



Neutral Citation Number: [2020] EWCA Civ 1382

Case No: B4/2020/1534

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT HERTFORD
HHJ McPhee
WD19C01375

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2020

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE PETER JACKSON
and
LORD JUSTICE LEWIS

S (A Child: Finding of Fact)

Christopher McWatters (instructed by **Hertfordshire County Council**) for the **Appellant**
Local Authority

Grant Keyes (instructed by **Family Law Group**) for the **Respondent Mother**

Atim Oji (instructed by **Davjunnell Solicitors Ltd**) for the **Respondent Father**

Judith Charlton (instructed by **Hameed & Co Solicitors**) for the **Respondent Intervener**

Malek Wan Daud (instructed by **Collins Solicitors**) for the **Respondent Child by their**
Children's Guardian

Hearing date: 21 October 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Tuesday, 27 October 2020.

Lord Justice Peter Jackson:

1. This appeal arises from a fact-finding hearing within care proceedings. The main issue in the proceedings was how A (a girl then aged 2) came by a subgaleal haematoma (bleeding between the scalp and the skull). The local authority alleged that it was an injury inflicted by A's mother or by her mother's partner, Mr T. After hearing evidence from three doctors and five family members, His Honour Judge McPhee found that this had not been established. The local authority, supported by the Children's Guardian and by A's father, now appeals with permission granted by King LJ. The appeal is opposed by the mother and by Mr T.
2. An appeal of this nature faces a high hurdle, given the important advantages enjoyed by the trial judge. It is well-established that an appeal court may only interfere with findings of fact in limited circumstances, for example where there has been a material error of law, or where there has been a serious flaw in the evaluation of the evidence, or where it has been shown that the conclusion cannot reasonably be justified. In a case where all the evidence has been taken into account and the conclusion has been sufficiently explained, the fact that a judge has given more or less weight than might have been expected to a particular aspect of the evidence cannot lead to a successful appeal.
3. The background, very shortly stated, is that at different times during the month of October 2019, A suffered three injuries: a bruise to the forehead, bruising under the eyes, and finally the head injury. The medical evidence established that the last and most serious injury occurred within 36 hours of admission to hospital. During that period A was in the care of the mother and Mr T. A relative, Mrs N, had cared for A a few days earlier and had therefore become an intervener in the proceedings, but on the basis of the medical evidence the judge found that she had not injured the child. Following discharge from hospital, A was placed in foster care, where she has remained.
4. We have been provided with a bundle running to more than 1200 pages and transcripts of the witness evidence, from which it is possible to follow the course of the trial. It is unnecessary to review this material in detail. Instead, I will identify the main strands of the evidence and then consider the judge's analysis.
5. The first strand was the evidence of the mother and Mr T. They strongly denied causing injury to A. The mother described seeing the injury when she was cleaning A at the end of a meal and then taking appropriate steps to get medical assistance. Before the meal, A had been in a room on her own for 20 minutes, but nothing notable had happened. When asked at hospital, neither adult described any possibly relevant event, but several weeks later in police interviews they both described A bumping her head on a car door the day before the hospital admission. The mother described the impact as "a little tap", while Mr T described it as "a donk". Both described A crying for a short time.
6. The next strand was the medical evidence, given by a paediatrician at the hospital, and by two court-appointed experts, another paediatrician and a radiologist. They gave their opinions in these generally consistent terms: (1) a subgaleal haemorrhage is the result of a significant shearing force, such as may be caused in a ventouse delivery at

birth or by hair-pulling; (2) it is a very unusual injury in a child of this age, and a degree of diagnostic caution is therefore appropriate; (3) in this case, it is likely, though not certain, to have been an inflicted injury; (4) the 'car door' account is the only relevant suggested accidental cause; (5) it is unlikely, but not impossible, that such an incident caused the injury.

7. The third strand of the evidence concerned the N family, relatives of the mother. It related to a number of matters: whether A had been injured in the care of Mrs N, when the Ns had seen the bruising to A's eyes, whether the mother had asked the Ns to lie on her behalf. Once the first of these matters had been set aside, this evidence was relevant only to the credibility of accounts given by the mother and Mr T about all three injuries sustained by A.
8. The final strand of the evidence consisted of information about the general quality of care given to A before and since her removal inasmuch as it assisted the court to assess the degree of likelihood of inflicted injury. The mother had a difficult childhood. She was 18 when A was born and after her relationship with the father ended when A was aged 1, there was a very hostile relationship between herself and A's father, including court proceedings. Nonetheless, reports of the mother's commitment to and bond with A were positive. The relationship with Mr T was a relatively recent one and was not without some difficulties, but both adults denied domestic abuse, something that had allegedly been a significant feature of the relationship between the parents. There was also hair strand evidence that the mother was a cannabis user, which she denied.
9. The judge gave a substantial oral judgment on the sixth day of the hearing, and provided a written version running to 73 pages on the following day. Half of the judgment records the oral evidence as it was given, followed by a substantial passage on the relevant law in terms agreed between the parties.
10. Turning to findings of fact, the judge formed a poor view of the credibility of the N family witnesses. He said that he was greatly assisted by seeing the mother give evidence (she was the only witness to do so in the courtroom). He found that she had misinformed the hospital about when the bruise to the forehead had occurred and in telling them that the bruising to the eyes had been seen by the health visitor. He also found that she had asked Mrs N not to tell the authorities about the bruising to A's eyes and said that he was not convinced by her explanation that she was going to report it herself, observing that "by this time she and Mr T were too deeply into their mistruths..." He also rejected her evidence that she had not described the 'car door' incident at hospital because she thought she was being asked only about the events of that day. He described her as a caring and committed mother who would have been able to provide chapter and verse on any injuries.
11. The judge observed that the failure to describe any 'car door' incident at hospital raised the obvious question as to whether it was a manufactured explanation or a real event whose significance had not been realised at the time. He returned to the medical evidence, including the opinion of the paediatric expert witness who had said that if the car door incident had been a glancing blow it was not beyond the bounds of possibility that it could have caused the injury, but that he had difficulty with that explanation. Having carried out that review he concluded that the mother and Mr T had given a truthful account and that it was not a concocted incident. Despite his

other findings about her evidence, he described the mother as a very impressive witness, who gave a clear and unshaken view of the ‘car door’ incident, and he said that Mr T was equally compelling. He referred to the inherent improbability of the mother harming her daughter and said that although Mr T’s personality made him appear hostile and aggressive to others, there was no evidence that he was of a violent disposition.

12. The judge found that the bruise on the forehead, seen by the health visitor and at hospital had been caused in an accidental fall about two weeks before admission. He also accepted, despite anomalies in the evidence (which he did not reconcile), particularly about dating, that the bruising to the eyes had been caused in a later accidental fall as described by the mother and Mr T.
13. After this very condensed summary of an extensive judgment, it is right that I should cite the judge’s conclusion in full:

“On a review of the medical evidence I have reminded myself of the caution with which I should approach the uncertain testimony of the doctors in this case. That today’s medical opinions could be found to be misplaced by future research and discovery. That factor is signally important in this case where the doctors acknowledge the unusual nature of this presentation, where they acknowledge a lack of expertise by a lack of clinical experience with this presentation and where they caution against reliance on the medical reports to which they have been referred. None of the expert evidence approached any level of certainty, in fact they all acknowledge, but consider unlikely or very unusual, that the injury could have been caused by a shearing blow when A was struck by the car door on the 21st October, within the likely timescale for the presentation of the injury on the evening of the 22nd October 2019, certainly none could discount that as a possibility.

When once again, against that background, I review the wide canvas to which I earlier referred I come to the conclusion that the local authority has failed to establish on a balance of probability that the subgaleal haemorrhage to A diagnosed on 23rd October 2019 was a non accidental injury as they assert. There is a real possibility which even with the view of the medical evidence cannot be discounted that the injury was caused by a shearing blow on 21st October 2019 when A struck her head against an opening car door. The burden of proof remains with the local authority and I am not satisfied that the allegation is proved to the Civil Standard. It is of course not for the mother or Mr T to prove that it was the car door which caused the injury. The aetiology is known in that I have accepted the medical evidence that this was a shearing injury caused by the application of some force. The local authority falls into the incorrect position of suggesting that the medical evidence proves the aetiology and so discounts other possibilities than non accidental injury, including but not

exclusively so the car door incident, seeking to transfer the burden of proof to the mother and Mr T to prove their alternative explanation.

It follows that the suggestion of a failure to protect from non accidental injury also fails as pleaded.”

14. On this appeal the local authority contends that in relation to the ‘car door’ incident the judge’s assessment of the medical evidence and the evidence of the mother and Mr T was flawed. The analysis of the bruising to A’s eyes was inadequate. The credibility assessment of the lay witnesses was not balanced. These submissions are supported by the Guardian and the father. In response the mother and Mr T emphasise the status of findings of fact and contend that the judge was entitled to reach his conclusions for the reasons he gave.
15. With reluctance, given the obvious care with which the judge approached his decision, I am of the view that the appeal must succeed and that the matter must be reheard. These aspects of the judge’s analysis lead me to this conclusion.
16. First, the true effect of the medical evidence in this case was not brought into the final reckoning. The description of the medical opinion as “uncertain” is accurate only to the extent that the doctors agreed that the findings were not diagnostic of inflicted injury. The attribution of “signal importance” to the unusual nature of the injury has led to a loss of focus on the core message from the medical evidence, which is that this injury was caused by a shearing force that was likely, or very likely, to have been caused by an action such as hair-pulling. This evidence did not mandate a conclusion that the injury was inevitably an inflicted one, but the emphasis placed by the judge on the doctors’ willingness to entertain less likely possibilities has led to him giving demonstrably insufficient weight to their clear opinions, to the extent that the scenario of inflicted injury by hair-pulling is not mentioned in his final analysis.
17. Second, it is of course open to a judge to attach very great, and even determinative, weight to his or her judicial assessment that a witness is truthful, but a preference given to that assessment over evidence pointing the other way must be reasoned so that it can be understood. Here, it is clear that the judge was greatly impressed by the oral evidence of the mother and Mr T, but he does not explain how that impression is to be reconciled with his finding that they had given false evidence to him and unreliable accounts to others on a number of matters. Nor is there an explanation of how his assessment of their evidence fed into his ultimate findings.
18. Third, the mechanism for the injury is not adequately explored. Even if the judge was entitled to accept that there had been a ‘car door’ incident, the accounts given by the mother and Mr T did not contain anything to underpin the notion that this apparently minor impact gave rise to a shearing force at anything other than a theoretical level. That problem is not addressed in the judgment. Nor is there any investigation of how it might be medically plausible for a child to sit down to a meal without any visible injury but to end the meal showing an obvious and alarming injury to her head as a result of an incident a day earlier.
19. Fourth, the judgment does not resolve the conflicts in the evidence about when and how the bruising to the eyes was caused.

20. Finally, although the judge correctly directed himself on the civil standard of proof, his finding that there was “a real possibility that cannot be discounted” that the ‘car door’ incident caused the head injury suggests that by importing a concept from another context (‘pool’ findings) he was in fact rejecting the local authority’s case because he was not sure of it. I also have difficulty with the assertion that the local authority was seeking to transfer the burden of proof to the mother and Mr T to prove their alternative explanation. In this case there was no mystery about what caused the injury: a significant shearing force. As to how the force arose, there were two realistic possibilities: the ‘car door’ incident or an undisclosed inflicted injury involving hair-pulling of some kind. The court’s task was to analyse the relative likelihoods of each possibility and then to ask itself whether the local authority had made out its case to the civil standard. For the local authority to have pointed out difficulties with the ‘car door’ theory involved no reversal of the burden of proof.
21. These errors of approach lead me to conclude that the judge’s conclusion is unsustainable. It is not a situation in which this court can substitute its own conclusions and in giving my reasons for allowing the appeal, I am not seeking to express any view about the evidence or the outcome of the rehearing that must now occur. Those are matters exclusively for the judge conducting the rehearing. In the first instance the matter will be referred to the Designated Family Judge, His Honour Judge Vavrecka, who has kindly agreed to conduct a case management hearing on 2 November 2020, the date already set aside for the welfare hearing. We will give directions for the parties to present a draft order on that occasion to identify matters agreed and any issues requiring decision. The rehearing itself will be conducted by Judge Vavrecka or by another judge with a section 9 ticket. The case management order will no doubt identify the extent to which it will be necessary for any further medical evidence to be given (and if so, whether written questions may be sufficient) and the extent to which evidence from the N family will need to be reheard. It will also determine whether, given the length of time that A has already remained in foster care, a composite fact-finding and welfare hearing can be achieved to minimise further delay.

Lord Justice Lewis

22. I agree.

Lord Justice Underhill

23. I also agree.
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