



*WSCC v Mother & Ors [2024] EWFC 147 (B) (19 February 2024).*

Jodie Cudworth instructed in report case, acting for Maternal Grandmother.

Jodie Cudworth

**WESTGATE**  
CHAMBERS

## Jodie Cudworth appeared on behalf of the Maternal Grandmother in *WSCC v Mother and Ors* [2024] EWFC 147 (B) (19 February 2024)

These proceedings centred around allegations of inflicted injuries to child B, who was diagnosed with subconjunctival haemorrhages in both eyes and multiple rib fractures at just weeks old.

The Court heard evidence from three experts, an Ophthalmologist, Consultant Paediatrician and Consultant Radiologist as regards the injuries albeit ultimately, the injuries and their causation were non contentious, it having been accepted that the injuries were likely to have been inflicted. The real issue for the Court to determine was, who caused them?

At the outset of proceedings, the LA sought findings that the injuries were inflicted by either the Mother, Father or Maternal Grandmother. All parties denied having caused the injuries or having seen anyone else inflict the injuries. During the proceedings and as the evidence unfolded, the Mother, supported by the Maternal Grandmother, alleged that the injuries were caused by the Father.

Unusually, at the conclusion of the LA's oral evidence and the Court having heard primary evidence from the Maternal Grandmother and Maternal Aunt, but prior to hearing evidence from the parents, the LA accepted that there was insufficient evidence upon which to pursue findings against the MGM. Consequently, the LA applied to remove the Maternal Grandmother from the pool of potential perpetrators – a position that was supported by all parties. This is perhaps a helpful reminder to practitioners that whilst ordinarily the Court will hear the totality of the evidence, including from the parents before determining disputed factual issues, the Court does have jurisdiction to dismiss allegations before the conclusion of all the evidence in the exercise of its case management powers, in appropriate cases (see *AA & 25 Ors (children)(rev)* [2019] EWFC 64 and *BB (care proceedings)(mid-trial dismissal and withdrawal of allegations* [2021] EWFC 20).

A further interesting feature of this case is that the capacity assessment of the Father was successfully challenged. Part way through the fact-finding hearing and prior to Father giving evidence, the Father's team raised concerns about his litigation capacity. This was following the Father having approached the Mother outside of proceedings and

subsequently lying about this to the Children's Guardian. Father purported to have suffered mentally following this incident, including a loss of memory and no recollection of events prior to this.

The initial capacity assessment concluded that Father did not have litigation capacity and the OS was accordingly appointed to act as litigation friend. The capacity assessment undertaken by Dr McClintock was subject of successful challenge, it having been the Mother's case, supported by the Maternal Grandmother, that the Father had lied to professionals regarding his mental health and functioning. In order to so prove, the Mother successfully applied for Father's mobile phone to be seized and forensically examined (see *P, H-L (children)(mobile phone extraction)[2023] EWCA Civ 206*).

It was on the basis of the forensic analysis of Father's mobile phone, together with Dr McClintock's approach to this evidence, that the Court had little confidence in the expert's conclusions and therefore ordered the instruction of a second psychiatrist, Dr Morton, whose subsequent opinion was that Father had capacity.

The issue of Father's capacity having been resolved, the Court went on to determine the significance of his lies, it having been the Mother's case, supported by the LA and Maternal Grandmother that Father had lied in order to:

- i) avoid giving evidence and
- ii) the reason he sought not to give evidence is because he caused the injuries to the child.

Having referred to *Re A, B and C (children) [2021] EWCA Civ 451*, the Court gave itself a **Lucas** direction and found that 'Father has sought to avoid giving evidence to this Court and that although ultimately did give evidence, he embarked upon a deliberate misleading of professionals, medics and this court with a view to avoiding giving evidence. I am satisfied that the Father has deliberately lied. The relevance of that lie is that it had the aim of preventing him giving evidence on the causation of the injuries to B...' at [166].

Finally, on the issue of who caused the child's injuries, the Court highlighted the legal principles to be applied when identifying a perpetrator as follows:

70. The court must seek to identify the perpetrator of any injuries as per *Re B (Children: Uncertain Perpetrator) [2019] EWCA Civ 575, [2019] 2 FLR 211*) per Jackson LJ And *Re A (Children) (pool of perpetrators) [2022] EWCA Civ 1348*. 'The proper approach is not to seek to distinguish as between the possible perpetrators in order

to see which one inflicted the injuries. **Rather the proper approach is to consider each individual separately in order to determine whether that individual can be found on the balance of probabilities, to be the perpetrator;**' (para 43)' (author's emphasis)

71. If the court is satisfied that it is more likely than not that an identified individual caused the injuries, then it will make that finding. Any previous guidance which suggests that a court should seek to identify a perpetrator but should not strain to do so is no longer relevant and that approach must not be applied. *Re A (Children) (Pool of perpetrators)* [2022] EWCA Civ 1348 where King LJ said at para 34: "I suggest, therefore, that in future cases judges should no longer direct themselves on the necessity of avoiding "straining to identify a perpetrator". The unvarnished test is clear: following a consideration of all the available evidence and applying the simple balance of probabilities, a judge either can, or cannot, identify a perpetrator. If he or she cannot do so, then, in accordance with *Re B (2019)*, he or she should consider whether there is a real possibility that each individual on the list inflicted the injury in question".
72. Only if the court is unable to identify a perpetrator will it establish a list of those people in respect of whom there is a real possibility that they caused the injuries. *Re B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575 The court, in composing that list and making such a finding will not express any view as to whether there is variation in the likelihood between those named on the list.

Applying the principles in **Re B** and **Re A** (above), the Court ultimately determined that the Father inflicted the injuries and had lied in order to avoid taking responsibility for the injuries to B.