**YM (Care Proceedings) (Clarification of Reasons)** [**[2024] EWCA Civ 71**](https://www.bailii.org/ew/cases/EWCA/Civ/2024/71.html)

The Court of Appeal heard an appeal by a local authority and found itself *‘confronted again with a case in which problems have arisen as a result of requests by the parties for clarification of the reasons given by the judge for her findings at the end of a lengthy fact-finding hearing’*.

Baker LJ gave substantive judgment and all uncredited quotes (in italics) are attributable to him.

This summary may seem long but the judgment runs to 27 pages in the same font size.

The question for the Court of Appeal was whether a *‘litany’* of requests and responses to the trial judge had resulted in the integrity of the judgment being fatally undermined.

**Background**

Injuries

The mother noticed marks on Y’s arms when he was three weeks old, at which time she sent photographs of the marks to Y’s maternal grandmother. The more noticed further extensive bruising on Y’s arms a month later, in November 2021, and Y’s maternal grandmother advised the mother to attend at the GP.

The mother attended at the GP about a rash on Y’s arm, chest and head and was advised by the GP to take Y to the hospital, which she did not do; the grandmother’s advice was that the mother told her she (the mother) decided not to take Y to the hospital after speaking to the father. The father’s evidence was that he thought Y had sustained the bruising accidentally while he was standing up from a chair while holding Y.

On 24 November 2021, the family had a guest (“the guest”) who stayed with the parents following Y’s birth. The events of that night were extensively evidenced during the trial and summarised in the judgment that formed the basis of this appeal.

On 25 November 2021, the mother took Y to the hospital, complaining that he was unable to move his leg. Y had bruising on his back and had sustained a “bucket handle fracture” which was indicative of non-accidental injury. The facture was to his right shin and he presented with soft tissue swelling, indicative of excessive yanking or pulling as well as further fractures to two posterior ribs (6th and 12th) which were indicative of squeezing or a direct blow.

Proceedings

Y was placed in foster care following discharge from hospital in early December 2021 under a s.20 agreement with the parents and the police initiated an investigation. An ICO was made on 18 January 2022 and the matter was listed for fact-finding hearing.

The local authority’s case was that Y’s injuries were non-accidental and the pool of perpetrators included the mother, the father, the maternal grandmother, the maternal grandfather or, in the case of the injuries seen on admission to hospital on 25 November 2021, the guest who stayed with the family the night before. The local authority also said that, in the event either/neither of the parents had caused the injuries, threshold had been crossed on the basis that they had failed to protect Y.

The hearing was adjourned as the father applied for genetic testing and was further delayed due to the established practice of allowing regular breaks where one or more party is assisted by an intermediary.

The hearing saw nine witnesses give oral evidence and was delayed to allow regular breaks; by its conclusion, the local authority’s case was that the ‘pool’ contained only the parents.

The judge delivered an oral judgment, with formal judgment to follow; *‘[it] was recorded that the transcript would be amended to include a section on the law which the judge had omitted’*.

Clarification was sought on behalf of the local authority, who raised questions as to whether two findings within its schedule of findings sought had been made as they seem to have been but had not been dealt with explicitly. The two items were concerned with Y’s discomfort and whether threshold had been crossed.

The local authority also sought clarification as to whether the mother was found (1) to have failed to protect Y, noting the judge considered herself unable to conclude that the mother was covering for the father, and (2) to have failed to seek medical attention for Y.

Clarification was sought on behalf of the guardian as to why the father was concluded to have been the perpetrator and why the mother was considered not to have been covering for him as Y had only been in his sole care for 20 minutes and at all other times the mother was in the property (it is noted elsewhere that she might have been showering or not physically present in the same room as Y and the father).

The written judgment and requests for clarification

The parties received the written judgment on 6 October 2023 which was *‘based on a transcript of the judgment delivered orally but omitting some parts and introducing others, including the section on the law and details of the finding of failure to protect’* as well as dealing with the suffering point.

Regarding the substance of the judgement, Baker LJ summarised the judgement as saying that the injuries to Y were *‘inflicted by the father using excessive force. He did not inflict them deliberately out of malice but rather because, as a result of his inexperience and cognitive difficulties, he did not know how to handle a small child and did not recognise the harm he had caused. This conclusion was based on the judge's assessment of the totality of the evidence after a very long hearing in which she heard evidence from the key witnesses. As the trial judge, she was in a unique position to carry out that assessment and there are no compelling reasons for this Court to interfere. It is a coherent conclusion which is plainly sufficient for the purposes of future assessments’*.

In summary, the judge:

* Did not provide a summary of facts, instead referring to summaries prepared on behalf of the local authority and the mother.
* Did extensively cite the expert evidence as well as other evidence including:
	+ witness evidence regarding the father’s heavy-handed handling of Y, his status as somewhat of a ‘spectator’ who was not very hands on, and his expressions of frustration which included wishes to harm Y as witnessed by the other non-expert witnesses;
	+ a recording of the father saying he *‘would like to swing him by the legs and smash his head against the wall’*; and
	+ witness evidence concerning events that occurred at home around the times of the GP and hospital visits.
* Did summarise the relevant legal principles, which were omitted in her oral judgment.
* Did comment on the manner of each of the non-expert witnesses.
* Made a number of observations which contributed to her conclusion on the injuries that, *‘I accept the medical opinion. They are not explained by rough handling but rather by the use of excessive force. They were injuries which were inflicted’*.
* Did set out her findings as to who had inflicted the injuries, referring to:
	+ the parents’ demeanours and attitudes towards Y;
	+ evidence on the parties’ general dispositions as well as evidence regarding their relationship;
	+ the mother’s concerns about the father’s handling of Y; and
	+ the reports on/recording of what the father had said about wishing to hurt Y.

According to Baker LJ, *‘[what] is clear, however, and of particular relevance to this appeal, is that the written judgment included the following additional paragraph:*

*195. Y should have had medical attention for his injuries. Hs parents should have ensured that he did but they did not do so. In respect of the extensive bruising to his arm the mother certainly showed it to others but when she had a telephone consultation with the family's general practitioner she was advised to take him to a paediatrician but having consulted the father did not act upon the advice. In respect of the bucket handle fracture it was only at the insistence of the grandfather that the child was taken to hospital.*

The parties sought lengthy clarifications and submitted corrections at a case management hearing thereafter, including an email from the mother reproduced at [54(4)] wherein a number of passages from the written evidence were cited with an invitation to the judge to consider the same and reconsider the findings on the mother’s failure protect and to seek medical assistance.

The judge delivered a supplemental judgment in response to those requests within a week covered in three sections: clarifications sought by (1) the local authority regarding the events of 25 November 2021, (2) the guardian’s query about why the father was found to be the perpetrator, and (3) the mother father and the grandparents in relation to the mother’s failure to protect.

The father thereafter requested further clarifications at a further case management hearing:

* querying what it means for an injury to be ‘inflicted’, accepting it would mean threshold is crossed if an injury were inflicted/non-accidental but querying the culpability of the inflicting person;
* inviting the court to expressly accept that the father did not deliberately harm Y and did not realise he had harmed Y except on one occasion when he realised he had bruised Y;
* asking the court to find the father was not frustrated at the time he caused the bucket handle fracture; and
* inviting the court to accept the evidence of Dr Saggar that Y might suffer from a hypermobility disorder and may therefore suffer a greater degree of bruising and bleeding after suffering capillary bleeding.

The requests were supported by four pages of submissions and Baker LJ said that the second and fourth requests for clarifications were in fact invitations to make further findings. Concern was also expressed that *‘[the judgment] contained no mention of [the father’s] cognitive difficulties’* and sought permission to appeal if the clarifications sought were not given.

The judge responded in writing on 7 November 2023 and that response was said by Baker LJ to be *‘a major factor in the decision to bring this appeal’*. It is found at [66] and should be read in full and also addresses the local authority’s further request for clarification as to whether the injuries had been considered separately or as a ‘constellation’.

Baker LJ identified good and bad practice within the parties’ *‘litany of requests and responses*’, which is helpful guidance:

*The local authority was right to point out that the judge had not dealt with the issue of failure to protect. It was also plainly right to inquire whether the judge had found that the mother was covering up for the father as a sentence in the oral judgment to the effect that she was not covering up was removed from the written version. But a number of the other requests were inappropriate. The email sent on behalf of the mother on 11 October identifying certain aspects of the evidence and inviting the judge to reconsider her findings was a glaring example of using the process to reargue the case. The final request on behalf of the father took the whole process to another level. It sought findings that had not been raised previously, made fresh submissions in support of those findings, relied on additional evidence filed by the father, and warned that, if the judge declined to make the clarifications sought, an application would be made for permission to appeal.*

*Overall, the scale of this clarification exercise was wholly unreasonable… I am sure that counsel were not intending to "bamboozle" the judge (to use Coulson LJ's word) by their repeated requests but she would certainly be forgiven for feeling bamboozled. In some instances, counsel were plainly trying to lead the judge to refine her judgment so that her ultimate findings were closer to the outcome favoured by their client.*

**Appeal**

The question for Court of Appeal, according to Baker LJ, was *‘whether at the end of this chaotic process the integrity of the judgment has been fatally undermined’.*

The appeal was pleaded on the following grounds;

1. The finding that all the injuries suffered by Y were the consequence of a 'lack of care' by the father was not supported by the expert medical opinion.
2. The medical records and expert evidence did not support the court's finding that the parents would have been unaware that Y had suffered significant injuries.
3. The finding that the father had not intended to cause injury to Y was incompatible with the weight that the court had attached to previous threats of harm made by the father to Y, which the judge relied upon in concluding that the father had caused all of the injuries.
4. The judge failed to sufficiently consider whether the father could have caused each injury suffered by Y, determining the issue of perpetration on grounds of propensity rather than opportunity, and failing to have sufficient regard to the absence of opportunity to cause injury without being detected by the mother.
5. The finding that the mother was unaware that the father had injured Y on the evening of 24 November 2021 and had therefore not colluded with the father to blame the guest for the leg fracture [was not] supported by the expert medical opinion, as to how Y would have reacted following this injury, or by the evidence provided by the parents.

The guardian supported the appeal; the parents and grandparents opposed it.

The local authority’s appeal was summarised as Baker LJ to be *‘based principally on perceived differences and inconsistencies in the judge's reasoning between the original judgment and the responses to requests for clarification’* and in oral submissions the local authority acknowledged that it had not been minded to appal following the delivery of the judgment but had been obliged to do so following the clarifications and the fact-finding needed to be reheard by different judge as *‘the judge's ultimate analysis did not reflect the evidence and failed to provide an accurate basis on which assessments could safely be conducted to enable decisions to be made about the child's future and the parents' role in his care’*.

Law

The relevant legal background and principles were considered in some detail by Baker LJ in the introduction to his judgment.

The salient principles as they relate to the fact of this case are as follows.

Per *English v Emery Reimbold & Strick* [2002] EWCA Civ 605, if an application is made for permission to appeal on the basis of a lack of reasons given by a trial judge, the judge:

*should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course.*

This principle has been adopted into family cases and in *Re T (A Child)* [2002] EWCA Civ 1736 and *Re B (Appeal: Lack of Reasons)* [2003] EWCA Civ 881, Lady Justice Arden gave the following guidance:

*In a complex case, it might well be prudent, and certainly not out of place, for the judge, having handed down or delivered judgment, to ask the advocates whether there are any matters which he has not covered. Even if he does not do this, an advocate ought immediately, as a matter of courtesy at least, to draw the judge's attention to any material omission of which he is then aware or then believes exists.*

It was later on stated by Munby LJ (as he was then, in *Re A and another (Children) (Judgment: Adequacy of Reasoning) [*2011] EWCA Civ 1205, reported as a Practice Note) to be a *‘professional obligation … to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process’*.

Findings – grounds of appeal

On the first ground, it was found that the judge’s conclusion on the father’s conduct lying at the less serious end of the ‘element of wrong’ spectrum did not amount to a rejection of the expert evidence and neither was it *‘a substitution or modification of her basic finding that the injury was inflicted by the father using excessive force’*.

Regarding the inconsistencies between the judgment and the judge’s written response to further requests for clarification of 7 November 2023, as contained in the first and third grounds of appeal, the local authority’s submissions on these were largely not accepted. Where there was *‘arguably some inconsistency*’, the judge did not accept *‘sufficiently serious to require this Court to set aside the findings’*.

The fourth ground of appeal was found to be without merit, not least as the local authority identified the father as a potential sole perpetrator.

Regarding the second fifth grounds, (1) the parent’s awareness or lack thereof was a matter for the judge and not the experts and (2) any collusion sto blame the guest was adequately addressed, although this was not a finding that appeared in the local authority’s schedule of findings sought and so the judge was not obliged to consider it.

Requests for clarification

It was said that, *‘[everything] said by the judge in her responses to requests for clarification must be interpreted in the light of [the] clear finding’* in respect of her acceptance of the medical evidence.

Importantly, *‘if a judge in the course of responding to requests for clarification makes statements which plainly contradict what is said in the judgment, that may undermine the findings to a degree which amounts to a serious irregularity so as to justify an appeal. But the fact that one word or phrase in the clarifications response, taken in isolation, is capable of a different interpretation from what is said in the judgment should not inevitably lead to such an outcome. What is said in the responses must always be read in the context of the findings in the judgment’*.

It was said that the purpose of the clarification process is to head off unnecessary appeals, although the process is now often used for the opposite purpose, and the following points were given as lessons to be learned:

1. A judgment does not need to address every point that has arisen in the case. The court should only be asked to address any omission, ambiguity or deficiency in the reasoning in the judgment if it is material to the decisions that have to be taken in the proceedings. In care proceedings, the decisions are whether the threshold criteria for making orders under s.31(2) are satisfied and, if so, what orders should be made to meet the child's welfare needs.
2. When making a request for clarification of any perceived omission, ambiguity or deficiency in the reasoning in the judgment, counsel should therefore identify why the clarification is material to the decisions that have to be taken in the proceedings.
3. Counsel should never use a request for clarification as an opportunity to re-argue the case, reiterate submissions, or invite the judge to reconsider the findings.
4. Requests for clarification should not be sent in separately by the parties but rather in a single document compiled by one of the advocates. If necessary, there should be an advocates meeting to compile the document. Save in exceptional circumstances, there should never be repeated requests for clarification.
5. Judges should only respond to requests for clarification that are material to the decisions that have to be taken in the proceedings.

**Delay**

The proceedings had been going on for two years at the time of the fact-finding and a final hearing (t/e 9 days) had yet to take place or be case managed. Baker LJ commented that even a shorter relisted fact-finding would likely mean the case would not be concluded until Y’s third birthday; the proceedings had been initiated when he was 4 months old.

A further issue with re-listing that was raised was the issues the parents would have with re-giving their evidence so long after the relevant events, although Baker LJ said *‘it would be incumbent on us to order a retrial if we thought that the local authority's analysis of the outcome of the fact-finding exercise was correct’*.

A repeated feature of the findings on the ground of appeal was that individual findings, even if they had been made in the local authority’s favour, were said not to warrant a re-trial due to disproportionality.

**Mahnoor Javed**

**Pupil**

**4 Brick Court**

**February 2024**