

Case No: SA01C00334

Neutral Citation Number: [2002] EWHC 1379 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
SWANSEA DISTRICT REGISTRY
(In Private)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2002

Before :

THE HONOURABLE MR JUSTICE MUNBY

In the matter of the CHILDREN ACT 1989
And in the matter of L J C (dob 6.4.01)

Between :

THE CITY AND COUNTY OF SWANSEA

Applicant

- and -

(1) D M C

(2) S A C

(3) P T F

**(4) L J C (by his children's guardian
Mrs E)**

Respondent

Mr James Tillyard QC (instructed by the Head of Legal Services) for the applicant (the local authority)

Mr Michael Keehan QC and Ms Ruth Henke (instructed by Avery Naylor Wilson) for the first respondent (the mother)

Mr Mark Allen (instructed by Graham Evans & Partners) for the second and third respondents (the maternal grandmother and step-grandfather)

Mr David Crowley (of Howe & Spender) for the fourth respondent (the child)
The child's father (M D) was neither present nor represented

Hearing dates (in Cardiff) : 27-31 May 2002

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
The Honourable Mr Justice Munby

This judgment was handed down in private on 1 July 2002. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mr Justice Munby:

1. These are care proceedings under the Children Act 1989 in relation to a little boy, L, who was born on 6 April 2001. His mother and father were never married. His father, MD, plays no effective part in the proceedings. His mother, D, was born on 20 September 1980. She had a previous child by another man, a little girl, M, who was born on 19 June 1997 and who died on 10 November 1997. In the mean time, in about August 1997, D had begun a relationship with an older man, SC. That relationship broke down in 1998.
2. Because of the circumstances in which M had died it was decided at a Child Protection Conference on 16 February 2001 that L should be placed on the Child Protection Register at birth. Care proceedings were started on 9 April 2001, three days after L was born. Initially the plan was for L to be placed with D at the home of the maternal grandmother, S, and then in a residential unit. Within days the plan was changed. An interim care order was obtained on 12 April 2001 and L was placed with foster carers, Mr and Mrs J, with whom he has remained ever since.
3. In order to defend themselves against any allegations that might be made in relation to M's death, both SC and S were granted leave to intervene in the proceedings.
4. Pursuant to directions given by Coleridge J on 11 May 2001 and by Sumner J on 30 July 2001 a threshold hearing took place before Connell J in November 2001. On 23 November 2001 D submitted to a consent order which recited that it was made "on the basis that [D] caused [M's] death" and provided that the Court had found threshold established on the basis of a "document submitted to the Court and agreed by the parties". SC and S were granted leave to withdraw from the proceedings.
5. The agreed threshold document was in the following terms:
 - 1 [D] accepts Professor Meadow's opinion in that:

No natural cause of death was identified. That does not exclude possibility of natural disease but the circumstances of her ([M]'s) sudden collapse and the presence of previous injuries, characteristic of physical abuse, make it more likely that the cause of death was from an unnatural cause, such as smothering."
 - 2 She therefore accepts that on the current medical evidence, and on the balance of probabilities:
 - a. [M]'s death was unnatural, and
 - b. It is likely that it was caused by suffocation.

3 She however continues to assert that there is possibility that [M]'s death was caused by a yet unascertained natural cause.

4 [D] specifically and firmly denies that she did anything that might have caused [M]'s death. She specifically denies smothering [M].

5 However, given the factual circumstances surrounding [M]'s death and the overwhelming current medical evidence, she accepts:

- a. That the Court will find the balance of probabilities, that she caused [M]'s death, and
- b. that any future assessment of her ability to care for a child will have to proceed on that premise.

6 [D] accepts that:

- a. The rib fractures were non–accidental and were caused by [M] being squeezed or gripped, and
- b. the facial bruising was non–accidental,

and that they both occurred whilst the child was in her care, and that of [SC] and [S]. In the premise she failed to protect [M] from injury.

7 Having regard to the matters set out above on the balance of probability, it is accepted that the Court will find that [D] caused significant harm to her child [M], and as a result [L] is at risk of suffering harm whilst in the care of his mother."

6. Both before and after the threshold hearing the plan had been for D to be assessed with a view to possible habilitation of L to her care. That plan was abruptly terminated in March 2002 following an unfavourable report from a Consultant Child and Family Psychiatrist dated 13 March 2002, amplified in a further report by him dated 11 April 2002. An assessment of S and her partner P dated 25 March 2002 recommended against placing L with them. The local authority's care plan dated 7 May 2002 was accordingly for adoption. Thus the general shape of the case when it came on for hearing in front of me on 27 May 2002.
7. Thus far the case would appear to be of a type with which the court is, unhappily, all too familiar. But to understand what it is that takes the case somewhat out of the ordinary and what it is that has given rise to the important points of practice on which I now give judgment I must first go back and recapitulate the course of the proceedings in more detail.

8. On 3 May 2001 D applied for a direction under section 38(6) of the 1989 Act for a mother and baby assessment in a residential home. That application was adjourned at the hearing before Coleridge J on 11 May 2001. On 30 July 2001 Sumner J made an order by consent giving leave to the local authority, D and L's guardian "to jointly instruct" the well known Consultant Child and Family Psychiatrist Dr J "for the purposes of providing a preliminary report to the Court upon the potential avenues for the management of this case after the November hearing". Dr J is highly expert in cases of this kind. His letter of instructions was dated 6 August 2001. In accordance with Sumner J's order it had been drafted by the guardian's solicitor and approved by the other parties. It made it clear to Dr J that he was being instructed on behalf of the local authority, D and L's guardian. Appropriately it included this reminder to Dr J:

It is essential to your role as an independent expert and to the parties' perception of your independent status, that there are no informal unrecorded discussions, or correspondence with any of the professionals or lay parties involved in this case."

9. Together with his colleague Ms N, a Senior Social Work Practitioner, Dr J assessed D on 29 August 2001. Later the same day there was what was described as a "professionals meeting" attended by, inter alios, Dr J, N, L's guardian and the local authority's lead social worker, Mrs HD. D was neither present nor represented. It appears that no minutes of this meeting were taken. The only record which has been produced are notes taken by Dr J for his own clinical purposes: they were not disclosed to anyone until after the final hearing before me had begun.
10. Dr J and N assessed D again on 14 September 2001. Dr J discussed the case with N on 24 September 2001. His note of the discussion recorded that "our observations were not positive, by and large". He provided an initial report dated 3 October 2001. The report stated that:

[D] will need a high level of therapeutic intervention both in relation to her own personal life story and her parenting ability, if she is to be able to assume care of [L] and offer him appropriate parenting. × We feel × that if a successful family unification were to be achieved it would take longer than the Family Unit at [my] Hospital is able to offer. Further psychiatric intervention therefore would need to be linked with a longer-term residential mother and baby type placement × [my] Hospital would initially offer a two-week residential admission for [D] with [L]. The aim of such an admission would be both to continue with a more detailed assessment and also to consider whether [D] is able to respond to parenting advice/support and individual personal therapy. × In summary, therefore, while we feel that [my] Hospital Family Unit could have a further assessment and treatment role with this family, we do not feel that this service on its own would be enough to achieve a successful family unification."

11. On 19 October 2001 the guardian telephoned N. The only record of this conversation which I have been shown is N's note which records:

Guardian *ad litem* and the social workers involved with [L] have expressed concern following receipt of the report from the × Hospital, which they feel puts a more optimistic slant on the assessment than was perhaps shared at the professionals' meeting following the all-day assessment. Guardian *ad litem* and I discussed the fact that [Dr J] and [N] had met with [D] for a second appointment as planned, and had felt slightly more encouraged re the possibility of her engaging in psychological work following that second meeting. Hence this was reflected in the report that was submitted."

12. On 23 November 2001, as I have said, Connell J made threshold findings.
13. On 4 December 2001 HD had a meeting with D to discuss her reaction to the threshold hearing. HD's contemporaneous note shows D saying

she knew she hadn't caused the injuries to [M], although she said she recognised she'd failed to protect [M] from injury (but not death). She said "I did fail to protect her, in a way"."
14. HD described this occasion in her subsequent witness statement dated 7 May 2002:

[D] had moved her position slightly in that she felt responsible for taking [M] to live at [SC's] home. She continued to deny that she caused any of [M's] injuries prior to her death and denied any part in her death. I explained that her lack of acceptance of any responsibility was a serious block to her caring for [L] and of people feeling confident that she could do so safely."
15. The essential accuracy of that summary is borne out by HD's own contemporaneous note and accords with a letter referring to the meeting which D's solicitors wrote to the local authority on 5 December 2001.
16. On 12 December 2001 Dr J and N again saw D. Dr J's clinical notes state:

Choices are - admit for assessment or decide that likelihood is too slim of rehabilitation."
17. On 18 December 2001 there was what was described as a "professionals meeting", this time attended not merely by Dr J, N, the guardian and HD but also by the guardian's solicitor and the local authority's solicitor. Again, D was neither present nor represented. Again, it appears that no minutes of the meeting were taken. The only records that have been produced are the notes taken by Dr J for his own clinical purposes: they were not disclosed to anyone until after the hearing before me had begun. The notes exist in two forms: the manuscript notes taken by Dr J whilst the meeting was in progress and a typed 'process note' which he dictated immediately

after the meeting had ended. Each version is consistent with the other; in some respects they usefully complement each other.

18. Because the discussion at this meeting is so central to an understanding of Dr J's analysis of the case I must cite a number of extracts from his two notes.

19. Dr J listed his assessment of "what would need to change", that is, the "criteria with which to gauge whether it was appropriate to move on to future stages in the direction of reunification". The list (which I derive from conflating information in both of Dr J's notes) is as follows:

- 1 A clearer understanding about what happened -
 - the ABC of abuse
 - appropriate psychological work on the consequences of that new found acknowledgement
 - a genuine empathic concern for [M]
 - the understanding should extend to both the physical abuse over time, as well as the death itself
- 2 Development of attachment behaviour in the child (L)
- 3 Improvement in parenting/care giving behaviours
- 4 Open and honest working relationships
 - an improved working relationship with professionals network - social work especially - includes taking and generalising with advice
 - more openness and honesty in relationships generally.

20. In his oral evidence before me Dr J explained that ABC stood for the **A**ntecedents **B**ehaviour and **C**onsequences of maltreatment.

21. In his 'process note' Dr J included the following observations:

The situation is clearly difficult to decide because there are several negatives, yet the case is not as bad as some ×

× we all agreed that it was not possible to be optimistic about the possibility for successful rehabilitation. However, on the other hand, one could not write her off completely because she has made some changes over the past several months. ×

We came to the conclusion that it would be inappropriate to launch into a two week residential assessment because the

likelihood of emerging from it in the direction of further plans towards reunification seem slim at this stage. Also it was agreed that in this particular case there would need to be a greater degree of acknowledgement of responsibility on [D's] part for the harm to [M] in order to move forward safely with respect to her parenting of [L]. That being the case and because we are uncertain whether this is even feasible ([D] herself has made it clear that she did nothing other than fail to protect, and was quite adamant with us in the last session with us on this question), we feel that we must have a preliminary phase of seeing whether there can be any shift in this with [D] more intensively that can be achieved in an out-patient setting. Therefore, we agreed at the meeting to have a three day assessment admission for [D] individually × to see whether she will shift on the question of acknowledgement. If she won't then, we will not move further forward towards reunification. If she does, then we would propose a two week assessment admission to include the baby. The difficult issue is just how far she's got to go along the dimensions of acknowledgement /admission.

For the three day admission, we will expect there to be some significant movement with respect to acknowledgement of responsibility for harm to [M]. × Furthermore, we need to have some beginnings of acknowledgement, at least of the feasibility that she suffocated [M] (even if she feels she can't remember it, etc). If she does not make progress with acknowledgement of harm then it seems fairly clear that we will not be able to move forward. If on the other hand she does, then we will still be left with all the issues of social isolation and questions about her personal capacity to use psychological treatments effectively. Both of these will need extensive thought and assessment in any rehabilitative plan.

In summary, it would be extremely unlikely that she will be able to care for [L], but we feel it necessary to be certain ×"

22. Now just pausing there, Dr J's approach is clear enough. As the documents show, and as Dr J in fact confirmed in the witness box before me, his view was that *if* D was to progress beyond the three day in-patient assessment on her own to the two week residential assessment with L -
- i) There *had* to be a significant movement on D's part towards a greater degree of acknowledgement of *her* responsibility for having harmed M.
 - ii) That movement had to take place during - or, to be more precise, at the latest by the end of - the three day assessment.

- iii) If by the end of the three day assessment there had not been a sufficient shift by D in this direction, then the process of moving towards reunification would be brought to an end and the two week assessment would not take place.
 - iv) In other words, the key benchmark which Dr J had identified as requiring to be met if there was to be the two week residential assessment of D with L was a "significant" shift in D's acceptance of responsibility for harming M.
23. In terms of his four-point list as I have set it out in paragraph [19] above, and again Dr J confirmed this in the witness box, what needed to change by the end of the three day assessment was D's attitude in relation to item 1. If there was change in relation to item 1, then all well and good, and items 2, 3 and 4 could be addressed subsequently. If there was insufficient change in relation to item 1, then that would be that. In particular - and this is a very important point - no amount of change in relation to items 2, 3 or 4 could make up for, or counter-balance, an absence of change in relation to item 1. So although Dr J had, as it were, mapped out the overall programme of change which would be required before deciding that reunification was indeed appropriate, the critical determinant of *any* move to the two week residential assessment was item 1, and item 1 alone.
24. On 20 December 2001 the guardian's solicitor (who had, of course, been present at the meeting on 18 December 2001) wrote to D's solicitors. Referring to the meeting he said:

Formal minutes were not taken. Its purpose was to conduct a Professionals planning meeting and to determine the next steps that may or could be undertaken.

I do not intend to set out the views formed by [Dr J] at this stage regarding your Client. × Suffice it to say that active consideration is being given to admitting your Client for 2-3 days for the purpose of intensive work focussing upon the findings at the threshold hearing. I understand that there will be a further review immediately after that admission."

25. There was in fact a three day assessment from 2-4 January 2002. On 3 January 2002 D had two sessions with N. N's note of the first session begins as follows:

I began the session by explaining to [D] why we had asked her to come for the 3-day admission. She had very little idea prior to coming in. I explained to her that, in relation to her making decisions about [L] it was very important for us to know and understand more about the circumstances leading to [M's] death. I explained that, in relation to thinking about the possible risks to [L], we would need to be very clear about what had happened to [M] in order to make that assessment. I acknowledged that it would be difficult for her to say more than she had already talked with us about but encouraged her that this was really the way forward for her in terms of the possibilities of resuming care of [L]."

26. On 7 January Dr J chaired a staff group discussion with N and the nursing staff who had looked after D. His notes of the meeting include two comments of some importance:

Observation of interactions here were not very impressive."

"Clear progress re empathy [and] re lack of protection, not with maltreatment itself."

27. That last comment neatly encapsulated the essential issue and the dilemma facing Dr J and his team. Given that, although there was clear progress in relation to D acknowledging that she had failed to protect M, there was no progress in terms of her acknowledging that she had herself harmed M, was there nonetheless sufficient progress overall so as to justify moving forward to the two week residential assessment of D and L?

28. The note expressed the meeting's conclusion as follows:

Although no progress made re direct actions of abuse; there have been in other domains. (This is difficult because the statement is agreed, rather than subsequent to a hearing). Hence we will recommend a 2/52 trial/assessment with meeting at 2/52 stage."

29. On 14 January 2002 Dr J provided a further report for the court. Reporting on the three day assessment he said:

This was a successful admission enabling us to clarify our view as to whether we felt that further assessment and treatment work within our Unit was indicated. The outcome is that we think that it is and that there is sufficient indications of a positive nature to justify an initial assessment admission of [L] with his mother. We would not propose this way forward unless we thought that there was a reasonable possibility that [L] could be cared for by his mother. Although I would not put the chances of this much higher than possible at this stage, I think nonetheless × there is a reasonable possibility ×

The overall proposal × is for an *initial two week* period of residential assessment for [L] and his mother, followed by a further period of approximately *four–six weeks*, should the outcome of the first two week period be generally regarded as successful ×

× successful outcome in the direction of reunification is by no means a certainty at this stage, but the aim of the work proposed as an in–patient at the Family Unit is in part to clarify this conclusion ×"

30. Pausing there, and comparing the criteria for 'success' which Dr J had formulated at the professionals meeting on 18 December 2001 with his evaluation on 7 January 2002 of what had in fact been achieved by the end of the three day assessment, one is perhaps entitled to wonder whether, even on Dr J's own evaluation of events, his criteria had in truth been met.
31. The local authority was obviously doubtful, for on 17 January 2002 HD drafted a letter asking Dr J amongst other things to clarify and expand his reference to "sufficient indications". A copy of the draft letter was passed to the guardian's solicitor who telephoned Dr J the same day, indicating (according to Dr J's note of the conversation) that HD was "not happy" and was "very concerned re this going ahead at all". Later the same day the guardian's solicitor sent Dr J a copy of the draft letter.
32. The next day (18 January 2002) the case came before Holman J for directions. He directed that Dr J was to reply to HD's letter as soon as possible, that the local authority was to indicate by 1 February 2002 whether it was prepared to agree to and fund the course of action proposed by Dr J - if not, D's section 38(6) application was to be heard on 13 February 2002 - and that the matter was to be listed for further directions on 18 March 2002. A letter which the guardian's solicitor wrote to Dr J on 22 January 2002 is illuminating:

I duly appeared before Mr Justice Holman ×

He was fully informed of the developments and his immediate response was to say of you "he does not know of any other Doctor in the field who demonstrates such a caring and conscientious attitude". He was giving the Local Authority a very firm indication that they would be completely at odds with Judicial thinking if they went against advice that you tendered. Counsel for the Local Authority accepted totally the position that the Local Authority is in. The matter now is of convincing the Social Worker."

33. On 23 January 2002 the local authority wrote to Dr J enclosing a copy of HD's draft letter and asking for his response as soon as possible.
34. Dr J reported on 24 January 2002. Responding to the local authority's request for elucidation he wrote:

[D] does not acknowledge having caused direct harm to [L]. In fact she denies having done so However, she was clear that she knew her partner must have done so × but at the time she accepted his explanations and didn't question him further. She is extremely remorseful about this lack of action on her part in retrospect and chastises herself for not having been more active on [M's] behalf. However, there are other indicators which we think are significant, besides those centering around direct acknowledgement of abusive acts. For example [D] × recognises that she did not care for [M] adequately emotionally or in terms of cognitive stimulation. × In addition, she has

expressed considerable empathic feelings for [M's] plight, and experiences feelings of guilt and personal responsibility for her failure to protect. She states repeatedly and in different ways that she is responsible for her death, in that sense and should have 'read the signs'."

35. In his report Dr J also said this:

If she can care for [L] safely then in our view she should be given a chance to do so, and indeed [L] should be given a chance to be cared for by his birth mother, if the prospects for habilitation are reasonably good. In order to gauge this, we propose a staged approach with regular times in which the professional groups stop and think and consider whether there is truly a reasonable prospect of success. In that way we suggest that the balance × does tip in favour of an attempt at habilitation".

36. On 29 January 2002 D had contact with L. The contact supervisor, Miss LH, made the following record in the contact notes:

[D] came out with a very strange comment × She was talking about going to [Dr J] with [L] and what the daily routine would be. [D] said, with a smile, that she wouldn't be supervised all the time and that "there are no cameras in the rooms so they can't see me all the time". This shocked me because of the way it was said - the tone of [D's] voice as if in a "smug" tone and with a smile on her face × I felt uncomfortable by this comment."

37. On 4 February 2002 a representative of the local authority spoke to Dr J, raising a number of queries arising out of his report of 24 January 2002. The note of the conversation prepared by the local authority recorded that Dr J:

wished to make clear × that [D] had only made a partial acknowledgement and she has not made a complete acknowledgement × of what has happened to [M]. He felt that it was important for people to know that, whilst [D] had conceded the Threshold Criteria at the Finding of Fact hearing, she had still not acknowledged this in full to him.

Dr [J] felt it was important for the parties to know at this stage of this "partial acknowledgement". He felt that [HD] had raised a very important point in asking for this to be clarified."

38. The local authority obviously felt that note to be sufficiently important to send it to Dr J under cover of a letter dated 7 February 2002 asking him to sign it as confirmation that he agreed with it. For some reason, and despite Dr J's reference to the importance of "the parties" knowing of these matters "at this stage", the note was not copied to D or her solicitors or, so far as I am aware, to anyone else.

39. Be that as it may, later on the same day as the telephone conversation (4 February 2002) the local authority wrote to the guardian's solicitor to confirm that it was prepared to agree to and fund the course of action proposed by Dr J. The same day it communicated the same information to D's solicitors.

40. On 5 February 2002 Dr J telephoned the guardian's solicitor to say that he wanted to meet with HD, her team manager and the guardian prior to D's admission. It appears from a letter which the guardian's solicitor wrote to Dr J on 7 February 2002 that the purpose of the meeting, as he understood it, was that:

[Dr J] would like to try and secure a meeting of minds before we actually embark upon the work."

41. On 6 February 2002 the guardian's solicitor wrote to Dr J enclosing a copy of the local authority's letter of 4 February 2002. He added:

Perhaps we can also now consider future issues such as the professionals' meeting × together with exploration of contingent planning to handle a residential placement should the matter progress to that point."

42. On 7 February 2002 the guardian's solicitor wrote to D's solicitors telling them that Dr J wanted to meet with HD, her team manager and the guardian prior to D's admission. They replied the next day (8 February 2002):

Our client is happy that the meeting will proceed as Dr [J] has suggested × Ideally, our client would wish to be present at such a meeting, as she was excluded from the previous meeting which was held on the 18th December 2002 [sic].

Our client's understanding is that the Local Authority have agreed to pursue with Dr [J's] recommendations and she is concerned that they will now retract such an agreement ×

Our client would like it noted that [we are] aware that in the meeting on the 18th December 2002, no formal minutes were taken of that lengthy discussion. We would, therefore, ask that minutes are taken of the next meeting and will be made available to all parties."

43. That letter obviously found its way to the local authority. On 13 February 2002 the guardian's solicitor replied:

I am only concerned to have feedback from Dr [J] following the meeting. Formal minutes will not be kept. The presence of your client and any representative on her part would not assist the purpose identified by Dr [J]."

44. On 15 February 2002 the local authority responded:

With regard to the meeting between Dr [J], the Guardian and the Social Worker we would point out that this is a professionals meeting, which has been requested by Dr [J]. The reason that your client was "excluded" from the meeting held on 18 December 2002 is that she is not one of the professionals involved in this case.

With regard to Dr [J's] recommendations, as you will know the Local Authority have indicated × that they agree with Dr [J's] recommendations and agree that the course of action which he advises should be pursued. Kindly reassure your client that it is not the intention of the Local Authority to "retract such an agreement".

45. The meeting had been planned to take place on 18 February 2002 but had to be cancelled because Dr J was ill. It was re-fixed, as D's solicitors were informed on 4 March 2002, for 7 March 2002. The result was that D's admission was also delayed, a matter that understandably caused her worry and that led to her solicitors writing to the local authority on 28 February 2002. The guardian's solicitor responded on 4 March 2002 and the local authority on 6 March 2002, both saying, in effect, that they were completely in Dr J's hands and could not dictate to him when she should be admitted. The guardian's solicitor added:

Admission will no doubt be considered by Dr [J] at the meeting on the 7th of March."

46. On 7 March 2002 the meeting took place. Those present were Dr J, HD and the guardian. D was neither present nor represented. Yet again, it appears that no minutes of the meeting were taken. Again, the only records that have been produced are the notes taken by Dr J for his own clinical purposes. These exist in two forms: the manuscript notes taken by Dr J whilst the meeting was in progress (not disclosed to anyone until after the hearing before me had begun) and typed 'notes' which he dictated immediately after the meeting had ended (not disclosed until 11 April 2002 - see paragraph [65] below).

47. For the purposes of the meeting HD had asked the contact supervisor, LH, to prepare summaries, based on the contact records, of what were listed as 'Aspects in relation to parenting'. One, headed "positives", listed five numbered points:

- 1 Mum is always there for contact - never misses.
- 2 Is willing to change contact times as long as she has her time.
- 3 Interacts quite well at times with [L], using appropriate "baby talk".
- 4 Can provide some basic care.
- 5 Appears happy to see [L] at contact times."

48. The other, headed "negatives", listed no fewer than sixteen numbered points:

1 Will not accept advice from anyone in relation to [L]'s care.

2 Does not change [L]'s nappy unless dirty, or is reminded to.

3 Does not buy anything for [L], or provide for him in any way.

4 Repeatedly told to buy reins for highchair to feed [L], even though H.V. has said not to feed him in walker [D] continues to do it.

5 Does not contact carers to ask about [L]'s well-being.

6 [D] does not ask workers about [L]'s progress or well-being when contact has not taken place, i.e. over the weekend.

7 [D] constantly complains about [L]'s clothes and the care that he is receiving -complains about Social Services.

8 Poor relationship with mother and [P] Flack - continued squabbling in presence of [L].

9 [D]'s present life style is visiting local pubs that are rough and known to the locals, and the police, as places to take drugs.

10 [D] prefers to buy [X] - her boyfriend - gifts, spending money on socialising, meals out, going to the pub, visiting cinemas, etc., rather than prioritising [L]'s needs.

11 [D]'s continual denial of her relationship with [X].

Repeatedly saying that [X] was just a family friend when in fact she has been making comments to *works* that indicate that this relationship is more than "just friends", and has actually been going on for 5-6 months. I.E. [D] told supervised contact worker at Christmas time that [X] has "finished" with her, and that [X] wanted his freedom. [D] says that [X] knows all about "her business", and that he will "wait for her" if she goes to [the Hospital].

12 [D]'s continual variations of the "truth", e.g.

[D] would deny drinking any alcohol when going out to pubs, and Clubs. However, she admitted to the contact worker to having a headache one contact session. When questioned to see if [D] was ill, she replied, smirking, "It's a hangover more like". [D] also talks to the contact worker about various

alcoholic drinks that she has consumed, and recommends which ones to try!

13 [L]'s lack of eye contact with [D], and turning away from her when she tries to kiss him.

14 Unexplained bruises on [D]'s stomach before Christmas 2001.

15 [D]'s personal hygiene, body odour, and cleanliness of the house, not good.

16 Inappropriate chastisement, e.g. repeatedly pointing her finger in [L]'s face, and saying in a very loud voice "No".

49. HD took these documents to the meeting and handed them to Dr J as she was leaving. It is apparent from Dr J's notes, however, that although they were not specifically referred to she used them in part as 'speaking notes' for her contributions to the discussions during the meeting.

50. As indeed in the case of the professionals' meetings on 29 August 2001 and 18 December 2001 no formal agenda had been prepared for the meeting on 7 March 2002. On this occasion the omission was to have very unfortunate consequences. The guardian and HD had arrived at the meeting assuming - it would seem with some justification - that the matters to be discussed, and on which Dr J was seeking a meeting of minds, were the two questions which Dr J's notes identified as having been formulated by the guardian's solicitor: (i) when was D's admission to Dr J's unit likely and (ii) what contact between D and L should there be in the run up to the proposed admission (a topic which D's solicitors had raised with the local authority in their letter of 28 February 2002)?

51. No sooner had they arrived, however, than Dr J announced that, as he put it in his oral evidence, "I want to go back a step". As Dr J's typed note then records:

We established that the primary agenda, prior to addressing the above two questions was to seriously consider the current situation affecting [L] and his mother, and to stop and think at this point in order to review the process by which the current decision point to admit had been reached; to consider whether this remained the correct decision; and to review case progress in relation to the original criteria which we had established through which to gauge progress. All present agreed that this was the most important area to discuss prior to considering whether to admit and what to do about contact in the interim."

52. The guardian's evidence was that she and HD were "very surprised" when they heard Dr J's agenda. She was unaware that prior to the meeting Dr J had already begun a process of revision of his earlier conclusions: this had not been communicated to her, to her solicitor, Mr Crowley, or, to the best of her knowledge, to the local authority. She had assumed that the purpose of the meeting was to plan the timing and

management of D's admission. Dr J agreed in his oral evidence that both HD and the guardian had been surprised at the line he was taking at the meeting.

53. Following a discussion of events since his initial involvement Dr J then summarised his position:

the × team were becoming increasingly concerned about the direction of the case, as the move in the direction of reunification continues, yet with seemingly insufficient progress with respect to key criteria, which we had established during the early stages of working with [L] and his mother. [Dr J] explained that we were doing everything possible to give [D] space and room to make the appropriate changes and that had probably explained the difference between the tenor of our original oral feed back after the first assessment at the × Hospital, compared with that in the report that we subsequently wrote. We clarified, therefore, that our intent had been to provide an opportunity for change and attempt to enable [D] to get into a position where a rehabilitative approach might be feasible.

In our meeting subsequent to the finding of fact hearing, we thought there were some, albeit small, signs that [D] was shifting in her position concerning harm to [M]. However, that optimism had not been subsequently confirmed."

54. HD then listed some "new and recent concerns" which to judge from Dr J's notes reflected items 1, 3, 5, 6, 8, 9, 11, 13 and 16 on LH's list of "negatives". She referred also to concerns about D's capacity to work co-operatively with professionals, particularly the local authority, and about the very different views of D's own childhood given by D and by her mother, S.

55. Dr J's typed note then summarises the discussion in a long passage that I ought, I think, to set out verbatim:

In the light of these concerns we discussed the current plan to proceed with an assessment in the direction of continuing to assess the viability of re-unification, with [Dr J] raising a series of concerns which he and fellow team members had been debating amongst themselves.

In the first place we are concerned that an assessment admission may involve considerable disruption for [L] in relation to his current attachment and relationships with substitute carers. The overall view was that one would need to be reasonably sure that an initial assessment period would lead in a positive direction, in order to justify the harm caused by disruption to [L]. In our view there would have to be a reasonable likelihood of success. However, the disruption caused might not be too great if there was a programme of

visiting from his substitute carer during the admission. However, notwithstanding this, the × Hospital's policy has been not to admit children from foster care with their parents unless there is a reasonable likelihood of proceeding forward towards re-unification.

We next therefore considered the family's progress in relation to the original criteria we established for considering re-unification. Firstly [D] has not moved significantly on the issue of abuse. This is seen as a significant stumbling block to re-unification particularly in view of the clear-cut nature of the Findings of Fact.

With respect to co-operation with professionals, there has been a marked tendency to misinterpret what professionals are feeding back to her. The example was provided of her difficulties in respect to a male contact worker.

There are also continuing concerns about lack of empathy shown towards [L] and accompanying egocentricity demonstrated by [D]. In short, a concern that [D] consistently places her own needs ahead of [L]'s. It is clear that there is a significant discrepancy between what was apparently accepted in the High Court and the finding of fact hearing and [D]'s real position with respect to taking responsibility. It is clear that she accepts little, if any, responsibility for the harm to [M] and only barely acknowledges that she failed to protect and even then excusing herself from any responsibility, either through lack of awareness or through claiming she was the victim of abuse from her partner.

Continuing concerns about lack of acceptance of advice and feedback. For example that gave surrounding [L]'s eczema.

Overall we agreed that our team need to balance the likelihood of success against the harm to [L] caused by disruption and potential exposure to continuing abuse and neglect if there was no significant change in [D].

Lastly, HD confirmed that her experience with many clients, including significantly deprived, difficult and hard to reach people, was that she was normally able to build and keep good quality casework relationships. This had not been possible in respect to [D] and we agreed that this factor too needed to be taken into account when considering future likelihood of successful re-unification."

56. I should add that, although this was for some reason omitted from the typed note, Dr J's manuscript note records HD as raising during this part of the discussion the question:

But how much has [she] been coached by her legal adviser?"

57. Dr J summarised the outcome as follows:

Overall, I indicated that our grave reservations about pursuing the assessment and treatment work in the direction of re-unification had not been allayed by this meeting. In fact, if anything, our concerns were now heightened. I would therefore be writing an additional psychiatric report in readiness for the next Directions appointment before the Court, which was scheduled for 18 March 2002, before Mr Justice Munby. [Dr J] indicated concern that the position was a change in opinion, compared with the last session [Dr J] had with [D] and anticipated she would be distressed at the change in the [Hospital]'s view. HD and [the guardian] agreed to discuss this with [D] and convey the option of a face-to face meeting here at the [Hospital] in order to explain our reasoning further if this would assist."

58. On 8 March 2002 the guardian telephoned Dr J to say that D was still minimising the extent of her relationship with her boyfriend and to tell him that he was about to be sent a copy of the notes of D's contact with L on 29 January 2002. They were in fact sent to Dr J by HD on 11 March 2002.

59. Dr J's report was dated 13 March 2002 but was not in fact sent to the guardian's solicitor until 15 March 2002 - the Friday before the directions hearing due to take place before me on Monday 18 March 2002. He said:

× I have now had further time to reflect upon the situation and have had the benefit of further discussions with [HD and the guardian] on 7 March 2002. I have also discussed [L] and his family situation with members of the multi-disciplinary team here × The outcome of these processes is that I now wish to revise my opinion about the best way forward, having re-evaluated the prognosis for a safe outcome for [L] with respect to an attempted return to the care of his mother. In doing so I have taken into account a wide range of issues including:

- The severity of the prior abuse to [M].
- The lack of acknowledgement by [D] concerning the full range of harm which the Court found [M] to have suffered.
- Lack of empathic concern for [M's] suffering.
- On-going concerns about parent-child interaction, based on contact observations.
- Problems in the level of co-operation, which do not bode well for the ability of [D] and the involved professionals to be able to work together in partnership.

- [D's] relative social isolation and lack of family support.
- In addition it is clear that both primary health care, Health Visitors and the Social Work Team have major reservations from their perspectives and this factor too I feel should be taken into account when considering the prospects for the successful return of [L] to his mother's care.

only if the prospects for successful reunification were sufficiently high would it be appropriate to subject [L] to the potential uncertainty involved in residential assessment here at the Family Unit. I was originally persuaded, but only on the finest of balance points, that it would be appropriate to move towards that plan, as reflected in my previous two reports. However, I have rethought the situation and feel now that the balance is tilted in the other direction, notwithstanding the fact that there are some positives in this situation. On that basis, I really do not feel in a position to recommend a period of in-patient assessment and possible treatment work, because the likelihood of success is insufficiently high.

I have not been able to discuss our change of position with [D] herself, I anticipate that she will be distressed × "

60. The guardian's solicitor telephoned Dr J the same day. His note records Dr J as acknowledging that he would need to explain in greater detail why he had departed from his earlier recommendations. It also records Dr J as saying that he did not need to see D before producing a fuller report:

When he makes reference to seeing her × that is for the purpose of explaining his view direct to her. It is not an assessment."

61. Thus the state of affairs when the directions hearing started before me on 18 March 2002. Not surprisingly D was exceptionally distressed. Dr J's report of 13 March 2002 had come to her as a bolt from the blue. It must have come as a terrible blow - shattering her hopes of being able to keep L. I adjourned the hearing until 22 March 2002 to give D's solicitors an opportunity to see whether the Cassel Hospital - which Dr J had recommended for this purpose - would be able to consider assessing D. Her solicitors wrote to the Cassel on 20 March 2002. The Cassel replied on 21 March 2002 indicating that it would need to see the papers before taking the matter any further forward.
62. The guardian's solicitor wrote to Dr J on 20 March 2002 inviting him to begin the preparation of a fuller report and requesting (no doubt in the light of discussions which had taken place at court between the parties) that in that report Dr J inter alia (i) identify what documents he had received and from what source between 14 January 2002 and 13 March 2002, (ii) explain the reason why he requested the

meeting which took place on 7 March 2002, (iii) explain why the two week assessment referred to in his report of 14 January 2002 did not proceed and (iv) set out the reasons that had led him to depart from the conclusions in his earlier report. In the course of his letter the guardian's solicitor commented:

The Local Authority at this stage will have to work on the basis of the advice that you have provided. There is an obvious inevitability that their plans will now exclude mother as a potential carer."

63. At the adjourned directions hearing on 22 March 2002 I directed that Dr J's further report was to be filed by 12 April 2002 "setting out in more detail the reasons behind his change of position and any recommendations he may have as to the future progress of the case". I gave D leave to disclose the papers to the Cassel, directed that there was to be a further directions hearing before me on 20 May 2002 and fixed the final hearing, also before me, to start on 27 May 2002.
64. On 26 March 2002 the guardian's solicitor wrote to Dr J to tell him that D's solicitors now asked that his further report also identify what oral information he had received between 14 January 2002 and 13 March 2002, and from what source, and that he produce any minutes which had been taken of the meeting on 7 March 2002.
65. Dr J's final report is dated 11 April 2002. Attached to it was a copy of Dr J's typed note of the meeting on 7 March 2002. Having identified, as requested, both the oral information and the documents he had received between 14 January 2002 and 13 March 2002, he then turned to deal with the key questions that had been identified by the guardian's solicitor in his letter of 20 March 2002.
66. The relevant passage is very long but in the circumstances I think I should set it out in full:

I requested the meeting because I had developed major concerns about proceeding with the rehabilitation plan. I am not able to date precisely the sequence of my thinking about this matter except to confirm that it involved a continuing process of steadily increasing doubt about the direction of decision-making following my meeting with [D] in the aftermath of the Finding of Fact hearing in November 2001. The Local Authority's request for further information was an important, but not determinative component to the sequence of decision making. I became aware from [HD]'s letter of 17 January 2002 of the depth of the level of the Local Authority's misgivings about the direction of case planning. This acted as a spur to cause me to reconsider the matter further though I stress that I had already had discussions with colleagues within my team. In these, we were debating correctness of the decisions made thus far and the directions we were planning. After receiving the letter of the 17 January, and notwithstanding the formal reply of the local authority as set out in the × letter of

23 January 2002, I felt it was important to have a further professionals meeting to review decision making and the direction of planned attempts towards rehabilitation.

I then reviewed our case record and clinical history and observations against the criteria we had set down as a means for gauging progress in this case. I had reached the preliminary conclusion that it was probably not appropriate to offer residential admission, prior to the meeting on 7 March 2002. The meeting on 7 March, served to both confirm that view in my own mind and further underline the depth of the Local Authority's misgivings. As a result of that meeting I was clear in my mind that it would not be appropriate to offer residential admission for further assessment and/or treatment with the possibility of re-unification in this particular case. I remain of that view now.

This case is one of only two family situations in the last few years in which I have changed my opinion halfway through the process of planning assessment and intervention. Naturally it is regrettable when such a situation occurs because of the distress caused to a parent who quite reasonably was expecting a different outcome. However, I am hopeful that the reasons and basis for this change of mind will be evident from this report. I stress that our primary concern throughout has been to ensure the most appropriate welfare outcome for [L].

Our policy at the Family Unit is to offer residential assessment and treatment work where there is a reasonable prospect of re-unification occurring. We do not offer a residential placement where, in our view, this is a mere possibility. These are the issues we take into consideration:

- To avoid disruption to the child
- To prevent exposing the child to potential significant harm.
- To avoid raising the expectations of parents/carers and extended family, and indeed the children themselves, in situations where the prospects for success are not reasonably good.
- To avoid establishing a situation wherein the momentum inevitably established through residential care, leads incrementally to reunification, especially in cases where the decision to re-unify is marginal. Thus we seek to avoid the situation where the momentum carries the case through to reunification rather than more objective decision-making.

- In cases where the decision to re-unify is delicately poised rather than more clear cut, we rely on an amalgam of factors to enter the decision making matrix, as set out below. One aspect of this inevitably includes the prospect of health and social services agencies being engaged in work with the family, such that there is a sufficiently wide network of professionals to have confidence that continuing assessment and intervention work will keep the child safe and his or her welfare needs assured.
- It would be inappropriate to use scarce health and social work resources for cases where the likelihood of success is relatively slim, as compared with those cases with better prospects. In our view where the other factors listed above are tending in a positive direction, however, it is an appropriate use of expensive resources to press ahead and attempt to achieve family reunification.

I turn now to the factors which I took into consideration when considering the likelihood of success in this individual case.

When considering the prospect for a safe and successful reunification the evidence indicates that it is preferable to consider a matrix of groups of factors which are able to be linked with eventual outcome for the child × This approach was applied in this particular case. These factors can be grouped into the following domains:

- Factors associated with the abuse
- Parent factors
- Parenting and caregiving
- Aspects of the relationship between parent and child
- Family dynamics and relationships
- Factors related to the neighbourhood and support therein
- Professional factors
- Social support

When applying this matrix in [L]'s case, we established that the following factors were key ones with respect to gauging the appropriateness and success or otherwise of work in the direction of family reunification:

1. To obtain a clearer understanding about the abuse and neglect that [M] had suffered including any antecedent factors, the behaviour including assault or neglect, and any consequences thereof.
2. Psychological progress on working through the implications of any fresh acknowledgement of maltreatment which could be expected to occur with [D].
3. The emergence of genuine empathic concern for [M] within [D].
4. The maltreatment needed to include the full range of abuse and neglect established during the Finding of Fact hearing. This should include physical abuse on more than one occasion, the death of [M], and the issue of neglecting to protect her (in whatever proportions were revealed to be appropriate, once acknowledgement had been established).
5. Development of attachment behaviour in [L] towards his mother.
6. Improvement in parenting caregiving behaviour by [D].
7. The establishment of a greater degree of openness and honesty in [D]'s relationships, particularly with professionals, but also with her extended family.
8. Overcoming social isolation both with respect to extended family and within her neighbourhood.
9. The establishment of improved working relationships with the professional network, particularly social work. This to include both taking advice and using it in order to generalise to other equivalent situations.

There has been insufficient progress to indicate that progress might be made within a reasonable period of time (i.e., one commensurate with [L]'s developmental needs) such that a recommendation to pursue reunification would be safe and appropriate, in our view. I had already established, in December 2001, that a necessary pre-condition for reunification would be a greater degree of acknowledgement of responsibility on [D]'s part for having caused harm to [M], in order to be able to conclude that [L] should be returned to her care. The aim of the admission on 2 January 2002 was to see whether this level of acknowledgement could be advanced. Although our report in the wake of this admission were (*sic.*) initially in the direction of the proposed plan for assessment and treatment of reunification, I have re-evaluated the prognosis for a safe outcome now and this does involve a revision of my original opinion about the best way forward. This opinion is shared by colleagues within the

multi-disciplinary team which whom I work. The particular points which concern us and lead us to this conclusion are the following:

- The severity of the prior maltreatment of [M], eventually resulting in her death.
- The lack of acknowledgement by [D] concerning the full range of harms which the Court had found [M] to have suffered.
- The lack of empathic concern, in retrospect, for [M]'s suffering before her death.
- Continuing concerns about parenting and parent/child relationships during present contact with [L].
- [D]'s social isolation and lack of support from her own extended family.
- Lack of engagement with health and social work professionals and concerns about the level of co-operative work which has been able to be established.
- The reservations of health and social work professionals are an added factor to take into consideration if a reunification plan were to be set in motion."

67. On 18 April 2002 the Cassel wrote to D's solicitors:

There is absolutely no reason for me to offer a new assessment × Dr [J] has given a very clear report which gives the reasons for his decision. [D] has simply not made enough progress to warrant rehabilitation."

68. In the meantime, on 25 March 2002, as I have mentioned, HD had produced her assessment of S and her partner P, concluding that it would not be in L's best interests to place him with them.

69. On 30 April 2002 HD had another meeting with D - her first since their meeting on 4 December 2001. In her subsequent witness statement dated 7 May 2002 HD says of D on this occasion:

she informed me she only felt responsibility for taking [M] to [SC's] home. She continues to deny any responsibility for the actual injuries or [M's] death × "

70. On 7 May 2002 the local authority filed its care plan and HD's witness statement. The care plan was commendably clear and to the point:

The aim of this plan is to place [L] for adoption × adoption is the only option left for him × direct contact [with his birth family] would [not] be in [L's] interests once he is placed for adoption."

71. In her statement HD said, hardly surprisingly, that the local authority "must be × guided by" Dr J's latest report.

72. On 13 May 2002 L's name was placed before the Adoption Panel, which approved adoption as being in his best interests.

73. On 20 May 2002 I made an order in agreed terms requiring the local authority to disclose various documents, including:

- i) all the contact notes;
- ii) HD's "positives" and "negatives" documents (the existence of which had first come to light only as a result of their being referred to in the typed note of the meeting on 7 March 2002 attached to Dr J's report of 11 April 2002); and
- iii) all documents relating to each of the various "concerns" of the local authority as referred to in the typed note of the meeting.

74. Disclosure took place in accordance with my order on 23 May 2002. Only then did D for the first time see the contact notes for 29 January 2002 (which the local authority had felt sufficiently important to send to Dr J on 11 March 2002) and the "positives" and "negatives" documents handed to Dr J on 7 March 2002. This disclosure did not include (because my order had not included) any of the materials held only by Dr J. Nor at this stage had the local authority disclosed its note of the telephone conversation with Dr J on 4 February 2002 - that was not disclosed until shortly after the final hearing had begun.

75. On 10 May 2002 the guardian's solicitor had written to Dr J asking him to produce all his clinical notes. Eventually on 24 May 2002 - this was the Friday before the final hearing was due to start on Monday 27 May 2002 - Dr J responded, with some exasperation, pointing to the strain it would put on his "very stretched" resources. More revealingly he added:

However, more importantly, what is the purpose behind this request? If merely a fishing exercise then I feel the request would be wasteful and should be resisted strongly."

76. Thus the state of affairs when the case was opened before me on 27 May 2002. By then the parties had available to them the documents disclosed by the local authority. But the parties - and more particularly D - did not have, with the sole exception of Dr J's typed note of the meeting on 7 March 2002, any of Dr J's clinical notes. These did not become available until the second day of the hearing. The consequence of this was that until the second day of the hearing neither D nor her representatives had seen such important documents as Dr J's notes - which were of course the only notes - of the meetings on 29 August 2001, 24 September 2001, 19 October 2001, 12 December 2001, 18 December 2001, 3 January 2002 and 7 January 2002, his manuscript notes of the meeting on 7 March 2002 and his note of the telephone conversation with the guardian on 8 March 2002.
77. The local authority was represented by Mr James Tillyard QC, D by Mr Michael Keehan QC and Ms Ruth Henke, S and P by Mr Mark Allen and the guardian by her solicitor, Mr David Crowley. I am grateful to all of them for the very great help they gave me - and, I do not doubt, their respective clients - in a case which, no doubt for differing reasons, cannot have been easy for any of them.
78. The hearing began, as I have said on 27 May 2002. It concluded on 31 May 2002 when I reserved judgment. On 13 June 2002 I handed down a short judgment announcing my conclusions (i) that there should be no further assessment by Dr J of either D or L and (ii) that the amended care plan which had been lodged on 31 May 2002 should be approved. I indicated that I accordingly proposed to dismiss D's application under section 38(6) of the Act and to make a care order in relation to L, but at the same time to adjourn the local authority's application - issued on 23 May 2002 - for an order under section 34(4) of the Act terminating all direct contact between D and L. I now (1 July 2002) hand down my full judgment.
79. I heard oral evidence from (in this order) the lead social worker, HD, the health visitor, Ms MC, one of the contact supervisors, LH, and then, on 29 May 2002, Dr J. I next heard evidence from the team leader of the local authority's family placement team, Ms SN, and from the foster carer, Mrs J. Finally, on 30 May 2002, I heard evidence from D herself and then from the guardian. Neither D's mother, S, nor P gave evidence. I shall refer to all this evidence, to the extent that is necessary, in due course.
80. I am not concerned with threshold. That was dealt with by Connell J on 23 November 2002. I am concerned only with what is conventionally, if unfortunately and, as I feel, all too often insensitively, referred to as disposal.
81. D opposes the application for a care order. The primary submission made on her behalf by Mr Keehan and Ms Henke is that there should be an assessment of her ability to care for and protect L, as had indeed previously been the plan envisaged by all parties.
82. At the forefront of his arguments in support of that primary submission Mr Keehan puts the complaint that in the circumstances as I have described them there were what he calls wholesale breaches of good practice, the cumulative effect of which was, he

says, to deny D any or any adequate involvement in the decision-making process and any proper or fair opportunity to present her case in court during the hearing before me. He submits that the breaches which had occurred before the hearing, and their consequences, were so serious that they could not be remedied either wholly or sufficiently during the hearing.

83. Understandably Mr Keehan focussed on articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He says that D has been denied her right to a fair hearing under article 6 and denied respect for her right to family life under article 8. It is, accordingly, to the Convention that I turn first.

84. Article 6, so far as is material for present purposes, is in the following terms:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

85. Article 8 is in the following terms:

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

86. I make no apologies for beginning with my own recent judgment in *Re B (Disclosure to other parties)* [2001] 2 FLR 1017, where I reviewed a number of the relevant authorities. I do not propose to set out again what I said in that case. Suffice it to say that at pp 1028–1030 (paras [35]–[39]) I referred to the principles relevant to article 6 to be found in *Golder v United Kingdom* (1979–80) 1 EHRR 524, *Ruiz-Mateos v Spain* (1993) 16 EHRR 505, *Dombo Beheer BV v The Netherlands* (1994) 18 EHRR 213, *McMichael v United Kingdom* (1995) 20 EHRR 205 and *McGinley and Egan v United Kingdom* (1999) 27 EHRR 1.

87. At pp 1030–1031 (paras [40]–[42]), referring to *W v United Kingdom* (1988) 10 EHRR 29, *McMichael v United Kingdom* (1995) 20 EHRR 205 and *TP and KM v*

United Kingdom (2001) 34 EHRR 42, I pointed out that where article 8 rights are engaged, unfairness in the trial process may involve a violation not merely of a parent's rights under article 6(1) but also of his or her rights under article 8. As the Court said in *McMichael* at p 239 (para [87]):

Whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8."

88. But the protection afforded in this respect by article 8 goes further, for it is *not* confined to unfairness in the *trial* process. As the Court's decision in *TP and KM v United Kingdom* (2001) 34 EHRR 42 and Holman J's recent decision in *Re M (Care: Challenging Decisions by Local Authority)* [2001] 2 FLR 1300 show, article 8 guarantees fairness in the decision-making process at *all* stages of child protection.
89. Referring to the decision of the Court in *W v United Kingdom* (1988) 10 EHRR 29 (the report of his judgment erroneously gives a reference to *R v United Kingdom* [1988] 2 FLR 445), Holman J at p 1308G said:

the European Court of Human Rights clearly determined that, although there are no explicit procedural requirements within Art 8 of the Convention, the quality of a local authority's decision-making process nevertheless itself engages Art 8. The court said in para 62 of its judgment:

It is true that art 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by art 8."

As a result of that reasoning the court went on to hold at para 63 that:

The relevant considerations to be weighed by a local authority in reaching decisions on children in its care must perforce include the views and interests of the natural parents. The decision-making process must therefore, in the Court's view, be such as to secure that their views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them.""

90. I see no reason in principle why the requirements of fairness mandated by article 8 should not also apply to the other persons and agencies involved in child protection work as they apply to the local authority - after all, many of the decisions which most directly impact upon parents are properly taken at multi-disciplinary meetings. Collective decision-making surely carries with it collective responsibility and a collective duty to act fairly.
91. The significance of this aspect of article 8 is further enhanced when one considers the remedies which it affords to a dissatisfied parent even if there are no other proceedings (eg care proceedings) on foot:
- i) Judicial review, by a judge of the Family Division sitting either in the Administrative Court and/or in the Family Division, may be available: see *A v A Health Authority; In re J; R (S) v Secretary of State for the Home Department* [2002] EWHC 18 (Fam/Admin), [2002] 3 WLR 24. This will, though, usually be a remedy of last resort: cf *Re C (Adoption: Religious Observance)* [2002] 1 FLR 1119 at p 1134 (para [51]).
 - ii) More importantly, a breach of article 8, if it involves a "public authority" within the meaning of section 6 of the Human Rights Act 1998, can be remedied in free-standing proceedings brought, either in the County Court or in the High Court, in accordance with sections 7 and 8 of the Act: *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582 at pp 608-610 (paras [71]-[76]), *R (P) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002 at p 2037 (para [120]), not affected on this point by *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 WLR 720. Holman J's decision in *Re M* is an illuminating example of this jurisdiction in operation.
92. I return to article 6. The starting point is the Court's recognition in *Golder v United Kingdom* (1979-80) 1 EHRR 524 at p 536 (paras [35]-[36]) that what article 6 confers is an *effective* right of access to a court.
93. That said, the fundamental principle is clear. As the Court said in *Mantovanelli v France* (1997) 24 EHRR 370 at p 383 (para [34]):
- The Court has × to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair".
94. This approach has consistently been adopted by the Court in the context of family proceedings: see *Elsholz v Germany* [2000] 2 FLR 486 at p 500 (para [66]) and *Sahin v Germany; Sommerfeld v Germany; Hoffmann v Germany* [2002] 1 FLR 119 at pp 146, 161 (*Sommerfeld* para [62], *Hoffmann* para [62]).

95. A fair trial is an adversarial trial in which there is 'equality of arms'. In *Ruiz–Mateos v Spain* (1993) 16 EHRR 505 at p 542 (para [63]) the Court said that:

the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial."

96. In *Dombo Beheer BV v The Netherlands* (1994) 18 EHRR 213 at p 229 (para [33]) the Court said that:

certain principles concerning the notion of a "fair hearing" in cases concerning civil rights and obligations emerge from the Court's case law. Most significantly for the present case, it is clear that the requirement of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to such cases as well as to criminal cases. The Court agrees with the Commission that as regards litigation involving opposing private interests, "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent."

97. These principles have been explicitly recognised by the Court in the context of family proceedings: *Buchberger v Austria* (2001) 20 December (para [50]).

98. Two aspects of "fairness" are particularly germane for present purposes. The first is long established. As the Court said in *W v United Kingdom* (1988) 10 EHRR 29 at p 50 (paras [63]–[64]):

The decision–making process must therefore × be such as to secure that [the parents'] views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them. × what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision–making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as "necessary" within the meaning of Article 8."

99. More recent statements of this principle in the context of children proceedings are to be found in *Elsholz v Germany* [2000] 2 FLR 486 at p 498 (para [52]), *TP and KM v United Kingdom* (2001) 34 EHRR 42 at p 82 (para [72]), *Sahin v Germany*; *Sommerfeld v Germany*; *Hoffmann v Germany* [2002] 1 FLR 119 at pp 129, 142, 158 (*Sahin* para [44], *Sommerfeld* para [42], *Hoffmann* para [44]) and *Buchberger v Austria* (2001) 20 December (para [42]).

100. Decisions of the Court have made it clear that there may be circumstances where a parent will *not* be sufficiently involved in the decision-making process in the absence of appropriate expert evidence: see *Elsholz v Germany* [2000] 2 FLR 486 at pp 498, 500 (paras [52]–[53] and [66]) and *Sahin v Germany; Sommerfeld v Germany; Hoffmann v Germany* [2002] 1 FLR 119 at pp 143, 146 (*Sommerfeld* paras [43]–[44] and [63]).

101. The other aspect of fairness is equally well established. As the Court said in *Ruiz-Mateos v Spain* (1993) 16 EHRR 505 at p 542 (para [63]):

The right to an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party."

102. Likewise in *Mantovanelli v France* (1997) 24 EHRR 370 at p 382 (para [33]) the Court said that:

one of the elements of a fair hearing within the meaning of Article 6(1) is the right to adversarial proceedings; each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision."

103. Again, this principle has been explicitly recognised by the Court in the context of family proceedings: *Buchberger v Austria* (2001) 20 December (para [50]). The leading authority is *McMichael v United Kingdom* (1995) 20 EHRR 205 where there had been care proceedings in which social services and medical reports were given to the court, but not disclosed to the parents, though the contents were made known to them. Holding that there had been violations of both article 6(1) and article 8, the Court at p 237 (para [80]), having commented on the special nature of care proceedings, said:

Nevertheless, notwithstanding the special characteristics of the adjudication to be made, as a matter of general principle the right to a fair – adversarial – trial "means the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party". In the context of the present case, the lack of disclosure of such vital documents as social reports is capable of affecting the ability of participating parents not only to influence the outcome of the children's hearing in question but also to assess their prospects of making an appeal to the Sheriff Court."

104. In this connection it is also important to recall, as Mr Keehan observes, what the Court said in *Sahin v Germany; Sommerfeld v Germany; Hoffmann v Germany* [2002] 1 FLR 119 at pp 129, 143 (*Sahin* para [48], *Sommerfeld* para [43]):

Correct and complete information × is an indispensable prerequisite for × striking a fair balance between the interests at stake."

105. Moreover, article 8 imposes positive obligations of disclosure on a local authority. As the Court said in *TP and KM v United Kingdom* (2001) 34 EHRR 42 at p 85 (paras [82]–[83]):

[82] The Government have submitted that there was nothing to stop the first applicant from applying to the High Court for disclosure of the interview at any point. The applicant responded that she had no reason to suspect that the interview disclosed an error of identification by the professionals or that it would make a difference to her position. The Court considers that the power of the High Court in its wardship jurisdiction to take decisions concerning the welfare of the child in local authority care is an important safeguard of the interests of parent and child. However, this is not an instance where it should be the sole responsibility of the parent, or lie at his or her initiative, to obtain the evidence on which a decision to remove their child is based. The positive obligation on the Contracting State to protect the interests of the family requires that this material be made available to the parent concerned, even in the absence of any request by the parent. If there were doubts as to whether this posed a risk to the welfare of the child, the matter should have been submitted to the court by the local authority at the earliest stage in the proceedings possible for it to resolve the issues involved.

[83] The Court concludes that the question whether to disclose the video of the interview and its transcript should have been determined promptly to allow the first applicant an effective opportunity to deal with the allegations that her daughter could not be returned safely to her care. The local authority's failure to submit the issue to the Court for determination deprived her of an adequate involvement in the decision-making process concerning the care of her daughter and thereby of the requisite protection of their interests. There was in this respect a failure to respect their family life and a breach of Article 8 of the Convention."

106. So much for the general nature of what is meant by a fair trial.
107. But *Mantovanelli v France* (1997) 24 EHRR 370 illustrates an important aspect of fairness for the purposes of article 6 which has, as it seems to me, significant if thus far wholly unrecognised implications for procedure in family cases.
108. The case involved what in this jurisdiction would be called a clinical negligence claim against a hospital, the CHRN, arising out of the death of the applicants'

daughter. The trial court (p 374, para [18]) appointed a medical expert who examined the hospital's files and interviewed five members of the hospital staff before producing a report whose conclusions (adverse to the applicants) were (p 375, para [20]) adopted by the trial court in dismissing the claim.

109. The applicants complained (p 381, para [30]) that:

neither they nor their counsel had been informed of the dates of the interviews conducted by the expert. The expert had also referred in his report to documents which they had not seen and which it had been pointless to ask the hospital management to produce.

They had thus been deprived of the opportunity to examine the persons who gave evidence to the expert, to submit comments to him on the documents examined and on the witness evidence taken and to ask him to carry out additional investigations.

Admittedly, the expert report had later been communicated to the applicants, who could thus have challenged it in the Administrative Court. They had nevertheless been prevented from participating on an equal footing in the production of the report."

110. The Commission supported the complaint (p 382, para [31]):

The Commission submitted that compliance with the principle of adversarial procedure meant that where a court ordered the production of an expert report, the parties should be able to challenge before the expert the evidence he had taken into account in carrying out his instructions. There were three reasons for this: an expert report of this kind, produced under a court's authority for its own enlightenment, was an integral part of the proceedings; as the court was unable to assess for itself all the technical issues considered, the expert's investigation tended to replace the taking of evidence by the court itself; and merely being able to challenge the expert report in court did not permit an effective application of the adversarial principle as the report had become final by then."

111. The Court acknowledged (p 383, para [35]) that:

In the present case it was not disputed that the "purely judicial" proceedings had complied with the adversarial principle."

112. It nonetheless held that there had been a breach of article 6, saying (p 383, para [36]) that:

while Mr and Mrs Mantovanelli could have made submissions to the Administrative Court on the content and findings of the report after receiving it, the Court is not convinced that this afforded them a real opportunity to comment effectively on it. The question the expert was instructed to answer was identical with the one that the court had to determine, namely whether the circumstances in which halothane had been administered to the applicants' daughter disclosed negligence on the part of the CHRN. It pertained to a technical field that was not within the judges' knowledge. Thus although the Administrative Court was not in law bound by the expert's findings, his report was likely to have a preponderant influence on the assessment of the facts by that court.

Under such circumstances, and in the light also of the administrative courts' refusal of their application for a fresh expert report at first instance and on appeal, Mr and Mrs Mantovanelli could only have expressed their views effectively before the expert report was lodged. No practical difficulty stood in the way of their being associated in the process of producing the report, as it consisted in interviewing witnesses and examining documents. Yet they were prevented from participating in the interviews, although the five people interviewed by the expert were employed by the CHRN and included the surgeon who had performed the last operation on Miss Mantovanelli and the anaesthetist. The applicants were therefore not able to cross-examine these five people who could reasonably have been expected to give evidence along the same lines as the CHRN, the opposing side in the proceedings. As to the documents taken into consideration by the expert, the applicants only became aware of them once the report had been completed and transmitted.

Mr and Mrs Mantovanelli were thus not able to comment effectively on the main piece of evidence. The proceedings were therefore not fair as required by Article 6(1) of the Convention."

113. I derive from *Mantovanelli* two principles of particular importance for present purposes:

- i) First, that the fair trial guaranteed by article 6 is not confined to the "purely judicial" part of the proceedings. Unfairness at *any* stage of the litigation process may involve breaches not merely of article 8 but also of article 6. This is potentially very important bearing in mind that, as I explained in *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017 at pp 1035, 1038, 1039 (paras [56], [64], [67]), whereas rights under article 8 are inherently qualified and can be - and often have to be - balanced against other rights, including other rights under article 8, a parent's right to a fair trial under article 6 is absolute. It cannot be qualified by reference to, or balanced against, the child's

or anyone else's rights under article 8. The right to a fair trial under article 6 cannot be compromised or watered down by reference to article 8.

- ii) Secondly, that where a jointly instructed or other sole expert's report, though not binding on the court is "likely to have a preponderant influence on the assessment of the facts by [the] court" there may be a breach of article 6 if a litigant is denied the opportunity - *before* the expert produces his report - (a) to examine and comment on the documents being considered by the expert and (b) to cross-examine witnesses interviewed by the expert and on whose evidence the report is based - in short to participate effectively in the process by which the report is produced.
114. In *Mantovanelli* itself the Court held that the earlier defects in the procedure were not cured by the litigants' ability to make "submissions to the [trial] court on the content and findings of the report after receiving it" because that did not afford them "a real opportunity to comment effectively on it". A fortiori, and perhaps hardly surprisingly, in *Buchberger v Austria* (2001) 20 December the Court held (paras [43]–[45], [51]) that there had been breaches of both article 6 and article 8 where, in what we would call public law proceedings, reliance was placed on a report of the Youth Welfare Office which was never seen by the applicant mother. It made no difference (para [48]) that the report related to a meeting with the applicant herself and that accordingly it could be said that she knew the facts mentioned in the report.
115. *Mantovanelli* and *Buchberger* can be contrasted with *Sahin v Germany*; *Sommerfeld v Germany*; *Hoffmann v Germany* [2002] 1 FLR 119 at pp 152, 158, 161 (*Hoffmann* paras [10]–[14], [43]–[46] and [63]), where the Court, in what we would call private law proceedings relating to contact, held that the applicant father, represented by counsel, had had a sufficient opportunity at trial to comment on the various reports which had been prepared on the question of contact.
116. Now in the present case the relevance of *Mantovanelli* is obvious. Indeed, as I have already noted, not merely did the local authority feel that it had to be guided by Dr J, the guardian not surprisingly treated Dr J's *volte-face* in March 2002 as creating an "obvious inevitability" that the local authority's plans would now exclude D as a potential carer for L.
117. But the wider implications of *Mantovanelli* for children's cases seem to me to require more detailed consideration than there has been hitherto. Indeed, so far as I am aware, this is the very first occasion when anyone, judge or commentator, has even referred to *Mantovanelli* in this context. The principles to be found in the case may, as it seems to me, have significant implications for the way in which guardians, welfare officers, CAFCASS officers and the like go about producing reports, both in private law and even more so in public law proceedings. I say that not least bearing in mind the principle, expounded in cases such as *Re CB (Access: Attendance of Court Welfare Officer)* [1995] 1 FLR 622, *S v Oxfordshire County Council* [1993] 1 FLR 452, *Re W (A Minor) (Secure Accommodation Order)* [1993] 1 FLR 692, *Re C (Section 8 Order: Court Welfare Officer)* [1995] 1 FLR 617, *Re V (Residence: Review)* [1995] 2 FLR 1010 and *Re J (children) (residence: expert evidence)* [2001]

2 FCR 44, that although the court is not bound to follow the recommendation of a children's guardian, a welfare officer or a children and family reporter, it must give careful consideration to any argument advanced by him and, where it differs, must explain its reasons carefully. After all, in many cases such a report is, surely, "likely to have a preponderant influence on the assessment of the facts by [the] court".

118. Now this is not the time, and this is not the occasion, to consider the wider implications of *Mantovanelli* in any great detail. That is something for a future and more appropriate occasion. But *Mantovanelli* cannot, as it seems to me, be confined to experts appointed under CPR 35.7. It extends, in my judgment, to any jointly appointed or other sole expert whose report is "likely to have a preponderant influence on the assessment of the facts by [the] court". It may be - I express no view on the point - that it goes further. Be that as it may, it clearly applies, in my judgment, to Dr J's role in the present case. Dr J was, after all, a sole expert jointly instructed by all the parties with the sanction of the court.
119. Before leaving the Convention jurisprudence there are two final points.
120. The first is this. Many of the cases I have referred to, albeit family law cases, were what we would call private law cases. But as *W v United Kingdom*, *McMichael v United Kingdom* and other cases show, the principles are equally applicable in public law proceedings. Indeed, if anything, what the Court has called "stricter scrutiny" is called for in cases such as this where what is being proposed is that the family relations between a parent and a young child will effectively be curtailed: see *Elsholz v Germany* [2000] 2 FLR 486 at p 497 (para [49]) referring to *Johansen v Norway* (1996) 23 EHRR 33 at pp 67-68 (para 64) and *K and T v Finland* (2000) 31 EHRR 484 at p 512 (para 135), *Sahin v Germany*; *Sommerfeld v Germany*; *Hoffmann v Germany* [2002] 1 FLR 119 at pp 128, 142, 158 (*Sahin* para [41], *Sommerfeld* para [39], *Hoffmann* para [41]) and *Buchberger v Austria* (2001) 20 December (para [39]).
121. As the Court said in *W v United Kingdom* (1988) 10 EHRR 29 at p 49 (para [62]):

The Court recognises that, in reaching decisions in so sensitive an area, local authorities are faced with a task that is extremely difficult. To require them to follow on each occasion an inflexible procedure would only add to their problems. They must therefore be allowed a measure of discretion in this respect. On the other hand, predominant in any consideration of this aspect of the present case must be the fact that the decisions may well prove to be irreversible × This is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interferences."
122. The final point is this. As Mr Tillyard correctly points out, the words "considered as a whole", when used in *Mantovanelli* in the phrase "whether the proceedings considered as a whole × were fair", are crucial. There will be cases where a parent's exclusion from meetings or from access to documents is so significant as to make the whole proceedings unfair: see, for example, in addition to *Mantovanelli*, the facts in

W v United Kingdom (1988) 10 EHRR 29 at pp 32–33 (paras [10]–[15]) and, more recently, the facts in *Re M* as analysed by Holman J and in *Buchberger* as analysed by the Court at paras [43]–[45]. But that will not always be so: see, for example, the facts in *Hoffmann* to which I have already referred.

123. In this connection Mr Tillyard drew my attention to *Scott v United Kingdom* [2000] 1 FLR 958 at p 969 where the Court, rejecting an argument based on article 8, said this:

As regards the decision-making process, the Court notes that the applicant, who had the benefit of legal aid, was legally represented before the Reading County Court, which on 31 October 1994 decided to dispense with her consent for freeing her child for adoption after having examined her complaint that she had not been allowed to participate at the meeting of 22 September 1993 and other complaints concerning that meeting. The Court recalls that, among the matters raised by the applicant before it, the county court's decision dispensing with the applicant's consent was the only measure formally affecting the applicant's rights. Moreover, the Court notes that the applicant took part in or was invited to a series of meetings organised by the local authority concerning her child's future. Not an insignificant number of those took place after June 1993. As a result, the Court considers that, overall, the applicant was given a proper opportunity of making her views known to the authorities.

The Court recognises that the meeting of 22 September 1993, which the applicant was not invited to attend, was of special significance since it was on that occasion that the local authority decided to abandon the rehabilitation option. However, the applicant had been invited to, but did not attend, the previous meeting of 19 August 1993 when it was decided that long-term plans needed to be made urgently for the child's future. Moreover, between the two meetings, a community worker visited the applicant with the intention to discuss the matter with her and convey her views to those attending the meeting of 22 September 1993. Most importantly, the meeting in question was an administrative internal meeting, the aim of which was to formulate the local authority's strategy. Other such meetings occurred in the applicant's absence both before and after 22 September 1993. Moreover, the strategy decided at that meeting was not legally irrevocable. Finally, the applicant was promptly informed of the outcome of the meeting and had ample opportunity to attempt to change the course of events by making appropriate representations to the local authority and having resort to the domestic court that had been seized of the matter.

In the light of all the above, the Court considers that it has not been established that the decision-making process was unfair or that it failed to involve the applicant to a degree sufficient to provide her with the requisite protection of her interests."

124. As against that Mr Keehan points to the reasons why in *Re M Holman J* held the local authority's actions to have been in breach of article 8. In that case a full care order had been made on 10 November 2000. The care plan dated 23 October 2000 which had been approved by the court contemplated rehabilitation of the child to the mother or, if that failed, and subject to assessment, to the father. At a meeting on 23 April 2001 the local authority decided fundamentally to change the care plan, abandoning all plans for rehabilitation with either parent and approving contingent plans for adoption. Holman J held that the local authority had acted unlawfully on 23 April 2001 because, as he put it at p 1311A,

in the particular circumstances of this case, the decision-making process seen as a whole did *not* involve the parents to a degree sufficient to provide them with the requisite protection of their interests, and × it was objectively (but unwittingly) unfair."

125. Holman J explained why he had come to that conclusion in ten numbered paragraphs (pp 1311B–1313D). I will not set them out in full. But I draw attention to three of them, paragraphs (v), (vii) and (x). At p 1311G he said this:

In the event, the meeting on 23 April proved to be the decisive meeting in the decision-making process, and neither parent had any opportunity to address it, or to clarify any factual issues with the persons participating at the meeting."

126. At p 1312A he said:

Both parents say that in the record of the meeting of 23 April there are a number of errors of fact with regard to the state of their relationship and to whether they were now putting themselves forward effectively as joint carers for T or as alternative sole carers. At para 31 the minutes state: 'It was acknowledged that Mr M had not put himself forward as the sole carer ...'. He says that that is simply wrong, although at para 5.2(ii) of her statement of 22 June 2001 Ms Doyle says that on 12 April 2001 the father told Helen Richards and Jerry Tremaine that their intention was to reunite. I do not know where the truth of the matter lies; but the critical meeting of 23 April disabled itself from trying to clarify the position face-to-face with the parents.

Further, the father says that the meeting was misinformed as to, or misunderstood, the extent of his progress with abstinence from drugs. Paragraph 10 of the minutes records that 'Mr M has not fully addressed his quite severe long-term drug abuse'. He says that inquiry of the drugs project at Trengweath would have showed that he had. Paragraph 21 of the minutes records that 'Mr M is now on heroin substitute which he intends giving up in time'. He says that in fact by 23 April he had already ended, or was on the point of reaching the end of, his prescribed treatment with heroin substitute. Again, I do not

know the truth of the matter; but it is not clear that the meeting reliably informed itself."

127. Finally, at p 1313C Holman J said this:

I have heard nothing at all to satisfy me that there was any necessity to deny each parent an opportunity to attend at, and address, this critical meeting."

128. Now reported cases are, of course, authority only for the propositions of law that they establish. Disputes are not to be resolved simply by comparing the facts of more or less similar reported cases and selecting the case that appears to be closest on the facts. That said, one can see why Mr Keehan draws attention to Holman J's reasoning. From Mr Tillyard's point of view it might be thought that the facts of the present case are uncomfortably closer to the facts of *Re M* than to the facts of *Scott* .

129. Be that as it may, the essential principle is clear. At the end of the day fairness is something to be assessed - whether for the purposes of article 6(1) or article 8 - having regard to "the particular circumstances of *this* case" (*Re M* - emphasis added). And one has to evaluate the process or the proceedings (as the case may be) "considered as a whole" (*Mantovanelli*), assessing matters "overall" (*Scott*) and "having regard to all circumstances" (*Buchberger*).

130. So much for the Convention jurisprudence. But Mr Keehan also took me to important domestic authority, to which I must now turn. It relates to two topics that are central in the present case: the role of the single jointly instructed expert and the issue of disclosure by the local authority and guardian.

131. Extensive guidance in relation to the involvement of experts in children cases is given in authorities such as *Re G (Minors) (Expert Witnesses)* [1994] 2 FLR 291, *Re C (Expert Evidence: Disclosure: Practice)* [1995] 1 FLR 204, *Re CB and JB (Care Proceedings: Guidelines)* [1998] 2 FLR 211 and, most recently, *Re R (Care: Disclosure: Nature of Proceedings)* [2002] 1 FLR 755. I do not propose to rehearse again matters dealt with in those cases so fully, and so much better than I could do, by Wall J, Cazalet J and Charles J. For present purposes I confine myself to quoting two extracts.

132. The first is from the judgment of Wall J in *Re CB and JB* at p 224F where, having referred to the draft letter of instructions to jointly instructed experts contained in the Children Act Advisory Committee Annual Report for 1994/95, he said:

The mischief which the letter is designed to prevent is an informal discussion between experts which is either influential in or determinative of their views, and to which the parties to the proceedings (including perhaps other experts) do not have access.

The watchword of the Family Division is *openness*. Although the proceedings are confidential and held in chambers, nothing which affects the conduct of the proceedings must be done in secret. Everything must be above board. It is absurd in my view, and quite contrary to the spirit of the Children Act 1989, if experts are to feel constrained by their instructions from entering into discussions, informal or otherwise, which may assist in informing their opinion of the case. But if experts do have informal discussions about a case, perhaps because they share the same premises, or meet at a conference, or simply because they wish to inform each other's opinions, it is of course *essential* that they make a record of all such discussions (however brief) and, in their reports or otherwise, inform those instructing them that such discussions have taken place. It is equally important that they should state how (if at all) those discussions have influenced their thinking about the case.

For my part, therefore, I would delete the word *informal* from the passage in the draft I have cited. Furthermore, I would put the sentiments the other way round. I would say:

It is expected that you will have meetings with the parents, children (*where leave is given*), social workers and the guardian ad litem. You are also, of course, at liberty to discuss the case with any of the other experts instructed if you feel that would assist you in writing your report. It is, however, essential both to your role as an independent expert and to the parties' perception of your independent status, that if you do have informal discussions or correspondence with any of the professionals or the lay parties involved in the case, you should make a note of all such discussions. You should also disclose the fact that you have had them when you write your report, and explain what influence, if any, such discussions have had upon your thinking and your conclusions.""

133. At p 228F Wall J added this:

It is of the greatest importance that a proper record is kept of all meetings of experts. This, in my experience, is best done by the guardian, although in complex cases it may be appropriate to employ a shorthand writer.

It is, however, even more important that the results of the meeting itself are distilled into a statement or similar document to which the experts can put their names and which thus acquires evidential standing.

Like every other aspect of procedural innovation, where experts' meetings are necessary, set up with care and conducted with intellectual rigour and discipline, they can save an

enormous amount of court time and reduce the costs of a case substantially. Where, however, such meetings are unfocused or badly conducted, they can obfuscate rather than clarify issues, thereby lengthening a case and increasing costs.

In my judgment, therefore, the parties' lawyers and the guardian ad litem have a particular duty to ensure that such meetings are only called when necessary; that they are appropriately constituted, have clear and relevant agendas, are sensibly conducted and properly minuted; and that the outcome of such meetings is as clear as the subject matter allows."

134. The other is from *Re R* where at p 795G Charles J said:

All involved in giving joint instructions should take a full part at all stages and thus attend meetings with the relevant experts, or at least comment in respect of them."

135. I conclude on this aspect of the matter with a reference to *Peet v Mid-Kent Healthcare Trust (Practice Note)* [2001] EWCA Civ 1703, [2002] 1 WLR 210, where the Court of Appeal had to consider whether, in the context of a clinical negligence case, it was proper for a single jointly instructed expert to have a conference with the claimant in the absence of the defendant. The Court of Appeal held unanimously that it was not. Lord Woolf CJ said at p 214H (para [21]):

One of the experts whose expertise is nursing has interviewed the parents of the claimant for the purposes of the preparation of her report. There can be no objection to that. A single expert is perfectly entitled to interview the parents for the purposes of preparing a satisfactory report. There was no suggestion, as I understand it, for the defendant to be represented when instructions of that sort were being taken by the expert, and I would not expect the defendant to raise any objection to what happened in this case. That is one thing; but the idea of having an experts' conference including lawyers without there being a representative of the defendant present, as was suggested by the claimant's solicitors, in my judgment is inconsistent with the whole concept of the single expert. The framework to which I have made reference is designed to ensure an open process so that both sides know exactly what information is placed before the single expert. It would be totally inconsistent with the whole of that structure to allow one party to conduct a conference where the evidence of the experts is in effect tested in the course of discussions which take place with that expert."

136. He added at p 215C (para [22]):

I would see no objection to consultation, as long as it takes place where both sides are aware of what happens within that consultation. × There is nothing objectionable, subject to both

sides being present, in such a discussion taking place. But the idea that one side should be able to test the views of an expert in the absence of the other party is clearly impermissible."

137. Simon Brown LJ at p 216E (para [32]) put the point bluntly:

When, if at all, should one party, without the consent of the other party, be permitted to have sole access to a single joint expert, ie an expert instructed and retained by both parties? In common with Lord Woolf CJ, I believe that the answer to this question must be an unequivocal "Never"."

138. Buxton LJ at p 217E (para [38]) added this:

the whole idea of separate and private approaches (and I emphasise private) to a joint expert is wholly inconsistent with the reasons for the introduction of a regime of joint expert evidence. It is unfair to the expert himself who cannot properly judge how he should deal with the matters in the consultation. And if it is known to have been engaged in, it is likely to undermine the degree of reliability which the court itself can place upon the evidence which the expert eventually gives."

139. Although it is right to record that I have heard no argument on the point (the case having come to my attention only after the conclusion of submissions) I find it difficult to see that the principle can be any different in the Family Division, merely because the Family Division is not the Queen's Bench Division or because the proceedings are regulated by the Family Proceedings Rules rather than by the Civil Procedure Rules. The approach in *Peet* is, as it seems to me, entirely consistent with the approach to be found in the other authorities - including the family cases - to which I have referred. Dare one say, it is in any event mandated by the very concept of fairness which lies at the root of article 6.

140. So far as concerns disclosure I start with a passage from the judgment of Cazalet J in *Re C* at pp 208B, 209G:

In *R v Hampshire County Council ex p K* [1990] 1 FLR 330 it was held that a local authority who brought care proceedings has a duty to disclose all relevant information in its possession or power which might assist parents to rebut allegations being made against them, save for that which is protected by public interest immunity. × In my view it is the responsibility of the local authority actively to consider what documents it has in its possession which are or may be relevant to the issues as they affect the child, its family and any other person who is relevant in regard to an allegation of significant harm, and to the care and upbringing of the child in the context of the welfare checklist issues. The local authority should not content itself with disclosing the documents which support its case, but must consider itself under a duty to disclose in the interests of the

child and of justice documents which may modify or cast doubt on its case. The particular concern should relate to those documents which actually help the case of an opposing party. If there is any doubt about whether the information is relevant, consideration should be given to notifying the affected parties of the existence of the material. Whilst the temptation to invite costly, intrusive and pointless fishing expeditions should be avoided, there should be a presumption in favour of disclosure of potentially helpful information. If documents are obviously relevant and not protected from disclosure by public interest immunity, then the local authority should initiate disclosure."

141. More recently, in *Re R*, the topic has been considered at some length by Charles J in a judgment arising out of contested care proceedings which, if I may be permitted to say so, deserves and repays the most careful study and with which I am respectfully in entire agreement. The relevant part of the judgment is at pp 772G–779F, with a coda at pp 785H–787G. The passages require to be read in full. For present purposes I must be selective.

142. Charles J began with this general observation at p 772G:

It was rightly accepted that all parties are under a duty to make full and frank disclosure. Initially, this places a heavy burden on a local authority when presenting their case × it is also their duty × to confine issues and evidence to what is reasonably considered necessary for the proper presentation of the case. A proper presentation is, naturally, one that is fair and that has a proper regard to Art 6 of the Convention.

That heavy burden arises in all cases where public law orders are sought because of the nature of the proceedings."

143. At pp 774F–775A he emphasised that:

all respondents and their advisers × have mirror duties and responsibilities to those [of] the local authority × All the above duties of all the parties continue with appropriate modifications throughout the preparation of the case".

144. At p 775A he continued with this important observation:

In relation to disclosure, there seems to be a general reluctance of many involved in family proceedings to disclose documents. In part, this is justifiably based on the nature of the procedure which, like judicial review, is based on statements and the obligation of the public body involved and other parties to make full disclosure. This leads to the discouragement by the courts of fishing expeditions for discovery or applications for discovery that can be described as Micawberism ×

However, it seems to me that, additionally, this reluctance is also often incorrectly based on views relating to confidentiality and an assertion that records of the local authority are subject to public interest immunity × issues relating to confidentiality and public interest immunity in the context of Children Act proceedings are regularly misunderstood and asserted as a reason why disclosure has not been made, or for refusing a request for disclosure made of a local authority, a guardian ad litem and experts in connection with proceedings under the Children Act 1989."

145. At p 776B he said:

something over and above or in addition to the simple assertion of confidentiality is needed to lead to a conclusion that disclosure of material that passes the relevant threshold test for disclosure can be refused in proceedings."

146. Having then sought to dispel a number of misunderstandings about the doctrine of public interest immunity, Charles J continued at p 778C:

Both local authorities and guardians ad litem should be more willing than they seem to be at present to exhibit their notes of relevant conversations and incidents that are relied on as evidence for findings at the threshold or welfare stage of proceedings, rather than to embark on what is a time-consuming and difficult exercise of preparing summaries of those notes"

147. In a passage starting at p 779A which I need not set out in full he made it clear that guardians should be more willing than many guardians are at present to disclose contemporaneous notes when asked for by other parties. At p 779B he commented that:

the role and status of the guardian did not warrant the failure to disclose the notes requested."

148. I agree entirely with everything said by Charles J. And I wish to emphasise that I associate myself entirely not merely with the detail but also with the more general thrust of his observations.

149. Too often in public law proceedings both the level of disclosure and the extent of a parent's involvement in the crucial phases of the out of court decision-making processes fall short not just of the well-established requirements of domestic law - just how consistently are the principles so clearly articulated by Cazalet J in *Re C* , by Wall J in *Re CB and JB* and by Charles J in *Re R* actually observed in practice? - but also of the standards which are now demanded by articles 6 and 8 of the Convention. The present case is in many ways an all too characteristic example of an all too frequent phenomenon. Not the least important of the many important messages

which, as it seems to me, we all need to absorb from what Charles J has so clearly told us in *Re R* is the need for change in the prevailing culture - a culture of reluctant and all too often inadequate disclosure.

150. The fairness which articles 6 and 8 guarantee to every parent - and also, of course, to every child - in public law proceedings imposes, as Charles J recognised, a heavy burden on local authorities. But it must never be forgotten that, with the State's abandonment of the right to impose capital sentences, orders of the kind which judges of this Division are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. It is a terrible thing to say to any parent - particularly, perhaps, to a mother - that he or she is to lose their child for ever.

151. The State, in the form of the local authority, assumes a heavy burden when it seeks to take a child into care. Part of that burden is the need, in the interests not merely of the parent but also of the child, for a transparent and transparently fair procedure at all stages of the process - by which I mean the process both in and out of court. If the watchword of the Family Division is indeed *openness*— and it is and must be - then documents must be made openly available and crucial meetings at which a family's future is being decided must be conducted openly and with the parents, if they wish, either present or represented. Otherwise there is unacceptable scope for unfairness and injustice, not just to the parents but also to the children. For as I pointed out in *Re B* at p 1041 (para [68]), referring to what Lord Mustill had said in *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593 at p 615F about 'the interest of the child in having the material properly tested':

"It is not only the individual litigant's right to a fair trial which may point in the direction of disclosure of the documents to him. The interests of the other litigants may well point in the same direction, for the children and other parties also have a right to a fair trial and, as part of their right to a fair trial, the right to have the forensic materials properly tested. It may well be that only if there is disclosure to *all* concerned can the children and other parties to the proceedings be confident that the materials have been properly tested. So it may often be that disclosure of the documents to the individual litigant is not merely for his benefit but also for the benefit of the others and the children in particular."

152. So much for the various authorities to which I was referred.

153. I do not propose even to attempt to summarise all this learning, let alone to formulate a comprehensive statement of good practice in cases such as this. That is a task for others. But there are certain principles of practice in public law cases, particularly pertinent perhaps in the circumstances of this case, to which attention can usefully be drawn. What follows is based in large measure on the closing submissions carefully crafted by Mr Keehan and Ms Henke, for whose assistance in this respect, as in others, I am grateful.

154. If those involved in cases such as this are in future to avoid the criticisms which, understandably and, as it seems to me with no little justification, have been levelled against some of those involved in the present case they would be well advised to bear the following precepts in mind:

- i) Social workers should, as soon as ever practicable:
 - a) notify parents of material criticisms of and deficits in their parenting or behaviour and of the expectations of them; and
 - b) advise them how they may remedy or improve their parenting or behaviour.
- ii) All the professionals involved (social workers, social work assistants, children's guardians, expert witnesses and others) should at all times keep clear, accurate, full and balanced notes of all relevant conversations and meetings between themselves and/or with parents, other family members and others involved with the family.
- iii) The local authority should at an early stage of the proceedings make full and frank disclosure to the other parties of all key documents in its possession or available to it, including in particular contact recordings, attendance notes of meetings and conversations and minutes of case conferences, core group meetings and similar meetings. Early provision should then be afforded for inspection of any of these documents. Any objection to the disclosure or inspection of any document should be notified to the parties at the earliest possible stage in the proceedings and raised with the court by the local authority without delay.
- iv) Social workers and guardians should routinely exhibit to their reports and statements notes of relevant meetings, conversations and incidents.
- v) Where it is proposed that the social workers and/or guardian should meet with a jointly appointed or other sole expert witness instructed in the case (what I will refer to as a 'professionals meeting', as opposed to a meeting of experts chaired by one of the legal representatives in the case - usually the children's guardian's solicitor):
 - a) there should be a written agenda circulated in advance to all concerned;
 - b) clear written notice of the meeting should be given in advance to the parents and/or their legal representative, accompanied by copies of the agenda and of all documents to be given or shown to the expert and notice of all issues relating to or criticisms of a parent, or a non-attending party, which it is intended to raise with the expert;

- c) the parent, or non-attending party, should have a clear opportunity to make representations to the expert prior to and/or at the meeting on the documents, issues and/or criticisms of which he or she has been given notice;
- d) a parent or other party who wishes to should have the right to attend and/or be represented at the professionals' meeting;
- e) clear, accurate, full and balanced minutes of the professionals meeting (identifying in particular what information has been given to the expert and by whom) should be taken by someone nominated for that task before the meeting begins;
- f) as soon as possible after the professionals' meeting the minutes should be agreed by those present as being an accurate record of the meeting and then be immediately disclosed to all parties.

155. I emphasise that these are not intended to be comprehensive guidelines. Nor are they intended in any way to water down, let alone replace, anything said by Wall J, Cazalet J and Charles J in the cases to which I have referred. I build on those earlier analyses. I intend, simply by way of supplement, to draw attention to some particular aspects of proper procedure which need to be observed if in future other parents are to be spared the unfairness to which D was, as it seems to me, subjected in this case and if in future proper regard is to be paid not merely to what domestic law and practice have long recognised as appropriate but to what articles 6 and 8 now require if there is to be proper compliance with what the Convention demands.

156. On one point, however, I have to part company with Mr Keehan. He submitted that the local authority's disclosure should be by way of a list of all relevant documents. In this, it seems to me, he goes too far.

157. General discovery - for that is what this would amount to - has never been the practice in children cases, not even when wardship was still in Chancery: *In re D (Infants)* [1970] 1 WLR 599. As Harman LJ said at p 601E, speaking of his vast experience in the Chancery Division:

giving discovery in a wardship case × is quite contrary to practice."

He added at p 601C:

in my experience I have never heard of discovery of documents in such a case."

158. Karminski LJ, no doubt with his extensive experience in what is now the Family Division, agreed at p 601H:

Speaking only from my own experience, I have no recollection of any such order ever having been made."

159. Now of course practice and procedure in such cases has moved on enormously since 1970, not least under the spur of the Convention and, since 2000, the Human Rights Act 1998: cf *Re M (A Minor) (Disclosure of Material)* [1990] 2 FLR 36. But the fact remains, as Charles J mentioned in the passage in *Re R* at p 775A which I set out in paragraph [144] above, that what (to use pre-Woolf terminology) one might call automatic general discovery by list is not, and never has been, part of the procedure in cases under the Children Act 1989 - neither in private law proceedings nor even in public law proceedings. CPR 31 does not, after all, apply to such cases.
160. Disclosure as referred to by Charles J in *Re R* and as I have referred to it in paragraphs [149], [151] and [154] above is one thing - and a very necessary thing. Automatic or routine general discovery by list is another thing - and, in my judgment, at least at present neither a necessary nor a desirable thing.
161. I return to the circumstances of the present case.
162. Mr Keehan complains, as I have said, that in the circumstances as I have described them there were what he calls wholesale breaches of good practice. The cumulative effect of these was, he says, to deny D any or any adequate involvement in the decision-making process and any proper or fair opportunity to present her case in court during the hearing before me.
163. First, he says, and of the greatest concern, is the mention by Dr J for the first time in his report of 11 April 2002 of a necessary pre-condition for re-unification, namely "a greater acknowledgement of responsibility on [D's] part for having caused harm to [M]". Although as we now know this had in fact been identified at the meeting on 18 December 2001, D, according to Mr Keehan, was never told of this pre-condition. It is not, says Mr Keehan, referred to in any of Dr J's previous reports of 3 October 2001, 14 January 2002, 24 January 2002 and 13 March 2002. It was never notified to D or her legal representatives, in writing or otherwise. At no time, says Mr Keehan, was D ever told plainly as, according to him, she should have been that a greater acknowledgement on her part of responsibility for the injuries inflicted on M was an essential pre-condition to any further assessment and thus to any possibility of re-unification with L.
164. More generally, Mr Keehan identifies a long list of what he says were serious shortcomings - indeed, wholesale breaches of good practice - in the procedures adopted by the various professionals in dealing with D. According to Mr Keehan:
 - i) D was not informed, and there was never any discussion with her:
 - a) of the changes required to be seen in her, as identified at the meeting on 18 December 2001; nor

- b) save for relatively minor matters, of the concerns and criticisms of her care held by the social workers or the guardian, many of which were then raised with Dr J at the meeting on 7 March 2002 - eg, her failure to acknowledge her role in M's death, her inappropriate disciplining of L, her attending rough and drug-ridden public houses and clubs and her falsely presenting bottled milk for L as breast milk.
- ii) D was not offered in an appropriate manner and at an appropriate time:
- a) guidance or support on how she might correct or remedy the defects identified; or
 - b) counselling or support to move forward in her acceptance and understanding of her role in M's death.
- iii) Record keeping was seriously deficient:
- a) The guardian failed to make any notes of her conversations with D, with the other parties and with Dr J.
 - b) No minutes were kept by the social workers or the guardian of their meetings and discussions with Dr J.
 - c) The minutes or notes kept by Dr J were not contemporaneously agreed by the other participants, nor (with the exception of his typed note of the meeting on 7 March 2002) were they disclosed to the parties until after the commencement of the final hearing.
- iv) So far as concerns the meetings on 18 December 2001 and 7 March 2002:
- a) D was denied the opportunity to attend or have a representative present at the meetings.
 - b) No agendas were prepared.
 - c) No proper minutes were taken or circulated.
 - d) The lead social worker, HD, raised with Dr J a large number of issues the majority of which had not been raised with D and many of which were inaccurate, exaggerated or unsupported by any evidence.
 - e) D had no opportunity to respond to or counter those issues.

- f) Despite the letter from her solicitors dated 8 February 2002, D was allowed to remain under the impression that there were no minutes of either meeting; she received no record of the meeting on 18 December 2001 until after the hearing before me had begun and no record of the meeting on 7 March 2002 until she was given a copy of Dr J's report of 11 April 2002.
- v) Correspondence passing between the local authority and/or the guardian and Dr J was not disclosed at the time to D or her legal representatives. All but one of the letters referred to in Dr J's report of 11 April 2002 had still not been seen by D or her legal team prior to the start of the hearing before me, nor had the lists of "positives" and "negatives" handed to Dr J at the meeting on 7 March 2002.
165. What then were the consequences for D of all these alleged breaches? According to Mr Keehan D had no opportunity to understand or react to the criticisms of her parenting or care of L. She was thus denied the opportunity to seek help, ask for advice or otherwise demonstrate to the professionals, to Dr J and, vitally, to the court that she could improve her parenting, or change her approach or sustain it. She was given no support or assistance to change her approach to the death of M and her role in it - which support was identified by Dr J in his oral evidence as a matter of first importance. All these handicaps, says Mr Keehan, still exist. She was denied an opportunity to correct inaccurate or false information which was given to Dr J at various stages through his involvement and at crucial times when he was formulating his views about her and about her prospects - ultimately decided on a fine balance - of successfully parenting L.
166. Mr Keehan criticises both the social worker, HD, and the guardian. HD, he says, made none of the efforts or approaches normally to be expected of a social worker, particularly in so difficult a case, to work and build a relationship with a mother. HD was allocated to the case in July 2001. It is a fact that she has observed only four contact visits between D and L - the last some eight months ago - and that her last two visits to D were on 4 December 2001 and 30 April 2002. It is, says Mr Keehan, a lamentable approach. The local authority, he says baldly, has failed D in seeking to assist and support her to care for L.
167. The approach of the social worker, HD, and the guardian, suggests Mr Keehan, is graphically illustrated by their failure to invite D to explain her observations to the contact supervisor, LH, on 29 January 2002 but nonetheless to assume the most sinister and worst possible construction and communicate it to Dr J. In the event, as he points out, the guardian in her evidence accepted as wholly plausible the explanation that D had given in her evidence to me (see further paragraph [208] below).
168. It is manifestly unfair, in breach of natural justice and in breach of articles 6 and 8, says Mr Keehan, that D should be unaware of documents given to or discussed with an expert witness in the case, unaware of criticisms or allegations to be made against her in discussions with that expert (the majority, at least, of which she had no prior

knowledge) and thus be deprived of any opportunity to counter the matters raised or to explain them. An opportunity at a final hearing to cross examine the expert or other witnesses cannot, he submits, be any substitute for making contemporaneous representations before such an important decision was made as not to admit D and L to Dr J's hospital. As Mr Keehan correctly points out, neither the local authority nor the guardian has even sought to suggest, let alone to establish, that there were any proper grounds for failing to disclose documents or criticisms and allegations to D in advance of their meetings or discussions with Dr J.

169. Moreover, as Mr Keehan asks rhetorically, Why could D and/or her legal representative not have attended the meetings, even if only as observers?
170. Summarising D's case, Mr Keehan submits that L's interests are best met by being raised by his mother, D, if at all possible, but the refusal to continue any further with an assessment of D's ability to care for L effectively ends any hope that he could live with and be raised by his mother. Mr Keehan recognises, as he must, for there is much Strasbourg and indeed domestic jurisprudence to this effect, that L's best interests - his right to respect for *his* private and family life - may in appropriate circumstances override D's right to respect for *her* family life. But, he says, such an interference with L's and D's respective rights to respect for their family life can only be justified if it is a necessary and proportionate response to L's needs. Moreover, the procedure by which such plans and decisions are made must be manifestly fair and must allow the involvement of D in the decision-making process to a degree sufficient to provide her with the proper protection of her interests. In fact, he says, D has been excluded from the decision-making processes in this case and those processes have been seriously flawed.
171. Furthermore, says Mr Keehan:
 - i) None of the various matters raised by the social worker, HD, the guardian or Dr J, individually or collectively, provide any objective basis for Dr J's change in his original clear recommendation.
 - ii) D has made substantial changes in her life since M's death, the evidence as a whole speaks positively of her abilities to care for him and of her, as he would have it, unwavering commitment to prove herself a good and safe parent, and in all the circumstances she - and L - should be given the opportunity for further assessment before final plans are made for his future.
172. I must return to consider the first of these points in due course. But it is convenient at this stage to elaborate Mr Keehan's submissions in support of his second point.
173. Of course, he says, D was found to have caused M's death. Of course, he says, that finding is a very grave one. *But* D was then only 16; now she is 21. She has demonstrated great commitment to L and to caring for him. She expressed breast milk for some five months in the belief it would be best for him. She has never failed a contact with him or, save on one occasion, complained of alterations in the contact

arrangements. She has enjoyed a good relationship with L's foster carers, Mr and Mrs J, and been polite and, in the main, co-operative with LH and the other contact supervisors. She has co-operated fully with the health visitor, MC, and with Dr J and his team. Four times, and under her own steam, she has made the long and difficult journey by public transport to Dr J's hospital: not once was she late.

174. Moreover, there *have* been improvements, he says, since the beginning of this year. Dr J and his team noted progress during the assessment in January 2002. The guardian also seems to have thought there was some improvement and indeed claims to have said as much at the meeting on 7 March 2002 though there is no record of it in either of Dr J's notes: "I put forward my view that [D] had moved forward × [Dr J's] notes do not reflect my comment about [D's] progress." (Unfortunately this only emerged after Dr J had left court having given his evidence, so there was no opportunity to explore this issue with him. Mr Keehan suggests that Dr J's failure to note this important comment of the guardian shows that he omitted to take account of her views. This was, he submits, a significant omission in Dr J's assessment of D's ability to progress on these issues.)
175. Finally, says Mr Keehan, there is much evidence, particularly from the contact supervisor, LH, to show that contact between D and L has very significantly improved since Easter this year. There are no longer any significant criticisms. On the contrary, HD in her oral evidence described the last few weeks' contact as more relaxed; LH said that the quality of the contact between D and L had changed since Easter 2002. And on top of all this, D's relationship with her mother, S, is also much improved.
176. So all in all, says Mr Keehan, I ought to conclude that D has not had a proper opportunity to prove or demonstrate her ability to move forward in her views about M's death, that the commitment she has demonstrated to L augers well for their future together and that she ought properly in all the circumstances to have an opportunity in a renewed assessment to prove her ability to care safely for him. In this regard he suggests that the combination of his continued contact with the foster carers and his improved contact of late with his mother reduces significantly the possible, albeit temporary, adverse effects on L of placing him with D during an assessment in Dr J's hospital.
177. Thus Mr Keehan's submissions.
178. At the outset of the hearing the local authority's stance, as outlined in Mr Tillyard's position statement dated 26 May 2002, was that these complaints were "wholly without merit". By the end of the hearing the local authority's position had moderated. Tacitly, at least, it accepted some of Mr Keehan's criticisms, though stoutly maintaining that overall, and assessing the case as matters stood at the end of the hearing, the decision-making process had been fair. Mr Crowley was more forthcoming in acknowledging the deficiencies of the pre-trial decision-making process but joined with Mr Tillyard in asserting that, overall at the end of the day, fairness had been achieved.

179. I return to Mr Keehan's first submission, that D was never told of the necessary pre-condition for re-unification, namely a greater acknowledgement of her responsibility for having harmed M.
180. Whatever may have appeared to be the position before the hearing began, and before all the relevant documents had been disclosed, it can now be seen quite clearly in my judgment that there is no substance in this complaint. It is difficult to see how D can have been in any real doubt as to what was required following her meeting with HD on 4 December 2001. Be that as it may, matters could hardly have been made much clearer than they were by N on 3 January 2002.
181. Moreover, N's notes, the relevant parts of which I have quoted in paragraph [25] above, need to be seen in a wider context. One part of that wider context is Dr J's own identification of the purposes of D's assessment in January 2002, both as set out previously at the meeting on 18 December 2001 and subsequently at the meeting on 7 January 2002. The other is that the nursing staff who were also part of the team looking after D during the assessment in January 2002 had been carefully briefed in advance as to the purpose of the exercise. The nursing notes clearly identify that purpose. In one such note the 'reason for admission' was said to be in part:
- to offer [D] intensive individual work with the wider team to work on her acknowledgement of her responsibility for the death and abuse of her 1st child [M].
182. In another the 'goal' was:
- For [D] to use her formal and informal individual work to explore and acknowledge her involvement and responsibility for her first child's death by suffocation and physical and emotional abuse."
183. Describing the required 'nursing interventions' the same document explained:
- nurses should attempt to build a relationship with [D] in which she may feel safe enough to talk about her experiences."
184. Now true of course it is that D was not privy to what had gone on at the meeting on 18 December 2001 and to every detail of Dr J's thinking or (I am prepared to assume) to the precise nature of the instructions given to the nurses. But the assessment between 2–4 January 2002 was very intensive and, as the clinical notes show, involved not merely intensive work with the more senior members of the team but also extensive interactions between D and the nurses. Given the thought that Dr J had given to it, and given how very carefully every member of the team had been briefed, I find it almost impossible to imagine how D could have got through the process without becoming very well aware of where the focus of all the effort was being directed. It seems to me quite inconceivable, not least having regard to her conversations with HD and N, that D can have been left in any doubt as to what the assessment was driving at - namely the extent to which she was or was not able to

move forward towards an acknowledgement of her responsibility for having harmed M.

185. Observation of a conversation on 3 January 2002 recorded in the nursing notes is revealing and sadly telling:

Staff spent over an hour with [D] chatting × she was very chatty ×"

186. The conversation turned to M:

× She also said that after [M] died [SC] was violent towards her & this made her think who had he been hitting before her. She said 'even though I never laid a hand on her I was in a way responsible for her death.'"

187. This could hardly be clearer, as it seems to me, both of the fact that D must have been aware of what the purpose of the assessment was and also of how wholly unable in fact she was to move forward. The note stands as eloquent if saddening testimony to the accuracy of the team's overall analysis of D's progress as summarised in Dr J's notes of the meeting on 7 January 2002, the key passage in which I have set out in paragraph [26] above.

188. In the course of his oral evidence Dr J made an important point which I have borne very much in mind when considering Mr Keehan's submissions. Dr J explained that for clinical purposes it was important to avoid being too prescriptive, too precise, in telling a patient in D's position exactly what was required of her. There was a difficult balance to be held, but it was not appropriate to spell it out in terms of "unless you do so—and-so, this will happen". Otherwise an assessment such as that in January 2002 would simply become a process of setting up a hoop and inviting the patient to jump through it, "success" in passing through the hoop being judged merely by the not necessarily sincere mouthing of formulaic phrases.

189. Commenting on N's note of her discussion with D on 3 January 2002 Dr J said that N was attempting - and in his opinion successfully - to steer a course between, on the one hand, being too explicit with D and, on the other hand, not sufficiently attempting to engage successfully with her. In other words, to formulate the necessary pre-condition with that degree of precision and explicitness which tends to appeal to a lawyer might, in Dr J's view, be clinically counter-productive. I agree. There was a careful and difficult balance to be held. It was for Dr J and his team, exercising their clinical judgment, to decide how the balance was to be held. They seem, if I may be permitted to say so, to have held the balance admirably.

190. In any event, and this is what matters at the end of the day, I am entirely satisfied that D can have been left - was left - in no real doubt as to what the assessment was all about and what it was that was expected from her. It is quite apparent that she was given every possible chance to show that she was indeed able to move forward. Very sadly, despite being given every opportunity, and for whatever reason, she signally

failed to do so. In the course of his oral evidence Dr J told me that his team made clear to D that they had to understand what had happened to M. I am sure they did. He told me that in his view there can have been no doubt in D's mind as to the need for acknowledgement. I agree.

191. In any event Mr Keehan's contention, whatever substance there might have been in it down to that time, cannot have survived the point on 30 May 2002 at which D finished giving oral evidence before me. For the simple fact is that, despite being given every conceivable opportunity to do so, both while giving her evidence in chief and whilst being cross-examined, D conspicuously failed to give the slightest indication that she was able to move forward at all from the position she had adopted in submitting to the threshold document on 23 November 2001 and when speaking to HD on 4 December 2001.
192. Indeed, from one point of view her oral evidence might even be thought to represent a step backwards. For D suggested under cross-examination that it was SC who had caused M's death, something which Mr Tillyard was able to demonstrate had not been D's contention either at or prior to the threshold hearing in November 2001 (in the threshold document, as we have seen, she sought to attribute M's death to "a yet unascertained natural cause"). D's position at the end of her evidence was that, although she blamed herself for failing to protect M, she had not herself harmed her, let alone caused her death. "I'm not trying to blame [SC] - but it wasn't me." "If someone suffocated her, it was [SC] - certainly not me." "I was not responsible for her broken ribs - whoever did it would have known - I know it wasn't me." In answer to questions from Mr Crowley she agreed that the guardian had asked her if it was possible she had put her hand over M's mouth. "I said it wasn't possible." In this respect D's attitude in the witness box was really no different from that recorded by HD at their meeting on 30 April 2002: according to HD's evidence, which I have absolutely no reason to doubt, D continued to deny any responsibility for the actual injuries or for M's death.
193. I agree with Mr Tillyard when, in his closing submissions, he suggested that, although there is *some* acceptance of *some* responsibility for what happened to M, D is now trying to dissociate herself more than she was in November 2001 from having been the cause of M's death. I agree with Mr Tillyard when he submits that there has been little if any acknowledgement by D of *her* responsibility for what happened to M - the injuries and, more importantly, her death - and when he also submits that *nor is there likely to be in the foreseeable future*. As he says, she has had every opportunity to change her position. She must have known - in my judgment she did know - that Dr J and his team were hoping she would change. She certainly knew that the court regarded it as being of the utmost importance when she gave her oral evidence. Mr Tillyard, in my judgment, is entirely correct when he says that D is entrenched in her view and that there is no evidence that it is likely to change.
194. It may be convenient to record here a revealing comment that D made in the witness box, this time in answer to questions from Mr Tillyard. "I didn't harm [M], so I don't need therapy to protect [L] from me." Something else she said rightly attracted the worried concern of the guardian, who commented that D's reference to M "passing

away" did not reflect the fact that she had died by suffocation. As the guardian said, "I am deeply concerned that [D] is still at that point today."

195. In answer to a question I put to her the guardian described D as very bright but emotionally somewhat flat - an assessment which entirely accorded with the impression I gained having had the opportunity to observe D's body language, facial expressions and general demeanour not merely whilst she was in the witness box giving evidence but as she was sitting in court throughout the hearing.
196. For these reasons I reject Mr Keehan's first submission. In my judgment D knows perfectly well - she knew perfectly well during the assessment in January 2002 - that the necessary pre-condition for re-unification with L was and is some real acknowledgement of her responsibility for having harmed M. But, sadly, the reality is that, for whatever, reason D is either unable or unwilling to accept such responsibility.
197. There is, however, very much more substance in Mr Keehan's other and more wide-ranging submission, namely that D has been denied a fair opportunity to participate in the decision-making process.
198. For reasons that will become apparent in due course I think it convenient first to consider the question by reference to how matters stood immediately before the final hearing began on 27 May 2002.
199. The simple fact, in my judgment, is that Mr Keehan's catalogue of complaints is in very large measure entirely justified. Indeed much of it is well-nigh irrefutable. To take only three of the most obvious failures to comply with well-recognised and elementary requirements of good practice and fairness:
 - i) No agendas were prepared for the meetings on 29 August 2001, 18 December 2001 and 7 March 2002 (the omission on the last occasion having, as we have seen, the most serious consequences).
 - ii) Record keeping was in many respects abysmal - notes taken for clinical purposes are simply no substitute for properly prepared, agreed and circulated minutes.
 - iii) Disclosure of important documents to D was neither volunteered nor prompt.
200. The consequences of this are all too apparent:
 - i) There was misunderstanding between the participants as to the purpose of what in the event emerged as the crucial - indeed decisive - meeting on 7 March 2002.

- ii) Dr J, whose clinical notes turned out to be the only contemporaneous records of crucial meetings, was cast in the unfortunate and unfair position of being seemingly criticised for not giving earlier disclosure of minutes of meeting - which it was not his function to take - when these so-called minutes were simply his clinical notes. His notes would probably not have attracted the attention which, *faut de mieux*, was given to them had there in fact been proper minutes of the meetings.
 - iii) Time was taken up unnecessarily at trial whilst witnesses who had not previously had an opportunity to study Dr J's notes were asked whether they agreed them as accurate records of meetings which had taken place some months previously.
201. But more serious than all of this is the fact that D was afforded, almost from beginning to end, what in my judgment was a wholly inadequate involvement in the decision-making process. This failure is exemplified by the following features in particular:
- i) D and her legal representatives were wrongly excluded from meetings - on 18 December 2001 and 7 March 2002 - to which she should have been invited and one of which - on 7 March 2002 - she had specifically asked to attend.
 - ii) D was given no opportunity to answer the criticisms of her that, without her knowledge, were put to Dr J both at and after the meeting on 7 March 2002.
 - iii) The failure to disclose a whole series of documents, including correspondence and other communications passing between the local authority and the guardian and Dr J, meant that she was kept significantly in the dark as crucial events unfolded.
 - iv) The lack of direct contact between D and both HD and the guardian merely exacerbated her marginalisation in the decision-making process, particularly during what turned out to be the period in the early part of 2002 when crucial decisions about her future were being taken.
202. Some of these points require further elaboration.
203. There is a striking contrast between, on the one hand, the exemplary notes of the contact between D and L taken by the contact supervisors, in particular LH (the mainly typescript records of contact between 16 July 2001 and 3 May 2002 fill some 170 pages), HD's exemplary note of her meeting with D on 4 December 2001 and the more than adequate minutes of the Core Group Meetings held on 26 March 2001, 8 June 2001, 24 July 2001, 4 September 2001, 5 October 2001, 16 November 2001, 20 December 2001 and 23 April 2002, the Child Protection Case Conferences held on 3 August 2001 and 30 January 2002 and the Looked After Review / Core Group Meeting held on 22 January 2002, and, on the other hand, the entire absence of any

minutes, notes or records (other than Dr J's notes taken for clinical purposes) of what in the event turned out to be the two crucial meetings - the professionals' meetings on 18 December 2001 and 7 March 2002.

204. What is also striking (to put it no higher) is the fact, as she was forced to admit in the witness box, that from beginning to end of her involvement in this case the guardian kept at best only "very minimal" notes of her meetings and discussions. She said that she relied on her memory to write her reports. Whatever notes she did keep, none were ever produced for inspection.
205. In assessing the extent to which D was actually allowed to be involved in the decision-making process it is also important to bear in mind the striking fact that during the crucial period between 23 November 2001, when the threshold findings were made by Connell J, and 18 March 2002, when the matter came before me for directions,
- i) apart from at the Core Group Meeting on 20 December 2001, the Looked After Review / Core Group Meeting on 22 January 2002 and the Child Protection Case Conference on 30 January 2002 (none of which were attended by the guardian), D had seen HD only once - on 4 December 2001; and
 - ii) D had seen the guardian only once - on 7 December 2001 when she arrived unannounced to observe D's contact with L.
206. Indeed, as she readily acknowledged in the witness box, HD had only met D a total of six times in the last ten months. The last time she saw D and L together was on 26 September 2001. Court hearings, Core Group and similar meetings apart, since the threshold hearing in November 2001 she has seen D only twice: on 4 December 2001 and on 30 April 2002. And during the same period she appears to have written to her only once: on 6 February 2002.
207. The failure to raise with D, whether before or after the meeting on 7 March 2002, the various concerns listed in LH's list of "negatives" is bad enough. But it does not appear to have been an isolated phenomenon. LH, whose contact notes are the quarry from which many of the local authority's reported concerns seem to have been extracted, did not herself ever raise any of these concerns with D. Her understanding, as she explained in her oral evidence to me, was that it was not her place to do so. She did raise some of her concerns, she said, with HD. She did not know whether HD had in turn raised them with D.
208. It is apparent, not merely from the limited extent of her direct involvement with D but also from what she said in her oral evidence, that HD does not seem to have been particularly astute at any time to discuss such matters with D. Nor is it clear to what extent the guardian did so. It would be tedious, and in the event no real purpose would be served, if I were to go through this aspect of the case in any great detail. Two examples suffice, but they are painfully revealing:

- i) HD accepted in her oral evidence that she did not raise with D the local authority's concerns about her lifestyle and her frequenting of local pubs known for drug dealing. It is concerning, to say the least, that an issue as important as this, an issue which, after all, was felt by the local authority to be sufficiently relevant and important as to require to be brought specifically to Dr J's attention, should never have been discussed with D by the main social worker.
 - ii) The other example relates to the comments made by D during contact on 29 January 2002, comments felt to be so significant that, as we have seen (paragraph [58] above), both the guardian and HD specifically drew Dr J's attention to them following the meeting on 7 March 2002. Yet when the point was put to her in cross-examination the guardian was prepared to accept D's explanation that her comment had been flippant. It is apparent that this obviously important incident was never discussed with D. Had it been, an incident which both the guardian and HD saw as potentially significant and indeed sinister would have been seen for what it was, an innocent piece of flippancy.
209. But when all is said and done, quite plainly, in my judgment, the single most serious failure to involve D adequately in the decision making process - the single most fundamental deficiency in the entire process - relates to her exclusion from the meeting on 7 March 2002. And the unfairness D suffered by having been wrongly excluded was simply compounded by what then took place in her absence - indeed to all intents and purposes behind her back. I do not propose to go into the details - the matter was understandably explored at some length in the evidence before me - but the simple fact is that in a number of important respects the information given to Dr J at the meeting on 7 March 2002, without any prior warning to D and without D being given any opportunity to challenge it or put it in context, was, as Mr Keehan submitted, either inaccurate or exaggerated.
210. There was no justification for refusing D's request to attend the meeting. This was not a meeting of experts. It was a meeting at which a jointly appointed expert, whose decision, as Mr Crowley very properly accepted, was effectively going to be determinative, was discussing the case with two of the parties in the absence of the third. That, in my judgment, was a plain breach of the principles of fairness and openness articulated in cases such as *Re CB and JB* and *Peet* and mandated by articles 6 and 8. And D's right to attend such a meeting is not affected by the fact that it was described as a professionals' meeting. No doubt it was, but the fact is for this purpose immaterial. One of two parties who have jointly appointed an expert cannot justify an ex parte approach to the expert in the absence of the other merely because he is, or appoints as his delegate someone who is, professionally qualified. And the excuse cannot in any event explain what happened at the so-called professionals' meeting on 18 December 2001, given that it was attended not merely by the guardian and HD but also by the local authority's solicitor and the guardian's solicitor, Mr Crowley. Why, if they were invited, was not D's solicitor also invited? I can think of no justification for the omission and Mr Crowley, much to his credit, accepted that there was none.

211. Given what took place during and immediately after the meeting on 7 March 2002, and given the centrality of Dr J's role and the fact that his opinion was likely to be determinative both of the local authority's stance and, indeed, of the ultimate decision the court is required to make, there was here in my judgment, just as there was in *Mantovanelli* and for much the same reasons, a clear failure to meet the standards of fairness mandated by articles 6 and 8.
212. Looking to all the circumstances of the case, assessing matters as they stood immediately before the final hearing began on 27 May 2002, I have come quite clearly and without any hesitation to the conclusion that the decision-making process seen as a whole had *not* been such as to involve D to a degree sufficient to provide her with the requisite protection of her interests. I am not suggesting for a moment that anyone set out to treat her unfairly. But in my judgment her treatment by the local authority and, in particular, the events surrounding, and her exclusion from, the meeting on 7 March 2002 were, however unwittingly and unintentionally, unfair on any objective view.
213. There had been, as Mr Keehan correctly submitted, wholesale breaches of good practice. Whether judged by well established principles of domestic law or by reference to the domestic and Strasbourg jurisprudence in relation to articles 6 and 8, the process, as matters stood immediately before the final hearing, had been unfair to D - and, I might add, to precisely the extent that it had been unfair to D it was unfair also to L.
214. Moreover, Mr Keehan's criticisms of the social work in this case (see paragraphs [166]–[167] above) seem to me unhappily to be well-founded. "Lamentable" - his epithet - may be unduly harsh in its description of HD's work with D, but the shortcomings in the local authority's treatment of her are apparent. Not merely was she insufficiently involved in the crucial stages in the decision-making process; D did not receive from the local authority the social work assistance and support that one would have hoped to see.
215. Thus matters when the final hearing began.
216. Mr Keehan, as we have seen, submits that nothing which took place during the final hearing did - indeed could - cure the previous deficiencies in the decision-making process.
217. Mr Tillyard and Mr Crowley disagree. Their submission, as put by Mr Tillyard, is that, looked at as a whole and assessed at the end of the hearing - as I agree it must be - the decision-making process has been fair and such as, overall, to afford D the requisite protection of her interests as required by articles 6 and 8. In particular, says Mr Tillyard:
- i) D has now had sight of all the relevant case records and the records of all the professionals' meetings.

- ii) She has had the opportunity to cross-examine both the professionals who spoke to Dr J at the meeting on 7 March 2002 - HD and the guardian - and also LH, the author of the lists of "positives" and "negatives".
 - iii) She has had the opportunity to cross-examine and put her case to Dr J, including, as it were, putting to him, "what if you had been told this × would your view have been different?"
218. In other words, says Mr Tillyard, the situation here is very different from that in *Mantovanelli* . True it is that Dr J's views even if not determinative are likely to have a preponderant influence on the court. But, says Mr Tillyard, D, in contrast to the litigants in *Mantovanelli* , has, albeit only at trial, had access to, and been able to cross-examine all the relevant witnesses on, the documentary and other material laid before Dr J and has been able to cross-examine not merely Dr J but also the witnesses on whom it might be said he relied in coming to his final conclusion. Moreover, as Mr Crowley points out, in contrast to what happened in *Mantovanelli* , it is not as if D has not in the past had substantial access to Dr J and thus had every opportunity prior to 7 March 2002 to put her case over to him. In that sense, he suggests, D was on an equal footing with the local authority and the guardian.
219. These are, I entirely accept, important and significant distinctions between the two cases, but the ultimate question remains the same: looked at overall, has the decision-making process, particularly as it relates to the formulation by Dr J of his final position, been fair?
220. Mr Tillyard and Mr Crowley say it has been. In this connection Mr Crowley makes an important point. Nothing that had happened down to the meeting of 7 March 2002, he says, could be said to have involved any unfairness so far as concerns Dr J's role in the decision-making process. And, says Mr Crowley, whatever happened at and in connection with that meeting it was not *that* which in the final analysis led Dr J to change his mind. In his evidence, he says, Dr J maintained that a correct account of D at the meeting on 7 March 2002 would *not* have changed his provisional decision to refuse a residential assessment of the mother, contrary to his initial decision. The negative events as reported to him merely heightened his concerns but did not bring about his change of mind.
221. This last point is crucial. It is therefore important to analyse closely Dr J's oral evidence in the witness box.
222. Dr J made it quite clear in his oral evidence that the "key" factor was D's acknowledgement of responsibility. He made the important general point that at the more serious end of the spectrum of abuse, and particularly where the abuse had resulted in a child's death, one needed some degree of acknowledgement if there was to be any prospect of a successful rehabilitation. In his experience, where there had been a successful rehabilitation following a death there had usually been both a partner who was supportive - and D, of course, has no such partner - and a level of acknowledgement greater than there had been in D's case. As I understood his evidence, if there was to be any realistic prospect of success Dr J would expect more

by way of acknowledgement than there had so far been from D. His appraisal was that there had been no movement by D in relation to M's death. In relation to the basic facts of what had happened to M, D had never moved beyond the admissions in the threshold document.

223. So far as concerned the meeting on 7 March 2002 Dr J was able to reconstruct his approach in detail and with what seemed to me convincing clarity. His account in the witness box accorded in all material respects with the accounts given in his reports dated 13 March 2002 and 11 April 2002. *Prior to the meeting taking place he had reached the conclusion that the assessment should not go ahead* . Although this represented, as he frankly admitted, a change of mind, *he was now very clear, he had made his mind up* - subject to this, of course, that if either HD or the guardian had anything positive and persuasive to report he would have to consider it carefully. He thought it unlikely they would.
224. Not surprisingly, Dr J was probed in some detail on this last point.
225. *If* there was a sea-change in relation to D's acknowledgement of responsibility, then he would certainly have to listen to that - that would be a very different position. However the simple fact was that there was no such change to report.
226. But what if there was change only in other areas, for example the change to which I have already referred in relation to the quality of D's contact with L in recent months? That was something which he would want to know about - it was, in his view, both "interesting" and a "surprise" to him - but, as Dr J made quite clear, and I unhesitatingly accept his evidence on this point, *it would not change the balance or make him reverse the view he had formed by the time of the meeting on 7 March 2002*.
227. And what if the account of D he had been given on 7 March 2002 had been the "true" and accurate account - the account he would have had if D had been able to attend the meeting and give her version of events - rather than the over-stated and in some very important respects significantly inaccurate account summarised in LH's list of "negatives"? Dr J's answer to this absolutely crucial question was quite clear, and again I have no hesitation in accepting it. Even if he had been given an absolutely accurate version of events *it would not have made any difference to his decision not to carry out the assessment* .
228. Now if one stands back and looks at the case in the round, and if in particular one remembers Dr J's analysis of the case both in December 2001 and in January 2002 (see in particular paragraphs [22]–[23] above), there is nothing at all surprising about this. If D was to progress beyond the three day in-patient assessment on her own to a two week residential assessment with L, there *had* to be a significant movement on D's part towards a greater acknowledgement of her responsibility for having harmed M. If there was then, as I have said, all well and good. But - and this is the key point - if there was not, then progress in other areas would not suffice to swing the balance.

229. In other words, the critical swing point, if Dr J was to be persuaded at the meeting on 7 March 2002 to reverse the decision to which he had gradually come since his reports of 14 and 24 January 2002, and persuaded to revert to the position as set out in those reports, was a demonstration that in relation to acknowledgement of responsibility D had in fact moved forward since he had last seen her in January 2002. Positive further progress in relation to acknowledgement of having caused M's death had to be demonstrated if he was to be justified in reverting to his earlier view. And the simple fact, in his view, was that there had been *no* progress in this respect.
230. I have no hesitation whatever in accepting Dr J's evidence which was given with complete frankness. The short point, and he did not seek in any way to shirk it, was that he had gradually come to the conclusion, mulling things over in his own mind and discussing the case with his team, that he had come to the wrong decision in January 2002. On reflection he had realised that there simply was not sufficient of an acknowledgement on D's part to justify moving forward to the next stage of the process. I do not find that particularly surprising (cf paragraph [30] above). But - and this is the vital point - that was a conclusion he had come to his own and before the meeting on 7 March 2002. It was not anything he was told on 7 March 2002 that made him change his mind. The determining factor was simply D's lack of acknowledgement of responsibility. It is therefore, with all respect to him, entirely beside the point for Mr Keehan to say that none of the matters raised by the guardian and HD justified Dr J's change of mind. I agree, but it is not Dr J's evidence that they did or could.
231. It is to be noted that from beginning to end Dr J has never moved on the fundamental point that unless there was appropriate acknowledge there could be no further assessment. His only change of view has ever been as to the extent to which (if at all) there has in fact been a sufficient acknowledgement.
232. The most skilled cross-examination by Mr Keehan - who has with great skill done everything that any advocate could have done for D - entirely failed to shake Dr J on this.
233. Mr Crowley helpfully identified a series of questions I should ask myself:
- i) Was the information given to Dr J on and after 7 March 2002 inaccurate or exaggerated?
 - ii) If so, what impact did it have on Dr J?
 - iii) Did it influence his decision?
 - iv) Did it impinge upon his independence?

234. I have already answered question (ii) at some length. The answers to the others can be stated very shortly. The answer to question (i) is yes, to both questions (iii) and (iv) no.
235. Now this is all very well, says Mr Keehan, but, he submits, what D has lost as a result of her exclusion from the meeting on 7 March 2002 is the opportunity, as it were, to put her own case to Dr J, the opportunity herself to demonstrate to him the progress she had made, the opportunity herself to persuade him to continue with the assessment. It is no good, he says, that D may have been given the opportunity of persuading *me* that she has made progress. For this purpose the crucial decision-maker - the person who has to evaluate whatever progress D may have made - is, submits Mr Keehan, the expert, Dr J, and not the judge. And D should have the opportunity to put her case to Dr J in a more friendly and supportive setting than a court-room. Moreover, says Mr Keehan, Dr J has been deprived of the opportunity to exercise his professional judgment in the light of and having regard to all the relevant material. Indeed, as he points out, Dr J gave his oral evidence before D had given hers.
236. I can agree with Mr Keehan to this extent. *If* there was anything to suggest that there had been - even at this very late stage - any sign of a change in D's position, any sign of a greater willingness on her part to acknowledge her responsibility for M's death, then it would, as it seems to me, have been for Dr J sitting in his consulting room, and not for a judge sitting in a court, to evaluate the significance of that change and, in particular, to decide whether that change was significant enough to justify a continuation of the assessment. But in my judgment one does not get to that point unless I can be satisfied - and the plain fact is that I cannot be and I am not - that there is indeed *some* sign of such a change. That is not just my view. It accords entirely with the considered opinion of Dr J, who said that unless the *court* found a greater degree of acknowledgement he would not want to go down the route he had contemplated in January 2002. And his own view, as we have seen, is that there had in fact been no such change.
237. Mr Keehan sought to justify D's failure in the witness box by saying that there was no point in her making any further acknowledgement at such a late stage. She was, he suggested, damned if she did not but equally damned if she did, for any acknowledgement now would inevitably be condemned as insincere. That, I am afraid, simply will not do. There is no reason why I cannot assess her sincerity or, if I think it appropriate, leave it to Dr J to evaluate what she is saying. She could have made a further acknowledgement. The sad fact is that she is either unable or unwilling to do so.
238. In my judgment Dr J was entirely justified in placing the emphasis he did on an enhanced acknowledgement of responsibility by D as the pre-requisite to any possible move towards rehabilitation. Dr J is very expert in this field and I accept his professional analysis without any hesitation. Research data which he summarised for the court shows clearly that, particularly where the abuse is very severe, rehabilitation is more likely to fail if there is lack of parental compliance and denial of problems and more likely to succeed if there is compliance, lack of denial, acceptance of the problem and acknowledgement of responsibility.

239. Mr Tillyard submitted that if I were to accept the evidence of Dr J - which I do - I would inevitably have to conclude (a) that there is no reasonable prospect of D assuming the care of L within a time scale that meets his needs and (b) that there should not be any further assessment of D. I agree. I agree further with Dr J's view that the local authority's plan to place L for adoption forthwith is in the child's best interests. In my judgment a further assessment is not in L's best interests; on the contrary, the delay which it would be likely to engender might well imperil his interests. Nor, bearing in mind the false hope that it would almost certainly create in D's mind, would a further assessment really be in her interests.
240. For all these reasons I am satisfied that, assessing matters overall as I must as at the end of the final hearing, the earlier unfairnesses in the decision-making process have been overcome. D has, overall, been involved in the decision-making process to a degree sufficient to provide her with the requisite protection of her interests. Despite the very serious shortcomings in the process as matters stood immediately before the hearing before me commenced I am satisfied that, overall, D has had the fair trial to which she is entitled under articles 6 and 8.
241. D has, albeit very late in the day, had full access to all the relevant documents. Here, in contrast to what happened in *Mantovanelli*, D was able to cross-examine, in court and before a judge at the final hearing of the matter, not merely the key expert, Dr J, but also each of the people - HD, LH and the guardian - whose information and views had informed the decision he took following the meeting on 7 March 2002. Insofar as the earlier breaches of D's rights under articles 6 and 8 may not in certain respects have been fully cured by the trial process I am satisfied that the deficiency is immaterial. For any such breaches do *not* go to what, I am satisfied, is at the end of the day the key issue, namely whether or not D has to a sufficient degree acknowledged her responsibility for M's death; they go, if at all, to matters which do not bear on that determinative point.
242. At the end of the day, the question I have to ask myself is whether, assessing matters as they stand at the end of the hearing before me, the decision-making process and the proceedings, considered as a whole and having regard to all the circumstances, were fair. In my judgment they were. Mr Keehan's challenge on this ground fails.
243. Before leaving this part of the case there is one final matter that I need to deal with. In the light of my conclusions in relation to Mr Keehan's fundamental submissions the point does not in fact arise for decision but I ought nonetheless to make some reference to it.
244. Had I, contrary to the decision to which I have in fact come, concluded that D's rights to a fair trial had been sufficiently impaired as *prima facie* to require an adjournment of the proceedings so as to enable her to be further assessed then, says Mr Keehan, her right to be assessed - a right protected by article 6 - would properly take priority over L's rights under article 8.
245. Implicit in this is the further submission that, in determining the question of whether or not there should be an adjournment for this purpose, L's rights are not paramount.

With that last point I agree. These are of course, within the meaning of section 1(2) of the 1989 Act, "proceedings in which [a] question with respect to the upbringing of a child arises", so in deciding whether or not to adjourn I would be required to "have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child". But the question that I would be having to "determine" - whether there should be an adjournment for an assessment - is not, within the meaning of section 1(1)(a), itself a "question with respect to × the upbringing of a child". So the 'no delay' principle operates, but the child's welfare is not for this purpose the court's paramount consideration.

246. In support of his more general submission Mr Keehan relied in this context also upon *W v United Kingdom*, in which, as he pointed out, referring to p 35 (para [20]), the parents whose complaint was ultimately upheld by the Court had been prejudiced by delay. In relation to this the Court at p 50 (para [65]) said:

Contrary to the Government's submission, the Court considers that in conducting its review in the context of Article 8 it may also have regard to the length of the local authority's decision-making process and of any related judicial proceedings. As the Commission has rightly pointed out, in cases of this kind there is always the danger that any procedural delay will result in the de facto determination of the issue submitted to the court before it has held its hearing. And an effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere effluxion of time."

247. Mr Crowley's riposte was to point out, correctly, that L too has rights protected not merely by article 8 but also by article 6 - including in particular the right guaranteed by article 6 to a hearing "within a reasonable time". He relied on an unreported extempore judgment which I gave on 22 March 2002 in a case called *Re H*. That was a case in which I was asked to remove a guardian in public law proceedings on the grounds that she had pre-judged the case and in consequence so lost the confidence of the father and grandmother as to compromise her standing both with the parties and with the court. The father and grandmother relied upon article 6, asserting that they could not have a fair trial unless a new guardian was appointed. The local authority and the guardian resisted the application, pointing out that, quite apart from anything else, the appointment of a new guardian would cause very substantial delay and, in consequence, damage to the children. They too relied upon article 6, asserting that the delay caused by the appointment of a new guardian would breach the children's rights to a hearing within a reasonable time.

248. Dealing with these submissions I said this (paras [43]–[45]):

[43] × this case, like so many cases, insofar as one chooses to analyse it in terms of the Convention and in terms of article 6 rights, is a case where the difficulty arises because, whereas [the father and grandmother] lay stress upon one aspect of their article 6 rights - that is to say, the aspect which guarantees

them a fair, unbiased and uncompromised guardian - [the guardian] and the local authority, not surprisingly, lay emphasis upon a different aspect of the children's and the other parties' article 6 rights: that is to say, the right to a speedy trial. It has to be borne in mind that not merely is the right to a speedy determination of proceedings of this sort a principle mandated in domestic law × by section 1(2) of the Children Act; it is also × one of the bundle of rights comprised in article 6. Moreover, it is a right or an aspect of the article 6 right which Strasbourg jurisprudence has long told us is of particular and pressing importance in the context of cases involving children."

249. This, I might add was a reference to cases such as *H v United Kingdom* (1987) 10 EHRR 95 at p 111 (para [85]) and *Johansen v Norway* (1996) 23 EHRR 33 at p 75 (para [88]) which call for "exceptional diligence" in this context. I continued:

In other words, in just the same way as section 1(2) of our domestic Act identifies delay as being something inherently contrary to the interests of children, so does well-established Strasbourg jurisprudence in relation to article 6.

[44] If one chooses to analyse the case in this way, this is in the final analysis a not untypical situation in which some litigants relying upon article 6 press upon the court the deleterious × consequences of the delay which article 6 guarantees the litigants should be protected from, whereas another group of litigants point to the need, as they would have it, to take a step which will necessarily cause delay. In that sense, the article 6 rights or, to be more precise, the arguments derived from the article 6 rights of the various litigants before me stand in stark and opposing conflict. How, in that situation, is the matter to be resolved?

[45] × I have to evaluate and weigh the conflicting rights and interests. Although this may be conventional language, it is not merely a balancing exercise. It is a process of judicial evaluation of the factors which stand in the one scale, a judicial evaluation of the factors which stand in the other scale and a final balancing of those various factors in accordance with Convention jurisprudence and having regard overall to Convention principles of proportionality."

250. I might add that I had previously had to consider analogous tensions between the conflicting article 6 rights of different litigants in *Clibbery v Allan* [2001] 2 FLR 819 at pp 871, 872, 875 (paras [139–140], [143]–[145], [152]) - a part of my judgment which, as I read their judgments, received the approbation of the Court of Appeal: see *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 2 WLR 1511 at p 1536H (para [82]). At para [140] I said:

× the conflict between apparently competing rights can only be resolved by reference to the overriding Convention principle of 'proportionality', assessed in the context of the Convention's commitment to the needs of democratic society."

251. I added at para [145]:

the ultimate resolution of the problem with which the court is faced is to be found by striking what in *Z v Finland* (1997) 25 EHRR 371 at p 407 (para [99]) was called 'a fair balance' and what in *Douglas, Zeta-Jones and Northern & Shell plc v Hello! Ltd* [2001] 1 FLR 982 at p 1018 (para [135]) Sedley LJ called 'the proper balance'."

252. I also referred at para [143] to the passages in Sedley LJ's judgment at p 1019 (paras [136] and [137]) in which he had said that the balance is to be struck:

... articulated by the principles of legality and proportionality which, as always, constitute the mechanism by which the court reaches its conclusion on countervailing or qualified rights ... tested by, among other things, the standard of what is necessary in a democratic society ... the outcome ... is determined principally by considerations of proportionality."

253. I agree with Mr Crowley's analysis. Had the point arisen I would have been faced not just with a conflict between D's article 6 rights and L's article 8 rights - a conflict in which, as I pointed out in paragraph [113] above, D's rights would in the final analysis have had to prevail over L's. I would have been faced with the need to resolve the countervailing, indeed in one sense the conflicting, article 6 rights of both D and L - and *that* conflict would not necessarily have had to be resolved in D's favour. Its resolution would, as it seems to me, have had to be in accordance with the principles as I sought to explain them in *Clibbery v Allan* and in *Re H* .

254. How I should have resolved that conflict had the point arisen for decision is a question that in my judgment it is neither appropriate nor profitable to consider. It might have been resolved in D's favour, but possibly it might not.

255. So much for Mr Keehan's main case.

256. Having thus failed on his primary submission how then does Mr Keehan seek to meet the local authority's case? Although he made no formal concessions I did not understand him to be putting forward on this footing any reasoned case against the making of a care order. Realistically he confined his submissions to two points:

i) First, he submitted that if, contrary to her primary case, I were to find that D is unable to care for L, he should be placed with her mother, S, and her partner,

P, alternatively that he should continue living with his foster carers, Mr and Mrs J.

ii) Secondly, he sought to resist the local authority's application for an order under section 34(4) of the Act terminating all direct contact between D and L.

257. If I may be permitted to say so Mr Keehan was, I think, wise to take this course. *If* it is once accepted that there is to be no further assessment of D as a possible carer for L - and that is the decision which I have made - the case for a care order is overwhelming, indeed to all intents and purposes irrefutable. I do not in the circumstances have to go into this aspect of the case in any detail. It is enough to look at what is said by the local authority in its evidence, by the independent social worker, Ms R of SMT, in her very detailed assessment dated 7 September 2001, by Dr J in his various reports and his oral evidence and by the guardian in her report dated 24 May 2002 - the whole of which material remains, in all its essentials, totally unscathed by anything that has happened during the hearing.

258. The sad realities which underlie this case were put very clearly, and in my judgment entirely accurately, by the guardian in her oral evidence. She said that although D has started the process she has a considerable way to go to become a safe parent; she has a long journey to make. The guardian recommended against any further assessment: the prospects of success were not such as to justify it and it was not likely to produce anything within L's timescale, given the long journey that D has to undertake.

259. Very sad - indeed deeply distressing - though it must be for D, it is in my judgment plain and obvious in the light of all this material that there must in principle be a care order. Mr Keehan did not contend to the contrary.

260. Moreover, a placement with S and P is simply not realistic. They had applied on 14 May 2002 for leave to apply for a residence order in respect of L. On 20 May 2002 I gave them leave to apply. But they were faced, of course, with the negative assessment that HD had prepared on 25 March 2002, an assessment endorsed by the guardian in her report dated 24 May 2002. Bravely in the circumstances they decided not to pursue their application. Their position was succinctly summarised in the position statement dated 23 May 2002 prepared by Mr Mark Allen on their behalf:

They have decided that if the substantial case proceeds to be heard on Monday 27th May 2002 they will not pursue their application for residence. They would, however, seek to continue to have contact with [L] if he remains in his present placement, although they accept that this would be infrequent. It is their view that maintaining a link with his natural family would be in [L's] interests and that this can be best achieved by occasional contact. They accept that [L] is being extremely well cared for in his present placement and are fully supportive of it if it is the Court's decision that he should not live with a family member."

261. In these circumstances there are only two remaining live issues. The first has to do with the position of the foster carers, Mr and Mrs J.
262. In the events which have happened, and given the conclusions I have come to thus far, both D and her mother, S, are at one in saying that L should remain with Mr and Mrs J. In that they are in fact joined by Mr and Mrs J themselves, who want to adopt L - a possibility which was indeed first canvassed with them by the local authority itself in about December 2001 (see paragraph 9.3 of the guardian's report dated 24 May 2002).
263. The local authority's final care plan dated 7 May 2002 was, as I have said, for adoption outside the birth family. Mr and Mrs J were quite plainly identified as possible adopters. Paragraph 2.3 of the care plan (paragraph 4.2 was to very much the same effect) read:
- The Social Worker, Family Placement Officer, Health Visitor and Foster Carers have observed that [L] is happy and contented in his present placement. His foster parents have expressed a wish to be considered as his adoptive parents and this is under consideration. It is likely that there will also be other suitable couples who will also be considered."
264. Thus the local authority's position on 7 May 2002. But within a fortnight - to be precise, on 21 May 2002 - HD filed another statement that seemed to indicate, though without saying so in as many words, that Mr and Mrs J were no longer being viewed by the local authority as possible adoptive parents.
265. This was a matter that understandably concerned the guardian. In a passage in paragraph 9.3 of her report dated 24 May 2002 which is too long to quote but which requires to be read in full the guardian was - justifiably in my judgment - critical of the local authority and of the way in which it had dealt with Mr and Mrs J.
266. Quite apart from anything else, given the history of their dealings with the local authority as summarised by the guardian, Mr and Mrs J would be entitled to feel that they have not been well treated by the local authority, indeed that they have been treated unfairly. If they do not, that is no thanks to the local authority but rather testimony to their own generosity of spirit and their concern for L. The fact is that, as Mr and Mrs J correctly put it, the local authority has 'moved the goal posts'. It did so, moreover, *after* Mr and Mrs J moved into a larger house as the local authority had indicated would be necessary if they were to adopt L. Indeed, the guardian reports that Mr and Mrs J have sought legal advice about the predicament they now find themselves in and have indicated that they are seriously considering challenging the local authority. Her view is that Mr and Mrs J may be in a position to challenge the local authority by virtue of section 31(1) of the Adoption Act 1976, that they satisfy section 13(2) and that they could themselves apply for an adoption order: see *Re C (A Minor) (Adoption)* [1994] 2 FLR 513.
267. Be that as it may, the guardian made her own views very clear in her report:

It would be a great shame if these foster parents are not formally considered as adopters for this child as [L] will benefit from remaining with the carers he has been with since birth. I would note that these are not foster parents who have tried to adopt by the back door, as it was the Local Authority who initiated the idea of keeping [L] located within their family."

268. She concluded:

I am perturbed that the Care Plan placed before the court does not now truly reflect the actual plan of the Local Authority. I am of the view that I cannot endorse the current Care Plan as being acceptable at this stage."

269. Precisely so. I am not surprised that the guardian felt it necessary to express such views.

270. In the position statement dated 25 May 2002 that Mr Crowley filed on her behalf the guardian made it clear that if the local authority was not minded voluntarily to address the issue she would consider inviting the court to make an order under section 38(6) of the 1989 Act directing an assessment of L with Mr and Mrs J so that the court would have before it such information as it needed before making a final care order.

271. The guardian's recommendation to the court was as follows:

I do not at his stage recommend the making of a full Care Order. I would recommend that the Local Authority formally consider the positive benefit of [L] remaining with his current carers."

272. At the start of the hearing the local authority's position, as set out in Mr Tillyard's position statement dated 26 May 2002, was that Mr and Mr J were not the local authority's "preferred choice".

273. Shortly after the hearing began before me, SN, the team leader of the local authority's family placement team, made a statement in which she said:

I do not consider Mr and Mrs [J] as suitable adoptive parents for [L] as it became evident to me though the supervision process, as early as December 2001, that these relatively new and inexperienced foster carers were very emotionally involved with [L]."

274. In her oral evidence, which I have to say was in some respects not very compelling, she was emphatic that she would resist any suggestion from the court that Mr and Mrs J should be assessed as potential adoptive parents.
275. Not the least worrying of the many worrying features of this case is the plain indication that the local authority's left hand either did not know or did not care about what its right hand was doing and thinking. SN's evidence - both written and oral - was put before me by the local authority and as part of its case. SN, as I understand it, had managerial responsibility for the local authority's planning in relation to adoption - although it emerged that she herself had had little if any contact with either Mr or Mrs J prior to the hearing! Given that SN's views appear to have been formed as long ago as December 2001, how could the local authority put forward its care plan on 7 May 2002 - a care plan suggesting a quite different assessment of Mr and Mrs J's possible suitability than that at which SN had apparently arrived? The answer, it would seem from SN's evidence, is that there was no effective communication between her and HD. She (SN) was not aware of the contents of paragraphs 2.3 and 4.2 of the care plan and had not spoken to HD about them - although she accepted in cross-examination that they should have done. According to SN, whose evidence on this point I have no reason to doubt, it was only a few weeks before the hearing that she first learned from HD of her (HD's) discussions with Mr and Mrs J.
276. Understandably, and with considerable justification, Mr Keehan was scathing of the local authority. Correctly, as it seems to me, he submitted that the discrepancy between the written care plan as presented to the court and the plan as presented in oral evidence was deeply troubling and that the divergence between HD and SN must give the court grave cause for concern. He went too far, however, in suggesting that it must raise doubts about the bona fides of the local authority and of any further plan put before the court. I am satisfied that the local authority - indeed that all concerned - have from beginning to end acted throughout in complete good faith and from the best of motives. What is more questionable is the competence with which the local authority has handled what, to be fair to it, and to put the case into its true perspective, was, I do not doubt, an exceptionally difficult case.
277. The point is really elementary but obviously bears repeating. L is not in the care of the social services department of the local authority, let alone of that part of the social services department in which HD is based. The care plan is not the care plan of the social services department or of that part of it that employs HD. L is in the care of the local authority. The care plan is - or ought to be - the care plan of the local authority. It is depressing and worrying that the local authority should be putting before the court at the beginning of the hearing a care plan which it is obvious had never been properly discussed with, and which in a most important respect was to all intents and purposes repudiated by, one of the local authority's own 'key players'. The sad reality is that this appears to have been a local authority which not merely failed adequately to 'work together with' D; it is a local authority which in at least one vital respect seems to have been unable to 'work together with' itself.
278. It was not until the final morning of the hearing, as Mr Keehan was about to start his closing submissions, that the local authority's amended care plan dated 31 May 2002

and representing its final position was placed before the court. Paragraph 2.3 now reads:

The Social Worker, Family Placement Officer, Health Visitor and Foster Carers have observed that [L] is happy and contented in his present placement. His foster parents have expressed a wish to be considered as his adoptive parents and the Local Authority agree to undertake an assessment of [L's] current carers. The Local Authority will endeavour to complete this assessment within a period of three months."

279. Paragraph 4.2 of the amended care plan reads as follows:

There will be a delay of 3 months whilst an assessment of the current carers is carried out. There will be no change of placement for [L] whilst this assessment is undertaken. It would be proposed that if a positive recommendation cannot be made for [L's] long term future with [Mr and Mrs J] then a suitable alternative couple would also be presented to the panel in order that there is no further delay. If a positive recommendation can be made matching [L] with [Mr and Mrs J], they would be the only couple presented to the panel."

280. On this basis the guardian and the local authority were, by the end of the hearing, in agreement. The guardian made it clear that she endorsed the amended care plan only on the basis that (a) Mr and Mrs J will be assessed as potential adopters, (b) if Mr and Mrs J are approved as adopters they will be placed before the panel on their own and (c) a specific timescale has been identified. On this basis she supported the making of a final care order.

281. Essentially for the reasons given by the guardian, whose opinion on this aspect of the matter I entirely share, I agree that the amended care plan can and should be endorsed, but only on the basis identified by the guardian.

282. I think I ought to add this. I had only a comparatively brief opportunity to see and hear Mrs J giving evidence in the witness box but she impressed me very favourably indeed, coming over as a warm, sensible, caring and down to earth woman devoted to L. I hope that her evident qualities are considered very carefully indeed in the course of her assessment as a potential adopter for L.

283. The one other remaining issue relates to contact.

284. The guardian in paragraph 11.3 of her report made these important observations:

Having considered all the issues in this case, and noted mother's stance I would consider that indirect contact for [L] with his birth mother would be tenable in the future. I also consider that I would be supportive of the grandmother having

irregular direct and indirect contact with [L], for [L's] identity needs. Such contact would also reassure his mother that [L] is developing well and reaching his full potential in a happy settled environment. I am of the view that if the court does endorse the plan to place [L] for adoption, neither mother nor grandmother would wish to jeopardise the permanency of his future family life."

285. In her oral evidence the guardian said that the issue of direct contact should be reviewed at the time of the freeing or adoption hearing.
286. In paragraph 2.5 of the amended care plan the local authority sets out its plans for future contact between L, D and S. Direct contact will be reduced and then cease following a farewell visit arranged once an adoptive placement has been approved. Following adoption there will, subject to the views of the prospective adopters, be some limited indirect contact. The local authority's view as set out in the amended care plan, is that direct contact between L and S once he is placed for adoption would not be in L's interests. But the amended care plan records in paragraph 3.1 the local authority's awareness of the guardian's view that limited direct contact with S may be in L's interests.
287. In his closing submissions Mr Tillyard made it clear that the local authority was not pursuing its section 34(4) application in front of me but, on the contrary, was inviting me to adjourn it generally, to be restored once an adoptive family had been identified and a freeing or adoption application had been filed.
288. I agree that this is the right course to follow. The precise details of D's and S's continuing indirect contact with L, and the question of whether S should continue to have some, albeit limited, direct contact with L, are matters to be determined - and determined, as it seems to me, by the court, and having regard to the views of the prospective adopters - once L's adoptive parents have been identified.
289. The result is that, with the sole exception of that part of paragraph 2.5 of the amended care plan which relates to the issue of S's continuing direct contact with L following his placement for adoption, I approve the amended care plan dated 31 May 2002, I dismiss D's application under section 38(6) and I make a care order in relation to L. The local authority's application under section 34(4) is adjourned.
290. Before parting with this case one final comment is, I think, in order. This is not the first case, and I doubt it will be the last, to reveal the extent to which there are still on occasions more or less serious shortcomings in the decision-making processes in public law cases, shortcomings which on occasions deny parents the openness and fairness in procedure which articles 6 and 8 guarantee them. There are painful lessons to be learned by the various professions from Holman J's judgment in *Re M*, from Charles J's judgment in *Re R* and, I dare to think, from my own judgment in this case.