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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION  
(OFFICE OF CARE AND PROTECTION)

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IN THE MATTER OF THE CHILDREN (NI) ORDER 1995  
UPON APPEAL FROM THE FAMILY CARE CENTRE IN BELFAST

RE: A and B (No. 2)

(CHILDREN: INJURY: PROOF: SUSPICION: SPECULATION)

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O'HARA J

Introduction

[1] On 23 September 2015 I gave judgment in this appeal by the mother from a decision of the Family Care Centre that injuries caused to one of her children were non-accidental. As a result of my decision the children were returned to their mother's care. In the course of my judgment I made observations about the nature and extent of the evidence which can properly be given by medical experts in these difficult non-accidental injury cases. I also expressed at paragraph 25 a concern about the way in which the term "non-accidental injury" can be used too loosely.

[2] The Trust which was the applicant in the original proceedings subsequently applied to me to state a case for the opinion of the Court of Appeal. The question which the Trust wants the Court of Appeal to rule upon is as follows:

"Was the learned Family Division judge correct in law in finding that in cases involving injuries to children, medical witnesses should not be asked to express an

opinion as to whether the injuries are accidental or otherwise?"

[3] At a hearing convened on 13 November 2015 to discuss this issue, counsel for the Trust confirmed that the Trust was not applying to reverse or challenge the substance of the decision which I made, ie that the children should be returned to their mother. Nor was it challenging my decision that it had not been proved that the injuries were non-accidental. Rather the Trust is concerned with the first of the following points which I set out at paragraph 24 of the decision:

"For future reference I emphasise the following points:

- In cases involving injuries to children medical witnesses should not be asked to express an opinion as to whether the injuries are accidental or otherwise.
- The burden of proof always lies with the Trust which alleges that injuries are non-accidental.
- A conclusion that injuries are non-accidental may be comparatively easy to reach in cases where the injuries are severe or of a type which makes an innocent explanation inherently implausible.
- In other cases a conclusion as to whether injuries are accidental or otherwise will involve careful consideration of a range of factors such as those which I have identified in the course of this judgment and which are likely to go far beyond medical evidence about the injuries.
- The fact that a mother seeks help from her GP because she is having difficulty with a 3 year old boy is as likely to point away from non-accidental injury as it is to point towards it.
- It is not an unacceptable "fudge" or avoidance of its duty for a court to conclude that while injuries are suspicious they have not been proved to be non-accidental. It is simply not possible to identify with the required degree of confidence the causes of injury to children in every case."

[4] Counsel for the Trust submitted that I should state a case as requested or at least clarify what I stated at the start of paragraph [24]. Counsel for the mother agreed that clarification of this point would be of assistance.

[5] I do not accept that it is necessary to state a case. What I said at the start of paragraph [24] can be expressed in a number of ways. I will take this opportunity to expand on what I have already said but not without expressing some surprise that in the context of the full judgment there is any need to do so – see in particular the passage cited at paragraph 19 from Baker J.

[6] Medical witnesses are expert witnesses when called upon to give evidence within the area of their expertise. They can therefore use their skill, qualifications, training and experience to express an opinion on any issues which are properly within the area of their expertise. In this case that meant that Dr Primrose and Dr Evans could properly give expert opinions as to what the injuries were and whether the injuries could be considered to be accidental or otherwise. However those opinions could only be expressed by reference to the clinical evidence and any explanation offered as to how the injuries were or might have been sustained. Ultimately it is a matter for the court to determine whether injuries are accidental or otherwise, taking account of all relevant factors including, but not limited to, the expert medical evidence.

[7] In “A Handbook for Expert Witnesses in Children Act Cases” Wall LJ outlined the respective roles of experts and judges in these terms:

“5.1 It will help you, when writing a report and giving evidence in family proceedings, if you bear in mind throughout the respective functions of expert and judge.

5.2 You form an assessment and express your opinion within the particular area of your expertise. Judges decide particular issues in individual cases on all the evidence available to the court.

5.3 Your function is to advise the judge. You do not decide the case or any issue in the case. This is of particular relevance when the credibility of an adult witness is in question. Whether or not an adult witness is telling the truth is a matter for the judge, not for you.

5.4 The corollary to this is that it is not for the judge to become involved in medical controversy except in the extremely rare case where such a controversy is itself an issue in the case and a judicial assessment of it becomes necessary for the proper resolution of the proceedings.”

Lord Justice Wall continued in the following terms:

“7.1 ... your function is to give your advice to the court on any issue properly within the area of your expertise. You do not decide the case: that is the function of the judge.

7.2 By virtue of Section 3(1) of the Civil Evidence Act 1972, your opinion on any relevant matter on which you are qualified to give expert evidence is admissible in evidence.

7.3 Accordingly while it is for the judge to decide, for example, whether a child has been sexually abused, or is to be believed when recounting allegations of sexual abuse, you are entitled, if you have the relevant expertise, to tell the judge that in your opinion the child has been sexually abused or that the child is credible when he or she relates allegations of abuse.

7.4 You should, however, be very cautious when advising a judge that in your opinion a particular event occurred. You should do this only if you feel you have all the relevant information and that the expression of such an opinion is both truly within the area of your expertise and a necessary part of your decision-making process. The judge will have to decide the question on all the evidence in the case, including the oral evidence given in the witness box. You will not have access to all that information and the expression of a categorical opinion which may be invalidated by material not within your knowledge will - at the very least - substantially devalue your evidence ....”

For these purposes there is no relevant distinction between the law of Northern Ireland and the law of England and Wales.

[8] As I explained at paragraph [13] of the substantive judgment Dr Primrose fell into error in the present case by not confining her opinion to clinical issues. Specifically she referred to a “collection of things” which for her tipped the balance towards the injuries being non-accidental. Those “things” were not clinical and should not have formed part of her thinking, her conclusion or her evidence. They were, however, directly relevant to the social workers whose responsibility it was to form a view of the case based on all the evidence, clinical and non-clinical, in order to determine whether there were reasonable grounds for believing that the

circumstances were such that the children had suffered or were likely to suffer significant harm in accordance with Article 50(2) and 57(2) of the 1995 Order. The view they took would ultimately be for the court to rule upon.

[9] Having expanded on my reasoning, I confirm that I decline to state a case for the opinion of the Court of Appeal but I take this opportunity to add to my substantive judgment by expressing the first bullet point in paragraph [24] in the following amended terms:

“In cases involving injuries to children medical witnesses should not be asked to express an opinion as to whether the injuries are accidental or otherwise **other than in clinical terms.**”