Re G-L-T (children)

[2019] EWCA Civ 717

COURT OF APPEAL

KING, LINDBLOM AND PETER JACKSON LJJ

17 APRIL 2019

Care proceedings – Fact-finding – Failure to protect – Threshold finding – Must not be bolt on to findings as to perpetrator – Error as to evidence given – Implications of actual evidence given – Relevance of departure from allegations included in Scott schedule – Distinction to be made between welfare issues and threshold findings.

The mother had four children; she lived with the father of the two younger children, who was involved in caring for all the children. The youngest child had been born prematurely at the end of 2015 and suffered from a number of associated medical problems. The hoped-for slow, steady improvement did not seem to be happening, and the child was admitted to hospital on 26 occasions prior to care proceedings being issued in January 2018. He presented with a range of symptoms, including: cardiac arrest, breathing difficulties, poor swallow, apnoea, seizures, a fractured femur, subdural and retinal haemorrhages, faltering growth, developmental delay, copper deficiencies and unexplained glucose/sodium levels. The child was given oxygen through tubes and after a time was fed directly into his stomach. He had both an apnoea alarm and a SATS tester for oxygen levels at night. He wore glasses and also a helmet to protect his head in the event of seizures.

In January 2018, the child, then 26 months old, was again an inpatient at hospital. One of the investigations being undertaken was in the telemetry unit, which used a video camera to constantly monitor the patient's condition. On 9 January, the camera recorded the mother slamming the child's face into the hard floor on four occasions in a very calm, deliberate and measured way. This incident led to a reassessment of all the medical issues the child had presented with. Care proceedings in relation to all four children were issued within days. The younger child remained in foster care, where he thrived, dispensing with the helmet and starting to eat normally within only a few days.

The local authority's Scott schedule was 42 paragraphs long; the final paragraph asserted that if only one of the parents was responsible for the inflicted, induced and fabricated/exaggerated injuries and illnesses suffered by the child, then the parent not responsible either had known or ought to have known that the other was responsible.

The overwhelming evidence was that the mother was almost exclusively responsible for the child's care. She was the sole point of contact with the doctors and she always accompanied the child to appointments and the hospitals.

a The mother alone was trained in the administration of the child's medicines. The father explained that he had trusted the mother to give full and accurate information to the professionals. Comments by the doctors up to the incident on 9 January suggested that in their view the mother was responding appropriately; no concerns had been expressed by the nursing staff.

b

The father's oral evidence was that the child had not suffered from any seizures or any apnoea that he himself had seen after 29 September 2017 (when the family moved home); he had believed this was because the child was responding well to medication. The mother had had at least one conversation with health c professionals in the father's presence about ongoing seizures after this date. On the main occasion there had been eight people in the room; the mother had been sitting at the desk facing the doctor, the father had been at the back of the room in an area behind the door sitting on the floor attending to the two younger children (aged three and two). The doctor's evidence had been that the boys 'needed attention d during the appointment' and that 'both were upset and unsettled'. It was accepted that the father had not contradicted what the mother had said to the doctor about ongoing seizures. The father in cross-examination explained that trying to look after two children in an appointment was hard, so 'one parent talks to them while the other one is keeping the other two occupied, which I did that day'. At no stage in cross-examination was the father asked whether he had heard what the mother e had said to the doctor in relation to the child's seizures and/or apnoea.

The judge made findings of abuse against the mother, including that she had deliberately fractured the child's femur, poisoned the child with sugar, caused a subdural haemorrhage and a retinal haematoma by an impact injury and/or f by shaking the child, and falsely given the doctors a history of seizures of such severity that the child had to wear a helmet. The judge went on to make a finding that the father had failed to protect the child by failing on three separate occasions to inform various medical professionals that the child was no longer suffering from seizures or apnoea; this specific allegation had not formed part of the Scott g schedule. The judge held that, as a consequence of this failure by the father, the child had received medication and oxygen which he had no longer required. After the father sought clarification, the judge provided a more detailed finding, describing 'a serious omission' on the father's part amounting to an 'issue of parental neglect'. The father appealed. It was common ground in the appeal that h the father's evidence, which had been accurately recorded earlier in the judgment, had later been translated into a finding that the father had been saying, in terms, that the child had had no seizures following the move, rather than that he had not personally witnessed any seizures.

i **Held** – (1) There was no merit in the father's ground of appeal that the finding in respect to failing to inform professionals that the child was no longer suffering from seizures or apnoea had not appeared in the Scott schedule. Clearly the issues which led to that finding had been firmly before the court and, all other things being equal, the judge had been entitled to make this far less serious finding than that which had featured at in the final paragraph of the schedule (see [36], below).

(2) There was a fundamental difference between the judge's earlier description of the father as a man somewhat remote from the child and with no involvement in his medical treatment, concentrating his efforts on caring for the other children of the family and who had not, himself, seen any seizures recently, and the judge's later description of him as a man who had become actively aware that the child was no longer having seizures, but had done nothing to bring it to the attention of the medical professionals. This difference was critical and the judge's error in interpreting the father's actual evidence as a categoric statement that the child had had no seizures since the move had undermined the basis of his finding in respect of the father, infecting the entirety of the judge's analysis of the evidence on this issue (see [46], [47], below).

(3) Further, the evidence showed that, from a medical point of view, it was far too simplistic to say that, once that the child was no longer having seizures or apnoea, his oxygen and medication would be stopped. There was simply no basis upon which the father would have 'known' that the child no longer needed oxygen. Even had the judge been correct and the father had 'known' that there had been no seizures, it would not have been unreasonable for the father to have put the improvement down to the efficacy of the treatment the child was receiving (see [48], [50], below).

(4) As was accepted by the local authority, the most that the father could have told the professionals was that he had not seen any seizures since the relocation. In respect of the main occasion referred to by the judge (the only one at which the father had definitely been present), the doctor's evidence had merely been that all the people present would have been able to hear any conversation, not that they had in fact heard what was being said. The failure during the hearing to ask the father whether he had heard what the mother had said to the doctor in relation to the child's seizures and/or apnoea, in itself rendered unsupportable this aspect of the judge's finding that the father had been guilty of a culpable omission in failing to interrupt the mother and say that the child was no longer having seizures. In any event, simply picturing the scene of eight people in the doctor's room, the mother sitting at a desk facing away from the father, whilst the father, on the floor, was doing his best to deal with two demanding toddlers, it would have been a wonder if he had meaningfully absorbed what the mother had said, particularly given that the meeting simply followed the established pattern of the mother 'dealing' with the medical staff and the medical issues, whilst the father looked after the children (see [52]–[54], [58], [61], below).

(5) This was one of the rare cases where the court felt obliged to reverse a judge's finding of fact (only in respect of the father). It should never be forgotten that a finding of what was generally called 'failure to protect' was itself a threshold finding, which satisfied the threshold independently of any finding that was made in relation to the conduct of the perpetrating parent. The judge had made the sort of error referred to in *Re L-W (children)* [2019] EWCA Civ 159, in that the finding he had made in relation to the father had been, in effect, a 'bolt on' to the central issue of perpetration. The result of the finding in question was that

any assessment of the father would have to proceed on the basis that he had in some way, whether deliberately or wilfully, permitted the mother to mislead the doctors about the true state of the child's health. Such a finding would sit uneasily with other findings made by the judge, including findings about the child's genuine health problems and about the part played by the medical professionals in the over-medicalising of the child. Courts and local authorities had to approach allegations of 'failure to protect' with assiduous care and keep to the forefront of their collective minds that any threshold finding might have important consequences for subsequent assessments and decisions. There was a danger that significant welfare issues, which needed to be teased out and analysed by assessment, would be inappropriately elevated to findings of failure to protect capable of satisfying the s 31 criteria. It should not be thought that that the absence of a finding of failure to protect against a non-perpetrating parent created some sort of a presumption or starting point that the child/children in question could or should be returned to the care of the non-perpetrating parent. At the welfare stage, the court's absolute focus (subject to the Convention rights of the parents) related to the welfare interests of the child or children (see [64], [68]–[74], below).

Statutory provisions referred to

Children Act 1989, s 31(2)

Cases referred to

B (a child), Re [2013] UKSC 33, [2013] 2 FCR 525, [2013] 1 WLR 1911, [2013] 3 All ER 929, [2013] 2 FLR 1075, [2013] HRLR 29.

L-W (children), Re [2019] EWCA Civ 159, [2019] 2 FCR 76.

W-C-T (children), Re [2019] EWCA Civ 845, [2019] 3 FCR 287.

Appeal

The father appealed from the findings of His Honour Judge Farquhar, following a fact-finding hearing within care proceedings which concluded on 5 November 2018, that the father had 'failed to protect' his son, J, by failing to inform various medical professionals that he was no longer suffering from seizures or apnoea. As a consequence, the judge held that J had received medication and oxygen which he no longer required. The facts are set out in the judgment.

Clive Newton QC (instructed by *EJ Moyle LLP*) for the appellant, the father.

Mark Chaloner (instructed by *West Sussex County Council*) for the first respondent, the local authority.

17 April 2019. The following judgment was delivered.

KING LJ.

[1] This is a case where a judge made findings that a father (the father) had 'failed to protect' his son, J, by failing to inform various medical professionals that he was no longer suffering from seizures or apnoea. As a consequence, the judge held that J had received medication and oxygen which he no longer required.

[2] The father now appeals against those findings, made by His Honour Judge Farquhar, sitting as a section 9 High Court Judge, following a fact-finding hearing within care proceedings which concluded on 5 November 2018.

[3] In addition to the findings made in relation to the father, the judge made findings of the utmost seriousness against J's mother (the mother) covering a range of abuse from deliberately fracturing his femur, to poisoning him with sugar, and falsely giving the doctors a history of seizures of such severity that J had to wear a helmet.

BACKGROUND AND THE JUDGE'S FINDINGS

[4] There are four children the subject of these care proceedings. Their ages, at the time when proceedings were commenced, were as follows: E aged 12; B aged 9; L aged 3; and J aged 2. F is the father of L and J.

[5] The father and mother lived together and shared the care of the two older children from 2013. There were no local authority concerns prior to the birth of J. J was a premature baby born at 28 weeks. He suffered from a number of genuine medical problems due to his prematurity.

[6] J, however, seemed not to make the slow, steady improvement looked for in these tiny babies; rather, he was admitted to hospital on 26 occasions prior to care proceedings being issued in January 2018.

[7] J has suffered variously from cardiac arrest, breathing difficulties, poor swallow, apnoea, seizures, a fractured femur, subdural and retinal haemorrhages, faltering growth, developmental delay, copper deficiencies and unexplained glucose/sodium levels. J has received oxygen through tubes, and latterly been fed directly into his stomach via Peg-J. J had both an apnoea alarm and a 'SATS' tester for oxygen levels at night. He wore glasses and also a helmet to protect his head in the event of seizures. In addition to visits to the hospital, there were regular visits to the family home by community nurses and physiotherapists.

[8] Tragically, it would seem that, other than the expected medical challenges and difficulties to be expected in a baby born at 28 weeks, virtually all of these manifestations were fabricated or directly caused by the actions of the mother. This meant that J, for example, wore a helmet to protect his head from seizures which didn't exist, and his faltering growth was due to his mother's failure to feed him through the Peg-J which he didn't, in any event, need.

[9] In addition, the mother caused J direct injury, deliberately fracturing his femur and inflicting an injury resulting in subdural haemorrhage and retinal haemorrhages.

[10] On 9 January 2018, J, then aged two years two months, was an inpatient at Southampton Hospital. One of the investigations being undertaken was in the telemetry unit which constantly monitors a patient's condition and includes a video camera. The images captured by the video that day can only be described as chilling and shocking. The judge described the scene as follows:

> '1. … His mother, M, can be seen slamming his face into the hard floor on four occasions in a very calm, deliberate and measured way. As a result of having seen this assault, questions have been raised as to whether any of the other medical issues from which he was then believed to suffer had been

induced/inflicted/exaggerated by his mother and/or father. Importantly and significantly he does not appear to suffer from any of these issues now that he is in foster care.'

[11] This horrifying incident brought to an end the catalogue of neglect, violence, and fabricated and induced illness inflicted upon J by his own mother.

[12] Care proceedings were issued on 11 January 2018 in relation to all four children.

[13] J remains in foster care where he has thrived, almost immediately dispensing with the helmet and, as was noted at a medical strategy meeting held only a matter of days after he came into care: 'this is a peg fed child who is now eating shepherd's pie'.

THE TRIAL

[14] Inevitably, the trial focused mainly upon the complex medical issues; the medical records alone ran to over 10,000 pages. For the assistance of the parties and the court, a Scott Schedule had been prepared by the local authority setting out the allegations and each of the parents' responses. This document ran to 42 paragraphs. The final paragraph was drafted in the following broad terms:

> '42. If only one parent is responsible for the inflicted, induced and fabricated/exaggerated injuries and illnesses suffered by J, the parent not responsible, either knew or ought to have known that the other was repeatedly so doing. The failure to take any active steps to prevent the continued absence of J prolonged the invasive medical treatment of J, the prescribing and administering of unnecessary medication to J, and caused him continued pain and suffering.'

[15] Following an exemplary analysis of the medical evidence, the judge found that the s 31(2) Children Act 1989, threshold criteria, was satisfied and that J had suffered significant harm, attributable to the care which had been given to him not being that which was reasonable to expect a parent to give. The judge's key findings in respect of the mother were as follows:

> 'Finding 1: M intentionally assaulted J by slamming his head on the hard hospital floor on four occasions causing significant harm to her child. M has repeatedly lied to others in an attempt to cover up her actions. M was aware of her actions at the time and is still aware of her actions. The fact that she stated immediately that "J often gets nosebleeds" was a blatant attempt to cover up the assault and to attribute a medical cause to the nosebleed.
>
> Finding 2: The mother caused a fracture to J's right femur in January 2016. The mother has lied to health care professionals and to the father, as well as the Court in an attempt to cover up her actions.
>
> Finding 3: The mother administered sugar solution to J in February 2017 and December 2017.

Finding 4: J failed to gain weight as a result of the mother failing to provide him with all of his food.

Finding 5: The mother caused J to suffer a subdural haemorrhage in late July 2016 together with retinal haematoma by either an impact injury or by shaking J or possibly both.

Finding 6: The mother fabricated the symptoms of apnoea and seizures after September/October 2017 which caused harm to J as he was still receiving medication and oxygen to deal with these conditions which were no longer required.'

[16] The mother has not sought to challenge these findings by way of an application for permission to appeal, nor could she. The judge's judgment and analysis in relation to the medical evidence is a model of its kind and could be open to no criticism.

[17] At the conclusion of his consideration of the evidence which culminated in what was to become Finding 6 (the exaggeration or fabrication of apnoea or seizures in J) the judge went on to consider the father's role in respect of his alleged 'failure' to report to relevant health professionals, the nature and extent (if any) of J's apnoea or seizures following the family's relocation to another area at the end of September 2018. The judge's analysis, to which I will return shortly, led him to a seventh finding ('Finding 7'):

'Finding 7: The father failed to inform the health care professions at any of the three times that he came into contact with them in October, November or December 2017 that J was no longer suffering from apnoea or seizures. This failure contributed to the continuation of the medication and oxygen that J was still receiving which were no longer required.'

[18] Before considering the evidence relied upon in support of that finding, it is helpful to consider the judge's general findings about the household and, in particular, the father's role within it. The judge rightly noted that 'the evidence of the parents is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability'.

[19] It was common ground that J had been treated at numerous different hospitals with all the attendant risk of disjointed treatment and communication difficulties. The judge said:

'39. It is accepted that by more or less all of the health professionals that there was a problem with communication between all of the treating physicians and that there was no one individual that had overall oversight of J's care. This would have been confusing for the family. It is also accepted, in general, that part of the problems was caused by J being over medicalised by the treating professionals and that this cannot possibly all be laid at the door of the parents or either of them.'

[20] The overwhelming evidence was that the mother was almost exclusively responsible for the care of J. At one stage the judge found:

> '98. … It was clear from his evidence, which I accept that he (the father) was reticent to get involved with any of the medical treatments required by J. In many ways this is a criticism of F because he appeared fairly detached from all of the knowledge in relation to his son's health.'

[21] Evidence came from a Dr Rose that the mother was the sole point of contact with the doctors and it was the mother who always accompanied J to appointments and the hospitals. Dr Rose did not regard this as either uncommon or unreasonable. The mother alone was trained in the administration of J's medicines and the father trusted the mother to give full and accurate information to the professionals. There are references throughout the papers, of the mother being 'caring', 'appropriate' and 'asking the right questions'. There were no concerns expressed in relation to her behaviour by the nursing staff. The judge summarised it in this way:

> '41. … In general (although there are indications that this was not always true), the view of all of the doctors, nurses, dieticians and physiotherapists has been that the parents and the mother in particular have been fully engaged and cooperative and taken on board advice. This is not a case in which there were huge suspicions in regard to the actions of the parents for a lengthy period although it is fair to say that there are a couple of question marks that have been raised over time. That is not particularly surprising when one bears in mind the huge number of medical notes that have been prepared and studied for this hearing.'

[22] The judge encapsulated his findings as to the credibility of the parents as follows:

> '150. … There are many occasions in which I have found the mother to be dishonest as set out above. I have disbelieved her in relation to the fracture, the subdural haemorrhages, the sugar poisoning, and of course she was thoroughly dishonest to the police and the nurse when she was first seen on 9th January 2018. On the other hand, the father in general has given his evidence it seems to me in a truthful way albeit without a great deal of detail. It does not appear that he has been particularly involved in the medical treatment of J and indeed showed little interest in many aspects of it. That does not mean that he has been dishonest however and I am satisfied that his version of events be preferred over that of the mother.'

FINDING 7

[23] The judge analysed the evidence in relation to Finding 6. Having considered the history overall, the judge was not satisfied, to the civil standard of proof, that the local authority had proved the allegation of exaggerated or fabrication of seizures in the period of time up until September 2017.

[24] The judge found the situation to be different from the weekend of 29 September 2017 onwards when the family moved. The judge set out the father's evidence about the time following the move in this way:

'148. That J did not suffer from any seizures that he saw once they had moved nor did he witness any apnoea' *a*

[25] This stemmed from the father's oral evidence which, it is agreed was consistent in maintaining that the he had not seen J have a seizure since the move, nor had the mother given him 'rescue' medication during a seizure. The father explained, during cross examination, that he believed that the medication which had been prescribed for the seizures was helping to reduce them and, not unreasonably it may be thought, he commented that, had the seizures happened when he was not there, he would not have seen them. *b*

[26] The father's evidence, therefore, was clear: he had not seen any seizures since the family moved. Having recorded this to have been the case, the judge went on to consider three occasions following the move when the mother had conversations with healthcare professionals about J's alleged seizures. The first two took place at home: *c*

(i) 6 October a home visit from Ms C, a community children's nurse;

(ii) 16 November 2017, a home visit by Ms M another community children's nurse. *d*

[27] The judge said of the father in respect of these two visits:

'On neither of those occasions did he indicate to the relevant health care professionals that J was no longer suffering seizures. It was his evidence that he was never directly asked this question.' *e*

[28] The third occasion referred to by the judge was a meeting with Dr W on 13 December 2017 at the hospital epilepsy clinic. At 148, the judge notes that both parents were at this meeting. The mother spoke of seizures and the 'need to give rescue medication' although she said that the number of seizures had significantly reduced. The judge said in relation to this meeting, 'it is accepted that it was the mother that provided the medical history. The father was also in the room and at no time did he contradict the information given by the mother'. *f*

[29] The judge said that there was a factual difference between the parents which needed resolving in relation to J's seizures. He identified the discrepancy as he saw it in this way: *g*

'150. … Is the father correct in saying that there were no seizures or apnoea after they had moved in September 2017 or is the mother correct in stating that they continued?' *h*

[30] This, it is accepted by Mr Chaloner on behalf of the local authority, is an incorrect reflection of the father's evidence which was not that there had been *no* seizures, but that he himself *had not seen* any seizures since the move.

[31] The judge resolved the conflict in evidence he had identified by finding that the father was truthful and the mother dishonest – see paragraph 150, set out at paragraph [22] above. *i*

[32] The judge, therefore, held that the mother had fabricated seizures which led to Finding 6 set out at [15] above. This, however, was not the end of the matter as the judge went on to make the following finding against the father without further analysis:

> '152. I am also unimpressed that the father failed to mention this highly important information that J was no longer suffering seizures or apnoea to the health care professionals in October, November or December 2017 when he was able to do so. It is a serious omission. It is difficult to say why he did this and indeed perhaps not that important. The fact is that if he had *voiced his concerns* to either to Ms C, Ms M or Dr W then some action could have been taken which would have avoided his son receiving further medication which was not required. He failed to do this and this must be seen as an issue of parental neglect.' [my emphasis]

[33] This finding became Finding 7 (see paragraph [17] above) and is the focus of this appeal.

[34] The judge distributed his judgment on 21 November 2018 and, shortly afterwards, those representing the father made a request for amplification of Finding 7, a finding which had not in its specific form formed part of the Scott Schedule which had provided the framework for the hearing. At a hearing on 29 November 2018, the judge agreed to provide clarification and confirmed that the finding was not based on the local authority's Scott Schedule. On 14 December the judge distributed a perfected judgment which amended paragraph 152 of his judgment as follows and added in seven new paragraphs expanding upon his reasons for making the finding.

[35] The judge's clarification amended paragraph 152 as follows:

> '152. I am also unimpressed that the father failure to mention this highly important information that J was no longer suffering seizures or apnoea to the health care professionals in October, November or December 2017 when he was able to do so. It is a serious omission. It is difficult to say why he did this and indeed perhaps not that important. The fact is that if he had *said* either to Ms C, Ms M or Dr W *that his son was no longer suffering seizures or apnoea* then some action could have been taken which would have avoided his son receiving further medication which was not required. He failed to do this and this must be seen as an issue of parental neglect.' [my emphasis]

[36] I should say that I see no merit in the father's ground of appeal that Finding 7 had not appeared in the Scott Schedule. It is clear that the issues which led to Finding 7 were firmly before the court and, all other things being equal, the judge was entitled to make this far less serious finding than that which had featured at paragraph 42 on the Schedule.

[37] Having set out a number of examples of the father having what were in my view very limited instances of direct communication with medical professionals, the judge said at new paragraph 155:

> '155. … Whilst the mother was the main carer, the father was still aware of all the important medical issues and was able to convey information to the professionals. He did not simply sit back and take no interest in his son's medical issues and was certainly aware of the main headlines, if not the fine detail in relation to some of his medical problems. That is what makes it all the more remarkable that he did not impart important information in regard to

the cessation of seizures and apnoea when he had a chance to do so in no less than three meetings.'

[38] The judge went on to identify the home visits by Ms C and Ms M in October and November respectively, criticising the father at 156 for not having raised with either of them 'as to whether oxygen should continue even though he was aware that there was no ongoing apnoea' and that 'needless discomfort' 'could simply have been avoided by the father mentioning something when he had the opportunity to do so'.

[39] The judge went further, saying:

'157. Indeed, even without the visits to his property one would expect any parent to be proactive to remove any medical interventions which are causing their child discomfort as soon as possible. To this end, once the father was aware that apnoea was no longer an issue and consequently the oxygen was not required then he should have taken steps to contact any one of the myriad of medical professionals in order to alter the situation. The father was aware of the sores caused to J's face caused by the plaster that attached the oxygen tubes and his inaction means that this discomfort for J continued longer than it should have done'.

[40] The judge then moved on to consider the consultation which had taken place with Dr W on 13 December 2017. The judge recorded her evidence in the following way:

'158. … In her oral evidence she added that whilst the information came from the mother she was confident that everyone that was in the room could hear what was being said. It was clear that a good deal of time was spent on recounting the different types of seizures that were occurring and the length of time that they lasted. This is evident both from her report as well as the letter that she sent to the GP and her oral evidence. Dr W added that if she had been told that no seizures were taking place at that time then there would have been a change in the prescribed medication.

159. I am satisfied that even if the father was concentrating on caring for L and/or J for the majority of the meeting he would have been well aware of the mother going into the fine detail about the seizures that she was saying that J was currently experiencing. Despite this, he made no attempt to interrupt to state that this had happened in the past but was not occurring any more. This was failing to put the needs of his son first and could have led to him receiving medication that he did not require. This was a serious omission.'

[41] It can be seen that the basis of this, most serious, finding against the father was that he *knew* that J had had no seizures since the move, and that not only had he had three opportunities to inform relevant professionals that this was the position, but that he should have been proactive in doing so. The consequences

of this 'serious omission' was, per Finding 7, that J had received oxygen and medication which he no longer required.

THE APPEAL

[42] Mr Newton QC on behalf of the father, submitted that the judge's findings had been predicated on the following erroneous basis:

(i) That the father knew that J no longer had seizures or apnoea;

(ii) That, as a consequence, the father knew that J no longer needed medication and, in particular, oxygen;

(iii) That the father should have told the medical professionals that J no longer had seizures/apnoea;

(iv) That the father knew or believed the mother was misleading the medical professionals about the continuation of seizures and apnoea.

[43] The basis of the appeal on behalf of the father is that each of these factors is, on closer examination of the evidence, invalidated and that this, both individually and collectively, fatally undermines Finding 7.

[44] Mr Newton skilfully 'unpicked' the evidence in respect of each of the issues. It is unnecessary to set out in this judgment the detail and extensive references to the transcripts of evidence and documents within the trial bundle to which Mr Newton referred. As Mr Chaloner (who did not appear below), whilst not conceding the appeal entirely, most realistically accepted, the local authority faced considerable, if not insurmountable, difficulties in supporting Finding 7. It is important, however, for the purposes of any future assessment of the appellant that each of the issues are addressed, albeit briefly.

(i) The father's knowledge of the seizures

[45] It is common ground that, unfortunately, for reasons which are not clear, the father's evidence which had been accurately recorded at [148] found itself two paragraphs later at 150 translated into a finding that the father, rather than saying that he had not *seen* any seizures, was saying, in terms, that J *had had no* seizures following the move.

[46] I accept the submission of Mr Newton, that the difference is critical. This error on the judge's part, Mr Newton submits, undermines the basis of the finding. I agree. In my judgment, there is a fundamental difference between the man the judge described in the main body of his judgment: a father, somewhat remote from J and with no involvement in his medical treatment, concentrating his efforts on caring for the other children of the family and who had not, himself, seen any seizures recently; and the man the judge now identified at 150 and onwards in the amplified judgment as a man who had become actively aware that J was no longer having seizures and had done nothing to bring it to the attention of the medical professionals.

[47] Inevitably, this error infected the entirety of the judge's analysis of the evidence in relation to J's seizure and apnoea.

(ii) That the father knew, as a consequence, that J no longer needed medication and, in particular, oxygen

[48] The undisputed evidence shows that J was given oxygen for three supposed reasons: (i) apnoea; (ii) oxygen desaturation; and (iii) chronic lung disease. Mr Newton took the court to the evidence showing that, from a medical point of view, it was far too simplistic to say that, if J was no longer having seizures or apnoea, his oxygen and medication would be stopped. There was simply no basis upon which the father would have 'known' that J no longer needed oxygen.

[49] Mr Newton highlighted that the father had firmly denied that the oxygen was for apnoea, saying that it was for J's chronic lung disease caused by his prematurity. This was confirmed by the evidence that at a strategy meeting shortly after J went into care, a Dr urged caution before J was taken off oxygen at night, as he was seen to be desaturating overnight. A subsequent sleep study was carried out which reported 'chronic lung disease' as part of the history with a 'striking feature' of the study being 'brief self-resolving desaturation episodes'.

[50] So far as medication for the seizures is concerned, the father believed that a reduction in the number of seizures was due to the medication he was being given. I accept Mr Newton's submission that, that being the case, even had the judge been correct and the father had 'known' that there had been no seizures, it would not have been unreasonable for him to have put the improvement down to the efficacy of the treatment he was receiving.

[51] Mr Chaloner accepted that the judge had not 'grappled' with the evidence in respect of J's continuing need or otherwise for oxygen and seizure medication and that as a consequence, the finding that the father 'knew' that J no longer needed medication and oxygen cannot stand.

(iii) That the father should have told the medical professionals that J no longer had seizures

[52] It is accepted by the local authority that the most that the father could have told the professionals was that he, the father, had not seen any seizures since the relocation. The judge's analysis, however, proceeded on the erroneous basis that the father knew that J had had no seizures and, it was in this context, that he went on to examine three occasions when he said that the father could, and should, have spoken up.

[53] So far as the two home visits are concerned, Mr Chaloner accepts that neither can be relied upon. It is unclear, Mr Chaloner said, from the evidence where the father was at the 6 October visit and, in any event, since it was only a matter of days since the move, it would have been unreasonable to have expected him to have been putting forward any sort of positive case that J was no longer having seizures after such a short period of time. So far as the November 16 visit is concerned, Mr Chaloner accepts that the judge was in error in relying on that visit, as the evidence clearly shows that the father was not in the house at the time of Ms M's visit.

[54] Mr Chaloner acknowledges, therefore, that this aspect of Finding 7 rests or falls on the meeting with Dr W and on the judge's assessment of the father's role on the day.

[55] The judge summarised the evidence of Dr W at 158:

> 'whilst the information came from the mother she was confident that everyone that was in the room could hear what was being said'

[56] Mr Newton submits that the judge fell into error as: (i) the judge mischaracterised Dr W's evidence; and (ii) at no time was it put to the father that he had, in fact, heard the mother give false information to Dr W which could, or should, have led him to interrupt in order to contradict her.

[57] I accept that the judge (no doubt seeking to put flesh onto his central conclusion sometime after the trial) misinterpreted the evidence of Dr W. The judge, in saying 'she was confident that everyone that was in the room could hear what was being said', clearly implies that the father actually heard what was being said. The whole of the evidence about this was as follows:

> 'Q. Okay. Was Mr T in the room throughout the meeting?
>
> A. Yes.
>
> Q. Okay. Was everyone able to hear each other in the meeting?
>
> A. Yes. I would say yes.'

[58] In my judgment, all that Dr W was saying at that stage, when counsel was merely 'setting the scene' with the witness, was that the nature of the room was such that all the people present would have been able to hear any conversation, not that they had in fact heard what was being said. The misleading impression given by the judge's summary of the evidence is underlined by the rest of the evidence in relation to the meeting. There were eight people in the room; the mother was sitting at the desk facing the doctor, the father was at the back of the room in an area behind the door sitting on the floor attending to J and L (who, it will be recollected, were at this stage only just three years and only just two years old respectively). Dr W explained in evidence that the boys 'needed attention during the appointment' and that 'both were upset and unsettled'.

[59] Dr W went on to say that she had struggled to examine J, even getting onto the floor with him as he was upset. The father, she told the court, had not participated in any way in the conversation with her and he was focussing all his attention on the two boys.

[60] The father in cross-examination explained that trying to look after two children in an appointment is hard so 'one parent talks to them while the other one is keeping the other two occupied, which I did that day.' At no stage in cross-examination was the father asked whether he had heard what the mother had said to Dr W in relation to J's seizures and/or apnoea.

[61] The failure to put this to the father, in itself, in my judgment, renders this aspect of the finding unsupportable, that is to say the judge's finding at 159 that the father was guilty of a culpable omission in failing to interrupt the mother and say that J was no longer having seizures. In any event, in my view if one simply pictures the scene of 8 people in the doctor's room, the mother sitting at a desk facing away from the father, whilst the father, on the floor, is doing his best to deal with two demanding toddlers, it would have been a wonder if he had meaningfully absorbed what the mother had said, particularly given that the meeting simply followed the established pattern of the mother 'dealing' with the medical staff and the medical issues, whilst he looked after the children.

[62] Mr Chaloner fairly accepted that the evidence did not support the judge's finding at [159] that the father 'would have been well aware of the mother going into the fine detail about the seizures …' He also accepted that it should have been put to the father that he had heard the mother giving a dishonest account to Dr W, and that, in the event, the direct evidence of what went on at the meeting, far from supporting the finding, undermined Finding 7.

FINDING 7 IN A LEGAL CONTEXT

[63] On 4 April 2019, this court gave judgment in *Re W-C-T (children)* [2019] EWCA Civ 845, [2019] 3 FCR 287. Peter Jackson LJ reiterated the established position, namely that the appeal court will only rarely contemplate reversing a finding of fact made by a judge who had had the benefit of hearing and observing witnesses. Such a rare case, he said, would require the finding to have been made without evidence to support it, or to have been based on a misunderstanding of the evidence, or to have been one that no reasonable judge could have made: *Re B (a child) (care proceedings: appeal)* [2013] UKSC 33, [2013] 2 FCR 525, [2013] 1 WLR 1911 followed.

[64] In my judgment, this is one of those rare cases where, for the reasons set out above, this court feels obliged to reverse the judge's finding of fact in this one respect. Mr Newton has, by his detailed analysis of the evidence, shown that the evidence before the court did not support Finding 7 which cannot stand and the appeal must therefore be allowed.

[65] The judge's finding at Finding 7, reflected what he had called, 'a serious omission' on the father's part. The father's failure to 'mention' the 'highly important information' amounted, he found, to an 'issue of parental neglect'.

[66] This then was an unequivocal 'threshold finding' against the father under the well-known terms of s 31 Children Act 1989 that:

> '(2) A court may only make a care order or supervision order if it is satisfied—
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to—

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him.'

[67] Applying s 31 to the judge's findings; the significant harm (s 31(2)(a)) was the continued administration of unnecessary medication and oxygen to J. The attributable condition (section 31(2)(b)(i)) was met by the unacceptable failure of the father to inform the medical professionals that J no longer had seizures or apnoea.

[68] It should never be forgotten that a finding of what is generally called 'failure to protect' is itself a threshold finding, which satisfies the threshold independently of any finding that is made in relation to the conduct of the perpetrating parent.

[69] In *Re L-W (children)*, [2019] EWCA Civ 159, [2019] 2 FCR 76 I said:

'[62] Failure to protect comes in innumerable guises. It often relates to a mother who has covered up for a partner who has physically or sexually abused her child or, one who has failed to get medical help for her child in order to protect a partner, sometimes with tragic results. It is also a finding made in cases where continuing to live with a person (often in a toxic atmosphere, frequently marked with domestic violence) is having a serious and obvious deleterious effect on the children in the household. The harm, emotional rather than physical, can be equally significant and damaging to a child.

[63] Such findings where made in respect of a carer, often the mother, are of the utmost importance when it comes to assessments and future welfare considerations. A finding of failing to protect can lead a Court to conclude that the children's best interests will not be served by remaining with, or returning to, the care of that parent, even though that parent may have been wholly exonerated from having caused any physical injuries.

[64] Any court conducting a Finding of Fact Hearing should be alert to the danger of such a serious finding becoming 'a bolt on' to the central issue of perpetration or of falling into the trap of assuming too easily that, if a person was living in the same household as the perpetrator, such a finding is almost inevitable. As Aikens LJ observed in *Re J*, 'nearly all parents will be imperfect in some way or another.'

[70] In my judgment, the judge fell into just such a trap as, in my judgment, this serious finding was, in effect, a 'bolt on', dealt with in one paragraph in the original judgment, expanded thereafter in a few additional paragraphs when clarification was sought.

[71] The findings made and encapsulated at Finding 7, would mean that any assessment of the father (who, after all, had been the older child, L's, primary carer for all his life) would have to proceed on the basis that he had in some way, whether deliberately or wilfully, permitted the mother to mislead the doctors about

the true state of J's health. Such a finding would sit uneasily, not only with the evidence analysed above, but also with the findings the judge had made in his substantive judgment, namely:

(i) That J had had multiple genuine health problems consequent upon his extreme prematurity including chronic lung disease and apnoea;

(ii) That the treatment J was receiving was confusing for the parents (39);

(iii) That J had been over medicalised which was not entirely the parents' fault (39);

(iv) That the mother was in charge of everything to do with J and had all direct contact with the doctors. None of the innumerable medical professionals felt that they had any reason to be suspicious of her;

(v) That the father trusted the mother and knew little about J's treatment and he was not trained to administer his medication and feeds. He was 'somewhat disinterested';

(vi) That the father gave truthful evidence 'albeit without a great deal of detail' (150);

(vii) That the father was a primary carer for L, a baby, who had only just had his first birthday when J was born. At medical appointments he supervised the children (often in a different room) whilst the mother spoke to the doctors.

[72] I repeat my exhortation for courts and local authorities to approach allegations of 'failure to protect' with assiduous care and to keep to the forefront of their collective minds that this is a threshold finding that may have important consequences for subsequent assessments and decisions.

[73] Unhappily, the courts will inevitably have before them numerous cases where there has undoubtedly been a failure to protect and there will be, as a consequence, complex welfare issues to consider. There is, however, a danger that significant welfare issues, which need to be teased out and analysed by assessment, are inappropriately elevated to findings of failure to protect capable of satisfying the s 31 criteria.

[74] It should not be thought that that the absence of a finding of failure to protect against a non-perpetrating parent creates some sort of a presumption or starting point that the child/children in question can or should be returned to the care of the non-perpetrating parent. At the welfare stage, the court's absolute focus (subject to the Convention rights of the parents) is in relation to the welfare interests of the child or children.

[75] By reference to the present case, I know not, but it may be that upon assessment at the welfare stage of the proceedings the local authority identifies a myriad of welfare reasons why it would not be in the best interest for any of the children to live with the father. Conversely, the local authority may conclude that, whilst rather weak and gullible, the father, once removed from the mother's sphere of influence, can once again be a loving and 'good enough' parent to, at least, L. But these are welfare issues and not threshold issues and care must be taken not to confuse the two. It is anyhow no part of this court's role to speculate as to the likely outcome of the welfare hearing.

a CONCLUSION

[76] If my Lords agree therefore, for the reasons set out above, the appeal will be allowed and Finding 7 shall be set aside.

b **LINDBLOM LJ.**
[77] I agree.

PETER JACKSON LJ.
[78] I also agree.

c *The court allowed the appeal; the finding against the father was set aside.*

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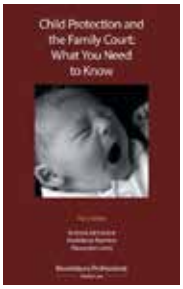

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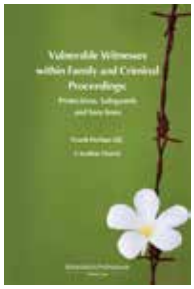

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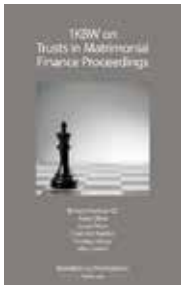

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