

CHILDREN'S COURT OF VICTORIA

Applicant: **(Name removed) "the protective worker"**
[Department of Human Services]

Children: **(Name removed) "M"** [12/02/2001]
(Name removed) "B" [10/02/2006]
(Name removed) "S" [10/02/2006]

<u>MAGISTRATE:</u>	Susan A. Blashki
<u>WHERE HELD:</u>	Melbourne
<u>DATES OF HEARING:</u>	February 12, 13, 14, 15, 19, 20, 21, 22, 26, 27, 28, 29 March 1, 2, 5, 6, 7, 8, 13, 14, 15, 19, 20, 21, 22, 26, 27, 28, 29 April 23, 24, 26, 27 June 18, 19, 20, 21, 22, 25, 26, 27, 28, 29 July 5, 10, 11, 12, 16, 17, 18, 19, 20
<u>DATE OF DECISION:</u>	19 December 2007
<u>CASE MAY BE CITED AS:</u>	DOHS v Mr & Mrs H
<u>MED. NTRL. CITATION:</u>	[2007] VChC 2

REASONS FOR DECISION

Child protection – Protection application – child abuse – serious injury – causation – non-accidental injury – death of sibling – SIDS – objection to autopsy.

PARTY	COUNSEL	SOLICITOR
Department of Human Services [Child Protection]	Mr Allen SC with Ms Ehrlich & Ms Mendes da Costa	Court Advocacy Unit
Parents	Mr Langmead SC with Mr Testart	Maitland Lawyers
M, B and S	Unrepresented – Too young to give instructions	

APPLICATIONS

Protection applications in respect of the three children, (name removed) “M” born 12 February 2001 and the twins (name removed) “B” and (name removed) “S” born 10 February 2006, were filed at the Children's Court at (location removed) “location 1” on 13 April 2006. The grounds stated in each of these applications were pursuant to s.63(c) and (e) Children and Young Persons Act 1989. The Department of Human Services (the applicant) seeks an order be made by the Children's Court that each of the protection applications be proved on the grounds as set out in s.63(c) and (e) Children and Young Persons Act 1989 and that M, B and S be placed on Guardianship to Secretary orders for a period of 12 months. Under the legislation no conditions can attach to such an order.

In a disposition report dated 15 August 2006, the applicant recommended that such an order be made in respect of each of the three children. That disposition has not altered throughout the course of these proceedings. (The respondents), the parents of the three children, (name removed) “the father” and (name removed) “the mother”, opposed the proof of the protection applications and thereby opposed the making of any protection order under the relevant legislation. If the Court does determine that the protection application should be found proved, then the position of the parents is that the Court should commence with the lowest available order with the most minimal interference in the life of the family. In the event that the Court did determine that any protection order should be made the respondents would not consent to an undertaking being made but indicated to the Court that they would be prepared to accept and cooperate with an order requiring them to give undertakings pursuant to the terms of the legislation. These undertakings would be expressed to endure for a period of 12 months from the date of the orders and would be in the following terms:

- (a) the respondents and the children reside at (address removed) in the State of Victoria with the maternal grandparents and maternal aunt.

- (b) the respondents accept visits from the Department of Human Services protective workers at all reasonable times.
- (c) the respondents notify the Department of Human Services forthwith in the event of any of the children suffering serious accident or illness or injury.
- (d) the respondents authorise the Department of Human Services to communicate with any medical practitioner or other health professional involved in the medical treatment or care of any of the children.
- (e) the respondents keep Department of Human Services informed as to the names and addresses of any medical practitioners treating any of the children without the necessity for there to be any further court proceedings.

The contention of the respondents is that such a mechanism would address the reasonable concerns of the Department of Human Services and any reasonable concerns that might be raised by the Court in this case. They further asserted to the Court that they would not physically harm the children in any way and that would extend to physical chastisement.

The circumstances which led to these protection applications arose out of a notification made to the Department of Human Services, Child Protection After Hours Service on 12 April 2006.

Allegations have been made by the After Hours Service that the infant S, had received serious and unexplained injuries late in the afternoon of 12 April 2006 at approximately 5.10 p.m. and that the mother of the children had driven the child S to the (location removed) Hospital (“hospital 1”) in a critical condition. S was transferred to the Royal Children's Hospital by the Newborn Emergency Transfer

Service and was admitted to the Intensive Care Unit. He was alleged to have multiple skull fractures, rib fractures, brain damage and damage to his eyes.

Later that evening, at approximately 11.40 pm notification was made to the Department of Human Services After Hours Unit, and at approximately 5 a.m. the following morning, 13 April 2006, Department of Human Services workers attended at the (name removed) family home in the company of police and the father of the children, together with the other children M and B, was taken to the (location removed) Police Station. Protection applications in respect of all three children were issued at the (location removed) Police Station and served on the father.

A Bail Justice hearing was conducted at the police station and S was placed on an Interim Accommodation Order to the Royal Children's Hospital and M and B were each placed on an Interim Accommodation Order to their maternal grandmother and maternal grandfather. As it was Easter weekend the further hearing of the protection applications was adjourned to the (location removed) ("location 1") Children's Court on Tuesday 18 April 2006. Pursuant to the conditions on the Interim Accommodation Order B was to be taken to the Royal Children's Hospital for examination. Upon examination he was also found to have skull, rib and limb fractures.

(LOCATION 1) CHILDREN'S COURT

On 18 April 2006 each of the protection applications came before the Children's Court. S was placed on an Interim Accommodation Order to the Royal Children's Hospital, and M and B were placed on an Interim Accommodation Order to suitable persons, being the maternal grandmother and the maternal aunt. There were five conditions attached to each of the Interim Accommodation Orders which included Condition 3 The parents must allow the child to be taken to a paediatrician for assessment, must allow any recommended treatment to be carried out and must allow reports to be given to Department of Human Services and Conditions 4 and 5 which

allowed the parents to have supervised access to the children, but "Each parent is only to have access in the absence of the other." The further hearing was adjourned to 8 May 2006 for further hearing at (location 1) Children's Court. On 21 April 2006 a Children's Court search warrant pursuant to s.265 *Children and Young Persons Act* 1989 was executed alleging that the parents had breached the Interim Accommodation Order made on 18 April 2006 at (location removed) Children's Court.

The affidavit in support of the warrant stated amongst other matters:

- On 19 April 2006 Department of Human Services was informed that the parents are refusing to allow the children to have a paediatric assessment, stating that they thought this was invasive. This is a condition of the current accommodation order and B also requires follow-up with the Gatehouse Centre with regards to his bone fractures.
- The mother is residing at the maternal grandmother's home and the father is attending the home, stating that he is having access with the children in another room. This raises doubt that the children are being adequately supervised in the maternal grandmother's care.

On 21 April 2006 there was a Bail Justice hearing of the application to breach the Interim Accommodation Order and the matter was adjourned to the (location removed) ("location 2") Children's Court on 24 April 2006. The Bail Justice varied the conditions to provide that neither parent resided overnight at the maternal grandmother's home.

On 24 April 2006 the breach of Interim Accommodation Order in respect of M and B was listed for mention at (location 2) Children's Court. In error, no Interim Accommodation Orders were made for M and B, and the further hearing was adjourned to 16 May 2006 at (location 2) Children's Court.

On 8 May 2006 S's matter was adjourned from (location 1) Children's Court to (location 2) Children's Court on 16 May 2006 and he remained on an Interim Accommodation Order.

(LOCATION 2) CHILDREN'S COURT

On 28 April 2006 these matters were listed at the (location 2) Children's Court to rectify the error made on 24 April 2006 and a submissions contest was held. By consent the Interim Accommodation Order in relation to M and B was reinstated, together with the previous Conditions 1 - 4. Condition 5 which provided that the parents may only have access in the absence of each other was not reinstated. M and B were again placed on an Interim Accommodation Order to the maternal grandmother and the maternal aunt.

On 9 May 2006 the parents brought an application to vary the Interim Accommodation Order in respect of M and B, specifically in respect of the parents' access. This application came before the (location 2) Children's Court on 10 May 2006 and was adjourned for an evidence contest on 23 and 24 May 2006 and the children each remained on their current Interim Accommodation Orders. This application to vary did not proceed and the contest was vacated.

In the meantime a Notice of Appeal was filed in the Supreme Court on 24 April 2006 seeking an appeal against all orders made at the (location 1) Children's Court on 18 April 2006. That appeal initially came before Hargrave J and appears to have been essentially in relation to the issues of access. An amended Notice of Appeal was filed in the Supreme Court in respect of the Interim Accommodation Order made in relation to S on 18 April 2006 and in relation to M and B on 28 April 2006 with the parents seeking more access to their children. Ultimately that appeal was heard before Kellam J in which judgment was delivered on 15 May 2006.

On 15 August 2006 there was a Directions Hearing at the (location 2) Children's Court with a hearing date being fixed for a 25 day contest on 12 February 2007 with a further Directions Hearing being fixed for 29 January 2007. Each of the children remained on an Interim Accommodation Order.

On 25 September 2006 a second Notice of Appeal was filed at the Supreme Court and that matter was resolved.

On 18 October 2006 a third Notice of Appeal was filed at the Supreme Court on behalf of the parents which was heard before Whelan J on 26 October 2006 and judgment was delivered on 27 October 2006.

On 3 November 2006 the parents made a further application to vary the Interim Accommodation Order and that application resolved with the further hearing being adjourned to the directions hearing for final contest.

RELEVANT LEGISLATION

Children and Young Persons Act 1989

Relevant provisions of the Children and Young Persons Act 1989 s.63

“A child is in need of protection if any of the following grounds exist -

- (c) *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;*
- (e) *The child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected or are unlikely to protect, the child from harm of that type;*

Section 85 provides that:

"If the court finds that a child is in need of protection, it may make -

- (a) any one of the following protection orders:
 - (i) an order requiring a person to give an undertaking
 - (ii) a supervision order
 - (iii) a custody to third party order
 - (iv) a supervised custody order
 - (v) a custody to Secretary order
 - (vi) a guardianship to Secretary order; or

- (b) an interim protection order

Under s.86(1)

"The court must not make a protection order or an Interim Protection Order unless

- (a) it has received and considered a disposition report; and
- (b) it is satisfied that all reasonable steps have been taken by the Secretary to provide the services necessary to ensure the safety and wellbeing of the child."

Under s.86(2)

"The court must not make a protection order that has the effect of removing a child from the custody of his or her parent unless -

- (a) the court has considered and rejected as being contrary to the safety and wellbeing of the child, an order allowing the child to remain in the custody of his or her parent;
- (b) the court is satisfied by a statement contained in a disposition report in accordance with s.49(c) that all reasonable steps have been taken by the Secretary to provide the services necessary to enable the child to remain in the custody of his or her parent;
- (c) the court considers that the making of the order is in the best interests of the child."

Under s.49(c) a disposition report must include, if the report recommends that the child be removed from the custody or guardianship of a parent a statement setting out

the steps taken by the Secretary to provide the services necessary to enable the child to remain in the custody or under guardianship of the parent.

Section 87 provides

- "(1) in determining what finding or order to make on a protection application the court as far as practicable
- (aa) must have regard to the need to protect children from harm and to protect their rights and to protect their welfare; and
 - (a) must have regard to the need to give the widest possible protection and assistance to the family as a fundamental group unit of society and, accordingly must ensure that intervention in to family life should be to the minimum extent that is necessary to secure the protection of the child; and
 - (b) must have regard to the need to strengthen and preserve the relationship between the child and the child's family; and
 - (c) must have regard to the desirability of allowing the child to live at home;
 - (d) must have regard to the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
 - (e) must take in to consideration the affect of the finding or order on the stability of family relationships and the welfare and interest of the child; and
 - (f) must have regard to the needs, when the child is removed from his or her family, to plan the reunification of the child with his or her family wherever practicable; and
 - (h) must ensure that, if there is a conflict between the interests of the child and some other person, the welfare and interests of the child

are of paramount consideration; and

- (j) must ensure that a child is only removed from his or her family if there is an unacceptable risk of harm to the child; and
- (k) must have regard to the suitability of the order in terms of the welfare and interests of the child"

1(A) In considering the matters referred to in sub-s.(1), the court must treat the matters referred to in Paragraph (aa) of that sub-section as paramount considerations.

CHILDREN, YOUTH AND FAMILIES ACT 2005

At the commencement of these proceedings the operative legislation was the Children and Young Persons Act 1989. On 1 July 2007, in the course of these proceedings, the new legislation came in to effect. There are a number of transitional and saving provisions which are contained in Schedule 4 of the Children, Youth and Families Act. The main purpose of the transitional provisions is to deem:

- Structures existing under the Children and Young Persons Act to be structures under the Children, Youth and Families Act;
- Court orders made under the Children and Young Persons Act to be orders made under the Children, Youth and Families act, and
- Applications made to the court under the Children and Young Persons Act to be applications made under the Children, Youth and Families Act.

The Children, Youth and Families Act does not substantially alter the existing powers of the Family Division of the Children's Court. However, it does provide a number of principles to which decision makers must have regard in making any decision or taking any action under the Children, Youth and Families Act. In particular, all judicial and administrative decisions and actions under the Children, Youth and Families Act must be consistent with the "Best interests principles." These principles

are set out in s.8 - 14 of the Children, Youth and Families Act. The "Best interests principles" are set out in s.10.

- (i) The best interests of the child must always be paramount
- (ii) When determining whether a decision or action is in the best interests of a child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking in to account his or her age and stage of development) must always be considered, and
- (iii) Consideration must also be given, where they are relevant to the decision or action, to each of the 18 other matters listed in s.10 sub-s.(3) many of which are in identical or similar terms to those in s.87 sub-s.(1) Children and Young Persons Act.

The events which led to the issuing of protection applications and the overall circumstances of the (name removed) family are unusual and clearly distressing for members of the extended family. It has been stated by counsel for the respondent parents on numerous occasions throughout these lengthy proceedings that this is a tragic and unusual case. These parents have only recently completed their "dream home" on a substantial country property. This has now been sold in order to fund these proceedings. This family is presented as a united family with no dependence on drugs, alcohol or any history of family violence. Neither of the parents has a criminal history and there has been no previous involvement of Department of Human Services. Both parents have normally been in gainful employment. There has been no prior history of mental illness and both parents are said to be in a loving, caring relationship with each other, with their children and with their extended family. Although they had recently moved in to their farm which was somewhat isolated, there are none of the usual factors present which frequently bring families to the attention of the police, Department of Human Services and to the Children's Court. It is against this backdrop that these proceedings commenced in this court.

Although the significant incidents which have occurred in this case happened during a brief period of time, these incidents have led to a vast amount of professional investigation with a large number of experts providing reports and being called to give expert evidence, in particular as to the issue of "Non accidental" or "Inflicted injury".

For this reason these proceedings have become long and complex, despite the respondents filing with the Court a Notice of Admission of Facts which in its amended form was provided to the Court on the commencement day of the proceedings. It is due to the complexity of the issues before me that I propose to set out my findings of fact on the evidence in some detail.

HISTORY OF PROTECTION APPLICATION

The parents of M, S and B were married in 1994. They have had four children born during this period, M born 12 February 2001; J, who was born on 1 October 2004 and who died on 7 October 2004 at seven days of age; and the twins S and B who were born on 10 February 2006.

No full autopsy was every undertaken of J after his death at seven days. It has been suggested that he died of Sudden Infant Death Syndrome, but after the Coroner ordered that an autopsy be conducted, the parents objected on the grounds that they are devout Catholics and sought to provide their son with "a decent burial in an open coffin as quickly as possible". An application was made to the Supreme Court objecting to the autopsy. The Coroner, in written material provided to the Supreme Court, indicated that the question confronting him was whether or not the medical cause of death can be concluded without an autopsy. He said that if the medical cause of death cannot be concluded without an autopsy, then an autopsy is required to enable a conclusion to be made. In his comments the Coroner noted that J's body had

been externally examined in the mortuary, and Dr Lynch, a forensic pathologist, had been consulted. He noted that on externally examining the deceased, the pathologist could find no evidence on which to conclude the cause of death.

This application was heard before Morris J in the Supreme Court on 11 October 2004 and he formed the view that

"Looking at the public interest, I am not satisfied that a great public interest is likely to be satisfied if an autopsy is carried out. Based on the material, there is the prospect that an autopsy will not produce any evidence to confirm the cause of death"

He allowed the application of the parents and ordered that there be no autopsy. During the course of the current proceedings evidence was given that little J was cremated shortly after that order had been made, and that an application for the cremation had been made by the father prior to the decision of the Supreme Court.

Prior to the commencement of these current proceedings there has been no involvement of Department of Human Services with any of the children in this family.

EVENTS LEADING TO POLICE INVOLVEMENT AND PROTECTION APPLICATIONS

A) Events prior to 12 April 2006

A vast amount of evidence has been provided to the Court over many days as to the activities of this family in the days leading up to the tragic events of 12 April 2006. Although some of it is contentious, much of it is not.

The evidence of Department of Human Services witnesses as it unfolded indicated the following scenario. On 10 April 2006, when the twins were some eight weeks old, the parents had some concerns about the medical condition of each of the twins. On that morning the mother telephoned the rooms of Dr (name removed) ("witness 2"),

Paediatrician and spoke to his receptionist, (name removed) ("witness 1"), requesting an urgent appointment for both of the twin boys, S and B. She explained they had been passing out when opening their bowels, each had become floppy and become non responsive. Witness 1 told the mother she would get witness 2 to ring back as soon as she could. Later that day witness 2 returned the mother's call and obtained a history over the telephone from her of both children having episodes of "brief floppiness" and possibly one of the twins having a "colour change". Witness 2 said, both in his evidence and in his statement that he was concerned about this. He told the mother he would arrange for the twins to be admitted as inpatients to the (location removed) Hospital ("hospital 2") the following morning in order to conduct an assessment and any necessary interventions over the next couple of days. He said he would see them the following morning.

Witness 1, witness 2's receptionist, then made the necessary arrangement with the hospital for the infants to be admitted at 10.30 am the next morning, that is, 11 April 2006. She also made arrangements for the infants to have an ECG at the hospital and said that she then telephoned the mother to provide her with the details of the hospital admission and the times for the ECG. Later that same day, that is, 10 April 2006 at approximately 4.45 pm the mother rang (name removed) ("witness 3"), the maternal and child health nurse at (location removed) and described to her a lump on the head of one of the twins that she described as "squishy". When asked by the nurse whether the infant had been knocked, she said no, and was then advised to have it checked as soon as possible. She does not appear to have described this squishy lump on the head either to witness 2 or his receptionist.

On 11 April 2006 the mother rang witness 2's rooms and cancelled the admission to hospital but said they would attend for an ECG test. An appointment was made for 12 April 2006 for the mother to bring the twins in to witness 2's rooms, presumably as a follow-up to the ECG. The mother attended with the twins on 11 April 2006 at the (name removed) Hospital ("hospital 3"), and told the receptionist there that she had

been referred by witness 2 for an ECG. She did not attend hospital 2. A registered nurse at hospital 3, (name removed) (“witness 4”), performed the ECG, during which she undressed each of the babies. She was not aware of either child being distressed or having any bruising or feeding problems. When the mother asked her about "a soft spot on the side of the infant S's head", witness 4 looked at the soft spot and did not notice any bruising or swelling and the baby did not appear to be tender or sensitive to touch. The mother was then referred to Dr (name removed) (“witness 5”), an emergency doctor at hospital 3, to explain the results of the ECG, a common procedure. Witness 5 said that he did not observe any abnormality, but it was not his usual practice to read an ECG for such small infants.

The mother asked witness 5 to look at the lump behind S's left ear. He looked at it, but also could not see any bruising, but advised the mother to follow up with witness 2. It was the following day, 12 April 2006, that the mother rang witness 2's rooms and cancelled the appointment for later that day.

(B) Events of 12 April 2006 and immediately thereafter

At about 5 pm while the mother was out shopping with M, the five year old daughter, she received a phone call from her husband, who was caring for the infants S and B. The father told her that S was staring at the ceiling and was not responding and that when she came home she should take him to the doctor. It would appear that she then drove home, collected S and took him to hospital 1. The hospital records indicate that she arrived with S in the emergency department of the hospital at 5.23 pm on 12 April 2006, and that S was very pale, not breathing, flaccid and unresponsive.

(Name removed) (“witness 6”), the emergency doctor on call, attended immediately, and found S to be in a life threatening, critical condition. Attempts were made to resuscitate him and he was intubated. He was still unconscious, but gradually he was revived. The NETS emergency service was called at 5.37 pm but was unable to

transport S to Royal Children's Hospital until about 11 pm because his condition at that time was so critical he was unable to be moved. A chest X-ray performed at hospital 1 indicated that S had healing fractures of two of his ribs to the back of the right 5th rib and to the back and side of the left 7th rib. At this time the hospital staff became aware of the possibility of non accidental injury, and at 11.39 pm on 12 April 2006, a notification was made to Department of Human Services in respect of S. S at that time was travelling between hospital 1 and the Royal Children's Hospital arriving at the Royal Children's Hospital shortly before midnight. He was immediately admitted in to the Intensive Care Unit at Royal Children's Hospital and during the early hours of 13 April 2006 he was examined by a number of specialist medical practitioners, some of whom performed emergency treatment on him. A number of these treating medical practitioners were called to give evidence during the course of these proceedings. Shortly after his arrival in emergency a CT scan was performed and the Court was told it revealed multiple skull fractures.

Dr (name removed) (“witness 7”), Consultant Paediatrician, Department of General Medicine, Royal Children's Hospital, gave evidence to the Court that upon his first observation of S he found him to be paralysed and connected to a ventilator and life support. At that time he had already undergone emergency surgery by way of intervention of a ventricular drain tube. His opinion was that the injuries he observed and treated were consistent with the application of significant forces to the skull and ribs of S and that they had occurred at different times. He said that the injuries were of different ages. Witness 7 has continued to treat S, initially as an inpatient over several months, and subsequently as an outpatient.

Dr (name removed) (“witness 8”), the director of Ophthalmology at the Royal Children's Hospital also examined S in the early hours of the morning of his admission, whilst he was in the Intensive Care Unit. At that time he diagnosed the presence of bilateral extensive retinal haemorrhages, both intra retinal and pre retinal. He also diagnosed retinal macular folds, or at least a macular fold on the left side.

Upon initial examination he said that almost no retina could be identified in either eye. It was his opinion that the most likely explanation for these injuries was non accidental injury.

Dr (name removed) ("witness 9"), Paediatric Radiologist at Royal Children's Hospital gave evidence of X-rays which were taken of S on 13 April 2006. Upon examination of these chest X-rays she found that they revealed healing rib fractures to the right 5th and left 7th ribs. There was also some disruption of the left 4th rib. She also gave evidence of other radiological procedures and tests performed on S. It was her opinion that the presence of multiple fractures of different ages, together with the presence of intra cranial and retinal injury was highly suspicious of non accidental injury.

Consultant Neurosurgeon, Dr (name removed) ("witness 10"), also examined S in the early hours of the morning of 13 April 2006 and also assessed the CT scan. Her diagnosis, upon that review, was that the infant had bilateral and sub-galeal haematomas and multiple skull fractures. She assessed there to be an occipital fracture, a right parietal fracture and a large left parietal fracture. She also observed subdural and subarachnoid haemorrhages on the CT scan of S and performed surgery on him involving the placement of the external ventricular drain tube. In evidence she also expressed the opinion that these injuries were the result of what she described as "major force consistent with non accidental injury".

Dr (name removed) ("witness 11"), Consultant Paediatrician, also examined S in the Intensive Care Unit on 13 April 2006. She also assumed the role of examining and assessing the extensive volume of diagnostic tests and the results of surveys that had been performed. It was her opinion that the injuries suffered by S were caused by "significant trauma of considerable force and that overall, the pattern of injuries indicate non accidental injury."

Later on the morning of 13 April 2006, B, being the twin of S, was brought to the Royal Children's Hospital for him to be examined. A skeletal survey was performed on B. Dr (name removed) ("witness 12"), Consultant Radiologist, also gave evidence of his findings and prepared a detailed report in respect of each of the twins. The skeletal survey of B revealed multiple rib fractures of differing ages, and two skull fractures to the parietal region and the occipital region. It was the opinion of witness 12 in respect of B that "this constellation of findings is virtually diagnostic of non accidental injury." Subsequently witness 11 also examined B and reviewed the surveys and X-rays and that in respect of B it was her opinion that the skull fractures and the setting of the rib fractures of differing ages and bucket handle fractures to some of his long bones would have required considerable force to produce such injuries. It was also her opinion that these injuries were most likely non accidental injuries.

S remained as an inpatient at the Royal Children's Hospital until 30 May 2006 when he was discharged from hospital as an inpatient and was placed on an Interim Accommodation Order to live with his maternal grandparents and maternal aunt on a number of conditions pursuant to orders of the Children's Court. He continues to reside with his maternal grandparents and aunt with siblings, B and his older sister, M. He regularly attends the Royal Children's Hospital as an outpatient for follow-up treatment and assessment.

NOTICE OF ADMISSION OF FACTS BY THE RESPONDENTS

On 29 January 2007 the respondents had filed a Notice of Admission of Facts. On 12 February 2007 at the commencement of the contested proceedings, the respondents filed with the Court an amended Notice of Admission of Facts by the respondent. The Notice of Admission of Facts sets out detailed admissions in respect of each of S and B. In respect of S the notice provides that:

"Between the time of S's birth and 12 April 2006, S sustained injuries of a severe and life threatening nature. S's injuries are accurately described in a report dated 2 May 2006 by witness 11, Consultant Paediatrician, save and except for the assertion that there was any retinal detachment in respect of either of S's eyes."

The injuries as sustained by S are then set out. There follows an admission by the respondents "That the amount of force required to produce such a head injury as suffered by S is not able to be accurately determined, but that the amount of force required to produce S's injuries including the fractures of his skull, as well as intracerebral bleeding, is likely to be quite considerable, and that it is likely that the injuries to his skull were derived from trauma of significant force."

The notice continued:

"The respondents admit the accuracy of the results of all imaging taken of S's injuries and the accuracy of the interpretation of such imaging, but do not admit any proposed mechanism of causation inferred by any of the witnesses proposed to be called by the applicant."

The notice in respect of B made similar admissions as to the severe and life threatening nature of the injuries suffered by the infant and further, accepted the report of witness 11, dated 18 May 2006, save where there was specific reference in the notice to such non acceptance. It again concluded that the respondents do not admit any proposed mechanism of causation submitted by witness 11 or any other witness called by the applicant. It further admitted the accuracy of the results of all imaging taken of B's injuries and the accuracy of the interpretation of such imaging.

EXPERT MEDICAL EVIDENCE : The issue of non accidental injury and the issue of causation of the injuries

Having been provided with a Notice to Admit Facts on behalf of the respondent parents it then became evident to the Court that the substantive issue between the parties was the non admission by the parents of the causation of the injuries, and in particular the issue of non accidental injury. This led to a detailed and extensive cross-examination of a substantial number of the medical specialists called on behalf of the Department of Human Services as to their qualifications and experience as to the level of force required to cause the constellation of injuries suffered by both S and B, and further as to their expertise to give evidence as to non accidental injury. There is an extensive list of such medical experts who were called to give evidence, and each one was rigorously cross-examined by Mr Langmead SC on behalf of the parents as to their relevant training, experience and study as to the question of causation of the type of injuries sustained by these infants and the issue of non accidental injury. It is not intended to traverse the lengthy cross-examination and submissions in respect of each such medical expert. It was a lengthy process, and a ruling was made during the course of the proceedings as to the competence of each medical expert to give evidence as to the mechanics of causation of such injuries, and the issue of non accidental injury. Clearly the levels of qualifications and experience of the medical experts varied, but as each provided the Court with a detailed curriculum vitae which included their qualifications, experience, study, research and publications, the competence of each medical expert to give such evidence was tested. The list of medical experts challenged to give evidence relating to non accidental injury included witness 7, Consultant Paediatrician, Department of General Medicine, Royal Children's Hospital, Melbourne; Dr (name removed) ("witness 13"), Consultant Paediatric Neurologist, Royal Children's Hospital, Melbourne; witness 10, Neurosurgeon, Royal Children's Hospital, Melbourne; witness 8, Director, Department of Ophthalmology, Royal Children's Hospital, Melbourne; Associate Professor (name removed) ("witness 14"), Head Genetic Service, Royal Children's

Hospital, Melbourne; witness 9, Consultant Paediatric Radiologist, Royal Children's Hospital, Melbourne; witness 12, Consultant Paediatric Radiologist, Director, Department of Medical Imaging, Royal Children's Hospital, Melbourne; witness 11, Consultant Paediatrician, Gatehouse Centre for the Assessment and Treatment of Child Abuse, Royal Children's Hospital, Melbourne; Dr (name removed) (“witness 15”), Senior Forensic Physician, Victorian Institute of Forensic Medicine; Dr (name removed) (“witness 16”), Consultant Paediatrician, Director, Paediatric Forensic Service Child Protection Team, Senior Staff Specialist Paediatrician, Sydney Children's Hospital, Randwick, New South Wales.

No issue was taken by counsel representing the parents in respect of any of these medical experts as to their qualifications and experience in their particular field of medical specialty. The subject of the objection to the evidence of each of these expert witnesses was their qualifications to give opinion evidence and their expertise in the field of non accidental injury. Counsel for the respondent parents in objecting to each of these medical witnesses giving expert opinion evidence in relation to non accidental injury relied on a number of well established authorities including *Clark v. Ryan* [1960] High Court of Australia 103 Commonwealth Law Reports p.486 where at p.491 Dixon CJ stated:

"The rule of evidence relating to the admissibility of expert testimony as it affects the case cannot be put better than it was by J W Smith in the notes to *Carter v. Boehm* [1876]: 'On the one hand' that author wrote, 'It appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it'."

He further relied on a Victorian Court of Appeal decision of *R v. Anderson* [2001] Victorian Reports 1 where at p.25 President Winneke stated in referring to an opinion of an expert:

"It is also true that an opinion is only as good as the factual or scientific basis upon which it is expressed; and if no such basis is given or, if given can be seen to be speculative or irrelevant to the opinion expressed, then the opinion will be worthless."

It is upon the application of these principles that Mr Langmead SC based his objection to the opinion evidence of each of these witnesses in respect of the mechanics of the causation of the injuries and non accidental injury. It is his submission that the medical experts being called by the Department of Human Services lacked a proper foundation in fact or science in non accidental injury. Mr Allen SC, on the other hand, submitted on behalf of the Department of Human Services that there is no recognised degree or specialist course in non accidental injury but rather that there is an organised body of knowledge in the field of non accidental injury. Non accidental injury is an area where lay persons cannot form opinions without the assistance of expert medical opinion. Each of these medical experts, he submitted, through study, training and experience had sufficient knowledge to give an expert opinion on non accidental injury. Mr Allen SC also referred to the authority of *Clark v. Ryan* where Dixon CJ stated at p.491, observations of Vaughan Williams J in

R v. Silverlock:

"No one should be allowed to give evidence as an expert unless his profession or course of study gives him more opportunity of judging than other people."

He further referred to the South Australian Court of Criminal Appeal decision of *James Langdon Bonython* [1984] at p.34 King CJ said that;

"Before admitting the opinion of a witness in to evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. The second question is whether the witness has acquired by study or experience, sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."

After considering all of the submissions made by counsel concerning the objection of counsel for the respondents that each of the medical experts be restricted from giving

evidence in relation to non accidental injury, and having read the authorities to which I was referred, I formed the view, upon cross-examination of each of the medical experts, that each had sufficient knowledge, training and experience to be of assistance to the Court in determining the serious issue of non accidental injury in these proceedings and that their evidence in these matters should be admitted. During the course of these submissions Mr Langmead SC provided to the Court a body of medical literature relating to the scientific foundation of the syndrome loosely termed "non accidental injury." Reference was made to a number of articles during the course of these proceedings and each of them have been read and considered in conjunction with the evidence which has been heard by each of the medical expert witnesses.

GENETICISTS - OSTEOGENESIS IMPERFECTA

Witness 14, Head, Royal Children's Hospital, Clinical Genetic Service; Associate Professor, University of Melbourne and Director, Southern Cross Bone Dysplasia Centre, provided two reports to the Court dated 24 May 2006 and 8 February 2007 and was called on behalf of the Department of Human Services to give evidence to the Court.

His evidence was in respect of the child B. He had been requested to assess him as to whether he might have an underlying bone condition that predisposed him to fractures. He reviewed the radiographs available at the Royal Children's Hospital and found no evidence to suggest an underlying brittle bone disorder which would account for the numerous fractures sustained by B. B has not sustained any further fractures since being assessed initially at the age of eight weeks, and on clinical examination and assessment of the radiology, he could not find any underlying bony cause that would have predisposed him to sustain multiple fractures, with no evidence to suggest osteogenesis imperfecta.

THE MEDICAL EVIDENCE

As previously indicated specialist medical experts were called to give evidence from a range of specialist areas. I heard evidence from Paediatric Radiologists; Consultant Paediatricians; a Neurosurgeon; a Paediatric Neurologist; a Paediatric Ophthalmologist; a Geneticist; an Obstetrician and Gynaecologist; Forensic Pathologists; General Practitioners and Psychiatrists and Psychologists.

There was a consistency in this vast array of medical evidence that the constellation of injuries suffered by both B and S, eight week old infants at the time of the injuries, and whilst in the sole care of their two parents, were so extreme that those injuries were more likely than not non accidental injuries. In the absence of any plausible explanation from either of the parents, and bearing in mind that the only other person present during that time when the injuries were likely to have been caused was their five year old sister, M, the evidence presented to this Court suggests that these injuries were not caused by accident.

The issue relating to any likelihood of any involvement by the child M will be addressed later.

Many days of this court hearing involved a detailed account of the extensive constellation of injuries suffered by these two infants when they were no more than eight weeks old. Witnesses were cross-examined extensively as to the nature of the injuries, the time that the injuries may have occurred and a variety of possible explanations for the cause of some of the injuries was put to some of the witnesses, such as "a young child dropping an infant on its head," or "falling off a chair whilst playing with an older sibling". The parents from the outset both stated that "we have no explanation for these injuries. We just cannot explain what happened."

Witness 12, Consultant Paediatric Radiologist and Director, Royal Children's

Hospital, Department of Medical Imaging, provided a detailed list of the extensive injuries caused to each of S and B. The parents at no time have disputed that each of these infants have suffered multiple injuries which include multiple skull fractures, multiple rib fractures (for S it was 14 rib fractures) and for B, also multiple skull fractures, (13 rib fractures and 4 long bone fractures).

The respondents have conceded that the injuries suffered by B and S were horrendous and life threatening. S's injuries were so critical that fortuitously he received immediate urgent treatment upon his admission to hospital 1 from a specialist Emergency Physician. If this intervention had not been so readily available the likelihood is that he would not have survived. The expert evidence heard by the Court comprised medical witnesses who had a vast range of experience in dealing with infants who had suffered head injuries, limb injuries, eye injuries and a whole constellation of injuries suffered by these two children. The list is extensive and not one medical expert was prepared to say to the Court that these injuries had most likely been caused accidentally. Witness after witness told the Court that the most likely cause of these multiple injuries of different ages was non accidental injury. I do not propose to canvass the extensive detail of their evidence, as I am of the view that there was little, if any, difference of opinion between the experts as to how these injuries were caused.

DR (NAME REMOVED) (“WITNESS 17”) - FORENSIC PATHOLOGIST

The respondents called evidence from a number of witnesses, including a number of professional witnesses. Significant reliance was placed by the respondents on the evidence of witness 17, Consultant Forensic Pathologist, who attended court over a number of days and heard the evidence of a number of medical witnesses called by the Department of Human Services. These witnesses included witness 16, Consultant Paediatrician; witness 10, Neurosurgeon; witness 9, Consultant Paediatric Radiologist; witness 11, Consultant Paediatrician; witness 15, Senior Forensic

Physician, Victorian Institute of Forensic Pathology; Dr (name removed) (“witness 18”), Paediatrician; witness 12, Consultant Paediatric Radiologist.

Witness 17 said in evidence that he had heard the evidence of each of these witnesses, and had also read the transcript of all of the medical evidence, and that he had a basic understanding of the nature of the injuries. He provided two reports to the Court, the first dated 28 July 2006 and a second, short report dated 31 January 2007. In his first report he indicated that he had been provided with a number of medical reports relating to the multiple injuries suffered by S and B and that he had read those reports. He also indicated in his report and in evidence that he attended the home of the family and met with each of the parents where he said that he was told by the parents that "On occasions, M (the five year old sibling of the twins) would sit the twins (then eight weeks old) on various chairs in the kitchen/family room around the table playing, 'tea parties'". In his report he continued "They advised me that M was not necessarily always supervised during these and other activities with the twins and they could not exclude the possibility of a twin falling or being dropped on to the wooden floor, although they had not personally witnessed such an event." This passage in witness 17's report of 28 July 2006 developed during the course of these proceedings to a real possibility that five year old M had caused these "horrendous and life threatening injuries to her siblings". More will be said about that later. The difficulty arises that each of the parents in their evidence have denied that they told witness 17 that M played "tea parties", with her infant siblings. They have both also denied that they told witness 17 that M would place the infants on chairs during the "tea parties" and that she was sometimes unsupervised during those and other activities. The mother said in her evidence that witness 17 must be mistaken about that fact.

Witness 17 gave evidence that he had made contemporaneous notes of this information given to him by the parents. Witness 17 relied on this information in his report with the possibility that M could not be excluded as a cause of the infants'

injuries. Witness 17 summarised the injuries of S as

- (a) multiple skull fractures, particularly involving the parietal and occipital bones;
- (b) markedly oedematous (swollen) brain, especially the left cerebral hemisphere;
- (c) a left-sided subdural haemorrhage;
- (d) bilateral retinal haemorrhages;
- (e) right and left rib fractures of differing ages.

At the time of hospital presentation, an adequate explanation was not provided by the parents, or anybody else, as to how the head injuries could have been sustained.

Witness 17 said that it was his view that "having inspected the family home, if S were to fall from either the play chair (30 centimetres) or dining chair (50 centimetres) striking his head on the wooden floor, there would be a real possibility that sufficient force would be generated to produce skull fracturing and/or subdural haemorrhage, even if the skull bones were of normal structure."

He agreed with the view of witness 15, Senior Forensic Physician, Victorian Institute of Forensic Pathology, that "The multiple skull fractures are likely to have resulted from several episodes of blunt force trauma, although (he said) it should be noted that a number of fractures can be produced from a single application appropriate trauma, and the subsequent conscious state of an individual who has sustained sufficient force to cause skull fracturing is highly variable."

Witness 17 stated:

"There may well be a lucid interval following the initial injury lasting for minutes, hours or even days, and if there is then a further decrease in consciousness, this is generally related to an increase in intracranial pressure consequent upon the development of a number of conditions, such as intracranial haemorrhage and/or cerebral oedema."

He continued:

"Having regard to this variable time of onset of decreased conscious state consequent upon head trauma, with its other attendant neurological symptoms and signs, repeated episodes of falls within the next few days prior to S's collapse in the afternoon of 12 April 2006, could not be excluded, in my opinion, as reasonable mechanisms of causation for his eventually serious medical condition on that afternoon."

So far as B was concerned, witness 17 described his injuries as

- (a) differing age fractures of the right and left rib cage;
- (b) skull fractures of the parietal and occipital bones;
- (c) multiple metaphyseal fractures of the long bones of the arms and left lower leg.

Whilst he was in general agreement with witness 15 as to the long bone and rib fractures, he said these injuries may also result from unintentional or accidental rough handling of an infant.

Witness 17 in evidence said that in general terms he basically agreed with the medical evidence which had been given by the medical experts, but that there were various opinions as to when S's head injury occurred. The evidence of witness 16, Consultant Paediatrician and Director, Paediatric Forensic Services, Sydney Children's Hospital as stated in his report dated March 2nd 2007, and after consideration of numerous reports provided to him, was as follows in respect of S.

- (1) The constellation of head injuries indicates a severe impact injury to the left side of the head resulting in scalp swelling, a left sided, comminuted, parietal fracture, focal subdural haemorrhage, underlying left parietal fracture, and a focal contusion seen in the left parietal and occipital lobes. The impact also resulted in a severe rotational (inertial) injury to the brain. This is evidenced by the presence of apnoea, unconsciousness, the large subdural haemorrhage over the left

cortex which extended in to the interhemispheric space, and the areas of swelling/infarction throughout both cerebral hemispheres.

- (2) The injury to his brain was acute and had taken place in the hour while he was in his father's care. Witness 17 said that he disagreed with witness 16 in the sense that witness 16 was of the opinion that S was unconscious from the time of the infliction of the injury and it was his view that there would have been no lucid interval. Witness 17 agreed that he had never been involved in a case where there has been this level of injury without explanation, and although not one of the medical experts had ever heard of a sibling (let alone a five year old female child) causing such serious injuries, the Court should accept that "Rare things do happen."

PSYCHIATRISTS AND PSYCHOLOGISTS

Both the respondents and the applicants provided the Court with reports from a number of Psychologists and Psychiatrists and each of them were called to give evidence to the Court. Such evidence was given by (name removed) ("witness 19"), Registered Psychologist, who was called to give evidence for the parents. He was initially requested to provide an opinion regarding the psychological functioning of the mother of the children. This referral came from Dr (name removed), a General Practitioner from the (name removed) Medical Centre, (location removed). Witness 19 provided such an assessment and a report dated 31 July 2006. Further psychological evidence was called by the parents and reports were provided to the Court by (name removed) ("witness 20"), Clinical Psychologist, dated 11 September 2006; (name removed) ("witness 21"), Psychologist, dated 28 December 2006 and Dr (name removed) ("witness 22"), Psychiatrist, dated 5 February 2007. Each of these witnesses provided evidence to the Court.

The applicant, Department of Human Services called evidence from Dr (name

removed) (“witness 23”), Child and Adolescent Psychiatrist with a particular interest in child maltreatment and over 30 years experience in matters related to allegations of child maltreatment. He was requested to consider a number of reports provided by the respondents and to provide an assessment of each of these reports as to the methodology used and the conclusions drawn from each. The reports he was requested to assess primarily were the psychological reports of witness 19, witness 20 and witness 21. He was also requested to comment on the psychiatric report of witness 22 a Forensic and General Psychiatrist also of some 30 years experience having given evidence in a significant number of court proceedings. Witness 23 also believed it relevant to comment on the reports prepared by witness 11, Paediatrician; witness 15, Forensic Physician and witness 17, Forensic Pathologist. In response to this request witness 23 provided two reports dated 6 February 2007 and 20 February 2007. The Department of Human Services also sought evidence from Dr (name removed) (“witness 24”), Clinical Psychologist, who also indicated that he had 30 years experience as a psychologist. He also provided a report dated 18 March 2007 to the Court and gave evidence and had been asked to review the reports of witness 22, witness 21, witness 19 and witness 20. Each of these expert witnesses sought to assist the Court from a somewhat different perspective.

Witness 19 assessed each of the parents by the use of a number of psychological instruments, providing both a psychometric appraisal and a clinical examination of each parent. He concluded, in respect of the mother that she was "A capable, caring and loving parent who enjoyed a good relationship with her husband. An examination of her past history did not reveal any matters of concern." He also found that upon completion of the Minnesota Multiphasic Personality Inventory that there was no evidence of any major pathology. On examination of the father he found that his general mood was despairing and that he showed signs of an adjustment disorder with mixed anxiety and depressed mood. Witness 19 questioned whether M may have inadvertently caused the injuries to the twins by rough handling. He further states

that:

"A psychological assessment is no guarantee of discovering truth: human behaviour can be complex and exceedingly difficult to assess on occasions. Apparent 'Normality' obviously does not preclude the possibility of disturbing actions."

Witness 20 was requested to assess M in particular in response to her having been removed from the care of her parents. He was unable to interview her separately from her parents as she became distressed when this was suggested. She did not appear to have similar difficulty when attending on two separate occasions for VATE interviews with the police. Witness 20 does not appear to mention the possibility raised by both witness 19 and witness 21 of M being inadvertently responsible for the injuries to her twin baby brothers, but he is conscious of the traumatic affect on M being separated from her parents under such acute and difficult circumstances. At the time of his assessment in September 2006 he recommended that M be returned to the care of her parents with appropriate supervision and monitoring.

Witness 22 assessed the parents at the request of their solicitors. He too was provided with a number of reports. In relation to the mother he found no current evidence of a diagnosable psychiatric disorder and states that "There is simply nothing to suggest that the mother is in a category of elevated risk of causing harm to her children." Nevertheless, he says this falls well short of making an absolute statement of saying that she is not responsible for the injuries. In respect of the father he says that he is "Adamant that he has not been responsible for any intentional injuries to his sons, but he does accept the proposition that he may have accidentally injured them. He says that the father could be diagnosed as suffering from a depressive disorder, but was not responsive to the suggestion that he take antidepressant medication.

Witness 21, the Psychologist, accepted a referral from a fellow psychologist, Dr (name removed), in November 2006. The referral was "To determine whether or not M may benefit from a period of psychotherapy for problems with attachment." Although witness 21 had been a treating clinician providing psychotherapy to M, the

nature of her report was unclear. It appeared to be a medico legal report prepared for the benefit of the court proceedings.

The evidence of witness 21 raised some serious concerns as to her level of competence in matters of such complexity, as did her report dated 28 December 2006. Witness 21 gave evidence that she had become a fully registered psychologist in 2005 and at the time that she prepared her report she was employed as a Student Support Services Officer with the Department of Education and Training. She had not given expert opinion evidence to a court previously. She is currently completing a Doctor of Philosophy entitled "The psychology of difference: a psychodynamic approach to cultural identity, cultural difference and reconciliation in Australia." When she accepted this referral she said that she had very limited time available as she was completing her thesis and was working at schools, with a very small case load of private patients. Witness 21 provided a short history of the relationship of the parents before any of the children were born. Like most of the other psychological and psychiatric reports provided there was limited information about the parents developmental history. She said that her brief was to determine whether or not M would benefit from therapy.

Witness 21 said that she had been told as part of the referral that there was an assumption that the parents had perpetrated the injuries to the infant twins after there had previously been a SIDS death. She said that she believed that there were issues around attachment as M had been separated from her parents. She said that it quickly became evident that this was a "Case out of the ordinary" but that she worked with a (name removed) as her mentor and supervisor, a relationship which had commenced while she was a probationary psychologist and has continued since her registration as a psychologist.

Witness 21 had access to many of the medical and psychological reports prepared for these proceedings. She was also provided with reports prepared by Department of

Human Services. It would appear from witness 21's report that she did an observation of the mother with M on 29 November 2006 and an observation of the father with M on 20 December 2006. Prior to that she had one interview with the mother on 22 November 2006. She then arranged for a parent interview with the mother and father on 11 December 2006. Her evidence was that "By the meeting of 11 December 2006 my mind was at ease that it (the injuries) had not been perpetrated by the parents." Witness 21 relied on the report of witness 17 where she stated:

"Specifically, witness 17 disagreed with both Doctors witness 15 and witness 11 that deliberate abuse at the hands of one or both the parents was the only explanation for S's injuries. Witness 17 argued that S's injuries could, in fact, have been caused accidentally."

She continued;

"In May 2006 witness 17 went to the family home at (location removed) and examined the furniture and area where M sometimes played 'Tea parties' with the twins without parental supervision."

She then moved on to what she called "An alternative hypothesis" and noted that neither parent has been charged with any offence. Witness 17 and witness 20, she said, had pointed out the fact that a third person, M, was present in the home and sometimes unsupervised in the company of her infant siblings. She then moved on to the hypothesis that "M may have been implicated in accidentally incurring both S and B's injuries through rough play." This hypothesis remained untested. In her report, witness 21 then went on to say that at the interview with the parents on 11 December 2006 "The main purpose of this interview was to gain an understanding of whether or not any of the professionals who had been involved in their case had spoken to them directly about the possibility of M's involvement in her brothers' injuries both parents appeared startled by the question either both parents were complicit in covering up abuse committed by one or both of them against S and B, or someone else was responsible. The only other person who could have been involved was M. Since all the evidence presented thus far corresponded with clinical impressions that the mother and father were loving parents who had a strong emotional bond with M, I told them that on balance, the hypothesis that M had caused the head and limb injuries

sustained by the twins, either accidentally or through overtly aggressive actions, seemed to be a more credible explanation than the alternative."

Witness 21 continued:

"The emotional impact of this statement was immediate and palpable."

She later stated:

"Both parents then spontaneously record instances where M had expressed extreme jealousy of her brothers ..."

Witness 21 concludes that "M's removal has been based on the erroneous assumption that she and her brothers had been subject to abuse by one or both parents or are in danger of being subject to such abuse."

Witness 21 continues:

"In my professional opinion and on the balance of the evidence presented to me, M is most likely to have caused the injuries observed in both her brothers, either accidentally through unsupervised rough play, or through overtly violent actions driven by unconscious mechanisms on M's part."

She recommends an immediate return of the three children, M, S and B to the full time care of their parents with therapeutic support to assist the family in coming to terms with the experiences and events of the past seven months.

The only caveat she places on this recommendation "Is that M should not be left alone with her brothers at any time until she has developed and is mentally mature enough to understand the consequences of her actions." In evidence witness 21 again reiterated that "Nothing alters my views as expressed in the report."

Witness 23, having considered the reports provided to him, gave evidence to the Court. He said that he commenced working in the area of child abuse in 1974 and that a considerable proportion of his clinical and research work has been in this area.

He said that there is no strong association between psychiatric diagnosis and child maltreatment. There are a number of risk factors which are commonly associated with child maltreatment, such as drugs and alcohol, violence, lower socioeconomic group, but child maltreatment is not necessarily absent if those other risk factors are not present. Witness 23 said that he had never seen skull fractures, brain injury, rib fractures, limb fractures, retinal haemorrhage all caused by a sibling. He had observed the VATE interviews with M and said that she presents as a very articulate, intelligent child, able to agree and disagree with the police officer. He said that she made some very impressive comments for a five year old child, and was an impressive interviewee. He saw no evidence of intense feelings of rage nor of aggression in the interview. The reunification of the family he believed was secondary to the protection of the children. On being asked whether he would accept that the particular constellation of injuries does not necessarily point to non accidental injury and that the parents challenged the proposition of non accidental injury as not having scientific reliability witness 23 responded:

"No, I think it achieves a reasonable standard of reliability."

Witness 24, Clinical Psychologist, also with many years experience, said that he was not aware of a case where a sibling has injured another child in this way. Witness 24 said in evidence "If there is a series of injuries with no demonstrable cause, there is no assurance that it will not occur again. These are mammoth, horrendous injuries. It is catastrophic, almost beyond words. If the injuries have ceased since the children have been out of the parents' care, his professional opinion is that there would be grave, clinical concerns about the children being returned to the care of the parents."

THE MOTHER, THE FATHER AND M

The mother

The mother of all of the children, first made a statement to police at 7.45 am on Thursday 13 April 2006, the morning after S had been admitted to the Intensive Care Unit at the Royal Children's Hospital. This was followed by a Record of Interview at

11.25 am on 14 April 2006 at (location removed) CIB office, and a subsequent Record of Interview conducted at (location removed) Police Station at 10.05 a.m. on 19 May 2006. The mother also gave evidence in these proceedings. The mother provided evidence in her statement, Records of Interview and by way of viva voce evidence. She is an architectural draftsman by occupation, she was 36 years old at the time of making her statement and she said that she had been married to her husband for 12 years, having met him when she was 17 years old. She described their relationship as healthy and said that she has not known him to be a violent man. She said that her husband had left his employment the week before on 5 April 2006 as the company was closing down and he preferred to leave rather than be dismissed. There is no violence between them, neither have a criminal record, and rarely use alcohol. Both have worked hard and been in a stable financial position. They had purchased an 88 acre property at (location removed) and recently built a home on it. They left the house at (location removed) on the night the children were removed and made a decision to sell the house in order to fund this litigation. They sold the house for \$585,000 with a mortgage of approximately \$80,000 owing on it.

Initially after the children were removed there were some difficulties with access, but that has now resolved and the current arrangements are 12 hours each day, with eight hours of access together. All access continues to be supervised. Initially the mother stayed at her mother's home and for about two weeks the father slept in the car. Subsequently the mother and father moved to stay at her aunt's house. She said at the time of the incident concerning the twins Department of Human Services requested a radioactive bone scan and skeletal survey of M, but that she and John were horrified and refused to consent. Eventually, she said, Department of Human Services "backed off". No such investigations have ever been conducted in respect of M. In her original statement the mother explains the death of J at seven days old in 2004 due to SIDS. She indicates that both she and her husband did not want an autopsy and applied to the Supreme Court to prevent it. She said that they wanted their daughter

M to sleep in the same room as her parents after that incident. She describes the birth of the twins, B and S, and that S was born with a shallow hip requiring a hip brace, but with no other complications. She also described the boys becoming limp or having fainting spells. Generally, the boys were seen to be good babies, feeding and sleeping well.

The family had what the mother called "our usual showering routine" whereby the father has a shower with the boys. This routine involved the father taking one baby in to the shower and washing him and then taking the other baby and holding both, one on top of the other. She said that as she continued to work the father helped with the twins and sometimes she left him to look after them. She regularly attended the Maternal and Child Health nurse and she followed up with doctor's appointments about a problem with B's tongue and the boys floppy episodes. She said that an appointment had been made with witness 2 on Monday 10 April 2006. Her evidence was that witness 2 gave her the option of admitting the boys to hospital for a few days and having an ECG, or attending as outpatients. She said she understood they were to go to hospital 3, but now accepts they were booked in to hospital 2. Her evidence was that the father was worried if "we went to stay in the hospital because it would upset their routine". The mother said she would leave the twins with the father two or three times a week. Sometimes, she said, M would be really rough with the twins and that she would "tell her off". When asked by Mr Langmead SC, her counsel, what possibilities she had considered about the injuries to the twins, she said that the father could have done it by his handling of the twins, or that it could have been M. She said that she had considered that from the beginning. She said that she was shocked when witness 21, the Psychologist, suggested that M was a strong possibility as to the cause of the injuries. Witness 21 said that she had seen some aggression in her drawings.

The mother said that she had never told M she could be implicated in the injuries.

She was aware the Department of Human Services believed that one of the parents had harmed the children and that the other parent is harbouring the perpetrating parent. On Wednesday 12 April 2006 the mother said she helped the father feed the twins just before 4 pm. She then left the father with B and S and went with M to the supermarket. The father rang her on the mobile when she was five to ten minutes from home. She said he said "Hurry home because S doesn't look too well." She said she waited in the car and told M to ask the father to bring S out to the car and she would take him to hospital 1. He put S in the car and she took him to the hospital. She didn't agree that S had to be revived. The ambulance from the Royal Children's Hospital took about two hours to arrive. She didn't go in the ambulance with S but went home and swapped cars. She arrived at the Royal Children's Hospital about 11 pm that evening. The mother, in her statement dated 13 April 2006 stated:

"I have been informed that S has three fractures to his head and also fractures to his ribs. I have no idea how he got these injuries. I am completely dumfounded. I know I have not done anything to hurt my son in any way. I can't think of any incident that has occurred where he would receive such serious injuries. I don't think my husband has had an accident with the boys, he would have told me if there was. I don't think he would do anything to hurt any of our children, he has never raised a hand to any of them. No one else has had care of the boys except for my husband and me. They have not been left with any family members or babysitters. I have not noticed any bruising on S's body other than his face and the redness under his tongue."

"M and I have a close relationship and I think if something happened to the boys when she was with them she would tell me about it. I don't think she would have caused S's injuries at all."

It was under cross-examination by Mr Allen SC that the mother first mentioned that she had seen M give B a "Chinese burn". She said she did not mention it in her statement or Record of Interview as she may not have seen it as significant. She said she didn't know it caused any harm and she told M that you don't do that to little babies.

The father

The father of each of the children currently before the Court, has sworn a number of

affidavits in this and other court proceedings in respect of his children and which have been tendered to this court. He swore an affidavit to the Supreme Court of Victoria on 10 October 2004 relating to the death of his infant son J. He also swore an affidavit to the Supreme Court on 28 April 2006 in respect of an appeal from the Children's Court to the Supreme Court in relation to his children, M, S and B. There is also a transcript of a Record of Interview with the father on 13 April 2006. The father said that he is now a trainee train driver with Connex, where he has been employed since September 2006. He and his wife have been married for about 12 years and have three children, M, B and S. A fourth child J passed away on 7 October 2004 at seven days old. He described his involvement with the twins since their birth, including visits to various doctors. In his affidavit dated 28 April 2006 and prepared for an appeal to the Supreme Court he stated:

"On 12 April 2006, the day began with our normal routine of feeding and changing the twins. The mother and I then took the children for a drive to (location removed). After arriving home from that drive, at approximately 4 pm, the mother took M to (location removed) to do some grocery shopping. After the mother left I changed each boy's nappy and laid them on their mat in the family room. At approximately 5 pm I noticed that S was not acting himself. He was lying on his back staring at the ceiling, and his breathing seemed rapid and shallow. I tried to gain his attention by gently tugging his ears and touching his face, but he remained staring at the ceiling. I was very worried and I then telephoned the mother and told her to hurry home so that we could take S to the doctor. The mother told me she was only a couple of minutes away from home."

In his Record of Interview on 13 April the father was asked:

"Is there anything that you can tell us in relation to how he (S) may have sustained some serious injuries?"

The father answered:

"Probably. There's probably a few ways he could have sustained those injuries. Considering I've been looking after him for the last two weeks, it's probably my fault. I don't know. Like I said to you before, he - he fell off the mat and hit his head on the floor last week. I could have hit his head in going through a doorway or putting him in a car. Or maybe the way I hold him with one hand, maybe I held him too tight. I don't know."

He continued:

"Yeah, I just ... I was just gonna say I changed their nappies, that's ... that's all I did, so I walked from one end of the house to the other with them. So I ... I may have hit them, I don't know. Who knows?"

In his evidence the father described how on occasions he would pick up each baby by the jumpsuit and he believed on one occasion he bumped the baby's face on the steel part of the pram. He also described how M would sometimes become jealous of the boys. He explained that the psychologist, witness 21, said that it was possible that M had injured the boys and that he had presented witness 21 with a drawing he said that M had done, saying "That's me and that's the time I tried to catch S when I nearly dropped him." He said that witness 21 had said to M in his presence "Well, maybe you haven't been a good sister." The father agreed in evidence that both the mother and M had told him he was too rough with the boys and that he should be careful, but that he persisted in grabbing the babies by their jumpsuits and what they described as "rough handling." The father said that he was not aware of anything out of the ordinary happening to S on 12 April 2006, but that "If something has happened, it's probably been my fault that I accidentally hit his head walking through the doorway and I just didn't pick it up."

M

M was only five years old at the time that her infant brothers S and B suffered these most serious injuries. She has remained in the care of her maternal grandmother and her maternal aunt since 12 April 2006, together with S and B, sharing the same bedroom, which at times has also been shared by her grandmother.

M has featured extensively in these proceedings. M attended at the (location removed) Police Station on 13 April 2006 and again on 19 April 2006 where Senior Constable (name removed) interviewed her by way of VATE interviews. The video tapes of each of these interviews were provided to the Court for viewing, and also to

witness 23, Child and Adolescent Psychiatrist. The VATE tapes were also made available to any of the other experts, if required.

As already stated, it was the expert opinion of witness 23 that in the VATE interviews, one of which was conducted the day after S had been admitted to hospital, that "M presents as a very articulate, intelligent child. She was able to agree and disagree with the police officer." He observed that "She doesn't simply go along with the interviewer, which was a very important part of her presentation." She corroborated that her father took the babies in to the shower. He said she was not uncomfortable in talking about the boys. He said "I think there are some really important comments made by a five year old child. Given the age, she is an impressive interviewee". "There was no evidence of intense feelings of rage in the interview, nor was there any evidence of aggression. It suggests she is not a particularly aggressive child." The drawing done by M, he said, should be treated with extreme caution.

(Name removed) ("witness 25"), the Maternal and Child Health Nurse, said that she had not had any concerns about the development of either of the twins or of M. She had seen M, and her assessments at 18 months and three and a half years presented no concerns. She was developing well and she never observed any aggression. Both parents attended quite regularly at the Health Centre and both presented as competent and caring parents, although they were "up to their elbows" in caring for the twins. M had attended the Health Centre twice with the twins and was very attentive to them. The mother never mentioned any problems between M and the boys.

(Name removed) ("witness 26"), Kindergarten Teacher/Director, (location removed) Kindergarten, had M in her four year old kindergarten class for about ten hours a week from the beginning of 2006. Witness 26 described M in the following way:

"She was very quiet and reserved, shy and needed encouragement to play. She never showed any aggressive behaviour. I would describe her as a

mature child - helpful, reliable, articulate - quietly confident. She enjoyed spending time with adults rather than her peer group. She would be able to verbalise her feelings to peers - also to teachers. She has an extensive vocabulary for her age and was never aggressive to her peers. She spoke about her brothers, especially J, as a member of the family, also S and B. I don't recall her ever saying anything negative about her brothers. I cannot recall the parents ever expressing (M's) extreme jealousy of the twins."

POLICE INVESTIGATION

Police witnesses were called to give evidence as to their role in the ongoing investigations and to produce tapes of the Records of Interview with the father and the mother and statements made by them.

Detective Sergeant (name removed) ("witness 27") gave evidence that he had been directed to investigate the circumstances surrounding the serious injuries that were sustained by S and B. He has also been directed to look at the circumstances surrounding the death of J. All of these police investigations are ongoing.

MATERNAL AUNT

(Name removed) ("witness 28") who is the younger sister of the mother gave evidence that there had been no discussion about who might have injured the children as "We are very close as a family and all believe the parents are not responsible." She said that she formed the view that M had injured the boys the morning after the injuries to B had been found. She said she raised this matter with the Department of Human Services the very next day. M, she said, is always supervised at home in the presence of the twins. B is doing really well and "If we hadn't had the X-rays we wouldn't have known about his injuries. S too is now doing really well at 16 months he can now sit up by himself, he is fed through a tube. He cannot crawl, but rolls around. Despite what the doctors say about his lack of vision she believes he can see something. She said that she didn't ever see M injuring the twins, but that she (M) did draw a picture of her dropping S. She said "This is me dropping S." M has told her "It's all my fault that we are here."

MATERNAL GRANDMOTHER

(Name removed) (“witness 29”) said that the father is a very good man, not aggressive at all. She had never known the parents to have disputes with each other. Both had a very bad reaction to the death of little J. She knew that the children had both suffered very serious injuries. She was aware that M used to be very jealous of the babies and had on one occasion seen M kicking S in the head. M behaved very badly when she was first placed in the grandparents' home.

CHILD PROTECTION

These matters first came to the attention of the Department of Human Services, Child Protection, After Hours service on 12 April 2006. At this time allegations had been made that S had serious and unexplained injuries to his head and a torn frenulum. After Hours were advised that S had a twin brother B and an older sister M. As described previously on 13 April 2006 in the early hours of the morning, Child Protection After Hours Outreach Team attended the family home in the company of police. The mother was at the Royal Children's Hospital with S, but the father, M and B were transported to the (location removed) Police Station. The father was then separated from the children, informed by police that he was a suspect in the matter and advised that an interview would be conducted with him by police. A protection application was then issued in respect of each of the children on the grounds s.63(c) and s.63(e) *Children and Young Persons Act 1989*. A bail justice hearing was then held at the (location removed) Police Station and each child was placed on an Interim Accommodation Order, M and B with the maternal grandmother and S to the Royal Children's Hospital. During the course of these proceedings a number of reports have been tendered to the Court by the Department of Human Services and a number of protective workers have given evidence.

Soon after the Protection Application had been issued on 18 April 2006, the parents indicated to protective workers that they understood why Child Protection was

involved but did not believe there were any protective concerns, given neither parent knew how S's injuries occurred. Department of Human Services have assessed M, B and S as suffering or likely to suffer significant harm. It is stated that this assessment is based on consideration of M, B and S's "vulnerability to harm, the likelihood of future harm and a lack of safety factors for M, B and S."

The main protective concerns relied on by Department of Human Services are:

- S's life threatening injuries
- Old unexplained injuries to both B and S
- The death of J in October 2004 at seven days old, with no substantive medical conclusion
- No explanation as to the cause of the injuries to S and B
- Medical evidence that the injuries are non accidental

STANDARD OF PROOF

The standard of proof upon which I am required to find facts in this case is the balance of probabilities. The nature of this case is such that it is appropriate to make all positive findings subject to the so-called *Briginshaw* standard or "Reasonable satisfaction" on the civil standard.

Briginshaw v. Briginshaw [1938] 60CLR336 per Latham CJ at p.343

"No court should act on their suspicion, surmise or guess work in any case. In a civil case fair inference may justify a finding upon the basis of preponderance of probability. The standard of proof required by a cautious and responsible Tribunal will naturally vary in accordance with the seriousness or importance of the issue."

Per Dixon J at p.362

"But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which

must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters 'Reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect references."

LEGAL SUBMISSIONS

Mr Testart on behalf of the respondent parents, in his final submissions to the Court said that the essence of the dispute between these parties arises out of the horrendous and life threatening injuries which were sustained by both S and B. The nature and extent of the injuries, he says, is a distraction which could lead to a conclusion which would irretrievably damage this family by tearing it apart. He accepts that a primary weakness in his clients' case is that these children were in their care, they suffered terrible injuries and the parents have no explanation for that.

Nevertheless, he submits, it is the role of the Court to consider all of the facts and to determine whether or not, within the confines of the legislative framework, the Department of Human Services has proved its case. He accepts that it is common ground that both B and S suffered significant harm as a result of physical injury. The issue for the parents is the proposition that they have not protected, or are unlikely to protect their children from harm of that type, that is, physical injury. The position of the parents is that "true it is that these children have suffered terrible injuries, and we can't explain it, but we were appropriately vigilant. We are sober, hard working, responsible family people. We suffered a terrible tragedy a couple of years before the birth of these children, and were, if anything, hypo vigilant about these twins. We took them to Medical Practitioners, we took them to Maternal and Child Health nurses. Those who examined them on a regular basis had no cause for alarm of any kind."

Section 162 of the *Children, Youth and Families Act 2005* provides for the circumstances in which a child is in need of protection, and specifically in this case, Department of Human Services seeks to prove that each child is in need of protection

on the grounds as set out in s.162(1)(c) and (e). If those grounds are found proven then the various protection orders which the Court can make are to be found in Part 4.9 *Children, Youth and Families Act 2005* and under s.274 of that Act. The Court may make an order under this Part in respect of a child if the Court finds (a) that the child is in need of protection.

Section 275 sets out the types of protection order which can be made. It is submitted on behalf of the parents that the scheme in the legislation requires the Court to go for a minimum to maximum in terms of the orders and the levels of protection to the children. Section 276 places certain restrictions on the making of protection orders. The parents, relying on that provision, submit that while in compliance with that section a Disposition report has been provided to the Court, the Court cannot be satisfied that all reasonable steps have been taken by the Secretary to provide the services necessary in the best interests of the child (s.276(1)(b)). Section 276(2) provides:

"The court must not make a protection order that has the effect of removing a child from the custody of his or her parent unless (a) the court has considered and rejected as being contrary to the best interests of the child an order allowing the child to remain in the custody of his or her parent."

Mr Testart, for the parents, relied on the significant burden placed on the Department of Human Services in order that they prove their case. His primary position is that the court ought to dismiss the protection applications and immediately allow the family to be reunited with no finding being made under s.274 that any of the children are in need of protection. If that is an unacceptable position for the court, the parents would not consent, but would be prepared to accept and cooperate with an order requiring them to give undertakings pursuant to s.275(1)(a) for a period of 12 months from the date of these orders, with specific conditions being attached to such undertakings. It should be noted that s.278(4) provides that the court may only make an order requiring a person to enter in to an undertaking if that person consents to the making

of the order.

The parents submitted that the twins were no longer such vulnerable infants, and that the circumstances are now quite different. In speaking of the "huge amount of vigilance over M", Mr Testart said, in referring to the children all living with the parents and the grandparents "Well, not only would there be Grandma, Grandpa and the maternal aunt but there would be Mum and Dad, all of whom are alive to the possibility that M has had something to do with the injuries to the children. There are the issues that have been raised by witness 21 which are still alive. Issues of some jealousy, some sibling rivalry, some issues for M to deal with and to go through and grow through surrounding the arrival of her twin brothers and the difference that's made in her life."

Mr Allen SC submitted on behalf of Department of Human Services that the Department by protection applications made on 12 April 2006, asserts that each of the children, M, B and S are in need of protection and that the court should find each Protection Application proven on the grounds set out in s.162(1)(c) and (e) *Children, Youth and Families Act 2005*. In particular the court should find that B and S have suffered significant physical and emotional harm, and that M is likely to suffer significant physical harm and that she has suffered significant emotional harm.

RELEVANT LAW

Section 8(1) *Children, Youth and Families Act 2005* requires the court, where relevant, to have regard to the principles in: s.10 Best Interests Principles and s.11 Additional General Decision Making Principles.

"Best interests" principle.

Section 10(1) *Children, Youth and Families Act* provides that for the purposes of this Act the best interests of the child must always be paramount.

Section 10(2) requires the decision maker, in determining whether a decision or action is in the best interests of the child, to consider always the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking in to account his or her age and stage of development).

Section 10(3) sets out a number of matters to which consideration must also be given, where relevant, in determining what decision to make or action to take in the best interests of the child.

In deciding the appropriate findings and orders to make on the protection applications in this case I have had regard to each of these matters. I have also had regard to the following dicta of Lord Nicholls of Birkenhead in *re H (Minors)* 1996 2 WLR at 28:

"The range of facts which may properly be taken in to account is infinite. Facts include the history of members of the family, the state of relationships within a family, proposed changes within the membership of a family, parental attitudes and omissions which might not reasonably have been expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child ... and facts which are minor or even trivial if considered in isolation, when taken together may suffice to satisfy the court of the likelihood of future harm."

CONCLUSION

Best Interests Case Plan

Bearing in mind the provisions of s.10 *Children, Youth and Families Act 2005* that the "Best interests of the child must always be paramount" at the conclusion of all of the evidence I requested that Department of Human Services prepare a "Best Interests Case Plan for the children" for the benefit of the court and also for the legal representatives of the parents for consideration. That Draft Plan was contained in an Addendum Report which was dated 16 July 2007 and was prepared by (name

removed) (“witness 30”), Unit Manager, Department of Human Services, (location removed) and (name removed), Child Protection Manager, (name removed) Region. That report is to be read in conjunction with the earlier Application report and Disposition report and purports to provide a rationale for the orders being sought by the Department of Human Services.

Factual Findings

In order to consider the grounds upon which the Protection Applications have been based and whether or not it is appropriate that these applications be found proven certain factual findings to the requisite standard of proof need to be made by this court. Having listened carefully over many, many days to the evidence of witnesses, and in particular highly specialised, very well qualified medical experts, each of whom were extensively cross-examined, I have formed the view that it is appropriate that I make the following findings:

- That B has suffered significant physical and emotional harm, in the course of which he suffered serious physical injuries
- That S has suffered significant physical and emotional harm in the course of which he suffered life threatening injuries resulting in long term physical and intellectual disability. Although the precise prognosis for S remains unclear, witness 10 indicated that she couldn't detect any visual responses or responses to sound from him. She said that he would be likely to have difficulty in exhibiting voluntary control over his arms and legs, in expressing his wishes. He would be unable to ambulate independently and will have problems controlling the tone in his limbs, which will affect him when he gets spasms. He will have difficulty with dressing and also with hygiene. He may require further medical treatment and possibly surgical treatment. He is likely to remain significantly disabled and is unlikely ever to develop the skills necessary to protect himself. In addition to these

significant physical disabilities he also has limitations on his sight and sound, speech and intellectual disability. I accept this account as an accurate statement of the physical and emotional harm caused to S.

- The mother is unable to explain the horrendous injuries caused to her infant sons, save to say that her husband has on occasions handled the infants "roughly", or that her five year old daughter M may in some way have caused the injuries
- The father is unable to explain the horrendous injuries to his infant sons, save that he may on occasions have been rough with them. He also believes that M may in some way have caused these injuries
- There is no reasonable possibility, on all of the evidence I have heard, that M could in any way have caused these horrendous injuries to each of her infant twin brothers, and that M is not responsible for any of the injuries
- That M has suffered significant emotional harm by being implicated as a possible perpetrator of such serious injuries, and by being provided with inappropriate psychotherapeutic intervention to assist her with coming to terms with her involvement in these events
- In the absence of any reasonable explanation for the cause of these significant and life threatening injuries, and having heard the evidence of numerous medical experts as to the nature of the injuries and their most likely causation, and having read the literature provided, I am satisfied that the most probable cause of these injuries is that they were non accidental
- In the absence of any reasonable explanation for the cause of the injuries, and on the evidence as to the conduct of the father in respect of the infant twins, the most likely person to have caused these injuries to each of the twins is the father.

It has been submitted to the court that a protection order must not be made unless the court has received and considered a Disposition report, unless the court is satisfied

that all reasonable steps have been taken by the Secretary to provide the services necessary in the best interest of each child, and that the court must not make a protection order which has the effect of removing a child from his or her parent unless the court has considered and rejected as being contrary to the best interests of the child an order allowing the child to remain in the custody of his or her parents. Section 276 *Children, Youth and Families Act 2005* is in very similar terms to s.86(2) *Children and Young Persons Act 1989*, save that s.276(2)(a) refers to "The best interests of the child" rather than the "Safety and wellbeing of the child." These provisions, which are rarely raised, but have been raised in the present case, were discussed in the case of *MB & BS v. DOHS* an unreported decision of Cohen J in the County Court in 2002 and which was approved by Gillard J in an application for judicial review to the Supreme Court in 2003. In *MB & BS* the disposition report did not specify any steps taken to provide services to enable the children to remain in the custody of their mother or under the guardianship of their parents. Judge Cohen at pp.35-36 in considering s.86(2) of the *Children and Young Persons Act* (the equivalent provision to s.276(2)(b) *Children, Youth and Families Act*) stated:

"The sub-section is on its face prescriptive, and prevents the court from making an order that removes children from a parent's custody unless the disposition report has addressed the issue and the court is satisfied that all such reasonable steps have been taken. However, the wording of the provision read this way assumes that there will always be services that exist which are capable of enabling children to stay with their parents. This assumes that the perceived risk to a child's welfare can be averted by provision of services, where it is not hard to postulate examples of where this will not be so."

She continued:

"The purpose of the protection provisions is to enable the court to make orders to protect children from the risks set out in the grounds under s.63 (now s.162 *Children, Youth and Families Act*) and in my view it would be out of keeping with the whole tenor of these provisions and of the paramount considerations which must be had under s.87(1)(a) that a child cannot be removed from a parent's custody because no services exist capable of averting or minimising the risk of harm to the child."

In the present case, counsel representing the parents submitted that effectively the court could not make an order granting Custody to the Secretary or Guardianship to the Secretary because the Department had not provided services. In the addendum report of 16 July 2007 the Department of Human Services stated:

"The suggestion by the family that Department of Human Services has failed to outline and propose services to assist them, begs the question of what services and to assist in what regard. The parents deny any responsibility for the harm to the children, so apart from services to assist the parents in dealing with grief and loss associated with what has occurred and the future management of the children, particularly S who now displays evidence of developmental delay, there would be little point in directing the parents to engage with services that are targeted at addressing the precursors that led to this unfortunate and devastating event or series of events."

Department of Human Services in its report further states:

"Whilst the Department is committed to ensuring that the children are maintained within their extended family, it is also concerned about the extended family's collusion with the parental perspective of how the twins came to be harmed and the alleged involvement of M."

As this family does not demonstrate many of the common features in which this court frequently determines a protection application, such as unemployment, drugs, alcohol or domestic violence, I accept that in all of the circumstances of this case, services could not readily be made available to the parents in a situation where such extraordinarily serious injuries remain totally unexplained. It may be that at some later date, Department of Human Services would be in a position to assist this family with services, but I do not accept that they are a prerequisite to the court making an order under the *Children, Youth and Families Act 2005*.

I have carefully considered the dispositions available to this court within the provisions of s.274 as to when a court may make a protection order, and under s.275 as to the types of orders to be made. Mr Testart, on behalf of the parents, has urged upon the court to dismiss these applications and make no order. In the event that the protection applications are found proven, he indicates to the court that his clients

would cooperate with the conditions that could be placed on undertakings to be given by the parents to the court.

I have considered the type of protection required for each of these children in the circumstances of this case. I have considered each of the possible orders and the extent of protection required for these children, and in particular for the need to protect the needs and rights of these children to ensure that appropriate decisions are made regarding their long term health, wellbeing and development, and to protect each child from harm.

In considering, pursuant to s.10(1) *Children, Youth and Families Act*, that the best interests of the child are paramount, and s.10(2) when determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking in to account his or her age and stage of development) must always be considered. I have also carefully considered the provisions of s.10(3) and in particular

- (a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention in that relationship is limited to that necessary to secure the safety and wellbeing of the child; and
- (b) the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child; and
- (g) that a child is only to be removed from his or her parent if there is an unacceptable risk of harm to the child; and
- (h) if the child is to be removed from the care of his or her parent, that consideration is to be given first to the child being placed with an appropriate family member or other appropriate person significant to the child, before any

other placement option is considered

I am mindful that the order being sought by the Department of Human Services of Guardianship to the Secretary in respect of each child is an order only to be made in extreme circumstances, but that such an order, whilst allowing the parents to participate in decision making regarding the children, would vest the responsibility to make final decisions in the best interests of the children with the Secretary of the Department of Human Services.

I have formed the view that on the balance of the evidence and to act in the best interests of each of these three very young children, and to protect these children from the risk of harm which I have found to exist, I must find each of the protection applications proved on the grounds set out in s.162(c) and (e) *Children, Youth and Families Act 2005*. In all of these circumstances I am satisfied that the only appropriate order to be made in respect of M, S and B is an order granting Guardianship to the Secretary for a period of 12 months. In making a Guardianship to the Secretary order in respect of each of the three children, I am mindful that the court is unable to impose any conditions on such an order, a matter which is regrettable. The Department of Human Services, at my request, have provided a clear indication to the court of their intentions in respect of each of the three children and whilst unable to impose conditions on these orders, I want to indicate that having heard a vast amount of evidence about these children I have strong views as to their best interests in the short to medium term. I note that the Department of Human Services has stated as their goal that the children are to remain in the care of extended family where possible and have regular supervised contact with their parents at the home of the maternal grandparents. I expect that will continue.

The Department of Human Services have indicated that there are a number of tasks to be addressed in the near future:

1. The children are to remain in the care of their maternal grandparents pending a family group conference.
2. A complete family assessment is to be conducted, including maternal and paternal extended family to explore family dynamics and beliefs about the children's trauma and its causation, and to look at the issues of attachment, separation and placement. Options are currently being explored for access to family therapists at the Bouverie Centre.
3. M is to be assessed and to receive counselling to assist her with understanding the changes in her life. This counselling is likely to assist M with past and future issues. The Take Two Intensive Therapeutic program is being considered and should provide guidance to the Department of Human Services regarding future decision making. It is understood that the psycho therapy commenced with witness 21 will not continue.
4. Parents are to participate in individual therapy.
5. Parents are to participate in a parenting program to develop knowledge and skills associated with child development and behaviour management.

It is certainly to be hoped that in the best interests of all the children that all of these matters can be addressed in a positive manner and as soon as practicable. It is true that this family has been torn apart and has suffered almost beyond words during this period of intense pain and trauma, but it can only be hoped that with appropriate care and assistance there can be a positive future for these very young children, each of whom has been so significantly traumatized.

ORDERS

I order guardianship to the Secretary in respect of M, S and B for a period of 12 months from the date of this order.

Susan A. Blashki

Magistrate

WITNESSES

Department of Human Services

Witness 1	Secretary to witness 2
Witness 2	Consultant Paediatrician
Witness 3	Maternal and Child Health Nurse
Witness 4	Nurse, Emergency Department, Hospital 3
Witness 5	General Practitioner, Emergency Department, Hospital 3
Witness 6	Career Medical Officer, Emergency Department, Hospital 1
Witness 7	Consultant Paediatrician, Department of General Medicine, Royal Children's Hospital
Witness 8	Doctor, Director, Department of Ophthalmology, Royal Children's Hospital
Witness 9	Doctor, Consultant Paediatric Radiologist, Royal Children's Hospital
Witness 10	Neurosurgeon, Royal Children's Hospital
Witness 11	Consultant Paediatrician, Gatehouse Centre (for the assessment and treatment of child abuse), Royal Children's Hospital
Witness 12	Doctor, Consultant Paediatric Radiologist, Director, Department of Medical Imaging, Royal Children's Hospital
Witness 13	Consultant Paediatric Neurologist, Royal Children's Hospital
Witness 14	Associate Professor, Head Genetic Service, Royal Children's Hospital
Witness 15	Doctor, Senior Forensic Physician, Victorian Institute of Forensic Medicine
Witness 16	Doctor, Consultant Paediatrician, Sydney Children's Hospital
Witness 18	Doctor, Paediatrician
Witness 19	Registered Psychologist
Witness 22	Doctor, Consultant Psychiatrist
Witness 23	Professor, Child and Adolescent Psychiatrist
Witness 24	Doctor, Clinical Psychologist
Witness 25	Maternal and Child Health Nurse
Witness 26	M's previous kindergarten teacher
Witness 27	Detective Senior Sergeant, CIU
Witness 30	Unit Manager, Child Protection, Department of Human Services

The Parents

Witness 17	Doctor
Witness 20	Clinical Psychologist
Witness 21	Clinical Psychologist
Witness 28	The maternal aunt
Witness 29	The maternal grandmother