



Neutral Citation Number: [2026] EWCA Civ 1024

Case No: CA-2026-001575

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT SWINDON
HHJ Richard Case
SN25C50008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2026

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE NEWEY
and
LADY JUSTICE FALK

Re B (A Child: Uncertain Perpetrator)

Gemma Taylor KC and Sorrel Dixon (instructed by **Walker Family Law**) for the **Appellant Mother**

Zosia Keniston (instructed by **Wiltshire Council**) for the **Respondent Local Authority**
June Venters KC and Rachel Temple (instructed by **Richard Griffiths & Co Solicitors**) for the **Intervenor**

The **Respondent Father** did not attend and was not represented

The **Respondent Child by their Children's Guardian** did not attend and was not represented

Hearing date : 29 July 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Introduction

1. This is a mother’s appeal from a ‘pool finding’ that there was a real possibility that she was responsible for inflicting bruising on her son. The context clearly appears from the summary given by the judge, HHJ Richard Case, at the outset of a 91-page reserved judgment, delivered on 29 May 2026 at the end of a hearing lasting 13 days, and reported at [\[2026\] EWFC 103\(B\)](#):

“Summary

1. Alfie (anonymised name), a boy aged between 18 and 21 months at the relevant time and now aged 3, sustained multiple injuries including very serious fractures whilst in the care of his Mother and her former partner. I have to decide how the injuries were caused and whether they were inflicted; if I find they were inflicted I have to decide if they were inflicted by the Mother or her former partner or if there is a real possibility it was either of them.

2. In summary I find that on various dates between 11 October 2024 and 17 January 2025 the Mother’s former partner (the Intervenor) deliberately inflicted serious injuries on Alfie on eight separate occasions. He inflicted a serious skull fracture, a right arm fracture, four rib fractures on two occasions, bruising to Alfie’s head and face on two occasions, he slapped him hard enough to the face to leave a very clear handprint and he forcefully gripped his face leaving fingertip bruises. Additionally, whilst I cannot determine exactly who caused them, there is a real possibility the Intervenor or the Mother also inflicted bruising to Alfie’s groin, left ear and right hip between 19 and 23 January 2025.

3. The Mother failed to protect Alfie from the Intervenor; she failed to separate from him to protect Alfie and failed to report him to police or Children’s Social Care, in particular after she became aware the Intervenor had slapped Alfie to the face and inflicted fingertip bruising to his face.

4. The Intervenor videoed himself applying pressure to bruised areas of Alfie’s face on two occasions and peeling back an obviously swollen lip on one occasion. The videos, particularly of the lip being peeled back, are distressing to watch. The Mother’s counsel said he “effectively tortured” Alfie “to satisfy something in him”; I do not know why he did it and I do not know why he videoed himself probing injuries but his actions caused Alfie very obvious pain. On one occasion, when Alfie had a bruised and swollen face, he videoed himself with Alfie and said “got a fucking elephant face haven’t you” before laughing out loud. It is truly sickening to watch.

5. The Intervenor and the Mother failed to seek appropriate medical attention for Alfie following an additional fracture to the leg, the arm

fracture and facial bruising. Both used cannabis whilst living with Alfie and fought with each other whilst he was present. Alfie is at risk of physical and emotional harm in the care of the Intervenor and Mother.

6. Alfie is currently in foster care. He will require support via the under 5 psychotherapy pathway within CAMHS to help him re-write the narrative of early trauma experiences. The court appointed Guardian describes it as “an intense service and will consist of 3 appointments a week lasting an hour”. The Local Authority tell me it may last up to two years. It is a measure of the serious and likely life-long consequences of the Mother and Intervenor’s behaviour.”

2. The intervenor has not challenged the very serious findings against him at paragraphs 2, 4 and 5. The mother does not seek to appeal from the serious findings of failure to protect (paragraph 3) or to seek medical attention (paragraph 5). The appeal is concerned only with the pool finding, underlined in paragraph 2.
3. The findings as a whole form the basis for a welfare decision that was due to be made at a hearing on 8/9 July 2026. However, on 19 June, the mother filed an Appellant’s Notice and on 7 July I granted permission to appeal, stating that:

“The grounds of appeal assert that the judge failed to consider the relevance of the wider evidence and his other findings about perpetration, propensity and honesty in circumstances where there was no opportunity for the intervenor to be cross-examined. It is common ground that the ‘pool finding’ about the three bruises may be of importance for the welfare decision.

An appeal on this basis would have a real prospect of success. In an otherwise compelling and unchallenged judgment, the judge does not appear to have taken meaningful account of the potential significance of his very serious findings against the intervenor when assessing the likelihood that he was not also responsible for these more minor injuries. Nor, having assessed the evidence of the applicant, does he appear to have attempted to assess the intervenor’s evidence about them. Where there is an imbalance of information about some individuals in comparison to others, particular care may need to be taken to ensure that the imbalance does not distort the assessment of the possibilities: *Re B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575 at [51].”

4. Having heard full argument, we informed the parties that the appeal would be allowed, that the pool finding would be set aside, and that a finding that these bruises were on the balance of probabilities inflicted by the intervenor would be substituted. These are my reasons for arriving at that conclusion.

The background

5. The mother is now aged 21. Alfie was born in April 2023, when she was 18. They lived with the maternal grandmother for nine months before the mother obtained her own accommodation, where she and Alfie lived alone for eight months.

6. The intervenor is now aged 23. In the summer of 2024, he and the mother met online, and in September/October 2024 he moved into her property and began to assume a substantial role in Alfie's care.
7. On 22 January 2025, the mother and intervenor separated and their relationship ended. That night, she and Alfie stayed with her mother.
8. On 23 January 2025, the mother took Alfie to a minor injuries unit with a presenting complaint of a limp in the right leg. He was referred to hospital where, as a result of the amount of bruising that was seen, he underwent a Child Protection Medical assessment, which revealed a range of fractures.
9. On 24 January 2025, Alfie came into police protection and was placed in foster care, where he remains. Care proceedings were issued on 31 January 2025 and on 4 February 2025 an interim care order was made. The intervenor was joined as a party in July 2025. In September 2025, the local authority issued an application for a placement order.

The trial

10. The judge had 8,000 pages of written evidence and he heard from twelve witnesses: four medical witnesses, the mother and three witnesses on her behalf, and the intervenor and two witnesses on his behalf. The intervenor had the assistance of an intermediary.
11. The mother gave evidence across days 3, 4 and 5. On day 7, the intervenor began to give evidence with special measures in place, but soon withdrew:

“28. ... During the lunchtime adjournment the Intervenor became unwell having suffered what was thought to be a panic attack and expressing suicidal ideation, he was unwell and unable to attend to continue his evidence on 6 May (day 8) and I interposed two other witnesses. An application for a psychiatric assessment and a consequent adjournment of the fact-finding hearing was made on the Intervenor's behalf. I refused the applications and gave an oral judgment and directed the Intervenor to attend court the following day. Permission to appeal was subsequently refused by the Court of Appeal on 8 May 2026. The Intervenor did not attend the following day, 7 May 2026 (day 9), and self-referred to Accident and Emergency at 00.05 with the presenting complaint recorded as “decreased food/water intake in the last 2 weeks, significant weight loss, breakdown last night... referred to medical team for admission to further investigate his physical/mental health.” I directed his attendance on an additionally listed day, 11 May 2026 (day 10) at 2pm with directions for medical evidence from the GP and indicated I would decide whether to proceed in his absence if he did not attend. He did not attend on day 10 and I heard submissions. I directed him to attend on 12 May 2026 at 10am (day 11) with a warning that if he did not do so I would proceed to hear submissions and may make findings against him in his absence. I gave a lengthy oral judgment setting that out and will not repeat it here.

29. He did not attend on day 11 and I directed submissions on 13 May 2026 (day 12). The intervenor did not complete his evidence.”

The judgment

12. The judge found that the intervenor injured Alfie on eight occasions, causing these injuries:
 - (1) Bruising to the left forehead on or around 11 October 2024. It would have been visible to the mother but she could not have concluded without more that it was an inflicted injury.
 - (2) Bruising to the right face and above eyebrow on or around 28 October 2024. He slapped or forcefully gripped Alfie to the right side of his face leaving bruising to the right cheek and temple. The mother would not have been aware the injury was inflicted by the intervenor.
 - (3) A right parietal bone skull fracture with an element of depression and soft tissue swelling, caused on or about 1 November 2024. It was the result of a single impact against a hard surface or a blow by a hard implement, which could include a closed adult fist. The mother would not have been aware of the fracture.
 - (4) A right radius fracture on or shortly before 3 November 2024, caused by greater than normal or rough handling and resulting in notable distress. The mother would not have been aware that a fracture had been caused by the intervenor.
 - (5) A slap to the left side of the face on or about 6 November 2024, leaving a handprint which would have resolved to a red mark and which would have been visible to the mother, who was absent at the time but returned shortly afterwards. She would have been aware that it was the result of a slap perpetrated by the intervenor.
 - (6) Grip marks to the right side of Alfie’s face on or about 13 December 2024, caused by gripping his head, leaving fingerprint bruising to the right cheek and temple. The bruising would have been visible to the mother who would have been aware that it was the result of excessive force by the intervenor.
 - (7) Three left rib fractures caused between 20 December 2024 and 10 January 2025. The rib fractures were caused by the intervenor compressing Alfie’s torso. The mother would not have been aware of the fractures.
 - (8) A left rib fracture caused in the same way on a separate occasion between 6 January and 17 January 2025. The mother would not have been aware of the fracture.
13. As to the three areas of bruising that are subject to this appeal, the judge found that there were:
 - (1) A small cluster of 2-3 bruises overlying the inner aspect of the left groin, caused by the intervenor or the mother around 22 January 2025 by an unknown non-accidental mechanism. The non-perpetrator would not have been aware of the injury.

- (2) A short curvilinear bruise on the rolled edge of the back aspect of the left earlobe, and a small area of bruising over the back aspect of the left earlobe, caused by the intervenor or the mother between 19 and 23 January 2025 by an unknown non-accidental mechanism. The non-perpetrator would have been aware of the injury.
 - (3) A cluster of bruises overlying the right hip and a large skin abrasion immediately above them, caused by the intervenor or the mother before 23 January 2025 by an unknown non-accidental mechanism. The non-perpetrator would not have been aware of the perpetration.
14. The judge made other extensive findings, leading to the conclusion that Alfie had suffered and was at risk of suffering physical and emotional harm and neglect in the care of the intervenor and/or the mother. These included that:
 - “In denying the injuries the Intervenor has been found to have caused (excluding injuries in relation to which there is only a real possibility he caused them) the Intervenor has been dishonest.
 - The perpetrator of injuries would be more likely than not to have been aware their actions had led to significant injury.
 - The Mother and Intervenor failed appropriately to seek medical advice in relation to a leg injury sustained by Alfie on or before 12 January 2025 when symptoms failed to resolve following initial advice on 14 January 2025. The delay was from 18 January 2025 until 23 January 2025.
 - The Mother and Intervenor failed appropriately to seek advice in relation to bruising to Alfie’s face sustained on or about 11 October 2024, 14 October 2024 and 28 October 2024.
 - Neither the Mother nor Intervenor presented Alfie to a medical professional in relation to the right radius fracture in circumstances where distress post-fracture would have been notable and behaviour noticeably different as evidenced in part by two photos of Alfie guarding his right arm on 3 November 2024.
 - The Mother and Intervenor used cannabis in the home where Alfie resided during the day when Alfie was present. This placed him at risk of significant physical and emotional harm and neglect.
 - The Mother’s misuse of cannabis put Alfie at serious risk of harm and made her less responsive and able to protect him.
 - The Mother failed to take action after 6 November 2024 (slap to left side of face) at which point she would also have been aware of a recent injury on 28 October 2024 (bruising to the right cheek and temple) and around 3 November 2024 (fracture to right radius).
 - The Mother failed to take action after 13 December 2024 (fingertip bruising to right side of face).

- The Mother failed to separate from the Intervenor despite having the opportunity to do so and/or failed to report him to Children’s Social Care or the police.
 - The Mother failed to protect Alfie from emotional harm arising from domestic abuse by permitting him to be present when she and the Intervenor were arguing in person (for example on 20 November 2024, 4 December 2024, and 20 December 2024) and by phone (on 20 December 2024).
 - On 14 October 2024 the Intervenor applied pressure to Alfie’s right cheek. The area was evidently swollen and the action caused Alfie to cry.
 - On 14 October 2024 the Intervenor peeled back Alfie’s obviously swollen upper lip provoking loud crying by Alfie.
 - On 28 October 2024 the Intervenor applied pressure, including in a circular motion, to Alfie’s upper cheek below his right eye with his index finger. The area was evidently bruised and the action caused Alfie to cry.
 - On 28 October 2024 the Intervenor, who was holding Alfie in his left arm, videoed Alfie who had a bruised and swollen face and said “got a fucking elephant face haven’t you” before laughing loudly. This put Alfie at risk of emotional harm.
 - On 20 November and 20 December 2024 the Mother and Intervenor argued loudly with Alfie present in the room. On 4 December 2024 the Intervenor slapped the Mother on the forehead. On two occasions the Mother slapped the Intervenor. On one occasion the Intervenor pushed the Mother. The actions of the Mother and Intervenor are likely to have placed Alfie at risk of emotional harm.
 - Alfie suffered physical and emotional harm in the care of the Intervenor and the Mother between 11 October 2024 and 23 January 2025.”
15. In relation to credibility, the judge found the mother to be a generally straightforward witness, noting that she made significant concessions and showed apparently appropriate emotional responses, though caution was needed in relying on demeanour. She accepted failures to seek medical advice for bruising and failures to protect Alfie by challenging the intervenor. However, there were credibility concerns arising from inconsistencies in her accounts, especially about how often Alfie was left alone with the intervenor and who undertook nappy changes. The judge found that the mother had been untruthful in one respect, by denying that she had seen the 6 November slap mark.
16. As to the intervenor’s credibility, the judge recorded that his demeanour could only be observed briefly before he became unwell, so greater weight was placed on objective matters. Two features of his mobile phone use were significant. First, there were 34

short videos on his phone, including nine taken in the early hours of 14 October 2024 showing him examining Alfie's face. These were highly suspicious. Secondly, his phone contained concerning internet searches about slap marks, rib injuries, bruised ribs, a dent in a baby's head, a cracked skull, and whether a one-year-old would remember events. He also gave inconsistent evidence about his presence and role in the home. The judge found these to be troubling and relevant inconsistencies, undermining the reliability of his written and oral evidence and suggesting an attempt to minimise his role in Alfie's care.

17. In relation to the three forms of bruising, and following a request for clarification of his draft judgment, the judge set out his full reasoning at paragraphs 273-280. I have placed the additional reasoning in italics.

“5: Bruising to left ear, groin and right hip

Left Groin

273. In relation to photos of bruising to the groin the Intervenor says he changed Alfie's nappy on the day he left (which was 22 January 2025) and it was not there [H0.FP]. The Mother says she first noticed this when she changed Alfie's nappy on 22 January 2025 [C62/iv]. That explanation differs from what it is reported she said during the 23 January 2025 Child Protection Medical which is that she had not seen the bruising before [I141]. When asked about what she said in the Medical in the course of cross-examination by the Local Authority she could not recall; when asked why she would have said that was the first time she had seen the bruising she said she did not know; I asked her again and she said “I'm not sure”. I cannot accept she would not have changed Alfie's nappy between 22 January 2025 and the Medical. *The fact she has given different accounts of when she first saw the bruising and no explanation for the difference is important. I have considered why that might have been. One possibility is she lied at the Child Protection Medical to protect the Intervenor, another is she lied because she had perpetrated the injury, another is that she lied because she was worried she would be seen as neglectful, another is she was just confused in the distress of being presented with apparent injuries Alfie had suffered. I do not find all of those plausible on the balance of probabilities: First, given her case now is that the injury must have been caused by the Intervenor, I would have expected that when faced with the possible loss of her child she would have admitted she said it because she was protecting the Intervenor if that was the explanation. That would be consistent with her frank admission of a failure to protect. Second, if she had lied because she was worried she would otherwise have been seen as neglectful I would have expected her to give that answer. That is the answer she has given in relation to lying about her presence when Alfie sustained injury on the stairgate (see above where I consider her credibility generally). Third, if she had been confused it would have been the simplest thing to say so, she had two opportunities to say this in cross-examination and she did not.*

274. *Accordingly, both the Mother and Intervenor had an opportunity to cause the injury, the Mother has given different accounts as to when she first became aware of it which have not been explained and I have found the Intervenor has caused other injuries, as set out above. In the circumstances I cannot determine who caused the injury or how it was caused but given my finding there is no plausible explanation for an accidental injury in this location and there is a real possibility that it was the Mother or Intervenor who perpetrated it and I make this finding:*

There is a real possibility the bruising to Alfie's left groin was caused by the Intervenor and/or the Mother around 22 January 2025. The mechanism is not known save that it was non-accidental. The non-perpetrator (either the Intervenor or Mother) would not have been aware of the perpetration.

Left ear

275. In relation to the left ear the Mother's oral evidence was that Alfie was collected from the maternal grandmother on 19 January 2025 and "he was fine" but the injury to the ear was pointed out by the Intervenor "as soon as we got back", she said that she now thought the Intervenor did something to Alfie's ear but that there was no time when he was alone with Alfie and when pressed she could not explain how he could have done it without her seeing him do it.

276. I note that the maternal grandmother's evidence was that the Mother did raise this with her after collecting Alfie from her home but the medical evidence does not agree that the injury could have been caused by the mechanism alleged at that time (i.e. repeated hitting to the head with a toy phone).

277. The Intervenor was aware of the injury at the time, describing to the police it was "actually like-it was like a black ear" [H0.FT].

278. *Accordingly, both the Mother and Intervenor were aware of the injury; I have found the Intervenor caused other injuries; on the Mother's account the Intervenor could not have perpetrated it without her being aware but she did not perpetrate it and she did see him do it. Her evidence is unsatisfactory, as it is in relation to the groin injury (above) and the hip injury (below). Again, I have considered different scenarios: perhaps the Mother is lying to protect the Intervenor but I find that hard to credit given what is at risk for her in these proceedings and her case that other injuries must have been caused by the Intervenor. Perhaps she has forgotten either an incident in which she saw the Intervenor perpetrate injury (which is frankly unlikely) or an opportunity he had to do so without her seeing it but she did not give either explanation even when I asked her to explain the inconsistency. The final possibility is that in fact she perpetrated the injury and the inconsistency arises from an effort to conceal that. In those circumstances, I cannot determine on the balance of probabilities either who caused the injury or how the injury was caused but having decided above that there is no plausible non-accidental cause*

I find there is a real possibility of it being inflicted by either or both the Mother and Intervenor and I make this finding:

There is a real possibility the bruising to Alfie's left ear was caused by the Intervenor and/or the Mother between 19 and 23 January 2025. The mechanism is not known save that it was non-accidental. The non-perpetrator (either the Intervenor or Mother) would have been aware of the injury.

Right hip

279. In her police interview the Mother said that she “did not see this cut until the Intervenor showed me it” [H0.BD]. That is probably a neutral piece of evidence in that on the one hand it may be thought the Intervenor would not have shown her if he had caused it, on the other he may have pre-emptively shown her to avoid suspicion. *I note that the Mother's evidence was inconsistent in relation to this injury in that in her oral evidence she first said she was not aware of the injury “until I was at my mum's and saw it” but on being taken to the entry from the police interview above conceded she must have seen it before but it was “so long ago I can't remember details”.*

280. *Whilst I have made significant findings against the Intervenor (above) I have also been unable to determine the perpetrator of the left groin and left ear injury by reason, in part, of the Mother's inconsistent evidence. This is a further example of inconsistency in relation to events around the time of the right hip injury which must have been incurred in a similar time frame as the left groin and left ear injury given the evidence set out above. Having already determined it was inflicted, in light of this state of the evidence I cannot determine who caused the injury or how it was caused. There is a real possibility that it was the Mother or Intervenor and I make this finding:*

There is a real possibility the bruising and abrasion to Alfie's right hip was caused by the Intervenor and/or the Mother before 23 January 2025. The mechanism is not known save that it was non-accidental. The non-perpetrator (either the Intervenor or Mother) would not have been aware of the perpetration.”

The appeal

18. The grounds of appeal are in summary that:

- (1) The judge's reasons do not support the pool findings against the mother.
- (2) The judge failed to properly examine each potential perpetrator and the likelihood of each having individually perpetrated the injuries in the context of the other findings and the wider canvas evidence generally.

- (3) The judge failed to give proper consideration to how the evidence of the mother and the intervenor should be fairly assessed in circumstances where the intervenor withdrew and was not available for cross-examination.
19. For the mother, Ms Taylor KC and Ms Dixon argued that the judge's findings about these bruises are perplexing. They arose because, in contrast to all his other findings, he did not assess the evidence as a whole. He did not weigh the wider evidence of the intervenor's violence and dishonesty, or of the fact that he had made no finding that the mother was dishonest in any significant way or had ever handled Alfie roughly. He did not address the improbability of more than one person having caused injuries. He did not properly address the unfairness caused by the intervenor's withdrawal and instead treated the mother differently, wrongly focusing on inconsistencies in her accounts without explaining why they justified findings that she may have injured Alfie. In being critical of the quality of the mother's oral evidence about the bruising, he did not take account of her youth, her vulnerability, the impact of cannabis on memory, the effect of the passage of time of over a year since the events, and the stress involved in giving evidence for the equivalent of two days. This led to a discrepant conclusion with potentially serious consequences for the mother.
20. For the local authority, Ms Keniston rightly submitted that findings of fact should only be overturned if shown to be plainly wrong or rationally insupportable. She described these findings as reasoned, evidence-based, and well within the range of permissible conclusions. The judge was not required to identify the most likely perpetrator where the evidence did not permit it. Both adults had opportunity, the mother gave inconsistent accounts about when she noticed some injuries, and although the intervenor had caused other injuries, that did not exclude a real possibility that the mother caused these lesser injuries. On the mother's own evidence, the intervenor could not have caused the ear injury without her being aware of it at the time. In relation to the fairness of the process, the judge did consider the wider canvas of domestic abuse, cannabis use, volatility and the intervenor's previous violence. He was entitled to distinguish evidence of domestic abuse from evidence of propensity to injure the child, and the fact that one perpetrator caused many injuries did not logically exclude a second possible perpetrator of the three disputed injuries. Although the intervenor withdrew, the judge carefully recorded the fact, and the mother had opposed an adjournment. The court had other evidence from the intervenor, including statements, police interviews and phone material, and did not unfairly prefer his evidence over that of the mother.
21. These submissions were supported by Ms Venters KC and Ms Temple, for the intervenor. They argued that the judge expressly considered his findings against their client, but that he also had to weigh serious difficulties in the mother's own evidence. There were important inconsistencies in her accounts of when she first saw the groin bruising. Her own account made it difficult to see how the intervenor could have caused the ear injury without her knowing. Similar inconsistencies arose about the discovery and timing of the hip injury. The judge was therefore entitled to conclude that he could not identify a sole perpetrator. It has not been shown what cross-examination of the intervenor on behalf of the mother would have achieved. The appeal should be dismissed, but if it was allowed, there should be a complete rehearing and not a substitution of findings or a narrow rehearing.
22. Ms Venters relied on the familiar injunctions in *Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48. An appeal court should not interfere with the trial judge's

conclusions on primary facts unless it is satisfied that he was wrong in the sense that the decision under appeal is not rationally supportable. Unless there is compelling reason to the contrary, the trial judge can be assumed to have taken the whole of the evidence into consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it. Ms Venters, like Ms Keniston, accepted that there was no indication that the judge had compared the likelihoods of each adult having caused the bruises, but submitted that it was implicit from the whole of the judgment that he had done so. At all events he did not determine perpetration on the basis of propensity.

Analysis and conclusion

23. Alfie suffered a large number of serious inflicted injuries in the short period during which the intervenor was in the home. The findings against him were based on compelling reasoning. They have not been appealed and there could have been no question of disturbing them, whatever the outcome of the mother's appeal.
24. In an impressive and well-organised judgment, the judge gave himself an accurate legal self-direction, including in relation to injuries caused by an unknown perpetrator. He cited *Re B (A Child)* [2018] EWCA Civ 2127, *Re B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575; [2019] 1 W.L.R. 4440; [2019] 3 All E.R. 481 and *Re A (Children) (Pool of Perpetrators)* [2022] EWCA Civ 1348; [2023] 1 W.L.R. 1743; [2023] 2 All E.R. 870; [2023] 1 F.L.R. 565. Another recent decision of this court in the same vein is *Re Y, V and B (Fact-Finding: Perpetrator)* [2024] EWCA Civ 1034; [2025] 1 F.L.R. 795.
25. The judge adopted this correct summary from the Family Court Practice:

“The court should... consider whether it can identify the actual perpetrator on the balance of probability and should seek to do so. At this stage, the correct legal approach is to survey the evidence as a whole as it relates to each individual in order to arrive at a conclusion about whether the allegation has been made out in relation to one or other on a balance of probability. Evidentially, this will involve considering the individuals separately and together and comparing the probabilities in respect of each of them. Within this context, the right question is not ‘who is the more likely?’ but rather ‘does the evidence establish that this individual probably caused this injury?’ In a case where there are more than two possible perpetrators, the Court of Appeal highlighted a clear danger in identifying an individual simply because they are the likeliest candidate, as this can lead to an identification on evidence that falls short of a probability.”
26. The Family Court Practice also refers to the guidance given in *Re B* at [51], namely that where there is an imbalance of information about some individuals in comparison to others, particular care may need to be taken to ensure that the imbalance does not distort the assessment.
27. The court's first and most important task in a case of where inflicted injury is alleged is to seek to identify the perpetrator on the balance of probabilities. Where that is possible, it provides a stronger factual foundation for the welfare decision. Resort to a

pool of perpetrators will only arise in a case where the court finds itself unable to make a finding in the normal way.

28. Where, as here, an injury has been found to have been inflicted, as opposed to being accidental or of natural origin, and where there are only two people who might be responsible, the question for the court becomes a binary one: which of the two is more likely to have been responsible? If the question can be answered, it follows that the person identified on a balance of probabilities as the more likely of the two to have been responsible is in fact responsible. That is in contrast to a case with more than two possible perpetrators, where the identification of the likeliest perpetrator might not satisfy the balance of probability standard that is necessary for a finding of fact.
29. In making its assessment, the court will take account of the quantity and quality of the evidence available to it, and will be alert to any potentially significant imbalances. Only if it cannot answer the question for lack of reliable evidence, or because it finds the evidence equally balanced (a rare occurrence), will it fall back on a pool finding.
30. In the present case, the judge applied this process when he found on the evidence as a whole that the intervenor was culpable in relation to eight injuries. When doing so, he drew appropriately on his conclusions in respect of other injuries as providing support for his conclusion in respect of the injury under consideration, whether it was the injury to the face (at 241), the skull fracture (at 247), the broken arm (at 249) or the rib fractures (at 260).
31. However, and despite the manifest care that the judge took in reaching his decision, I regret that in this limited but potentially significant respect – attribution of responsibility for the three areas of bruising – he did fall into error in relation to the findings at paragraphs 273-280.
32. First, and in contrast to his approach to the other injuries, he focused almost entirely on the mother's own evidence about the single week in which the bruises were inflicted. At 280, he based his conclusion about the hip injury "by reason, in part, of the Mother's inconsistent evidence", but there is no other supporting reasoning in relation to this or to the other bruises.
33. Second, while the judge identified some inconsistencies (not lies) in the mother's accounts, he did not explain why they led to the conclusion that the mother might have injured Alfie, as opposed to her being a poor or forgetful witness in relation to some of his least serious injuries when asked about them over time. Nor did he explain why the inconsistencies were so significant that they prevailed over the strong inferences that arose from all the other evidence.
34. Third, and centrally, when considering these injuries the judge did not evaluate and compare compelling features of the case.

With reference to the intervenor:

- Alfie's injuries were clustered entirely in the period when he was on the scene.
- He had been found by the judge to have carried out multiple serious assaults on Alfie, showing a propensity to injure a very young child.

- His conduct had elements of cruelty.
- He had dishonestly denied causing any injury at all.
- He had caused the rib fractures at or around the same time as these bruises were caused.
- The mechanism for the bruising to the groin and to the hip may have been some form of gripping or grabbing (evidence of the paediatrician at 157 and 165), the same mechanism as the intervenor had used to cause the facial injuries in October and December.
- He had caused rib fractures on two occasions in December/January by a squeezing mechanism.

By contrast, with reference to the mother:

- There was no evidence that Alfie had suffered inflicted injury in the first 18 months of his life, including eight months in her sole care.
- She has not been found to have inflicted any injury on Alfie during her relationship with the intervenor.
- She was observed to have a close and loving relationship with Alfie and had never been seen to handle him inappropriately.
- She had not (with the exception of her denial of having seen the 6 November slap mark) been found to be a dishonest witness.

Generally:

- There was no indication in the evidence that Alfie was being assaulted, at the same time and in a similar way, by more than one person.

35. These features were in my view bound to lead a court to find that the intervenor was more likely than the mother to have caused the bruising. There was no basis for the court to find itself in a state of uncertainty and the proposition that the mother was equally likely to have caused these injuries is simply unsustainable. Had the three areas of bruising been the only injuries in this case, and had there been no wider context, a pool finding might well have been a proper outcome. But here the evidence as a whole painted a very different picture. The fact that the court could not divine exactly when and how the bruising had been caused was equally true of other injuries which the intervenor perpetrated, and it did not relieve the court of the obligation to assess the evidence as a whole. Ms Venters was right to say that the judge did not determine perpetration on the basis of propensity. It would have been wrong to have acted on the basis of propensity alone, but it was equally wrong to assess the bruising as if the other injuries had never happened and the mother and the intervenor were in a position of parity as potential sources of risk.

36. Nor do I accept the submission that, reading the judgment as a whole, it is implicit that the judge compared the probabilities of each adult having caused the bruising. In respect of these injuries, that comparison did not happen.
37. As to multiple perpetrators, it is obviously right to say that a finding that A has caused eight injuries does not mean that B could not have caused three others. But that provides no answer in a case where the evidence leads firmly to a different conclusion.
38. Finally and relatedly, in this one respect the judge did not adjust to the forensic imbalance that he had worked so hard to prevent. The mother's evidence received detailed scrutiny while the intervenor's evidence, such as it was, was not interrogated at all. The inability to carry out a fully balanced assessment arose from events outside the court's control, but the judge should then have exercised caution when reaching conclusions on the basis of the mother's evidence alone.
39. I therefore joined in the decision to allow the appeal and to set aside the pool finding. Rehearing is unnecessary, even if it were practicable, because the only proper conclusion is that it is more likely than not that the bruising injuries were also caused by the intervenor. We substitute a finding to that effect and remit the matter to the judge for him to make welfare decisions on the foundation of his findings, as augmented by those of this court.

Lord Justice Newey :

40. I agree.

Lady Justice Falk :

41. I also agree.
