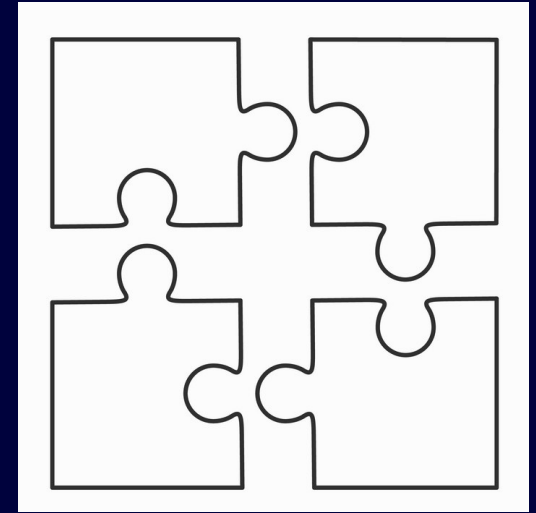


# Medical Experts in the family court

Where two worlds collide !



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**Barrister, 4PB**



EST. 1597

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# Medicine and Law in the Court Room- Friends or Foes?

- What type of cases need medical experts ?
- Who can be an expert?
- Does being a medical expert differ from being a medical witness?  
The Expert v The Advocate
- Why we each do the job we do
- Challenges for the future



# Cases as jigsaw puzzles- the beginning



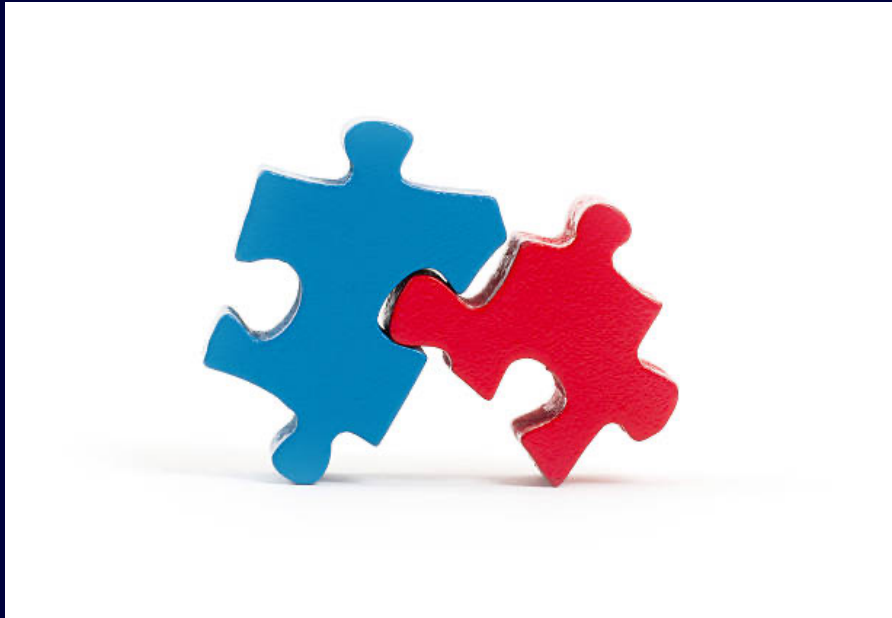
# What happens and why?

A young child is injured or dies whilst in the care of a parent / carer

- Non Accidental Injury is suspected
- The child can't say what has happened to it
- The parent won't or can't say what has happened to their child
  
- But a child's body can tell a story without words
- This is who it tells its story to : receiving medics at hospital  
police, social services experts  
And - most importantly - the court
- In court - experts and advocates reconstruct, as best they can , what happened



# Cases as jigsaw puzzles : the traps



Don't force pieces to fit

Don't think all the pieces can be found

Don't presume you know what the end picture looks like

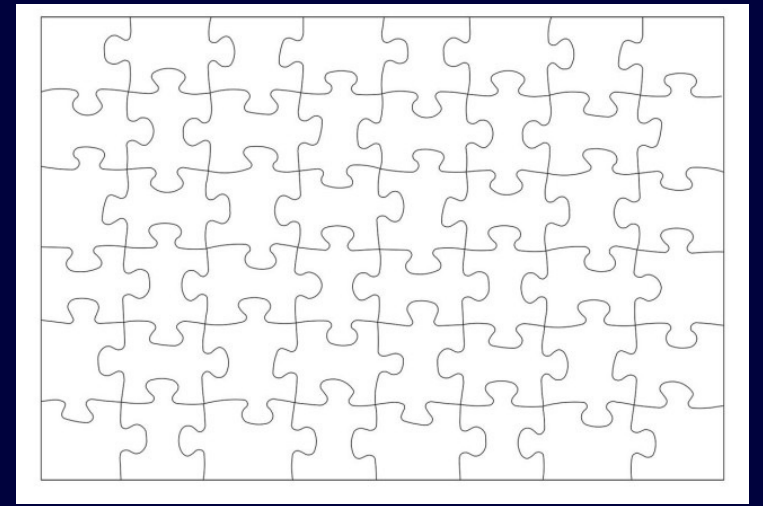
The 'Broad Canvass' + anomalies

Parents can be wrongly accused just as parents can deceive – don't judge

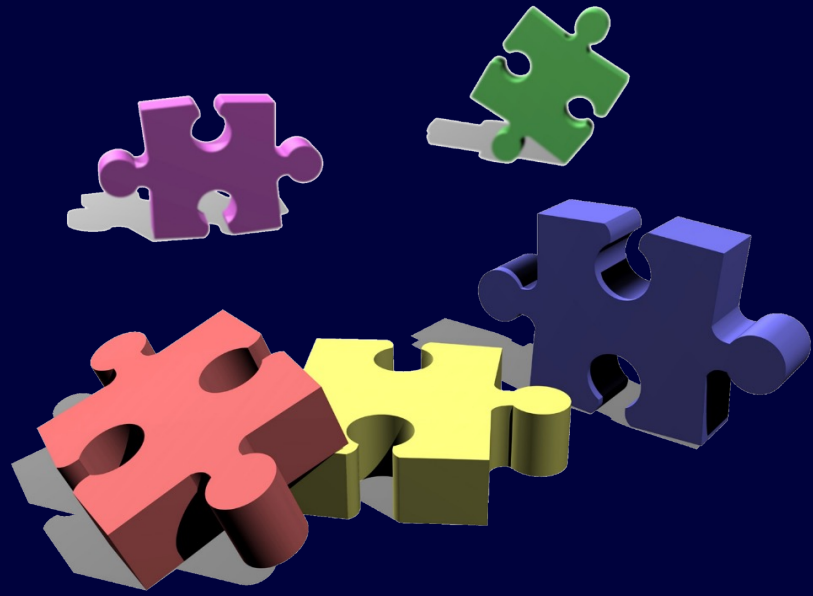


# The time line

- The 999 call
- The hospital swings into action
- The parents account
- The child's account - flesh, body, eyes, blood, bone, brain
- The medics imperative - assess to treat – prospective, as it happens
- The trial
- Call in the “Experts” – retrospective analysis, benefit of hindsight



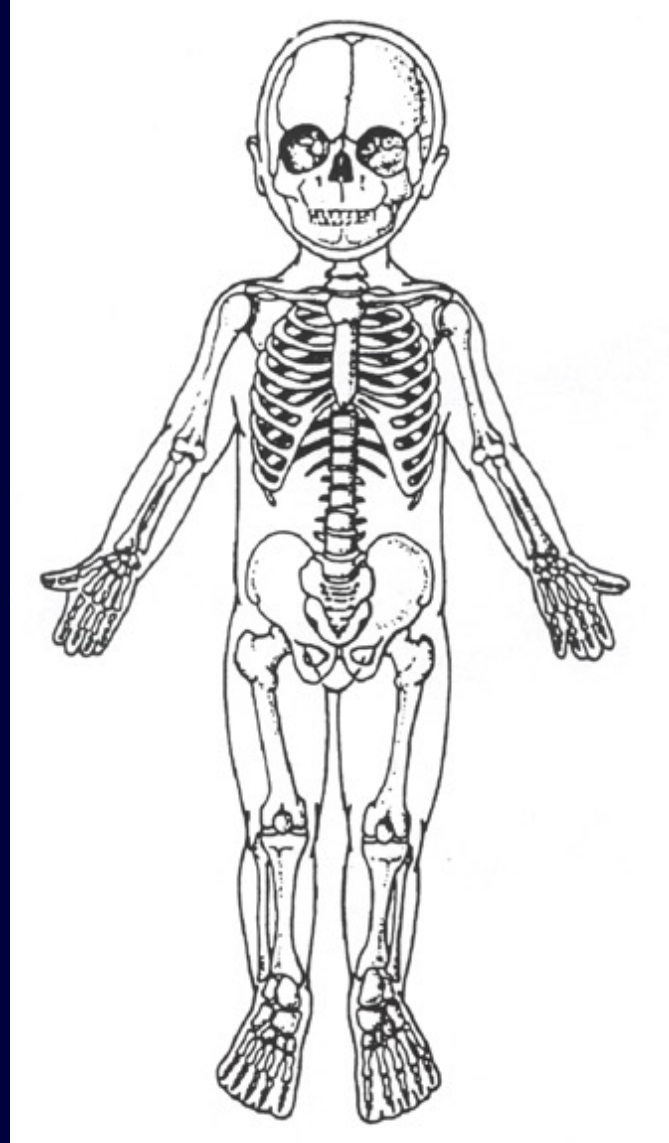
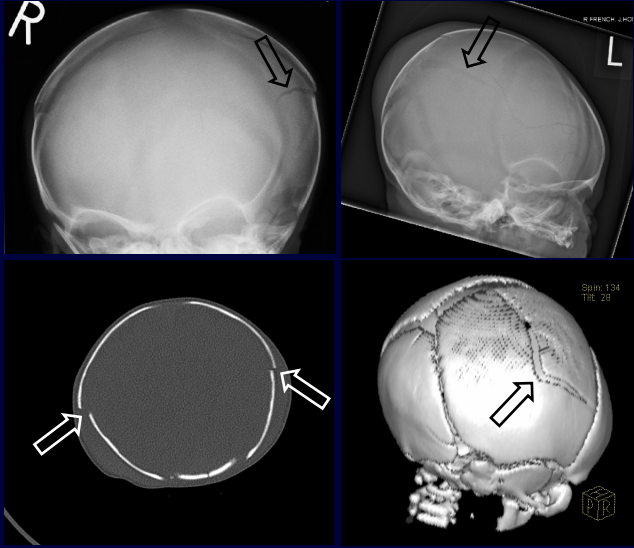
# Treating the child



CHILD PROTECTION BODY MAP		
The body map section contains five line drawings: a full-body outline of a child, two profiles of a child's head (left and right), two hands (front and back views), and two feet (front and back views).	Name of child:	.....
	Date of birth:	.....
	Staff member raising concern:	.....
	Date recorded:	.....
	Observations:	..... ..... ..... .....

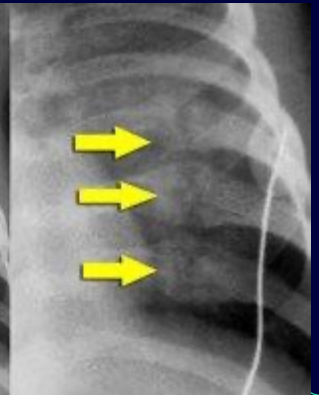
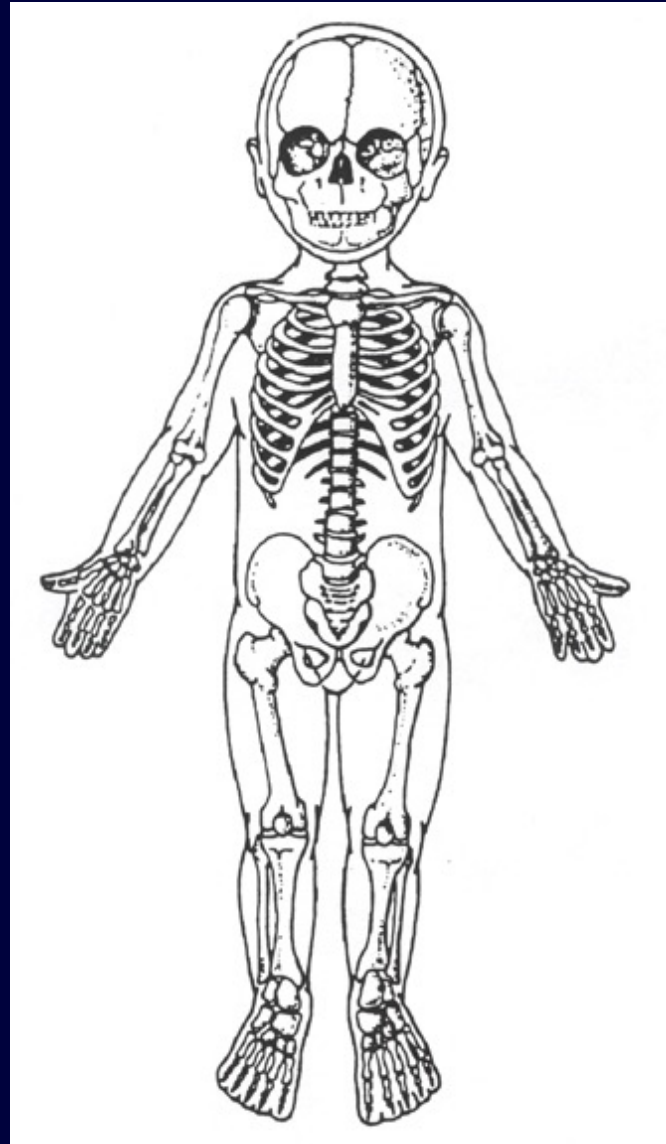
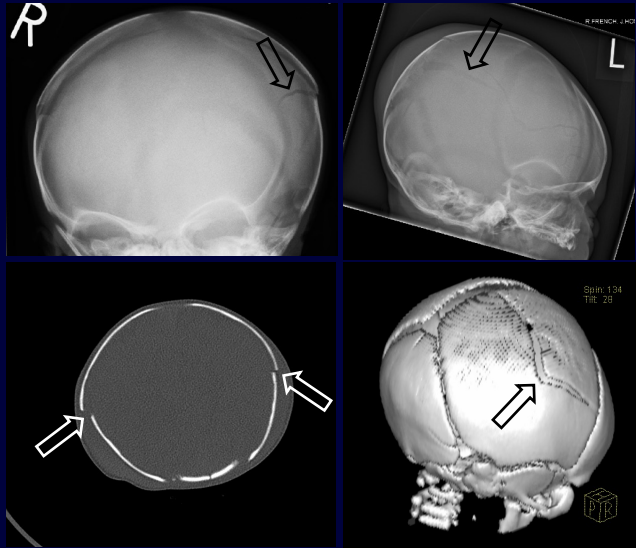


# Investigations





# Investigations



# Treating medics

## Professional witness

HV

GP

Paediatrician

Radiologist

Ophthalmologist

Haematologist

# Court medics

## Expert witness

Paediatrician \* the difference is the order

Radiologist

Ophthalmologist

Haematologist ?

Neuro radiologist

Neuro surgeon

Microbiologist /Immunologist?

Geneticist ?



# Professional medical witness

What does the medical witness bring to court ?

Evidence of-

*'This is what I saw,  
what I heard  
what I wrote  
what I did'*

That's all !

Why ? They are witnesses of fact, not opinion



# Child in hospital

- Treating medics form opinions and make decisions when medical intervention is the clinical imperative for the child
- Hospital staff are faced (literally) with the consequences of harm
  - objectivity is a hard taskmaster
- ‘Corridor’ discussions (unrecorded ) inevitably take place
- They are required to have strategy meetings with the police and social services child protection protocols
- Opinions are formed as evidence is emerging and facts are unclear
- They do not have the benefit of hindsight nor the whole picture



# Medics → court

- Medics don't like coming to court as professional witnesses
- What if I got it wrong ?
- What if I can't remember ?
- What if they ask me about things I can't answer ?
- Will I be criticized for something I said / did?
- What if the "expert" disagrees with me ?
- Easier not to bother - do I have to go ?



# Expert medical witness

What does the expert witness bring to court ?

Experience

*Case review*

*help understand subtle points of fact*

*how often does this type of injury occur?*

*summarize published literature*

*what is the mainstream opinion behind these observations*

Why ? They give opinion, help the court to understand context



# Part 25 Expert : The key word = 'Necessity'

- The choice of expert – the CV and research papers
- The client – joint instruction
- Sole Instruction ? Unfavourable reports can't be repressed by any party
- The report – the experts duties
  - transparency of communication,
    - Impartiality,
    - rigour,
      - clarity
      - balance





# Interface with lawyers pre-trial

Finding an expert

Letter of instruction; the questions

Report; the review and next steps

Experts meetings



# The Expert in Court ?

## The image



The Barrister

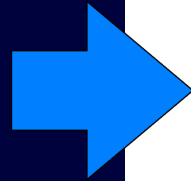
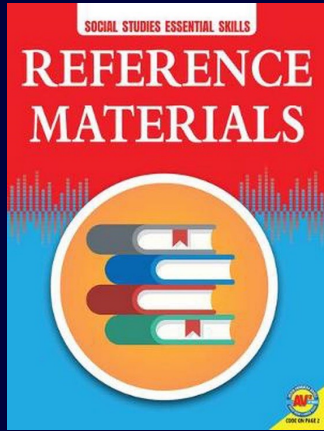
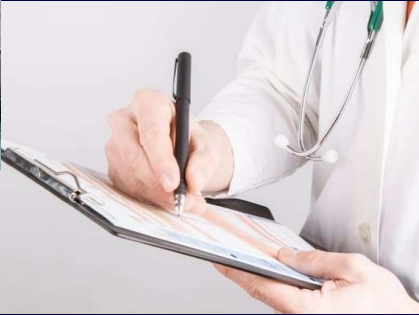
v



The Expert



# The reality – a pursuit of possibilities & probabilities



Barrister



Expert



# Rogue experts ?

Mainstream?

Outside of their area of expertise?

Professional /personal agendas?

Or .....may some just be ahead of their time ?

*'Never forget that today's medical certainty  
may be discarded by the next generation of experts  
or that scientific research may throw light into corners that are presently dark'*

( R v Cannings ) (2004) 1 WLR 2607



**Why do we bother ?**

Why be an expert ?

Why be the brief ?



# A Dwindling Pool of Experts – the risks?

Delays in finding / instructing experts and getting their reports

Delay undermine judicial determination for the child & family's future

Expertise becomes under-valued – is it really 'necessary' ?

We make do and mend?

Substitute medical evidence for medical expertise ?

We do without ?

The outcome? ??? **We run the risk of miscarriages of justice**





What does the future hold ?

The crushing pressures on the family justice system

Compare and contrast

The Rolls Royce System ?





*'A court hearing an application for care orders  
based on cases of suspected physical injury  
must follow the evidence and pursue the enquiry  
in whatever detail and for however long is necessary  
to arrive at the truth'*

Devon County Council v EB & Ors ( Minor ) [2013]EWHC 968 (Fam) per Baker J (as then was)



*‘With the states abandonment of the right to impose capital sentences, orders of the kind which family judges are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make .*

*When a judge makes placement orders or an adoption order in relation to a 20 year old mothers baby, the mother will have to live with the consequences of that decision for what may be upwards of 60 or even 70 years and the baby for upwards of 80 r even 90 years’*

Re J ( A Chld) [2013] EWHC 2894(Fam) Per Munby J ( as then)



# The Budget option?



# Delays in formal reports

Re G (Child Post-Mortem Reports: Delays) [2022]EWFC 55 Sir Andrew McFarlane (P) – (March22)

4 month old baby who died in suspicious circumstances with serious suspected NAI injuries in October 2021.

Sibling was 18 m old - removed from the parents care 6 months before this hearing with a further delay of 8-11 months before receipt

Consequence - family court hearing in 2023, by which time he would be 3 ½.

Why? – Time taken to collect post mortem evidence / expert opinion into post-mortem report.

bleeding to the brain, in the eyes, a healing rib fracture and injury in the mouth

Meaning - specialist reports required from:

- a consultant neuropathologist; paediatric pathologist (in particular with respect to the eyes);
- a consultant osteoarticular pathologist.



# Interface with lawyers pre-trial

## Osteoarticular Pathology Experts?

There is **ONE expert in the UK** who is prepared to take on this work.  
NHS consultant and a professor at Manchester University in histopathology.  
Timescale dictates the date for completion of the overall post-mortem report.

Undertakes over 100 cases a year, report turnaround time is 9-12 months  
He has no one to delegate to  
**This work is voluntary !**

Solutions

- training courses for others ? Home Office engagement
- Use experts in other countries e.g. USA ?



# What do family courts think ?

*'I am clear, as Head of Family Justice, it is no longer tenable for the Family Court simply to put up with the impact of this problem. ...*

*I wish to be plain that it is no longer acceptable for the Family Court simply, and passively, to accept that a post-mortem report will take a year and that the Family proceedings must therefore be put on hold.*



# What do family courts think ?

*It is no business of the court to engage in policy matters, but it is to be noted that the option of establishing a national service is not currently being taken forward by government.*

*In September 2020 the Chair of the Pathology Delivery Board wrote to Lady Justice Thirlwall, as Senior Presiding Judge, with the aim of alerting the criminal courts to these extended timescales. Since then there has been no improvement and the unacceptable situation that currently exists seems likely to remain. It is a matter for the police and the coronial system, who are the primary commissioners of this work, what they may choose to do to improve matters.*

*It is a situation which is outside the control of the Family Court, yet this court, and the wider child protection system, are currently forced to put up with the consequences of a regime which, from the perspective of meeting the needs of vulnerable children within the timeframe set by Parliament, is wholly unfit for purpose.'*





# What is the 'OVER RIDING OBJECTIVE' in family proceedings ?

Family Procedure Rules 2010, r 1:

"1.1

- (1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases **justly, having regard to any welfare issues involved.**
- (2) Dealing with a case justly includes, so far as is **practicable** –
  - (a) ensuring that it is dealt with **expeditiously** and fairly;
  - (b) dealing with the case in ways which are **proportionate to the nature, importance and complexity of the issues;**
  - (c) ensuring that the parties are on an equal footing;
  - (d) saving **expense;** and
  - (e) allotting to it an appropriate **share of the court's resources,** while taking into account the need to allot resources to other cases."



When is it necessary for the Family Court to engage in fact-finding with respect to serious allegations ?

- The interests of the child (which are relevant but not paramount);
- The time that the investigation will take;
- The likely cost to public funds;
- The evidential result;
- The necessity or otherwise of the investigation;
- The relevance of the potential result of the investigation to the future care plans for the child;
- The impact of any fact finding process upon the other parties;
- The prospects of a fair trial on the issue;
- The justice of the case.”

*Oxfordshire County Council v DP, RS, BS (By the Children’s Guardian) [2005] EWHC 1593 (Fam), ( McFarlane J as then )*



(viii) *The justice of the case* gives the court the opportunity to stand back and ensure that all matters relevant to the overriding objective have been taken into account.

One such matter is whether the contested allegation may be investigated within criminal proceedings.

Another is the extent of any gulf between the factual basis for the court's decision with or without a fact-finding hearing.

The level of seriousness of the disputed allegation may inform this assessment.

*“The court must ask itself whether its process will do justice to the reality of the case.”*



# Main criteria to decide fact-finding

- (a) the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of the child arrangements order,*
- (b) that the purpose of fact finding is to allow assessment of the risk to the child and the impact of any abuse on the child,*
- (c) whether fact-finding is necessary or whether other evidence suffices, and*
- (d) whether fact-finding is proportionate.”*

K v K [2022] EWCA Civ 468 by the Court of Appeal. Para 66, Master Rolls



# Should a judge decide ?

Issue – whether to hold a 9 day fact find hearing into alleged NAI- rib fractures to a baby , discovered on routine examination aged 2 months, child had remained in family care , now aged 18 m

Parents denied abuse- suggested birth or hospital related

Treating paediatrician considered fractures NAI

Part 25 Experts considered NAI most likely

No flags for concern in the 16 months of proceedings as per Re BR (Proof of Facts) [2015] EWFC 41

Applied K v K ( private law case) to public law welfare issues , the fact threshold alleged does not change

*‘the Court’s approach that a finding of fact hearing should not be undertaken unless it is going to make a material difference to the welfare outcome and the orders which may be made*

Derbyshire CC v AA, BA and X ( a child) & University Hospital Derby and Burton NHS Foundation Trust ([2022] EWHC 3404( Fam) , Lieven J , 5.12.2022



# EXPERTS ADVISE , THE COURTS DECIDE ?

- Understanding the facts and circumstances of an alleged non-accidental injury is often critical to the determination of future risk. But here I do not find that is necessary
- There is no evidence here to support any finding of deliberately inflicted injury.
- The overwhelming probability is that if the court did find a non-accidental injury, it would be a single act of significantly inappropriate handling of a very young baby, rather than any deliberate act or any course of conduct.
- It is highly unlikely that the parents would accept any findings even if I made them, so even if a fact-finding hearing were held, there is a strong possibility that in practical terms we would be no further forward.
- Given the oversight of the family so far, it is extremely unlikely that (even if all of the facts were found) any Court would remove X from the care of his parents. That is not a realistic prospect given all that has happened over the last 18 months
- I also have to take into account the proportionality of a 9 day fact-finding hearing.
- There are the costs of the lawyers, NHS resources, CAFCASS and social work resources in play.



# Judgement

*It is sometimes argued in these circumstances  
that the parties and child need to know “the truth” of what has happened....  
In this case the benefit of finding out what happened is largely illusory.*

*X is too young to know (or care) what happened.  
I think it highly unlikely that the parents would accept findings even if I made them.*

*I cannot see any justification for a 9-day finding of fact hearing  
so that at some point in the future X can know “the truth”*





# The Re-launch of the Public Law Proceedings

- 3 hearings** for each case save in EXCEPTIONAL circumstances
  - Threshold (at case management hearing)
  - Interim resolution hearing
  - Final hearing – in cases where a placement order is realistic possibility,
    - no longer than 3 days allotted
- **Oral expert evidence** – only with specific permission of the court

‘ permission will rarely be granted if questions haven’t been asked of them ’



# We have covered:

Why being a medical expert is different from practicing medicine

Why the family courts need experts

But we jointly ask ..... as medical expert

&

child protection advocate .....



*“Can we confidently say that ‘justice’ will continue to be the driver in this overstretched Family Justice System.....?”*

*Emeritus Prof of Law – Jo Delahunty KC  
Prof Owen Arthurs*



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