] The Local Authority must, ultimately, assess the manner in which it considers it can most efficiently, fairly and proportionately establish its case. The weight to be given to records, which may be disputed by the parents, will depend, along with other factors, on the Court's assessment of their credibility generally. Here, the reliability of the hearsay material may be tested in many ways e.g., do similar issues arise in the records of a variety of unconnected individuals? If so, that will plainly enhance their reliability. Is it likely that a particular professional e.g., nurse or doctor would not merely have inaccurately recorded what a parent said but noted the exact opposite of what it is contended was said? The reaction of witnesses (not just the parents), during the course of oral evidence, to recorded material which conflicts with their own account will also forma crucial aspect of this multifaceted evaluative exercise. At the conclusion of this forensic process, evidence can emerge and frequently does, which readily complies with the qualitative criterion emphasised in Re A (supra)…’*

**Credibility, memory, recall and reconstruction**

1. The evidence of witnesses and the explanations given by them are of the utmost importance and a clear assessment of their credibility and reliability must be made by the court. In the context of the consideration of a wide canvas of material in reaching the factual decisions in the case, investigations of fact should have regard to the wider context of social, emotional, ethical and moral factors. The assessment of credibility generally involves wider difficulties than mere ‘demeanour’, which is mostly concerned with whether the witness appears to be telling the truth as he or she 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. Therefore, contemporary documents are always of the utmost importance.

1. Every time a court has to assess ‘memory’ and ‘credibility’ it is faced with a difficult process and a sometimes almost impossibly difficult problem. In **Gestmin SGPS v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)** Leggatt J (as he then was), confirmed the importance of a proper approach to memory and eyewitness testimony –

*‘[16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*

*[17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more lor less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).*

[18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past *beliefs* are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

*[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.*

*[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.*

*[21] It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.’*

**Hearsay evidence**

1. Hearsay evidence which must be considered in the wider context. Proper caution must be exercised in view of the fact that hearsay evidence has not been the subject of formal challenge in cross-examination.

1. In **R v B County Council ex parte P [1991] 2 All ER 65 (at 72J), [1991] 1 FLR 470** at 478, Butler-Sloss LJ observed that –

*‘A court presented with hearsay evidence has to look at it anxiously and consider carefully the extent to which it can properly be relied upon.’*

1. When assessing the weight to be placed on hearsay evidence the Court may have regard to the matters set out in section 4 of the Civil Evidence Act 1995 even in cases (such as this one) where the Civil Evidence Act does not strictly apply.

1. Section 4 of the Civil Evidence Act provides that –

*(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.*

*(2) Regard may be had, in particular, to the following—*

*(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;*

*(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;*

*(c) whether the evidence involves multiple hearsay;*

*(d) whether any person involved had any motive to conceal or misrepresent matters;*

*(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;*

*(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.*

**Expert evidence**

1. In considering the evidence of an expert witness, the court must not confuse the functions of the expert and the judge whose roles are distinct. It is for the court to make the factual decisions based on all the available evidential material in the case, not just the scientific or medical evidence; and all that evidence must be considered in the wider social and emotional context[[4]](#footnote-4).

1. If the court disagrees with an expert’s conclusions or recommendations an explanation is required[[5]](#footnote-5).

1. In **Re B (Care: Expert Witnesses) [1996] 1 FLR 667** Ward LJ gave the following guidance as regards the evidence of expert witnesses –

*‘The expert advises but the Judge decides. The Judge decides on the evidence. If there is nothing before the court, no facts or no circumstances shown to the court which throw doubt on the expert evidence, then, if that is all with which the court is left, the court must accept it. There is, however, no rule that the Judge suspends judicial belief simply because the evidence is given by an expert.’*

Butler-Sloss LJ continued –

*‘An expert is not in any special position and there is no presumption of belief in a doctor however distinguished he or she may be. It is, however, necessary for the Judge to give reasons for disagreeing with experts’ conclusions or recommendations. That, this Judge did. A Judge cannot substitute his own views for the views of the experts without some evidence to support what he concludes.’*

1. In **A County Council v K, D and L [2005] EWHC 144 (Fam)** Charles J emphasised at paragraph [39] that the roles of the court and the expert are distinct, and that it is the court that is in the position to weight the expert evidence against its findings on the other evidence. A paragraph [44] he noted that in cases concerning alleged non- accidental injury to children, properly reasoned expert medical evidence carries considerable weight, but in assessing and applying it the judge must always remember that he or she is the person who makes the final decision.

1. At paragraph [49] Charles J went on to make the following observations about the judicial function –

*‘i) The court has to take into account and weigh the expertise and speciality of individual experts and is often assisted by an overview from, for example, a paediatrician.*

*ii) In a case where the medical evidence is to the effect that the likely cause is non accidental and thus human agency, a court can reach a finding on the totality of the evidence either (a) that on the balance of probability an injury has a natural cause, or is not a non accidental injury, or (b) that a local authority has not established the existence of the threshold to the civil standard of proof.*

*iii) The other side of the coin is that in a case where the medical evidence is that there is nothing diagnostic of a non-accidental injury (or human agency) and the clinical observations of the child, although consistent with non accidental injury (or human agency) of the type asserted, is more usually associated with accidental injury or infection, a court can reach a finding on the totality of the evidence that on the balance of probability there has been a non accidental injury (or human agency) as asserted and the threshold is established.*

*iv) Such findings have to be based on evidence and findings of fact to the civil standard and reasoning based thereon.*

1. In assessing the expert evidence the court must bear in mind that in cases involving a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bring their own expertise to bear on the problem, and the court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others[[6]](#footnote-6).

**Unknown and disputed cause**

1. The court is not precluded from making a finding that the cause of harm is unknown. In **Re R (Care Proceedings: Causation) [2011] EWHC 1715 (Fam)** Hedley J said at paragraph [10] –

*‘[10] ... 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.’*

1. 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.

*“There are few types of case which arouse greater anxiety and controversy than those in which it is alleged that a baby has died as a result of being shaken. It is of note that when the Attorney General undertook a review of 297 cases over a ten-year period following the case of R v Cannings [2004] EWCA Crim 1, [2004] 1 All ER 725, 97 were cases of what is known as ‘shaken baby syndrome’. The controversy to which such cases gives rise should come as no surprise. A young baby dies whilst under the sole care of a parent or childminder. That child can give no clue to clinicians as to what has happened. Experts, prosecuting authorities and juries must reconstruct as best they can what has happened. There remains a temptation to believe that it is always possible to identify the cause of injury to a child. Where the prosecution is able, by advancing an array of experts, to identify a non-accidental injury and the defence can identify no alternative cause, it is tempting to conclude that the prosecution has proved its case. Such a temptation must be resisted. In this, as in so many fields of medicine, the evidence may be insufficient to exclude, beyond reasonable doubt, an unknown cause. As Cannings at [177] teaches, even where on examination of all the evidence, every possible known cause has been excluded, the cause may still remain unknown.”*

1. In **Re U (Serious Injury: Standard of Proof); Re B [2004] EWCA Civ 567**, Butler- Sloss P explained at paragraph [23] that –

*‘i) The cause of an injury or an episode that cannot be explained scientifically remains equivocal.*

*ii) Recurrence is not in itself probative.*

*iii) Particular caution is necessary in any case where the medical experts disagree, one opinion declining to exclude a reasonable possibility of natural cause.*

*iv) The Court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour propre is at stake, or the expert who has developed a scientific prejudice.*

*v) The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark.*

1. **CANNINGS 2004 2 Cr APP R 7**

*“The unavoidable reality is that some infant deaths remain “unexplained” or “unascertained” (para 8)…We cannot avoid the thought that some of the honest views expressed with reasonable confidence (in that case as to cause of death) will have to be revised in years to come when the fruits of continuing medical research both here and internationally become available. What may be unexplained today may be perfectly well understood tomorrow. Until then any tendency to dogmatise should be met with an answering challenge” (para 22…) “Experts in many fields will acknowledge that later research may undermine the accepted wisdom of today “never say never” is a phrase which we have heard in many different contexts from expert witnesses. That does not normally provide a basis for rejecting the expert evidence or indeed for conjuring up fanciful doubts about the possible impact of later research. With unexplained infant deaths however…in many important respects we are still at the frontiers of knowledge. Necessarily further research is needed and fortunately thanks to the dedication of the medical profession it is continuing”* (para 178)

1. **RE R (CARE PROCEEDINGS: CAUSATION) 2011 EWCH FAM 1715**

*”I have been impressed over the years by the willingness of the best paediatricians and those who practise in the specialities of paediatric medicine to recognise how much we do not know about the growth patterns and what goes wrong in them, particularly in infants. Since they grow at a remarkable speed and cannot themselves give any clue as to what is happening inside them, and since research using control samples is self-evidently impossible in many areas, perhaps we should not be surprised. In my judgment, a conclusion of unknown aetiology in respect of an infant represents neither professional nor forensic failure. It simply recognises that we still have much to learn and it also recognises that it is dangerous and wrong to infer non-accidental injury merely from the absence of any other understood mechanism. Maybe it simply represents a general acknowledgement that we are fearfully and wonderfully made”.*

RE THAT CASE:

*(“ ….. I am deeply unwilling to make a finding of culpable conduct against these parents, unless entirely compelled by the medical evidence to do so. In my view, the court faces four options: first, that the child sustained the fracture whilst in the baby-walker, notwithstanding that explanation’s innate unlikelihood; secondly, which emerged in the course of argument, that the child sustained the fracture when, having in some way hurt himself in the baby-walker, he was yanked from it by the mother in such a way as to cause a twisting injury, but in circumstances where she could not be expected to know that. That is a possible, if inherently implausible, mechanism. Thirdly, that this was an inflicted injury in a momentary loss of control, perhaps whilst changing the baby; and fourthly, that the cause of this fracture is simply unknown. It seems to me that the explanation has to be found in one of these options, but all four options pose serious difficulties. The first two are inherently unlikely, though of course not impossible. Inflicted injury raises the difficulties that I have already referred to. Moreover, there is simply no evidence from which the court could draw any inference of pressure, tiredness, frustration or bad temper at the relevant time in either of the parents, nor indeed have any such circumstances been suggested to them. An unknown cause is very unlikely in circumstances where, quite unlike the head injury, the mechanism and causation of these fractures are generally well understood. An unknown cause must, I think, be rejected in this case. I have given long and anxious consideration to this matter, deeply aware, as Baroness Hale of Richmond has reminded us, that a mistake either way can have serious consequences. As she says, however: ‘It is a task which we are paid to perform to the best of our ability’, and that is all that I seek to do.* ***[32]*** *In the end, I have concluded that the local authority has not satisfied me that this injury has come about as a result of the culpable conduct of the parties….”)*

1. **WALKER V HM ADVOCATE 2011 HCJAC 51**

*“48 Cases involving the deaths of infants allegedly at the hands of a parent or other carer are amongst the most difficult, and potentially the most complex, of all cases coming before the criminal courts. In many such cases, and the present is such, there will be no direct evidence of criminal conduct by the accused towards the child. The case will largely, if not exclusively, depend on inferences to be drawn from medical testimony. In this field, while knowledge advances, there remain many uncertainties. Establishing the cause of a sudden infant death may be very difficult and in some cases may not be possible. If criminal liability is to be brought home to the accused it will be necessary to exclude not only any natural explanations for the death suggested in the evidence, but also any realistic possibility of there being an unknown cause. In R v Henderson (a series of cases concerned with “shaken baby syndrome”) Moses LJ said at para 217:*

*“ … a realistic possibility of an unknown cause must not be overlooked. In cases where that possibility is realistic, the jury should be reminded of that possibility. They should be instructed that unless the evidence leads them to exclude any realistic possibility of an unknown cause they cannot convict. In cases where it is relevant to do so, they should be reminded that medical science develops and that which was previously thought unknown may subsequently be recognised and acknowledged. As it was put by Toulson LJ, ‘today's orthodoxy may become tomorrow's outdated learning’ (*[*R v Houldsworth [2008] EWCA Crim 971*](http://login.westlaw.co.uk/maf/wluk/ext/app/document?src=doc&linktype=ref&context=144&crumb-action=replace&docguid=I743CCE8018CC11DDA249804644D629C2) *at [57]). In cases where developing medical science is relevant, the jury should be reminded that special caution is needed where expert opinion evidence is fundamental to the prosecution.”*

**Repeated accounts and possible reported discrepancies**

1. Peter Jackson J (as he then was) in **Lancashire County Council v. The Children and Others [2014] EWFC 3** stated that –

*‘[9] … 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 is 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 repeated 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 that might inelegantly be described as "story-creep" may occur without any necessary inference of bad faith.’*

**Identification of perpetrator**

1. The court should not 'strain unnecessarily' to identify who hurt the child. If the evidence does not support a specific finding against an individual(s) the court should attempt to identify the 'pool' of possible perpetrators.[[7]](#footnote-7)
2. Of particular importance are Baker J’s ninth and tenth observations in **Re J-S [2012] EWHC 1370 (Fam) at paras 44-5**:

44. Ninth, as observed by Hedley J in [**Re R (Care Proceedings: Causation) [2011] EWHC 1715 Fam**](https://www.familylawweek.co.uk/site.aspx?i=ed84542)**:**

"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**).

1. It is in the public interest that those who cause non-accidental injuries should be identified[[8]](#footnote-8).
2. In **Re K (Non-accidental injuries perpetrator: New evidence**) at paragraph 56 Lord Justice Wall stated:*“…it is in the public interest that children have the right, as they grow into adulthood, to know the truth about who injured them when they were children, and why. Children who are removed from their parents as a result of non-accidental injuries have in due course to come to terms with the fact that one or both of their parents injured them. This is a heavy burden for any child to bear. In principle, children need to know the truth if the truth can be ascertained”*

1. The approach which should be adopted in relation to the identity of a perpetrator has been the subject of recent consideration by the Court of Appeal in **Re B (Children: Uncertain Perpetrator [2019] EWCA Civ 575** where Jackson LJ reviewed the line of relevant authority and summarised the approach to be taken in ‘uncertain perpetrator’ cases as follows –

*‘[46] Drawing matters together, it can be seen that the concept of a pool of perpetrators seeks to strike a fair balance between the rights of the individual, including those of the child, and the importance of child protection. It is a means of satisfying the attributable threshold condition that only arises where the court is satisfied that there has been significant harm arising from (in shorthand) ill-treatment and where the only 'unknown' is which of a number of persons is responsible. So, to state the obvious, the concept of the pool does not arise at all in the normal run of cases where the relevant allegation can be proved to the civil standard against an individual or individuals in the normal way. Nor does it arise where only one person could possibly be responsible. In that event, the allegation is either proved or it is not. There is no room for a finding of fact on the basis of 'real possibility', still less on the basis of suspicion. There is no such thing as a pool of one.*

*[47] It should also be emphasised that a decision to place a person within the pool of perpetrators is not a finding of fact in the conventional sense. As is made clear in Lancashire at [19], O and N at [27-28] and S-B at [43], the person is not a proven perpetrator but a possible perpetrator. That conclusion is then carried forward to the welfare stage, when the court will, as was said in S- B, "consider the strength of the possibility" that the person was involved as part of the overall circumstances of the case. At the same time it will, as Lord Nicholls put it in Lancashire, "keep firmly in mind that the parents have not been shown to be responsible for the child's injuries." In saying this, he recognised that a conclusion of this kind presents the court with a particularly difficult problem. Experience bears this out, particularly where a child has suffered very grave harm from someone within a pool of perpetrators.*

*[48] The concept of the pool of perpetrators should therefore, as was said in Lancashire, encroach only to the minimum extent necessary upon the general principles underpinning s.31(2). Centrally, it does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown. This is why it is always misleading to refer to 'exclusion from the pool': see Re S-B at [43]. Approaching matters in that way risks, as Baroness Hale said, reversing the burden of proof.*

*[49] To guard against that risk, I would suggest that a change of language may be helpful. The court should first consider whether there is a 'list' of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so: Re D (Children)[2009] EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is should A or B or C be placed into the 'pool’.*

*[50] Likewise, it can be seen that the concept of a pool of perpetrators as a permissible means of satisfying the threshold was forged in cases concerning individuals who were 'carers'. In Lancashire, the condition was interpreted to include nonparent carers. It was somewhat widened in North Yorkshire at [26]to include 'people with access to the child' who might have caused injury. If that was an extension, it was a principled one. But at all events, the extension does not stretch to "anyone who had even a fleeting contact with the child in circumstances where there was the opportunity to cause injuries": North Yorkshire at [25]. Nor does it extend to harm caused by someone outside the home or family unless it would have been reasonable to expect a parent to have prevented it: S-B at [40].*

*[51] It should also be noted that in the leading cases there were two, three or four known individuals from whom any risk to the child must have come. The position of each individual was then investigated and compared. That is as it should be. To assess the likelihood of harm having been caused by A or B or C, one needs as much information as possible about each of them in order to make the decision about which if any of them should be placed in the pool. So, where there is an imbalance of information about some individuals in comparison to others, particular care may need to be taken to ensure that the imbalance does not distort the assessment of the possibilities. The same may be said where the list of individuals has been whittled down to a pool of one named individual alongside others who are not similarly identified. This may be unlikely, but the present case shows that it is not impossible. Here it must be shown that there genuinely is a pool of perpetrators and not just a pool of one by default.*

*[60] [The concept of a] pool of perpetrators is a departure from the norm and every effort must be made to ensure that the departure operates in a principled way.”*

1. The issue for the court must be to consider whether the actual perpetrator can be identified on the balance of probability and the court should seek, but not strain, to do so[[9]](#footnote-9).
2. Only if the court cannot identify the perpetrator to the civil standard of proof, should the court go on to ask whether there is a likelihood or real possibility that any of the people on the list, was the perpetrator or a perpetrator. Only if there is, should those people be placed into the ‘pool’.
3. If the court comes to the conclusion that it is not possible to narrow down the pool of possible perpetrators, Baroness Hale warns in ***Re S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17**the court to resist the temptation to compare the relative likelihoods of each individual in the pool being culpable.

**Threshold**

1. In **Re J (A Child) [2015] EWCA Civ 222** Aikens LJ set out the following fundamental principles at paragraph [56] –

‘ii) If the local authority's case on a factual issue is challenged, the local authority *must adduce proper evidence to establish the fact it seeks to prove. If a local authority asserts that a parent "does not admit, recognise or acknowledge" that a matter of concern to the authority is the case, then if that matter of concern is put in issue, it is for the local authority to prove it is the case and, furthermore, that the matter of concern "has the significance attributed to it by the local authority".*

*iii) Hearsay evidence* about issues that appear in reports produced on behalf of the local authority, although admissible, has strict limitations if a parent challenges that hearsay evidence by giving contrary oral evidence at a hearing. If the local authority is unwilling or unable to produce a witness who can speak to the relevant matter by first hand evidence, it may find itself in "great, or indeed insuperable" difficulties in proving the fact or matter alleged by the local authority but which is challenged.

*iv) The formulation of "Threshold" issues and proposed findings of fact must be done with the utmost care and precision. The distinction between a fact and evidence alleged to prove a fact is fundamental and must be recognised. The document must identify the relevant facts which are sought to be proved. It canbe cross-referenced to evidence relied on to prove the facts asserted but should not contain mere allegations ("he appears to have lied" etc.).*

*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 the 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. Even if that is demonstrated, adoption will not be ordered unless it is demonstrated by the local authority that "nothing else will do" when having regard to the overriding requirements of the child's welfare. The court must guard against "social engineering".*

*vii) When a judge considers the evidence, he must take all of it into account and consider each piece of evidence in the context of all the other evidence, and, to use a metaphor, examine the canvas overall..*

RB QC

1. Lancashire County Council v D and E [2010] 2 FLR 196 at paras [36] and [37]; Re C and D (Photographs of Injuries) [2011] 1 FLR 990, at para [203]. [↑](#footnote-ref-1)
2. See for example Re X No3 [2015] EWHC 3651 & Re Y No3 [2016]EWHC 503 [↑](#footnote-ref-2)
3. *see Minzner, “Detecting Lies Using Demeanor, Bias and Context” (2008) 29 Cardozo LR 2557* [↑](#footnote-ref-3)
4. see A County Council v X, Y and Z (by their Guardian) [2005] 2 FLR 129 [↑](#footnote-ref-4)
5. see Re B (Care: Expert Witnesses) [1996] 1 FLR 667 and Re D(A Child) [2010] EWCA 1000 [↑](#footnote-ref-5)
6. see the observations of Eleanor King J (as she then was) in Re S [2009] EWHC 2115 (Fam) [↑](#footnote-ref-6)
7. See Lancashire CC v B [2000] 2 AC 147 and North Yorkshire CC v SA [2003] 2 FLR 849 [↑](#footnote-ref-7)
8. see Re K (Non-Accidental Injuries: Perpetrator: New Evidence) [2005] 1 FLR 285, CA [↑](#footnote-ref-8)
9. see Re D (Children) [2009] EWCA Civ 472 [↑](#footnote-ref-9)