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Judgment: approved by the Court for handing down | *Delivered:* **30.06.2011**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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OFFICE OF CARE AND PROTECTION

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IN THE MATTER OF
THE CHILDREN (NORTHERN IRELAND) ORDER 1995

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10/040183

Between:

NORTHERN HEALTH AND SOCIAL CARE TRUST

Applicant;

-and-

CM & CL

Respondents.

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WEIR J

Anonymity

[1] This judgment has been anonymised to protect the identity of the child concerned. Nothing may be published of or concerning the judgment that could directly or indirectly identify the child or its family.

The nature of the proceedings

[2] In this case it is agreed by the medical experts and the parties that the child concerned ("A") suffered significant non accidental harm by the deliberate administration of an excess of salt. The parties do not, however, agree as to who caused the harm, the first and second respondents each

blaming the other and exculpating themselves. The purpose of the hearing to which this judgment relates was to seek if possible to identify the perpetrator.

[3] A was born on 25 February 2008 and on 28 September 2008 suffered a severe hypoxic brain injury due to a near-drowning that left her severely and permanently disabled. She remained in hospital until December 2008 when she was returned to the care of the respondents, her parents, who at that time lived together as a couple. The couple cared for A during the succeeding months but separated in June 2009 following the mother's involvement with another man. In July of that year the mother took an overdose as a result of which A went to live with her father and his parents for a period. Over the months that followed a shared care arrangement was arrived at whereby the mother looked after A for much of the week while the father was working and he brought the child to his own home for weekends. The arrangement seems to have worked reasonably well although there appears to have been some bickering between the parents about relatively minor matters and the father seems to have had a generalised feeling of dissatisfaction with the standard of care being provided for A by the mother. In the month of November 2009 the father began privately to keep a record in a diary of some seemingly rather trivial matters which he said caused him concern about the mother's parenting. I shall return to this document later. On 23 January 2010 A was due to be looked after by her father but the latter asked the mother whether she would be willing to keep A so that he could attend a concert for which he had tickets. She declined to assist him as did his father with the result that the father was obliged to remain at home to look after A and as a result was unable to go to the concert, an outcome which he agrees caused him to be annoyed both with the mother and his own father.

[4] On 26 January 2010 A was in the care of her mother at the mother's home. By reason of her prior injuries A had to be fed by way of a naso-gastric tube into her stomach for liquids and medicines and by spoon feeding for soft foods which were sometimes mixed with proprietary supplements. One such supplement with the trade name "Duocal" has a relevance to the facts of this case. On that day the mother arose at about 7.30 or 8.00 am when she prepared A's medicine and boiled some water for use during that day which she set aside to cool in a container on the kitchen work top. She used water boiled on the previous day to give A her medicine and breakfast. No ill effects were observed. During the course of the morning the mother took A to physiotherapy at the Child Development Clinic where the staff were pleased with her progress and on the way home the mother, though not a Catholic, called at the Catholic church where she lit a candle and then continued home with A. Between 12.30 pm and 12.45 pm the mother used the water which had been boiled and set aside that morning to flush A's naso-gastric tube and then give her a milk feed. A was a little sick after this but apparently this was not unusual.

[5] It had been arranged that a social worker would call at the mother's home that day to speak to the parents and for that reason the father came to the house sometime before 1.00 pm. The father was displeased to find A wearing soiled clothes and therefore not, in his opinion, properly presented for the visit of a social worker and it seems that some words were exchanged with the mother concerning this. The social worker then arrived and had the meeting during which forms were completed in respect of certain benefits to which A was entitled and she appears to have left again some time either a little before or a little after 2.00 pm and the father left about 5 or 10 minutes after that. It is not possible to be precise about these timings but it seems tolerably clear from the various estimates that the father left at the latest a little before 2.30 pm leaving the mother on her own in the house with A.

[6] At this point I record an important factual dispute between the parents as to whether or not the father was at any time left downstairs on his own during that lunchtime visit. The mother claimed in the course of her evidence that after the social worker left but while the father was still downstairs with A she went upstairs to the toilet for somewhere between 2 and 4 minutes. The father, on the other hand, denied that he was at any time left downstairs alone. This assertion by the mother (which is of crucial importance in the context of opportunity and timeframe in this case) was not mentioned in her first statement for the court nor in her interview with the police and it was not until 9 December 2010 that she first mentioned it. The importance of this toilet visit, if it occurred, is that it presented the father with his only chance to adulterate with salt the Duocal and/or the container of boiled water in the kitchen apart from the possibility, to which I will later return, that he made his way clandestinely to the mother's home during the morning while she was out with A and then carried out one or both of those acts. It is therefore an issue of fundamental importance to the fact finding exercise.

[7] After everyone else had left the mother says that she took A upstairs and put her to bed at about 3.20 pm. A neighbour's young daughter whom the mother minded when she came home from school arrived at about 3.30 or 3.40 pm and began her homework at the kitchen table and shortly thereafter the mother went upstairs to have a quick bath. The mother got A's medicines ready and gave them to her while A was still sleeping, beginning at about 4.00 pm. Three medicines were given at that time with a flush of the cooled water of about 5 millilitres ("mls") between each and a final flush of about 10 mls. This meant that she would have had a total of approximately 30 mls of water in the course of administering her medicines. At about 5.00 pm A woke and was out of sorts. The mother assumed that she was hungry and brought her downstairs, put her in her chair and started to prepare her dinner which was a small jar of "Cow and Gate" baby food which was heated in a microwave in a bowl and had added to it five scoops of the Duocal. She had had Duocal at breakfast on that day, another five scoops, but none at lunchtime. A was reluctant to take the food and toyed with it, spitting most of it out. It was by

then about 5.30 pm and the neighbour whose child was being minded arrived at that time. At that point the mother had given up trying to persuade A to eat and had gone into the kitchen to prepare a meal for the neighbour, herself and the neighbour's child.

[8] While the mother and the neighbour were together in the kitchen seeing to the meal the neighbour's child, who had been in the sitting room with A, came into the kitchen to say that A had been sick. When the mother went in she saw that A was indeed quite sick and she lifted her out of the chair, comforted her and got her changed. After 15 minutes A was retching again but as if there was nothing for her to bring up. A then began to get quite pale and because of the amount of sickness the mother phoned the hospital at about 6.30 pm. She spoke to a member of the nursing staff who told her to keep A under observation and that if she was still ill at around 9.00 pm to bring her up to the hospital. Before phoning the hospital the mother had phoned the father and his initial reaction was simply to tell the mother to get in touch with the hospital. About 20 minutes later the mother on the advice of the neighbour decided to phone the hospital again because A was getting worse and after that the father arrived and he in turn rang the hospital and phoned for his father to come and bring them to the hospital. They drove there and arrived within 5 to 10 minutes and A was admitted directly to the ward. The father went to his own home to bring the child's prescribed medicines and other necessaries and he slept at the hospital with the child that night. The following morning the mother returned to the hospital bringing some of A's toys, some milk and also her Duocal. At that point A was ill and in a private room and the Duocal and other items were placed upon a work surface in that room. At the request of the hospital the mother on the next day brought up the remains of the food which A had been eating before she became ill for examination by the hospital authorities.

[9] By this point the hospital authorities, having conducted tests, had become suspicious of the possibility that the child had ingested an excess of salt. At some point A became well enough to move back to the main ward and attempts were made to resume her spoon feeding. At this point an issue arose about whether or not the Duocal that the mother had brought in was or was not salty. According to the mother she had added it to spoon feeds that she was giving at the hospital but the child was reluctant to take them leading to the mother tasting the Duocal and forming the view that it was unusually salty. She brought this first to the attention of her grandmother and the matter was then mentioned to a nurse. The nurse was uncertain as to what Duocal should taste like but that particular tin of Duocal was removed and substituted by a tin provided by the hospital. Meanwhile, on 5 February 2010 the father had provided to a social worker the diary of matters with which he had been dissatisfied over the previous months and on 8 February the police searched the mother's home but appear to have found nothing of significance. It appears that for some time thereafter the relationship between the mother

and father repaired, or appeared to repair, to a point at which they were again having sexual relations. On 23 February 2010 A went to live with the father's parents and in March 2010 when the Trust initiated proceedings the parents were still in their renewed sexual relationship and went to court together. At that time the father had moved from his parents' home and was living temporarily with a cousin. In June 2010 it was agreed that the father could return to live with his parents and at that point in time the relationship between the parents seems again to have foundered.

[10] The police then pursued an investigation into the possible source of any salt poisoning and their attention focused initially upon the tin of Duocal which had been passed to them by the hospital authorities. On 12 March 2010 the suspect tin was submitted to the Northern Ireland Forensic Science Laboratory and for a period of 6 ½ months it languished there due to the incompetence of the Laboratory in putting it in the wrong place, appreciating that it required to be tested and submitting it to the correct person for testing and the parallel failure of the police to adequately follow up the whereabouts of the sample and the outcome of any testing. There appear to have been no procedures and certainly no adequate procedures in place either on the part of the Forensic Science Laboratory or of the police to follow up the progress of this analysis and to obtain a report. As a result the progress of this important investigation and of these proceedings was delayed for no good reason during a period of approximately 6 months. The outcome of the testing when it was finally performed showed that there had in fact been salt added to the Duocal and comparison of the tested sample with a control sample obtained from the manufacturers of the product and taken from the same manufactured batch showed that 15.4 grammes of salt to 100 grammes of the product were present which ought not to have been there.

The medical evidence

[11] There was broad agreement between the medical witnesses, Dr Coulthard, Dr Bochenhaur and Dr Livingstone. The significant points may be summarised as follows:

1. It was agreed that A received an overdose of salt for which there was no natural explanation.

2. The amount of salt administered to the child amounted to between 1 and 2 teaspoons or 5 to 10 grammes.

3. The contaminated tin of Duocal contained salt in the proportion of 15 ½ grammes to 100 grammes of the total powder which meant that to administer the amount of salt that A received it would have been

necessary to feed at least 50 grammes of the contaminated Duocal to A.

4. The correct total daily quantity of Duocal was 6 grammes but of course there was nothing to prevent someone from putting in additional scoops of the adulterated Duocal.

5. Duocal is a highly soluble powder and in its proper state has only trace elements of salt.

6. The tin that was brought to hospital was a 400 gram tin which when examined at the Forensic Laboratory still contained 346 grammes including its added salt.

7. As to the timing of the ingestion of the salt, a child with healthy kidneys (as A had) can excrete a normal daily dose of salt within one hour. Ingested salt enters the bloodstream very quickly and the plasma concentration therefore also starts to rise very quickly. In the opinion of the experts four hours was an "absolute outside limit" and two hours was felt to be much more likely for the onset of symptoms following ingestion.

8. It was considered that after the ingestion of a bolus of salt the child would be likely to develop symptoms within half an hour and while it might conceivably be up to four hours it was likely to be much sooner.

9. The experts considered that administration by way of the gastric tube was the most likely means of introducing the salt as it bypasses the child's taste mechanism and delivers the salt straight into the stomach.

10. If salt were added to water the water would be cloudy until the salt had dissolved which would take a matter of minutes at most whereupon the water would be crystal clear.

11. The amount of contaminated Duocal missing from its tin, if that were the source of the poisoning, would not be inconsistent with the findings because 35 to 61 grammes of the contaminated mixture would provide the calculated amount of salt administered to the child.

It would of course have had to be administered in one tranche.

12. If the recommended number of scoops of the contaminated Duocal had in fact been added in the morning and the evening feeds that would not have been sufficient to create the level of salt overload found at the hospital.

The evidence of the parents

[12] The mother gave an account in considerable detail of the events of the day in question. She had no knowledge of the means whereby A had received the excess salt and denied having administered it herself. The only possibilities that she could advance were that the father had used his key to the house while she was out in the morning to gain entrance and adulterate the boiled water subsequently used by her and/or the Duocal. Alternatively, he might have taken an opportunity to do so during the few minutes that she says she left him alone at lunchtime while she was upstairs at the toilet. The father gave evidence that on the morning in question he was at work in the family business where he was the sole employee based at the premises and that while he did agree that he did have a key to the mother's home and had used it without notice on one previous occasion to reclaim a television which was his property, he had not gone to her home on that morning. In support of this the father pointed out that his place of work was 3 or 4 miles distant from the mother's home, that he did not drive and had no means of getting there unless transported by one of his parents and that he was the sole employee in the premises of the family business and that his absence from those premises would have left the business unattended and would certainly have been noticed. In this he was supported by the paternal grandfather who gave evidence as to the arrangements in the business whereby the father was obliged to be present at the business at all times in order to answer telephone calls, deal with customers and receive deliveries and there was no question of his being able to turn on the answering machine during business hours in order to absent himself for the period needed to make his way to the mother's home. In relation to the other opportunity which he was alleged to have been afforded after the departure of the social worker from the lunch time visit, the father denied that he had ever been left on his own in the period up until his departure and said that at no time had the mother left him and gone to the toilet as she claimed. After he had left the mother's home to return to work he had not been back in the mother's home until summoned there by her following A's development of symptoms and her consequent telephone call to him.

Agreement of the parties in relation to others present in the home that day

[13] All parties agreed that the neighbour, her daughter and the social worker can properly be excluded from any pool of possible perpetrators which means that the only persons who may either separately or together have administered the excessive salt dose to A are the parents and that too is agreed by all parties.

The applicable law

[14] Helpful guidance on the question that arises for decision is to be found in the judgment of the Supreme Court in S-B children [2009] UKSC 17. The judgment of the court was given by Lady Hale who describes between paragraphs 34 and 44 the correct approach to be taken by a court in seeking to identify the perpetrator or, where the court is unable to do so, in identifying the pool of possible perpetrators. At paragraph 41 she refers to the case of North Yorkshire County Council v. SA [2003] 2 FLR 849 in which Dame Elizabeth Butler-Sloss P at paragraph 26 said:

> ". . . it seems to me that the two most likely outcomes in "uncertain perpetrator" cases are as follows. The first is that there is sufficient evidence for the court positively to identify the perpetrator or perpetrators. Secondly, if there is not sufficient evidence to make such a finding, the court has to apply the test set out by Lord Nicholls of Birkenhead as to whether there is *a real possibility or likelihood* that one or more of a number of people with access to the child might have caused the injury to the child. For this purpose real possibility and likelihood can be treated as the same test". (emphasis supplied)

[15] At paragraph 43 of the Supreme Court judgment Lady Hale refers with approval to this approach:

> "If the evidence is not such as to establish responsibility on the balance of probabilities it should nevertheless be such as to establish whether there is a real possibility that a particular person was involved."

I admit to being somewhat puzzled by the formulation of Dame Butler-Sloss in which she apparently equates "likelihood" and "real possibility". The Shorter Oxford English Dictionary defines likelihood, inter alia, as meaning "in all probability, very probably". To my mind that is a much higher level than that of "real possibility" and I am therefore reassured that in Lady Hale's

formulation she refers merely to "a real possibility" without adverting to what Dame Butler Sloss says about that concept being regarded as the same as "likelihood". I therefore propose to reach my conclusion in relation to this matter on the basis of the formulation of Lady Hale, namely, whether there is a real possibility that either the father or the mother in this case administered the excessive salt to A?

Consideration

[16] Both parents have, unsurprisingly, denied that they were responsible for this act. Plainly, by reason of the previously noted agreement of all parties including the parents that –

1. an excess of salt was administered to A; and

2. that the only possible sources of that administration were the father or mother or the father and mother acting jointly,

it seems a logical necessity that one or other or both of the parents must have given an untruthful account concerning their involvement.

[17] I do not consider it to be a real possibility that the mother and father acted in concert in administering the excess salt. The relationship between the parents at the time in question was so fractured and the father in particular was so hostile to the mother in relation to his perception of the quality of her care of A and indeed so intent upon undermining her position as a satisfactory carer of the child by keeping his diary of inconsequential complaints about the mother's care that I am entirely satisfied that at the date in question there was no possibility that they could have jointly agreed to poison A with salt. Turning therefore to consider each parent separately, I deal firstly with the father. Undoubtedly, as Miss Walsh's carefully structured and highly effective cross examination demonstrated, he was at the time and remains afflicted by a significant animus against the mother, probably derived from a feeling of anger due to her having formed a relationship with another man in the middle of 2009 that had led to their separation as a couple. Certainly from that point and very possibly beforehand, he became hyper-critical of the care afforded to A by the mother, picking arguments over minor matters and generally undermining the mother's confidence in her ability to care for A whose severe handicap rendered her day to day care both demanding and tiring. The father made no allowance for the fact that he had the assistance of his parents in looking after A at those times when the child was with him and adopted an unforgiving and overly judgmental attitude to the mother. Indeed, as the parents agreed in their evidence, even on the day when the salt poisoning occurred the father had

picked a row about a trivial matter immediately before the arrival of the social worker for their lunchtime appointment. In short, the father was shown to be a person invincibly convinced of his own rectitude on the one hand and of the inadequacy of the mother on the other. I conclude that if the father could have found any opportunity to paint the mother in a poor light in relation to her care of the child he would have been glad to take it. Indeed, this is evidenced by the fact that, when the question of sodium overload was mentioned by the hospital authorities, he was quick to hand over to the social worker on 5 January 2010 the diary of inconsequential complaints which he had been maintaining in relation to his perception of shortcomings of the mother's care of A. I did not believe his explanation that he had been advised to keep this diary by a therapist as part of counselling that he had been receiving. On the contrary, in my view he was building a dossier of complaints which he believed he might be able to use at some time in the future to the disadvantage of the mother. In short, his attitude to the mother in a situation when he and she ought to have been pulling together in a united fashion to secure the best care and treatment of their daughter was most unsympathetic and self righteous.

[18] However, I remind myself that the test is whether there is a "real possibility" that the father was involved in the salt poisoning? I have already said that I do not consider that there is any question that he colluded with the mother in its administration. Following upon what I have said in the preceding paragraph it may well be that he would have welcomed an opportunity to create a situation for which the mother would receive the blame with the result that he would be entrusted with the sole care of A for which I am satisfied he believed, rightly or wrongly, that he was best qualified. However, inclination must be coupled with opportunity and it is therefore necessary to examine what opportunity the father would have had to adulterate the boiled water which was used by the mother on the day in question. I restrict my consideration to the boiled water because, if the mother's evidence about the amount of Duocal that she fed on that day is correct, the extent to which her Duocal was found to be adulterated would not have been sufficient to give A the amount of salt that constituted the overdose. It was agreed by the mother that the father did not feed anything to A on the day in question and therefore if he was responsible for the salt overload it must have been because he gained access to the boiled water and put salt into it and that water was subsequently used by the mother, probably at the 4.00 pm administration of the medicines accompanied by water flushes.

[19] What opportunity did the father have to gain access to the boiled water on the day in question? Two possibilities were advanced. The first, that he had left his business premises unattended and made his way on foot (or possibly by taxi) to the mother's home during her absence at the clinic, does not seem to me to be a real possibility. The paternal grandfather, whose evidence on this issue I entirely accept, gave evidence of the working system within the family business and I am quite satisfied that the father could not have absented

himself from the business where he was the sole person "holding the fort" for the purpose of travelling 3 or 4 miles to and the same from the mother's home. The other possibility is that he adulterated the water while the mother was allegedly at the bathroom following the departure of the social worker and before the father in turn took his leave. Again, I do not consider that this is a real possibility. I am not satisfied that the mother did in fact go to the toilet leaving the father on his own. Rather I consider that that is an afterthought devised by her, very late in the day, to deal with her appreciation by that stage that she had somehow to contrive a window of opportunity for the father to have had unobserved access to the container of boiled water so as to be able to adulterate it with salt. I did not believe her evidence in that regard.

[20] It follows from my conclusions in relation to the absence of joint involvement and the involvement by the father acting on his own that, as a matter of logic, I must conclude that on the balance of probabilities the excess of salt was administered to A by the mother and I so find. Having regard to the medical opinions of Drs Coulthard and Bochenhaur that they would have expected the symptoms of the salt overdose to manifest themselves in less than the outside estimate of 4 hours, it seems to me likely that the salt was given to A during the process of the administration of her medicines at around 4.00 pm. The salt may have been administered by adulterating the boiled water or alternatively by a solution made up from the mother's tin of Duocal dissolved in water assuming, which is not clear, that it had already been adulterated by that stage. Whichever the mechanism, I conclude that the mother alone was responsible for the deliberate administration of the salt overload to A.