

Application under section 42(3) of the Children (Guernsey and Alderney) Law, 2008 and in the matter of A child

[2019]GJC049

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**IN THE GUERNSEY JUVENILE COURT**

**IN AN APPLICATION MADE UNDER SECTION 42(3) OF  
THE CHILDREN (GUERNSEY AND ALDERNEY) LAW, 2008  
AND IN THE MATTER OF A CHILD**

**(Citation: Re A [A Child] [Non-accidental injury])**

**Between:**

**THE CHILDREN'S CONVENOR**

**And**

**R1 (Mother)**

**First Respondent**

**And**

**R2 (Father)**

**Second Respondent**

**And**

**R3 (Father's Partner)**

**Third Respondent**

**And**

**A (A Child)**

**Fourth Respondent**

**(Acting by and through her Safeguarder)**

**Dates of hearing: 13<sup>th</sup> – 17<sup>th</sup> and 20<sup>th</sup> – 21<sup>st</sup> May, 2019**

**Decision handed down on: 27<sup>th</sup> June, 2019**

**Before: John Russell Finch, Esq., O.B.E., Judge of the Royal Court;**

**J. Bales, Deputy Convenor, for the Children`s Convenor; Counsel for the First Respondent (R1): Advocates C A Tee and N Hopkins; Counsel for the Second Respondent (R2): Advocate S Mallett; Counsel for the Third Respondent (R3) was not represented, but assisted by Advocate Mallett; Counsel for the Fourth Respondent A (A Child): Advocate S L Brehaut.**

**Materials referred to in Judgment:-**

The Children (Guernsey and Alderney) Law, 2008, sections 34, 35(2)(a) and (b), and 42(3).

Case heard in Magistrate`s Court 13.02.2017;

A Local Authority and a Mother and a Father and A [2019] EWCA Civ 799;

In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening) [2008] UKHL 35;

Re BR (Proof of Facts) [2015] EWFC 41;

McGregor v D 1981 S.L.T. 97;

Miller v Minister of Pensions [1947] 1 All ER 372

**JUDGMENT**

**Introduction**

1. This is a decision following a reference by the Children`s Convenor under section 42(3) of the Children (Guernsey and Alderney) Law 2008. The reason for this is that “prescribed persons” within the meaning of section 34 of the Law (namely the parties listed below) do not accept the Convenor`s Statement of Condition of Referral and Facts. It was necessary to have a full hearing in order to determine the facts before the Juvenile Court. This took place from 13<sup>th</sup> – 17<sup>th</sup> May and 20<sup>th</sup> – 21<sup>st</sup> May, 2019 and the decision was reserved and is now issued. For the purposes of this decision (anonymity of the child being essential), the parties are referred to as follows:

- the child - A
- the mother - R1
- the father - R2
- the father`s partner - R3

The names of the local GPs who gave evidence will also be anonymised; this is a small jurisdiction and giving such information may lead to people adding ‘2 and 2’ and making ‘4’, or indeed ‘5’. The two English experts are named, as their identification does not constitute any danger to the parties, and in particular, the child`s anonymity. The same applies to the local paediatricians, as they all operate from the Medical Specialist Group.

2. The child was separately represented and instructions came from an experienced Family Proceedings Adviser, due to the child`s young age. The mother and father were also represented. The father`s partner was assisted by the father`s Advocate and content for her to represent her interests; the Court appreciates this assistance. There was no dispute on the law, on which the parties were in agreement. There was marked disagreement on the facts, which the Court now has to deal with.
3. Three bulky volumes of documents were produced, which contained witness and position statements, medical and other reports and a number of other items. The documents will be

referred to simply by folio reference and page number, e.g. C279. The main facts to be determined are set-out in the Convenor's Statement in the Preliminary Documents at (i) and (ii). They are relied upon by the Convenor and the reasons put forward are:

A) In terms of section 35(2)(b) of the Law, which states that the child has suffered, or is likely to suffer sexual or physical abuse;

or, in the alternative –

B) In the terms of section 35(2)(a) of the Law she has suffered, or is likely to suffer, significant impairment to her health or development.

(There is no suggestion in this case of sexual abuse; the terms of the legislation were set out for the sake of completeness.) The specific matters relied on are set out in the Convenor's Statement. The factual backdrop is as follows:

1. A is now four years of age. She is the daughter of R1 and R2.
2. A resided in the shared care of her mother R1 and her father R2 who resided with R3. She has been residing in the care of R2 and R3.

4. The relevant facts are as follows:

Fact 3

A suffered an injury to her right arm resulting in a bruise to the inside of her right elbow. This injury was caused by R1 forcibly gripping or squeezing A's arm and with force required beyond the normal handling of a six week old baby.

Fact 4

A suffered an injury to the left side of her face resulting in a cluster of bruises. This injury was deliberately or recklessly inflicted by R1.

Fact 5

A suffered an injury to her face resulting in a linear abrasion and scratch extending from her eye to the lower end of her nose. This injury was deliberately or recklessly inflicted by R1.

Fact 6

Whilst in the care of R1, A suffered an injury resulting in unusual linear patterned parallel marks with petechiae to her lower right arm. This injury was deliberately or recklessly inflicted on A.

Fact 7

A suffered an injury resulting in two parallel red marks to the underside of her upper right arm. These were caused by A being grabbed or dragged forcibly by R1.

The general facts are:

Fact 8

The above statements demonstrate that A has suffered from a number of repeated injuries notable for their unusual site, unusual nature and lack of clear history as to how they were caused.

Fact 9

As a result of one or more of these injuries, A has suffered physical abuse.

**Applicable Legal Principles**

5. These are as set out by Advocate Hopkins in her helpful closing submission on behalf of R1. The standard of proof is quite simply the balance of probabilities, as explained by Lady Hale and Lord Hoffman in In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening) [2008] UKHL 35. In paragraph 70 of her speech, Lady Hale said:

“... for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold ..., or the welfare considerations ... is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.”

The “reason” was the nature of care proceedings, which are there to protect a child from harm, and neither punitive nor deterrent in nature.

A clear application of this, plus elucidation on the “proof of facts” is to be found in another case put in by Advocate Hopkins, Re BR (Proof of facts) [2015] EWFC 41, from Peter Jackson J. In particular, at paragraph 7 it is stated:

“The standard of proof is the balance of probabilities: *Is it more likely than not that this event occurred?* Neither the seriousness of the allegation, nor the seriousness of the consequences, nor the inherent probabilities alters this.”

And, a useful reminder at paragraph 8:

“Each piece of evidence must be considered in the context of the whole. The medical evidence is important, and the court must assess it carefully, but it is not the only evidence. The evidence of the parents is of the utmost importance and the court must form a clear view of their reliability and credibility.” (emphasis supplied)

6. It was pointed out, on behalf of the Convenor, that there is no definition of the phrase “physical abuse” in the Law (section 35(2)(b) – “the child has suffered, or is likely to suffer, sexual or physical abuse”). Assistance was gathered from other sources, in particular, HM Government’s “Working Together to Safeguard Children” (July 2018). The Glossary at Appendix A states that “abuse” means:

“A form of maltreatment of a child. Somebody may abuse or neglect a child by inflicting harm, or by failing to prevent harm ...”

“Physical abuse” is:

“A form of abuse which may involve hitting, shaking, throwing, poisoning, burning or scalding, drowning, suffocating or otherwise causing physical harm to a child ...”

These definitions are workable and it is proposed to adopt them in this case. Going back to the specific “Facts” it will be noted that in respect of Facts 4, 5 and 6, the allegation is that the

injuries there were caused “deliberately or recklessly” by R1. Facts 3 and 7 do not include these words: 3 is “forcibly gripping ... and with force required beyond the normal handling of a six week old baby” and 7 is allegedly “caused by [A] being grabbed or dragged forcibly by [R1]”. That is how the Convenor’s case has been set-out. For the purposes of the case, the mental element in 4, 5 and 6 will be dealt with in accordance with the words used – which will be taken to mean “intentionally” or “recklessly” in the *mens rea* of offences of basic intent. What these mean is now well-known and needs no further exposition. The absence of the words in 3 and 7 means that negligence or neglect can be considered in addition to them. For the sake of completeness it should be understood that although English cases are not binding in Guernsey, they are respected as of high authority - in particular re B was a House of Lords decision, where the judges are the same as those making up the Judicial Committee of the Privy Council, the highest appellate court for Guernsey.

## Approach to the Case

7. The first task is to consider the brief details of A’s family background, then consider each of the injuries in the light (principally) of the medical evidence, the other evidence and the accounts of R1, R2 and R3. Emphasis was placed, particularly on behalf of the Convenor on the question of the totality of the injuries. This is also commented on by the two English medical experts, who have produced a very useful report setting out their joint conclusions and areas of disagreement (at G429-435). Throughout it has been necessary to bear in mind that despite the great value of expert evidence – which has been extremely helpful in this case – there is no such thing as a trial by experts. Here, as well, it is crucial to evaluate the evidence of the three Respondents. This will form a later part of the judgment before any findings of fact, and the reasons for them are given. As indicated, there are three full volumes of documents and it is only intended to cover those deemed most useful, so as to keep the judgment from being too lengthy and complicated. In relation to the point made about totality, a recent English Court of Appeal decision is especially apposite. In A Local Authority and A Mother and A Father and A [2019] EWCA Civ 799, the danger of looking at injuries separately and not “at each in the context of all the other injuries and evidence” was stressed emphatically by Baker LJ (especially at paragraphs 47-48). The court must “balance the totality of the evidence”. (This is how the evidence in the present case must be assessed.) The judge at first-instance unfortunately fell into a trap there and did not do so, as the Court of Appeal found.

## The Earlier Judgment

8. Another judge heard a private law application by R2 against R1. Evidence was heard from one of the local Paediatricians and from Dr Zeitlin, one of the very experienced English experts, both of whom gave evidence in the present case. R2 applied for a sole residence order in respect of A. Facts 3 and 4 were relied upon (facts 5-7 were after the decision). The judge set out his reasoning in detail and this has to be looked at in the light of the facts before him, which were limited. His judgment is at B2-10 and one of the early points made is that “the small bruise” was not considered to have “any relevance to this hearing”. That was, as stated, Fact 3 and in the present case looking at all the evidence presented, it is suggested it was a highly significant event or precursor. Fact 4, the judge concluded, was “unusual and inexplicable”, but he was not satisfied on the balance of probabilities that non-accidental injury (NAI) was involved. We now, of course, have the additional injuries to consider and the private law decision, as stated, has to be understood in terms of the limited evidence adduced – a lot more was put forward in the present public law application. It was not suggested that this decision somehow inhibited the rôle of the Court in the present application, nor could it in all the circumstances where a wealth of new evidence and a number of further allegations are under consideration. Whilst you cannot have a second bite

of the same cherry, this is not the same cherry. The Scottish case of McGregor v D 1981 S.L.T. 97 is consistent with this, and was cited by the Convenor.

## **The Injuries – Evidence**

10. The witnesses had made various statements and generally were tended for cross-examination, having adopted them. The logical way to examine the evidence is to look at each injury and consider what has been said in respect of it:

### Fact 3 - Bruising on Arm

This was recorded by the Health Visitor in the “Red Book” as “Bruise inside R elbow where mother grabbed when [A] was falling from her”. R1 explained that it was a difficult time, A having been ill, she slipped from her arms. R1 did not grab her with a frustrated level of force, but cannot say if by oversight she grabbed her too hard. R1 was making a bottle. A was going to fall out of her arm, the incident did occur as described, it was not some other cause. Dr Bohin did not see it, but there is a strict policy on bruises for (as here) non-mobile babies and the Health Visitor should have entered more details and sought further advice. Indeed, as a result of this case, Guernsey now has in place guidance to that effect. The English experts, Dr Ward and Dr Zeitlin concur in saying normal handling of a 6 week old baby would not produce such bruising and the injury is significant in view of later events. They disagree regarding the details and Dr Zeitlin considers the force required would not be great and the injury is likely to be consistent with the mother’s explanation. Dr Ward considers a bruise on that location with a non-mobile child “would require significant force” (G432). The injury was disclosed to the Health Visitor, but she would have seen it anyway as she was there to weigh A.

### Fact 4 - Facial Bruises

- (i) This was referred to the Guernsey Police and the Consultant Paediatrician. There are a number of photographs. R2 took the child to A&E and the case was referred to Dr Bohin. She took three photographs. She considers the most likely explanation is a slap. In oral evidence, she stated that this is clearly a significant assault, and she agrees with Dr Ward’s conclusions. The various photographs are produced at H1-9; Dr Bohin’s are at H3-4. This is probably the most serious of the injuries. As A’s counsel put it in her submissions, it was “an alarming cluster of bruises” and the experts agree it is most likely associated with an inflicted injury and “would have been very painful”. R1 had responsibility for the child from the 16<sup>th</sup> when R2 dropped her off. A was firstly left with her step-grandparents and then with R1’s best friend at the time, who shall be designated as “Miss E” who was one of a group who helped R1 out with child-care when she was working. She had A on average 2-3 times a month (C1125) and sometimes her mother helped out as well. Miss E collected the child from R1’s step-grandparents (who also gave evidence) about 1.30 pm on the 16<sup>th</sup>. Then A was returned to her mother around 4 pm. Things then get more complicated. R1 had the child overnight. The evidence is consistent that there were no marks on her face when Miss E handed her back. There was an ongoing argument, with a number of snappy text-messages between R1 and R2, (beginning on 13<sup>th</sup> March and building-up to a heated and nasty argument). There was, in short, a dispute about whether R2 should have the child on the evening/night of the

17<sup>th</sup> March and morning of Friday 18<sup>th</sup> March. R1's other friend, Miss F, was texted by her on the 16<sup>th</sup>, when R1 was "upset with his controlling manner" and at 10.00 am on the 17<sup>th</sup> to ask if she could have the child the next morning. R1 said R2 was supposed to have her, but was "acting as though it was not his day". This was not, R2 explained, his intention and in evidence he described that this was not an issue. Indeed he became quite upset and wanted his daughter.

(ii) Miss F and her boyfriend duly collected A at the early hour of 5.30 am on the 18<sup>th</sup>. They noticed the bruises. R1 said she didn't know where they came from. She just saw two red-lines, not what is depicted in photographs at H1-3. Miss F and her mother were not concerned; Miss F's mother later on put aloe vera gel on the site and the other cheek. Miss F thought R2 did not want the child. Indeed when R2 got in contact that morning, Miss F and her mother decided to hold on to her. They returned her to R1 after lunch. R2 had sounded panicked and quite demanding, but the child was in Miss F's care until her mother, R1, had finished work. R1 had also referred to the possibility of the injuries being caused by the cot-bars, although Miss F's police statement (D168) does not refer to that.

(iii) The texts between R1 and R2 have already been mentioned, but there were also a number of exchanges between R1 and Miss E, going into the early hours of 18<sup>th</sup> March (see especially C1166-1176). There is no reference there to the facial injury and Miss E never saw it. Miss E was very concerned about R's state of mind. Indeed she made an offer of help/counselling (C1169). Miss E did not want the hostility between the parents. She thought R1 should let the father have the child (C1166) and when R2 rang he was in a panic and state of distress. If A had been available she would have given her to him. Miss E was concerned about how upset and distressed the mother was. It was the worst she had seen between the parents but it was in respect of R1, "unprecedented distress that night". Until this event R1 and R2 had been "very organised" on who would have A. Miss E was an excellent and well-intentioned witness.

(iv) In relation to the marks, R1 stated they were not as pronounced in the photographs. They did not seem tender. In evidence, R1 did not accept that this was an inflicted injury, her suspicion was that it was caused by the cotbars. Her step-grandparents had A on the 17<sup>th</sup> from 1 pm and were not concerned. They did purchase a cot-bumper for R1. But she did not put the bumper on that evening, A was asleep and she did not want to disturb her. R1 did accept that in her Police interview (C726q) she described the injuries as "horrible". The picture she painted was of a baby that was hot and bothered that evening and teething. She did not make the other child-care arrangements to conceal the marks from R2. She did not tell him about the marks. She could not explain why she had not panicked and taken her to a doctor, but the marks were not tender. If she did not cause it and not the cotbars "I cannot think of any other cause". In the private law case the judge treated it as unexplained.

(v) The step-grandparents gave evidence. The grandfather does not recall seeing the lines depicted in the photograph, only a bruise. They thought it was the cot-bars. There is no other way the bruising could have occurred. The lines did not appear that afternoon, only after A had left hospital. His wife

ascribed the same cause, but did see the lines. She was shown the pictures and said “that’s what it’s like when I first saw it”. Both of the witnesses saw the rather vivid photographs taken on Frossard Ward and differed in their views, though not as to the cause. It should be noted that the grandfather is a very experienced teacher, who is well-versed in Child Protection matters.

- (vi) Dr Ward and Dr Zeitlin are in a substantial state of agreement about these injuries (G430-434). The pattern and appearance is “very concerning”. The absence of a “memorable event” from a carer is significant. We heard a good deal about such events that could be pin-pointed as identifying when and how an injury was occasioned. It would have been very painful and A would have cried out in pain. It is not consistent with an accidental injury. The cot-bars would not have been the cause of the injuries seen. It was inflicted with “considerable force”. It is not possible to date it and immediately after infliction red marks would have been apparent. The injury is not consistent with contact with an object encountered when A was rolling over or being hit with e.g. a mobile phone. In their area of disagreement Dr Ward states it could be consistent with a slap, but not hair-straighteners. It is most likely a hand mark. Dr Zeitlin considers it is not suggestive of a slap to the face. She would not exclude hair-straighteners.

Fact 5 - Scratch to Face

- (i) See the photographs at H31 and H32. It is accepted by R1 that she caused this injury. This is accepted by the experts as a significant injury. Dr Zeitlin considers R1’s explanation plausible and the injury is suggestive of accidental rather than inflicted injury. A reconstruction was enacted at the hearing with R1 and Advocate Tee (on her knees) as the child. Dr Ward questions this account given the length and severity of the scratch and associated abrasion. R1’s explanation was summarized in DC Dutot’s police report at C673: She was walking the child to the bedroom and the child tripped; by instinct R1 pulled her arm upwards to stop A falling. When doing this her thumbnail caught A’s cheek. A cried for a short time, but she soon settled and slept. Evidence was also received from R1’s then boyfriend, Mr G. He described the rather unsuitable conditions at R1’s small flat and was present when the scratch occurred. He did not hear anything untoward, despite the walls being thin. He was watching TV in the next room. He spoke highly of R1’s parental care. It is to be noted that R1 informed people (including R2 and R3) of the scratch and e-mailed her social worker on 23<sup>rd</sup> August. A GP examination took place later. The GP Dr G, stated that the matter was not fully-documented and took place four full days before the appointment. She does not, understandably, remember the injury in detail now to comment on how it occurred, although R1 gave her the explanation already mentioned. It was decided to close the case and no further action was taken after a strategy meeting.
- (ii) But also to be considered is a possible disclosure by A. Miss H is R2’s sister. She knows the child quite well. R1 dropped her off to her care. She said, “[A] bit mummy” and “mummy scratched [A]”. This was corroborated by Mrs I, her mother. Social services attended and Elise Brehaut, who gave evidence prepared a note (C1209). A told her mummy had done it, but said nothing to indicate it was an intentional act. When asked why mummy had done this, A said something like “bit” or “hit”. The two statements may not

be linked. As stated, R1's explanation was accepted and social services took no further action.

- (iii) There is evidence of a bruise to A's right arm on the same occasion (see photograph H32). It is not one of the facts put forward by the Convenor. The pictures were taken by R2, who explained in evidence that all the parties had requested pictures of any injury. R3 disclosed it by e-mail to her sister (page F38 reproduces this).

Fact 6 - Marks to Lower Right Arm

- (i) There is a photograph taken by R1, shown at H33. A was in her mother's care at the relevant time and had played in the soft play area at Beau Sejour and the park. If she had hurt herself R1 said that she, the mother, would be aware. She was changing the nappy when she saw the mark; A said she didn't know how she did it. It was evidently painful and the only thing R1 could think of was the swing. R1 stated the mark was not there at bath-time on 31<sup>st</sup> May, but was seen on the 1<sup>st</sup> June'. She messaged R2. There was some WhatsApp messaging (see D46, attached to R1's First Position Statement). Both parents attended the GP, Dr J, on 1<sup>st</sup> June at 5.23 pm. The report is at C360-361. Dr J gave oral evidence and referred to it as a superficial injury "with no bruising". He referred it to the Paediatrician by letter on the 6<sup>th</sup> August, but accepted that he should have rung up and made an urgent referral due to the past history. A was not seen by the consultant, Dr Betteridge until 8<sup>th</sup> June, when this injury was no longer discernible.
- (ii) At no point did Dr Betteridge see the mark, but she did have the photograph. Her report is at C393-395. The photograph disclosed "a significant area of petechiae (broken blood vessels immediately under the skin), so it would have hurt". She did consider if the chain of a swing would cause this; the child would cry out. However, Dr Betteridge even, to her credit, visited the site and could not see how the swing mechanism could cause the injury. In evidence, Dr Betteridge indicated that some significant force needs to be administered to break the little blood vessels. She considered that being hit with a flat object, such as a spatula, leaving the central area of clearing would be the most likely explanation. In her report Dr Ward agreed (G137-138) and stressed the "highly unusual" nature of the injury. The presence of petechiae suggests that the injury is more likely to be inflicted than accidental. There was no clear "memorable event" to link with it; however A was by then more mobile and the lack of this is seen as less significant. Dr Ward and Dr Zeitlin concur (G430-431) in saying that the pattern of the marks is unusual, that gripping or twisting is the most likely cause of injury, that the swing chain cause is unlikely and this is an unexplained inflicted injury, with similarities to the next injury Fact 7 in August of that year. Dr Zeitlin considers it is not possible to be certain about the mechanism of the injury, but it was likely to cause the child distress.
- (iii) There is a stressed-out message from R1 to R2 on 31<sup>st</sup> May explaining how unwell A had been that night. She was "dripping, shaking, crying. Literally I couldn't calm her down, felt so helpless". She had never seen her in such a state, and this was linked with the removal of A's dummy. "I could do nothing to calm her" and R1 was in bed with a "horrific headache & pressure

in my face from the head butt she gave me this morning. She's got one hard head". R2's response was constructive. (C1212-1213).

Fact 7 - Marks to Upper Right Arm

- (i) These are shown at photographs H35-40. (It has to be emphasized that in the course of the hearing the screen pictures were notably better in showing the injuries than the photographs on the papers; this was particularly so in relation to this matter.) Here R3 dropped the child off with her mother around 8 am. There were no unusual marks on a photograph taken by the mother around 8.23 am. R1 was called into work and at 11 am asked R3 to collect her. R3 and her sister did so from Costa Coffee around 11.25 am. There was then a house viewing with R3, her sister and others present, including A. Around 12.30 pm A had her clothing changed and the marks were noticed. At 1.02 pm R3 advised R1 of the marks. The child was taken to the GP, Dr K by R2 and R3. Dr K (C390) noted two parallel "pencil line marks" 3 cm long and about 2 cm apart of recent onset. In his presence R2 asked A how she had got them (following Dr K's prompt). A told Dr K that "her Mum had grabbed her arm". There was, as he stated in evidence, no explanation why. Dr K acted promptly and notified the on-call social worker. A consultant paediatrician, Dr Hadoura, examined A. A informed him in the presence of social workers what she said had happened. His examination was recorded via a Police camera and this took 12 minutes and was played in Court. They were scratch marks rather than bruises and the photograph taken by R3 at 12.30 pm shows redder marks (H35). The witness cannot say when or how it occurred. It should be noted that, as shown vividly in the film, the examination room was very crowded, with DC Thomas, a social worker, a nurse and R3 also present (R2 was outside during the examination). Dr Hadoura considers the marks could have been consistent with A's explanations. She could have been grabbed from behind and tried to wriggle free and nails caught her arm. In the context of the history relating to A, Dr Hadoura stated that the marks were on a place where it is not usual to sustain accidental injuries. His view is "that there is a greater likelihood of it being a non-accidental than accidental injury but I cannot put it higher than that". In evidence, he stated that this view is based on what he saw, not on what the child said. If she had said nothing he would have the same view. There was some difference between the earlier 3 cm measurement and his 2 cm, but it was "around 2 cm".
- (ii) A had an Achieving Best Evidence (ABE) interview. This was also played and there is a transcript at C1055 – 1066. This has to be considered in the light of how young the child was. It will be recalled that a trained intermediary (who has previously assisted in the Royal Court in serious sexual cases involving younger persons) was used to assist the Police officer. A said "mummy grabbed me" and "it's under my armpit" (C1057). "She put me in timeout because I didn't go to sleep for the beach". It was "... right under my armpit" (C1058), then "mmm my mum just dragged on floor" (C1059) after which "I screamed and had a fussy and cry like a baby" (C1060). ("A fussy" is a phrase she uses for getting upset/crying). Then at C1061 A said "And I had a fuss at mummy". She repeated this at C1064, it was "on timeout".

- (iii) Dr Ward’s report states (at G140) that the site of the injury is a very protected area of soft tissue, which “is unlikely to be injured accidentally”. The injury is consistent with an inflicted, NAI. Furthermore, the two parallel linear marks are identified from research as being more likely than not associated with NAI and lie over a “protected” soft tissue site, unlikely to suffer accidental injury. R1 in her Police interview said nothing memorable had occurred. A had not screamed and there had been no ‘timeout’, where A is misbehaving and needs to collect herself. R1 does pick her up by her arms, but has never dragged or pulled her. In the joint report, Dr Zeitlin and Dr Ward agree that the appearance and location of the injuries is unusual, they are unlikely to have been caused by normal handling, are not inconsistent with a grab and could have been caused by rough handling. There are similarities between this and Injury 4. Dr Zeitlin considers what was found was relatively superficial and may or may not have distressed the child at the time of injury. Whilst Dr Ward is clear it is consistent with NAI caused by gripping, grasping or dragging the arm through clothes; Dr Zeitlin considers this is not characteristic of grab marks, with or without clothes; the injury is “concerning but explained”.
- (iv) R1 explained that she put A on timeout when she refused to have a sleep, in order to calm her down. A “is fairly headstrong and likes to get her own way and she would have been cross about not getting her own way. She wouldn’t come to timeout voluntarily so I did have to pick her up from off her bed and put her on timeout. I picked her up as I always do with my hands under her arms. She was flailing as she was wanting to stay awake, but I told her she needed to rest before going to the beach” (D14). It did not take long for her to calm down and they then had a rest. In cross-examination by the child’s Advocate, R1 accepted that she had been “evasive” in her Police interview about timeout (see pages C1014 and C1027). In the first excerpt, R1 stated she does not have to discipline A at all, and there was no timeout that she could remember. At 1027 the phrase used was “... she rarely goes in timeout now ...” and could not give a date about the last one. R1 told the child’s Advocate that she was under a lot of pressure then. However R1 was clear that she did not inflict the injury at timeout. R1 had also told R2’s Advocate that “I was under immense pressure” when interviewed by the Police.

## **The Protagonists**

11. The three main parties, R1, R2 and R3 all gave evidence. A of course, is far too young, but her interests were fully served by her Advocate (instructed by her Safeguarder). R1 consistently denied inflicting any injuries on her daughter. She told R2’s Advocate – “Everyone thinks it’s me”. She did not know how the injuries occurred. It is a possibility that someone has taught her to say it. “It is a possibility they’ve taught her”. She added that it is a possibility she is coached “it gets clearer every time”. R3, in relation to the last injury, was “desperate” to get a disclosure. R2 had referred to an incident where R1 allegedly struck a senior co-worker and this was being “spiteful and calculating” on R2’s part. The person concerned had made a derogatory comment, so it was just a friendly “would you stop please?”. R1 added that “I can see the impression is that I am trying to set him [i.e. R2] up”. She does not accept that she gets stressed and lashes out - “I haven’t lashed out”. She denied trying to conceal the injuries set out in Fact 4 (facial bruise). She did tell R2’s Advocate here that “I don’t know why I didn’t let him have her”. Adding, she had been essentially cared for by a stranger. “I can see how it looks”. She did not tell R2 until the last moment, when R1 agreed it was inevitable he would see her. She told her (then) best friend Miss E that the

injury was “massive”. “I can’t offer an explanation”. She said (to Miss E) that R2 would accuse her of hitting the child. The assessment by the social worker (K Khan) was put to her. She did not accept it. The person in question only met her once for 45 minutes. In answer to the child’s Advocate R1 saw why people are concerned about the child, on the totality of the incidents. “I have no theory about why they keep happening”. She was not “a bit rough” on these occasions. R1 told her Advocate that in relation to Fact 4, she was speculating about the cot-bars. She also mentioned, when looking at the facial scratch (Fact 5), that there was no connection between A’s two remarks about “mummy scratching” and A “biting mummy”. There was no attempt at concealment from R2 in connection with the facial bruise (Fact 4).

12. R1 answered quite probing questions in a civil manner and (understandably) did get upset, but only noticeably once, in the course of her account. She is far from a stupid person, and, as stated earlier, holds a responsible but very demanding job, with occasionally last-minute requests for her attendance. The assessment of her evidence, together with that of the other main witnesses, will come later.
13. R2 also has a (different) but demanding and responsible job. He, also, was civil and also measured in how he presented giving evidence. Although R1’s case was put fully to him he responded calmly and clearly throughout. He, too, was respectful to all the lawyers asking their detailed questions. He strongly asserted that on the occasion of the alleged injury in Fact 4 that it was “not an issue” to have A the following day. When that came he found R1 was working and could not be contacted. He spoke to various people who may have had A, including Miss E, whose evidence he accepted – “I was quite upset and didn’t know who had her”. Then with Miss F who said she had A at her mum’s. He asked for A, but the response was she was told not to. “I was incredibly upset and frustrated.” It was a normal arrangement to have her when R1 was at work. It had never happened before, and he would send her a copy of his shifts. Speaking more generally, R2 said it was “absolutely ridiculous about coaching”. He described in detail his various actions when dealing with the incidents alleged and concluded, “I’ve not been involved in coaching her”. When R1’s Advocate put the question of his attitude to him he responded he was “hyper-vigilant” - it was the norm to ask questions. “Now there is a protocol, I do not keep questioning A”. It is normal to be questioned by professionals, not by him. He does not accept that A was trying to please himself and R3 in her disclosure, “I believe my daughter”. He added that she had her own mind and it is “preposterous to say we coached her”. He has never reminded her of something so she repeats it, and has never reinforced her recollection at all.
14. R3 (who for practical purposes was represented and advised by R2’s Advocate) also gave evidence in a calm manner. She is a co-worker with R2. She and R2 have never inflicted any injury and she has not coached A, nor repeated things to her. R3 was not desperate to get a disclosure in relation to Fact 7. Mention was made of a house viewing (described in evidence briefly by Miss H, R3’s younger sister and also R3’s mother, Mrs I). There were a number of people present: Miss H, Mrs I, R3 herself and others, but there was no injury caused at this event. A was with R3 and her sister, Miss H, throughout. The viewing took about 20 minutes and they were together at all times. R3 discussed when asked by R1’s Advocate, about the medical examination. There had been some criticism of R3 by Dr Bohin in relation to an incident (not the subject of any allegations for this hearing), when A suffered a mark to her upper arm. The family was directed to bring her in for examination. A told the social worker that she had “bashed” it. There was nothing disclosed concerning A’s mother. A should tell things in her own words and Dr Bohin considered she was being “slightly coached” by R3. R3 said she was trying to help. She accepts Dr Bohin’s criticism now, it was not that helpful saying “Just tell X what you told me”. “I could see how it could be seen I was coaxing or encouraging a child.” R3 later said that R2 has not encouraged her to give her evidence, “I have a view that something has been happening – [R1] has had her throughout” and “I’m not

looking back for a more sinister explanation”. If A hurts herself she would let you know, she is “very dramatic anyway”. R3 also pointed out that she was very active in arranging contact, R1 and her step-grandparents were quite accommodating. It is now difficult, but manageable.

## The Expert Evidence

15. The observations by the locally-based consultants and GPs have been considered. The evidence of Drs Ward and Zeitlin is, in essence, compatible with them. The useful joint report (G429-435) shows a lot more agreement than disagreement, and, in addition the disagreements are viewed by both experts as “a matter of degree” (Dr Zeitlin, G435) or “a difference in degree” (Dr Ward, G437). Reference was made earlier to the very important question in cases such as this of the “totality” of the injuries. This is addressed by both experts at G431, and deserves citing in full:

- “The injuries are notable by their unusual site (e.g. on the soft tissue of the face and arms) and their unusual nature – linear, patterned injuries.
- Unexplained injuries where there is a cluster of marks and which have a pattern raised significant concerns that the injury has been inflicted.
- The constellation of unusual injuries is concerning and suggests that [A] was the subject of recurrent inflicted injury.”

Generally Dr Zeitlin, to use her own wording is “less certain (more ambivalent) than Dr Ward, rather than disagreeing with her”. However, when questioned by the child’s Advocate, Dr Zeitlin considered that the injuries in relation to alleged Facts 6 and 7 were “very similar indeed”. There was, she added, no good explanation for two such similar injuries occurring. The similarities are “red flags”. Both experts confirmed that you expect injuries more to the bony prominences, not soft tissue (as the Guernsey consultants also carefully put it). When looking at the totality of the injuries, Dr Zeitlin found the bruising to the face really concerning; the plausible explanations become less so when looking at the (unusual) totality. Dr Ward’s evidence was that A is the subject of repeated NAI, more likely than not. She earlier told the Convenor’s representative that here, overall, there is a child who has had injuries which are not the typical injuries of a child falling, there is a lack of explanation, there are unusual sites of injury, and the concerning nature of the injuries – particularly the linear marks. This observation was in accordance with Dr Ward’s conclusions on all the injuries set out at G144. Again a full citation is helpful:

“I have considered each of the injuries individually as recommended in forensic assessment. However, from early age [A] has had injuries which were notable by:

- (a) their unusual site (e.g. on the soft tissue of the face and soft tissue of the arms).
- (b) their unusual nature – linear patterned injuries, some of which have been associated with petechiae.
- (c) lack of a clear history of memorable injury or a suggested mechanism which was not consistent with the observed injury.

Finally, two of the injuries occurred when [A] was a pre-mobile child and unlikely to cause injuries to herself.

The pattern of injury suggested that [A] was the subject of repeated non-accidental injury.”

This assessment is convincing on all the facts before the Court and is accepted to the appropriate standard.

And, when asked about what the pattern suggested Dr Ward stated, again convincingly on all the facts:

“The pattern is not one of an active child sustaining minor bruises as a result of slips, trips and falls. The pattern of unexplained or inadequately explained injuries to soft tissue areas and patterned/clustered/linear injuries, suggests inflicted injury.”

16. Based on the evidence, and once more emphasizing the need to consider the totality of the injuries, the evidence of the experts is very persuasive and the two English consultants essentially differ in emphasis. What their joint observation states (G431) is very clear and convincing evidence which is accepted. None of the paediatricians, Guernsey-based, nor the two from England had the impact of their evidence lessened by cross-examination. However, one aspect of the case causes an element of circumspection, namely alleged Fact 5 – the scratch. In her very able closing submissions on behalf of R1, Advocate Hopkins referred to a familiar case; one which is frequently referred to in civil litigation. In Miller v Minister of Pensions [1947] 1 All ER 372 at 373, Denning J observed that if in a civil case the probabilities are equal then the burden of proof is not discharged. In relation to this injury the evidence is not quite so compelling as in the other allegations. Indeed the facts rather appear out of kilter to those others. Dr Zeitlin was clear that the accidental scenario put forward by R1 was plausible and that the “injury is suggestive of (but not diagnostic of) accidental rather than inflicted injury” (G433). Dr Ward refers to the severity of the scratch and its length and finds R1’s explanation “difficult to envisage”. This is a situation where, on all the evidence, the probabilities are equal.

### **The Other Evidence**

17. It was most important to look at the witnesses, especially the parties and consider their reactions to cross-examination. R1 did not have a plausible explanation for the injuries (save the scratch) and it is significant that Facts 4, 6 and 7 coincided with periods of heightened stress for R1. In relation to Fact 7, R1 gave an account to the Police which has been described, and which was economical with the truth. When standing back and looking at the nature and totality of the injuries, together with the lack of any viable explanations, and what the parties said in relation to these injuries, then the clear conclusion is that in respect of Facts 3, 4, 6 and 7 it is more likely than not that they were inflicted by R1; intentionally or recklessly in respect of Facts 4 and 6. In considering the evidence, R2 and R3 were found to be truthful and reliable and their accounts are accepted on the appropriate standard of proof. (It is small wonder that R2 may well indeed have been “hyper-vigilant” on the question of recurring injuries to his daughter.) It is not part of the remit of this case to decide if he was “controlling” during the course of the relationship, as this is a case about the child A, and what has happened to her. No opinion is expressed on that.

### **Facts 8 and 9**

18. In view of all the evidence it is clear that Fact 8 is established on the balance of probabilities. A has “suffered from a number of repeated injuries notable for their unusual site, unusual nature and lack of clear history as to how they were caused”. Also, as a result, she has suffered “physical abuse”. There is no doubt that “abuse” (see paragraph 5 above) is proven. Accordingly, with the exception of Fact 5, where the probabilities are as stated equal, the Convenor’s case succeeds on the requisite standard of proof.

19. The earlier case has been referred to at paragraph 7 above. There needs to be little more said, apart from the fact that the “small bruise” (Fact 3) should have been reported by the Health Visitor. Dr Bohin was clear on this, and the policy in Guernsey has been brought into line with that in the UK. This injury, small in itself, had it been referred to a consultant paediatrician, would have raised a ‘red warning flag’ at an early stage. The significance of such an injury to a non-mobile baby would have been apparent on expert examination.

### **A Final Word**

20. This judgment cannot be concluded without some relevant and, hopefully, appropriate observations. They are kept to a minimum to avoid too prolix a decision. Firstly, it was noticeable how R1’s then boyfriend referred to her habitation as “squalid”. This word is not quite on the target, but it can be seen what he meant. R1 was on her own, with a small child who had earlier not been well. She had, as has been stated more than once, a demanding job which could result in unsocial hours and was not especially well-remunerated. All these circumstances pitched in with the rather unsuitable housing, were bound to produce stress and emotion. It is within that background that from time to time they impacted on the situation which emerged in this case. I have dealt, unfortunately, over the years in England and Guernsey, both as advocate and judge, with some incidents of deliberate cruelty, often over a prolonged period, normally inflicted out of pure wickedness. This is not such a case and R1 deserves some sympathy for the difficult situation she found herself in. This is not to water down the factual findings, but to place them in context. The person in whose interests this case is brought is, of course, A. It is greatly to be hoped that now there will be no need for the attention of doctors, social workers, Police officers and others coming into her young life, so she can develop normally. She, from what was seen and mentioned, already has her own distinctive character and should be able to be a child, growing-up safely and without disturbance.

21. The various legal representatives deserve thanks for agreeing what matters they could; not making life even more difficult than it was with tedious procedural arguments, and also cross-examining civilly and sensibly. All the witnesses, professional and lay are thanked as well. The people called on behalf of the parties all made a good impression and tried to help the situation by assisting the Court; all the evidence has been considered in reaching the present decision, whether specifically referred to or not.

**J R Finch O.B.E.**  
**Judge of the Royal Court**

**27<sup>th</sup> June, 2019**

**IN THE GUERNSEY JUVENILE COURT  
IN THE APPLICATION MADE UNDER S.42(3) OF THE CHILDREN (Guernsey & Alderney)  
LAW 2008  
AND IN THE MATTER A CHILD**

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**AGREED SUBMISSION IN RESPECT OF THE DEFINITION OF ‘PHYSICAL ABUSE’**

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**Background**

1. There is no definition of physical abuse within the Children (Guernsey & Alderney) Law, 2008 (“the Law”). There is no similar threshold condition within either the Scottish or English legislation therefore there is no case law to assist with the definition.
2. The term physical abuse is more generally used in the context of child protection.
3. The local Island’s Safeguarding Children Partnership (ISCP) has a definition of physical abuse on their website that it states is taken from the Scottish Office guidance of 1998.

*“Actual, attempted or risk of serious physical injury to a child including the administration of toxic substances, where there is a definite knowledge or reasonable suspicion, that the injury was inflicted or knowingly not prevented”*

4. The ISCP website also states the following:-

*“Physical injury may include a serious incident or a series of minor incidents involving bruising, fractures, scratches, burns or scalds, poisoning, attempted drowning or smothering, fictitious illness by proxy, serious risk of injury or actual injuries resulting from parental lifestyle prior to birth, for instance substance abuse or physical chastisement deemed to be unreasonable”.*

5. The Scottish Office Guidance referred to by the ISCP (Protecting Children – A Shared Responsibility, 1998) categorises abuse (at Annex C) into 5 parts, physical injury, sexual abuse, non-organic failure to thrive, emotional abuse and physical neglect.

*“Physical Injury  
Actual or attempted physical injury to a child, including the administration of toxic substances, where there is knowledge, or reasonable suspicion, that the injury was inflicted or knowingly not prevented.”*

6. In the updated version of the Scottish guidance issued by the Scottish Government (National Guidance for Child Protection in Scotland 2014) physical abuse is defined as follows;

*“Physical abuse is the causing of physical harm to a child or young person. Physical abuse may involve hitting, shaking, throwing, poisoning, burning or scalding, drowning or suffocating. Physical harm may also be caused when a parent or carer feigns the symptoms of, or deliberately causes, ill health to a child they are looking after.”*

7. The statutory guidance in England and Wales issued by the Department for Education (Working Together to Safeguard Children) updated in 2018 defines physical abuse as:-

*“A form of abuse which may involve hitting, shaking, throwing, poisoning, burning or scalding, drowning, suffocating or otherwise causing physical harm to a child. Physical harm may also be caused when a parent or carer fabricates the symptoms of, or deliberately induces, illness in a child.”*

and defines abuse as:-

*“A form of maltreatment of a child. Somebody may abuse or neglect a child by inflicting harm, or by failing to act to prevent harm. Children may be abused in a family or in an institutional or community setting by those known to them or, more rarely, by others. Abuse can take place wholly online, or technology may be used to facilitate offline abuse. Children may be abused by an adult or adults, or another child or children.”*

8. The ISCP website goes on to provide guidance for professionals on the identification of abuse stating that the following indicators should alert workers to the possibility of children having been abused.

***“Bruises***

- *Black eyes are particularly suspicious if: both eyes are black (most accidents cause only one); there is no bruise to the forehead or nose or suspicion of skull fracture (black eyes can be caused by blood seeping down from an injury above).*
- *Bruising in or around the mouth (especially in small babies).*
- *Grasp marks on arms - or chest- of a small child.*
- *Finger marks (e.g. you may see three or four small bruises on one side of the face and one on the other).*
- *Symmetrical bruising (especially on the ears).*
- *Outline bruising (e.g. belt marks, hand prints).*
- *Linear bruising (particularly on the buttocks or back).*
- *Bruising on soft tissue with no obvious explanation.*
- *Different age bruising (especially in the same area).*
- *Petechial bruising (petechia - a small spot due to an effusion of blood under the skin) - tiny red marks on face and especially in or around eyes and neck, also ears, indicating shaking or constriction.*
  
- *Most falls or accidents produce one bruise on an area of the body - usually on a bony protuberance. A child who falls downstairs generally has only one or two bruises. Bruising in accidents is usually on the front of the body as children generally fall forwards. In addition, there may be marks on their hands if they have tried to break their fall. The following are uncommon areas for accidental bruising: back, back of legs, buttocks (except, occasionally, along the bony protuberance of the spine), neck, mouth, cheeks, behind the ear, stomach, chest, under the arm, genital and rectal area.”*

**Submissions**

9. The Court is invited to adopt a purposive approach to the interpretation of the term physical abuse in section 35(2)b Children (Guernsey & Alderney) Law, 2008.

10. The Law introduced a significant new legal regime for the protection and care of children. The purpose and objects of the Law are set out in Section 1:

*“Purpose and objects.*

*1. (1) The principal purpose of this Law is to reform, in respect of Guernsey and Alderney, the law relating to children and their families, in order that suitable provision may be made –*

*(a) to protect children from harm, and*

*(b) to promote their proper and adequate health, welfare and development.*

11. The effect of Section 35(2) of the Law is to set out the range of situations where the States of Guernsey may legitimately intervene in a child’s family life when it is necessary to do so. Establishing that a section 35(2) condition exists however is only the initial part of a multi-staged process to consider whether or not the state should intervene. The second stage involves the welfare considerations that will be carried out by the CYCT. Even if the 35(2) threshold is crossed the CYCT may conclude, taking into account the parent’s ability and willingness to provide the child with adequate care, protection, guidance and control and the child welfare principles set out in the law, that intervention is not necessary.

12. Were the section 35(2) conditions to be interpreted too narrowly then some children who may need the state to consider whether it is necessary to intervene to ensure their safety and wellbeing will be beyond reach. The nature of child abuse is such that there are unlikely to be independent witnesses to the incidents that lead to harm. In many situations, for example where the child is too young to give an account of events, it will not be possible to know exactly the mechanism that caused the injury. Therefore the Child Youth and Community Tribunal (CYCT) and the Court when considering whether or not to make a Community Parenting Order must be able to protect children when the exact cause of the physical harm is unknown and the identity of the person who caused the harm is not known.

13. Both of the current English and Scottish definitions of physical abuse for the purposes of child protection refer to causing physical harm to a child. The act of causing physical harm does not require a deliberate action or intention to cause harm.

14. In order to ensure that the States of Guernsey has a basis for intervening to protect children when necessary the Court should adopt an interpretation of physical abuse that

- Does not require proof of intention to cause harm so therefore will include deliberate, reckless or negligent action or inaction resulting in physical harm
- Does not require identification of the person who caused the harm.
- Does not require identification of the mechanism or physical act that caused the physical harm.