The judgment is being given in public on the basis that, save with the prior leave of the court, in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Case No: BM 04 CO 7115

Neutral Citation Number: [2005] EWHC 2885 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th December 2005

Before :

THE HONOURABLE Mr JUSTICE CHARLES

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Between :

Birmingham City Council	**Applicant**
- and -	
Mrs H	**First Respondent**
Mr H	**Second Respondent**
S (acting by her Guardian)	**Third Respondent**

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Roger McCarthy QC and Dermot Casey (instructed by **BCC**) for the **Applicant**
Ian Peddie QC and Joanne Briggs (instructed by **William Bache & Co**) for the **First and Second Respondents**
Paul Lopez (instructed by **Osbourne & Co**) for **S's Guardian**

Hearing dates: 14 to 24 November 2005

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Judgment

Charles J :

<u>Preliminary</u>

1. I am giving this judgment in public in an anonymised form. I give my reasons for this later.

2. This introduction is inevitably a restricted account of events and because of that it does not give a full picture. A fuller background is provided by earlier judgments of Bracewell and Kirkwood JJ. I have decided to place them in the public domain in an anonymised form and on the basis of an injunction preventing the identification of persons concerned. I give my reasons for this later.

3. I shall refer to the child who is the subject of this case as S. She is the third child of the first and second respondents who I shall refer to as Mr and Mrs Haynes, because this is the pseudonym they have been known by in the media.

4. The parents have been married for a number of years and they have had two other children. Their first child P died on 29 January 1999 aged 4 months. Their second child K was born in early 2000. She has been adopted.

5. The cause of P's death was a central point of the proceedings relating to K. Those proceedings included what are commonly called a fact finding hearing and a disposal hearing. They also contained a hearing at which the parents sought the discharge of the care order. That application was refused. The first two hearings were before Bracewell J and the later hearing was before Kirkwood J. They gave judgment on respectively 29 June 2000, 7 November 2000 and 11 October 2001. The second judgment of Bracewell J was delivered in an anonymised form in open court, and is therefore a public document. I have adopted most of her anonymisation.

6. At the fact finding hearing in June 2000 Bracewell J found to the civil standard of proof that Mrs Haynes had obstructed P's airways on four separate occasions leading to cerebral oedema and his death on the last episode. In short that Mrs Haynes killed P and had intentionally obstructed his airways on three previous occasions. In doing so Bracewell J heard medical evidence and evidence from Mrs Haynes (and others). Bracewell J analysed and made findings on such evidence. She rejected the evidence of Mrs Haynes concerning the history of the four episodes and did not find her to be a truthful witness.

7. Both Mr and Mrs Haynes have always rejected the findings of Bracewell J and have maintained that A's death was caused by a natural cause or causes. This rejection is recorded and commented on in the second and public judgment of Bracewell J.

8. It is common ground between all the medical experts who have considered this case (and there have been a great number) that the undisputed elements of the history relating to the four incidents are consistent with, but not diagnostic of, P's airways being intentionally blocked. It is also common ground that in respect of each of the four incidents Mrs Haynes had the opportunity to do this and that no other person did. In this context there is, of course, nothing unusual in a mother being the person who is most often alone with her baby.

9. The issue relating to the cause of P's death (and the earlier incidents) was, and is, whether they have a natural or non-accidental cause or causes or whether Mrs Haynes was responsible for them and therefore inflicted harm on P.

10. Amongst the medical evidence heard and read by Bracewell J was evidence from two paediatricians Professor Meadow and Professor X. It is already in the public domain that the Professor M referred to by Bracewell J in her public judgment is Professor Meadow. These experts disagreed. Professor Meadow was of the view that it was more likely than not that A's death was caused by the mother as Bracewell J found was the case. Professor X proceeded on the basis that the account of the history given by Mrs Haynes was truthful and was of the view that it was more likely than not that the cause of the incidents and thus of A's death was an unknown metabolic cause. Bracewell J found that parts of the accounts given by the mother to Professor X were not accurate or intended to be helpful in finding the truth.

11. Thus the parents had support from Professor X, and the upshot of all the medical evidence in June 2000 was that the choice was between smothering and an unknown metabolic cause. A considerable amount of work and investigation had been done by a number of doctors as the background to that conclusion.

12. At the disposal hearing in November 2000 Bracewell J made a care order with a care plan for adoption.

13. In 2001 there was an investigation by the police prompted at least in part by the parents reporting Professor Meadow and another doctor to the coroner and the police for perjury and to the GMC for misconduct. The parents had enlisted the help of a councillor to act on their behalf. During that investigation a number of other medical experts became involved. Professor X's position remained the same. Kirkwood J considered the additional medical evidence and the criticisms then levelled at Professor Meadow. He concluded that there was absolutely nothing in the medical material that had arisen since June 2000 to show that the finding of Bracewell J was apparently wrong and that, if anything, the result of the police inquiries reinforced it.

14. After the disposal hearing in November 2000 both parents sought permission to appeal the earlier findings made by Bracewell J in June and to appeal the care order. These applications were refused on paper by Thorpe LJ. The father sought a reconsideration at an oral hearing. There is a record of that application being refused but the father has no recollection of attending such a hearing. It seems that it may have been refused without a hearing on the basis that as the mother (who was then separately represented) had not made such an application the father (then in person) had indicated that he did not want an oral hearing. No application to appeal the order of Kirkwood J was made.

15. No criticism is made of the approach in law taken by either Bracewell J or Kirkwood J. I comment that the approach taken by Bracewell J has been confirmed by later cases to have been the correct one. It is manifest from her judgment that she recognised the respective roles of the court and the expert witnesses (to which I return later) and had regard to all aspects of the evidential jigsaw she referred to. She did not proceed on the basis of suspicion but on the basis of undisputed facts and facts found by her to the civil standard for the reasons she gave.

16. The parents do not now seek the return of K to their care.

17. S was born on 27 July 2004. The local authority commenced care proceedings in respect of her very shortly after her birth. She has been, and is, the subject of interim care orders and is placed with foster parents. She has never lived with her parents but has extensive supervised contact with them.

18. I was told by their counsel that the attitude of the parents has changed since the birth of S and thus since the disposal hearing before Bracewell J concerning K. I have not heard evidence as to this. It is however the case that the parents made it clear during the hearing before me that they do not wish to be identified by the media at this stage.

19. The parents oppose the making of a care order in respect of S and seek her return home.

20. A central issue in the current proceedings is the effect in them of the findings made as to the cause of P's death in the proceedings relating to K. The local authority rely on those findings to establish the jurisdictional threshold for making a care order in respect of K, and thus the jurisdictional trigger to the court's ability to consider what order would best promote the welfare of S. The parents argue that those findings should not be so relied on.

The position reached in these proceedings

21. The dates for this hearing were fixed some time ago. They were fixed on the basis that it would be an effective hearing at which substantive decisions having a long term effect would be made. For a number of reasons this has not proved to be the case and it is common ground between the parties that the only welfare issues to be dealt with now relate to interim contact.

22. On 24 November 2004 Holman J made an order in the following terms:

> " Permission is granted to all parties jointly to instruct a further expert, whose identity is agreed between them and whose speciality is essentially that of a paediatrician. - The letter of instruction shall be agreed and signed on behalf of all parties. - Permission for all papers (including transcripts of judgments or evidence, or agreed notes of evidence) filed or to be filed in these proceedings and in the previous proceedings concerning K to be disclosed and supplied to that expert. Permission is granted for that expert to perform any examination of, or ethically justifiable tests upon, S that all parties including the Guardian agree. – Without limiting the scope of the instructions, the expert should be requested (a) the report on all aspects of the case relevant to the question of whether or not the mother injured P, and (b) to comment on all issues raised by Dr Z [a doctor instructed by the parents to whom Holman J had directed questions agreed by the parties were to be put] "

23. It is common ground between the parties that Holman J stated and directed that this order for directions was to be implemented in a stepped way by firstly inviting that further expert (paediatrician) to consider whether there had been any relevant medical advances or changes since June 2000. The order is not however so limited. Rather it sets a wide ambit of enquiry and investigation in that it directs the expert to report on all aspects of the case that are relevant to the question whether the mother injured P.

It also gives permission for a wide disclosure of documents to the newly instructed expert and sets a role for Dr Z (of whom more later).

24. Considerable difficulty was encountered in finding a suitably qualified and experienced paediatrician who would agree to carry out the task set by Holman J. This resulted in a foreign paediatrician being instructed, Professor Y. This did not occur until June 2005. At that stage none of the parties revisited, or invited the court to revisit, the stepped approach that Holman J had indicated should be taken and they agreed instructions to Professor Y on that "stepped basis". Certainly with hindsight it can be seen that this agreed course of action introduced a great risk that, as has happened, the case would not be ready for trial in November 2005. For example, this risk flowed from the point that the agreed instructions to this newly instructed expert did not contain any instructions for him to consider the parts of the evidence of Professor Meadow which are attacked or questioned by the parents (or any of the other parties) and enclosed a limited number of documents.

25. An attack on the evidence of Professor Meadow in the case concerning K has always been a limb of the parents' case. It can easily be appreciated why it was thought sensible and practicable in November 2004 to address this aspect of the parents' case at a later stage of an envisaged stepped approach and thus when relevant medical advances (if any) had been identified. It is less easy to see why it was agreed between the parties that this approach remained the appropriate one in June 2005 with a hearing set for November 2005.

26. I confess that I do not understand why the parties (and in particular the parents through their advisers) did not revisit the understanding relating to the implementation of the directions order made by Holman J in June 2005 when the matter was before me and I dealt with issues relating to interim contact. This is water under the bridge, but the unfortunate situation has now arisen because of the well known shortage of available court dates that decisions as to the future of S may be delayed until October 2006 (the first available court dates with appropriate time estimates have been fixed for June and October 2006).

27. After June 2005 problems were encountered in providing material to Professor Y. He has done a great deal of work. He attended at court on the first two days of the present hearing. He did not give evidence but took part in meetings with the parties and others. He was in court when his up to date position was explained to me.

28. As I pointed out in <u>Re R (Care: Disclosure: Nature of Proceedings)</u> [2002] 1 FLR 755 the advisers of <u>all</u> the parties have a duty to ensure that an expert is fully and properly instructed. It follows that all such advisers owe a duty to keep a close watch on the progress of this case and to make every effort to ensure that it is ready for trial on the dates now re-set for it and thus, in particular, to ensure that the relevant steps are taken to enable them to properly present their cases.

29. In this context it is important that all the parties closely consider and define the issues they maintain the court will have to consider and decide and thereby seek to ensure that new issues and requests for further investigations and expert or other evidence are not raised late in the day (or at the last moment). By the time set for the next hearings there will be considerable force in the point that S cannot wait any longer for decisions to be made as to where her home will be.

The lead up to the present hearing

30. Professor Y had indicated that in his view some further tests should be carried out to investigate possible natural causes of the incidents relating to P and his death. I understand that at least in general terms the possible natural causes to which these are directed were considered in 2000 and rejected as real possibilities. However I understand that both Professor Y and Dr Z are of the view that they merit further investigation on at least two bases. Firstly in the light of knowledge and practice in 1999 and 2000 and secondly having regard to developments in knowledge, testing techniques and approach since then.

31. During October there were a number of directions hearings. I directed that the parties were to identify further questions they wished the experts to deal with. These included questions directed expressly to the evidence of Professor Meadow and thus the challenges to it. There was also a meeting between Professor Y and Dr Z.

32. A major purpose behind the directions was to try and save the hearing in November 2005 as a hearing at which decisions that would affect the long term position were made. These attempts failed and during them a number of problems were encountered as to the delivery of papers and the location of samples for testing. This resulted in Professor Y receiving material very late in the day. It also seems that these attempts produced some confusion and dissatisfaction (or further dissatisfaction) in the mind of Dr Z as to his role, and the overall approach that was being adopted. I return later to his role.

33. I was keen to try and ascertain whether the challenge to the earlier judgment of Bracewell J could be conducted against a background based on assumptions and thus without the further testing being suggested being completed. With this in mind Professor Y was asked whether at this stage in the light of the range of the possible test results, and assumptions as to them, he could carry out the exercise set out in paragraph 89 of my decision in A County Council v K, D and L [2005] 1 FLR 851.

34. He was not prepared to commit himself on his views as to how likely any of these natural causes might be, or to commit himself to an overview which he would regard as satisfactory, before further tests and work along the lines he had suggested were carried out and before he had had more time to study material recently provided to him. It was thus (in my view correctly) common ground that a decision could not be made now as to the basis on which the court would treat the findings of Bracewell J concerning P (in the case concerning K) in this case.

35. Professor Y confirmed that the incidents relating to P were consistent with inflicted harm.

My present task

36. This is limited to giving further directions and dealing with interim issues concerning contact.

37. However to properly consider what directions should be made it is axiomatic that the issues that will, or may, arise are considered to see what the directions are directed to. The arguments the parties will, or might, advance set the parameters of the issues that the court may have to decide subject to directions that limit the arguments that can be put and to the court identifying points it thinks should be considered and argued.

38. I therefore discuss issues which I consider the court will probably, or may, have to address. In doing so I am conscious that I have raised issues not advanced by the parties and that I am not the trial judge.

Some general background

39. It is important to remember that in a case such as this there are a number of competing interests and considerations, so justice is at least a two way street. Issues of public policy and the purposes of the underlying legislation are relevant.

40. For example, in my view there are clear differences between Criminal proceedings and Family proceedings. A major reason for this is that the two types of proceedings have different purposes. They also have different standards of proof.

41. Importantly the overall underlying purpose of the Children Act 1989 is the promotion of the welfare of children. A Criminal court that convicts or acquits a parent, or allows an appeal against the conviction of a parent for inflicting harm on a child, is not concerned with the care and welfare of that injured child, or the siblings of that child, and thus where they should live. The Family court is so concerned provided that the statutory provision which gives it jurisdiction to interfere in the lives of a family is satisfied.

42. Proceedings for a care order or a supervision order (public law proceedings) have two stages commonly called (1) a threshold or jurisdictional stage, and (2) a disposal or welfare stage. The statutory threshold conditions which give the court jurisdiction have to be satisfied at the date of the relevant intervention by the local authority. If they are not satisfied the court does not have power to go on to consider making orders to promote the welfare of a child (and thus to protect the child).

43. There is thus an obvious importance in establishing where the jurisdictional threshold or line should be drawn. It provides protection to families (parents and children) from interference in their lives by public authorities and, if it is met, it permits child protection measures to be taken.

44. The local authority have the burden of establishing the jurisdictional threshold. To do so in this case they rely on the finding of Bracewell J that the mother inflicted harm on P. If that finding stands it is common ground that the jurisdictional threshold and thus the power of public authorities to intervene in the lives of Mr and Mrs Haynes and S exists.

45. If the second stage is reached the court has power to make a care order or a supervision order. The local authority has a duty to prepare a care plan and if one of those public law orders is made the local authority has statutory duties in respect of the child. Matters such as placement, contact and protective arrangements are included in the care plan. The court carefully considers the care plan before making a public law order. At this second or disposal stage the welfare of the child is the court's paramount concern.

46. The statutory roles of the court and the local authority were the subject of the decision of the House of Lords in Re S (Minors)(Care Order: Implementation of Care Plan) [2002] 2 AC 291 where Lord Nicholls identified that a cardinal principle of the Children Act was that once a final care order was made it is for the local authority to decide how to meet their parental responsibilities towards a child. So after the

making of a final public law order the powers of the court are limited and the statutory decision maker on matters relating to the upbringing of the child, who is the subject of the order, is the local authority.

The stark overall issues and the dilemma

47. They flow from the points that:

a) four incidents in P's life (the fourth of which led to his death) are consistent with, but not diagnostic of, him being the victim of inflicted injury (obstruction to his airways),

b) his mother had the opportunity to inflict such injury on all four occasions and no-one else has been identified who had such opportunities. This has the result that if the injuries were inflicted the only real possibility is that the mother was the perpetrator,

c) the incidents in P's life are also consistent with, but not diagnostic of, (i) an unknown metabolic cause or some other unknown or unidentified natural cause (the position in 2000), and (ii) potentially (and importantly) some medical possibilities that Professor Y considers merit investigation (or further investigation given the advances in learning and testing techniques since 2000) to see if they should now be included as real possibilities in the case of P, and

d) the mother with the full support of her husband denies that she caused P any harm.

48. It follows from points (a) to (d) in the preceding paragraph that unless either inflicted or natural causes are excluded as being real possibilities on medical (and other evidence) an assessment of the truthfulness of the mother's account of the history is a central, and possibly determinative, issue in the decision as to the cause of the four incidents relating to P. As I have said Bracewell J found that the mother was not telling the truth.

49. In a case under the Children Act findings are made to the civil standard (i.e. more likely than not).

50. If the mother's assertion that she never harmed P is true a finding that she inflicted harm on A has the consequence that the parents and their children are the victims of a tragedy. All who have addressed, and are addressing, the issues in this case recognise that. The Family and other courts are also very aware of, and sympathise with, the invidious position of a parent who has not injured a child when he, or she, is seeking to refute an allegation of inflicted injury when a natural or non-accidental cause has not been identified and the clinical presentation is consistent with, but not diagnostic of, inflicted injury.

51. The refusal of the parents to accept the findings of Bracewell J is consistent with their position throughout that Mrs Haynes did not harm P and those findings are wrong. However as appears from the published judgment of Bracewell J this refusal causes problems in the assessment of the risk the mother poses to her other children when that assessment has to be carried out against the background of that finding.

52. In contrast, if the mother's assertions that she never harmed P are not true and she did inflict harm on P it follows that if decisions as to the upbringing of K or S were to be made on the basis that she did not harm P the risk of a future tragedy namely that that child might also be harmed by the mother exists. The consequence of the risk if it materialises is very serious. It involves a risk or threat to life.

53. These possible tragic results identify the dilemma faced by the court, the local authority, the experts, the Guardian and the family (adults and children). In human terms that dilemma is essentially the same as that which existed, and was succinctly described by the County Court judge, in Lancashire CC v B [2000] 2 AC 147 (see at 149E).

54. The court is charged with making decisions in respect of that dilemma and thus decisions as to whether a child (here P) was the victim of harm inflicted by a carer. When doing so it is generally not dealing with certainties and has to make decisions which have a profound impact on the lives of the children and the adults affected by them.

The approach of the Family court to earlier findings and thus in this case the earlier finding that the mother inflicted harm on P

55. *Introduction.* In my view the approach has three stages. Firstly the court considers whether it will permit any reconsideration or review of, or challenge to, the earlier finding (here referred to by the parents as a review). If it does the second and third stages relates to its approach to that exercise. The second stage relates to, and determines, the extent of the investigations and evidence concerning the review. The third stage is the hearing of the review and thus it is at this stage that the court decides the extent to which the earlier finding stands by applying the relevant test to the circumstances then found to exist.

56. The issue can arise within proceedings relating to the same child (see for example Re M and MC (Care: Issues of Fact: Drawing of Orders) [2003] 1 FLR 461 (see in particular paragraphs 23 and 24). Indeed it arose in the proceedings relating to K when Kirkwood J carried out such an exercise and applied a test that, as I understand it, was either agreed, or not challenged.

57. *The first and second stages.* In this case relating to S the first stage has been passed because Holman J, in my view correctly, permitted a review. We are at the second stage.

58. In Re B (Children Act Proceedings: Issue Estoppel) [1997] 1 FLR 285 Hale J (as she then was) gathers together the earlier cases and gives guidance. From page 293 she goes back to first principles and explains that the inquisitorial or investigatory aspects of proceedings under the Children Act means that the concept of issue estoppel in purely adversarial civil litigation does not apply. Rather the court has a judicial discretion (i) not to allow parties to call evidence on and challenge issues decided in an earlier case (stage 1), and (ii) to regulate the evidence that can be called and the extent of any challenge to, and revisiting of, the earlier finding and thus the nature and extent of the inquiry relating to an earlier finding (stage 2). The court applies its discretion so as to work justice and not injustice.

59. This brief summary does not do justice to the very helpful guidance given by Hale J in *Re B*. There is no substitute for reading it in full. As it shows there are a number of

competing factors to be taken into account. I add that in my view the recent decision of the Court of Appeal in Re K (Non-accidental injuries: Perpetrator: New Evidence) [2005] 1 FLR 285 is also relevant at these stages.

60. One of the factors to be taken into account is the prospect that a rehearing will result in a different finding and thus in my view the prospect that it will result in the court concluding that it should not rely on the previous finding. If the latter position is reached, the question would arise whether a party sought to re-prove the relevant allegation (here, whether the local authority would seek to re-prove to the civil standard that Mrs Haynes inflicted harm on P).

61. *The third stage.* As she points out at page 296 F/G Hale J was not concerned with this stage in *Re B.* She however says that no doubt the trial judge would wish to consider whether there is some real reason to cast doubt upon the earlier findings.

62. At this stage, as well as at the earlier stages, the strong public interest in finality in litigation plays an important part. It supports the conclusion that before earlier findings are set aside, or are not to be treated as binding, a high test has to be passed.

63. At this stage it seems to me that analogies can be drawn from the approach taken by the Court of Appeal:

    a) in respect of appeals against a finding of fact where great weight is given to the decision of the judge whenever, in a conflict of testimony, the demeanour and manner in which relevant witnesses gave evidence are material elements (see for example the notes to RSC Order 59), and

    b) the approach of the Court of Appeal in the recent cases of Re U, Re B [2004] 3 WLR 753 and [2004] 2 FLR 263 (see in particular paragraphs 88 to 91 and 151 to 152) and Re U [2005] 1 WLR 2398 (in particular paragraphs 21 to 23) where the importance of the findings of the judge as to the credibility of the mother in that case (which were not appealed) were given weight in refusing permission to appeal and to reopen the appeal in the case of U, and in dismissing the appeal in the case of B.

In my view the approach taken by the Court of Appeal in these circumstances supports the view that the parents have to satisfy a high test to prevent the local authority and the court from relying on the earlier findings of Bracewell J, as to which firstly the Court of Appeal refused permission to appeal and Kirkwood J found that, if anything, it was reinforced by the result of the further enquiries in 2001.

64. An argument for a wider, or less rigorous, test might be based on *Re K* where the Court of Appeal ordered a rehearing. But, as appears later in this judgment there are problems in this case as to the extent of the issues that can now be fairly reheard. This does not seem to have been thought to be a problem in *Re K.*

65. I provided the parties with copies of a decision of my own (Re W [2005] EWHC 556 (Fam)) in which I revisited a finding I had made in the light of new medical evidence. There I had a clear recollection of the case and was quite confident that if the additional medical evidence (that the child suffered from Ehlers Danlos Syndrome VIB, which was not discoverable at the tine of the first hearing) had been before me at the first hearing I would not have concluded that the subdural and subarachnoid haemorrhages suffered by the child had been caused by culpable behaviour of his

carers. Thus I found that it had been demonstrated that, contrary to my earlier finding, the threshold conditions were not satisfied and discharged the care order.

66. I accept that each case is fact specific. However *Re W* is an example of a case when the findings that, or to the effect that, the carers were not giving a full and truthful account was set aside because of an addition to the medical evidence and its "knock on" effect.

<u>The general position of the parties on the review of the earlier findings at the third stage.</u>

67. In my view correctly, none of the parties argued at this stage that given (i) the credibility findings made by Bracewell J, (ii) the reasoning underlying them and (iii) the common ground of all the doctors that P's symptoms were consistent with him being the victim of inflicted harm, the test at the third stage could <u>never</u> be satisfied whatever the results of the investigations and testing now being suggested by Professor Y and the arguments relating to the effect of Professor Meadow's evidence.

68. All therefore accepted that it was necessary to "wait and see". I agree and in those circumstances I am of the view that I should not try to define the test or approach at the third stage. The trial judge will formulate and apply the test or approach he adopts. His aim will be to achieve justice having regard to the competing (and common) private and public interests involved and thus the dilemma referred to earlier.

69. *The parents' position.* At an earlier directions hearing when I asked leading counsel for the parents what order he would be seeking at the third stage his answer was that there should be a full re-hearing (then or later) at which the mother (and others) would give evidence and (amongst other things) the mother's credibility would be assessed again.

70. During the hearing before me in November 2005 the position of the parents through leading counsel changed and he asserted and accepted that for a number of reasons it was no longer realistically possible for the court to revisit all the factual evidence concerning the death of P, or for there to be a fair reconsideration of the mother's evidence of the events leading up to and during the four incidents relating to P. These reasons relate to the passage of time and the unavailability of some documents.

71. Leading counsel for the Local Authority took the same position. Counsel for the Guardian did not argue against it. I see the force of this common ground. But as appears later in my view it causes some problems.

72. Further, as a matters now stand, in my view realistically leading counsel for the parents acknowledges that it is unlikely that he would be able to properly submit at the final hearing that the further information then available meant that it was no longer a real possibility that the cause of the incidents involving P, and his death, was harm inflicted by his mother.

73. Correctly he did not rule out being able to make this submission or a submission that a positive and exculpatory finding should be made that it was more likely than not that the incidents had a natural cause. But this realistic acknowledgment meant that he also acknowledged that:

a) he hoped (he submitted with good cause) to be able, as a result of the further information being sought, to submit (i) that in June 2000 both Professor Meadow (and indeed Professor X and others) had been wrong and the real possibilities for the incidents relating to P included natural causes (in addition to smothering or unknown metabolic cause) which were at present being further investigated, (ii) there were powerful reasons for advancing and considering one or more of those natural causes in combination to be the actual cause, and (iii) the finding that inflicted injury was more likely than not to be the cause cannot stand, even if he could not persuade the court to conclude that it was more likely than not that the cause was a natural one, but

b) the medical experts who identified such natural causes would have to acknowledge that if the mother was not telling the truth in respect of the incidents relating to P this would at least be highly relevant to the identification of the cause of the incidents.

74. In my view these acknowledgments mean that, as in June 2000 in respect of the proceedings concerning K, the credibility of the mother will remain an important factor in deciding between inflicted harm and a natural or non-accidental cause of P's death.

75. *The general position of the local authority and the Guardian.* The position of counsel for both the local authority and the Guardian was that:

a) the further tests suggested by Professor Y should be carried out and that they might confirm the existence of, or eliminate possibilities to which they are directed (as other possibilities suggested in the past have been eliminated),

b) further investigation might reveal further lines of appropriate further inquiry,

c) took the common ground referred to above as to there being a full rehearing or a rehearing directed to the mother's credibility, and

d) although their final positions must await the outcome of the further investigations they envisaged arguing that the court should proceed in this case on the basis of the findings made by Bracewell J and thus on the basis that, as she found, P was the victim of harm inflicted by his mother.

76. *The upshot of these stances.* In my view these stances raise difficult issues concerning the approach to be taken by the court to (i) the overall finding of Bracewell J, (ii) her overall finding on credibility and (iii) findings made and relied on as part of her reasoning process in reaching those overall findings. These arguments will relate to:

a) how much change in the overall jigsaw referred to by Bracewell J would warrant a conclusion that either the overall finding should not stand, or that the overall finding on credibility should not stand, and

b) whether subsidiary findings, or some of them, stand but the overall finding of inflicted harm falls, and if so the reasons for this.

77. At present the parties have an all or nothing result in mind in that they envisage a situation in which the court either proceeds on the basis that the overall finding of inflicted injury is applied or it is not. The arguments in respect of that approach will have regard to the detail of the reasoning of Bracewell J, and to the nature and extent of changes established by the time of the hearing (e.g. the identification of possible natural causes or the demonstration that parts of the evidence of Professor Meadow did not have a sound basis).

78. The detail of these arguments both as to the test to be applied and its application are matters for the trial judge. It may be that the changes in the overall jigsaw (and in particular the medical evidence) are such that it becomes reasonably clear that either (i) they make no effective difference to the reasoning that underlies the overall finding of inflicted harm and the credibility findings made by the judge in respect of the history, or (ii) they are of such significance that they mean that the overall finding or inflicted harm and the credibility finding relating to the history cannot stand. But the present common ground between the parties as to the extent of any rehearing (which I repeat in my view has force) also gives rise to the real possibility that:

a) on the medical and other evidence inflicted injury and a natural cause or causes remain real possibilities,

b) Bracewell J has found that the mother has not given a truthful account of the incidents relating to P,

c) changes in respect of the medical evidence (and possibly other evidence) to that before Bracewell J, or established challenges to the expert evidence before Bracewell J, mean that there are changes in parts of the jigsaw referred to by Bracewell J, but

d) a number of her findings directly related to the credibility of the mother, the history, the medical evidence and other matters are not affected (or sufficiently affected by such changes) and therefore stand, and

e) the court is now not in as good a position as Bracewell J was to determine outstanding issues relating to the credibility of the mother in respect of the history, or the relevant circumstances more generally and thus to carry out an overview and make findings by reference to all the pieces of the jigsaw as to which of the real possibilities is more likely than not to be the actual cause of P's symptoms. And no party would be inviting the court to conduct a full rehearing, or a rehearing of the credibility findings, at which the mother (and others) would give oral evidence.

79. In those circumstances the argument at the third stage would be as to whether given the nature and extent of the changes and their relevance and place in the reasoning of Bracewell J (i) her overall finding of inflicted injury should stand, and if not (ii) what, if any, finding should replace it.

80. If that overall finding does not stand it does not follow that the court would find that it was more likely than not there was a natural cause or causes for the incidents.

81. Rather a strong possibility would be that the court was not able to say which one or more of the identified real possibilities was the actual cause or causes of the incidents relating to P and his death. In this sense the cause would be unknown.

<u>The general positions of the parties as to the effect of the finding that the mother inflicted harm on P and was responsible for his death and problems they raise in connection with risk management</u>

82. *The general position of the parents.* Understandably the parents assert that the focus of the challenge they seek to make to the earlier findings relating to P is at the threshold stage of the proceedings relating to S, with the result that if their challenge succeeds the court has no power to authorise any further interference in their lives by the local authority and S would be returned to their care.

83. This is in complete accord with their contentions that the earlier finding is wrong and thus that neither of them have ever harmed or presented a risk to their children.

84. To succeed on this argument the parents would not have to show what was more likely than not to have been the cause or causes of the incidents relating to P. This is because the onus of establishing the existence of the threshold (jurisdictional) conditions rests on the local authority. So their argument would succeed if the court is unable to say which of the identified real possibilities is more likely than not to be the cause or causes of the incidents relating to P.

85. *The general position of the local authority and the Guardian.* Although, as I have already indicated, they made it clear that they were (i) not advancing any aspirations or hopes, or making predictions, as to the outcome of the further investigations, (ii) supported the carrying out of such further investigations as the court considered appropriate, and (iii) would review their positions in the light of all further relevant information, they were, as I understood them, anticipating that the local authority would be able to argue successfully that (a) the findings of Bracewell J should stand, and thus (b) those findings establish the jurisdictional threshold (which was not disputed if the findings stood) and the basis of the assessment of future risk.

86. Albeit that they acknowledged that if the court did not feel able to rely on the finding of inflicted harm made by Bracewell J, it was at least possible that:

    a) the court would not be invited to and would not if its own motion conduct a full rehearing, and in those circumstances,

    b) the local authority would be unable to establish the existence of the threshold by proving to the civil standard that P was the victim of inflicted harm,

    counsel for both the local authority and the Guardian (against the above mentioned background of their positions) accepted and asserted that in those circumstances:

    (i) the threshold conditions could not be and would not be established, with the consequence that

(ii) the court would have no jurisdiction to make any orders, and

(iii) S would return to the care of her parents.

87. This stance is clearly based on, and is understandable having regard to, the decision of the House of Lords in Re H and R (Child: Sexual Abuse [1996] 1 FLR 80 reported as Re H and Others (Minors)(Sexual Abuse)(Standard of Proof) [1996] 1 AC 563). However I am not satisfied that it is correct.

88. The decision of the House of Lords in *Re H and R,* and later decisions of the House of Lords, are based in large measure on the purposes that underlie the relevant statutory provisions and legal policy.

89. In my judgment if the overall finding that P was the victim of harm inflicted by his mother made by Bracewell J does not stand this case raises, or may raise, difficult points as to where and how the line should be drawn as to the jurisdiction of the court to consider what order, if any, should be made to best promote the welfare of S. This is because the position might be reached that:

a) on the medical and other evidence both inflicted injury and a natural cause or causes remain real possibilities,

b) changes in the medical evidence (and possibly other evidence) and thus parts of the jigsaw referred to by Bracewell J mean that her overall finding that it is more likely than not that P was the victim of injury inflicted by his mother cannot be relied on as proof of that significant harm in these proceedings, but

c) some or all of the subsidiary findings of Bracewell J related to the credibility of the mother, the history, the medical evidence and other matters (e.g that the mother did not give a full and truthful account of certain parts of the history) do stand because they are sufficiently based on a foundation of reasoning that is not undermined, or sufficiently undermined, by the changes in the medical evidence, and

d) the court is not now in as good a position as Bracewell J was (i) to assess and determine the outstanding issues relating to the history and the credibility of the mother against a background that the cause of the incidents is consistent with but not diagnostic of inflicted harm and natural cause, and thus (ii) to reach a conclusion as to whether one of those possibilities is more likely than not to be the cause having regard to an overview of all the evidence.

If the parents were to establish that none of the earlier findings on the credibility of the mother's account of the history can stand points (a), other parts of (c) and (d) would remain as would the point that Bracewell J made the credibility findings that she did (which favour a conclusion that the mother inflicted harm on P) against the background of real possibilities identified by the medical evidence at the time and set out in her judgment.

90. In my view it is arguable that (i) points (a), (c) and (d) in the last paragraph (or (a), parts of (c), (d) and the point that Bracewell J made the findings on credibility that she

did) are not suspicions or allegations, but facts established to the civil standard of proof, and (ii) from them it can as a matter of reasoning be concluded that:

a) there was a real possibility that the mother might injure S, a possibility that cannot be ignored having regard to the nature and gravity of the feared harm, and that

b) there is therefore a risk that S might suffer harm that should be considered by the court at the disposal stage.

91. It follows that in this case these points raise issues concerning risk management and where the jurisdictional line should be drawn.

92. *Risk management*. During the present hearing I heard evidence from a psychologist (Dr U) who was a helpful and clearly knowledgeable witness. As had been the view of the experts instructed at the time of the disposal hearing before Bracewell J the mother did not demonstrate or have characteristics, or a history, that placed her within any of the main categories used by psychologists to indicate and assess that she was a risk to a child. Dr U asserted, with some minor qualifications, that the mother scored zero on these categories and on that basis that the mother presented a low risk.

93. Dr U was considering the case on the basis that the mother inflicted harm on P as found by Bracewell J and naturally accepted that on that basis a problem in this case was that the reason for this was unknown.

94. Dr U also made the point that notwithstanding that an approach based on the four main categories for identifying risk indicates that the risk presented by the mother is low, the consequence of the risk materialising was an important factor and warranted "strong" risk management in which Dr U would not wish to rely entirely on the father to protect S, although in her view he had the capacity to reflect on culpability and to be part of the "protection plan". Dr U pointed out that there was effectively no middle ground for the father on the issue as to the mother's innocence given that they were a couple who remained together.

95. I agree, and consider it to be axiomatic, that a consideration of the consequence of the perceived risk is an important factor to be taken into account in deciding what to do having regard to its existence.

96. The strong risk management plan Dr U had in mind if S was to be returned to the care of her parents involved a gradual and fairly long term process including the development of a separate bond between S and her father, gradually increasing contact to include overnight contact, considering the day to day presence of the father in the household, obtaining a local authority nursery placement, regular checks with the GP and accident and emergency, case conferences and liaison with school when S was older. This envisages a continuing active role for the local authority.

97. In the context of the finding of Bracewell J that the mother inflicted harm on P standing (which was the basis of her present instructions) Dr U did not envisage a return of S home, and thus a rehabilitation plan taking place in the absence of a public law order and active involvement of the local authority.

98. If the situation changed and that judgment of Bracewell J no longer stood Dr U pointed out that in her view this would probably have significant effects on the

parents and their relationship and that if this resulted in S being returned home they would need support and assistance in creating a family life with S.

99. *The effect of the present stance of the parties on risk management in this case.* It is that if the finding of Bracewell J that the mother harmed P does not stand the court has no power to act further and thus to consider or make any orders in respect of such risk management issues.

100. If that is the result of the hearing in June 2006, and thus if in percentage terms (which in my view are only generally valid for illustration purposes because the judgmental process is not so mathematical) the court estimated the chance that P was the victim of harm inflicted by his mother at say 45% the position of the parents, the local authority and the Guardian is at present that S would go home and neither the court nor the local authority would have any power to take any steps to address the risk flowing from such a conclusion.

101. In those circumstances the present position of the parties is therefore that S would go home to her parents and further assistance (if any) from public authorities would be a matter of agreement.

102. However if the result of the June 2006 hearing is that the finding of Bracewell J stands (say on a 55% basis) the common position of the parties is that the court has jurisdiction to make public law orders.

103. If that situation arises the present position of the local authority is that they do not envisage advancing a care plan that supports a return of S to live with her parents. Rather they envisage that they will be advancing a plan for adoption, perhaps by the adopters of K.

104. However if threshold is established both the court and the local authority would be obliged to consider rehabilitation and thus a placement of S with her parents. This would involve difficult issues of risk management not least because the consequence of the real possibility of harm to S that would have established the threshold is so serious if that risk was to materialise.

105. In that process differences of view may arise between the court and the local authority having regard to their different statutory functions and the limitations placed on the power of a court to dictate the terms of a care plan and thus a risk management programme. It cannot now be said whether such differences will arise and, if they did, whether the court would be faced at the disposal stage with a choice between adoption, or a return home without a public law order.

106. If threshold is established the problems that underlie these potential difficulties will be informed by the attitude of all concerned in the period between the two hearings now set for the determination of this case.

107. *Upshot of the above.* Notwithstanding the common stance of the parties that if the court decides that the earlier finding of inflicted harm made by Bracewell J can no longer be relied on, the threshold conditions would not be established in the case of S, in my view this cases raises issues which merit further consideration and argument as to the effect on the jurisdiction of the court (and thus the obligations and abilities of the court and the local authority to take any further steps with a view to promoting the

welfare of S) if the court concludes that the finding of inflicted harm on P cannot be relied on in this case concerning S.

108. These issues may have an impact on, or be affected by the approach to be taken by the court to the earlier findings made by Bracewell J and its decision as to which, if any, of them should stand. Also they fall to be considered against the development of the law in construing and applying s. 31 of the Children Act, both as to the establishment of the threshold conditions and the disposal of cases when jurisdiction to make a public law order has been established.

109. In my view these issues raise questions of public policy, importance and interest because they impact the circumstances in which public authorities can interfere in the lives of a family for the purpose of promoting the welfare of a child by, for example, seeking to protect him from a risk of significant harm.

General points as to the overall approach in law to issues arising in public law proceedings under the Children Act -- Expert evidence / the roles of the court and the expert

110. I refer to these in Schedules 1 and 2 to this judgment.

111. In my view it is important to consider and remember (i) the general approach taken by the Family court, and (ii) the respective roles of that court and experts, as background to the decisions that have to be made now and the issues concerning the establishment of the threshold conditions and thus jurisdiction, in this case. I also hope that these Schedules will be of some assistance to readers of this judgment who are not familiar with the approach taken by the Family courts.

Further comment on the general points raised above and the identification of issues that in my view arise for consideration in this case.

112. I repeat that in the case relating to K the threshold was established on the basis of a finding that P suffered actual harm inflicted by his mother. The local authority seek to establish the threshold in the case concerning S on the same basis by relying on that finding of Bracewell J. No other basis for establishing threshold is advanced at present. So if the court decides that it cannot now rely on that overall finding of Bracewell J the local authority do not at present seek a hearing at which the mother would give evidence again. Their position is that S should then return home whatever the extent of the other findings of Bracewell J that the court concludes stand. Thus they do not at present propose to argue that in the light of those subsidiary findings (or otherwise) the jurisdictional threshold is established.

113. Here the issue is not as to who the perpetrator of the alleged inflicted harm was but whether there was inflicted harm. Thus the "uncertain perpetrator" cases are not directly in point. However it seems to me that it can be asserted with some force that a number of the comments in those cases as to (i) purpose and consequence, and (ii) the difficulties facing the court in determining the facts, apply in a case such as this one where a child has been ill or died and his symptoms are consistent with, but not diagnostic of, inflicted injury and thus inflicted injury cannot be ruled out as a real possibility.

114. For example, many of the difficulties in penetrating the fog of family evidence can arise in this type of case as well as in an "uncertain perpetrator" case because of the

importance of the relevant history.

115. As the cases confirm medical issues can give rise to a range of possibilities and uncertainties. Doctors consider the histories provided and do not look at the clinical aspects of the case in isolation. In the context of a Family court case the history and thus for example (i) whether the injury is consistent with what is described, or (ii) a view as to whether the carers are giving a full and accurate account or are hiding something, is often of central importance in deciding between whether injury has been inflicted, or has a natural or non-accidental cause, and thus the choice between real possible causes for symptoms identified by the medical evidence. The court is the fact finder as to the history.

116. In some cases the range of possibilities identified by the relevant doctors, and the difficulties of penetrating the accounts of events given by the carers, may result in the court being unable to make a finding that it was more likely than not that an injury was inflicted. In carrying out that assessment the court has to remember the points made in *Re H and R* concerning the relevance of the seriousness of the allegation.

117. A tension arising from, the majority decision of the House of Lords in *Re H and R,* is that when the issue is whether or not serious harm has been inflicted, and by whom it has been inflicted, the points made as to the seriousness of the allegation in determining (i) whether the allegations are proved, and (ii) concerning the relevance of the nature and gravity of the feared harm when assessing whether there is a real possibility of harm that cannot be ignored, can be said to pull in opposite directions. That tension was a part of the background to the problems and issues dealt with by the House of Lords in the *Lancashire* case and *Re O and N.*

118. It seems to me that applying the approach in *Re H and R* of finding facts to the civil standard (more likely than not) and reasoning from them, in percentage terms the court may conclude that there is a 40 to 50 percentage chance that a child who demonstrated symptoms consistent with him having been injured by one or other or both of his primary carers, was so injured but be unable to find that it was more likely than not that there was an inflicted injury rather than a natural or accidental cause for such symptoms.

119. In such cases the House of Lords in *Lancashire* and *Re O and N* decided on a purposive approach to the construction and application of the statute that the real possibility that each member of that pool of possible perpetrators inflicted harm and the risk flowing from that real possibility should not be ignored. In doing so the House used strong language "dangerously irresponsible", "grotesque".

120. There is of course a real difference within the structure of s. 31(2) and generally between the two limbs of the threshold depending on whether or not inflicted harm has been established. There are also differences between the two limbs in the context of the assessment that falls to be made of the purpose underlying the threshold conditions when deciding what Parliament intended to be proved before the state could interfere in the lives of a family. These are clearly and compellingly explained by the majority in *Re H and R.*

121. There are also obvious factual differences between the uncertain perpetrator cases and a case such as this where the issue is as to whether there was inflicted harm. That issue could be, and often is, the first step in an uncertain perpetrator case, but in those cases the inflicted harm is established.

122. However, in my view there is also an overlap between, or common theme to, the feared harm or risk to either (i) the child who suffered symptoms consistent with but not diagnostic of inflicted harm, if it survives, and (ii) a sibling of that child, in both cases.

123. But the effect of the majority decision in *Re H and R* is that to give effect to the protection from interference by public authorities provided to a family by the threshold conditions the jurisdictional line has to be drawn in a way that precludes interference by public authorities in the lives of the family (adults and children) if the local authority cannot establish that it is more likely than not that the child who demonstrated such symptoms was the victim of inflicted harm (or that the threshold conditions are established on other grounds when the question of how an unproved allegation of inflicted harm should be taken into account at the disposal stage arises).

124. However as is also pointed out by the House of Lords in for example *Re O and N* the truth is that harm was either inflicted or it was not and it is legal policy that supports the general rule (i) that once it has been established to the required standard of proof the law regards it as definitely having happened, and (ii) that if it is not so established it is treated as not having happened.

125. If the standard of proof is a high one this increases the chances (i) that a finding to that standard that injury was inflicted represents the truth, and (ii) that an allegation of injury is not proved to that standard. It follows that an acquittal applying the criminal standard of proof does not mean that a finding of inflicted injury cannot and would not be made applying the civil standard. So an acquittal does not mean that a care order would not be made and a child would not be removed from the care of the acquitted parent on the basis that the criminal charge is established to the lower civil standard.

126. Where the primary underlying purpose of a statute is to promote the welfare of children, rather than to punish people who harm them, there is an obvious tension between (i) the interests of parents and carers (and indeed their children) to avoid interference by public authorities in their lives, and (ii) the protective purposes of the statute. It underlies the difficult position that doctors, local authorities, parents and others are in when dealing with child protection issues.

127. If doctors and local authorities raise issues that a child has been harmed which are later found to be wrong or unjustified then they can be criticised but if they do not raise such issues and a child is then killed or harmed then they can be criticised. There is therefore a need to identify when the consideration and imposition of protective measures should be allowed.

128. *Upshot of the above.* In public law proceedings under the Children Act the majority of the House of Lords in *Re H and R* drew the jurisdictional line by saying that if a real possibility of future harm was to be based only on an allegation of past inflicted harm that harm had to be proved to have occurred to the civil standard (more likely than not). They did so having regard to the language of the statute and the purpose of the threshold condition to protect families from interference in their lives by public authorities.

129. It is inherent in such a finding, or a refusal to make it, that the approach in law that is taken in reliance on it, namely that it represents the truth, may be wrong and the chances that this is the case in percentage terms can approach 50%.

130. Risks follow from whatever line is drawn. In the *Lancashire* case and in *Re O and N* the House of Lords recognise risks that flow from a rigid application of the approach in law to a finding to the appropriate standard (i.e. that it represents the truth) and avoided them having regard to the language and purpose of the relevant statutory provisions.

131. Against that background in my view the following points merit further consideration in this case:

132. *Point 1*. Whether, on the approach based on the unanimous view of the House of Lords in *Re H and R* that findings of real possibility of future harm have to be based on evidence, facts found to the civil standard and reasoning (and not on suspicion), the facts of this case warrant a conclusion that there is real possibility that S might suffer significant harm, a possibility that cannot sensibly be ignored having regard to the consequences of the perceived risk or threat of harm if it materialises, even though the overall finding that the mother harmed P cannot stand.

133. I appreciate that it can be said that this is an argument that the minority view is correct and is therefore impermissible. But in my view the particular circumstances of this case (which are different to those in *Re H and R* because of the previous findings) warrant careful consideration of this argument having regard to the extent and nature of the findings made by Bracewell J that the court finds do stand, and the point that she was in a better position than the court would now be in to assess issues of credibility concerning the history against the background of alternative real possibilities that P's symptoms were caused by inflicted harm or a natural cause or causes.

134. *Point 2*. Whether the decision of the majority of the House of Lords in *Re H and R* can be revisited because the threshold conditions now have to be construed and applied having regard to the provisions of Articles 2 and 3 of the European Convention. This argument would naturally also have regard to other Articles and perhaps in particular Articles 6 and 8.

135. *Point 3*. Whether the court can exercise its powers as to the approach to be taken to revisiting the earlier findings of Bracewell J to reach the result that the review of them is only to take effect at, or for the purposes of, the disposal stage.

136. This argument would be based on a combination of the flexible approach to earlier findings to do justice in the present case and the point that there are exceptions to the general rule that once an event has been proved to the required standard the law treats it as definitely having happened. It might thus be argued that justice, legal policy and the purposes underlying the Children Act warrant an approach that for the purposes of establishing jurisdiction the earlier finding of Bracewell J stands, but for the purposes of disposal the general rule that it is to be treated as something that definitely occurred does not apply and the underlying realities of the case can be revisited in the light of changes and new information and if they warrant it on the basis that there is a real possibility, a possibility or risk that cannot be ignored that Mrs Haynes harmed P. In such an approach she and her husband (and S) would run the risk that S would not be returned to them when there is no risk that she might suffer harm in their care but this is the situation recognised to exist in *Re O and N*.

137. *Point 4.* Notwithstanding the difficulties involved whether there should be a wider rehearing or reconsideration of the findings of Bracewell J to include a further appraisal by the court of the credibility of Mrs Haynes.

138. In my view it is not appropriate for me to expand on or reach conclusions as to these points. I however invite the parties, and in particular local authority and the Guardian, to consider them and to inform the court at the next directions hearing what their position is in respect of them. If they do not wish to advance any such arguments the court may then want to give consideration to inviting the Attorney General to appoint counsel to act as a friend of the court.

139. I add that in my view none of these points lead to a conclusion (i) that the process of and relating to a re-examination of the earlier findings should not continue in this case, or (ii) that generally efforts should not be made to identify the cause of symptoms and in doing so to make a findings, if the evidence supports them, as to which of the real possibilities is more likely than not to be the cause. Rather the re-examination in this case, and such investigation in other cases, would be focussed to the disposal and risk management stage of the proceedings.

140. I accept that points 1 and 2 could have a wide impact. This is because, although they do not depart from the unanimous part of the conclusion in *Re H and R* that the threshold conditions cannot be established on suspicion, they do lead to a conclusion that in certain circumstances a child who has not been proved to the civil standard (more likely than not) to have been the victim of inflicted harm would be at risk of being removed from its home and being deprived of a childhood with its family, which would be a tragic result if the truth was that the child had not been the victim of inflicted harm and therefore was not at risk from its family.

141. I also accept that the points may not arise if the investigations now be carried out do not result in sufficiently materially changes in the parts of the jigsaw considered by Bracewell J.

The attack on the evidence of Professor Meadow

142. This has always been a part of the case advanced by the parents. Amongst the directions I made leading up to this hearing was one which required the parents through their advisers to identify and put to Professor Y the parts of the evidence of Professor Meadow they attacked, asserted were incorrect or warranted reconsideration. Such questions were prepared. They were also shown to Dr Z.

143. In my view correctly, it was not argued before me that this should not be part of the review.

144. To my mind what matters in this case is the validity of Professor Meadow's reasoning and conclusions in this case at the time he gave his evidence and now and any personalised or general attack is unlikely to have weight. Thus, in my view the attack on the evidence of Professor Meadow is one that should be based on the validity of what he said in this case rather than a more general one by reference to, for example the hearings relating to the GMC proceedings concerning Professor Meadow, as to which there is an appeal, or other cases in which he has been involved. However the parents have indicated that they wish to rely on extracts from the transcripts of the GMC proceedings and have agreed to, and have been directed to, identify all the extracts they rely on. I agree with the other parties that they should be allowed to do

this. The relevance and weight of such material can only be assessed when it has been identified and the parents have particularised the reasons why they assert it is relevant.

145. Such identification of material should be a continuing process in respect of any material the parents seek to rely on. If in respect of any identified material there is a dispute as to whether it should be admitted into evidence, or put to any of the experts, this can be brought before the court for decision.

146. In my view it is very important that the parents notify the other parties as soon as is possible of all material whether it relates directly to Professor Meadow, or is more general material, that they would wish to rely on. If they do not do so they must face the prospect that such material would be excluded on the basis that it has been identified too late in the day.

147. It will be for the trial judge to assess the weight of admissible material relating to this attack.

Expert Evidence and Directions

148. In October 2005 I made efforts to try and get this case ready for hearing in November or to enable the court to hear some evidence from the expert witnesses and to progress the case. These efforts failed.

149. During the lead up to this hearing, and at it, a number of applications were made as to expert evidence. I comment generally that these applications have been bedevilled by a lack of precision and information, particularly in their presentation on behalf of the parents. Whilst I accept that there are difficulties in this respect in this case, as I said a number of times during the hearing, in my view the approach taken on behalf of the parents in respect of these applications fell well below the standard the court and the parties are entitled to expect. In particular, and despite numerous requests for it, no draft letter of instruction to Dr Z was produced until the last day of the hearing and until then what the parents were inviting the court to allow him to do remained vague.

150. *Professor Y.* He has been instructed to provide an overview as originally directed by Holman J. The stepped approach that Holman J indicated should be followed has now been combined with a wider approach.

151. In my view it is very important for the fair and proper disposal of this case that Professor Y carries out his overview role.

152. It is clear that all parties must keep under review the questions they wish him to consider in that role. As to that I consider that there should be regular communication between the parties to check whether any of them want further steps to be taken and to ensure that all know the progress that is being made in the investigations and tests.

153. Some of the tests have a long testing period and there have been difficulties in obtaining material for the tests and identifying testers. These have been addressed but need to be kept under regular review.

154. *Professor X.* He is a well known and respected expert. I acknowledge his considerable expertise.

155. I refused an application for him to give further expert evidence. I gave my reasons at the time. I indicated that the question whether he could at any later stage usefully add to the expert evidence, or give some evidence of fact, would be kept under review.

156. Complications arise from his earlier participation and some of the comments and views attributed to him by counsel for the parents. There is a risk that if Professor X were to give evidence the court would become diverted from the content and substance of the reasoning of Professor X and Professor Meadow in the case relating to K to more general and possibly personalised issues. In my view this should be avoided as should the risk of any argument being advanced that the weight of the evidence of Professor X should be reduced because he was defending a position or advocating a cause.

157. Unless Professor X has some expertise, or knowledge based on his earlier participation, that is unique or unavailable elsewhere I doubt that his evidence would be useful.

158. As one would expect from an expert like him I understand that he is content to address points with, or raised by, Professor Y so that Professor Y can consider them with a fresh mind and the benefit of advances since 2000. At present it seems to me that this would be the role that he could most usefully fill in this case.

159. *Doctor Z.* He too is a well known and respected expert. I acknowledge his expertise. I also have some sympathy for the frustrations he appears to have suffered during the course of this case. In emails to the solicitors acting for the parents he has been free with his criticisms of the courts and the local authority. Their backs are broad enough to bear such criticisms but I pause to comment that in my view it is a pity that the solicitors acting for the parents did not clarify with Dr Z his role pursuant to the order made by Holman J. I do not understand why they did not do so, or why they did not explain to Dr Z that they had agreed the letter of instruction to Professor Y and thus had not returned to court to move away from the stepped approach, or to widen the role of Dr Z.

160. If this had been explained him, Dr Z may not have agreed with the course the parties were adopting but at least be would have known that all parties were pursuing it and have been better informed as to it. The efforts made to make progress at the eleventh hour before this hearing went outside the structure of Holman J's order and stepped approach in that they involved Dr Z in meetings and the consideration of questions primarily addressed to Professor Y. I acknowledge that his may have caused some confusion in his mind as to his role.

161. A problem exists that the comments made by Dr Z and his failure to provide reports in accordance with orders of the court could found a line of questioning and argument that he has not taken an approach consistent with that of an expert, but has been an advocate for the parents. This may well be unfounded and I acknowledge that his original role was to identify areas for consideration by the jointly instructed expert who turned out to be Professor Y.

162. On the last day of the hearing when for the first time a draft letter of instruction in respect of Dr Z was provided leading counsel for the parents argued that he should be further instructed because of his particular expertise in defined areas. In his submissions leading counsel did not mention the wider instructions contained in the draft letter or the reasons for them. Confusion as to the position of the parents as to

the role they were inviting the court to give permission for Dr Z to take was therefore continued.

163. As I understand the position the parents wish Dr Z to, in effect, carry out the role of an expert who is giving an opinion or a second opinion on all aspects of the review of the medical evidence so that he can check that in his view all appropriate steps have been taken, and comment generally. This goes outside a role based on him considering aspects of the case because of his particular experience and expertise although I acknowledge and appreciate that to do so Dr Z may feel the need to look at wider aspects of the case.

164. Dr Z has now identified the areas he considers should be further considered. There is a large measure of, if not complete, agreement between him and Professor Y as to these. The reality of the present situation is that the position has now been reached that Dr Z either has to cease to have any further participation (save possibly as a person carrying out one of the tests suggested by Professor Y), or should have his role widened and defined as an expert who is invited to give an opinion, or a second opinion, on all aspects of the review of the medical evidence.

165. <u>Subject to the important caveat and condition precedent that Professor Y remains willing to carry out his role</u> as the expert who has been jointly instructed to carry out a review and an overview, if Dr Z is instructed to effectively carry out a parallel review and to express a second opinion, I favour the latter course. My main reasons for this are that in my view (i) Dr Z has made useful contributions in his initial role and his expanded role, (ii) he has made some criticisms and (iii) it seems to me that if he performs this wider role the parents, the other parties and the court will have the benefit of being able to consider and test his criticisms and his views on the approach taken and the detail of the case on a properly informed basis.

166. I acknowledge that this course may involve questioning as to whether Dr Z has taken a proper approach to this case but again it seems to me that it is better to deal with that issue on a properly informed basis and thus in the basis that Dr Z can deal with any such questioning if it is pursued than to leave it where it lies at present.

167. It appears Dr Z and Professor Y have been able to discuss the case and work together harmoniously and therefore I hope that this could continue if Dr Z has this wider role.

168. However I impose the caveat or condition precedent to him taking this role because in my view Dr Z should not be a substitute for Professor Y, and if Professor Y objects to Dr Z having this wider role, the case can be properly and fairly dealt with if Dr Z takes no further part (or his role is limited to that of a tester) whether or not a further expert instructed by the parents is introduced to give a second opinion.

169. If after discussion with Professor Y the condition precedent is satisfied and Dr Z is to take the wider role his draft letter of instruction will need to be amended to make this role clear and thus, for example, that he is to address the questions raised by the parties as to all the real possibilities including inflicted injury.

170. When Dr Z's role was more limited I indicated that it should be Professor Y and not Dr Z who took a history from the parents if he thought it appropriate. If Dr Z takes the wider role no doubt he and Professor Y will discuss whether they should both take histories, or whether only one of them should. In my view they should be permitted to take the course they agree in this respect. Further in my view in deciding whether

to take a history, who should do it and its purpose they should have regard to the histories taken at an earlier stage, the findings of Bracewell J as to the history taken by Professor X, and the passage of time taken together with the stance of the parents to the earlier findings of the court.

171. *Professor W*. The parents sought leave to instruct an expert on the effect of a drug taken by Mrs Haynes on memory. This was a point raised before Kirkwood J and commented on by him.

172. Provided that the parents set out in full in a statement the evidence relating to the memory of Mrs Haynes on which they seek to rely before such an expert was instructed I gave permission for such instructions to be given. I agree with the Guardian that the issue will be raised at the hearing and therefore it is better to have this expert evidence available.

173. The weight to be given to this expert evidence having regard to (i) its content, (ii) the evidence that the parents now rely on concerning Mrs Haynes' memory generally and, for example, her accounts of the incidents relating to P at and before the trial relating to K, and (iii) the point that her taking of this drug, or her having a poor memory was not advanced as an explanation for anything then (when it could have been), is a matter for the judge at trial.

Interim contact

174. The parents have for some time had supervised contact at home for 5 days a week (Monday to Friday) for 6 hours a day and once a month on a Saturday for 4 hours. During the course of the evidence the issues as to interim contact narrowed because the social worker accepted that there could be contact every Saturday for 6 hours effectively swapping Saturdays and Mondays, so that Monday contact would become monthly.

175. The reason for more regular Saturday contact was that the father was likely to have to increase his work commitments, he having thought that this hearing would be a final one. This change will result in the father not being at home so much (or at all) during the week and clearly supported a view that there should be regular Saturday contact. This was further supported by the view of Dr U that he should build up a separate relationship with S.

176. More general points as to this position of the parents are that they envisage that in the future Mr Haynes will return to full time work and that if they are successful S will be cared for by Mrs Haynes during the working week when Mr Haynes is out at work. This will be a factor to be taken into account if the disposal stage is reached in these proceedings.

177. The parents want to move to some interim overnight staying contact but accepted that it was not appropriate to seek an order for that at this stage. They may do so at a directions hearing set for next year.

178. The outstanding disputed issue was as to whether there should be two supervisors or one. It was not argued that there should be no supervision or, as it had been in June 2005, that the supervision should be by friends and family. I rejected that argument in June. The argument was that two outside supervisors were unnecessary and overly intrusive. The Guardian suggested that the supervisors could work in two 3 hour

shifts and this was supported by the parents who prayed in aid Dr U's view that the mother was a low risk and unlikely to harm S in a moment when a supervisor was not present.

179. In making her recommendation the Guardian concentrated on the intrusiveness of there being two supervisors and did not mention risk or the very serious consequences that would result if the risk materialised.

180. I agree with the local authority that having regard to (i) those consequences, (ii) the present position that there is a finding that the mother harmed P, (iii) the point that one of the incident occurred in hospital and (iv) the point that there is no identified reason why the mother harmed P as found by Bracewell J, that the welfare of S is best promoted by all reasonable steps being taken to ensure that there is constant supervision of the contact between the mother and S and that this means that unusually there should be two supervisors.

181. In my view any supervision is intrusive and creates an unnatural environment and given the advisability of constant supervision if properly managed supervision by two persons (i) should not be significantly more intrusive than constant supervision by one person, and (ii) should reduce the risk of there being gaps in supervision. The local authority agreed to address with the parents issues raised as to the management of the supervision to seek to make it less intrusive both in and out of the home.

182. Another reason for maintaining two supervisors was that it was likely that the father would not be at home so much.

183. The question of sibling contact was raised but, in my view correctly, it was common ground that, as K only has letter box contact with her parents, face to face contact now between K and S could cause considerable problems in the future if S was to be placed with the parents and that therefore such face to face contact should not take place at this stage.

184. In deciding issues on interim contact the court's paramount consideration is the welfare of the subject child.

Publication of judgments

185. I indicated to the parties that in my view this case raised points of public interest that warranted my judgment at this stage being given in an anonymised form in public.

186. There had already been some publicity in this case and I therefore caused a letter to be sent to the Press Association stating that this is what I proposed to do and indicating that I would hear representations on publicity relating to this case. This letter was copied to the BBC (with whom the parents have entered into a contract and for whom I understand they are keeping a video diary). I received written submissions and a witness statement from the BBC and written submissions from the Press Association. I heard submissions from counsel for the BBC and comments from the representative of the Press Association who attended court.

187. In their written submissions (i) the Press Association sought the lifting of reporting restrictions, and (ii) the BBC did not ask that the present proceedings be heard in public but sought disclosure of (a) the judgment in these proceedings, (b) a full transcript of these proceedings, (c) the reports of the experts served in these

proceedings, and (d) the judgment of Bracewell J given in June 2000. The BBC also sought permission to disclose the identity of the parents and indicated that if the reports of the experts were disclosed they would intend to identify them.

188. These written submissions were written on the basis of understandable misunderstandings as to the position reached in these proceedings and the present wishes of the parents as to the publication of their identities. When the representatives of the BBC and the Press Association were informed of those matters, in line with the responsible and reasoned stance taken in their written submissions, they modified their positions and sought only the publication of judgments at this stage on an anonymised basis. They reserved their position as to the disclosure and publication of further material including transcripts and reports in respect of the proceedings relating to K and these proceedings and indicated that they might make further applications in respect of it.

189. As the letter stating that I would give this judgment in public indicates I did not need persuading that this case raises issues of general public interest that warrant the giving of this judgment in public in an anonymised form. Those issues include:

a) the approach the Family court is taking in this case and takes to a case of this type, namely one in which parents seek a review of an earlier finding that a child of theirs was the victim of harm inflicted by one (or both) of them, and

b) more generally the approach of the Family court to cases concerning allegations that a child has been the victim of inflicted harm.

190. I identify and discuss such issues earlier in this judgment. In particular it seems to me that:

a) the dilemma that faces local authorities, doctors, courts and the parties in cases of this type,

b) the differences between Criminal and Family proceedings,

c) the role of experts, and

d) where the jurisdictional line set by s. 31 Children Act should be drawn and thus when a Family court (and through its order a local authority) should have jurisdiction to intervene in the lives of a family (adults and children) in cases where a child has demonstrated symptoms that are consistent with, but not diagnostic of, inflicted injury for the purpose of promoting the welfare of relevant children

raise points of general public interest.

191. The judgment of Bracewell J in November 2000 was given in public. In my view a proper understanding of the points raised in this case and my judgment now demands publication of the judgment of Bracewell J in June 2000 and the judgment of Kirkwood J in October 2001. In my view the decision as to the publication of those judgments is a matter for me as the judge now dealing with this case rather than them. I direct that these two judgments be published in an anonymised form that adopts the anonymisation I have used in this judgment. This will involve some alteration of

those judgments which I shall direct the parties to carry out. I see no need to anonymise the identity of the local authority (who were incorrectly named in the transcript of Bracewell J's November 2000 judgment before me, but I understand that this error was corrected on other transcripts).

192. In their written submissions the BBC said that, in respect of some of the documents they sought, appropriate undertakings or assurances may be given should the court consider that the identity of the parties and witnesses should not be published to the public at large. This was not pursued at the hearing and in any event such undertakings would not cover other organisations.

193. In my view it is appropriate that the identities of those involved (other than those identified in the anonymised judgments) should not be disclosed to the public at large at this stage and I propose to make an injunction equivalent to those made in *Re U; Re B* (they are set out immediately before the judgment at [2004] 2 FLR 265).

194. As the Press Association pointed out in their submissions it has been announced that there is to be a consultation process relating to the publication of proceedings in Family courts. This will cover, amongst other things, issues relevant to applications that may be made by the media for further publication of material relating to the cases concerning K and S. If such applications are made it seems to me that the court may well wish to consider the stage that consultation process has then reached and the impact any order might have on it.

195. It having been made clear to the Press Association and the BBC that the parents did not at present wish to be identified neither pursued an application that they should be. As I commented during the hearing it seems to me that although the wishes of the parents (and indeed others e.g. a social worker or doctor who has in his view been wrongly and unfairly accused by a parent of inappropriate conduct) are relevant to the issue of identification to the public of parties and others, these wishes are not, of themselves, necessarily decisive.

196. I also accept that there is force in the assertion that a story that is linked to people has, or can have, a greater impact and thus bring the issues of general public interest to the attention of wider sections of the public. But it is easy to understand and in my view has been demonstrated that when the reporting is link to identified people the focus is on one side of the debate (e.g. the tragedy and unfairness of a child being taken away from its parents (or carers) or the tragedy of a child being left with or returned to its parents (or cares) and then suffering inflicted harm). Such reporting may therefore fail to prompt public discussion based on, a balanced and properly informed view of the issues of general public interest and thus, for example, of the differences between criminal and civil procedures, the underlying aim and purpose of the Children Act and the dilemma in Family cases where there is a risk of tragic results whatever decision is taken.

197. To my mind the general public interests are best promoted by there being balanced and properly informed reporting and discussion. I am of the view that the publication of more judgments of the decisions of the Family courts in an anonymised form should assist to promote that albeit in a more arid environment than reporting that is linked to identified persons.

198. In respect of the applications for publication of the medical evidence, I comment that in my view there is also a need for balanced reporting of the medical issues. This

would include the reporting of cases where evidence that supports a conclusion that symptoms have a natural cause has been found or admitted to be flawed as well as cases where this has occurred in respect of evidence that favours a conclusion of inflicted harm.

199. In my view there are strong public interests in promoting and encouraging:

a) a rigorous, well informed, thorough and balanced approach by doctors and others to cases where inflicted injury to a child is a possibility to seek to ensure that any decision on whether this is or is not the case is the right one, and

b) doctors and others who are in a position to identify circumstances that indicate that a child might be the victim of inflicted harm to take an active part in reporting such matters, and in their investigation by the appropriate public authorities, to seek to ensure that proper steps are taken to protect children from inflicted harm and that courts and others have the benefit of properly reasoned medical evidence.

200. If the application for publication of the reports and transcripts of medical evidence had been pursued I would have considered carefully whether I should have invited representations from medical bodies, or one or more of the doctors concerned. I expect that such bodies will take an active part in the proposed consultation process with a view to arriving at a solution that promotes such public interests and other matters.

201. Issues as to who should be notified before publication is ordered of evidence given in private will also I imagine be part of the consultation process. This is an issue that has arisen in other areas e.g. DTI inspections.

202. As to this I add that before identifying Professor Meadow I considered whether he should be given an opportunity to make representations. In this context I am very conscious that there is an appeal relating to the GMC proceedings and that he disputes allegations levelled against him in those proceedings and elsewhere. However as I indicated earlier I decided that he should be named because his connection with this case is already in the public domain and an aspect of it cannot sensibly be discussed without identifying him even if he was to be described by a letter.