Neutral Citation Number: [2009] EWCA Civ 1208

Case No: B4/2009/1945

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION
HIS HONOUR JUDGE O'DWYER
Lower Court No: FD08000390

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2009

Before:

SIR MARK POTTER, THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE WILSON
and
LORD JUSTICE RIMER

- - - - - - - - - - - - - - -

Between :

Re T (A Child)

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(Transcript of the Handed Down Judgment of
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Grahame Richardson (instructed by **Paul Robinson Solicitors**) for the **Appellant**
Sarah Davies (instructed by **H E Thomas & Co**) for the **Respondent Father**
Judith Charlton (instructed by its **Law and Governance Department**) **for the Local Authority**
Damian Stuart (instructed by **Sternberg Reid**) for the **Child, by his Children's Guardian**

Hearing date: 5 November 2009

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Judgment

Sir Mark Potter P:

1. This case concerns an infant male child, T, born on 15 July 2008 and now some 16 months old. On 18 September 2008, when he was only 2 months old, he was admitted to hospital with multiple injuries which I will describe below. He was discharged on 22 October 2008 into foster care pursuant to an interim care order obtained by the respondent local authority ("the LA") on 3 October 2008.

2. We are concerned with an application by T's mother ("the mother"), who seeks permission to appeal against the findings of His Honour Judge O'Dwyer in a judgment dated 7 August 2009, following a 5-day fact finding hearing concerning the causation of T's injuries in the course of the care proceedings.

3. The second respondent to this application is T's father ("the father") with whom the mother was living at the time that T's injuries were sustained and when he was admitted to hospital. The third respondent is T, by his guardian ("the guardian") appointed in the care proceedings.

4. T had been briefly admitted to hospital on two previous occasions shortly before 18 September 2008, namely 6 August (a day visit) and 11 August (a five day stay), but no serious injuries were found at the time.

5. On 6 August 2008 he was admitted to hospital following the parents reporting a "limp and floppy episode". At that time some concern was expressed at the time of his admission that there was evidence of a cut lip sustained on or shortly before 6 August. There was a linear bruise on the right buttock similarly sustained shortly before that date. No explanation from the parents was forthcoming in respect of those injuries and it is not in dispute they were not followed through by health professionals at the time.

6. On 11 August 2008 T was again admitted following what the parents reported as a further "limp and floppy episode", being discharged on 16 August 2008. The medical assessment by the treating professionals at that time in respect of both episodes, each of which was said by the parents to have occurred around or shortly after feeding, was that T was suffering from reflux.

7. On 13 August 2008, T sustained an injury while in hospital which caused a bruise to his left forehead. He was in the immediate care of his father on the ward at the time. There were no other witnesses.

8. On 2 September 2008, T was seen by a health visitor who noted that the right side of his head was swollen. She advised the parents to seek medical advice but did not oversee it herself. T did not go to hospital. Experts later diagnosed that T had suffered a right sided complex t-shaped fracture of the skull during the week ending 2 September.

9. On admission to hospital on 18 September, T was found to have suffered bilateral frontal haemorrhages, acute subdural blood and acute blood in the posterior fossa, all of which were evidence of a left sided injury which occurred on or before 18 September 2008 and were noted as likely to have precipitated the deterioration which led to T's admission to hospital.

10. Subsequent x-rays on 24 September 2008 revealed right sided posterior fractures of T's fifth and sixth ribs, diagnosed as having occurred three to six weeks earlier i.e. during the period 13 August – 3 September 2008.

11. Finally, there was also a bruise under T's left eye diagnosed to have occurred on or shortly before 18 September, the date of admission.

12. Both parents have been charged with offences of causing grievous bodily harm under section 18 and section 20 of the Offences Against the Person Act 1861 and with child cruelty. They have pleaded not guilty and are due to be tried in January 2010.

13. In view of the age of T and the need to settle his future placement as soon as possible, it was not a case which could wait the outcome of the criminal proceedings to establish responsibility for T's injuries and, the day before T's discharge from the hospital, a fact-finding hearing was listed for hearing on 2 March 2009, the first date upon which five days were available. Regrettably, it was not completed within that time. The father suffers from dyslexia and, on 6 March 2009, the fact finding hearing had to be adjourned in the course of his oral evidence for his representatives to take him through the police disclosure which had not hitherto been done. His counsel then fell ill and the matter had to be adjourned for the obtaining of transcripts of evidence to assist counsel newly instructed in the matter. It was relisted for the first available date, namely 27 May 2009 when the evidence was concluded, submissions taking place on 27/28 May. The case was then adjourned for judgment which was unfortunately delayed for some nine weeks, being handed down on 2 August 2009. The Judge held both parents responsible for T's injuries in terms to which I will shortly turn.

14. At a hearing for further directions on 21 August 2009, the mother gave no indication that she would seek to appeal. Both parents agreed, and the Court ordered, the instruction of a consultant psychiatrist to undertake a forensic risk assessment of the parents and any other family member put forward as prospective carers for T, it being anticipated that such assessment would be available for a review before the Judge on 13 November 2009. The 21 day period for appeal lapsed on 28 August 2009. An appeal was lodged on 4 September 2009. It was delayed by reason of the absence on holiday of counsel whose advice was required for the purposes of applying for public funding and the time taken in making the necessary application.

15. On 19 October 2009, Wall LJ adjourned the mother's application for permission to appeal, directing that it be heard on notice to the other parties for hearing before the Full Court. He observed that it might well be that the Judge's conclusions could not be faulted, but he identified as unusual features the delay occasioned by the split hearing and the Judge's adverse comments on the conduct of the health visitor involved in the case, indicating that these failures made it appropriate for the case to receive the attention of the Full Court.

16. In the event, I do not consider that the Judge's conclusions can be faulted; but I will first say a word or two on the matters identified by Wall LJ. The reference to the health visitor arises in this way. Her evidence was criticised by the Judge in his judgment on the basis that it was "inconsistent, undocumented and misleading". He was particularly critical about her identification of a "boggy swelling" on the right side of T's head on 2 September which he said should have been the subject of rapid

child protection and health initiatives, but in respect of which she failed to take effective action. He recorded that the health visitor herself admitted that she should have ensured that T was taken to hospital immediately and should have communicated his condition to her successor health visitor (which she failed to do). The Judge went on to criticise the standard of investigation undertaken by the hospital following T's admissions on 6 August and 11 August. These matters indeed give rise to concern. However, having been recorded by the Judge in his judgment, on 21 August 2009 they were the subject of a direction by him for disclosure of his judgment to the chairman of the local Childrens' Safeguarding Board, the Director of Childrens Services for the particular local authority and the chairman of the relevant Hospital Trust, for them to consider the appropriateness of the procedures followed in the case of T and to undertake an assessment of the adequacy of their procedures generally. In those circumstances, it does not seem to me that there is anything which this Court can usefully add by way of consideration on appeal.

17. So far as the delays in the split hearing are concerned, they are both unusual and unfortunate. They have meant that the care proceedings, which should by now have been finally dealt with in the interests of a child who has now spent 14 of the first 16 months of his life in foster care, are still unresolved. Further they are now pushing up against the date at which the parties will be tried in criminal proceedings which, so far as the question of the actual perpetrator is concerned, may establish the position beyond reasonable doubt. In these circumstances, the Judge will have to consider whether the finalisation of the care plan should await the outcome of the criminal trial.

18. The delay between delivery of the submissions and delivery of the judgment was also regrettable. We have been told that the Judge made clear that it resulted from pressure of work, namely the volume of cases being listed before him on a "back to back" basis, thus impinging on the time available to him for preparation of a full judgment. It also appears that there was some delay in listing the judgment for hand-down, once prepared. Despite the lapse of time in this case, I find myself able to take reassurance from the fact that the delay, as such, has not been relied on in the Grounds of Appeal or in argument before us as a reason to question the Judge's recollection of the evidence. The complaint is of the relevant weight attached by the Judge to aspects of the evidence which he identified in his judgment when considering the parties' responsibility for the injuries to T.

19. The form of the judgment is as follows. Following a self-direction as to the burden of proof and the threshold criteria, as to which no complaint is made, and after brief reference to the history of the proceedings and the sources of evidence before him, the Judge set out the mother's medical history referring to episodes of depression suffered in 2008. Having done so he stated that, while those matters had been explored:

> "I accept what the guardian says that her depression as such is not of probative value in looking at the injuries suffered by [T] in the sense that the depression itself does not establish a propensity to harm the child; however it is part of the evidential matrix of this case."

20. So far as the father was concerned the Judge referred to the mother's assertion before him that the father was aggressive, but pointed out that such assertion rested upon an

occasion of violence in an altercation which he described as "an isolated incident when the father arguably acted in self defence". He stated that he found nothing in the incident "that was evidence of a propensity to violence that would assist me in this fact finding hearing. The father does admit to being heavy handed".

21. The Judge then proceeded to give an account of the significant dates and incidents in respect of T's treatment and history during the period which I have described at paragraphs 4 - 9 above, including the contemporaneous accounts of the parents when calling the emergency services and at the hospital, and the visits and observations of the health visitor. He also dealt with the history of the injuries and their discovery. He then set out the LA's case that there were two potential perpetrators: the mother and the father and that:

> "On balance the local authority seeks a finding that neither parent can be excluded as a perpetrator of the injuries. They say that at least in respect of some of the injuries including the most serious the mother cannot be excluded".

22. Having summarised the nature of the cases presented by the mother and father the Judge proceeded to deal in detail with the injuries and the experts' views as to their likely timing. In relation to the bruise to the forehead which occurred on 13 August in hospital he found that on the balance of probabilities it was the result of a non-accidental injury inflicted by the father, there being no evidence linking the mother to that injury or placing her within the pool of potential perpetrators.

23. In relation to the various skull fractures, he noted the gravity of the injuries and the likelihood that they were as the result of an impact onto a hard surface such as the baby being thrown or dropped onto the floor. He found that it was difficult to ascertain exactly when they occurred and probable that they were the result of separate impacts, both the mother and the father being "within the pool of potential perpetrators". He found that neither of the "limp and floppy" episodes on 6 and 11 August could, on the expert evidence, be linked to T's individual injuries. He turned to the single incident to which the mother sought to ascribe the possible cause of those injuries, namely an unspecified occasion when she said that she woke to a thud and heard T screaming, the father explaining to the Court that he had dropped a bottle of milk when feeding T. The Judge stated that he found the accounts of both the father and mother unsatisfactory in respect of that episode. He dismissed the likelihood that a loud thud would have come from the dropping of a milk bottle. He found simply that it was "certainly possible" that on that (undated) occasion T suffered injury.

24. The Judge then dealt with the rib injuries, noting that neither parent had any explanation for them. He commented that the father had moved from a general denial to an admission that he himself might have caused those injuries by holding the child too tightly. He dealt also with the bruise under T's left eye on his readmission to hospital, finding that it had occurred on or before 18 September, as a discrete incident from the injury on 13 August.

25. Finally, he dealt with the bilateral front haemorrhages which precipitated the admission of T to the hospital on 18 September. The timing of the injury which caused them was unclear beyond the expert diagnosis of "recent left side injury".

26. Having held that all the injuries spoken to by the experts were non-accidental and having identified the parents as the only potential perpetrators, the Judge found that, as between the parents, it was only possible for him to identify the father as the perpetrator of two injuries namely those which caused the bruise which occurred in the hospital and the cut lip. He found that he could not on the balance of probabilities be satisfied that either of the parents was the sole perpetrator of the more serious injuries.

27. In respect of the mother he posed the following question:

> "62. … how could a mother, whose case was that she was closely bound to the personal care of her very young baby, have failed to observe the non-accidental injuries this child has clearly suffered and have failed to take steps to protect this child. Or is the truth that she herself has participated in the harm this child has suffered? This point has troubled me greatly. Looking coolly at the evidence here was a troubled and unhappy child who cried a lot (quite probably as a result of the abuse), who was seen by the mother to have scratches and blood around his mouth on at least two occasions probably more, a child who has suffered a number of non-accidental injuries yet was only taken to hospital in extremis on 2 occasions. This was not a child whose protection and welfare was at the centre of the household but a child whose needs were in conflict with the mother's own needs as someone who perceived herself to be depressed and ill. Either the mother tolerated the father's abuse of the child at the least turning a blind eye to it or she herself inflicted the abuse."

28. Later the Judge stated:

> "64. … there is also the hugely obvious point that as Dr W says, during this child's short life, he was systematically abused and has undoubted [*sic*] suffered a series of serious non-accidental injuries. In the context of the close nuclear family life described by both parents, it is highly unlikely that one parent would not have noticed not only the effect of the injuries on the child: the immediate pain and distress of the child, but also the actual inflicting of injuries on the child in particular two skull fractures and broken fractured ribs. In relation to injury 8, the bruise under the left eye, neither parent is able to give any explanation and indeed, on the mother's own case she is primarily responsible for the child who by this time does not settle with the father.
>
> 65. I am driven to the conclusion firstly that on the balance of probability the mother has failed to protect this child. Secondly, which is the decision which most troubled me, I find the local authority has proved its case that the mother must remain in the pool of perpetrators. That is that these injuries (apart from the bruise in hospital and the cut lip) identified above were non-

> accidental and were inflicted by the mother or the father or both."

29. The Judge then proceeded to give his reasons why the mother remained within the "pool of perpetrators". He said:

> "66. In terms of attributing likelihood between the parents, given that the father is the sole perpetrator of two of the violent, although in this context lesser events, the father is more likely to have committed the other acts of violence."

In this respect the Judge also referred to the father's partial admission that he may have caused the rib fractures, and noted that the "limp and floppy" episodes had been noticed when the child was in the father's hands.

30. However, he went on to state:

> "68. It has been very difficult to penetrate during the course of this hearing the truth as to what was happening in the child's household at the relevant time. The father expresses bewilderment as to how these injuries occurred …
>
> 69. The mother, who in all earlier documentation professed no doubts about the father, as soon as proceedings were envisaged began to move her case to one of blame of the father. In Court she professes the child to be her sole concern but in my judgment the contemporaneous evidence (e.g. the report to HV on 4.8.08) indicates a predominant concern with her own health and welfare which this unhappy child's welfare has trespassed upon.
>
> 70. Bearing in mind the pattern of this child's life; - with his mother (and father with the mother) throughout most of the day and with his father in the evenings and the mother overnight and given the difficulty in the timing of these injuries it is a real possibility that either of them, frustrated at the child's inability to settle overnight or crying, abused the child in such a way as to cause these injuries and I am satisfied that one or both of them did cause these injuries. "

31. Neither the Grounds of Appeal, nor Mr Richardson in his cogent submissions on behalf of the mother, suggest that the Judge erred in his citation or understanding of the relevant principles of law or the task which he was obliged to perform. As already indicated, the grounds relate to the Judge's treatment of the facts and the weight which he attached to various aspects of the evidence. The real complaint is that, having found the father to be the perpetrator of two (relatively minor) acts of violence and, being presented with various *indicia* which Mr Richardson submits pointed towards the husband as also being the perpetrator of all the more serious injuries to T, the Judge failed so to conclude. It is submitted that there was a lack of any evidence pointing *directly* to the mother as having caused or participated in the infliction of the injuries to T and that this entitled her to a positive acquittal of any such participation.

In this respect, reliance is placed upon what is said to be the inherent unlikelihood of both partners using violence towards T.

32. By way of further submission, it is asserted that the mother is equally entitled to acquittal of a finding of failure to protect the child in circumstances where it is said that it would be likely that the husband only indulged in violence when out of sight and hearing of the mother. Furthermore, when she herself accompanied the child to hospital on 6 and 13 August respectively, it was notable that the professionals had themselves failed to note or alert her to any substantial injury to T.

33. In the course of his argument, Mr Richardson identified nine particular matters which he stated were either omitted from, or insufficiently weighed in, the judgment when balancing the probabilities as between the mother and father. The first three points can be condensed into the submission that the Judge, having found on the balance of probabilities that (i) T's cut lip sustained shortly before his admission to hospital on 6 August was the result of forceful use of the bottle by the father when feeding T (ii) the bruise to the left forehead was caused on 13 August 2008 when T was in the father's care at the hospital, and (iii) there was no direct evidence as to any injury caused by the mother, he should have been guided by the observation of Dame Elizabeth Butler-Schloss P in *North Yorkshire County Council v SA* [2003] EWCA Civ 839, [2003] 2 FLR 849, at [33], as to the high improbability (albeit possibility) that two separate people would have caused injuries to a baby within the period of the first few weeks of its life.

34. The fourth point concerns an incident canvassed in evidence and referred to by the Judge when the father lost his temper in a violent altercation with a co-tenant of the premises he was occupying, and admitted to striking him and kicking him when on the ground. Mr Richardson submits that the Judge was wrong, when considering the matter in his judgment, not to treat it as a likely indicator of violence or potential violence towards baby T.

35. The fifth point relates to the evidence of the mother in relation to the "thud" in the night. It was her evidence that she had gone to bed at about 10 pm leaving the father to feed T and was awoken by a loud thud from the lounge and the sound of T screaming. She said that the father was holding T and said that he had dropped the milk bottle and that at the time she had taken his word for it. She said that she had calmed T, walking about with him in order to do so and that the next day he awoke and fed as normal with no marks or anything unusual about him to cause concern. It is complained that the Judge failed to link this incident with the evidence of one of the doctors who said in relation to symptoms of skull fracture that, at the time of impact he would have expected an infant to scream in pain for several minutes but that then the infant might settle reasonably quickly with a cuddle, with little in the way of subsequent outward symptoms in an uncomplicated head injury.

36. The sixth point relates to T's rib fractures diagnosed as having occurred in the period between the second hospital admission and 3 September 2008, for which neither parent had any explanation. As the Judge indicated (see para 24 above) in the course of his evidence, the father admitted that he himself might have caused the injuries by holding the child too tightly. The Judge noted this as "an extraordinary admission" but did not state any positive conclusion (as it is submitted he should) that the rib injuries had been caused by the father.

37. The seventh point relates to the two early admissions to hospital when T was "limp and floppy". On the first occasion he was discharged within a few hours and on the second occasion was retained in hospital for tests but nothing adverse was found. Complaint is made that while the Judge recounted these episodes when considering the question of who had perpetrated the injuries which may have been responsible for them, he failed to make a definitive link between those incidents and the injuries.

38. Eighth, it is complained that, while the Judge made certain findings which of necessity meant that the father was untruthful in his evidence, namely by finding that he was responsible for the cut lip and the injuries sustained by T in hospital, he failed also to comment on a number of inconsistencies in the father's evidence which indicated a lack of general credibility. It is complained on the other hand that, save for some conflicting evidence on the mother's part as to how often she had seen blood on T's lips, the Judge did not identify any aspect of her evidence as demonstrably untruthful.

39. Ninth, it is said the father was unable to point to any matter which made it likely that the mother was the perpetrator other than by his own denial.

40. Finally, it is complained that the Judge came to conclusions relating to the mother's health which were pejorative and which may have led him to regard her as a potential perpetrator on a false basis.

41. In applying for permission to appeal in this case, Mr Richardson has acknowledged that the burden which rests upon him in seeking to appeal the findings of the Judge upon the issues of fact and inference to which I have referred is to demonstrate that the Judge was plainly wrong. In the course of argument Mr Richardson frankly admitted the difficulties which faced him in respect of the Judge's finding that the mother had failed to protect the child in respect of a series of injuries which, upon her case, were solely perpetrated by the father. However, he submitted that in respect of the Judge's failure to find that the father alone was the perpetrator, the Judge was plainly wrong in the conclusion to which he came for the accumulation of reasons which I have set out above.

42. It is plain to me that the Judge reached his conclusions after detailed examination of all the evidence and with the benefit of having heard oral evidence from each of the parents. The advantages of a Judge over an appellate court in such circumstances and the latitude to be accorded to his decision in a case of this kind are essentially the same as those identified by Lord Hoffmann in *Piglowska v Piglowski* [1999] 2 FLR 763, at 1372 d-h and 784 c-g respectively, when considering the circumstances justifying the interference of an appellate court with decisions involving exercise of a judicial discretion.

43. I shall deal shortly and in order with the individual points made by Mr Richardson. As to the first three points, the Judge clearly weighed, and weighed carefully, the significance of his findings in relation to the two "lesser" injuries for which he found the father to be solely responsible when addressing the question of whether or not he could be satisfied how T acquired his more serious injuries. This was not a case similar to the *North Yorkshire* case in which Dame Elizabeth Butler-Schloss P made her remarks relied on by Mr Richardson. In that case the child in question had sustained two separately identified shaking injuries, there being a positive

identification of the perpetrator of one of them. In this case, T sustained different injuries caused by different mechanisms and it would be wrong to suggest that merely because the father was found to have caused lesser injuries of a different character the more serious injuries were also to be attributed to him, given the observations of the Judge which I have quoted about the unitary nature of the household. Furthermore, the Judge showed himself well aware of, and troubled by, the difficulties inherent in assessing the mother's involvement. He did not ignore any of the significant evidence or features which have been referred to by Mr Richardson; he simply did not consider them, whether individually or cumulatively, sufficient to exonerate the mother from consideration at the disposal hearing as a possible perpetrator in the particular domestic circumstances which had been explored in detail before him.

44. As to the fourth point, it was for the Judge, having heard the evidence relating to the fight with the neighbour, to decide whether or not an incident in relation to which he plainly considered that the neighbour was also to blame was a helpful indication of a violent disposition in relation to the father's own small child. I do not regard his view as plainly wrong. I think it was right.

45. As to the fifth point, the episode of the "thud" spoken to by the mother was dealt with at some length by the Judge. It is simply incorrect to say that the Judge failed to refer to the evidence concerning skull fracture and its possible lack of other than very short-term symptoms; however, it is plain that the experts did not, and the Judge felt unable to link the episode with any of the individual injuries to T. He found the account of both parties "unsatisfactory" and in the circumstances felt unable to make any findings dependent upon it.

46. Similarly, in relation to the sixth point, he did not find the admission of the father sufficient on which to base a positive conclusion as to the causation of the rib fractures.

47. As to the seventh point, the expert evidence was unable to make a definitive connection between the "limp and floppy" episodes and the head injuries suffered, as the Judge noted. In any event, only one of the four head injuries was considered by the experts to have occurred on or before 13 August. Thus, it does not seem to me that the Judge could be criticised for failing to make a definitive link between those episodes and the injuries.

48. As to the eighth point, it seems plain that the Judge did not regard the father as generally credible. So far as the mother is concerned, it is plain that the Judge's doubts about her credibility rested on far more than the question of how often she had seen blood on T's lips. It is something of a theme in the judgment that he felt quite unable to accept from the mother (as the primary carer who took "marked possession" of T as against the father) that she had failed at least to observe injury to the child and had failed to take steps to protect it. The plain indication is that he regarded her as an unreliable witness.

49. As to the ninth point, it is clear that the father in his evidence did not accuse the mother of violence, but rather relied on his own denial of knowledge as to how any of the injuries to T were sustained. However, the Judge's concern and suspicion were based on the closeness of the mother's and father's existence, in the light of which he

felt unable to acquit them of the possibility that they were in it together, jointly covering up the truth of what had really occurred.

50. Finally, I do not accept that the Judge's references to the mother's state of health are properly described as pejorative. He was plainly entitled to find, as a result of the evidence and his judgment of the mother in the witness box, that she was preoccupied with her own condition and state of depression at the expense of her concern for the child. He expressly eschewed in his judgment reliance upon her depressive state as being indicative of a predisposition to ill treatment of T. The criticism made by Mr Richardson centres on the phraseology of paragraph 69 of the judgment (quoted by me at paragraph 30 above). It does not seem to me that such criticism is made out.

51. The law relevant to the problems posed in this case can conveniently be gathered from two authorities, the first of which is a judgment of the Court of Appeal in *NH v County Council and others* [2009] EWCA Civ 472 (4/6/2009). That was a case in which the Judge at first instance made an order of the type it is suggested by the appellant should have been made in this case, namely that the father was the perpetrator of injuries suffered by his children, and that the mother could be excluded as a perpetrator in circumstances where it was not suggested that any person other than the mother and/or the father could have perpetrated the injuries which it was not in dispute were non-accidental. The following passage from the judgment of Lord Justice Wall, giving the judgment of the Court presided over by Lord Justice Thorpe, addressed the question of identification of a perpetrator in such a case as follows:

> "9. ***Re B*** [2008] UKHL 35, [2009] 1 AC 1, of course, establishes that the standard of proof to be applied to all findings of fact in care proceedings is "the simple balance of probabilities test": - see (amongst other places) the speech of Baroness Hale of Richmond at paragraph 73 and the "binary system" analysis contained in the speech of Lord Hoffmann. We think it important, however, to make two points in relation to ***Re B***, which, we think, is in danger of being misunderstood.
>
> 10. The first point is that the court is not required to identify a perpetrator simply because, as Lord Hoffmann graphically puts it in paragraph 15 of his speech:
>
> > "If, for example, it is clear that a child was assaulted by one or other of two people, the fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator.
>
> 11. We do not resile from the propositions stated by this court in paragraphs 55 and 56 of its judgment in ***Re K*** [2004] EWCA Civ 1181, [2005] 1 FLR 285:
>
> > "[55] As a general proposition we think that it is in the public interest for those who cause serious non-accidental injuries to children to be identified, wherever such identification is possible. It is paradigmatic of such cases that the perpetrator denies responsibility and that those close to or emotionally engaged with the perpetrator likewise deny any knowledge

> of how the injuries occurred. Any process, which encourages or facilitates frankness, is, accordingly, in our view to be welcomed in principle.
>
> [56] As a second background proposition, we are also of the view that 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.
>
> 12. We do not think that there is anything in these two paragraphs which is in any way inconsistent with the speeches in the House of Lords in ***Re B***. The crucial phrases in the two paragraphs we have cited from ***Re K***, however, are "wherever such identification is possible" and "if the truth can be ascertained". Nothing in ***Re B***, in our judgment, requires the court to identify an individual as the perpetrator of non-accidental injuries to a child, simply because the standard of proof for such an identification is the balance of probabilities. If such an identification is not possible – because, for example, a judge remains genuinely uncertain at the end of a fact finding hearing, and cannot find on the balance of probabilities that A rather than B caused the injuries to the child, but that neither A nor B can be excluded as a perpetrator - it is the duty of the judge to state that as his or her conclusion. To put the matter another way, judges should not, as a result of the decision in ***Re B***, and the fact that it supersedes ***Re H*** [1996] AC 563, strain to identify the perpetrator of non-accidental injuries to children. If an individual perpetrator can be properly identified on the balance of probabilities, then for the reasons given in ***Re K*** 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. There will inevitably be cases - of which this, in our judgment, is one – where the only conclusion which the court can properly reach is that one of the two parents – or both - must have inflicted the injuries, and that neither can be excluded."

52. It seems clear from the approach of the Judge that he had this passage well in mind. Certainly the form of his judgment fits well with the terms of paragraph 12 of the judgment in *Re K* as last quoted. The Judge plainly felt, despite the points forcefully made by Mr Richardson, that, so far as the major injuries were concerned, he could not be satisfied that, of the two parents, one rather than the other (or both) inflicted those injuries. He had heard and seen the witnesses and obtained the full flavour of what was undoubtedly a very close household in which it was the joint case of the parties that the mother was very much the primary carer over the period concerned to the extent that the Judge felt quite unable to acquit her of involvement.

53. Turning specifically to the findings which the Judge made in respect of the mother (see paragraph 65 of his judgment, quoted at paragraph 28 above). I am quite satisfied that, even assuming that the father was the *sole* perpetrator of the injuries inflicted on T, the Judge was right to hold the mother guilty of a failure to protect, given the

conditions of close proximity and communication between the parents and the considerations set out at paragraph 64 of the judgment (see paragraph 28 above).

54. That leaves the question whether the evidence justified the Judge's refusal to acquit the mother of any participation in the numerous and varied acts of violence to which T was subjected. This is more problematic, particularly given the statement of the Judge at paragraph 66 of his judgment (see paragraph 29 above) that, by reason of various matters, the father was "more likely than the mother" to have committed the more serious acts of violence. Mr Richardson submitted that, if that was the Judge's view, it justified, indeed it required him to find that the father was the *sole* perpetrator, the burden of proof simply being the balance of probabilities (i.e. "more likely than not"). I follow the apparent logic of that submission, but I am not persuaded by it.

55. In my view, at that point in his judgment, the Judge was not focussing upon the task of deciding whether, on the balance of probabilities, he was satisfied that each of the injuries relied on had been caused by one or other parent (as to which he had concluded that two only were attributable to the father). Rather, in respect of those injuries where he felt unable to draw that conclusion, he was making observations designed to assist the LA, the Judge and others subsequently involved at the welfare stage in the assessment of further risk. That was a course counselled and encouraged by Lord Nicholls of Birkenhead in *Re O and N (Minors)*; *Re B (Minors)* [2003] UKHL 18, [2003] 1 FLR 1169.

56. Under the heading "The Welfare Stage: 'Uncertain Perpetrator' Cases", Lord Nicholls stated:-

> "26. The first area concerns cases of the type involved in the present appeals, where the judge finds a child has suffered significant physical harm at the hands of his parents but is unable to say which. …
>
> 27. Here, as a matter of legal policy, the position seems to me straightforward. Quite simply, it would be grotesque if such a case had to proceed at the welfare stage on the footing that, because neither parent, considered individually, has been proved to be the perpetrator, therefore the child is not at risk from either of them. This would be grotesque because it would mean the court would proceed on the footing that neither parent represents a risk even though one or other of them was the perpetrator of the harm in question.
>
> 28. That would be a self-defeating interpretation of the legislation. It would mean that, in 'uncertain perpetrator' cases, the court decides that the threshold criteria are satisfied but then lacks the ability to proceed in a sensible way in the best interests of the child. The preferable interpretation of the legislation is that in such cases the court is able to proceed at the welfare stage on the footing that each of the possible perpetrators is, indeed, just that: a possible perpetrator. As Hale LJ said in *re G (Care Proceedings: Split Trials)* [2001] 1 FLR 872, 882:
>
> > "the fact that a judge cannot always decide means that when one gets to the later hearing, the later hearing has to proceed on the basis that each is a possible perpetrator."

This approach accords with the basic principle that in considering the requirements of the child's welfare the court will have regard to all the circumstances of the case.

29. In such cases the judge at the preliminary hearing, while unable to identify the perpetrator, may decide that one or other of the parents, perhaps both, was guilty of failure to protect. It was submitted that herein lies a better solution to the problem. The court should assess future risk on the basis of this proved shortcoming. This would be a better way to proceed because it would avoid attaching to each parent the stigma of possible perpetrator.

30. I do not believe this would be a satisfactory alternative. Inability to identify the perpetrator is not always accompanied by a finding of failure to protect. … A finding of failure to protect is not a reason for leaving out of account at the welfare stage the undoubted fact that one or other of the parents inflicted the physical harm on the child. This may be important in cases where circumstances have changed since the injuries were inflicted and the parents are no longer living together.

31. In 'uncertain perpetrator' cases the correct approach must be that the judge conducting the disposal hearing will have regard, to whatever extent is appropriate, to the facts found by the judge at the preliminary hearing….

32. … the judge at the disposal hearing will take into account any views expressed by the judge at the preliminary hearing on the likelihood that one carer was or was not the perpetrator, or a perpetrator, of the inflicted injuries. Depending on the circumstances, these views may be of considerable value in deciding the outcome of the application: for instance, whether the child should be rehabilitated with his mother.

33. …

34. I wholly understand that parents are apprehensive that, if each of them is labelled a possible perpetrator, social workers and others may all too readily rule out the prospect of rehabilitation with either of them because the child would be 'at risk' with either of them. As already noted, failure to protect is one thing, perpetration is another. A parent fears that, once the possibility that he or she was a perpetrator is brought into the scales, cautious social workers will let that factor outweigh all others.

35. I understand this concern. Whether it is well-founded, generally or in particular cases, is an altogether different matter. Whether well- founded or not, the way ahead cannot be for cases to proceed on an artificial footing. Rather, in cases of split hearings judges must be astute to express such views as they can at the preliminary hearing to assist social workers and psychiatrists in making their assessments and preparing the draft care plan. For their part social workers, I do not doubt, will have well in mind the need to consider all the circumstances when assessing the risk posed by a carer who is, but who is no more than, a possible perpetrator. To this end transcripts of judgments given at the preliminary hearing should always be made readily available

> when required, so that reliance does not have to be placed on summaries or even bare statements of conclusions: see Dame Elizabeth Butler-Sloss P in *re G (Care Proceedings: Split Trials)* [2001] 1 FLR 872, 876.
>
> 36. I must mention a further point. The burden of proof on care order applications rests on the local authority. But, it was submitted, to proceed as mentioned above would improperly reverse the burden of proof. The parent would have the onus of exculpating himself when the local authority failed to prove he was a perpetrator but the possibility that he was a perpetrator was left open. I am unable to accept this submission. It cannot stand with the decision in *Lancashire County Council v B* [2000] 2 AC 147 [2000]1 FLR 583. As already noted, the effect of this decision was that a care order may be made in this type of case even though the local authority failed to prove, to the requisite standard of proof, which parent was the perpetrator of the physical harm. The approach described above does no more than give effect to this decision at the welfare stage in the only sensible way which is possible."

57. It seems to me that the Judge's observations fall to be viewed in the light of those remarks. At that point in his judgment the Judge was proceeding upon the basis of his stated conclusion that the injuries "were inflicted by the mother or the father or both" and that he was unable to be satisfied to the requisite standard of proof that more serious injuries could be attributed to the father alone. Having stated that position of uncertainty in which he (rightly in my view) felt unable to make a finding on a standard of proof to be separately applied to each parent, he nonetheless sought to indicate in an appropriate fashion those matters in respect of each of the parties which fell to be taken into account in any risk assessment at the welfare stage. In the cases of the father, a level or degree of violence was established in relation to the lesser of the injuries and that, together with the other matters identified by the Judge, were plainly "risk" factors to be taken into account by those involved in the welfare disposal. In the case of the mother, while there were no specific pointers on which to rely, on the Judge's assessment there was an overall real possibility that the mother had used violence towards T in the circumstances set out in paragraph 70 of the judgment.

58. After careful consideration of the nature of the case and the Judge's careful, albeit cautious, approach to his task, I do not consider that the Judge was constrained to exclude the mother from the list of perpetrators and I would not interfere with his decision.

Lord Justice Wilson:

59. I agree, for the reasons given by the President, that the judge was entitled, on the evidence before him, to reach in effect the following conclusions:

(a) all the injuries inflicted upon T were non-accidental;

(b) it was not possible for any person other than one or other or both of the parents to have inflicted any of them;

(c) it was not established on the balance of probabilities that any of the injuries (excluding the cut lip and the bruise on the forehead) were perpetrated by the father;

(d) accordingly, being the opposite side of the same coin, it was not open to the judge to exclude the mother from being a possible perpetrator of them; and

(e) the mother therefore had to be placed, along with the father, in a pool of possible perpetrators of them.

60. The *legal* interest of the case lies in the fact that the judge in effect added a further conclusion. He did so in [66] of his judgment, set out by the President at [29] above. The judge's further conclusion, which one could call (f), was that, for three specified reasons, the father was more likely than the mother to have perpetrated the injuries.

61. I confess that at first I was surprised by an approach to the effect that, in circumstances in which the identity of the perpetrator of the injuries was not established on the balance of probabilities with the result that two persons had instead to be consigned to a pool of possible perpetrators, it remained possible to identify one of the persons in the pool as more likely, and the other as being correspondingly less likely, to have been the perpetrator.

62. I had not come across such an approach before. I realised that it was logically defensible. For likelihood in this sphere of law is something less than probability; and to say "it is more likely that he did it than that she did it" is not necessarily to say "it is established on the balance of probabilities that he did it". Nevertheless I wondered whether HH. Judge O'Dwyer had been trying to dance on the head of a pin.

63. When on behalf of the mother Mr Richardson crisply delivered his nine points to us, it came as no surprise to me that a majority of them related, directly or indirectly, to the three reasons which the judge had specified in support of his conclusion that the father was more likely than the mother to have been the perpetrator of the injuries. In effect the thrust of this appeal was that the reasons which led the judge to conclude that, within the pool, the father was the *more likely* perpetrator, should, instead, have led him to conclude that, on the balance of probabilities, the father *was* the perpetrator, with the result that there should have been no pool at all.

64. But there is the highest authority for the approach taken by the judge. I refer to the speech of Lord Nicholls in *Re O and N; Re B* cited at [55] above, and in particular to [32] of the speech, cited at [56] above. The observations of Lord Nicholls are directly in point.

65. I still venture to think, however, that it will be rare for a judge to find himself in the position in which Judge O'Dwyer found himself, viz. unable to be satisfied on the balance of probabilities that a person was the perpetrator yet able to conclude that, of those within the resultant pool, he or she was the more likely, or most likely, perpetrator.

66. I too would grant permission to the mother to appeal but, for the reasons given by the President, would then dismiss the appeal.

Lord Justice Rimer

67. I agree with both judgments.