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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

IN THE MATTER OF THE CHILDREN (NI) ORDER 1995

UPON APPEAL FROM THE FAMILY CARE CENTRE IN BELFAST

RE A and B (CHILDREN: INJURY: PROOF: SUSPICION: SPECULATION)

O'HARA J

Introduction

[1] This case involves a boy who is now 4 years old and his sister who is 2 years old. Approximately one year ago they were removed from the care of their mother because of a suspicion that the sister (A) had suffered non-accidental injuries at the hands of either her mother or maternal grandmother. In May 2015 His Honour Judge Miller QC in the Family Care Centre held that he was satisfied that the injuries to A were non-accidental and that A and her elder brother B should remain removed from the care of their mother. The mother and grandmother appealed against that decision. I heard the appeal on 28 August 2015 and gave an oral judgment on 4 September that the children should be returned home to their mother. I was not satisfied that the injuries to A were non-accidental. These are the reasons for my decision.

[2] On appeal the mother was represented by Ms M Smyth QC with Ms W Davidson and the grandmother was represented by Ms R Lyle. Mr A Magee represented the Trust with Ms V Ross for the guardian. Ms J Lavery represented the father of one of the children. I am grateful to all counsel for their helpful submissions.

[3] Prior to September 2014 neither the mother nor grandmother nor A nor B were known to social services. This is significant in setting the context for the

subsequent decision to remove the children. The fact that there has been social services involvement with a family can suggest that there are problems which make it more likely that injuries to a child are non-accidental but in every case that will depend on the nature of the injuries, any explanation offered as to how they were caused and the general family circumstances. The absence of any history of social services involvement does not lead to a conclusion that injuries are accidental – the nature of the injuries may indicate strongly that they could only be non-accidental and the explanation for them might be quite implausible but any analysis of what happened must recognise as potentially significant the fact that the family has not previously come to the attention of social services.

[4] There had been one previous incident involving B, about a week or so prior to the events which led to A and B being removed from their mother. A report was made to the police that the mother had been mistreating B who was then 3 years old. She said that B had been misbehaving, that she had to remove him from his nursery school and that she had then taken him out of a shop by his arm with him screaming. The police called promptly at the home when the report was made. When they arrived they found B happy and content with his mother, unharmed and with everything in the home quite normal. Understandably that was the end of the police's interest. They did not think it was necessary to report anything to social services.

[5] On 19 September 2014 the grandmother was looking after the children while their mother was at work. She noted a spongy area or swelling on A's head which concerned her so she rang the mother who came straight out of work. Together they took A and B to hospital. A skull x-ray revealed a right parietal skull fracture. There was also bruising of A's right pinna i.e. the outer ear and a bruise inside the same ear. This bruising was not severe – in fact on photographs taken a few days later it is difficult to make out. A full examination of A was carried out but there were no other injuries to her and she was noted to be a beautiful child, clean and developmentally appropriate. B was also at the hospital and showed no sign of injury.

[6] Quite properly the adult carers were asked how the injuries might have occurred. They could give no definite explanation but referred to incidents typical of any home with two young children. They included:

- A was just starting to walk which meant that inevitably she had fallen a few times because she was unsteady on her feet.

- A had fallen down two steps on the stairs a few days previously while being looked after by her grandmother.

- B had a new toy sword which he had been waving around and "whacking" his mother with.

- There had been a birthday party for A the day before with nine other children and a bouncy castle.

[7] On 23 September a "strategy meeting" took place in the hospital involving paediatricians, nurses and social workers. The conclusion reached was that the skull fracture was "non-specific for NAI" (non-accidental injury), such fractures occurring with both accidental and non-accidental trauma. The conclusion about the ear was as follows:

> "Difficult to be definitive but bruising to pinna suspicious of NAI …"

[8] One other point noted was that the mother had recently attended her GP for advice and assistance because she was "under pressure" with B who was difficult to manage.

[9] On the basis of this meeting both children were removed from the care of their mother and grandmother with immediate effect. For the following 11 months A and B were with members of the extended family but separated from each other as well as their mother.

[10] A report was obtained from a Consultant Paediatric Radiologist, Dr Joanna Fairhurst. She advised that:

(i) A had suffered a right parietal skull fracture.

(ii) It probably occurred between 15 and 19 September, most likely between 18 and 19 September.

(iii) There were no features of this skull fracture which helped in deciding whether it was an accidental or non-accidental injury.

(iv) The skull fracture and the bruising to the ear were due to two separate events i.e. a single fall or a single blow was not responsible for the two different injuries. However, the separate injuries may have occurred during the same incident or at about the same time.

Dr Fairhurst also advised that A's fall on the stairs on 17 September probably did not cause the skull fracture. She further indicated that some features of fracture patterns which are seen in non-accidental skull fractures were not present in A's case.

[11] At the hearing in May 2015 before His Honour Judge Miller QC evidence was given by Dr Daphne Primrose, a consultant paediatrician with considerable expertise in child abuse and neglect. She had been present at the strategy meeting on 23 September 2014 which had reached the conclusion set out at paragraph [7] above. She was concerned about the lack of explanation for the skull fracture even though it

could not be said with any confidence to be non-accidental. She was more suspicious about the bruising (which could not be dated because bruises cannot be dated with any precision). She explained that the fact that the bruising contained petechiae (small red spots like pin pricks) was "a strong predictor of abusive injury". The doctor's conclusion in a written report of November 2014 was:

> "On balance it is my opinion that A's injuries are more likely to have occurred as a result of abuse than to have occurred unintentionally. There is also no evidence to suggest that she has any underlying medical problem to account for her injuries."

I note from this that Dr Primrose concluded that not only was the bruising to the ear a non-accidental injury but so also was the skull fracture which had previously been agreed to be non-specific for NAI.

[12] The other medical witness from whom the trial judge heard was Dr Dewi Evans, also a consultant paediatrician. His written report dated 23 March 2015 includes the following points:

- The skull and ear injuries are more likely to have occurred at the same time since "any injury to the head is in close proximity to the ear and is likely to cause trauma to the pinna".

- The skull fracture cannot be determined to be accidental or non-accidental.

- The absence of any explanation or any information from the adults about A crying in response to the injuries being sustained is concerning.

- "The absence of a reasonable explanation makes the injuries suspicious and initiating the relevant child safe-guarding procedures was entirely correct. In isolation however I find it impossible to state whether these injuries are accidental or non-accidental."

[13] In accordance with good practice Doctors Evans and Primrose discussed the case by phone in advance of the hearing before His Honour Judge Miller QC. At that point there appeared to be broad agreement between them that this particular skull fracture could not be said to be non-accidental but that the bruising to the ear without explanation was more indicative of NAI. They also agreed that there were probably two separate impacts or events causing the injuries rather than one, a departure from Dr Evans' written report. When Dr Primrose was discussing what had caused the bruising to the ear her suggestion was that it could have been due to A being pulled by a thumb on the inside of her ear and a finger on the back of the ear. However, as the minutes of the meeting continue they show how uncertain and tentative the doctors were. Dr Primrose specifically acknowledged that she was speculating in suggesting that A had been pulled by the ear and there was a

repeated emphasis by both doctors on the lack of explanation from the mother and grandmother. Dr Primrose stated:

> "Nobody knows how it happened in a very suspicious and unusual area. You have a mother about whom there has already been very recently an allegation and we also know that mum attended the GP two days previously saying that she was having huge difficulties, she was a mum under pressure, huge difficulty coping with a three year old and I suppose it is that collection of things that has me tipping over into non-accidental."

Later in the discussion the doctors agreed that "this has not been an easy case".

[14] By the time he came to give his oral evidence Dr Evans had been shown photographs of the ear taken on 20 and 21 September. On that basis he shifted his opinion and moved away from agreeing that they were non-accidental.

[15] In his judgment the trial judge was critical of Dr Evans, suggesting that his evidence should have been more considered and structured than in fact it was. I accept that there is some justification for that criticism but, however frustrating changes in opinions are, this is a case in which both experts were clearly unsure about expressing an opinion about whether the injuries were non-accidental but both did so because they had been asked to and were expected to do so. That approach is entirely wrong and must be avoided in future. It is definitively not the role of expert witnesses to tell the court whether they believe injuries are accidental or non-accidental. That is especially so in cases such as the present and lawyers should be far more alert to avoid drafting letters of instruction to doctors inviting them to express their opinion on that issue.

[16] It is for the trial judge to decide whether on all the evidence, not just the medical evidence, the Trust has proved that injuries are non-accidental. In many cases the severity and/or the nature of the injuries will lead to a conclusion of NAI. But the present case illustrates just how careful a judge has to be in balancing the relevant factors. On any analysis this case involved a variety of issues including the following:

(i) A significant skull injury to A but of a type which did not point towards it being non-accidental rather than being accidental.

(ii) Bruising to the ear which was more suspicious because it was more consistent with being non-accidental rather than accidental.

(iii) An absence of explanation for either injury.

(iv) Two well-presented and cared for children.

(v) An historic absence of social work involvement.

(vi) An absence of any injuries to B.

(vii) A report to the police which was investigated and disclosed nothing of concern.

(viii) A mother under pressure who had taken the positive step of seeking medical help and advice.

(ix) An attentive grandmother who spotted the sponginess of the skull and rang her daughter at work, resulting in them hurrying together to the hospital with the two children.

[17] Most of these issues featured in the discussion between the experts before the hearing. However, there was little or no reference to B being entirely uninjured and there was undue emphasis on the fact that the police had been called out a few days previously as opposed to the outcome of the police intervention. The doctors clearly felt that they had to reach a conclusion, agreed or otherwise, as to the nature of the injuries. They should not have been called upon to do so. A recurring theme of their discussion was the significance of the lack of an explanation from the adult carers for the injuries. It is of course relevant to seek and consider such an explanation but the absence of one should not lead to a conclusion that the injuries are non-accidental in a case such as the present. (There may of course be cases of severe injuries which cry out in stronger terms for an explanation.) In legal terms this also raises the problem of whether there has been a reversal of the burden of proof i.e. since the injuries, or one of them, are suspicious, the parents are under an obligation to explain how they came about failing which they will be found to be non-accidental.

[18] I agree that these injuries had to be investigated in September 2014. I further agree that they inevitably caused concern and suspicion, particularly the bruising to the ear. However I cannot agree that it has been proved that they are non-accidental. In paragraph 27 of his decision the trial judge stated:

> "Both doctors agreed that this was a very difficult case to call."

This highlights the misconception that it was for them to make "the call" – it wasn't. Instead it was for the judge to make "the call" i.e. decide whether on the balance of probabilities either or both injuries were non-accidental.

[19] There are a number of recent authorities in which the proper approach to these difficult cases has been emphasised. One of the leading authorities is the judgment of Baker J in Gloucestershire County Council v RH, KS and JS [2012] EWHC 1370 (Fam). In the course of that judgment the judge identified ten principles

which he then applied. I respectfully agree with and endorse his very helpful analysis. For the purposes of this case it is especially relevant to refer to three of those principles which are set out at paragraph [38] et seq of the judgment:

> "38. Third, findings of fact in these cases must be based on evidence. As Munby LJ, as he then was, observed in Re A (A Child) (Fact-finding hearing: Speculation) [2011] EWCA Civ 12:
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> > "It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation."
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> 39. Fourthly, when considering cases of suspected child abuse the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. As Dame Elizabeth Butler-Sloss P observed in *Re T* [2004] EWCA Civ 558, [2004] 2 FLR 838 at [33]:
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> > "Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to *sic* exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."
>
> 40. Fifthly, amongst the evidence received in this case, as is invariably the case in proceedings involving allegations of non-accidental head injury, is expert medical evidence from a variety of specialists. Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. The roles of the court and the expert are distinct. It is the court that is in the position to weigh up expert evidence against the other evidence …. Thus there may be cases, if the medical opinion evidence is that there is nothing diagnostic of non-accidental injury, where a judge, having considered all the evidence, reaches the conclusion that is at variance from that reached by the medical experts."

[20] The fact that the trial judge in the present case was unimpressed by Dr Evans left him open to being more persuaded by the evidence of Dr Primrose. As I have already indicated some of the evidence she was called upon to give was beyond her legitimate remit, notwithstanding her undoubted expertise and experience. The judge concluded that there were two distinct traumas or events which caused the injuries i.e. one involving the skull and the other involving this little girl's ear. This was a reasonable conclusion which was entirely open to him to reach on the evidence.

[21] However, the judge then continued as follows:

> "Thus there were two distinct though temporally linked incidents. This conclusion together with the nature of the injury to the ear highlighted earlier in this ruling and the lack of any viable explanation leads me inexorably to the conclusion that the injuries were non-accidental in nature."

[22] With respect to the judge I disagree entirely with that conclusion for the following reasons:

(i) I have already set out at paragraph [16] of this judgment a series of factors which are all relevant to the decision- making process in this case. There is no reference to many of them in the judge's "inexorable" conclusion and no reference whatever to any of the positive facts which point away from A having been injured non-accidentally.

(ii) I do not understand how a conclusion can be reached in this case that the skull fracture was non-accidental. Even if one could decide that the bruising to the ear was non-accidental, which has not been proved in my judgment, how does the fracture to the skull then become a probable NAI rather than an indeterminate injury? There is no compelling reason for reaching such a conclusion.

(iii) The emphasis placed on the lack of explanation from the adult carers supports the submission made by Ms Smyth QC that in effect the judge reversed the burden of proof after finding (on the basis of the evidence of Doctor Primrose in particular) that the bruising to the ear was suspicious.

[23] For these reasons I have concluded that the appeal must be allowed. Since the Trust's case for taking the children into care depended entirely on it being established that the injuries were non-accidental and since I have decided that this was not proved the children have already been returned to the care of their mother and grandmother.

[24] 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.

[25] I have to record one further issue of concern. In September 2014 the social workers had legitimate concerns about the well-being of A and B in light of the medical evidence about what had happened to A. However, if I have read the notes correctly the medical opinions were tentative. That being the case, I question whether the decision to remove and separate A and B, children who were just one year and 3½ years old, was a proportionate response to the concerns which had emerged. I refer back to Dr Primrose's speculation that the bruising to A's ear might have been caused by it being held between a finger and thumb and pulled. Even if that is what happened I question how that could possibly have justified the removal of the children, even on a temporary basis, pending a court hearing to determine the issues. The term "non-accidental injury" is used very loosely, perhaps too loosely. In practice it can cover everything from a violent and sustained attack on a child to tired or frustrated handling of a child by a parent who is isolated and stressed (and often poor). The label of non-accidental injury should not by itself be considered to constitute a basis for the removal of children without significantly more thought and consideration than is sometimes given.