



26 January 2017

**Crime and Punishment: When Legal Worlds Collide**

Professor Jo Delahunty QC

**Warning: this lecture contains description of injuries to children that viewers, listeners and readers may find distressing.**

In my first lecture ‘Sex, Death and Witchcraft: the Family Court[[1]](#footnote-1)’ I trailed the issue that I will focus on this evening.

Tonight’s lecture is ‘Crime and Punishment 1: ‘When Legal Worlds Collide’ in which I will explore the ways in which a criminal court and a family court each deal with events concerning the same child victim and the same alleged abuser/s. Each court is seeking to resolve who hurt the child and yet each can come to different conclusions as to culpability.

‘Crime and Punishment’ is a two part lecture: on 2nd March I will speak to the title ‘Crime and Punishment 2: ‘Guilty until Proven Innocent’[[2]](#footnote-2). In the companion lecture I will focus on a real case involving a dead baby, a young couple, the mother mourning her dead son, pregnant and facing a murder charge, accused of causing the death of first born child by shaking him to death and beating him, fracturing many bones in his body, in the build up to his fatal collapse. I will introduce some of the facts for you to ponder on in this lecture.

But, for now, we begin at the beginning: an introduction to the legal framework that the criminal and family justice system operate within. For the avoidance of doubt, the family cases I am dealing with in this lecture are public law family cases (care cases where the dispute is between the State (the Local Authority) and the family), not private law cases which deal with disputes between members of a family.

Private Law: **Parent A v Parent B**

Public Law: **Local Authority X v A, B and C (the child)[[3]](#footnote-3)**

**SECTION A: The Differences between the Criminal Justice System and the Family Courts**

There are three possible courts in which the circumstances of a child’s death might be investigated: the Coroner's Court, the Crown Court and the Family Court.

**Coroner's Court**

A **coroner's inquest** is held where a death was violent or unnatural or where the cause was sudden and unknown. The purpose of the inquest is to publicly establish the identity of the deceased, the place and time of death, and how the deceased came by their death. Its scope will be a matter for HM Coroner, who will consider whether the case is suitable for the application of guidance published in April 2014 by the Chief Coroner with the approval of the President of the Family Division: *"Family Court Proceedings - Findings of Fact Admissibility in the Coroner's Court".* This allows a coroner to introduce as evidence any findings of fact made in family proceedings, a procedure designed to avoid the need to hear the same evidence more than once, save for good reason.

**Crown Court**

**Criminal prosecution** will only occur if the Crown Prosecution Service considers that there is sufficient evidence for a realistic prospect of conviction. In order to convict, a jury must be satisfied beyond reasonable doubt of the guilt of the defendant, i.e. to the criminal standard of proof.

**Family Court**

**Care proceedings** are brought by local authorities in the Family Court if it is considered that children have suffered or are at risk of suffering significant harm and that it would be in their best interests for a care order or a supervision order to be made. The court makes any necessary findings of fact on the balance of probabilities, i.e. on the civil standard of proof.

What follows is a very basic summary of just some of the differences in the legal framework between the criminal and family justice system and I will then expand on some of them by 3 case examples.

In both the criminal and care jurisdiction the **burden of proof** is on the state:

Crime: on the CPS;

Family: on the Local Authority bringing the case.

The **burden** of proof is something very different to the **standard** **of proof:**

Burden = who has to prove their case

Standard = to what degree of certainty must they prove it

**Crime v Care**

**What is the purpose of proceedings?**

*Why do we need a trial to determine who did what, when, why? Accountability? Punishment? Risk assessment? Rehabilitation?*

Crime: Has the defendant committed a criminal offence against the victim or not? The outcome is specific to the adult defendant: conviction or acquittal, prison or freedom.

V

Family: Has a child suffered serious harm? If so, by whose action? What risk is there of future harm? The outcome is focused on the welfare of the subject child, not the respondent adult.

Fundamental points

1) The family court only looks to the past in order to make a decision about a child’s future.

2) A family court does not conduct proceedings to establish whether or not a parent or associated person has harmed a child unless that child, or another in the family, may be at risk through the actions of that person.

3) The primary purpose of a family trial is not about the guilt or innocence of the alleged abuser, it’s about the protection of a child.

4) The family court makes every decision for the child taking the child’s welfare as its paramount concern. S 1 of the Children Act 1989 is the foundation stone of the care court’s thinking and acting[[4]](#footnote-4).

If there is no relevant child that could be affected by the family court trial, there is no trial, i.e. if the injured child dies and there are no other children who might be at risk of harm from the alleged assailant (e.g. no siblings), then there will be no family court trial into the circumstances of the child’s death but there will be an inquest and may be criminal prosecution.

**What is the legal basis for the trial? What is the ‘offence’?**

Crime: A criminal offence is alleged to have been committed i.e. an unlawful act punishable by a state or other authority.

V

Family: The local authority only becomes involved when the problems in the family give rise to professional concern that the children within it have either been seriously harmed or are at risk of serious harm or neglect by their carers or those their carers associate with[[5]](#footnote-5).

‘Harm’ covers a wide range of ills: emotional, physical, sexual etc.[[6]](#footnote-6)- we aren’t talking about minor parenting shortcomings - the harm has to be ‘significant’ and the legal and factual threshold proven (the ‘Threshold Criteria’[[7]](#footnote-7)) on the balance of probabilities to justify why the state is seeking to intervene in a family’s right to a private family life.

**What is the Standard of proof?**

Crime: Beyond reasonable doubt

V

Family: Balance of probabilities

Why is there a different standard of proof? Why is that fair to the alleged abuser? How could he/she be acquitted by a jury on a 99:1 analysis but found culpable by a judge on a 51:49 balance?

In the criminal court the standard is higher (beyond reasonable doubt: satisfied so as to be sure) because it is thought better that a guilty person goes free than an innocent person be convicted. Taking away someone’s liberty and branding them a criminal is so serious a charge between the state and a citizen that society must be as sure as it can be that they are guilty.

In a family court, the standard is lower (balance of probabilities: more likely than not), because the purpose of any hearing is to protect a child. If there is a risk that they could come to significant harm, the consequences could be too serious to subject them to the risk. So the standard of proof is lower i.e. err on the side of caution rather than risk avoidable significant harm to a child even when this breaches a parent’s right to bring up their child.

The House of Lords (as then called) reviewed the standard of proof in family cases: considering the degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen.

**Re H (Minors)(Sexual Abuse: Standard of Proof) [[1996] AC 563](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/1995/16.html" \o "Link to BAILII version)** is that section 31(2)(a) of the Children Act 1989 requires any facts used as the basis of a prediction that a child is "likely to suffer significant harm" to be proved to have happened made it clear that it must apply the ordinary civil standard of proof. A Court must be satisfied that the occurrence of the fact in question was more likely than not. This decision was reaffirmed in **Re B (Care Proceedings: Standard of Proof ) CAFCASS Intervening in 2008**[[8]](#footnote-8) (declaration: I acted for CAFCASS in it) . The conclusion of the Law Lords was unanimous and clear

‘I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.’

He continued:

‘If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.’

Per Lord Hoffman

**Where do we hear the cases?**

Think about it. We have different courts for different purposes. The Family Court room is, physically, a different place from a Criminal Court. We may have combined centres but the two types of court room have very different functions and facilities and are separated geographically. Cells are not commonly found in Family Courts, we don’t have ‘docks’, we don’t have police level security, we don’t have different entrances and exits for vulnerable witnesses or juries.

**What can the outcome of proceedings be?**

In England, we don’t have the Scottish equivalent of ‘Not Proven’. The jury may fail to reach a verdict of course, but if they return one, they have two options ‘Guilty’ or ‘Not Guilty. In the Family Court the question isn’t one of guilt but of responsibility.

Crime: Acquittal or conviction, the jury determines the verdict, the judge determines the sentence. The purpose of it may be part punishment, part deterrent. It’s a verdict and sentence focused on THE DEFENDANT.

V

Family: There is no jury: the judge determines what happened in the past and will happen in the future i.e. what has happened to the child? Who did what to it? Who poses a risk to a child? Where is it safe for a child to live? Who can the child safely see and under what conditions? Can the child be rehabilitated to a parent or the family or is permanent separation through foster care or adoption required? The judge’s decision is focused on THE CHILD. The consequences for the parent or adult are secondary.

**Who decides the case?**

Crime: Jury determines fact, Judge decides law

V

Family: Judge decides fact and law

**Who are the parties to the case?**

Crime: The Crown v The Defendant/s

V

Family: The Local Authority v The Respondents: which automatically includes the parents and the child and other people (interveners) may also be joined with the courts permission (e.g. a partner living with the child at the time the child was injured and who has a role to play in explaining what happened to the child and /or may be accused of harming it).

*Why?* In crime, the case is between the State and the Individual. Only those who have been charged with an offence are joined to the proceedings and face trial. They are in court because they are accused of a criminal offence.

In care, the respondents are automatically the parents, whether or not one is accused of inflicting harm to their child. The court wants before it those adults who have responsibility for the child as the court is going to make decisions about the child’s welfare. It will need to decide if a child has been harmed, if so by whom, who could have protected that child from harm and can the child live with one or other of the parents or within the extended family. The decisions the court makes affect the whole family, not simply the alleged wrongdoer, as the family court is there to decide the future welfare arrangements for the child.

Most significantly THE CHILD has a direct role in the care case. A child has formal status as a respondent and has its own legal representation. A child has, depending on age and maturity a ‘Children’s Guardian’ to act in their best interests. If the child is old enough, and if what they want differs from the view their Guardian takes about what is in their best interest, then the child can have their own legal representative and play a direct role in the court hearing, rather than have their wishes and feeling presented by their guardian on their behalf (particularly when the child is a teenager) albeit the Guardian remains involved in the case. In addition, it is not just the (allegedly) abused child that is automatically a respondent to the care case: their siblings (if minors) are too, even if they might not have suffered direct harm, because they may be at risk of harm.

**What about the lawyers?**

Crime: (Crown Court) Barrister and judge wear wig, gown, wing collar, bands or collarettes.

V

Family: (High Court, County Court) No 18th century dress code[[9]](#footnote-9) but etiquette and the professional Code of Conduct requires ‘business wear’ and a colour palate of black, dark grey, navy.

*Why?* Dress code[[10]](#footnote-10): what one wears in court as a lawyer is governed by professional rules. A woman wearing trousers in court would have been unheard of in the 1990s: had a female barrister attending court in a trouser suit begun to address the court, the following exchange was likely: the judge might well have said “*I can’t hear you, Miss…”* The female barrister speaks louder, there is nothing quiet about her voice, the Judge repeats the phrase….it’s not that he can’t hear her, he won’t hear her because of inappropriate court attire.

It took a sustained campaign from the Association of Women Lawyers for that outmoded and frankly ridiculous position to change: it was not until the Bar Council received permission from The Lord Chief Justice in May 1995 that women were ‘permitted’ to wear trousers as court wear.

**Who can hear and listen to what’s happening in court?**

Crime: Heard in public: public admitted.

V

Family: No public permitted. Only the Local Authority social work team bringing the case, the respondents themselves and the lawyers for each team are in court.

Crime: Press permitted into court and can report within recognised limitations that don’t compromise the fairness of the trial.

V

Family: Accredited members of the press are permitted into court but are not permitted to report anything that could lead to ***identification of the subject children*** [[11]](#footnote-11). Press, Parties, witnesses etc. who are involved or have knowledge of the case cannot publish any detail of the case or the documents. That is a contempt of court and can be punished by the court[[12]](#footnote-12).

The effect of section 12 of the Administration of Justice Act 1960 is that it is a contempt of court to publish a judgment in a family court case involving children unless either the judgment has been delivered in public or, where delivered in private, the judge has authorised publication. In the latter case, the judge normally gives permission for the judgment to be published on condition that the published version protects the anonymity of the children and members of their family. The President of the Family Division has been keen to create more transparency in the family justice system and published guidance[[13]](#footnote-13) in 2014 that widened the scope of publication of judgments. In particular, he provided that publication of information was permitted through:

* an authorized publication of the text or summary of the whole or part of an order or judgment,
* an authorized news publication, or
* as authorized by rules of court.

These three categories comprise publications which either meet certain criteria, or where the court has specifically given its permission. Any publication which is not ‘authorized’ as defined by the Act will amount to a contempt of court.

‘Identification information’ is wide enough to avoid identification of the child by ‘jigsaw’ identification of those closest to the child, i.e.address lived at; school attended by the child or sibling. Re adults, it could encompass the name of the individual, pseudonym or alias of the individual; the address or locality of any place where the individual lives or works or is educated or taken care of; the individual’s appearance or style of dress; any employment or other occupation of, or position held by, the individual; the individual’s relationship to particular relatives, or association with particular friends or acquaintances, of the individual; the individual’s recreational interests; the individual’s political, philosophical or religious beliefs or interests; any property (whether real or personal) in which the individual has an interest or with which the individual is otherwise associated.

The general position is that the media has since April 2009 been able to attend hearings in the Family Court, as a result of Practice Direction 27B to the Family Procedure Rules 2010.  Hearings themselves remain private, but significant judgments should be published.  In cases involving serious medical treatment for children and incapacitated adults, the Family Court sit in public, but the identities of the individuals are usually protected by reporting restriction orders.

There has been a move in recent years in the direction of opening the work of the Family Court to public scrutiny. At the same time, there is a need to protect the children and adults who are the subject of the proceedings: it is no use taking great care to make decisions that protect their welfare if publicity exposes them to harm.

**What evidence is heard to inform the outcome in each court?**

Crime: Strict rules on evidence used in court with legal argument to determine admissibility on contentious matters (heard in absence of the jury and determined by the judge).

V

Family: a wide canvas of evidence is permitted including hearsay; it’s a question of weight rather than admissibility.

The judge hears all matters of fact and law (there is no jury) so to argue on an issue of admissibility exposes the nature of the evidence that is being argued over. The judge can decide on the quality of the evidence for him/herself.

**What are the differences in the roles of an Expert in each court?**

Crime: A pool of Experts.

V

Family: A drought of Experts.

*Why?* There are differences in: their duty; their availability; their willingness to become involved; the use of their report; their interaction with those instructing them in court and outside of it.

Key issues for the family court that affect an expert’s involvement are: necessity; transparency; time scales to report; willingness to become involved; funding of their work; national or international scope of expert instruction.

This is a complex and contentious area and one I will consider on 12th April’ [[14]](#footnote-14) in my lecture ‘*Expert Witnesses: a Zero Sum Game?*’

**Is there a right to silence?**

Crime: The defendant can elect to give no evidence at all and can refuse to answer questions if he/she chooses.

V

Family: The respondent can be witness summonsed to attend court, be threatened with contempt of court if they refuse to give evidence and, if giving evidence, cannot avoid answering a question even if the answer might incriminate him or her (pursuant to s 98 Children Act 1989[[15]](#footnote-15)).

Essentially, s98 of the Children Act 1989 has two key provisions

1. That a parent cannot refuse to give or provide evidence on the basis that to do so might incriminate them.

*Why?*

**‘**The importance of parents or interveners giving a frank, honest and full account of relevant events and matters cannot be overstated. It is a vital and central component of the family justice system’

Per Mr Justice Keehan in **A Local Authority v DG and Others 2014 [**2014] EWHC 63 (FAM) **[[16]](#footnote-16)**

AND vitally:

2) That such evidence that they give may only be used in prosecutions against them for perjury and nothing else.

*Really?* No.

Over recent years, that principle has been rather eroded, as the Family Courts have become more and more amenable to requests by the police for disclosure of care proceedings. That means that if a parent in care proceedings gives an honest account of what went on, as they are encouraged to do and on the basis of the s98 protection, it may come back to haunt them in criminal proceedings and they are unwittingly potentially waiving their right to silence.

This is especially so if the family case precedes the criminal case or is running in tandem with it as:

‘The fact that a party who is a defendant in linked criminal proceedings has not yet filed a criminal defence statement is no reason for the court to delay requiring that party to provide a full and comprehensive account in a response to threshold and/or a narrative statement. Furthermore, it is wholly inappropriate for those representing that party in criminal proceedings to advise him not to comply with the order in the care proceedings or to advise him not to respond to a particular issue or allegation, whether until the criminal defence statement has been filed or at all.’

 Per Keehan J supra

*Why?* The reason is simple: the family case is about the welfare of the child and the protection of the adult against incrimination is secondary to the court’s determination to understand what happened to a child so it can make the best decisions for the welfare of it (if the child is alive) and/or other children in the family

In October 2013, a Protocol and Good Practice Model[[17]](#footnote-17) was issued by the President of the Family Division, the Senior Presiding Judge and the Director of Public Prosecutions. It came into force on 1 January 2014. It provides comprehensive guidance on the procedures to be followed when there are linked care proceedings and criminal proceedings especially in relation to applications for disclosure between the two sets of proceedings.

**What is the likely time from proceedings being instituted to a decision being made in each court?**

Crime: How long is a piece of string? It can be a year or years. A trial may be stood down because of witness availability, counsel availability, admin problems etc.

V

Family: The Children and Families Act 2014 introduced profound changes in the way family care cases were dealt with by the courts. We now have to operate under a 26 week timetable from issue of proceedings to conclusion unless there are exceptional and necessary extensions to the trial timetable which have to be authorised by the judge.

*Why?* Delay is inimical to the welfare of the child:

‘Only the imperative demands of justice - fair process - or of the child's welfare will suffice’ to extend the proceedings beyond 26 weeks.

 Per Munby[[18]](#footnote-18) **Re S (A Child) [2014] EWCC B44 (FAM).**

In order to achieve this, the Court is now required to draw up a specific timetable for the child at the beginning of proceedings, which will involve all key dates including the child's birthday, school progress, any Looked After Child reviews, Child Protection Conferences and any other dates relevant to the child.

**SECTION B: Pulling it together: Why do we have these differences in two jurisdictions and what impact can they have?**

What impact can they have? It’s hard to appreciate the differences in the abstract: so I shall explain by example. Here are three cases with different courses to consider

**Second Warning: the facts of these cases may be distressing.**

**CASE 1**

Poppi Worthington: the death of a 13 month old girl

Poppi collapsed with serious injuries at her home in Barrow-in-Furness, Cumbria, on December 12th 2012 and was rushed to hospital, where she was pronounced dead.

**The time line:**

### December 2012*Poppi dies*

Poppi Worthington dies suddenly, aged 13 months, after she collapses at her home in Barrow-in-Furness, Cumbria.

### February 2013

## Poppi buried

Poppi is buried after the coroner releases her body.

### June 2013

## Post-mortem report

A full post-mortem report concludes with the cause of death unascertained.

### August 2013

## Poppi’s parents arrested

Poppi’s parents are arrested and formally interviewed for the first time. Poppi’s father, Paul Worthington, is questioned on suspicion of sexually assaulting his daughter – an allegation he denies.

### March 2014

## Fact-finding judgement delivered in private

A fact-finding judgement on the circumstances of Poppi’s death is delivered in private, as part of family court proceedings involving other children in the family. Its publication is delayed in case it prejudices any criminal trial.

**June 2014**

Cumbria Police referred themselves to the Independent Police Complaints Commission (IPCC) .The force later confirmed that three officers were subject to the IPCC investigation with one suspended and two others moved into different roles. The suspended officer has since retired, one was dealt with by management action and the third was made the subject of performance proceedings.

### October 2014

## Death declared as “unexplained”

HM Coroner for South Cumbria, Ian Smith, holds an inquest at Barrow Town Hall and takes just seven minutes to declare her death as unexplained after stating he was satisfied to rely on the findings of the private fact-finding judgment. The case is not listed in Poppi’s name but as “a child aged 13 months”.

### January 2015

## Request for fresh inquest

Senior Coroner for Cumbria, David Roberts, confirms he will ask for a fresh inquest in a written reply to lawyers representing various media organisations, who argued the October hearing was insufficient and therefore unlawful.

### March 2015

## No police charges

Cumbria Police announce no charges will be brought against anyone over Poppi’s death. They had previously passed a file to the Crown Prosecution Service for its consideration.

### April 2015

## Publication of fact-finding judgement delayed

Paul Worthington is granted a review of the March 2014 medical evidence, which further delays publication of the original fact-finding judgment.

### July 2015

## High Court orders fresh inquest

High Court Judges order a fresh inquest into the youngster’s death after the first hearing was deemed “irregular”.

### November 2015

## Hearing reviews medical evidence

A hearing reviewing the medical evidence from the March 2014 court proceedings gets under way in Liverpool.

Ahead of the hearing, Mr Justice Peter Jackson releases parts of his original fact-finding judgement which reveal that Cumbria Police did not conduct any “real” investigation into Poppi’s death for nine months despite a senior pathologist raising concerns the girl’s injuries were caused by “a penetrative sexual assault”.

### January 2016

## Family judge rules Poppi was sexually assaulted

A family court judge concludes that 13-month-old Poppi was sexually assaulted by her father shortly before her sudden death.

What had led to this decision?

Poppi’s last night[[19]](#footnote-19):

By about 8.00 pm the children were all in bed.  The mother, who often slept downstairs on a large settee, carried out some household tasks and then watched television.  At about 9.00 pm the father went upstairs with his laptop and went to bed.  He followed some sports results on which he had gambled and then watched pornography, which he describes as involving adults, before falling asleep at about 10.00 pm.

At about 2.00 am the mother, who had not yet been to sleep, went upstairs to fetch the laptop for her own use.  She may have got into the bed briefly but, noticing that S was snuffly, she took him downstairs to sleep with her.  After using the laptop for a short while, she fell asleep.  At some point in the night, A, who is a poor sleeper, came downstairs to sleep on the settee.

The father said that he was woken in the early hours by a scream or a cry from P.  He went into her room and found her sitting in the corner of her cot.  She was rigid and stiff and he thought that she may have had a bad dream.  He picked her up and cuddled her and took her to his room.  He sat down on the edge of the bed with P on his lap.  He tried to give her dummy, but her teeth were clenched and she would not open her mouth.  He thought that she was trying to pass a stool and he undid her clothing to see what was in her nappy.  He describes loosening the sticky tabs on the nappy.  He thought from the smell that she had passed a stool.  She became relaxed and stopped screaming.  He laid her on the bed crossways with her head on a pillow.  At this point AM woke and shouted 'P's woke me up' and came to the doorway of her room.  He told her to go back to sleep.  He then went downstairs to fetch a clean nappy.  While there, he exchanged a few words with the mother about what he was doing, and then went back upstairs.  P was quiet so he did not disturb her but instead got into bed himself.  After a few minutes he for some reason put out his hand and touched P.  He realized that something was wrong.  She was limp.  He picked her up and ran downstairs, calling for the mother to get an ambulance.

The mother said that she was woken by P crying out loud and then heard the father upstairs.  Thinking that he was dealing with her, she went back to sleep.  She was aware of him coming downstairs and mentioning the time and that P had pooed.  She then drifted back to sleep and was woken by the father shouting.  She immediately got up and met him at the bottom of the stairs, carrying P in his arms.

A 999 call was made. She was taken to hospital. Resuscitation ceased and P was pronounced dead at 7.07 am.

Injuries suffered by Poppi were identified after death, were a fracture to her lower leg and acute injuries in the region of her anus.

Mr Worthington, Poppi’s father, was arrested and questioned on suspicion of sexual assault in August 2013, [has always denied any wrongdoing](http://www.telegraph.co.uk/news/uknews/law-and-order/12176609/Father-of-Poppi-Worthington-given-117000-legal-aid-for-custody-battle-over-her-siblings.html) and the CPS twice came to the decision not to pursue criminal charges..

But High Court Judge Mr Justice Peter Jackson ruled in both 2014 and 2016 that Poppi’s father had sexually assaulted his daughter shortly before her sudden death. **F v Cumbria County Council and Anor (No 7) (Fact-Finding: No 2) [2016] EWHC 14 (FAM)[[20]](#footnote-20)**

How can two different investigative processes come to different conclusions on the same child on the same allegation against the same parent?

At the March 2014 hearing, the main medical evidence came from three pathologists, Dr Alison Armour, Dr Stephania Bitetti and Dr Stephen Leadbeatter, and from Dr Victoria Evans, a paediatrician.  Their opinions coincided in some respects and diverged in others.

In March 2014 Mr Justice Jackson concluded:

‘141. 'This is a more than usually troubling case.  I have given anxious consideration to the question of whether the court's inquiry has been so degraded by the deficiencies in the initial investigation as to make it impossible to draw reliable conclusions.  In the end, I have concluded that this is not the case in relation to the anal injuries. Unlike the position in relation to the broken leg, there is still a mass of contemporaneous information about the events of the night on which P died, even though procedures fell far short of good practice

142. 'Careful assessment of the meticulous pathological and paediatric evidence has clearly established that the injuries were the result of trauma from outside the body.'

143. While, as already stated, the father is not called upon to prove anything, I cannot accept his evidence about the events surrounding P's collapse.  I was not impressed by his account.  His description of being woken by a cry and then removing P from her cot in a most unusual condition (clenched teeth, rigid body) before loosening her nappy and leaving her on the bed was puzzling.  It is hard to understand why he should have loosened her nappy or why, having gone downstairs to get another nappy, he should have begun to go back to sleep without changing P while leaving her on the bed.  There is also no explanation as to why he would then have reached out to touch P, when his whole object would on his account have been to keep her asleep as long as possible.  Moreover, in the overall circumstances, the fact that this was the only occasion (according to the father) when he and P were in the bed together raises concern when taken together with the fact that P suffered injury on that very occasion.  Overall, the sequence of events that the father describes is unconvincing as an account of a parent comforting a distressed child in normal circumstances.

144. I have observed the father, not only in the witness box but in the courtroom.  In contrast to the mother, who became emotional at understandable points during the hearing, the father's presentation was unusual.  He spent large parts of each day in tears and took every opportunity to make eye contact with me from the back of the court as a way of emphasising his predicament.  I do not attach much significance to this behaviour during an undoubtedly emotional hearing, but it was nonetheless unusual in my experience.

145. It is not possible to reconstruct the exact sequence of events that led to P's collapse without a truthful account from the father.  All that can be said is that at some point after 2 am he removed P from her cot and took off her pyjama bottoms and her nappy.  He then inserted his penis or another object into her anus, causing her injury.  He probably replaced the nappy, which P filled with faeces at some point before or at the time that she collapsed.  The father then realised what he had done and sought help.

146. While it is true that what has happened in this case is extremely unlikely, the position is not to be compared with cases of sudden infant death that occur without any clear signs of abuse.  As has been said elsewhere, there is no logical or necessary connection between seriousness and probability.  The improbability of the father assaulting P in this way must give way to the evidence that establishes that she was in fact assaulted.  As to the argument that this was a crowded house, the fact remains that the father had the clear opportunity to carry out the assault, however risky it might have been.  On his own account, the presence of two very young sleeping children in his own bedroom did not stop him from watching pornography.

152. I find that the father perpetrated a penetrative anal assault on P, either using his penis or some other unidentified object.’

The Judge found the father had perpetrated a penetrative anal assault on Poppi at or around the time of her death, but that the cause of death was medically unascertained. There was no appeal at that stage against those findings.

The fact-finding judgment in March 2014 was not published at that time for two reasons: the risk of prejudicing any criminal proceedings in respect of which a charging decision was awaited, and the need to protect Poppi’s siblings and their mother from public identification at a particularly sensitive stage in the planning for the children’s’ future.

Mr Justice Jackson's ruling was made as part of care proceedings in the Family Court involving siblings of Poppi.

The judge concluded that Cumbria Police carried out no "*real"* investigation into the death of the toddler for nine months, and highlighted a list of basic errors in evidence-gathering. He noted that senior detectives thought a pathologist *"may have jumped to conclusions*" in her belief that the youngster had been a victim of abuse. Poppi was buried in February 2013, precluding a further post-mortem examination, after her body was released by the local coroner. There was said to be an *"absence of evidence*" to find out how she died, or definitively prove if or how she was injured.

As a result of the fact-finding judgment, the police commissioned further medical enquiries.  Opinions were given by Dr Nathaniel Cary (pathologist) and Dr Liina Kiho (histopathologist); their views diverged in a number of respects from those of Dr Armour.  An opinion was also obtained from Dr Victoria Aziz, who is described as a forensic examiner.

On 7th April 2015, the father issued an application to discharge the care orders and for contact orders in relation to his children, which was, in effect, a request for the March 2014 findings to be reconsidered.  A central element of the father's application was the contention that new medical evidence offered an alternative explanation for the bleeding found at the time of P's death.  This application was granted.

During the course of the second fact-finding hearing Mr Justice Jackson heard evidence in relation to the interpretation of post-mortem findings from six professional witnesses, three of whom had given evidence at the earlier fact-finding hearing in March 2014.

Mr Justice Jackson addressed and considered the respective evidence of the six professionals, alongside the evidence as a whole, and reached the following conclusion:

123.'In conclusion, stepping back and reviewing the evidence as a whole, I arrive at the same view as I expressed at paragraph 142 of the previous judgment.

142. Shorn to its essentials, the situation is one in which a healthy child with no medical condition or illness was put to bed by her mother one evening and brought downstairs eight hours later by her father in a lifeless state and with troubling injuries, most obviously significant bleeding from the anus.  Careful assessment of the meticulous pathological and paediatric evidence has clearly established that the injuries were the result of trauma from outside the body.'

*123.*As stated, the local authority, supported by the mother and to an extent by the Guardian, invites the court to find that P died as a result of the assault upon her either by suffocation, or from reflex cardiac arrest or from another unidentified cause.  Having considered the matter carefully, I have concluded that it would not be appropriate to make that finding.  Instead, I find that P died during or shortly after the assault upon her but that the cause of her death is unascertained.

**This was in January 2016: what happened next? How did the criminal justice system react?**

### June 2016

## Serious Case Review published

Health workers had "lack of professional curiosity", Serious Case Review finds. Dr Amanda Boardman, leading GP for Safeguarding Children for NHS Cumbria Clinical Commissioning Group, says "If professionals had put all the pieces of the puzzle together then early help should have been offered."

### September 2016

## Inquest postponed

A fresh inquest into the death of 13-month-old Poppi Worthington was been postponed as the Crown Prosecution Service conducted another review of the case following having received an application under the victims’ right to review scheme. David Roberts, HM senior coroner for Cumbria, said he was advised on September 20 that the CPS was to carry out a fresh review of the evidence, and a day later was asked to stop his own investigation.

**November 2016**

Following a review of the original charging decision in this case, the CPS announced that there was not a realistic prospect of conviction. ‘In accordance with the scheme, a CPS lawyer with no prior involvement in the case has completed a full review of the evidence and has concluded that the decision not to charge was correct.”

Despite Mr Justice Peter Jackson's findings, the CPS confirmed its decision not to press charges against Mr Worthington. The CPS said it was not its function "to decide whether a person is guilty of a criminal offence, but to make fair, independent and objective assessments about whether it is appropriate to present charges for the criminal (courts) to consider".

Poppi’s sibling had been placed with her mother after the investigation into Poppi’s death in 2014. Poppi’s mother had suffered years of uncertainty. She was reported by her solicitor to be angry and disappointed with the decision by the Crown Prosecution Service.

**CASE 2**

Kye Kerr: a baby boy dead by the time he was 6 weeks old

In 2015, in Liverpool Crown Court a jury found a man called Craig Beattie not guilty of killing his son, 6 week old Kye Kerr[[21]](#footnote-21).

In 2014, in the Family Division of The Royal Courts of Justice in London, Mr Justice Peter Jackson had considered the same allegation and found that Mr Beattie had caused his son’s death[[22]](#footnote-22) .

**The background:**

2011: On 11th July 2011, after just 13 days at home, 6 week old baby Kye died. He was discovered by his mother in his baby basket. A post-mortem revealed that he had sustained a catastrophic head injury at the time of death and a lesser brain injury 2 or 3 days earlier. Kye had a sibling (A) and she was temporarily removed from home to live with an Aunt. At that time it was decided that the cause of death was unascertained, the parents were not responsible and the CPS did not prosecute. No care proceedings were ever issued in respect of A. After 3 weeks, A was returned to live with her parents. In 2013, the conclusions were reviewed and a report concluded that on the balance of probabilities the inflicted injuries were at least a significant contribution to, and probably the main cause of, Kye's death. The parents were arrested in September 2013 and care proceedings were initiated. A was taken into foster care initially under an emergency protection order, where she remained until the conclusion of the care proceedings later heard by Mr Justice Peter Jackson.

2014: Mr Justice Peter Jackson found that the injuries that Kye had sustained were non- accidental in origin[[23]](#footnote-23) and that the father was responsible for them

“On the first occasion, the father shook K in a manner clearly inappropriate for such a young baby. On the second, the father struck K’s head against a hard surface with enough violence to fracture his skull and cause fatal brain injuries.

He realised that K had been hurt, but instead of seeking help, put him in his Moses basket in the bedroom, hoping all would be well and determined to conceal what he had done.”

Mr Justice Peter Jackson’s criticisms of the 2011 investigation into Kye’s death were withering. The care hearing concluded before a criminal trial took place or was even in process. The Family Court cannot delay decision making for a child and will timetable its evidence and decision making whether or not a criminal trial is proceedings or when it might be heard. Jackson J heard this case because there was A’s welfare to consider and she couldn’t wait in limbo, in foster care, not knowing whether she was to return home or move to another family (delay being inimical to the welfare of the child).

2015: After the care case, the criminal investigation was reopened and that led to the father being charged with manslaughter in March 2015. He came to trial later that year and was acquitted[[24]](#footnote-24).

**Other examples**

The case reported as**Wigan Borough Council v Fisher & Ors[2013] EWHC 3770 (Fam)**and **Wigan Borough Council v Fisher & Ors (Rev 1)[2015] EWFC 34**, where it was found that a father had caused severe injuries to his baby daughter.  He was subsequently acquitted by a jury*.*

[**Wigan Council v M & Ors (Sexual Abuse: Fact-Finding) [2015] EWFC 6**](http://www.familylawweek.co.uk/site.aspx?i=ed158260)**,**where the Family High Court found that a step-father had sexually abused his two step-children.  No criminal charges have been brought.

 **CASE 3**

Jayden Wray: a baby boy dead at 4 months

*Declaration: I acted for Chana Al Alas in the Family Trial before Theis J that I describe below.*

**The Background**

**The birth:** The mother, Chana, was just 16 and the father 19 when Jayden was born. Jayden was born in 7.3.2009. His mother breast fed her baby from birth.

There were no concerns re Jayden or the couples’ parenting until the baby was admitted to University College Hospital (UCH) on 22.7.09 aged 4 months. He died 3 days later at Great Ormond Street Hospital (GOSH).

**The clinical picture pre collapse:** Jayden had fed and gone to sleep as normal but the parents had woken to find his tongue 'stuck' to the roof of his mouth. He wouldn't feed. The parents rang the out of hours emergency medical help line and were told to take him to the GP, which they did later that morning. At some point they noticed 'fit like' movements. They told the GP: he noted the unusual appearance of the tongue, carried out a physical examination, noted the parental concern re fitting but described the baby as 'awake' on examination. Given that Jayden had been taken by the parents to UCH a week before over concerns he had flu, the GP erred on the side of caution and referred the baby to UCH walk in clinic. This wasn't seen to be a clinical emergency. No ambulance was called by the clinic and the parents made their way to UCH by public transport.

**The receiving hospital UCH:** On clinical reception Jayden showed further signs of fitting observable by nursing staff but not identified or immediately acted on by the receiving consultant paediatrician The fitting continued and only after a second assessment by the same paediatrician, was Jayden referred to A & E where he was assessed as 'A' (for Alert) on the AVPU range and 13/15 of the Glasgow Coma Scale. Despite emergency treatment to contain his seizures, Jayden's condition deteriorated rapidly, the fits increased in intensity and he showed signs of decerebrate posturing. Jayden was referred for intubation and a skull x-ray to see if emergency neurological surgery was needed. There was a 90 minute delay in intubation, the tube was wrongly inserted and led to the collapse of a lung, this was not immediately detected, when it was remedied was untimed and, what was intended to be a 30 minute absence from paediatric care, turned into a 4 hour period after a skull fracture was detected and clinical concern turned to NAI.  The examination of his clinical presentation, deterioration and medical treatment in this 4 hour period off ward became a critical factor in the care case. Although a UCL radiologist queried rickets based on a chest X-ray taken to look for infection, this was discounted by the paediatrician on the basis that calcium levels appeared normal. Jayden remained in the radiology department for 4 hours while he underwent further CT scans and an MRI scan, which showed he had suffered a skull fracture, brain injury and subdural haemorrhage. Professionals at the hospital were now deeply suspicious that the parents had inflicted Jayden's injuries. He was transferred to Great Ormond Street. In the meantime his condition had further deteriorated, and he was still showing signs of seizures.

**Transfer to GOSH:** arrival at 19:45 22.7.09. Once at GOSH, Dr Peters, Consultant Paediatric Intensivist assessed Jayden's condition as incompatible with life; Jayden's presentation pre admission to and at UCL was not given in detail by UCL or enquired after by GOSH. Dr Peters acknowledged that the system in place for transfer of the notes was "chaotic". NAI was strongly suspected by Dr Peters and his team and investigations undertaken to consider that possibility. Jayden was found to have retinal haemorrhages to add to the picture presented by subdural haemorrhages and encephalopathy. By 22.10 that evening Dr Peters felt able to record in Jayden's notes ‘in the absence of any explanation this has all the features of inflicted head trauma’*.* (This remained Dr Peter's evidence throughout the criminal and care proceedings despite the clinical picture that emerged therein). In addition, skeletal fractures were identified by Dr Hiorns, consultant paediatric radiologist upon reviewing a skeletal survey. Dr Hiorns concluded that all 11 fractures detected were likely to have been caused by non-accidental injuries, and **specifically discounted metabolic bone disease as a cause**. She also timed the fractures as all between 0-7 days old, i.e. potentially contemporaneous with the baby's collapse.

**The death**: on 23.7.09 the parents were arrested at GOSH at Jayden's bedside on suspicion of GBH. They never saw Jayden again. He died on 25th July. Although released on police bail, conditions prohibited their ability to return to GOSH where Jayden was christened and died at GOSH on 25th July 2012.No parent or family member was allowed to be present.

**The Post Mortem:** Dr Scheimberg was instructed by the Coroner to perform the post mortem (against the express wishes of the police). She observed radiological signs of rickets on the GOSH X rays confirmed by her physical examination of the ribs and skull.

During the course of the post-mortem she snapped one of the ribs. She described snapping one of the ribs with her fingers by a flicking/twisting motion. This is confirmed by Dr Rouse. She said she has been snapping baby’s bones at post mortems for 15 – 20 years; she does it as a matter of course. She said she found it *‘brittle’* it was *‘too easy to crack’*. She said she finds it hard to find the right word, but to her brittle means is that it’s too easy to break compared to a normal bone. She said it did not feel like the rib of a 4 ½ month old child, it felt more like a new-born baby.

She initiated requests for Vitamin D testing of Jayden and his mother and faced subsequent police criticisms in the criminal trial for so doing.

Tests results initiated by Dr Sheimberg later showed that Chana had severe vitamin D deficiency passed to Jayden in utero leading to congenital rickets, a condition that became more severe in life as the mother’s Vitamin D deficiency remained undetected and continued to be passed on to Jayden through her breast milk. Unbeknown to her (or anyone else) the fact that she breastfed Jayden almost certainly further contributed to his vitamin D deficiency. Chana had never been given any advice about Vitamin D deficiency. Her own levels were not tested, neither were her baby's.

**The Cause of Death? Conflict between the pathologists**

Dr Scheimberg (instructed by the Coroner) conducted the post mortem alongside Dr Rouse. Dr Scheimberg concluded that the death was as a result of hypoxic ischemic injury, cause undetermined in the context of severe Vitamin D deficiency and rickets.

Dr Cary (forensic pathologist instructed by the metropolitan police) observed the post mortem. He concluded that Jayden died as a result of non-accidental injuries (shake/ impact). The parents were charged with murder and causing or allowing the death of a child.

**A baby is born: Jayda**

Meanwhile Jayda was born to the couple on 17th October 2010. Chana was compelled to give birth in isolation without the presence of her partner or any family member to support her, witness the birth or to hold the baby. Chana was 18 years old. Police and social services feared that Chana, her partner or family members might deliberately injure the new born baby to try to prove that Jayden's injuries had been birth related. Jayda was removed; literally, at birth into police protection. Chana was not allowed to hold or see her new born baby and was only given a picture to have at the insistence of her midwife. Jayda was placed in foster care where she remained until the conclusion of the Theis J case.

**The criminal trial**

Chana Al-Alas was by the time of the trial, 19, and Rohan Wray, 22. They had lived under the shadow of suspicion for over 2 years. Both denied murdering their child and causing or allowing his death. The prosecution said the brain damage could only have been caused by the trauma of Jayden having been shaken or his head having been hit against something. But the defence said it was only after Jayden died that it was discovered he had rickets owing to an undiagnosed Vitamin D deficiency in his mother. This would have caused him to have weak bones, including a weak skull, and could have caused a series of fractures. The Old Bailey court heard that Jayden died from brain damage and swelling but nearly 60 medical, professional and expert witnesses were unable to agree the cause.

On 9th December 2011, a jury returned not guilty verdicts on the direction of the judge after prosecutors withdrew the charges.

Judge Stephen Kramer said: "The further and deeper one delves into the evidence, the more complex it becomes. We could not have got to this stage without a proper investigation, examination and exploration of the evidence on all sides."

Despite the acquittal at the direction of HHJ Kramer QC and his reasoned judgment for withdrawing the case from the jury, LB Islington initiated section 31 proceedings against the parents, adopting the Crown’s experts as their own, mindful another sibling had been born to the young couple, that the standard of proof was lower in the Family Courts and the Crown’s criminal prosecution experts were maintaining their opinion evidence that Jayden had died from injuries inflicted on him by one or both of his parents.

Thus, in 2012, the parents again faced the allegation that Jayden was a victim of baby shaking, demonstrated by the classic TRIAD of injuries (subdural haematoma, encephalopathy and retinal haemorrhages) to which fractures at multiple sites and of varying ages added additional evidence of violence to substantiate death through non accidental injury. With the Crown experts now forewarned as to the parent's defense of death due to the effects of Vitamin D deficiency and fractures caused by rickets, and the lower standard of proof in family proceedings, those acting for the parents faced a case made more complex by the medical and scientific evidence rather than simplifying it. It appeared that the experts had become polarized in their beliefs.

Despite a positive independent social workers assessment, the family's belief that neither Chana nor the father would ever have hurt Jayden made them all unacceptable family placements in the view of the local authority. It was said they lacked insight into the risk of harm posed to Jayda by Chana Al Alas and Rohan Wray. Jayda remained in foster care. It took the High Court’s decision for the parents to see and hold their baby. Supervised contact between Jayda and her parents was ordered. It was, week by week, month by month seen to be exemplary. Jayda waited 18 months for a decision on whether she could be rehabilitated or would be adopted.

**EXPERTS, the TRIAD and its alternative, a benign cause of collapse and death [[25]](#footnote-25)**

The Family Court had the assistance of many eminent experts covering many disciplines: paediatric pathology, ophthalmology, osteopathology, neuropathology, radiology, mechanical forces, midwifery, and paediatrics. Their opinions had to be based on the facts identified by the court in the course of Jayden’s treatment in life by the parents and by the medical treatment he received.

It emerged that Jayden had been seen by health professionals on 30 occasion’s right up to 5 days before they brought him to UCH, and at no stage did they see any signs of bruising or pain. The parents argued, through American experts Professors Barnes and Miller, that as a result of rickets, it was impossible to conclude that any of Jayden’s fractures could have been caused by anything other than normal handling.

In respect of the fractures, the LA relied on the evidence of Professor Malcolm, an osteopathologist, who stated that whilst some of the fractures could have been due to rough handling/rickets, the skull fracture, the metaphyseal fractures and two other fractures were due to non-accidental injury. None of the fractures were dated by him as having occurred within 5 days of death: the skull fracture was 7 – 14 days old i.e. not connected to Jayden’s death. The description of Jayden’s rickets as ‘moderate to severe’ by Dr Scheimberg was agreed by Professor Malcolm, **who conceded that he had only had only ever come across a case of rickets as severe as Jayden’s in the 1970’s**. However, it emerged that the medical research he relied on lacked firm foundation for the conclusions he drew.

Professor Malcolm expressed the view that recent haemorrhage around the site of the skull fracture and traumatised fissure took place within 24 hours of death, which was when Jayden was on intensive care at GOSH and denied contact with his family. This contradicted the prosecution case advanced at the criminal trial and adopted by the LA that this bleeding was evidence of inflicted trauma contemporaneous with Jayden’s collapse. It was not suggested by anyone that Jayden had been injured whilst on the ward at GOSH but the fact he had sustained such bleeding whilst on the PICU did evidence the fact that he was a “very fragile child”.

In respect of head injury and ‘the triad’, the parents’ expert evidence suggested that the retinal haemorrhages could have been caused by raised intra-cranial pressure; the subdural bleeds through hypoxia, which had been caused through sustained seizures. It became apparent not only from the evidence of medical witnesses who saw Jayden before and shortly after his admission to UCH but from the CCTV of the bus journey that the parents took that morning (which had not been made available during the criminal trial but was obtained for the family trial) that Jayden was conscious when he arrived at UCH. There was consensus amongst the experts that had Jayden’s injuries been caused by inflicted trauma, he would have been noticeably very unwell immediately. Dr Mark Peters had stated at the criminal trial that he would have expected the child to have collapsed immediately or 2 minutes after having been subjected to trauma. When Dr Peters learned that Jayden had been assessed as ‘alert’ soon after arriving at the hospital, he expressed surprise and sought to argue that the health professionals had been mistaken in believing Jayden was conscious and that they were using an outdated assessment chart. It was argued against the parents that Jayden was in fact exhibiting signs of “decerebrate posturing” on admission rather than seizures, a sign of profound neurological abnormality caused by irreversible brain injury.

The key period in understanding Jayden’s decline and death was identified as being a four hour period after Jayden’s intubation when he moved between different imaging departments at UCH without effective management of his seizures or his CO2 levels. In this period, seizure medication was drawn but not administered until the retrieval team arrived at 6pm. On intubation the tube had been wrongly placed causing one of his lungs to collapse but this was not identified for at least 20 minutes. After this Jayden’s CO2 levels had risen to dangerous levels but by then he was probably en route to or at the radiology department and it was unclear when the tube had been correctly positioned. By the end of the afternoon when the retrieval team arrived, his condition had deteriorated to the extent that there were clear signs of raised ICP (intra cranial pressure) which the team struggled to control, even with very aggressive treatment. Expert evidence, (contradicted by Dr Peters) suggested the fluctuating CO2 levels and raised ICP could have contributed to his deterioration, as well as the hypoxic-ischemic injury he suffered. Both ophthalmologists agreed this could have been the cause of his retinal haemorrhages.

**The Outcome in Crime and Care**

Acquittal in the criminal court does not always presage rejection of the self-same allegations in the family court. In this case it did, but the young bereaved parents had been sorely tested.

To recap: The parents had faced and been acquitted of a murder charge heard at the Central Criminal Court which had lasted for 6 weeks. Jayden had been dead for 2 years and 4 and half months by the time the Old Bailey Judge, on 9.12.11, directed the jury to acquit the parents due to conflicting expert evidence. Jayden had not yet been buried. The inquest into his death was awaiting the outcome of the criminal, and then the care proceedings. The parents had never returned to the former home having been compelled to leave it as they left Jayden for the last time in hospital as it was ‘the scene as the crime’. Their names and faces had been all over local and national media. They had had to ask one another if the police medical evidence was true: had the other hurt their son? They stayed together and had another child as the investigations rolled on. By the time the criminal trial collapsed Jayda was by then 14 months old. She had never lived with her parents and saw them only restricted times under close supervision. Her future was to be determined in the family division. The parents endured a 5 week trial in the High Court of the Family Division to argue for her return to their care.

The findings of the Family Division Judge Mrs Justice Theis, who heard their case, were that:

* all fractures were a product of rickets;
* death was attributed to a constellation of benign causes;
* severe vitamin D deficiency rendered the baby vulnerable to infection and seizures;
* ongoing seizures led to raised intracranial pressure, retinal haemorrhages, subdural haematoma and culminated in hypoxic ischemia brain injury and death;
* Jayden was conscious and was suffering from seizures when he arrived at UCH which were not adequately brought under control during his treatment at UCH which she described as sub optimal.
* Dealing with the triad of injuries, she concluded that the retinal haemorrhages were more likely to be secondary to Jayden’s hypoxic ischaemic injury, and the encephalopathy was not due to inflicted trauma. However, she concluded that the subdural haemorrhage (SDH) was more likely to be caused by trauma (of undetermined origin) and that further research was required
* She stated that her finding on SDH had to be looked at in the context of her findings about the other component parts of the triad, the clinical history and her assessment of the parents.

Judgment was publicly handed down by Theis J on 19.4.2012 after the conclusion of a second hearing listed to determine if any of the clinicians, professionals or experts named within the judgment, or the institutions they were employed by, should be anonymised. Lawyers for Chana led the argument that there should be full publication of the judgment and that she should have total freedom to name those who had failed her and her son. Chana Al Alas wanted to be able to reclaim her daughter with pride, without the fear that suspicions surrounding the death of Jayden would haunt the family, blighting their future family life just as they had a chance to become parents again.

Chana Al Alas and Rohan Wray were reunited with the baby Jayda who, at 18 months old, had never lived with them. Their dead baby Jayden could at last be released to them for burial.

**A Post Script**

In cases like Al Alas there is a small pool of available experts. The science on which their opinions depend is complex and sometimes controversial. The acceptance or rejection of those opinions by the court has a pivotal effect on the outcome for the family at the heart of the case. But for the vigilance of Dr Irene Scheimberg, the paediatric pathologist who conducted the post mortem, Jayden's Vitamin D deficiency and rickets may have gone undetected in death as it had been in life and the outcome of the criminal and care case for the parents and Jayda may have been very different. The importance of open minded experts in cases such as this cannot be under estimated.

This case predated the revised directions about timescales for a care case and the 26 week time table. I fear we could not have secured Jayda’s return under that programme.

I, along with fellow barrister Kate Purkiss, and our solicitor Anne Thompson represented Chana Al Alas in her Family Division trial. We worked closely and collaboratively with her lawyers instructed in her criminal trial. We were and remain proud to be Legal Aid lawyers.

**SECTION C: Concluding Remarks**

Child abuse is the stuff of nightmares: but so is being falsely accused of harming your child.

As Lady Justice Hale said **In Re B** when giving the lead judgment reaffirming the balance of probabilities as the appropriate test in care proceedings

1. There are some proceedings, though civil in form, whose nature is such that it is appropriate to apply the criminal standard of proof. Divorce proceedings in the olden days of the matrimonial "offence" may have been another example (see Bater v Bater [1951] P 35). But care proceedings are not of that nature. They are not there to punish or to deter anyone. The consequences of breaking a care order are not penal. Care proceedings are there to protect a child from harm. The consequences for the child of getting it wrong are equally serious either way.
2. As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.

From the point of its birth the child has rights of its own to live a life without being subjected to significant harm and abuse within its family.

Children have both the right to life under article 2, and the right not to be subjected to torture or inhuman or degrading treatment or punishment under article 3, of the European Convention on Human Rights. States are required to take measures to protect them, principally in form of effective deterrence through the criminal law (***A v United Kingdom* [(1999) 27 EHRR 611](http://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/ECHR/1998/85.html" \o "Link to BAILII version))** but also through taking steps to remove them from an abusive situation about which the authorities knew or ought to have known.

The ‘right’ of a child to life and the right not to be subject to inhuman or degrading treatment matters more than the ‘right ‘of his or her parents to care for their child if by so doing the child has or may suffer serious harm which has or may blight its healthy development.

The family court looks to the Threshold Criteria (s 31 of the Children Act) to set the boundary for state intervention in a family’s life. Suspicion is not enough. It is because the welfare of the child is the paramount consideration of the court that explains the many differences between the legal framework of the criminal and care jurisdictions. Every decision the court makes; the remit of the evidence to be called; what expert evidence is permitted; how the trial is to be structured; who plays a part in it: all of these case management decisions are determined by, what the judge determines to be, the child’s best interest. Their welfare is paramount. The extent to which family courts get it right or wrong will always be the subject of intense debate, and rightly so.

Babies die at home in parental care and the Family Court has to determine if death came about by violence or from a benign cause mimicking abuse.

In alleged Non Accidental Injury cases the significance of Vitamin D deficiency, rickets, genetic abnormalities and rare syndromes affecting bone density are emerging as areas that have to be put into the equation when the alternative is that a carer has hurt, maimed and/or killed their child

The link between science, emerging medical research and the welfare of a child has never been so intertwined and important. You may have recently read in the media of a case concerning a family who had their children removed and adopted because of findings of abuse by the parents when they and the court were unaware that the mother had a genetic abnormality called Ehlers-Danlos Syndrome which might have relevance to the injuries the child sustained[[26]](#footnote-26)? More and more of these cases are being explored at court as science evolves in its understanding of how the body works.

As the legal profession struggles to keep up with the evolving science in relation to the alleged inflicted trauma, the Court in care proceedings is enjoined to “never forget that today’s medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark” **R v Cannings [2004] EWCA Crim 1; [2004] 1 WLR 2607.**

Science is constantly evolving and miscarriages of justice have happened with parents wrongly accused of shaking their child to death based on scientific research and hypothesis, genuinely held, but discarded or refined as science develops.

It is a gross injustice to child and parent alike for social workers, backed by medical opinion, to wrongly remove children from their families accusing the parents of abuse, but it is equally unacceptable for vulnerable children to be left at home to suffer abuse at the hands of those who should protect them. Take your pick as to which angle makes headline news in relation to the story of the day.

For the time being, the criminal justice system offers a remedy *ex post facto* and the family justice system attempts intervention at an earlier stage before such abuse has occurred, if not to protect the child who has already been harmed or killed, then at least to protect any vulnerable siblings who might also be at risk.

Society needs a rational debate about how to balance the rights of a child, when there is a conflict between a children’s right to grow up in its family of origin and at the same time offer protection against parental abuse or neglect within that family. Cases in which a baby dies and parents face allegations of shaking it to death are amongst some of the most emotive and difficult cases the courts have to decide. Please come to listen, learn and question what is at stake in our family justice system and the families that become drawn into it as I explore these issues in my next two lectures.

2nd March ‘**Crime and Punishment 2: ‘Guilty Until Proven Innocent?**’

12th April: **‘Expert Witnesses: A Zero Sum Game?[[27]](#footnote-27) [[28]](#footnote-28)**

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1. Sex, Death and Witchcraft: <https://www.gresham.ac.uk/lectures-and-events/sex-death-and-witchcraft-what-goes-on-in-the-family-court-room> [↑](#footnote-ref-1)
2. 2nd March 2017 <https://www.gresham.ac.uk/lectures-and-events/guilty-until-proven-innocent> The issue of Shaken Baby or Natural Cause will be examined, using a case study involving a bereaved parent, the transformation of a family home into a crime scene, with the pregnant mother facing a murder trial and her baby removed at birth. Exoneration and reunification, despite a jury acquittal, did not happen until the Family Court's decision. The lecture will explore how such a decision was arrived at and the impact it has had on our understanding of Non Accidental Injury (NAI) versus undiagnosed rickets and Vitamin D deficiency that can mimic gross abuse.
 [↑](#footnote-ref-2)
3. Please see my first lecture Sex Death and Witchcraft for an explanation about the differences between public family law and private family law [↑](#footnote-ref-3)
4. 1 Welfare of the child Children Act 1989

(1) When a court determines any question with respect to –

(a) the upbringing of a child; or

(b) the administration of a child’s property or the application of any income arising from it, the child’s welfare shall be the court’s paramount consideration. [↑](#footnote-ref-4)
5. s31 (2) Children Act 1989: 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; or

(ii) The child’s being beyond parental control [↑](#footnote-ref-5)
6. The statutory definition in the Children Act 1989 states that 'harm' means ill-treatment or impairment of health and development. Ill-treatment includes sexual abuse and forms of ill-treatment which are not physical, thus including emotional abuse. Physical abuse itself is not explicitly included, but this is taken as read. 'Health' includes both physical and mental health, and 'development' includes physical, intellectual, emotional, social and behavioural development. To assess whether health or development are being significantly impaired the Act tells us to compare the health or development of the child in question 'with that which could reasonably be expected of a similar child’. The definition of significant harm also includes 'impairment suffered from seeing or hearing the ill-treatment of another'. [↑](#footnote-ref-6)
7. [↑](#footnote-ref-7)
8. http://www.bailii.org/uk/cases/UKHL/2008/35.html [↑](#footnote-ref-8)
9. Save for contested divorce or nullity or trials involving the liberty of the subject such as Contempt of Court proceedings [↑](#footnote-ref-9)
10. <http://www.barcouncil.org.uk/media/58802/court_dress_020609.pdf> [↑](#footnote-ref-10)
11. s97 Children Act 1989 makes publication of information identifying a child, his school or his address a criminal offence [↑](#footnote-ref-11)
12. s12 Administration of Justice Act 1960 defines circumstances where publication may amount to a contempt of court, [↑](#footnote-ref-12)
13. https://www.judiciary.gov.uk/wp-content/uploads/2014/01/transparency-in-the-family-courts-jan-2014-1.pdf [↑](#footnote-ref-13)
14. <https://www.gresham.ac.uk/lectures-and-events/expert-witness-a-zero-sum-game> : The use of experts in the family courts can make a significant difference to outcomes. The debate about the use of experts in court cases reflects the conflicted stance society takes on the emotive issue of child protection. It is a gross injustice to the child and parent for social workers, backed by ‘expert’ opinion, to wrongly remove children but it is equally unacceptable for vulnerable children to be left at home to suffer abuse. [↑](#footnote-ref-14)
15. By s.98 of the Children Act 1989:

(1) In any proceedings in which a court is hearing an application for an order under Part IV or V, no person shall be excused from–

(a) giving evidence on any matter; or

(b) answering any question put to him in the course of his giving evidence,

On the ground that doing so might incriminate him or his spouse of an offence.

(2) A statement or admission made in such proceedings shall not be admissible in evidence against the person making it or his spouse in proceedings for an offence other than perjury. [↑](#footnote-ref-15)
16. It is outside the range of this talk but **A Local Authority v DG and Others 2014** provides a clear example of the conflict between the court’s desire to have the best evidence before it to decide what happened to a child and the adults interest in self-protection: <http://www.bailii.org/ew/cases/EWHC/Fam/2014/63.html> [↑](#footnote-ref-16)
17. http://www.cps.gov.uk/publications/docs/third\_party\_protocol\_2013.pdf [↑](#footnote-ref-17)
18. Re S (A Child) [2014] EWCC B44 (FAM).  At paragraph 33 of his Judgment, Munby P lists three different situations in which extensions beyond the 26 week limit might be necessary:

1)where the case can be identified from the outset, or at least very early on, as one which it may not be possible to resolve justly within 26 weeks. (a) very heavy cases involving the most complex medical evidence where a separate fact finding hearing is directed; (b) FDAC type cases; (c) cases with an international element where investigations or assessments have to be carried out abroad; and (d) cases where a parent's disabilities require recourse to special assessments or measures.

2) Where, despite appropriately robust and vigorous judicial case management, something unexpectedly emerges to change the nature of the proceedings too late in the day to enable the case to be concluded justly within 26 weeks. E.g.)(a) cases proceeding on allegations of neglect or emotional harm where allegations of sexual abuse subsequently surface; (b) cases which are unexpectedly 'derailed' because of the death, serious illness or imprisonment of the proposed carer; and (c) cases where a realistic alternative family carer emerges late in the day.

3) Where litigation failure on the part of one or more of the parties makes it impossible to complete the case justly within 26 weeks. [↑](#footnote-ref-18)
19. Facts as recited by Jackson J: **Cumbria County Council and Anor (No 7) (Fact-Finding: No 2) [2016] EWHC 14 (FAM)** [↑](#footnote-ref-19)
20. <http://www.bailii.org/ew/cases/EWHC/Fam/2016/14.html> [↑](#footnote-ref-20)
21. http://www.bbc.co.uk/news/uk-england-cumbria-34916513 [↑](#footnote-ref-21)
22. Cumbria County Council v M & Others [2014] EWFC 18 [↑](#footnote-ref-22)
23. The court had instructed several medical experts to consider the evidence (Neuropathologist, Pathologist, Neurosurgeon, Neonatologist and Osteoarticular Pathologist), who reached the agreed conclusions set out at paragraph 41 of the judgment. The agreement as to the cause of death was (para.41 (8)): "… a hyper acute traumatic head injury which occurred at the time of K's collapse and cardiac arrest… Trauma could easily explain everything found in this case and appears to be the only explanation based on the clinical and pathological features". [↑](#footnote-ref-23)
24. Although the family court had considered the evidence re Kye’s death in 2014 the judgment was not published until 2016 well after the conclusion of the criminal trial in 2015. The father opposed the full publication of the judgment; all other parties in the care case supported it.

A post script was added to the 2014 judgment to explain why

*80. The publication of the above judgment was delayed for two reasons.  The first concerned the renewal of the criminal investigation into the death of K.  As a result, the father was charged with manslaughter.  At his trial, during which he exercised his right not to give evidence, he was acquitted by the jury.  The second reason related to an issue of police disclosure that had to be resolved before publication.  I describe that issue in a separate judgment at*[***[2016] EWFC 27***](http://www.familylawweek.co.uk/site.aspx?i=ed160925)***.***

He then continued at

 *82. A decision about whether to publish a judgement in circumstances of this kind always requires careful consideration. …..  In a case of this seriousness, there is a very strong public interest in being informed of the decisions that are made in its name, both in the particular case and generally.*  [↑](#footnote-ref-24)
25. **Abusive head trauma** (**AHT**), which used to be referred to as **shaken baby syndrome** (a term no longer used), is a constellation of medical findings (often referred to as a "[triad](https://en.wikipedia.org/wiki/List_of_medical_triads_and_pentads)"): [subdural hematoma](https://en.wikipedia.org/wiki/Subdural_hematoma), [retinal bleeding](https://en.wikipedia.org/wiki/Retinal_hemorrhage), and [brain swelling](https://en.wikipedia.org/wiki/Cerebral_edema) which some [physicians](https://en.wikipedia.org/wiki/Physician) have used to infer [child abuse](https://en.wikipedia.org/wiki/Child_abuse) caused by violent shaking [↑](#footnote-ref-25)
26. http://www.nhs.uk/Conditions/ehlers-danlos-syndrome/Pages/Introduction.aspx [↑](#footnote-ref-26)
27. 12th April 2017 [↑](#footnote-ref-27)
28. https://www.gresham.ac.uk/lectures-and-events/expert-witness-a-zero-sum-game [↑](#footnote-ref-28)