



Neutral Citation Number: [2019] EWCA Civ 799

Case No: B4/2019/0291

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WATFORD
HH Judge Middleton-Roy
WD18C00668

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 May 2019

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE BAKER

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF A (A CHILD)

Between :

A LOCAL AUTHORITY
- and -
A MOTHER (1)
A FATHER (2)
A (by her children's guardian) (3)

Appellant

Respondent

Samantha King QC and Robin Powell (instructed by **Local Authority Solicitor**) for the
Appellant local authority
Andrew Norton QC and Emma Hudson (instructed by **Attwaters Jameson and Hill**) for the
Mother
Naomi Carpenter (instructed by **Barnes and Partners**) for the **Father**
Daniel Sheridan (instructed by **Duncan Lewis**) for the **Child, by her children's guardian**

Hearing date : 3 April 2019

Approved Judgment

LORD JUSTICE BAKER :

1. This is an appeal by a local authority against one finding (amongst others, not subject to appeal) made by HH Judge Middleton-Roy in care proceedings concerning a baby girl, hereafter referred to as A. The finding under appeal is the judge's conclusion that four rib fractures suffered by A were sustained as a result of overlaying whilst co-sleeping with her mother.
2. At the end of the hearing of the appeal on 3 April 2019, this court indicated that the appeal would be allowed, the judgment set aside, and the matter remitted for rehearing. Although only the finding referred to above was the subject of challenge, it was clear, for the reasons set out below, that the whole judgment and not just this finding should be set aside. We therefore referred the case to the Family Division Liaison Judge, Newton J, for judicial allocation and listing for case management. This judgment sets out the reasons for our decision.

Background

3. A, who is her parents' first child, was born in mid-April 2018, by emergency caesarean. A week later, mother and baby were discharged from hospital and went to live at the maternal grandmother's house where the mother and father were living. From the outset, it seems that she was a challenging baby to care for. The mother found herself unable to breastfeed her after a few days and shortly afterwards A started a pattern of staying awake crying for several hours every night. The mother sought appropriate advice from the health visitor. Amongst the advice given to her was a warning against co-sleeping.
4. After a few weeks, the father returned to work in which he was often required to work night shifts. Although the grandmother and her husband were living in the house, it seems that the mother was exclusively responsible for looking after the baby. She was in pain as a result of the caesarean delivery and the baby's disruptive sleeping pattern caused her further anxiety and distress. This manifested itself in text messages sent to the father at work in which the mother spoke in blunt terms about the problems she was having looking after the baby and the pressures and stresses she was under. She referred to A as a "bitch", a "demon", "devil", and a "bloody child". Amongst the many messages sent by the mother were the following: "she's just non-stop crying tonight I can't cope"; "I'm such a failure at life"; "I can't even look after my own fucking child"; "why can't I just be a mother"; "I'm a bad mother"; "I'm gonna lose my shit in a minute"; "I can't fucking cope"; "I don't even care that she's screaming now"; and "I was gonna hit her". The father replied to this last message by saying "you can't hit her babe", and in other messages he tried to reassure the mother that her feelings were normal. The mother spoke of hitting the child in other text messages.
5. By 30 May 2018, however, the baby was said to be in a more regular sleeping pattern. Visits to the health visitor and GP were uneventful, although the mother told the health visitor that she was not following the "safe sleep" advice and that the baby was sleeping with her in bed. On 12 June 2018, the mother rang the health visitor advice line because she had seen blood in A's stools. There followed several visits to the GP who identified small anal fissures.

6. On the morning of 21 June, the mother noted bleeding in the child's mouth. On the advice of the health visitor, the parents took the baby to hospital where she was admitted. On examination, she was observed to have a bruise on her left cheek, a petechial rash on her lower lip, a torn upper frenulum, a bruise on the outside of her right knee, and healing fractures on the anterolateral aspects of the left fifth, sixth, seventh and eighth ribs.
7. A police protection order was obtained and the parents were arrested on suspicion of inflicting grievous bodily harm. In her police interview, the mother was questioned about the sleeping arrangements, and confirmed that she had been co-sleeping with the baby, but said that she was aware of where the baby was positioned on the bed. On 26 June, the local authority applied for a care order and an interim order was granted on the following day. On discharge from hospital, A was placed with foster carers but a few weeks later moved to live with her paternal uncle and his partner following a positive viability assessment.
8. For the fact-finding hearing, the court authorised the instruction of Dr Karl Johnson, consultant paediatric radiologist, and Dr Russell Croft, consultant paediatrician. Each expert prepared written reports and took part in an experts meeting.
9. In his report, Dr Johnson estimated that the rib fractures were in the region of 2 to 5 weeks of age at the time of the x-rays taken on 25 June. There was no radiological evidence of metabolic bone disease. Dr Johnson advised:

“These rib fractures are typically the result of a severe excessive squeezing/compression of the chest. The amount of force required to cause these rib fractures is unknown, but in my opinion it is significant and greater than that used in the normal care of a child. Rib fractures do not occur from normal domestic handling, over-exuberant play or rough, inexperienced parenting. For example, in life-saving cardiac massage where the chest is forcibly compressed by one third of its diameter, rib fractures very rarely occur. In my opinion, given the location and appearance of the rib fractures, I think it most likely that all the fractures occurred from a single episode of chest compression.”
10. In his report, Dr Croft advised that:

“ ... the rib fractures ... are most likely to be due to abusive squeezing or gripping of the chest. She would have cried at the time that the fractures were inflicted, but another adult who had not been actually present and witnessed this abusive event may not later have realised that it had occurred. She may have been irritable, she may have had difficulty feeding, she may have been breathing slightly rapid, but these symptoms may have been overlooked as they are non-specific In the absence of bone disease, documented severe trauma such as a car crash, or birth trauma, non-accidental trauma is the most likely cause of rib fractures in an infant ... Normal handling of a baby could not cause rib fractures.”
11. Dr Croft proceeded to express an opinion on other aspects of the injuries sustained by the child. In summary he reached the following conclusions:

- (1) “A tear of a frenulum of the mouth in a baby of this age can only be due to inflicted injury, in the absence of a highly plausible explanation. Normal bottle feeding does not cause this.”
 - (2) “All the injuries on the face and around the mouth are likely to have been due to abusive acts, that is to say she was probably gripped round the face and either hit in the face or had the bottle thrust into her mouth. No other plausible explanation has been given. Normal handling of babies does not cause facial bruising or mouth trauma.”
 - (3) “The right knee bruise was probably a grip mark.”
 - (4) “In summary, A had an ensemble of injuries typically seen in abused babies: facial eye and mouth bruising, torn upper frenulum of mouth and four rib fractures.”
12. A number of questions were posed by the parties at the experts meeting. Amongst them was the following: “Is it likely that a severe compression to A’s chest would have left marks or bruising? If so, how long would any marks or bruising have been visible for?” Dr Croft replied that, in a lot of cases, rib fractures in infants do not present with bruising because the fractures are generally quite old and are healing so any bruising would therefore have disappeared. In addition, it is possible to squeeze the chest without causing bruises.
13. A further matter raised at the meeting was: “Please comment on the likelihood of the rib fractures of this type occurring as a result of the mother rolling onto A whilst she was sleeping” Dr Johnson’s reply was recorded as follows:
- “To cause a fracture you need a suitable mechanism and a significant level of force. An adult rolling onto a child would create the mechanism - although depends on how much force. Gently rolling on a mattress is unlikely to cause enough force on the chest to cause fractures. Although could not exclude - depends on what happened in the rolling episode and how much force was exerted on the child’s chest. Forcibly pressing down on a child could cause the rib fracture.”
14. Up to that point, the mother had not suggested that the child could have sustained the rib fractures as a result of co-sleeping. In her first statement she had described how she would hold A while they were in bed, saying “I never rolled over when she was lying on me or next to me”. However, in a further statement filed shortly before the hearing, she said:
- “I am now aware that Dr Johnson does consider that the rib injuries could result from an adult rolling onto a baby in the bed. Although I am not aware of any such incident occurring, A did sleep next to me in the bed for a period of time. I am aware this was against the advice of the health visitor however this was the only way that A would settle. I cannot exclude the possibility that I rolled onto her and then back without being aware that it happened and was not woken by her crying due to deep sleep due to my general exhaustion.”

15. Unsurprisingly, Dr Johnson was questioned about this aspect of the case in his oral evidence, first during the following passage in his evidence in chief when questioned on behalf of the guardian:

“Counsel: In the meeting note, Dr Johnson, you indicate that you could not exclude that as a mechanism. Is that a fair summary of your observations?”

Dr. J: That’s correct. To cause rib fractures you need to compress the chest. If an adult lay on top of the child, they’re going to cause some chest compression. Exactly how much would occur during a sleeping episode, I don’t know, and so you are creating a simple mechanism. It would depend on the level of force used during that episode. The more force used to compress the chest and the chest is squeezed tighter, the more likely the fracture would occur.

Counsel: So do I understand correctly that there is an important distinction between the mechanism and then the force as a separate and distinct point?

Dr. J: Well, they’re interrelated but you’d need a mechanism and a lot of force and the two are separate inasmuch as they’re a separate entity but it’s where they interact again that’s important so they’re not completely distinct but they are – they interact.

Counsel: Of course. In your clinical experience, Dr Johnson, do you have experience of that sort of mechanism resulting in rib fractures of this type?

Dr. J: The answer is on occasion I’ve been given this testimony to account for rib fractures and I can’t exclude it as a cause. Obviously I don’t know if that was the cause of the rib fractures but I’ve had testimony that correlates with fractures occurring around that time ... I’ve (inaudible) come across this explanation as a potential cause rib fractures on other occasions. I can’t say whether or not that was the cause of the rib fractures. All I can say is that the timing of the event and the dating of the rib fractures are consistent with the fractures being around the time, whether or not that was the cause of the rib fractures, I can’t say.

Counsel: ... is there a range of medical opinion of which you are aware as to that being a possible cause of such fractures?

Dr. J: I think there is certainly a body of opinion that says, and it’s a consistent body of opinion, that says to cause fractures you need to compress the chest. Exactly what occurs when a child is co-sleeping with a parent, I can’t say because I’m not there but in my opinion if an adult rolled on top of a child, you could compress the chest, and I think that is accepted opinion. Exactly how much force would be exerted, I think people’s perception in terms of technician [sic] would vary in that regard.”

16. A little later in his evidence in chief, Dr Johnson reiterated the point he had made in his report about the infrequency of rib fractures occurring as a result of cardiac massage adding that “to do that, in my opinion, is the result of severe brute force to the chest”.

17. During his cross-examination on behalf of the mother, the following exchange occurred:

“Counsel: I just want to ask you about the possibility that the mother has raised, that she could roll onto A during the night and then rolled back and not been aware of it. I just want to ask you about that mechanism particularly because it involves compression of the ribs, but it also involves the rolling, so there’s a twisting mechanism from the body that is also exerting pressure on the ribs, and then likewise rolling back, is that significant in your view in terms of causation? Does that contribute to the fractures, that actual extra twisting, rolling force?”

Dr. J To cause rib fractures, the ribs are, along with the other structures of the chest, the ribs form a (inaudible) structure, a tight band that you can compress. To cause a rib fracture, you’ve got to compress that band to the point that the compressive forces overcome the elastic strength of the ribs. At which point they will snap or will crack. That has to be done in a moment, i.e. there will be significant compression of the chest such that that compression overcomes the strength of the bones and then they break. In my opinion it would be a moment, therefore it wouldn’t be part of a rolling action. It would be at some point the chest had been compressed. Therefore I can’t say how that would happen or exactly what point but *I don’t believe the actions of rolling on and off would be the cause of it.* It would be the exact significant compression of the chest that caused it.” [my emphasis]

18. In re-examination, counsel put the following question:

“Counsel: In relation to the proposition that the mother’s weight might have contributed to the level of pressure applied, of course from your perspective, we don’t know the variables such as her weight, A’s exact weight at the time, the manner in which the force was applied, so would you agree that those matters are properly explored with the mother herself, who can describe the sleeping arrangements as opposed to speculating in respect of that mechanism?”

Dr. J: ... Those are all factors and the other issue would be, you know, varies in terms of how compliant the mattress was, whether or not, sort of that would be absorbed by the mattress as well, so it’s multi-factorial which is the reason why I can’t say this episode did or didn’t cause the rib fractures.”

19. The next witness was Dr Croft, who had been sitting in court during Dr Johnston’s evidence. The following exchange took place during his questioning on behalf the local authority:

“Counsel: Mother has posited a possible explanation. It is something she has a recollection of that says it’s possible that when she took A into bed with her at night, when she was tired, she may have rolled on her and off her and this may have caused the rib fractures. Is that a probable or likely or even a possible ...

Dr Croft: Well I don’t think it’s probable, your Honour. Whether it’s possible or not, I’ve been thinking about, listening carefully to Dr Johnson. I don’t think it’s completely impossible and I think I would agree with him, or I would agree with what I think he means, which is that in theory it’s possible but I do not know, and I was actually in the comfort break, your Honour, doing a little googling, and I do not know of any reported cases. To my knowledge and experience, the risk of what used to be called overlaying in the olden days was of suffocating the baby and unintentionally, non-abusively, mothers or parents, especially if they had taken drink, I think, because then they didn’t move very much, that was a sort of classic risk of overlaying as we used to call it, but not of rib fractures. I don’t know of any reported cases so I don’t think, although in theory it might be possible, epidemiologically, as far as I know, it has not been reported. If there has been an isolated report, reports I’m not aware of, I would stand corrected but I did do a literature check but that’s not exhaustive. I will have another look. For example, your Honour, if you look at the literature on the causes of rib fractures in infants, which I have read papers on, that’s not one of the causes mentioned.

Counsel: What are the causes mentioned?

Dr Croft: Well, for example ... trauma either accident or non-accidental.”

20. A little later in his evidence in chief, Dr Croft observed:

“ ... looking at this case holistically, in her lifetime A has sustained a number of injuries, so there’s a sort of pattern or ensemble of injuries which cannot be explained accidentally.”

21. During his cross-examination on behalf of the mother, the following exchange took place:

“Counsel: She doesn’t recall rolling onto A but she has to accept it is a possibility that she did that during the night without being aware, and then rolled back, so would not have been aware and it may be, and again mother very much accepts this as a hypothesis, if A cried when she was on top of, mother didn’t wake up for whatever reason, exhausted, mother not waking up and muffling by her body, and then when she rolled off, A may have continued to cry or may not have continued to cry if the pressure had been relieved of her and the mother still didn’t wake up and didn’t know anything about this. That’s a potential hypothesis, isn’t it, in this case?

Dr. Croft: Well, your Honour, I did say earlier that I thought in theory it was possible. I think the possibility is very low If you press me, I am happy to give you further reasons why I think it is very low.

Counsel: Well, the court's heard Dr Johnston's evidence in relation to that

Dr Croft: Well, I agree with Dr Johnston's evidence."

22. Both parents then gave oral evidence. The mother expressed shame and disgust about the text messages she had sent to the father. She was questioned closely about the possibility of the rib fractures having been caused during co-sleeping. She stated that after A's birth her weight had been "probably around 15 stone". She accepted that in her initial statements she said that she did not think she had rolled onto A but now felt that it was "a possibility" adding "I was extremely sleep-deprived and if I did roll on her – I mean, sometimes I do go into a very deep sleep so there is a possibility that I might not have heard her".

23. During cross-examination on behalf of the guardian, the following exchange took place:

"Counsel: One analysis of your evidence might be that it is convenient, if understandable, having now read all of the evidence, having heard what the experts say, having read their reports, too, I suggest, pluck ideas out of thin air, to think of – you heard me use the word 'hypothesis' to the experts – to think 'Well, that might explain it, that might be what happened'. Is that what you've done?"

Mother: No. It's always been a possibility. It always has, but I just, I just never thought that I would, but it's always been there.

Counsel: So why, when given the first opportunity then, was that not your evidence to the police?

Mother: I don't know.

Counsel: Well I have to suggest that one reason for that is that, as time has gone on, you have picked something out of the air.

Mother: I haven't picked it out of the air."

Counsel then drew attention to some of the text messages which were sent around the time when the rib fractures were said to have occurred, and continued:

"Counsel: I'm suggesting that, within the relevant time, can you see how the jigsaw starts to piece together, to look as though this is a lady ...

Mother: I can see how it looks

Counsel: ... who is sending concerning messages, who, for understandable reasons, may have flipped.

Mother: I never, I can't swear to you enough, she is so precious to me. I couldn't even imagine doing anything to hurt, let alone physically acting on it. Like, I said it, I know I said it, and I'm sorry that it, I said it. I could never ... I look at precious little face and I miss her so much, and if I'd done it, I swear to you I would tell you, if I squeezed her. But I never."

24. In his evidence, the father, for the first time and after the evidence of the doctors and the mother had been given, stated that he had unintentionally caused A to suffer the torn frenulum. According to the judge's note as recorded in his judgment, the father described how he had become frustrated while trying to feed her and "shoved the bottle at an upward angle in her mouth and it caught her lip and pulled her lip up. The teat did not go up to the roof of the mouth. It went between the gum and the lip and the teat bent because I pushed it in too hard."
25. In respect of the other injuries, both parents continued to deny that they had been inflicted.

The judgment at first instance

26. In his judgment, the judge started by summarising the history of the proceedings, the injuries, and the law. He then summarised the evidence, including extensive quotations from the evidence of the experts. Turning to the mother, he described her as a reliable witness who had given her evidence in a candid way and added that her evidence "in respect of all the key issues remained consistent throughout". He recorded that she had been ashamed and disgusted about the text messages. He noted that she had been candid in accepting that she had not followed the health visitor's advice about co-sleeping, but added that all the medical evidence suggests that A had been thriving.
27. The judge then made the following observations about the rib fractures:

"136. Whilst the exchange of text messages between the parents, in isolation, presents as a troubling script, I accept the mother's evidence and that of the father, when they told the court that the messages were indicative of the colloquial language they use between themselves and close friends, the text messages must also be read in the context of the father intending to be sympathetic and attempting to demonstrate his support, that they were variously post-scripted with indications that they were intended to be humorous and that they were never intended to encourage or cajole either parent to harm A. Indeed, what is clear from the messages read as a whole is that these were two parents who were struggling to cope with the pressures placed upon them by a very young baby who was not sleeping at regular times, cried frequently, most probably contributed by the intolerance to cow's milk later diagnosed and against the background of the mother being considerably sleep-deprived, recovering from a complicated birth, an emergency caesarean section and without assistance from the father on account of him working night shifts or shifts late into the evening. It is clear from the exchange of text messages that the mother indicated she was having difficulties coping alone. Further, it is clear that she was assessed by the health visitor as having mild depression. That background, however, does not,

without more, lead to a conclusion that the mother caused physical harm to the child.

137. When considering the evidence as a whole, including the consistent evidence between the parents that the mother, when she did achieve sleep, often did not respond to A's cries as the mother had fallen into a deep sleep, in my judgment, the likelihood of A's rib fractures having an accidental causation increase markedly from a simple medical 'possibility', to a real likelihood.

138. The fact that the parents had not put forward overlaying or co-sleeping as an explanation until after the expert evidence was obtained does not, in my judgment, make the explanation now given any less cogent. This is particularly so, given that the mother may not have known that she rolled on to the child during sleep either if she was sleeping alone while the father was at work or if she had to be woken from sleep if the father was present. In my judgment, this is consistent with the evidence of the experts that a child whose ribs were fractured in this manner would have cried at the point when the fracture took place but could have been soothed thereafter."

28. The judge then set out the father's oral evidence about the injury to the frenulum. He said he was unable to ignore the fact that the father had given a false account to the police, but concluded that the tear to A's frenulum had been caused in the manner father had described in the witness box. He accepted the father's evidence that he had lied for reasons of shame, panic, fear and distress and that the injury had been caused, not deliberately, but rather "through frustration contributed to by sleep deprivation and his own feeling of inadequacy as a parent" (paragraph 145).

29. The judge then returned to the rib fractures, setting out his conclusions as follows (at paragraph 147):

"Evaluating and assessing all the available evidence not in separate compartments but having regard to the relevance of each piece of evidence to other evidence and exercising an overview of the totality of the evidence, I find that the tear to A's frenulum was caused by her father. Whilst I find that A also suffered fractures to her ribs, I find that the rib fractures were most likely caused on the balance of probabilities during an episode of co-sleeping when the mother lay on A, oblivious to having cause such injury. I have reached these conclusions having regard to the expert evidence not in isolation but considered in the context of all the other evidence. I find the injuries to be separate and distinct and to have been caused at different times, namely the injury to frenulum having been caused on 21 June 2018 and the fractures to the ribs being caused in a separate, single stand-alone incident in the 2 to 5 week period prior to 25 June 2018."

30. He then concluded that the other injuries - the bruising to A's face and knee - were likely to have been caused accidentally. In support of this conclusion, he stated (at paragraph 148):

"When looking at the totality of the evidence in the broader context, there is no evidence of observation of rough handling by either parent, only evidence of gentle attuned handling."

31. After the judgment, the parties invited the judge to provide clarification as to his findings in respect of the bruising to A's lower lip. In an addendum judgment dated 18 January 2019, having set out some further evidence about this injury, the judge stated:

“On the totality of the evidence, I find that A presented to hospital on 21 June 2018 with a bruise and/or petechial rash to the lower lip. I accept the father's admission in his oral evidence that he is likely to have caused the bruise and/or petechial rash during the same feeding event that resulted in the tear to the frenulum of the upper lip, that is, whilst attempting to force the bottle into the child's mouth. Further, I find that such injury was not caused by normal handling ... The court finds that all the injuries around the mouth were caused by abusive acts, as a consequence of the bottle being thrust into her mouth.”

Submissions on appeal

32. The amended grounds of appeal advanced by the local authority were as follows.
- (1) The finding that the rib fractures were caused by overlaying and not caused by the mother or the father squeezing or compressing the chest was against the weight of the evidence.
 - (2) The judge gave insufficient weight to (a) the text messages between the parents which were abusive and threatening towards the child (b) the evidence of Dr Croft that overlaying was not a probable cause of rib fractures, and (c) the fact that the mother had not put forward overlaying while co-sleeping as a positive case, merely that she could not exclude it.
 - (3) The judge gave too great weight to the opinion of Dr Johnson that overlaying was a possible cause of rib fractures.
 - (4) The judge failed to consider each part of the evidence in the context of the other parts of the evidence.
 - (5) The judge failed to consider whether the father may have caused the rib fractures to the child taking into account the fact that he admitted causing the torn frenulum and bruising to the face in oral evidence.
33. On behalf of the local authority, Ms King and Mr Powell submitted that the judge's conclusion concerning the rib fractures was unsustainable. Although the judge stated, on more than one occasion, that he made his findings having regard to the totality of the evidence, it was plain from reading the judgment that he did not in fact do so, but instead treated the evidence concerning the injuries as a series of separate jigsaw puzzles without regard to the whole picture. He considered the evidence about each injury separately and not in the context of the other injuries. Ms King and Mr Powell submitted that the judge's failure to consider the injuries as a whole was a significant flaw given Dr Croft's opinion that this case involved “an ensemble of injuries” typically seen in abused babies. They further submitted that he did not properly consider the evidence concerning the injuries in the context of the text messages. In particular, he did not have proper regard to the fact that the time window in which the

rib fractures were sustained coincided with the period when the mother was sending text messages threatening to harm the baby.

34. It was further submitted on behalf the local authority that the judge failed properly to consider the evolution of the mother's account about the possibility of overlaying. Initially, she said that she had not rolled onto A in bed and only put it forward as a possibility after reading the experts' reports. Even at its highest, the mother's case was only that it was a possibility that this had occurred. She was unable to recall any occasion when it had happened or might have happened.
35. Ms King and Mr Powell further submitted that the judge misunderstood or misrepresented the expert evidence concerning the rib fractures. They pointed out that, in quoting the passage in Dr Johnson's evidence the transcript of which is set out at paragraph 18 above, the judge omitted the important phrase (emphasised in my citation from the evidence): "I don't believe the actions of rolling on and off would be the cause of it". They further submitted that the judge misconstrued Dr Johnson's evidence about his experience of overlaying as a cause of rib fractures. At paragraph 116 of the judgment, the judge said: "Dr Johnson told the court that in his clinical experience he has come across this mechanism as a potential cause on other occasions and he cannot exclude this mechanism." In fact, as is clear from the quotation from the transcript of his evidence at paragraph 16 above, Dr Johnson had come across instances when it had been suggested that overlaying was the cause of rib fractures, but it was not his evidence that it had ever been accepted as a cause or potential cause. Indeed, it was Dr Croft's evidence that there was no support for this as a mechanism in the medical literature.
36. It was also submitted on behalf the local authority that the judge did not adequately address the experts' evidence that there were two elements in the causation of rib fractures – a mechanism and a significant level of force – and in particular their evidence as to the degree of force which would be required – in Dr Johnson's words "significant compression" or "severe brute force to the chest".
37. Ms King and Mr Powell submitted that, in his concluding analysis as to the causation of the rib fractures, the judge wrongly spoke of a "simple medical possibility". It was argued that this misrepresented the expert evidence which was that the suggestion that overlaying was the cause of the fractures was, in Dr Croft's view, not probable although not completely impossible – the possibility was "very low".
38. It was further submitted that the judge failed to consider the possibility that the father was responsible for the rib fractures. Given his admission on the last day of evidence that he had inflicted the injury to the upper frenulum and lower lip in a moment when he was deprived of sleep and frustrated by what he perceived to be his inadequacies as a parent, it was incumbent on the judge, when evaluating the possible explanations for the rib fractures, to consider whether they had been inflicted by the father. Ms King went so far as to submit that it is questionable whether the possibility that the father was responsible for the rib fractures even entered into the judge's thinking. This was further evidence that the judge did not consider each injury in the context of all the other evidence. Yet more evidence that he fell into this error is found in his comment concerning the knee injury, quoted above. His assertion that, "when looking at the totality of the evidence in the broader context, there is no evidence of observation of

rough handling by the parent” was plainly wrong, given the father’s admission about the frenulum and bruising of the lower lip.

39. On behalf of the mother, Mr Norton and Ms Hudson invited the court to dismiss the appeal. It was submitted that the judge had given himself an impeccable direction as to the law and had arrived at conclusions as to the cause of the rib fractures which were clearly reasoned and explained in a long, careful and well-structured judgment in which he had regard to the totality of the evidence. An important feature of his decision was his assessment from the bench of the credibility and character of the parents in the witness box. Accordingly, counsel for the mother understandably relied on the well-established principles that the trial judge is in a unique position when it comes to the assessment of the witnesses and that it is the practice of this court not to interfere with that assessment, or the consequential findings of fact, unless compelled to do so.
40. It was submitted on behalf the mother that the state of the medical evidence at the conclusion of the hearing left open the clear possibility that the rib fractures could rationally be explained by an episode of overlaying. In such circumstances, it is the obligation of the court to have regard to the whole evidence and inherent probabilities based on a survey of the wide canvas of evidence when assessing the pleaded case against the requisite standard of proof. Here, the judge did just that. He carefully analysed the expert evidence and was plainly aware that it was necessary to consider both mechanism and force when analysing the possible causes of the rib fractures. He carried out an assessment of the parents as witnesses of truth, including the mother’s evidence about sleeping arrangements with the baby. He gave anxious consideration as to the terms of the text messages passing between the parents, and his interpretation as to the significance of those messages was one which he was entitled to reach having considered the run of messages as a whole (which included many messages in affectionate terms) and the parents’ oral evidence. He took into account the fact that the mother had not initially advanced the overlaying theory of causation. He carefully weighed the fact that the father had admitted causing the injury to the frenulum and lower lip and misled the police as to the causation of those injuries in his interview. It was submitted that, in the light of his findings and the reasoning underpinning them, the judge was entitled to reach the conclusions that he did.
41. Mr Norton conceded that the judge did not expressly analyse the significance of the father’s admission to causing the injuries to the frenulum and lower lip to the question of causation of the rib fractures. He submitted, however, that the judge’s repeated references to having considered the totality of the evidence, and to the need to survey the wider canvas, demonstrate that he did have that matter in mind when reaching his conclusion about the fractures.
42. In the alternative, Mr Norton submitted that, if this court concluded that the judge was wrong to find that on a balance of probabilities the fractures were likely to have been caused while A was co-sleeping with the mother, it would be open to this court to substitute a finding that the local authority had failed to prove that the rib injuries were inflicted non-accidentally.
43. The father also invited the court to dismiss the appeal. On his behalf, Ms Carpenter put forward submissions that were substantially in the same terms as those put forward on behalf of the mother. In his skeleton argument on behalf of the guardian,

Mr Sheridan had also invited the court to dismiss the appeal. In oral submissions, however, he indicated that the guardian adopted a neutral position.

Discussion and conclusion

44. It is plain the judge approached his task in this case with great diligence. It is also right to acknowledge that an important element in his decision was the impression he formed of the witnesses, and in particular the parents. This court has remarked on numerous occasions that the evaluation of witnesses is a matter for the trial judge, that the atmosphere of the courtroom cannot be recreated by reference to transcripts of evidence and other documents, and that accordingly an appellate court will not interfere with findings of fact by trial judges unless compelled to do so.
45. I am clear, however, that this is a case where this court is compelled to intervene, for several reasons.
46. First, the judge's assessment of the expert evidence was plainly flawed. So much is apparent from his reference to the theory that the rib fractures might have been caused by overlaying as a "simple medical possibility". In fact, as is demonstrated from the extensive citation from their written and oral evidence earlier in this judgment, the clear consensus of the experts was that, whilst not ruling it out as a possible explanation, the possibility was "very low". Although Dr Johnson had come across cases in which overlaying had been put forward as an explanation of rib fractures, it was not his evidence that he had any clinical experience of such an explanation being accepted. Whilst Dr Croft's investigation into the published research was seemingly not comprehensive, the evidence he gave was that there was no support in the literature for the theory that rib fractures could be caused by overlaying. Moreover, at no point did the judge adequately address the question of whether, even assuming that the mother had in fact rolled onto, or lain on, the baby, this would be sufficient to generate the significant compressive force which Dr Johnson advised would be needed to cause rib fractures. In those circumstances, the judge's reference to the theory as a "simple medical possibility" does not adequately reflect the degree of improbability ascribed to the theory by the expert witnesses.
47. Secondly, although the judge stated that the evidence as a whole raised the likelihood of the rib fractures having an accidental cause from a "simple medical possibility" to a "real likelihood", it is clear from paragraph 137 of his judgment that the judge did not, in fact, consider the totality of the evidence in reaching that conclusion. The only evidence on which he relied when elevating the degree of probability to a "real likelihood" was what he described as the consistent evidence of the parents that the mother, when asleep, often failed to respond to A's cries. On any view, this piece of evidence was manifestly insufficient to elevate the degree of probability from the "very low" level of possibility ascribed to the theory by the experts to a "real likelihood".
48. Thirdly, and following on from the previous point, it is plain from the structure of the judgment that, notwithstanding his repeated assertions that he was taking account of the totality of the evidence, the judge in fact considered each injury separately and did not stand back and look at each in the context of all the other injuries and evidence. In particular, for my part I am not satisfied that the judge, when considering the causation of the rib fractures, took into account the father's late admission in the

witness box that he had inflicted the torn upper frenulum and the bruising to the lower lip through rough handling when feeding the child. The judge's assertion towards the end of his judgment, when considering the injury to the knee, that, "when looking at the totality of the evidence in the broader context, there is no evidence of observation of rough handling by either parent, only evidence of gentle attuned handling", is plainly wrong. When the judge made that observation, it seems that he overlooked the fact that the father had admitted to an act of abuse when feeding the child. This confirms the impression gleaned from the judgment as a whole that the judge looked at each injury in isolation and not in the context of all of the evidence. He failed in particular to have proper regard to Dr Croft's opinion that A had an ensemble of injuries typically seen in abused babies.

49. The judge was plainly heavily influenced by the favourable impression he formed of the parties, in particular the mother, in the witness box. He accepted her explanation for the text messages and her assurances that, despite what she wrote in those messages, she would never have harmed her baby. In my judgment, however, the judge was overly influenced by the favourable impression he formed the mother and, as a result, his balancing of the totality of the evidence was flawed.
50. Finally, the judge's finding went beyond a rejection of the case presented by the local authority and extended to a positive finding that the rib fractures were caused by overlaying by the mother. It is impossible on any view of the evidence to see how such a positive finding could safely have been made.
51. For these reasons, and notwithstanding the evident care and concern with which the judge approached this case, I concluded that his finding in respect of the cause of the rib fractures sustained by A was wrong and should be set aside. Given the deficiencies in the judgment to which I have referred, I was not persuaded by Mr Norton's alternative submission that this court should substitute a finding that the local authority failed to prove that the rib injuries were inflicted non-accidentally.
52. Further, because of the flaws in the judge's approach to the evidence, as referred to above, it would clearly not be appropriate simply to set aside his finding as to the cause of the rib fractures. The case needs to be reviewed as a whole. Regrettably, the only option, therefore, was to remit the matter for rehearing.

PETER JACKSON LJ

53. I agree.

MOYLAN LJ

54. I also agree.