IN THE CHILDREN’S COURT OF VICTORIA

FAMILY DIVISION

DEPARTMENT OF FAMILIES, FAIRNESS AND HOUSING Applicant

and

APRIL PRICE Mother

BROCK WEST Father

MARIA WEST Child GREGORY WEST Child

|  |  |
| --- | --- |
| MAGISTRATE: | STEAD |
| DATE OF HEARING: | 11 – 15 July 2022 & 10 – 13 October 2022 |
| DATE OF DECISION: | 16 December 2022 |
| CASE MAY BE CITED AS: | DFFH v West (a pseudonym) |
| MEDIUM NEUTRAL CITATION: | [2022] VChC 2 |

CATCHWORDS: Child protection – preterm twins with marks – medical imaging, repeat x-rays – protection applications by emergency care under s.162(1)(c) and (e) CYFA – medical expert witnesses’ evidence regarding the marks and single fracture to each child – accepted that the marks were not deliberately inflicted – unlikely that the parents will inadvertently cause further marks to the children in providing care in the future – medical imaging and timing of rib fractures – medical opinion of causative mechanism and explanations for the rib fractures – signs of bone fragility in the twins – many other people handled the children during the relevant period; possibility that rib fractures could have been accidentally inflicted – no evidence that the children have been or are likely to be emotionally or psychologically harmed by their parents – DFFH invited the Court to strike out ground (e) – whether protection application proved under s.162(1)(c) – no direct witness evidence which supports a finding that the parents inflicted the rib fractures – parents cannot be reasonably expected to protect children from an unknown underlying vulnerability – no adverse inference against parents not giving evidence in the circumstances – no finding that the parents are objectively responsible for causing or failing to protect the children from significant harm from physical injury – no sensible basis for inferring that such harm is likely to occur in the future – protection application on ground (c) is dismissed.

APPEARANCES COUNSEL SOLICITORS

DFFH Ms K Cullen CPLO

Mother Mr A Kennedy Gorman & Hannan

Father Ms R Aoukar Stokes Pretty Lawyers

**REASONS FOR DECISION**

1. The Department of Families, Fairness and Housing (DFFH) issued protection applications by emergency care for Maria and Gregory West on 15 March 2022.
2. Maria and Gregory are non-identical twins, born in January 2022 by emergency caesarean section birth. The children were born preterm at 36 weeks gestation. Ms Price entered labour spontaneously, however surgical intervention was required as the twins were in breech position.
3. On 10 March 2022 the parents took the children to the Maternal and Child Health Clinic for a routine developmental check. Mr West alerted the nurse to a red mark on Gregory’s chin, and when Maria was undressed for weighing the Maternal and Child Health Nurse Ms Jane White noticed other small marks on her legs.
4. Ms White described how the father without hesitation attributed the marks to his performance of leg exercises to relieve wind on the twins. She thought he was referring to exercises they had been advised to do to address talipes noticed at birth.
5. Ms White described the marks as ‘bruise like’ and directed the parents to attend the Royal Children’s Hospital (RCH) that day to have the cause of the marks medically assessed.
6. The parents attended the RCH that afternoon as directed and consented to scans and testing to try to determine the cause. The children were admitted to the hospital on the afternoon of 10 March 2022. Medical imaging and blood tests were undertaken in compliance with protocols for identifying child physical abuse with the informed consent of the parents.
7. The Suspected Child Abuse Network Meeting held on 15 March 2022 was attended by a representative from the Victorian Forensic Paediatric Medical Service (VFPMS), Police representative and Child Protection representatives. The DFFH were informed and believed that the medical imaging performed at the RCH revealed that *both* children had *bilateral rib fractures and that Gregory had a possible skull fracture* and that the VFPMS clinician had formed the view that these reported injuries were highly likely to be non-accidental.
8. The DFFH were advised by the VFPMS clinician that significant force akin to a car accident was required to produce such injuries and were also advised that the discussions the clinician had with the parents had not revealed any explanation involving such significant force for the injuries.
9. On the strength of this information, the DFFH formed a reasonable suspicion that the parents were potentially responsible for the injuries and properly commenced these proceedings by taking the children into emergency care and seeking interim orders placing them with their maternal grandparents, whilst the DFFH, RCH and Victoria Police conducted further enquiries to investigate whether other circumstances and evidence supported the hypothesis that these injuries were not accidental or medical in origin.
10. The twins were discharged from the hospital on 16 March 2022 into the care of their maternal grandparents on an Interim Accommodation Order (IAO). The parents’ contact was to be supervised by the Grandparents, and they were not permitted to stay in the home overnight.
11. On 29 March 2022, during repeat x-rays of the twins, a new fracture on Maria’s rib was identified, and the earlier bilateral fractures reported for Gregory’s and her ribs were excluded, so too was the skull fracture reported for Gregory. The fracture observed on Gregory was present on the imaging taken on 11 March, and there was no fracture on Maria until the imaging of 29 March 2022.
12. The DFFH were made aware of these findings on 8 April 2022. They commenced proceedings alleging Breach of the IAO by emergency care, removed the children from the care of the maternal grandparents, placed them with the paternal grandmother, and excluded the mother, who was breastfeeding the children, and father from having *any contact* until the matter was returned to Court.
13. The breach application was heard by the Court on 11 April 2022. By the time of the hearing, the parents had arranged a consultation and examination of the twins by Professor AN, who provided a letter to the Court indicating her concerns that the twins both showed signs of bone fragility.[[1]](#footnote-1) Noting the potential medical explanation, the Court returned the children to the care of the maternal grandparents and varied the parental contact condition to allow them to reside in the home under the full supervision of the maternal grandparents. This order remained the same until the final contest was adjourned part heard, where it was varied by consent to progress the parents’ contact to monitored in some circumstances.
14. At the time of issuing the Protection Application, the DFFH asserted that the twins were in need of protection under s.162(1)(c) and(e) of the Children, Youth and Families Act 2005.
15. When this final contested hearing commenced, the DFFH sought proof of the protection application on both original grounds asserting that a permanent non-reunification case plan was the only way to provide safety for the twins and sought that the Court make care by Secretary orders.
16. The parents were united in seeking that the protection application be dismissed for want of evidence supporting proof on either ground.
17. At the conclusion of the evidence, the DFFH sought proof of the protection application of ground (c) actual harm and ground (e) likely harm and had changed their recommended disposition to a Family Reunification Order until 15 March 2023. The parents remained of the view that the evidence did not support a finding of proof.
18. Subsequently in submissions filed on behalf of the Secretary on 4 November 2022, the Court was invited to ‘strike out’ the Secretary’s application for proof of the application on s.162(1)(e).

**MEDICAL EXPERT WITNESSES**

1. I heard evidence from multiple medical witnesses regarding the marks and single fracture to each child.
2. Dr MC, paediatric radiologist, and current Vice President of the World Federation of Paediatric Imaging[[2]](#footnote-2), gave evidence of his review of the medical imaging findings for each child taken on 11 March and 29 March 2022.
3. Associate Professor HS, Paediatric Haematologist, gave evidence about the blood test investigations undertaken on each child to exclude known blood disorders.
4. Professor AN, a paediatric endocrinologist of 32 years’ experience, gave evidence of her assessment of the signs of bone fragility in each child, and of her referral of the twins for genetic testing and seeking the second opinion of Associate Professor HS regarding their blood tests and Clexane[[3]](#footnote-3), and Professor RS regarding bone fragility.
5. Professor LG, Paediatric Haematologist of over 20 years’ experience, was called to give evidence about whether the use of low molecular weight heparins after the caesarean section delivery would have any impact upon the bone health of the twins.
6. Dr HM, Paediatrician, gave evidence of her assessment conducted at the Victorian Forensic Paediatric Medical Service. Dr HM has been a qualified paediatrician since January 2022. She undertook one subject in the Master of Forensic Paediatrics at Monash University and spent approximately a year working on average 2 days per week with the VFPMS. Dr HM has no other specialisations relevant to the issues in this matter, having pursued a different specialisation and no longer engages in forensic assessments.
7. Professor RS, Paediatric Endocrinologist, gave evidence of his assessment of the x-ray images of the children and signs of bone fragility at the request of Professor AN. Professor RS is the current Director of the University of Queensland Health Research Centre and Professor of Paediatric Bone and Mineral Medicine at the University of Sydney and has been the Chair of the Australasian Paediatric Endocrine Group Bone and Mineral working group since 2012.[[4]](#footnote-4)

**LIKELY CAUSE OF THE MARKINGS ON THE TWINS:**

**PARENTS’ EXPLANATIONS AND MEDICAL OPINION**

1. The marks of concern on Maria were on her legs. On Gregory there was an area of redness on his chin, and a very small, discoloured area on his right knee of approximately 3mm. There were no marks or bruises on either child’s chest or back either on 10 or 11 March, or 29 March 2022.
2. Dr HM did not assess Gregory in person, she viewed the clinical photographs – as did Professors AN and LG. Dr HM did assess Maria. Dr AN assessed both twins, but all marks had resolved by the time she saw them on 11 April 2022.
3. In her evidence Dr HM stated that Gregory had been initially present when she commenced her discussion with the parents and assessment of Maria and that he was taken to have medical imaging done. She did not in her report, or her evidence, note having observed the pink mark on his chin.
4. The father has never resiled from the likelihood that he may have used too much pressure in his performing of the exercises to assist the children to pass wind.
5. During the interviews conducted by Dr HM, a possible explanation was given by the parents that the instruction given to hold the babies’ chin to assist with latching for breastfeeding may have caused the pink mark on Gregory’s chin, or both parents thought perhaps pressure from the dummy could have caused this mark.
6. The medical examinations of both children revealed no retinal haemorrhages, and no subdural haemorrhages or other brain changes. They also excluded known bleeding disorders and known genetic abnormalities.
7. The evidence of Associate Professor HS was that the twins both had borderline factor XI results, and that the PFA platelet clotting test had been unable to be performed. His opinion based on the result of the blood tests was that the factor XI abnormality was not at a level associated with spontaneous bleeding or bruising. Associate Professor HS was consulted by both Dr HM of VFPMS and Professor AN regarding the blood test results. He also gave evidence regarding the potential impact on the twin of the mother being prescribed Clexane, a low molecular weight heparin, post c-section. The question of whether this medication had a role in any of the injuries was first raised in the Emergency Department of the Royal Children’s Hospital. In his opinion, the use of Clexane would not have caused the abnormal factor XI, or other mild abnormalities described in the children’s blood tests as he understood low molecular weight heparins to not be orally available in breast milk.
8. The evidence of both Dr HM and Professor AN was that the marks seen on the skin were of differing mechanism to the single rib fracture in each child.
9. There was some dispute between the categorisation of the marks between the medical witnesses shown the images – Professor AN, Professor LG and Dr HM.
10. Professor AN disputed the characterisation of the two marks on Gregory as bruises, noting that she had been informed the marks disappeared by 12 March 2022 which in her opinion made them more consistent with pressure marks.
11. Dr HM conceded from the clinical photographs that she could not say without doubt that the pink mark on Gregory’s chin was a bruise.
12. The images were also shown to Professor LG, paediatric haematologist. His evidence was that he could not say whether they were accidental or not, but that the maternal and child health nurse was justified in referring the children to the RCH as it is unusual for ‘bruising’ on young babies, and it was important to assess to see if any urgent treatment was required for issues such as vitamin K disorder. Of all the clinical photographs, his opinion was that only two were bruises, those being on the calf and thigh of Maria.
13. In response to a question I asked based on evidence that the markings were present for 48 hours or less, Professor LG stated that this spoke to the amount of force likely to have caused them, and had earlier stated that in babies, forces are exaggerated, and in his opinion based on results of blood tests, that the likely cause was “some kind of handling over and above normal”.
14. Professor AN’s opinion as to likely causes for the marks was that the father’s explanation of the leg cycling exercises, and the rings he wore are consistent with a possible mechanism. Her opinion was that it was more likely they were “more likely accidental damage by an inexperienced parent”.
15. Dr HM disputed that the marks on Maria could have been caused by the leg cycling, as she was of the view that ”much greater force than normal was required to cause markings”.
16. All medical professionals who gave evidence agreed that bruising in non-mobile infants is concerning. I agree.
17. The marks had all disappeared by the time the twins were discharged from the RCH as inpatients on 16 March 2022. The mother informed the then allocated child protection practitioner Ms TH during a phone call on 21 March that they had all resolved by 12 March[[5]](#footnote-5), and no evidence was led to dispute this. I accept the opinion of Professor LG that the short duration of the marks speaks to the amount of force applied being lesser.
18. No possible causes other than those raised by the parents have been suggested by medical experts. There were no patterns to the bruising to indicate another obvious cause.
19. I accept the evidence of Associate Professor HS and Professor LG that the prescribed use of low molecular weight heparins by the mother did not play a causative factor in the appearance of the marks/bruising.
20. The father suggested his actions likely caused the marks to the legs. I accept that this explanation is the most probable cause, and that his concession that he may have used too much pressure in his grip, combined with the large solid rings he wore on his fingers is an honest one.
21. The pink mark on Gregory’s chin is on the edge of a pronounced milia. The limited duration of it being observed speaks to a lesser force being the cause. The mechanism of the mother holding his chin to help him latch for breastfeeding is a likely cause.
22. The twins have been examined and checked repeatedly since discharge from the RCH by Enhanced Maternal and Child Health nurses, Queen Elizabeth Centre parenting and skills development staff, a repeat examination by a different VFPMS clinician, and child protection staff. No repeat of any concerning marking on either child has occurred in the past 8 months.
23. The wind relieving and talipes exercises were done on the advice of medical professionals, as was the holding of the chin to assist with breastfeeding. I accept that the marks were not deliberately inflicted.
24. The notes tendered into evidence of Ms Janine Finch, EMCHN confirm that the parents ceased the wind relieving exercises on the children.
25. The evidence of PASDS, EMCH nurses and child protection employees who conducted home visits is that the parents were consistently observed to provide gentle, nurturing and responsive care to the twins post discharge. The Breastfeeding Service and Maternal and Child Health Nurse had not noticed any marks on the children prior to 10 March 2022. The most recent breastfeeding nurse appointment had been on 7 March 2022, where there were no concerns reported about the care provided to the twins.
26. On the strength and abundance of evidence of proper care over the last 8 months, I find that it is unlikely that the parents will inadvertently cause further marks to the children in providing care in the future.

**MEDICAL IMAGING AND TIMING OF RIB FRACTURES**

**GREGORY**

1. Dr MC gave evidence that Gregory underwent a skeletal survey (x-ray) at 3:58pm on 11 March 2022, followed by a brain and spinal MRI at 6:57pm. He also underwent a brain CT scan and nuclear medicine bone scan, both on 11 March. I am uncertain if he also underwent ophthalmological examination for retinal haemorrhages, as was performed on his twin sister as there is no mention of this in the VFPMS report. Clinical photography was also performed on this day, the timing of which was not able to be established in evidence.
2. On 29 March 2022, a repeat chest x-ray was performed on each child. The medical imaging was reviewed on 7 April 2022. Dr MC participated in this review.
3. For Gregory only one “*very subtle*” close to the vertebrae fracture of the 9th left rib was confirmed in the peer review. Gregory did not, in Dr MC’s expert opinion, have any skull fracture. His assessment for the timeframe for the rib fracture to have occurred was *“a minute to a week before the x-ray”* as there was no evidence of any healing, and the MRI showed a bright signal over this rib consistent with a very recent injury. This injury was seen on all three medical imaging scans performed on 11 March 2022.
4. His evidence was that the suspected fractures bilaterally on ribs 10 and 11 were not fractures. The repeat x-ray on 29 March showed clear callous formation only on the 9th left rib. This supported his estimate of timing for the fracture, and the exclusion of the other earlier reported fractures.

**MARIA**

1. Maria underwent similar scans also on 11 March and a repeat x-ray on 29 March. The skeletal survey was performed at 12:22pm, and the MRI at 5:50pm. Maria underwent ophthalmological examination for retinal haemorrhages also on this day. No retinal haemorrhages were observed.
2. The nuclear medicine scan, MRI and skeletal survey results for Maria from 11 March *did not* reveal that she had bilateral rib fractures, or multiple rib fractures. The imaging taken that day was contradictory: the skeletal survey and MRI revealed no bony abnormalities for Maria. The concern for rib fractures came from the nuclear medicine scan which concluded probable bilateral posterior rib fractures, (at left 10 and 11, and right 11) and recommended a repeat x-ray in 10 days.[[6]](#footnote-6)
3. The repeat x-rays were conducted on 29 March 2022. The earlier reported bilateral rib fractures were conclusively excluded, however these repeat scans showed a fracture of Maria’s right 7th rib not present in the earlier scans.
4. The evidence of Dr MC, consultant radiologist who reviewed all the medical imaging taken of Maria confirmed that in the medical imagery taken of the twins on 11 March 2022 there were no fractures identified on Maria, and the one fracture to her right 7th rib occurred in a timeframe from *“immediately after the scans on 11th March to likely 2 weeks before 29 March 2022- less likely a week before*” based on the amount and pattern of callous formation.
5. This places the most likely time frame for this injury from the evening of 11 March 2022 to 15 March 2022 (2 weeks prior to repeat x-ray), less likely up to one week before the repeat x-rays.
6. Professor AN concurred with Dr MC’s assessment of the likely timeframes. Professor RS was not asked to comment on this issue. I accept the evidence of Dr MC regarding the time frame for the fractures to have occurred.
7. Both infants were inpatients at the RCH during most of this period, (10-16 March 2022).
8. The evidence of Ms TH DFFH was that Dr HM told her that the fracture to Maria would have occurred post-discharge, and that the fracture was only a week old. In her report for the VFPMS, Dr HM did not include the assessment of Dr MC as to the timing window for the fracture to Maria, instead stating only that it was “*highly likely to have occurred after 11 March 2022.”*
9. The CRIS note taken by Ms TH of this conversation on 8 April 2022[[7]](#footnote-7) confirms that she understood Dr HM to say the fracture had occurred in the week prior to the repeat scan, and notes that the DFFH were to investigate whether either parent was left unsupervised when with the children in the hospital for any period, and whether the maternal grandparents had ever left the parents unsupervised since discharge, or whether they had cared for the twins unsupervised prior to 10 March.

**EVIDENCE OF CARE PROVIDED TO THE TWINS DURING THE LIKELY PERIOD OF FRACTURES**

1. No evidence was given that the maternal grandparents had provided care or support in the absence of a parent prior to 10 March 2022.
2. The reports of Dr HM include notes of her interviews of the parents.[[8]](#footnote-8) Those interviews detail that the only time the twins were in the sole care of one parent (the father) was in the week post discharge from hospital after their birth when the mother attended a post birth medical check. This period is outside the window for the fracture to the rib of Gregory and the subsequent fracture to the rib of Maria to have occurred on the evidence of Dr MC.
3. The conditions of the IAO made on 16 March 2022 excluded the parents from staying overnight in the home of the maternal grandparents, and no evidence was given that the grandparents ever failed to comply with the condition requiring they fully supervise all care provided by the parents under the court ordered contact conditions for the twins and the parents.
4. No evidence was given that the parents were ever left unsupervised by hospital staff during the inpatient admission dates, or that nursing staff observed any handling of concern by either parent.
5. No evidence was led of the parents’ presentation during the hospital admission as being of concern. The evidence is that they were open in their interactions and responses to hospital staff, cooperative, and nurturing in the care they provided to the children.
6. MCHN Ms White did not notice any signs of rib fracture in Gregory when he was examined on 10 March 2022. She did not give evidence that he showed any signs of discomfort, nor that she heard a popping sound. She did not observe any inappropriate handling of the twins by either parent. None was noted as having been observed by the breastfeeding nursing service (who saw last the children on 7 March 2022) on the file either – in fact, the observations were of gentle and responsive care.[[9]](#footnote-9)
7. Ms TH conducted a home visit on 16 March after discharge from RCH. She noted no concerns for either child. Ms SM, also of DFFH, conducted another home visit on 24 March 2022. Ms TH agreed that in Ms SM’s case note of this visit she not only had no concerns, she also noted positive care giving and interactions. She noted no external injuries and did not note Maria to show any signs of discomfort.

**MEDICAL OPINION OF CAUSATIVE MECHANISM AND EXPLANATIONS FOR THE RIB FRACTURES**

1. In her reports for the VFPMS, Dr HM[[10]](#footnote-10) notes that she is reliant upon radiology colleagues for interpretation of radiology investigations. In her report on Maria, she included Dr MC’s opinion that the location of the rib fractures was not typical of those thought to be caused “*from holding chest with two hands”.*
2. Contrary to this, Dr HM suggested in her viva voce evidence that the injury to each child was from a squeeze and shake with both hands gripping the torso.
3. Dr MC’s evidence given in this hearing regarding possible causation was that his expertise and role was in diagnosing the fractures. However in his experience, it was “*hard to imagine how force could be applied to only one rib*”, and that his professional opinion was that that the degree of force to only break a single rib would be less than a motor vehicle accident. He was of the view that the most likely mechanism was lateral compression on the side of the body where the fracture was located. In his opinion the fractures could be accidental and were not clearly deliberately inflicted.
4. He deferred to Professors RS and AN regarding bone fragility and agreed that whilst the imaging did not show a definitive bone abnormality, the observation of Professor RS that Maria’s ribs appeared gracile (twig like) and had thin femoral cortices was fair – he commented that “*they look a little thin, but it is matter of opinion*”.
5. Professor AN was consulted by the parents to explore other causes for the fractures. She was engaged due to her significant expertise as a paediatric endocrinologist with expertise in bone abnormality. Her expertise in this area was acknowledged by all other medical witnesses except Dr HM. She examined both children on 11 April 2022 and sought further testing and opinions of other relevant medical experts.
6. Professor AN agreed with the opinion of Dr MC regarding the timeframes of the single fracture to each child.
7. She gave evidence that as preterm twins, their bone mineralisation was “*behind the 8 ball”.* This opinion was explained as being preterm babies, they would have ¼ less bone accrual at birth than a full term neonate. Professor AN categorised their adjusted age at the time of the injury as 2 -3 weeks of age.She noted Maria’s gracile ribs, and that Gregory in her expert opinion had a large fontanelle for his size, “*significantly larger than expected”.* Her evidence was that these factors were consistent with the slow development of bone quality and strength in the twins.
8. Professor AN sought a second opinion from Professor RS, a paediatric specialist endocrinologist with over 25 years’ experience in bone disease, regarding her observation of indicia of bone fragility, and provided him with the x-ray imaging. In his evidence Professor RS agreed with Professor AN’s observations of the indicia of bone fragility and stated that the implications of having gracile bones is they are “*more prone to fracture*”.
9. Professor AN’s evidence was that as the children develop, she would expect that the further accrual of bone would lead to the resolution of the issues that she and Professor RS identified.
10. Evidence was also given by Professor LG about whether low molecular weight heparins prescribed to the mother would be a possible cause of bone fragility. His evidence confirmed that of Associate Professor HS about these substances not being orally available, so even if present in small amounts in breastmilk they would not remain active after digestion and therefore would not cause bone fragility in the twins.
11. Dr HM did not accept the opinion of Professor AN – and therefore Professor RS – regarding the bony abnormalities they observed on the imaging.
12. Dr HM asserted that deference to the expertise of a paediatric endocrinologist was not necessary to distinguish between non-accidental injury and conditions such as osteogenesis imperfecta and osteopenia. She relied upon the paediatric training she had received in her studies and internship, and a review article entitled Clinical perspectives on Osteogenesis Imperfecta versus non-accidental injury[[11]](#footnote-11). This article, rather than supporting Dr HM’s assertion, notes “*Some of the findings in NAI versus OI are subtle and could be easily missed, leading to an incorrect diagnosis*.”[[12]](#footnote-12) In her evidence, Professor AN stated that genetic testing performed on the children “*do not cover every possible test. There are 21 known possible bone fragility genes identified – collagen A1 and A2 are the main genes. This would exclude the majority of genetic conditions but doesn’t exclude other causes of bone fragility.*” The article provided by Dr HM supports this position, rather than contradicting it.[[13]](#footnote-13)
13. The evidence of Dr HM was that in her training and experience, it would take forces akin to a motor vehicle accident or fall from a large height to cause the single rib fracture to each child, putting her opinion of force at odds with other medical witnesses. She postulated a mechanism of each child having been “squeezed around the chest with both hands and shaken.” She further asserted that there is a “*95% positive predictive value of rib fractures being non-accidental in infants,*” and provided a review article entitled Pediatric rib pathologies: clinicoimaging scenarios and approach to diagnosis[[14]](#footnote-14) to support these opinions. Dr HM believed that the research underlying this claim was based on confessions and/or judicial determinations of guilt in child abuse cases. Dr HM had not read the original source of this figure, a paper published in 2003 in the Journal of Trauma.[[15]](#footnote-15)
14. This paper was not provided to me, however the abstract available online[[16]](#footnote-16) states “*NAT was determined by the Child Advocacy and Protection team*”. Not having been provided with the source paper, I am unable to be satisfied that the methodology involved is free from confirmation bias. I am aware that there is significant dispute amongst medical experts as to some of the forces and mechanisms required to produce certain injuries in infants, a fact which Dr HM herself acknowledged in her evidence and was present in the evidence of medical witnesses in this case. I also note that the paper provided by Dr HM, whilst claiming a strong association with rib fractures and non-accidental trauma, clearly states that “*multiple fractures and fractures of differing ages are more specific*”.[[17]](#footnote-17) Additionally, the article Review of clinical perspectives on Osteogenesis imperfecta versus non-accidental injury which Dr HM provided to the Court asserts that the 95% positive predictive value is for “*symmetric rib fractures, specifically if they are posterior medial and bilateral”,*[[18]](#footnote-18)not for single rib fractures.
15. The reliance and emphasis on the claim of a 95% positive predictive value invites the court to be led into error through what has become known as ‘the prosecutor’s fallacy’: rather than ask the probability that the parents did not inflict the harm given all the evidence, it invites the erroneous reasoning of asking what the probability is that the injury would occur if the parents did not cause it. The Secretary must provide evidence to prove their case on the balance of probabilities, rather than the parents having to refute a case based on statistical probabilities.
16. The propositions Dr HM relied upon were not put to the other relevant experts for comment.
17. Where the evidence of Dr HM differs from that of Professor AN and Professor RS regarding the signs of bone fragility in Maria and Gregory, I prefer and accept the evidence of the Professors.

**OTHER EVIDENCE OF THE SOCIAL FACTORS RELEVANT TO ASSESSING THE PROBABILITY THE INJURIES WERE INFLICTED BY ONE OR BOTH PARENTS**

1. Having accepted the expert opinions of Professors AN and RS that the twins had observable signs of bone fragility does not rule out the possibility of the children’s fractures having been caused by abuse. The fragility of their bones must be considered in the context of the constellation of facts – including the timing for the fractures, and the social factors investigated by the DFFH – when assessing the probability that the parents *knowingly* did something to cause the single fracture in each child.
2. The other risk factors which are matters of importance when assessing the probability that an injury to a child has been abusively inflicted, or accidentally occurred and likely to reoccur, are whether there is a context of family violence, whether either parent is compromised by drug use or a disturbance of their mental health, and whether there are concerns for their practical parenting skills.
3. There is no suggestion that drug use by either parent is a factor in this case.
4. There is no evidence of any nursing observations made by RCH staff that indicated safety concerns for the parents’ handling and care of the twins, nor by child protection staff who conducted weekly home visits. During the DFFH investigations, the parents engaged with the Queen Elizabeth Centre in-home Parenting Assessment and Skills Development Service who provided a comprehensive assessment of the practical and emotional parenting skills.
5. Ms HG of that service gave evidence in this hearing, prior to the final report being available due to an assessor being on leave. The final report was tendered by consent.[[19]](#footnote-19)
6. The PASDS closure report, and Intake meeting minutes [[20]](#footnote-20) reveal that initial injuries to the children as reported by the DFFH were incorrect. Despite the VFPMS informing the DFFH of the corrected injury details, I am unsure whether DFFH ever communicated this to the PASDS service. I am also unsure whether the DFFH ever advised the PASDS assessors that the timeframe for the rib fracture to the twins included the period of their hospital admission.
7. The PASDS assessment of the parents was conducted over 24 visits, of which the father attended 14. The only challenge for the parents noted by the service was ‘safety and protection’. This was not due to any observed practices that were unsafe, nor any failure to make modifications to the family home to provide safety for the children. It related solely to the DFFH alleging that the parents were responsible for inflicting the injuries to the children.
8. The PASDS noted in its closure report that the children’s sleeping arrangements were SIDS safe, that the parents “were observed to hold Maria and Gregory securely yet gently with no rough handling observed”.[[21]](#footnote-21) Ms Green was clear in her evidence that none of the PASDS practitioners had observed anything but attuned, gentle and responsive caregiving. At the midpoint review meeting, PASDS staff informed the DFFH that “*Parents are meeting infants needs pretty quickly and the infants are believed to feel safe with the parents doing this.”[[22]](#footnote-22)* Yet in their final report PASDS commented “Given that no definitive explanation has been supplied in relation to the cause of the injuries…sustained whilst in the care of Ms Price and Mr West, PASDS could not classify (safety and protection) as a strength.”[[23]](#footnote-23) It appears that the weight of suspicion alone is the cause for this inclusion, not the direct observations of the assessors.
9. The PASDS staff completed post-natal depression screens, and general mental health screens for the parents, with no concerns for their mental health, other than the grief and stress involved in these proceedings.
10. Neither parent has a history of mental illness.
11. Neither parent has a criminal record.
12. The PASDS staff had no concerns for the presence of any family violence from their observations. They observed healthy cooperative parenting between Ms Price and Mr West, and mutual emotional support.
13. The sole reference to any hint of family violence came from a note taken by Ms TH of her summary of a conversation with the Breastfeeding service. Ms TH noted the service to comment on the father’s diligence with attending to the children’s needs, doing all the practical tasks whilst the mother was in the feeding chair. The next sentence seems to have been interpreted by DFFH as a particular reference to the father: ”*breast feeding service on occasion sees this behaviour in Father as controlling but also understand that with twins both parents are very on top of managing children*.”[[24]](#footnote-24)
14. Having heard all the evidence and having had the opportunity to observe the tenderness with which the parents support each other in court, I am satisfied that to interpret Mr West’s performance of practical childcare tasks whilst Ms Price was breastfeeding as ‘controlling behaviour’ being an indicator of family violence in their relationship is grossly unfair.
15. A father should be expected to perform practical childcare tasks as a part of being a parent. Performing them diligently whilst the mother is breastfeeding shows he has equal regard for their roles in caring for the children and is the antithesis of controlling behaviour.
16. In addition, it seems to have been overlooked, whether by Ms TH or the Breast Feeding Service, that Ms Price was recovering from a caesarean birth and the sutures had become infected, necessitating that the father take on a more hands-on role to support the mother’s recovery. No less is to be expected in an equal and respectful relationship.
17. There is no evidence of family violence concerns in the parents’ relationship, and no circumstantial matters from which any concerns could justly be inferred, rather there is evidence of strong mutual support and cooperative parenting.
18. The original position of the DFFH, in seeking a care by Secretary order and endorsement thereby of their permanent non-reunification case plan, was based on the assertion that they could not safety plan for the children to be cared for by their parents if their parents did not provide a plausible explanation for the rib fractures. Ms TH agreed in her evidence that these were the injuries of concern that led to the non-reunification case plan.
19. The DFFH have not produced any evidence that demonstrates any social, emotional or psychiatric considerations that would be relevant to assessing the probability that the parents separately or together knowingly inflicted harm on Maria and Gregory or failed to protect the children from deliberate harm inflicted by the other parent, or any other person.
20. The evidence of the timeframe of the fractures centres around the 10-16 March 2022, when the children were inpatients of the Royal Children’s Hospital.
21. The DFFH did not produce any evidence that the parents were seen to be improperly handling the children during their admissions – which was done under the suspected child abuse protocols involving close observations of the parents by staff.
22. The objective medical opinion of two Paediatric Endocrinologists is that the twins showed signs of bone fragility.
23. The DFFH have failed to consider the many other people who handled the children between 10 March 2022 and 16 March 2022 who could have accidentally inflicted the rib fracture to each child, and the evidence has not excluded or diminished this possibility.
24. The parents were not present for the medical imaging of the children. Multiple imaging modalities were undertaken. Dr HM was unable to describe how the children would have been handled for each of these to be performed – indeed she never seemed to have considered that the parents might be unable to explain how the fractures occurred because they were not present and truly did not know. The DFFH have also failed to turn their minds to this possibility.
25. Until the x rays were performed, no-one knew the children had signs of bone fragility. The evidence of the Professors of Endocrinology is clear: bone fragility reduces the force necessary to produce a fracture. Dr MC considered it was possible these fractures were accidental. I agree with this opinion.

**HAS THE PROTECTION APPLICATION BEEN PROVEN?**

1. To make a protection order, the Court first needs to find the grounds alleged proven.[[25]](#footnote-25)
2. If the evidence supports a finding of proof, then the Court must apply the relevant s.10 ‘best interests’ principles of the Act in determining what order, if any, is to be made. The s.10 principles play no part in determining where the balance of probabilities lies on the evidence before the Court.[[26]](#footnote-26)
3. Whilst the Protection Applications were filed asserting grounds (c) and (e), in written submissions filed on behalf of the Secretary after the conclusion of evidence, the DFFH invited the Court to strike out ground (e).[[27]](#footnote-27)
4. There is no evidence before the Court that the children have been or are likely to be emotionally or psychologically harmed by their parents.
5. There being no evidence, the correct approach after the closure of the DFFH case is to dismiss the protection application on ground (e). The protection applications filed on 15 March 2022 for Maria and Gregory West are dismissed on this ground.
6. The Secretary pursues proof of the protection application on ground (c) based on actual injury having occurred that the parents failed to protect the children from experiencing. Section 162 (1)(c) sets the parameters for the finding that a child is in need of protection if “the child *has* suffered or *is likely* to suffer significant harm as a result of physical injury and the child’s parents have not protected or are unlikely to protect the child from harm of that type”.
7. An injury alone is not sufficient for the Court to find the protection application proven under s.162(1)(c). The legislation does not create a protective framework of strict liability. When the provisions of Part 4.9 of the Act are considered in the context of the purposes of the Act, the protection from harm relates to harm being caused by acts or omissions of a child’s parents. It cannot be otherwise as the Act does not allow for findings of proof against persons other than parents, and the acts or omissions that constitute failure to protect must be considered objectively. The finding that a protection application has been proven is an adverse finding that the parent(s) have failed to protect by causing the injury or failing to protect the child from injury in circumstances where it would objectively be within the responsible exercise of parental duty to do so.
8. Proof cannot be found against parents who objectively were not expected to be able to protect the child from the harm. The legislation does not allow an adverse finding against a parent due to an accidental injury. The Cambridge dictionary describes an accident as “an event not intended by anyone, but which has the result of injuring someone or damaging something.” It would be punitive rather than protective for a parent whose child was physically injured by accident, or by the actions of a third party that were not reasonably foreseeable by the parent(s), to be considered responsible for the injury. Punishment is not a purpose of Chapter 4 of the Act.
9. To prove that the parents did not protect Maria and Gregory requires the Secretary to prove on the balance of probabilities[[28]](#footnote-28) that:
	* the parents inflicted the relevant injury; or
	* the injury occurred in circumstances where the parents would objectively be expected to protect the children and they did not do so; and
	* the injury has caused significant harm.
10. No medical expert who gave evidence in this hearing gave an opinion that the marks on the children had resulted in or would likely result in significant harm. No treatment was required, and the marks were transient, having resolved by 12 March 2022. The use of the phrase ‘significant harm as a result of physical injury’ in the Act requires interpretation as it is not explicitly defined. Had the Parliament intended to refer to serious harm in a manner analogous to serious injury definitions relevant to criminal charges, it would have used that phrase. Had the Parliament intended to capture minor or trivial injury that has no demonstrably adverse impact upon a child then that too would have been expressed. The requirement for a finding that significant harm has occurred *as a result of* physical injury must therefore lie in the chasm between these two poles.[[29]](#footnote-29)
11. The marks alone do not support a finding of proof against the parents as they cannot be said to reach the threshold of significant harm as a result of physical injury in the circumstances of this case and on the evidence, I accept they were accidental.
12. There was no challenge to the Secretary’s proposition made during the hearing that a broken rib is a significant injury. The broken rib to each child was not caused in the same way that the marks to each child were. I accept that a broken rib is a significant injury – despite there being no treatment or pain management required for either child.
13. It is submitted on behalf of the Secretary by Counsel that as infants do not injure themselves, either or both parents must have handled the children inappropriately or applied a mechanism to cause the injuries. In support of this position, it is submitted for the Secretary that there is no “suggestion that the children were left in the care of a person other than the parent at the time the injuries were sustained”.[[30]](#footnote-30) This submission is factually incorrect.
14. The viva voce evidence of Dr MC – which was not disputed by any other medical witness – was that for Gregory the likely time frame was moments before to up to a week before the medical imaging conducted on 11 March. For Maria, it was from the moments after the medical imaging on 11 March and most likely 2 weeks prior, but possibly one week prior, to the repeat scan on 29 March 2022. The children were admitted to the RCH from 10 to 16 March. For the Secretary to submit that the children were not in the care of anyone other than the parents at this time might be correct legally in terms of there being no court orders that abrogated their custody and parental responsibility until the initial IAO was made on 16 March 2022, but it is a denial of the reality that the children were being handled by a multitude of people during their hospital admission.
15. The parents were involved in the care of the children with no concerns reported whilst under the watchful eyes of the RCH staff, and subsequently under the supervision of the grandparents upon discharge, again with no concerns that they in any way inappropriately handled the children.
16. There is no direct witness evidence which supports a finding that the parents or either of them inflicted the single rib fracture to each twin. The Secretary’s position seems to be that because the parents might be statistically more likely to be responsible for an injury, the application should be found proven against them. The Secretary sidesteps the consensus between both Professors RS and AN that Maria had thin femoral cortices and gracile ribs. It also ignores the evidence of Professor AN, the only medical witness to have directly examined Gregory, that his anterior fontanelle was significantly larger than expected – a sign of bones that are ossifying slowly, which of itself can be sign of bone fragility in preterm infants.
17. Statistics based on studies taken from cases determined by child protection authorities to be inflicted abuse are of dubious accuracy due to the likely presence of confirmation bias in the sample selected for study, and statistics are not evidence of what has happened in a particular case. They are nothing more than the basis for suspicion or speculation. Abstracted statistical probabilities do not form a sound basis for a finding that an alleged fact has been proven. In the case of *In re H. & Others (Minors)(Sexual Abuse: Standard of Proof)* – a case based on similar English legislation – Lord Nicholls of Birkenhead (with whom Lord Goff of Chiefly & Lord Mustill agreed) held that:

*“[A] court's conclusion that the threshold conditions are satisfied must have a factual base, and…an alleged but unproved fact, serious or trivial, is not a fact for this purpose.  Nor is judicial suspicion, because that is no more than a judicial state of uncertainty about whether or not an event happened".*[[31]](#footnote-31)

1. The House of Lords confirmed this threshold approach in 2008:

*“The threshold is there to protect both the children and parents from unjustified intervention in their lives. It would provide no protection at all if it could be established on the basis of unsubstantiated suspicions…the Act draws a clear distinction between the threshold to be crossed before the court may make a final order and the threshold for making preliminary and interim orders…”.*[[32]](#footnote-32)

*To allow the courts to make decisions about the allocation of parental responsibility for children on the basis of unproven allegations and unsubstantiated suspicions would be to deny them their essential role in protecting both children and their families from the intervention of the state, however well intentioned that may be. It is to confuse the role of the local authority, in assessing and managing risk, in planning for the child and deciding what action to initiate, with the legal role of the court in deciding where the truth lies and what the legal consequences should be”.*[[33]](#footnote-33)

1. The Children, Youth and Families Act 2005 contains similar threshold protections. A protection application cannot be found proven simply because the Secretary asserts having reasonable grounds to suspect or believe that a parent has caused or failed to protect their child from significant harm because of physical injury. The Court must be able to find on the balance of probabilities that the parent(s) has caused the injury or failed to protect on the evidence presented by the Secretary.
2. The evidence led by the Secretary failed to address the possibility that some handling of the children during their admissions to hospital could have caused the rib fractures, and the unlikelihood that the parents could have inflicted harm on Maria without either the action or the injury being detected whilst in hospital. It is highly unlikely that the parents could have avoided being observed inflicting a rib fracture on Maria or Gregory whilst they were in the hospital. The Secretary has led no evidence to show that the maternal grandparents failed to supervise the parents with the twins post-discharge.
3. In the context of the evidence that the children showed some signs of bone fragility likely related to their prematurity, the Secretary has not led evidence that the parents were aware of this prior to the consultations with Professors AN and RS.
4. Parents cannot be reasonably expected to protect children from an unknown underlying vulnerability. Whether the injuries occurred during handing by other persons or by the parents, not having been aware of this underlying vulnerability, the parents cannot objectively be expected to have prevented the injuries to each child’s rib, nor could anyone else who provided care to them. Nothing in this judgement is intended as a criticism of professionals or the maternal grandparents in relation to the handling of the twins: what was unknown to the parents, was also unknown to others.
5. The lack of the ability of the parents to provide an explanation for how the rib fracture occurred to each child, when they were being handled by many different people, and undergoing medical imaging and other examinations during which they were not present, and where the medical witnesses themselves could not in their evidence agree on a likely theoretical mechanism for the fracture does not add strength to the case put by the Secretary when considered in the context of the evidence overall. Instead, it demonstrates the logical fallacy of bifurcation – ‘*because the parents cannot explain how the injury occurred, they must have caused the injury’.* As I have set out earlier, this position ignores the multitude of people who would have handled the children during their hospital admission, medical imaging and other testing. It also ignores the evidence of Professors RS and AN of signs of bone fragility.
6. In written submissions filed after the conclusion of evidence, the Secretary asserts that the fact that the parents did not give evidence should be the subject of an adverse inference.[[34]](#footnote-34)
7. In the circumstances where the objective evidence does not support an adverse finding against the parents, I do not draw an adverse inference against either of them. The onus of proof rests with the Secretary. It is not for the parents to disprove the suspicions of the Secretary, nor to fill in any deficiencies of the Secretary’s evidence.[[35]](#footnote-35) There are cases where direct evidence presented by the Secretary invites inferential reasoning that may tend to support the Secretary’s assertions. In such cases if the parents can contradict this evidence and fail to do so, the inference may be more confidently made. This is not such a case.
8. When the probabilities are balanced, I cannot find on the evidence that the parents inflicted harm on the children or ought to have protected them from injury when being handled by others prior to being informed that each child had signs of bone fragility. There have been no further injuries to the children since the parents have been made aware of this by Professor AN and Professor RS.
9. Upon becoming aware of the expert opinion of gracile bones, the parents have been reported to have provided exemplary nurturing care to Maria and Gregory. The evidence is that the children are thriving in the practical and emotional care provided by the parents.[[36]](#footnote-36)
10. The DFFH application for proof if the protection application for s.162(1)(c) based on actual significant harm as a result of physical injury harm is dismissed.
11. There being no finding that the parents are objectively responsible for causing or failing to protect the children from significant harm from physical injury, and the abundance of evidence that the parents provide gentle nurturing care to the children in which they are thriving, there can be no sensible basis for inferring that such harm is likely to occur in the future.[[37]](#footnote-37) The protection application on (c) based upon a likelihood of future harm is also dismissed.

Magistrate Stead

16 December 2022

1. Exhibit 26 [↑](#footnote-ref-1)
2. Exhibit 21, page 4 [↑](#footnote-ref-2)
3. Clexane is a low molecular weight heparin that the mother was prescribed post caesarean section birth to prevent venous thromboembolism complications. [↑](#footnote-ref-3)
4. Exhibit 53 [↑](#footnote-ref-4)
5. Exhibit 10 [↑](#footnote-ref-5)
6. Exhibit 50, pg. 11. [↑](#footnote-ref-6)
7. Exhibit 12 [↑](#footnote-ref-7)
8. Exhibits 49 & 50 [↑](#footnote-ref-8)
9. Exhibit 16 [↑](#footnote-ref-9)
10. Exhibits 49 & 50 [↑](#footnote-ref-10)
11. Pereira EM 2015 Clinical Perspectives on Osteogenesis Imperfecta versus non-accidental injury. American Journal of Medical Genetics Part C Seminars in Medical Genetics 169C:302-306. [↑](#footnote-ref-11)
12. Ibid at pg. 303. [↑](#footnote-ref-12)
13. Ibid at pg. 305 [↑](#footnote-ref-13)
14. Aboughalia et al Pediatric rib pathologies: clinicoimaging scenarios and approach to diagnosis. Pediatric Radiology (2021) 51:1783-1797 [↑](#footnote-ref-14)
15. Barsness, Cha, Bensard et al (2003) The positive predictive value of rib fractures as an indicator of nonaccidental trauma in children. J Trauma 54:1107-1110 (endnote 35 in the above paper) [↑](#footnote-ref-15)
16. <https://journals.lww.com/jtrauma/Abstract/2003/06000/The_Positive_Predictive_Value_of_Rib_Fractures_as.10.aspx> Note NAT is the acronym for non-accidental trauma [↑](#footnote-ref-16)
17. Op cit Aboughalia et al pg 1791 [↑](#footnote-ref-17)
18. Op cit Pereira pg 304. [↑](#footnote-ref-18)
19. Exhibit 47 [↑](#footnote-ref-19)
20. Exhibit 38 [↑](#footnote-ref-20)
21. Exhibit 47, page 10 [↑](#footnote-ref-21)
22. Exhibit 33 [↑](#footnote-ref-22)
23. Ibid pg 10-11 [↑](#footnote-ref-23)
24. Exhibit 8 [↑](#footnote-ref-24)
25. S. 274(a) Children, Youth and Families Act 2005 (Vic). [↑](#footnote-ref-25)
26. DHHS v County Court [2018] VSCA 322 at [65]. Whilst the appeal before Ginnane J concerned allegations of sexual abuse, his Honour’s reasoning is also applicable to allegations of emotional and physical harm. [↑](#footnote-ref-26)
27. An order striking out an initiating document or an element thereof is not a determination of the merits of the case and therefore does not put an end to the proceedings. A striking out order is no more than a direction to remove the case from the list of matters for hearing and determination by the Court: see *R v McGowan & Another; ex parte Macko & Sanderson* [1984] VR 1000 at 1002 per Kaye J; *Chalker v Baldwin* [2021] VSC 644 at [15]-[17] per Niall JA; *Thurin v Krongold Constructions Aust P/L* [2022] VSCA 226 at [150]. [↑](#footnote-ref-27)
28. Section 215A Children, Youth and Families Act 2005 (Vic) [↑](#footnote-ref-28)
29. The reasoning of his Honour O’Bryan J in Director-General of Community Services of Victoria v Buckley & Others VSC 1992 (Unreported) regarding significant emotional harm is no less applicable to the interpretation of significant harm as a result of physical injury. [↑](#footnote-ref-29)
30. Submissions of the Secretary dated 4/11/2022 at paragraph 31 [↑](#footnote-ref-30)
31. [1996] AC 563 at 590-591 [↑](#footnote-ref-31)
32. In re B (Children) [2008] UKHL 35, Baroness Hale of Richmond (with who all other House of Lords members hearing the appeal agreed) at 54 [↑](#footnote-ref-32)
33. Ibid at 59 [↑](#footnote-ref-33)
34. Jones v. Dunkel [1959] HCA 8; (1959) 101 CLR 298 [↑](#footnote-ref-34)
35. Ibid: the precedent in Jones v Dunkeld as set out by Menzies J (at 312) “(i) that the absence of the defendant … as a witness cannot be used to make up any deficiency of evidence; (ii) that evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence; (iii) that where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference. (at p312) [↑](#footnote-ref-35)
36. The DFFH acknowledged in evidence that despite the interim orders requiring the parents’ care to be supervised, from the children’s perspective, the parents have remained their primary care givers. [↑](#footnote-ref-36)
37. See ss 162(2) and (3) of the Children, Youth and Families Act 2005 (Vic) [↑](#footnote-ref-37)