



Neutral Citation Number: [2019] EWCA Civ 1845

Case No: B4/2019/1555

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WATFORD
HHJ Mellanby
WD18C01428

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 October 2019

Before :

LORD JUSTICE DAVIS
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

S (A Child: Adequacy of Reasoning)

Victoria Teggins and (pro bono) Amy Stout (instructed by **Crane & Staples LLP**) for the
Appellant Mother
Shiva Ancliffe (instructed by **Hertfordshire County Council**) for the **Respondent Local**
Authority
The Intervenor appeared in person
Malek Wan Daud (instructed by **Collins Solicitors**) for the **Respondent Child** by his
Children's Guardian

Hearing date: 24 October 2019

Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. This appeal is a reminder of the pressure under which judges of the family court are working. Between 20 and 23 May 2019, Her Honour Judge Mellanby conducted a fact finding hearing in care proceedings. Over three days she heard ten witnesses, the hearing being interspersed with short hearings in other cases. On 23 May, she received submissions from three represented parties and an unrepresented intervenor. It was not possible for the court to sit on the following day and at 4.30 pm the judge, no doubt anxious to give the parties a decision, delivered an oral judgment that lasted until 6.45 pm. It is an unhappily familiar situation.
2. As we told the parties at the end of the hearing, this appeal must be allowed. In reaching that decision, we do not overlook the reality. Judges are encouraged to give extempore judgments where possible and appeals will not succeed simply because matters might be better expressed with the luxury of extra hours of preparation or because judgments may contain imperfections. What matters is that the parties know the outcome and the reasons for it. Where the essential evidence has been considered and the decision has been adequately justified, that will do. In this case however, it did not happen. Despite the judge's efforts, the parties were at the end of the judgment unsure what she had decided about the two main issues in the case. Clarification was sought. It to some extent makes the judge's intentions clearer but too many actual or arguable inconsistencies remain and important conclusions are inadequately explained. There will regrettably have to be a rehearing.
3. The case concerns a 3 year old child, S, who arrived at nursery one morning with a broken arm, a mark to his neck and a bruise to his clavicle. The arm injury had occurred no earlier than the afternoon of the day before and S had been in the care of his mother and her boyfriend Mr C throughout the intervening period. The questions that the judge therefore had to ask were these¹:
 - (1) Had the local authority proved that the injuries were inflicted as opposed to being accidental?
 - (2) If the injuries were inflicted, who had the opportunity to cause them?
 - (3) Of those people, could one person be identified on the balance of probabilities as having inflicted the injuries (a conventional 'known perpetrator' finding)?
 - (4) If only two people (the mother and Mr C) could have caused the injuries, but the one responsible could not be identified it necessarily followed that there was a real possibility that each of them may have caused the injuries (an 'uncertain perpetrator' finding).

¹ She also made findings of emotional harm and neglect, which the mother admitted, but these are not relevant for the purposes of this appeal.

- (5) Once these questions had been answered, had it been proved that the mother had failed to protect S from being injured or covered up what she knew about how he was injured?
4. Unfortunately the judge did not approach matters in this way.² Once she had decided to give the parties her decision that day, it would have been better if, rather than delivering a 30 page judgment under time pressure, she had simply set out and answered the necessary questions and given her essential reasons in a few additional lines. This is in any event a useful discipline, particularly where a party is unrepresented. Everyone knows exactly what has been decided and why. The full decision could follow, either then or at a later date.

The background

5. The mother was very young when S was born and there was concern about the father's history, the parents' relationship and the mother's vulnerability. By the relevant time, she was living in her own accommodation with S and had recently started a relationship with Mr C.
6. On 22 November 2018, after Mr C had taken him to nursery, S was seen to be looking sad and to be holding his right arm down by his side. His hand and wrist were swollen and his arm was immobile. He told his teachers that he hadn't seen his mother that morning. The nursery initiated child protection measures and the mother eventually came in. S said that "I did a wee on the sofa and [Mr C] smacked me." S was taken to hospital, accompanied by his grandparents. A child protection medical investigation was carried out. It disclosed fractures of the right arm that conveyed a high suspicion of abuse. The mother and Mr C were arrested and interviewed. No charges have been brought. By agreement with the mother, S was placed with his maternal grandparents, where he remains, subject to an interim supervision order and with frequent supervised contact with his mother.
7. On 17 December 2018, the local authority issued proceedings on the basis of S's injuries and his exposure to abusive relationships and the mother's fluctuating mental health. S's father did not play an active part in the fact-finding as S was not in his care at the relevant time. Mr C became an intervenor but due to funding issues represented himself at the hearing. I will say more about this below.

The medical evidence

8. A full child protection medical report concluded that S had without reasonable doubt been subjected to a serious assault which was likely to have taken the form of a very significant blow.
9. Further expert advice was obtained from Dr Coren (consultant paediatrician) and Dr Watt (consultant paediatric radiologist). Both doctors gave oral evidence.
10. Dr Coren's opinion was that it was unclear whether the fracture had an accidental or non-accidental cause, noting that fractures in toddlers' forearms are not unusual.

² Counsel did not refer the judge to the guidance given in [B \(Children : Uncertain Perpetrator\)](#) [2019] EWCA Civ 575, where the proper staged approach is confirmed at [49].

However, considering the wider context of the injuries including the way they were discovered and the lack of an identifiable accidental cause, it was more likely than not that they were non-accidental. S would have experienced pain straight away and any person who had inflicted the injury or was present would have noticed. S would have been unlikely to sleep through the night without pain relief. Any swelling would have shown a few hours after the injury occurred but the key symptom would be loss of function.

11. Dr Watt advised that this type of injury is common in children up to the age of 10 due to the relative frequency of falls. A blow to the forearm or another undisclosed inflicted injury, whether intentional or unintentional, could account for the injuries, as could accident. The nature of the fractures was indicative of less force than that required to cause a complete or displaced fracture. It was unlikely that the fractures were caused by S being picked up by his arm without any blow or impact. Based on the statements and clinical findings, it was likely that they occurred between 21 and 22 November.

Other matters

12. The mother and Mr C both described an event on the evening of 21 November when S had urinated on the sofa and was told off by Mr C. The mother says that Mr C lifted S off the sofa by one arm. She did not say anything about this at the time as it did not seem to upset S. Both adults gave evidence that S appeared to be unharmed. Neither described any accident that might account for the broken arm.
13. The relationship between the mother and Mr C ended immediately after the events of 22 November. By the time of the hearing, the mother's case was that Mr C must have inflicted the injuries to S on the walk to nursery. She gave evidence that S had appeared unhurt and waved to her before going to nursery that morning. She said (for the first time) that he had waved with his right hand, a detail the judge rejected as a lie. Mr C denied causing any injury. He suggested it must have been caused at nursery on the previous day.
14. At the trial, the local authority alleged that the injury was inflicted by one or other of the adults and that they were both concealing what had happened.

The judgment

15. The note of judgment begins with what is described as a summary. It then moves to what is described as the main judgment. That describes the factual background, the law and the evidence of each witness in the order in which they were called, with commentary from the judge. It ends with a section entitled 'findings'. At the same time as giving judgment, the judge handed down a copy of the 11 page Scott schedule of findings that had been used during the trial, to which she had added her findings in a narrative manner that to some extent, but not entirely, duplicated what was said in the judgment.
16. At the outset the judge found that S had undoubtedly sustained the injuries described by the medical witnesses. She fixed the time window as being between 2 or 3 pm on 21 November and 9 am on 22 November. She said that it was more likely than not that all the injuries occurred during the same timeframe though not necessarily during a single episode.

“I am satisfied that the broken forearm occurred prior to the departure for nursery, in all likelihood in the flat when both [adults] were present.” [para. 3]

“I cannot with any certainty say the injury to the arm occurred the previous afternoon/evening. It could just as easily have happened in the early hours of the morning. I find it had certainly occurred whilst he was in the flat before leaving for the nursery.” [85]

As to the mother's suggestion that the injury had occurred on the way to nursery:

“I consider that to be **extremely** unlikely given S’s presentation [on arrival]. He was not crying or screaming in pain. His fingers and hands had become swollen.” [79]

17. Noting the medical evidence, she determined that the mechanism was a significant blow, and continued:

“It could have resulted from a genuine accident eg fall over, arm out. I am unable to determine whether the fractures were as a result of a significant blow such as a karate chop or blow with a weapon. No eyewitness account how and when it occurred. Compatible with karate chop or one that might be caused when raising an arm to deflect blow. **Could** have occurred when fell, some other trauma to his wrist which neither [adult] witnessed, or if they did, not telling court about it.” [4]

18. I next identify some passages where the judge expressed herself dissatisfied with the evidence of both the mother and Mr C:

“There are details of their evidence which I find quite incredible.” [11]

In relation to the mother:

“... she was totally unable to account for S’s welfare or well-being from the time she went to bed around midnight until she woke at 8.53 as S and Mr C were leaving the flat. I do not believe her. I was left with the distinct impression that she was not being honest or forthright with the court.” [78]

In relation to Mr C:

“I completely reject Mr C’s evidence that S was fine when he dropped him off with no sign of injury. He suggested that teachers would notice something that he had not because they were experts. He would certainly have known there was something wrong and I believe he is hiding his knowledge and not being honest with either himself, the court or [the mother] about what had happened earlier in the morning or late at night.” [62]

“I found his evidence to be inconsistent and unreliable and I attach little weight to his account of the events of the 21st and 22nd November 2018. He was a mass of contradictions and at times lies.” [84]

19. As to who might have caused the injury, the judge stated at various points in the judgment:

“I am satisfied it is limited to them both. I do not find evidence S sustained injuries by either nursery or grandmother. S definitely sustained his injuries whilst in the care of both [the mother and Mr C]. I am not in a position to say that they were **deliberately** inflicted injuries with malice but I am in a position to say S suffered the injuries in particular his broken arm when in care of one or both of them and one or both of them knows how he sustained a broken arm and have withheld that information from the court.” [10]

“I cannot determine whether either or both together injured S. It is **just** possible that when unsupervised he sustained an injury but I consider on the balance of probabilities and in the light of all the evidence that one or both of them caused the break to his arm, the injuries to his neck and the bruise to his clavicle. S certainly is convinced his arm hurt because Mr C hit him.” [11]

“I am at a loss to discover, through the course of this hearing, how the injury was actually sustained but it was an injury and it was sustained. On that basis I find that it was an injury caused to S by either the mother or Mr C or both.” [33]

“It is tempting to rely on Mr C's demeanour, previous convictions and personality traits, observed in court, to reach the conclusion that it was he who caused the injuries to S. However, I would be straining to reach a conclusion based on the evidence as I have assessed it to be. I cannot, on the balance of probabilities, determine who caused which injuries. I do NOT find that S met with a genuine accident between 3 o'clock on the afternoon of 21 November and 9 am on the morning of 22 November 2018. The adults are lying over the details of the evening and following morning. They know how the injuries occurred and who was responsible. One or both would have heard him crying out in pain and notice the injury to his arm. They are protecting themselves over and above a vulnerable child. They are covering up and protecting their own backs rather than that of S.” [87]

The judge also said in her oral judgment, but not in the approved note of judgment:

“I would dearly like to be able to conclusively find that Mr C caused the actual break.”

20. As to the sofa incident:

“...I find as a fact there was an incident when S had urinated on the sofa and he was grabbed by Mr C and removed from the sofa. Professionals and investigators jumped to the conclusion that this was when the injury occurred. Based on the forensic analysis of timing of the injury to the arm that is possible. It is equally possible it could have occurred later that evening or in the early hours of 22nd November 2018 . If it occurred before he went to bed he would have had a dreadful night’s sleep caused by the pain unless he had been medicated with pain relief. The sofa incident would not necessarily have accounted for the mark on the side of the neck or the clavicle. I believe the mark on the side of his neck was more recent than the night before given how quickly it resolved.” [85]

As to the mother’s evidence about the incident:

“In my opinion she was playing this incident down. In S’s memory this incident... was a searing memory. I believe him when he told people his arm was hurt when he was pulled off the sofa but I cannot be sure even on the balance of probabilities that that was when the broken arm occurred. I am sure that S experienced the feeling of being hurt when Mr C shouted at him and pulled him off the sofa... I believe Mr C's short fuse came to the fore... I suspect there was an atmosphere, some shouting or disciplining of S which neither [adult] is prepared to acknowledge.” [74]

21. The judge further found that:

“Either or both failed to protect. Find undoubtedly [both] failed to protect from injury. The mother says she delegated responsibility to [Mr C] from c.3 pm 21st November to 9.05 am the following morning 22nd November 2018 apart from feeding him pizza and chips. On any account she was careless as to his welfare.

Either or both failed to seek any immediate, timely and appropriate medical attention. Whoever was caring for him at the time he sustained the injury it would have been immediately apparent that he had sustained significant painful injury to his lower right forearm. S sustained that injury inside the flat, and not on the short journey to school. The mother was oblivious to S’s welfare. Cannot be certain or even find on balance of probabilities that she knew the extent or severity of injury to his arm when Mr C left with S to take him to nursery. She may have been unaware or did not appreciate how serious. On any account significant injuries when she should have been caring and at times delegated care inappropriately.” [13-14]

and this of Mr C:

“I am certain Mr C was aware of an injury to S’s arm at the time they left for nursery.” [15]

22. Having heard the judgment, the parties requested clarification and a direction was made for an expedited transcript and for the matter to be listed for a further hearing on 5 June 2019 so that these issues to be addressed. Unfortunately the court tape was such poor quality that none of the evidence or judgment (except the evidence of Dr Watt, given by video link) could be transcribed.³ The advocates agreed a note of judgment which was amended by the judge and handed down electronically on 12 June 2019.
23. The questions asked by the parties were:
- (1) Whether the court had concluded that the injuries were non-accidental on the balance of probabilities;
 - (2) If so, whether the court had identified the perpetrator;
 - (3) What evidence from Dr Coren and Dr Watt had been accepted and what had not;
 - (4) What evidence of Mr C had been accepted and what had not.
24. In response, the judge gave these answers in an additional paragraph [89]:

“I accepted that very little if anything of what Mr C said I regarded as the truth. (*sic*)

I agreed that paragraph 16 of the local authority's summary of my judgment could be regarded as equivocal and provided the following clarification:

Something happened to S overnight. We will never know as the mother and Mr C have not helped us (ie the court). I said that the “likelihood” is that S injured his arm whilst in the care of Mr C.⁴ By that I mean an independent observer based upon Mr C's demeanour, previous convictions and demonstrated personality together with remarks made by S would all suggest that Mr C was the more likely perpetrator. However I would be straining to reach that conclusion based on the **evidence** as I have assessed it above. It would be speculation. I cannot be satisfied on the balance of probabilities that each or any of the injuries was caused by Mr C in preference to the mother. They were both in the flat with him at the time the injuries occurred. They have both lied. They are both protecting each other.

³ We have required an explanation from the court.

⁴ A statement made in the oral judgment that does not appear in the approved note.

On the balance of probabilities, I find that the injury to the arm was NOT an accident. It occurred either as S raised his arm to defend himself or as a consequence of a deliberate blow or excessively rough handling on the part of either Mr C and/or the mother. The injury to his neck, on the balance of probabilities, was similarly caused through rough handling. The bruise to the clavicle makes a third concerning injury occurring in the same time frame, which on the balance of probabilities was caused at the same time as rough handling or striking out at S by either Mr C and/or the mother.”

The judge also indicated that she had accepted the evidence of Dr Coren and Dr Watt as recorded above.

The grounds of appeal

25. On behalf of the mother, Ms Teggin and Ms Stout advance five grounds of appeal, which can be boiled down to two core submissions: the judgment was (1) internally inconsistent (2) perverse as being against the weight of the evidence.
26. Ms Teggin describes the judgment as chaotic. As to inconsistency, the finding at [62] – see paragraph 18 above – that Mr C was “hiding his knowledge and not being honest with either himself, the court or the mother about what had happened earlier in the morning or late at night” cannot sit alongside a finding that the mother may have caused the injuries. She also points to the judge’s statement, referred to at [89] that the “likelihood” was that S injured his arm whilst in the care of Mr C.
27. As to perversity, Ms Teggin argues that the judge simply did not take into account a mass of evidence that compellingly pointed to a finding on the balance of probabilities that the injuries had been caused by Mr C:
 - The grandmother’s evidence was that S had said to her in the car on the way to the hospital that Mr C had hurt his arm. He had repeated this on other occasions. S is a bright child, able to say who injured him.
 - S made many statements to adults that he was scared of Mr C.
 - In contrast, S has showed no anxiety when with his mother.
 - As a result the inappropriate delegation of care to Mr C, he had a major opportunity to injure S.
 - The judge assessed Mr C as a man with a short fuse.
 - She was critical of his demeanour during the hearing.
 - There was a manifest inconsistency in his oral evidence that there was nothing wrong with S when he dropped him at nursery and his statement in police interview that he had told the nursery that S was “going on about his arm”.

Most of these matters were described in the judgment, but instead of being weighed and evaluated, they were ignored or discounted for no good reason.

28. As to the outcome if the appeal succeeded, Ms Teggin submitted with a realistic lack of conviction that this court could substitute a finding that Mr C was responsible for the injuries.
29. The local authority and the Guardian do not accept the complaint of perversity. Ms Ancliffe submits that, although the judge did not say in terms why the injury was not accidental, the basis for the conclusion can be gleaned from material within the judgment: medical opinion, opportunity, no account of accident, not caused at school, pervasive lies by both carers, statements by the child. However, in addition to the inconsistency about the mother's state of knowledge, she contends that the judgment contains a central confusion as to whether accident had indeed been ruled out and, if it was inflicted, who was responsible. In particular, there is a discrepancy between paragraphs 4 on the one hand and paragraphs 87 and 89 on the other.
30. I am conscious that these arguments have not been balanced by legal submissions on Mr C's behalf. He attended before us in person to deny responsibility for S's injuries and express his dissatisfaction at the process. His lack of representation at the trial, while not in itself amounting to unfairness, placed him at a disadvantage and created difficulties for the other parties and the judge. He told us that although he did not want there to be another hearing he would want to be represented if there was one. We strongly encourage all possible steps being taken to achieve this, either by the grant of legal aid or through an application for pro bono assistance.

Analysis

31. In my view the main problem with this decision is not so much that it is internally inconsistent as that it has not been sufficiently reasoned.
32. In [Re N-S \(Children\) \[2017\] EWCA Civ 1121](#), McFarlane LJ said this:

“30. The need for a judge to provide an adequate explanation of his or her analysis and the reasoning that supports the order that is to be made at the conclusion of a case relating to children is well established. Not only is the presentation of adequate reasoning of immediate importance to the adult parties in the proceedings (in particular the party who has failed to persuade the judge to follow an alternative course), it is also likely to be important for those professionals and others judges who may have to rely upon and implement the decision in due course and it may be a source of valuable information and insight for the child and his or her carers in the years ahead. In addition, of course, inadequate reasoning is a serious impediment to any consideration of the merits of the judge's decision within the appellate process.”
33. For all these reasons, there needed to be as much clarity as possible about what had happened to S. Even though the other unchallenged findings of fact of emotional harm and neglect on the part of the mother are serious enough to cross the threshold, a finding that a parent has or may have caused serious injury to a small child is one that resonates. Here, there is no attempt by the judge to reason why there had not been an accident: she

simply asserts it [89]. In the same paragraph, the only reasons given for the inability to identify a perpetrator are that

“They were both in the flat with him at the time the injuries occurred. They have both lied. They are both protecting each other.”

That takes one nowhere. What was required was an analysis of the factors that pointed towards and away from each adult as being the perpetrator. If the result was an inability to identify, so be it, but the attempt had to be made.

34. I would accept the submission that the judgment contains within it evidence that could have been gathered up and assembled to justify the findings contained in the judge’s clarification at [89]. I would also accept that a judgment must be read as a whole and a judge’s explicit reasoning can be fortified by material to be found elsewhere in a judgment. It is permissible to fill in pieces of the jigsaw when it is clear what they are and where the judge would have put them. It is another thing for this court to have to do the entire puzzle itself. In my view, there is so little reasoning underpinning the judge’s conclusions that we would have to do this in order to uphold her decision, and if we were to attempt it there is no knowing whether we would arrive at the same conclusion.
35. I am also troubled by the procedural history. There were undoubtedly inconsistencies in the oral judgment, but one main ground for concern is that the parties had to seek clarification on such fundamental issues at all. As to the suggested inconsistencies, Ms Teggin is right that the clear statement at [62] that Mr C was hiding what he knew had happened from the mother is not compatible with the conclusion that she may have caused the injury. If the judgment as a whole was soundly reasoned this might not be fatal but as matters stand it is a serious anomaly. I am less struck by the argument made by the respondents about paragraph 89 and the “likelihood” that S injured his arm while in the care of Mr C. Read as whole the paragraph shows what the judge had meant by that observation. It is nevertheless a good example of the imprecision of language that pervades the judgement and causes doubt as to what standard of proof the judge was actually applying. She repeatedly says that she can or cannot be ‘certain’ or ‘sure’ about a fact and at one point says that she “cannot be sure even on the balance of probabilities” [74]. Occasional colloquial use of language is to be expected but when it is so frequently found in the context of important findings of fact it undermines confidence in the solidity of the findings.
36. I would therefore allow the appeal on the basis that the judge’s conclusions as eventually expressed were inadequately reasoned and further that there are too many actual or arguable deficiencies in the structure and content of the judgment for it to be upheld.
37. In the light of these conclusions, it is unnecessary to express a view on Ms Teggin’s perversity submission. Indeed, given that there will be a rehearing it would be unhelpful for this court to comment on the significance or otherwise of aspects of the evidence; that will be a matter for the judge conducting the retrial.
38. Lastly, I note that the resulting order did not recite the threshold findings as it should have done, but merely referred to the Scott schedule. A schedule of this kind is a useful

document in preparation for a trial but it is not the end product. For reasons of clarity of thought and clarity of communication to others, a simple statement of the grounds on which the threshold was crossed should have been created.

Outcome

39. We have allowed the appeal and directed a retrial before a different judge. We cannot substitute our own conclusions. That would only be appropriate if the result of the appeal allowed for only one realistic outcome. The matter will be remitted to the Designated Family Judge for an urgent case management hearing. At that hearing he will determine what needs to be done to move the case towards a final decision on S's future and our order will include a list of issues he will no doubt want to consider. These will include: whether it is necessary for the medical evidence to be recalled, given that it may be capable of agreement; whether there is any need for there to be a separate fact finding hearing or whether it could be incorporated into the five day final welfare hearing already fixed for February; last and not least, what steps should be taken to help Mr C to obtain representation if he wants it and is prepared to cooperate.

Lady Justice Asplin

40. I agree.

Lord Justice Davis

41. I also agree with the judgment of Peter Jackson LJ.
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