Neutral Citation Number: [2025] EWCA Civ 479

Case No: CA-2025-000257

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT NORWICH
HHJ North
NR24C50038

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 April 2025

Before:

LADY JUSTICE KING
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE MALES

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O (Children: Fact-Finding)

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Nicholas Stonor KC and Fiona Baruah (instructed by **Norfolk County Council Legal Services**) for the **Appellant Local Authority**
John Tughan KC and Marika Bell (instructed by **Rudlings LLP**) for the **Respondent Mother**
Andrew Norton KC and Luke Brown (instructed by **Norton Peskett Solicitors**) for the **Respondent Father**
Claire Thorne (instructed by **David Wilson Solicitors**) for the **Respondent Children by their Children's Guardian**

Hearing date: 9 April 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

1. In a reserved judgment, delivered on 23 January 2025 after a hearing lasting eleven days, His Honour Judge North made findings of fact in care proceedings. The central issue concerned the circumstances in which C, a baby boy, had suffered severe head injuries in November 2023, when he was three weeks old. The judge found that they had occurred during the course of an assault by his father on his mother on the eve of his presentation at hospital. The local authority now appeals, arguing that the expert medical evidence strongly pointed towards the more serious elements of the injury as having been caused by one of the parents during a second undisclosed event on the day of admission.

Background

2. The family is part of the travelling community. The parents, who are married but separated in May 2024, have five children, of whom C is the youngest. The eldest, A, was aged eleven at the time of C's injuries, while the second youngest, B, was then aged three. The family has been known to Children's Services since 2012. The parental relationship has involved significant domestic abuse perpetrated by the father against the mother.

3. On 26 November 2023, C was taken to his local general hospital twice, first by his father and his sister A, and then by his mother and A. On the first occasion he was discharged home without being formally admitted, while on the second he spent four weeks in hospital. On each admission, the accompanying parent gave an untruthful account that A had been holding C in her arms on the sofa the previous night, and that B had accidentally kicked the baby's head. In due course, they repeated the lie to other family members, to social workers, and to the police in interview, and they maintained it for five months until they were compelled to change their account. In the meantime, they were arrested and their phones were seized. However, on the basis of what was known at the time, C had been discharged from hospital into their care under the supervision of extended family members.

4. In April 2024, the police told the local authority that examination of the mother's phone revealed a message on the day of C's admissions to hospital that referred to an incident of domestic violence on the previous day. The parents then gave a new account of the father having assaulted the mother in drink while she was holding C at around 23.00 that night. The assault took the form of several punches, one of which caused her a black eye. They did not say that C had been struck, but that he might well have been 'caught in the crossfire'. In due course, the father pleaded guilty to causing grievous bodily harm to C, and he is now awaiting sentencing.

The two visits to hospital

5. The first attendance was at 15.47. C was assessed by nurses at three points during the stay. His respiratory rate, oxygen levels, heart rate and temperature were broadly normal. He was examined by a registrar, Dr M, at 18.15. He was asleep but easily rousable, pink and well perfused. There was a very small (less than 1 cm) area of slight elevation on the top of the head, but no bruise, and C

did not cry when this area was palpated. Overall, Dr M considered C to be a normal baby and he was discharged home at 19.15. The home lay within half an hour's drive of the hospital.

6. C was readmitted 2½ hours later at 21.40 in the company of his mother and A. His condition was so poor that the resuscitation team was called, alongside anaesthetic and paediatric support. He was examined by another registrar, Dr U. His test results were very abnormal. He was pale, appeared vacant and with poor muscle tone, and had a boggy swelling measuring 3 x 5 cm on the right back part of the head. A CT scan was performed. While in the scanner, his heart rate and oxygen saturations dipped and he appeared cyanosed (blue). Maximum oxygen supplementation was given and he was stimulated, whereupon his heart rate and oxygen saturations began to rise again, so the scan could be completed. His pupils were then noted to have become sluggish and his blood pressure low. In view of increasing episodes of apnoea (stopping breathing for up to 20 seconds) he was intubated and put onto a breathing machine. He was transferred as an emergency to a major teaching hospital, where he remained in intensive care for five days before being returned to the first hospital.

7. The findings from the CT scan were that C had suffered:

   - Two separate impact injuries, namely a fracture across the full width of the left parietal bone and an impact injury to the right frontal region.

   - Acute subdural bleeding overlaying the left side of the brain, the right side of the brain, between the two halves of the brain at the back, and in the posterior fossa.

   - Acute subarachnoid bleeding overlaying the brain.

   - Acute soft tissue swelling overlaying the top left side and top right side of the head.

   - Scattered areas of diffuse axonal injury ('DAI') – a severe form of tissue injury resulting from shearing forces between the white and grey matter of the brain.

8. These injuries were considered to be life-threatening. It is too soon to say whether C will suffer long term effects from them.

The proceedings

9. On 29 April 2024, after the discovery of the phone messages, the local authority took proceedings and the children were removed to foster care under interim care orders. Since then, they have been in a mixture of foster care and extended family care. The mother seeks their return to her care.

10. Permission was granted for the instruction of three leading medical experts: Professor Stivaros (consultant paediatric neuroradiologist), Mr Jayamohan (consultant neurosurgeon), and Dr Rose (consultant paediatrician). They provided reports and attended an experts meeting. As to mechanism, they

advised that C had sustained two impacts to the head. Dr Rose advised that the DAI was a very unusual injury for a child of this age. If it was caused by a punch, it is the kind of injury that professional boxers do not suffer from, even if they have been knocked out. A shake could not be ruled out. As to timing, the experts agreed that C's injuries must have been sustained in the two days preceding his first presentation at hospital, but that the DAI was highly likely to have been caused after that presentation and not during an incident of domestic violence the previous day.

11. The local authority sought a finding that the injuries were inflicted by one or both parents. They also sought findings of a failure to be honest with professionals, of emotional harm to the children through exposure to domestic abuse and by telling A to lie about the cause of C's injuries.

The hearing before the judge

12. A fact-finding hearing took place over the course of eleven days in January 2025. There were 9,500 pages of evidence and the judge heard from six treating clinicians, the three expert witnesses, two police officers and the parents. He handed down a written judgment on 23 January 2025, in which he ultimately found that the local authority had not proved that C's more serious injuries were caused between the two hospital visits and that the probable explanation for all of the injuries was that they were sustained on the night of 25 November 2023.

13. The judge identified the issue that he had to decide:

> "20. The mother and father both assert that the injuries caused to C were sustained on the night of 25th November 2023. The expert medical evidence strongly suggests that, if C had sustained all his injuries in that incident, then he would have presented in a seriously unwell way when seen by Dr M. It will be necessary for me to make a finding as to whether, on the balance of probabilities, the injuries were sustained at the same time or if the more serious injuries, the skull fracture and DAI, occurred after the first presentation at hospital.
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> 21. If I conclude that the injuries were sustained prior to the first presentation at hospital, then it seems incontrovertible that I must find that the father inflicted those injuries. If I find that the injuries were inflicted over more than one episode, I will need to consider whether I can identify the mother or father as the actual perpetrator on the balance of probability."

14. The judge then directed himself on the law, including in relation to the treatment of lies. He said this about expert evidence:

> "32. Where, as in this case, an important part of the evidence is provided by expert witnesses, I pay regard to two propositions in weighing the importance of that evidence. First, while it may be appropriate to attach great weight to

> clear and persuasive expert evidence, it is important to remember that the roles of the court and expert are distinct and that it is ultimately the court that is in the position to weigh the expert evidence against other evidence. This was expressed as *the expert advises and the judge decides* in *Re B (Care: Expert Witnesses)* [1996] 1 FLR 667. Secondly, the court should always remember that today's medical certainty may be disregarded by the next generation of experts and that scientific research may one day throw light into corners that are presently dark."

15. There then followed an efficient summary of the mass of evidence. On the whole, there is no complaint about that summary.

16. In his evidence, Dr M described the systematic and comprehensive way in which he had examined C during the first admission and he commented on the range of normal test observations that had been gathered. The father's case at trial was that, although he himself had given a false account to the hospital, Dr M had not examined C properly. However, the only relevant matter that was put to Dr M concerned why he had not ordered a CT scan, to which the doctor replied that, applying the usual criteria, a scan had not been required [CB189-190]. The judge considered the evidence of Dr M between paragraphs 52 and 56. He described the treating doctors as having given an honest account and he made no criticism of any aspect of their evidence.

17. The judge considered the expert evidence at paragraphs 58-87. He noted their united opinion that the mechanism for the injuries was two separate impacts. If it was caused during the described assault on the mother, C would have had to be struck by two blows, or (as an unlikely possibility) by a single punch to one part of his head, with a second impact against a hard surface, such as the mother's shoulder bone or chin. The judge accepted that this was a possible mechanism.

18. As to timing, the judge recorded the opinion of Professor Stivaros that as from the time of the DAI, C would have had reduced consciousness and would not have behaved normally. He described the professor's evidence as clear and extremely helpful.

19. The judge summarised this evidence from Mr Jayamohan:

> "It is very difficult for me to clinically associate such an encephalopathic child with the assessment in the first emergency department visit."
>
> "While the mother's description of C's altered feeding and vomiting and paleness before the first admission was compatible with a child who had sustained a DAI, it was not severe enough for him to relate it to the brain injury seen in C."

> "C's presentation at the second visit to the hospital was very much in keeping with the DAI and that he would expect such symptoms to have occurred within an hour of injury. He reiterated that the brain injury, being so significant and clearly causing a very unwell child, did not allow him to say that the presentation came on over hours."

20. The judge said that Mr Jayamohan's expertise and clarity of explanation were plain and that he had answered all questions comprehensively.

21. The judge recorded Dr Rose's opinion that C's presentation made it implausible that the severe intracranial injury occurred on the night of the 25 November. He described Dr Rose's evidence as providing him with a very helpful overview and a compass against which to consider the examinations of the hospital doctors.

22. The judge was accordingly complimentary of the expert advice he had received, and he made no criticism of any aspect of it.

23. The judge summarised the police evidence before turning to consider the evidence of the parents between paragraphs 97 and 127. He recorded that the mother was at times genuinely upset when giving evidence but that this did not blind him to the need to assess her evidence dispassionately. He found that she was on a journey to developing her insight into the impact on her and the children of domestic abuse. Even so, he did not find her evidence about what she knew about abuse in her parents' marriage, or what they knew about abuse in hers, to be satisfactory.

24. Coming to the injuries, the judge records:

> "104. The mother was questioned about the assault on 25th November 2023. She spoke of how shocked and scared she had been at the assault but that C seemed fine immediately afterwards. She said that it was not until the following morning, Sunday 26th November, that he seemed to be sleepy and quiet. The mother said that she was keen not to be seen because of her facial injuries and took the children to the local McDonalds to obtain food via the drive-in. She then became more concerned about C as he would not take his bottle and was pale.
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> 105. She explained that she did not take C to hospital herself as she was scared that being seen with the facial injuries would lead to children's services' involvement and potentially removal of the children.
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> 106. The mother said that she learnt only of the father having told the lie about B kicking C when he returned from hospital. The mother said that her expectation had been that he would tell the truth and she was angry with him for lying. Again, to save time, the father in his evidence said that he took the decision to tell the lie as he was frightened of the

> potential consequences for himself as well as the children. He added that if the mother had gone to the hospital when C was first taken, then the truth would have been told.
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> 107. The mother robustly denied that the father had been violent to her or to C after his return from hospital.
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> …
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> 109. The mother was questioned about the manner in which C may have been struck by the father. In what I considered to be a credible explanation, the mother explained and visibly demonstrated how she bowed her head down when the father was punching out at her. The mother could not say whereabouts the punches landed. I noted that the mother maintained that C was asleep when she was assaulted as she had just fed him and that she had no recollection of him screaming or crying, adding that she was sure she would have remembered if he had done so."

25. The judge then considered a number of text messages sent by the mother to the father and others on the evening of 25 November and the middle of the day on 26 November. The most significant were a series of ten unanswered messages between 14.27 and 14.42 in which she expressed a fear that C had been hit on the head and needed to go to hospital. The judge considered that, while the mother's lies required him to exercise care in placing any reliance on her evidence, it seemed incontrovertible that she was expressing a real and deep-held concern for C's welfare before the first attendance at the hospital and that she related his condition to the assault upon her on the previous night.

26. I interject that the mother's account to the police and in evidence to the court was that C had been "absolutely fine" overnight and through the morning, and that it was only when she took the children to McDonalds in the middle of the next day that she noticed that he did not "look right". She had asked the father to take him to the hospital:

> "Because he just did not seem himself. He was very pale, he was not taking any milk, even though he was on quite a small amount of milk at that time anyways. Yes, he was pale and he just did not seem himself." [CB242]

27. The judge recorded the father's evidence that on the afternoon of 26 November, he could see that C was not himself, with his lips looking grey, and his dummy kept dropping out from his mouth. He accepted that there had been "a huge amount of lies" told to all agencies in failing to speak of the domestic violence, and in the maintenance of the lies for some five months. The judge said that aspects of the father's evidence struck him as a genuine expression of remorse. He then recorded this in relation to the afternoon of the 26 November:

> "126. The father explained that in not answering the mother's messages on 26th November, this was fairly typical of how

> he would behave after an incident of bad behaviour on his part, describing himself as a selfish pig. He explained to the court that the mother was even more concerned for C when he returned from the hospital and that he could himself see that C was deteriorating. The father spoke of being in and out of the shed during the time spent at home between the two visits to hospital. This was a divergence from the mother's evidence as she had said that the father stayed in the shed when he returned from hospital."

The judge's analysis

28. This appears between paragraphs 128 and 143.

29. The judge rightly began with the medical evidence. About it he said:

> "130. While it is fair to say that the medical experts acknowledged that there must remain a possibility that C may have suffered all his injuries on the night of 25th November 2023, they agree that the symptoms exhibited by C at hospital were not consistent with the DAI having been sustained prior to his first attendance at the hospital. This being said each medical expert gave evidence which allows for the possibility of the injuries all having been sustained on 25th November 2023. For example, Mr Jayamohan advised the court that a DAI is always almost accompanied by significant change in behaviour and consciousness. That must necessarily mean that the possibility remains of a DAI not causing such significant change. Furthermore, Professor Stivaros spoke of the parents' account of the changes observed by them as being from his perspective not normal behaviour. Again, with Dr Rose, a good deal of his evidence went to the changes he would have expected there to have been in C after his injuries had been sustained, including being grizzly, irritable, not feeding well or exhibiting his normal reactions. I am of the view that this presentation is broadly consistent with what the parents described although they attributed C's change in behaviour of course to an incident which had not happened. I think that Mr Jayamohan put it very fairly when he spoke of the mother's description of C's altered feeding and vomiting and paleness being compatible with a child who had sustained a DAI, but not for him severe enough in nature for it to relate to the brain injury seen in C."

30. The judge then said that he was amply persuaded on the basis of the text messages and the mother's injuries that there had been an incident of domestic violence on the night of 25 November 2023 in which the father threw punches at the mother while she was nursing C. He next found that, in the light of the father's imposing physique, he could have caused C's injuries by two punches

or, less likely, by one significant punch. He also found that it was likely that the DAI had been caused at the same time as the skull fracture.

31. Next, the judge contemplated the possibility that the DAI and fracture were not caused on the night of 25 November. It must follow, he said, that this significant injury happened in the interval between hospital appointments, as suggested by the medical experts. As to that, he reasoned:

> "133. That would mean that, having taken C to hospital for assessment and treatment because of their concern that he had been inadvertently injured the night before in an incident of domestic violence which they had sought to cover up, one or both parents then visited a further non-accidental injury upon him. The medical experts were clear in saying that the DAI could only be caused by an impact of significant force in the absence of shaking which provided another potential mechanism. I would therefore need to find that a parent engaged in an act of considerable violence upon this baby and that such an act was done with some deliberate intent since it appears vanishingly unlikely that the baby could be caught up in another incident in which he was inadvertently injured.
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> 134. I do not think one can ignore the social background and contextual circumstances when I deliberate upon the findings being sought. The local authority had no cause to intervene in the parents' care of their children prior to these proceedings and therefore there is no history of the children suffering physical injury in parental care. Furthermore, no child came to any harm in the period between C's injuries and the removal of the children. While I obviously do not say this definitively excludes the possibility of either parent having injured C in circumstances which are different to those now admitted by them, I have to bear in mind the inherent probability or rather the improbability of a loving mother or father inflicting such serious injuries on their baby immediately after his discharge from hospital."

32. The judge placed weight on a text message sent by the mother to the father at 14.33 in which she said "He screams every time I touch his head." This, he considered, had real probative value as a contemporaneous record that the mother was concerned that C had been injured the night before. Having given himself a *Lucas* direction, he was satisfied that the parents' lies to the hospital, the police and children's services were understandable in the context of their fear of removal of the children and the father's fear of being in further trouble with the police.

33. The judge was not critical of Dr M or Dr U, but he reasoned at paragraph 139 that Dr M might have missed a swelling and fracture that were there on the first examination. He found some force in a submission on behalf of the father that

C's behaviour on first presentation fitted with a child who had sustained a DAI, and he continued:

> "140. …Additionally, when I consider the medical experts' evidence, I remind myself that scientific research may provide an explanation for those medical results and C's observations at the first presentation which I am prepared to accept presently does not sit comfortably with the more general expectation of the medical experts.
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> 141. I have also given anxious deliberation to the evidence of Professor Stivaros, which is supported by the other medical experts, that a DAI is not a slow burn injury. Against that, Professor Stivaros did accept that the parents may have been describing non-normal behaviour in C after the incident on 25th November 2023. Looking at Dr Rose's evidence in the round, I consider that he too admitted that possibility."

34. As to the time when the family was together between the hospital visits, the judge found that there would have been ample time for the injuries to be inflicted by either of them. He noted that the parents differed as to whether the father had at all times been in the shed, with the father saying that he had been in and out of the shed, while the mother was "adamant" that he had been in the shed at all times. The judge commented that this indicated that recollections vary. However, all the children were at close quarters and it seemed unlikely that the mother had inflicted the injuries on C after his return from hospital and that none of the children had mentioned it in any way.

35. Against this background, the judge reached his ultimate finding:

> "147. I am persuaded that C sustained all of the injuries identified on the medical experts' evidence, as set out in the aforementioned paragraphs of the schedule, but the local authority has not established on the balance of probabilities that those injuries were inflicted by one or both of the parents as pleaded at paragraph 5) in an incident other than what occurred on the night of 25th November 2023. I am aware that it is not for me to determine how C's injuries were sustained but rather to evaluate thoroughly the cases presented to me by all the parties. The local authority has not discharged its burden of proving that the more serious injuries (the DAI and the fracture) were sustained, as it has alleged, between the two hospital visits on 26th November 2023. I have been invited by the parties to give what assistance I may to the local authority and, accepting that invitation, I am of the view that the probable explanation for all of the injuries is that they were sustained on the night of 25th November 2023. Regardless, I am clear that the local authority has not established on balance of probabilities that the injuries were inflicted or caused by either the mother or

> father after the first presentation at hospital. Paragraph 5 will need to be amended in light of this determination."

36. The judge made a further finding about the involvement of A in the parents' lies. He did not accept that the parents had coerced her to lie to professionals, but rather that she was placed in the position of continuing the lie.

The appeal

37. The local authority appealed, with the support of the Children's Guardian, on these grounds:

> 1. The judge failed to attach appropriate weight to the agreed expert evidence as to the likely timing and presentation in relation to the DAI.
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> 2. The judge made findings, without sound evidential basis, that symptoms of DAI must have been missed when C first attended hospital.
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> 3. The judge invested in the parents' credibility without attaching appropriate weight to their history of sustained deceit or their continuing dishonesty.
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> 4. When considering the wide canvas of evidence, the judge attached inappropriate weight to the low level of previous involvement by Children's Services in circumstances where the extent of the parental domestic abuse had been hidden from safeguarding professionals.
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> 5. The judge lost sight of the realities of the case and stretched the evidence beyond its elastic limits.

38. I granted permission to appeal on 28 February 2025.

39. Mr Stonor KC and trial counsel Ms Baruah developed the grounds on behalf of the local authority. In summary:

(1) If the judge was going to reject the expert evidence, in particular the agreement that the DAI was likely caused between C's first and second presentation at hospital, then he should have given cogent reasons for doing so, considering that:

a. Evidence as to timing and presentation relating to DAI is highly specialised.

b. The expert evidence was agreed and came from eminent experts.

c. The rejection of the expert opinion was "full-blown". They agreed that the DAI was sustained up to one hour before the second presentation at hospital, while the judge found that it was sustained almost 23 hours before.

d. The judge lost sight of the expert evidence which was that that explanation was "not allowed" and "implausible".

e. The judge's reasons for rejecting the expert evidence at paragraphs 130 and 140-141 (cited above) lack cogency and demonstrate a failure to grasp the true import of the expert evidence.

(2) As the judge recognised at paragraph 139, for his finding to be correct, symptoms of DAI must have been missed at C's first hospital presentation. In reaching that conclusion, his approach was fundamentally flawed:

a. C was at hospital for almost three and a half hours, during which time he was triaged, examined and regularly observed with results noted as normal.

b. None of the experts criticised the care given to C during the first hospital visit.

c. The judge was satisfied that Dr M was an honest witness who had told the court that he considered C to be a normal baby at the time of examination.

d. The judge appears to have concluded that Dr M missed signs of DAI based on the evidence given by other treating doctors and the experts about how physical signs of head injury can sometimes be missed. That is not relevant to the neurological signs of DAI which would have been obvious and would have been inconsistent with C's normal test results.

(3) The judge's investment in the parents' credibility was unsustainable:

a. Both parents had lied about the cause of C's injuries for over five months. The judge failed to consider the extent to which this reflected their willingness to put their own needs before the needs of C and the other children. He also failed to consider how those matters could impact on the extent to which he could consider their oral evidence to be reliable.

b. By the judge's own assessment, he found that the mother was not being entirely truthful with the court, in particular in her oral evidence about her knowledge of domestic abuse in the maternal grandparents' relationship or her family's knowledge of the domestic abuse in her relationship with the father.

c. The judge found that the parents gave inconsistent evidence about the father's movements during the crucial period between C's two hospital visits, which is when the experts consider C suffered the DAI, but the judge failed to consider any potential significance of the inconsistency.

d. The judge considered it to be "vanishingly unlikely" and "inherently improbable" that C had been caught up in another domestic abuse

incident between hospital visits, reasoning that it was unlikely that "a loving mother or father" could have inflicted such serious injuries. In reaching those conclusions the judge failed to consider how the probabilities had been impacted by the reality of how the parents had acted before and after C's presentation to hospital.

e. The judge correctly gave himself a *Lucas* direction but his approach to credibility was superficial. He was too quick to dismiss the parents' extraordinary and multi-faceted deceit.

(4) The extent of parental domestic abuse was not known to safeguarding professionals. The weight that the judge attached to the lack of previous social care involvement was therefore not justified.

Ground 5 was described by Mr Stonor as a catch-all.

40. Responding for the mother, Mr Tughan KC and trial counsel Ms Bell, rightly reminded this court of the considerable advantages of a trial judge when making findings of fact. As to the main grounds of appeal:

(1) Courts decide cases, not experts. The judge correctly discharged his duty to put the non-medical evidence together with the medical evidence. The expert evidence was not couched in terms of certainty, exclusion or impossibility in relation to the explanation for the DAI that the local authority preferred. In relation to expressions of probability, the judge had the advantage of hearing the nuanced delivery of the experts' oral evidence and of assessing the leeway within it. Looking at the whole canvas of evidence, and not just the expert evidence, the conclusion can be reached that the judge was correct. In any event, his conclusion was well within the range of options open to him.

(2) There is no suggestion in the parents' crucial text messages that there was a second assault between the two hospital admissions. It is unlikely that the parents would maintain that position untruthfully in light of the mother's new-found ability to point the finger, truthfully, at the father and the father's acceptance of the assault on 25 November 2023. The only issue on which the judge's conclusions on the parental evidence did not sit happily with the expert evidence was their evidence about C's presentation following sustaining DAI, but he noted that the expert evidence left open the possibility of all of the injuries being sustained on 25 November. It is accepted that the expert evidence preferred a conclusion that there had been a second assault. However, the judge did as he was required to do and tested the expert evidence against the lay evidence. The oral evidence of the experts confirmed that there are a wide range of symptoms capable of being present in a baby with DAI, encompassing the obviously very unwell to the non-specific. The local authority has not identified any perpetrator of the alleged second assault. It is inherently improbable that there are two perpetrators in this family.

(3) In assessing the parents' evidence, the judge had a particular advantage over an appeal court. He did not blindly accept their testimony but looked for

corroboration, cautioning himself about their history of deceit, and he found it in the text messages that were not expected to 'see the light of day'. He was not obliged to give no weight to their evidence. His approach was a model of what a fact-finding court should do.

41. On behalf of the father, Mr Norton KC and trial counsel Mr Brown support these submissions. The judge's summary of the evidence is accurate and we should not go behind his careful balancing of these elements, even if we may have weighted the elements differently. There was a sound evidential basis for his determination that the symptoms of DAI were missed during the child's first admission to hospital and that the seriousness of the child's injuries was underestimated. Dr Rose accepted that it was possible that the doctors examining the child on both admissions were not precise in their technique. Professor Stivaros said that DAI usually causes children to have an immediate change in their demeanour, but that it was difficult to be precise as to the timing. Both parents said that the child was not right when they first took him to hospital. The mother's evidence was that he was "pale, quiet, not feeding as he would normally do and had vomited on one occasion". Professor Stivaros accepted that this could amount to abnormal behaviour, as did Mr Jayamohan, though he did not consider it was sufficiently abnormal. The judge did not 'invest' in the parents' credibility, and he was uniquely placed to assess it. He was factually correct to refer to positive aspects of the parents' care of the children.

42. The only contribution from the Children's Guardian was to endorse the local authority's submission and to say that she is anxious that the children's future is decided on the right factual basis.

Analysis and conclusion

43. Three questions arise. Why does the issue raised by this appeal matter for the children? Is there any proper basis for interfering with the judge's finding of fact? If there is, what order should this court make?

44. In relation to the first question, it might be said that the father has already admitted to causing grievous bodily harm to C and that, if there was a second assault, he was probably responsible. Mr Stonor says that this would be wrong for a number of reasons. If the judge's finding is unsound, C's most serious and possibly life-affecting injuries remain unexplained. If there was a second incident, the extent of the parents' deceit is even more profound and this ramps up the level of risk. It is not safe to assume that the father alone would have been responsible. The older children were in the home at the relevant time and may well have been drawn into the concealment. All these matters are significant for risk assessment and welfare planning.

45. I agree with these submissions and, more to the point, the parents have never suggested that the extent of the findings would make no difference. Nor, of course did the judge, who conducted a full hearing in the knowledge that the parents now admitted one incident. If the question he was deciding was immaterial, it would have been raised at the case management stage of proceedings in support of a submission that the parents' concessions were sufficient and that no further findings were needed. Such a submission was not

contemplated and it would not have succeeded. There is no reason for this court to take a different view on appeal.

46. I turn then to the second, and central, question. In deciding whether the judge's findings withstand challenge, we must start by recognising that the bar for a successful appeal in this case is as high as it gets. This is a finding of fact by a senior specialist judge who had mastered a mass of written and oral evidence and seen the witnesses give evidence at a substantial hearing. We have transcripts of the main evidence, and I have read them, but they are no substitute for what the judge saw and heard. Further, the care which he brought to his decision is obvious from the structure and clarity of the judgment. There is no complaint about his legal self-direction and no significant criticism of his summary of the evidence. The single thrust of the appeal targets the weight that he gave to the competing elements of the evidence.

47. An appeal of this kind therefore engages the familiar authorities on appellate restraint to the maximum. This court has repeatedly reminded itself, and been reminded, that an appellate court will only interfere with the findings of fact made by a trial judge if it is satisfied that his decision cannot reasonably be explained or justified: *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [67]. That has particular force where the appeal challenges the weighing up of evidence, which is at the heart of the judicial endeavour.

48. Having given due consideration to these important principles, I have nevertheless been driven to conclude that the judge's finding of fact in this case cannot be reasonably explained or justified for the reasons that follow, and that this court accordingly has a duty to intervene.

49. Standing back, the investigation of these injuries has been confounded not only by the parents' initial deception, but also by their enforced acceptance that there had been a violent incident involving C. This dramatic turn of events drew the court's attention away from the critical period for C, which was the time preceding his second admission. There was little primary evidence about that period, and the judge was left to assess it in a vacuum of parental denial. There is an unmistakeable sense of the parents calling the tune of the investigation, both before proceedings began and since. This led to the judge trying to fit the medical evidence around the parents' latest account, when the only safe course was to approach the matter the other way around. Mr Tughan's submission that the judge did as he was required to do and tested the expert evidence against the lay evidence encapsulates this error. The better view is that this expert advice was solid ground while the parents' evidence, unless the court could be very confident about it, was a slippery slope.

50. There is no challenge to the finding that there was a violent assault by the father on the mother on the eve of C's admission to hospital, and that finding was clearly open to the judge on the evidence.

51. The medical evidence essentially dealt with two separate matters, mechanism and timing. As to mechanism, the experts were prepared to accept that all the injuries *could* have been caused by the father's assault, though that was unlikely,

and it has to be borne in mind that the mother did not think that C had been struck at the time. But any latitude that their evidence permitted in relation to mechanism was absent in relation to timing. On the second occasion, Dr Rose described C as having being admitted *in extremis*. From their differing but complementary perspectives, the experts were united in the view that there was no realistic medical possibility of the DAI (and probably also the skull fracture) having been caused on the previous day. Mr Jayamohan was of the clear opinion that the cause was very recent ("within minutes or an hour"), but to assist the court he posited two theoretical alternatives: that the clinicians had completely failed to spot the child's predicament on first admission, or that C had been on a declining trajectory. The first of these gained no support from the medical record, and it was of course for the judge to scrutinise Dr M's evidence, which passed muster. The second alternative was purely theoretical and was excluded by the experts, who agreed that DAI is not a 'slow burn' condition.

52. The expert evidence established that the parents' descriptions of C's condition before first admission did not come close to matching the normal trajectory of a child with such grave injuries. For a sense of how he was, it speaks volumes that he fed and slept normally overnight, was taken to McDonalds by his mother in the middle of the day, and then, instead of taking him to hospital, she drove him home. The evidence about timing was objective and solid. The judge said that the parents' account of C's condition "did not sit comfortably" with the general medical expectation, but the reality was that it was incompatible with it.

53. In directing himself at paragraph 32 and reaching his conclusion at paragraph 140, the judge invoked the note of caution, sounded in *R v. Cannings* [2004] EWCA Crim.1 and reiterated in *Re U (A Child)* [2004] EWCA Civ 567; [2004] 3 WLR 753; [2004] 2 FLR 263, that 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. However, no one suggested to the experts that they were working at the frontiers of medical knowledge and their evidence showed that the career of an injury of this kind is well understood. The judge's statement at paragraph 140 that, referring to the first examination, "scientific research may provide an explanation for these medical results" had no basis in the evidence he had heard. The experts did not say that more research was needed, and no one else suggested that it was.

54. The significance of this is that it shows the judge to be looking for some other explanation of C's collapse after the first hospital admission. Other than some newly discovered medical theory, it is not clear what that could have been. If he was going to reject the medical opinion, it was incumbent on him to identify its limits or flaws. The expert evidence as a whole did not permit a finding that C had suffered DAI the previous night, and even if he was poorly in some way before the first admission, he was assessed to be a normal child at that time.

55. The judge did not find that Dr M and the nurses who carried out the observations and tests performed during the first admission missed the signs of DAI, and indeed there was no evidential basis on which he could have found that. Any issue about that examination related to whether or not swellings or a fracture might or might not have been missed, which was an entirely different question.

56. On the clinical and expert medical evidence alone, it was therefore not reasonably open to the judge to find that the most serious injuries were caused on the previous day.

57. However, the judge had, of course, to consider the medical evidence in the context of the other evidence, which came exclusively from the parents. It is often said that in these cases the evidence of parents and other carers is of the utmost importance and that it is essential that the court forms a clear assessment of their credibility and reliability. The judge rightly did not dismiss the parents' account out of hand simply because they had lied. He understandably expressed considerable caution in relying on their evidence because, as he said at paragraph 135, "having watched the videos of their police interviews, they were in their demeanour convincing in their protestations".

58. That said, the medical evidence in this case was so strong that in reality it could only be outweighed on a balance of probabilities by a compelling parental account. However, the judge did not make any express findings about the parents' credibility or reliability, generally or in relation to the crucial period between the two hospital visits. He did not say that he believed them about it, or give any reason for doing so. Instead he reached a negative finding that the local authority had not proved its case (paragraph 142). The positive finding that the injuries were caused on one occasion is the closest the judgment comes to an acceptance of the parents' credibility, but an acceptance of their evidence that there was an assault did not fortify their further assertion that it was the only assault.

59. As I have said, the evidence about the crucial period was limited. The only paragraphs in the judgment that touch on the evidence about it are 107, 111 and 126. The first merely records the mother's "robust" denial that the father had been violent to her or to C after his return from hospital. The second records that the mother very quickly decided that C needed to go back to hospital, and referred to her sending a message about a TV channel to a friend at 19.57. The third describes the difference in the parents' evidence about the father's whereabouts after he returned. Having considered these matters, the judge found at paragraph 133 that it was vanishingly unlikely that the baby would have been caught up and inadvertently injured in another incident, and that he would therefore need to find that C had been the victim of an act of considerable violence such that was done with some deliberate intent.

60. Neither of these conclusions reasonably springs from the evidence. In the first place, as Mr Stonor submits, the probabilities within this family had been resoundingly skewed by the initial assault and the subsequent lies, and the children were not going to break their silence. The mother gave evidence, recorded by the judge at paragraph 106, that she had been angry with the father for having lied to the hospital, even though she immediately did the same herself. Her evidence about this period was this:

> "Q. When and how did you become aware of the explanation that B had hit C's head?

> A. Then. When I said, "I am taking him back to the hospital", and then he said what he had said about A holding the baby and B kicking him. Everyone were getting very angry." [CB243]
>
> "Q. Can you remember whether [father] told you that he had not told the truth at the hospital before or after you told [father] that you were going back to the hospital?
>
> A. More than likely it could have been before I said I was taking him to the hospital. Because I remember getting really angry with him and screaming and shouting, saying, "I am taking him, I am taking him myself. I am taking my baby to the hospital myself." So it would have been before I said I was taking him.
>
> Q. Why were you so angry?
>
> A. For lying." [CB244]

The mother was then asked whether she or the father had injured E during this period. She denied it and denied any concealment. She then described her trip to hospital:

> "A. As soon as I got in the car, I told A to turn the back lights on, so then we could see C's face. And I kept trying to put a dummy in his mouth, to make sure he was sucking on the dummy. And then I rang my mum whilst I was driving, I put her on loud speaker. And I was driving to the hospital, and said that - that is when I told them the lie about - about A holding the baby and B hitting him in the head, and that I am bringing him to the hospital." [CB245]

61. The judge therefore had evidence that the situation between the parents at home after the first admission was fraught, which must significantly increase the likelihood of there having been a further incident. Even if he was only referring to the probability of an identical incident as being vanishingly unlikely, that clearly could not apply to an incident of some kind involving more violence, and the possibility of a shaking injury also had to be borne in mind. It was not necessary to look for deliberate intent.

62. To the extent that the judge found corroboration for the parents' evidence in text messages, those shone no light on events after the first admission. Between the two admissions the parents were together for most of the time. It is true that there were no inculpatory texts after the second admission but that could not take matters very much further.

63. It is also puzzling that at paragraph 134, the judge treated the family's social background and contextual circumstances as something that was apparently favourable to the parents. Matters of that kind might be relevant to a consideration of whether a small baby might have been injured by his parents,

but here the fact was that C had been injured. The context therefore could not tilt the probabilities in the parents' favour.

64. The only conclusion is that the non-medical evidence on any view fell far short of displacing the weighty expert evidence that was available to the court.

65. It is for all of these reasons that I have been driven to the view that the judge's findings of fact that the local authority had not proved its case on the balance of probabilities, and that there had only been one incident, were not reasonably open to him. I would therefore allow the appeal.

66. The remaining question concerns the scope of the order that should follow. Following a successful appeal in a case in which there is a significant outstanding issue and more than one possible outcome, this court will normally remit for a rehearing. Here, it would make no sense to remit, because the basis on which the appeal will be allowed is that there was, on a proper view of the evidence, only one possible outcome. I would set aside paragraphs 5 and 8 of the judge's findings and substitute findings on the balance of probabilities that (1) The father assaulted and injured the mother on the night of 25 November 2023, whether or not that caused injury to C, and (2) There was a second undisclosed event between the first admission and second admission during which the DAI (and possibly other intracranial injury) was caused to C.

67. Up to the start of the hearing before us, the local authority framed its case on the basis that there would have to be a complete rehearing if the appeal succeeded. However, in the course of submissions Mr Stonor then proposed that the consequence of his argument succeeding must be that this court should substitute a finding of its own. We gave the respondents an opportunity to consider that matter overnight, and (without the parents relaxing their opposition to the appeal in any way) the parties kindly provided an agreed note the next day in these terms:

"**Remit of Fact-Finding Rehearing**

If the appeal is allowed, it is agreed, subject to this court's view that:

1. There should be a fact-finding rehearing in relation to the causation of C's intra-cranial injuries (including the DAI) and any ancillary issues relating to failure to protect and dishonesty.

2. This fact-finding rehearing should proceed on the basis that:

    a. The father assaulted and injured the mother on the night of 25 November 2023, whether or not that caused injury to C.

b. There was a second undisclosed event between the first admission and second admission during which the DAI (and possibly other intracranial injury) was caused to C.

c. The jointly instructed expert evidence (contained in the reports, experts meeting and transcripts of oral evidence) will stand as it is, and there will be no further expert evidence.

d. There will be no need for any further evidence from any of the treating medical professionals or police officers.

e. Whilst the court may consider evidence before, during and after the two admissions, the evidential focus will be on the time between the two admissions as this is the period during which the DAI (at least) was caused. Such an approach has the best chance of achieving the correct factual result.

3. The case should be remitted to the Family Presiding Judge for an urgent FCMH."

68. In the circumstances of this case, I consider this to be the right outcome, and it is on that basis that I would allow the appeal.

Lord Justice Males:

69. I agree.

Lady Justice King:

70. I also agree.
