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Judgment: approved by the Court for handing down | *Delivered:* **11/09/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

WESTERN HEALTH AND SOCIAL SERVICES TRUST

Respondent

AND

L

AND

K

Appellants

BEFORE: Morgan LCJ, Girvan LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from the decision of Weir J to make final care orders in respect of the appellants' twin children. The approved care plans were for permanency away from the family by way of adoption. Nothing may be published that would lead directly or indirectly to the identification of the children or their families.

[2] Provision for care orders is made in Article 50 of the Children (Northern Ireland) Order 1995 (the 1995 Order).

> "50. - (1) On the application of any authority or authorised person, the court may make an order-
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> (a) placing the child with respect to whom the application is made in the care of a designated authority; or

(b) putting him under the supervision of a designated authority.

(2) A court may only make a care or a supervision order if it is satisfied-

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to-

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child's being beyond parental control."

In Re M (a Minor) (Care Orders: Threshold Conditions) [1994] 2 AC 424 the House of Lords held that where an authority applied for a care order and made interim arrangements for the protection of the children continuously prior to the hearing of the application the relevant date at which the court had to be satisfied of the existence of the threshold conditions was the date on which the authority initiated the protective arrangements.

Background

[3] The background to the application is helpfully summarized by Weir J in paragraphs 3-5 of the judgment.

> "[3] M and N who are non-identical twins were born to the Respondents in 2006. L, the mother, has had a long and very sad history of involvement with Social Services since childhood; a previous child born to her of whom K was not the father had been permanently removed from her care due to her then inability to parent satisfactorily and upon the birth of M and N they too were removed from the care of L and K because of these historic concerns and placed in foster care. The Respondents ultimately underwent a residential placement in Thorndale Family Centre which lasted for some five months. The outcome of the assessment was positive and the children were discharged from it to live with their parents in the

> community. The Trust initially considered that the children should remain subject to a care order as both the Trust and the Guardian Ad Litem ("GAL") encountered great difficulty in working co-operatively with the parents in their home setting. The father, K, adopted a confrontative attitude to social workers while the mother, L, tended to adopt a rather subservient position to that of the father, she being a person with significant intellectual and social impediments. K's declared attitude was that the family wished to be left alone to parent their children in peace and resented what he saw as the unwarranted interference of social workers and of the GAL. Ultimately, at a hearing in October 2009, the Trust decided to apply to withdraw the application for a care order in the hope that that might induce the parents to work more collaboratively with it on a voluntarily basis. The GAL opposed the application to withdraw, believing that the parents were unlikely to work collaboratively on a voluntary basis and that the Trust should therefore retain the statutory powers which the making of the care orders would afford it. I acceded to the Trust's application and upon determination of those proceedings the GAL was formally discharged.

[4] Regrettably it did not take long for the concerns of the GAL about the likelihood of voluntary cooperation to be realised. The parents did not, as they had promised, work collaboratively with the Trust but rather actively obstructed the efforts of social workers and of the health visitor to visit the children and confirm their well-being. When the parents failed to attend at an initial case conference in June 2010 the children were placed on the Child Protection Register. This did not produce any greater level of cooperation. It had been planned that the children should commence nursery school in September 2010 but this was not realised because the parents did not send the children there. The only professional who had some contact with the children was their general practitioner since K flatly refused to allow the health visitor to visit the children.

[5] This on-going lack of co-operation on the part of the parents presented the Trust with a dilemma. In December 2010 there was a further case conference when it was decided to remove the children from the Child Protection Register in the renewed hope that the parents would thereby be encouraged to work with the Trust. Unfortunately this strategy did not succeed and for some time the family remained to all intents and purposes below the Trust's sonar."

The relevant evidence

[6] In order to deal with the issues in the appeal it is necessary to set out some of the relevant evidence. On 3 March 2011 L brought M to hospital where he was found to have a broken right arm. X-rays were taken and inspected by Dr Nethercott, a consultant paediatrician. He noted a history that the child was running from the living room to the bathroom and slipped on a wet floor and that the fall was not witnessed. He concluded that the x-ray findings, which suggested a twisting force, were inconsistent with the history, that the child was apprehensive and that there was a lack of appropriate interaction between child and parents. He suspected that the injury was non-accidental and required further investigation.

[7] The x-rays were transmitted electronically to Mr Kieran Lappin, a consultant orthopaedic surgeon at another hospital. He noted a spiral type fracture of the right humerus and immediately suspected a non-accidental injury because in his experience accidental injury of this type was very rare in this age group. The child was transferred to Mr Lappin's hospital. He took a history from L that M had fallen on a wet bathroom floor which was slippery and that the fall had been witnessed by K who said that M's arm was angled behind him when he fell but that his arm did not get caught or trapped at all. Mr Lappin considered that the fracture was in keeping with a large torque or rotational force and that it would have been necessary for the hand to become trapped in order to accidentally affect this twisting or rotational injury. Due to the age of the child, the pattern of the injury and the explanation given by the mother as to how it came about he considered that there was a high probability that the spiral fracture of the humerus was caused non-accidentally.

[8] Mr Lappin manipulated the arm under general anaesthetic on 6 March 2011 and observed at that time bruising on the forearm in keeping with finger marks which he photographed. He was struck by the fact that after the operation when M woke up in the recovery room he told staff that he did not want his mother and on the previous day he had noticed that there was very little interaction between the mother and child, the mother sitting two beds away from the child. He said that he had spoken briefly to K on the morning after theatre. K had asked how he thought the injury happened and Mr Lappin said that he had replied by saying that it was a twisting type force. K denied that any such conversation had taken place. It was suggested to Mr Lappin that the injury was consistent with M falling on the wet floor of the bathroom with his feet in the bathroom and his back in the hall. Mr Lappin maintained that the child's hand would have had to be caught and he considered that a large force of a twisting type had to have been applied to the arm in order to cause the injury. If the arm is in a pocket it is fixed and any fracture is transverse or oblique. He did not rule out the possibility of an accident but he considered the higher probability was non-accidental injury.

[9] Dr Joanne Nelson is a consultant paediatrician with extensive experience in physical and sexual abuse of children. She was provided with some of the social

work material in relation to the family including notes from the Thorndale Family Centre and the reports prepared by Dr Nethercott and Mr Lappin. She had an opportunity to inspect the x-rays and interview the parents but not the children and as a result prepared a report dated 2 June 2011. She stated that such an injury should raise the possibility of abuse. She noted the history given to her that the child was found lying on the side with his right arm caught under his right leg, his head in the bathroom and his body in the doorway between the bathroom and corridor. The fall had not been witnessed. She noted that Mr Lappin had recorded a different history given by the mother. She referred to research which indicated that where a child under three years of age had humeral fracture there was a 50% chance that it had occurred as a result of abuse. In children aged 10 or more such factors were mostly the result of accidental trauma. The child was four years and three months at the time of injury. She agreed that the fracture was traumatic and most likely to have been caused by a high impact twisting force. She concluded that the history of injury as described by the parents could explain the fracture and she gave her opinion that this was the most likely explanation for the injury.

[10] She prepared a second report on 18 September 2011 having received further materials including x-rays of the fracture, the photographs taken at Mr Lappin's direction, material describing the layout of the child's home and social work reports about the children's behaviour and their verbal disclosures after being taken into foster care. This included a social worker report dated 10 August 2011 which disclosed allegations by the children that M had been physically abused. There were also behavioural activities indicative of significant psychological unrest. In light of the new information available and taking into account everything including the parental aggression towards professionals and disengagement in addressing the issues she concluded that a non-accidental mechanism of injury was much more likely than an accidental mechanism.

[11] Dr Nelson provided a subsequent note dated 9 February 2012. This dealt with K's evidence that M's position on the floor following his fall was that his legs were in the bathroom and his head was in the hallway. Dr Nelson indicated that she had taken a very careful history from K and that his account to her at the interview on 27 April 2011 was that the head was in the bathroom and the body in the doorway. She indicated that the difference did not in any event cause her to alter her opinion that this was a non-accidental injury.

[12] In her evidence Dr Nelson give four principal reasons for her change of opinion. When she originally prepared a report she noted that she did not have available to her contemporaneous medical notes and records or photographs or diagrams concerning the forearm bruising. Her original opinion had been given subject to her having an opportunity to consider those materials. As a result of her consideration she considered that there where now inconsistencies in the parental history. Mr Lappin was clear that L told him that K had witnessed the fall. The parents had indicated to her that the child had received medical attention as a result of a graze on the cheek but the GP notes indicated that no such attention had been

sought. The parents denied that they had physically chastised their children but the social worker diaries consistently indicated that the children complained of hitting, slapping and worse.

[13] At the time of her original report the only reference to forearm bruising was that contained in Mr Lappin's report. She had not had an opportunity to see the photographs and examine the diagrams of the bruising. She agreed with Mr Lappin that it was possible that the forearm bruising may have represented fingertip bruising which would be consistent with grabbing the child forcibly by the forearm and swinging or twisting the arm thereby causing the fracture.

[14] Since her original report she had been provided with material on the layout of the house. When she interviewed the parents she was told that the child had run from the front room along a corridor and turned left and right into the bathroom. She had envisaged that the child would have been able to pick up quite a degree of speed because of the length of the corridor. Having now had access to the arrangement of the house she concluded that the child would not have been able to pick up the degree of speed that would have added the force to cause this injury. Finally she noted as did others the lack of parental interaction while the child was in hospital.

[15] The Trust was anxious to interview M about the circumstances in which the injury was sustained. K would not allow such an interview to occur unless he was present. M appeared frightened, his speech was difficult to understand and he did not say how he had hurt his arm. Initially K would not tell social workers where N was but eventually he permitted him to be interviewed once on the same basis. N said that M had slipped and fallen on the bathroom floor. K refused to allow social workers to interview him further. As already indicated the foster care diaries contained significant allegations of physical abuse by the parents. The diaries also recorded, however, that the children from time to time made up allegations. The other piece of factual evidence adduced by the Trust was that a nurse had overheard L on the phone apparently telling K shortly after the child had been admitted to hospital "I told them what you told me to say, that he slipped and fell on the bathroom floor". L did not give evidence.

[16] K said that he had not witnessed the fall. He denied speaking to Mr Lappin on the morning after the child's admission. He stated that the position of the child when found was with his legs in the bathroom and his head in the corridor. He denied that he had told Dr Nelson that the position of the child's body was the other way round. He agreed that in his earlier statement to the court he had described the position of the child as indicated by Dr Nelson but said that he had not read the statement when he signed it. He denied any knowledge of a telephone conversation with L where she told him that she had given the account he had instructed her to give. He said the social workers had made up evidence that on the Saturday after the injury he had indicated that he would be willing to “sign M over” on condition that they would have no further contact with N. He said the social workers had

made up an entry recorded at a family meeting where he said that M was difficult to manage, called his mother names and refused to do what he was told. He said the social workers were biased against them and were using this incident as a means of removing the children.

The conclusions of the learned trial judge

[17] The judge helpfully set out his findings on the factual issues at paragraph 32 of his judgment.

> "(i) That M suffered a spiral-type fracture of the right humerus caused by a large force of a twisting type.
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> (ii) That the fracture could not have been caused by a fall as described by K because the description does not permit of M's hand having been caught or trapped and his body rotated around it.
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> (iii) That the account given by K of the circumstances and mechanism of the fracture is incorrect and untruthful and intended by him to deliberately conceal its true aetiology which was non-accidental and involved the deliberate application of a twisting force to the arm by either K or L.
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> (iv) That L gave this false explanation to the hospital on the instruction of K which she later confirmed having done in the telephone conversation which was overheard by the nurse and which I am satisfied she made to K.
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> (v) That K did speak to Mr Lappin at the hospital following the operation on M and did ask him what he, Mr Lappin, thought had caused the injury.
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> (vi) That K did give an account to Dr Nelson of the position in which he claimed to have found M following the accident which was the opposite of the account that he gave to the court. Dr Nelson did make her drawing of the position in his presence and in accordance with K's indication.

(vii) That the children M and N each suffered significant emotional and physical harm at the hands of K and L prior to and continuing at the time of the Trust's intervention and would have been likely to suffer significant continuing harm had it not been for the fact that M's fracture obliged the parents to bring him to hospital and the Trust was then able to intervene.

(viii) That the children's complaints of ill treatment by their parents were spontaneous and not prompted by social workers, foster carers or the GAL."

[18] The learned trial judge went on to make it clear that he found K to be "a wholly unsatisfactory, cunning and untruthful witness". At every point where K's evidence conflicted with that of another witness he preferred the evidence of that other witness. He considered K an intelligent and devious person and concluded that his evidence was dishonest and unworthy of belief. The judge concluded that K bore a deep animosity to social services which would make it impossible for him to work cooperatively with them in order to improve its relationship with the children and that L would find it impossible to think or act independently of him as long as she remains living with him.

The issues in the appeal

[19] The original notice of appeal contained allegations against the police and social services in relation to the conduct of an investigation into claims of sexual abuse against L, complaints about the manner in which social services conducted themselves in relation to the children, complaints about the manner in which the learned trial judge had managed the earlier stages of the proceedings and complaints about the conduct of the barristers retained on behalf of the appellants. A revised notice of appeal was lodged on 8 February 2013 and it was indicated that many of the earlier complaints would be taken up in another forum but would not be pursued in this appeal.

[20] The appellants complained that the learned trial judge failed to consider a portion of the statement made by the foster carer where she said that some hours after the boys arrived with her on 21 March 2011 M stated that he sustained his injury when he slipped on the bathroom floor of his parents' house. The statement also contained a long history of allegations by the boys over subsequent months that they had been beaten by the parents and there was a subsequent statement by the same foster carer on 1 July 2011 where she said that N stated on 22 May 2011 that "daddy" had caused the injury.

[21] It was submitted that the judge had failed to place sufficient weight on the first report of Dr Nelson and the statistical data indicating a higher incidence of non-accidental injury among those less than three years old. It was further submitted that Dr Nelson's evidence was prejudiced as a result of the foster diaries being provided to her along with the addendum social work report. Those matters should not been taken into account in considering whether this was a non-accidental injury. As a result the appellants did not have a fair trial.

[22] The appellants argued that the judge's assessment of K's credibility did not take into account that L did report to Dr Nethercott that the fall was not witnessed, that L had learning difficulties and allowances should have been made for any variation in her account, that K disputed Dr Nelson's evidence and that considerable allowance should have been given to K because of his suspicions of professionals.

Consideration

[23] In order to succeed in this appeal it is for the appellants to demonstrate that the judge's decision was wrong (see G v G [1985] FLR 894). Where the appeal concerns the evaluation of evidence the trial judge has a particular advantage helpfully described by Lord Hoffmann in Piglowski v Piglowski [1999] 2 FCR 481.

> "…the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc. v. Medeva Ltd. [1997] R.P.C. 1:
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> > "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."
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> "

[24] This passage is particularly relevant in respect of the judge's conclusion on the credibility of K. K had denied speaking to Mr Lappin on the day after the child's admission to hospital and discussing with him the mechanism of injury. He denied telling Dr Nelson that the child's head was in the bathroom and his body in the corridor when he was found. Dr Nelson explained that she had made notes at the time of the account given to her. He denied having the telephone conversation with L which was overheard by the nurse, denied recorded comments about M's difficulties at home and denied offering to give M up to social services if they left N with the family. On all of these important points the learned trial judge rejected K's evidence as untruthful. He was entitled to conclude that K was a dishonest witness and he was very well-placed in those circumstances to find that K was a wholly unsatisfactory, cunning and untruthful witness. The judge was well aware of the fact that K and L had succeeded in the rehabilitation of the children to them at an earlier stage and he was plainly aware of the suspicion K held towards social services and others but those matters did not in any way undermine the fact that there was ample evidence for the judge to reach the conclusion that he did in respect of K.

[25] The judge recognised that L was a lady with considerable intellectual and social frailties. There were discrepancies in the accounts recorded from her about whether the fall was witnessed. The judge made no finding about whether the fall was witnessed but he did find that L gave a false account of the circumstances and mechanism of injury at the behest of K. The conclusion that the account was false followed from his assessment that the injury had not been caused by a fall of the type described by K and L. The conclusion that L had acted at the behest of K was evidenced by the nurse who overhead the telephone call. The fact that the children were ill at ease with the parents was well evidenced by social workers, the Guardian, Dr Nelson and Dr Lavery.

[26] In preparing her first report Dr Nelson was provided with limited information. It is plain from her evidence that she was influenced in her original conclusion by the description of the layout of the house which would have enabled the child to build up speed before his fall and the positive reports of the interaction between the children and parents during their stay in Thorndale. The latter matter was effectively evidence of a lack a propensity and the danger of giving weight to such evidence has been the subject of advice in Re CB and JB (Care Proceedings: Guidelines) [1998] 2 FLR 211.

[27] In preparation for her second report Dr Nelson was provided with access to original medical documentation in relation to the fracture and its treatment, evidence about the physical layout of the house and social work reports in relation to the reaction of the children since taken into care. A careful analysis of the evidence of Dr Nelson indicates that she concluded as a result of examining the layout of the premises that the child could not have generated the speed necessary to explain the nature of the fracture on the account given by the parents. She also had available to her photographs which demonstrated bruising which was consistent with a

mechanism of injury. Although it is true that she was influenced by what the children told the foster carers these were supportive of the conclusion which she had reached looking at the physical layout and the account put forward by the parents. That physical evidence necessarily led her to reject the parent's account. The statistical evidence was of no assistance in determining the facts of this particular case.

[28] It was submitted that it was wrong to provide Dr Nelson with the social work addendum. It is not necessary for us to reach a conclusion on that point in order to determine the appeal but there are circumstances where propensity evidence can be taken into account (see A County Council v K, D and L [2005] EWHC 144 (Fam)). In this case Dr Nelson had formed an impression as a result of sight of the Thorndale records. The danger that this was a false impression was raised by the social worker's addendum report. The provision of material to an expert in order to alert her to the possibility of a false impression is generally appropriate. As we have indicated, however, in light of our analysis of Dr Nelson's conclusions we find no basis for the suggestion that the provision of additional materials to Dr Nelson in anyway imperilled the fairness of this hearing.

[29] The learned trial judge did not expressly refer to the fact that M had informed his foster carer that he sustained his arm injury by slipping on the floor. It is clear, however, that he made a range of conflicting statements on this issue and made a host of other allegations against his parents. The foster carer had noted that he was at times untruthful and this was recorded by the learned trial judge. He also noted that when interviewed in the presence of K shortly after the incident in the hospital he was incapable of articulating any explanation. In those circumstances the absence of an express reference to one of the child's many accounts is not material.

Conclusion

[30] For the reasons given we consider that none of the grounds of appeal is made out and the appeal is, therefore, dismissed.