Neutral Citation Number: [140] EWHC (Fam)

Case No: FD08C00046

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2009

Before :

THE HON. MR. JUSTICE HEDLEY

- -

Between :

F & L	**Applicants**
- and -	
A Local Authority	**1st Respondent**
- and –	
'A' (by her Guardian)	**2nd Respondent**

- -

- -

F & L (In Person) Applicants
John Tughan (instructed by **The Local authority**) for the 1st Respondent
Ms Kahatun Sapnara (instructed by **The Guardian**) for 2nd Respondent

Hearing dates: 14th/15th/16th January 2009

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HON. MR. JUSTICE HEDLEY

This judgment is being handed down in private on 30th January It consists of nine(9) pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

The Hon. Mr. Justice Hedley :

1. There are in form before me three applications made by the parents of a child known as 'A' who is now aged four by which they seek a residence order pursuant to Section 8 of the Children Act 1989 ('the 1989 Act'), a stay of adoption proceedings under the Adoption & Children Act 2002 ('the 2002 Act') current in respect of 'A' and a variation of a media injunction made herein by Baron J on 30th August 2007. I say that there are 'in form' three applications because not only cannot they be understood save in the context of extensive previous litigation but the real issue I have had to try is in respect of a discrete medical issue.

2. This case has attracted considerable publicity in the past. In particular it was the subject of an article in The Times of 21st December 2006 by Ms Camilla Cavendish (and set out in full in the earlier judgment of the Court of Appeal herein) and featured in an article in the Sunday Times of 6th July 2003 by Mr. Stuart Wavell. It has been held up as an exemplar of what is wrong with family justice with an undue reliance upon medical expertise and proceedings conducted in private. When these applications first came before me on 15th July 2008, I made it clear that whilst I was prepared to conduct these proceedings in public, I was not prepared to revisit the media injunction until judgment had been given on the applications. That has remained the position. I have heard the case in public and this judgment is given in public but the media injunction remains in force.

3. The parents appeared in person. It was obvious that the central issue was to be medical evidence as to causation of brain damage. At a Directions hearing I invited the parents to consider being represented. Having considered the matter, they have decided to continue to act in person which they have done with courtesy and restraint and, I may add, not without ability. They have been assisted at trial by a McKenzie Friend to whom the court is indebted.

4. At the original trial of this matter it was found that a child known as 'Y' had suffered non-accidental head injury whilst in the care of his parents, being this father and his then wife 'K' though no determination was made as to which parent had actually inflicted the injury. The parents first in May and then in September 2008 received a medical opinion that the cause of the original injury was likely to be a natural one rather than a non-accidental head injury ('NAHI'). Hence these applications. The local authority then obtained a further medical opinion which confirmed NAHI as the most likely cause of the original damage. It was that issue that I was invited to and did try. This is my judgment on it.

5. Most helpfully the parties are in agreement as to how any judgment of mine should be implemented. Were I to conclude that the original finding should stand it would follow that the parents' applications would essentially fail. On the other hand were I to reach the opposite conclusion, it is accepted that the parents should be given leave to defend the current adoption application in relation to 'A', their application for a residence order should be heard within those proceedings and the application to vary the media injunction stood over until the conclusion of those proceedings.

6. Although this case is ultimately about the future of 'A', it will be apparent that it cannot be understood outside the context of what happened to 'Y'. It is therefore necessary to set out the history of the whole of this litigation. In 1994 this father

married a lady known as 'K'. They had two children known as 'X' (a girl now aged 11) and 'Y' (a boy now aged almost 10). The family lived together without coming to the adverse notice of any statutory agency until 30th March 1999 when 'Y' (then aged about two months) was admitted to hospital with what transpired to be serious brain damage. It was and remains the case that neither parent could account for anything which might have caused this damage. In due course the view was expressed by Dr. Michael Nelson, a distinguished consultant radiologist , that the brain damage was most likely to have been a NAHI caused by shaking and, less clearly, an impact injury. Dr. Nelson had been instructed as the expert in care proceedings subsequently taken by the London Borough of Enfield ('The LA'). Although the parents disputed his evidence, it was and remained unchallenged by any other medical evidence.

7. Judgment was given in those proceedings on 6th March by District Judge Bradley sitting at the Principal Registry of the Family Division. The judge pointed out that there had been no adverse parenting history, that aside from the head injury, 'Y' was otherwise unhurt and that the parents had been consistent throughout in what they had said about what had happened. Nevertheless she concluded on the basis of the medical evidence that 'Y''s brain damage was a NAHI caused whilst in the care of his parents but that she could not determine which had been the perpetrator. From that judgment there was no appeal.

8. The sequel to that hearing was unusual. Sadly 'Y' had suffered permanent damage by way of cerebral palsy and therefore suffered from global developmental delay. However, subsequently the children were returned to the care of their parents who in due course separated. The ultimate order was no order on the LA's application, a residence order in favour of the mother with contact to the father, an arrangement which continues until this day. The father's contact is unsupervised.

9. In December 2003 the father married his second wife a lady known as 'L'. They remain together and are the parents of 'A' who was born a year later. Unsurprisingly the LA became involved with 'A'. Indeed she was the subject of an emergency protection order followed by a series of care orders and has lived effectively the entirety of her life away from her parents. The LA took proceedings under Part IV of the Act of 1989. During the course of those proceedings the LA decided on a plan for adoption so that in due course an application was made for a placement order under the 2002 Act. The reasons for that decision appear broadly to have been threefold: first, the adamant stance of the father that neither he nor 'K' had or could have inflicted injury on 'Y'; secondly, the unstable and aggressive behaviour demonstrated by the father towards professionals; and thirdly that the mother, although no complaint could be made about her, aligned herself wholly and completely with the father. These applications came on for hearing in October 2006 before HH Judge Horowitz, Q.C. who gave judgment on 23rd October.

10. The learned judge made the orders sought by the LA. He of course relied on the findings made by DJ Bradley which still stood unchallenged by medical evidence. He relied upon the vehement denials of responsibility which he found were poorly reasoned and reflected aspects of the father's personality. He relied upon a series of findings of aggressive or unco-operative conduct by the father. He concluded that for those reasons the father posed a continuing risk to 'A'. He also held that the mother would not be able to oppose or defy him and thus be unable to offer safe care to 'A'. He concluded his judgment thus –

"With some considerable regret I have, therefore, reached the clear conclusion that I must exercise my discretion under Section 31 to make a care order in the terms supported by the LA and the guardian. In my judgment that step is proportionate and necessary to secure '[A]'s welfare."

11. In due course adoption proceedings were contemplated. The parents, then acting in person, had sought relief from the European Court of Human Rights and applied for orders effectively staying the implementation of the plan for adoption. On 2nd February 2007 HH Judge Horowitz, Q.C. refused to grant such relief. This order the parents did seek to challenge on appeal and their application for permission was heard on 27th March 2007 by Munby J sitting as a single Lord Justice who refused permission in a reserved judgment given on 30th April 2007. That judgment, which was of course delivered in public, contains a very full account of all that had happened in the case up until then, surveys the publicity which it had received, refers to all the documents drawn to the court's attention, treats the application as an application to appeal all previous orders and explains why such permission was to be refused.

12. It is important to say something about the burden and standard of proof in these cases. The father has never been prosecuted for any offence nor have I seen evidence on which a jury could be invited to be sure of guilt of any offence. Nevertheless a court has concluded that either the father or 'K' caused a NAHI to 'Y' by shaking. How could this be? This question has recently been considered again by the House of Lords in Re B (CARE PROCEEDINGS: STANDARD OF PROOF) [2008] 2 FLR 141. The approach in civil proceedings is explained by Lord Hoffman where he says this-

"[2] If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and that fact is treated as having happened."

The matter is clearly put by Baroness Hale of Richmond (with whom all others agreed) as follows –

"[69] There are some proceedings, though civil in form whose nature in such that it is appropriate to apply the criminal standard of proof. Divorce proceedings in the olden days of the matrimonial 'offence' may have been another example (see Bater v Bater [1951] P 35, [1950] 2 All ER 458). But care proceedings are not of that nature. They are not there to punish or to deter anyone. The consequences of breaking a care order are not penal. Care proceedings are there to protect a child from harm. The consequences for the child of getting it wrong are equally serious either way.

[70] My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold

> *under s. 31(2) or the welfare considerations in s.1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account where relevant, in deciding where the truth lies."*

and then she adds this about the inherent improbabilities of child abuse –

> *"[73] In the context of care proceedings, this point applies with particular force to the identification of the perpetrator. It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied."*

13. In this case before DJ Bradley the LA undertook the onus of proof but once the medical evidence established NAHI by shaking it was inevitable that the court would conclude that a parent must have done it. There was simply no other option on the evidence. That finding stands until displaced. The burden is now on the father on the same balance of probability to show that the original finding was wrong.

14. There is, as the House of Lords accepted, a dreadful conundrum here. Wrongly to find that there has been NAHI is to risk tearing apart an innocent family – a shocking thing to happen. Likewise wrongly failing to find NAHI where such in fact occurred is to risk returning a child to a situation of high or even fatal risk as notorious cases have sadly demonstrated. There is for a court, however, no escape from that conundrum. It must make a finding one way or the other on the balance of probabilities as Lord Hoffman acknowledges.

15. And so matters were with a finding made until the Summer of last year. By then 'A' had been placed for adoption. This was a second placement, the reasons for an earlier failure being not unconnected with all the publicity that has surrounded the case. Then it was that the parents came into possession of what appeared to be new medical evidence. And it is to these matters that I must now turn.

16. Dr Waney Squier is a consultant neuropathologist to the Oxford Radcliffe hospitals and an honorary clinical lecturer in the University of Oxford. She has fairly frequently given evidence as an expert in alleged NAHI by shaking cases. She was consulted by the parents. In a report dated 30th May 2008 she wrote as follows:

> *"Review of the records available to me suggests that [Y] suffered cerebral venous sinus thrombosis when he was admitted to hospital in March 1999. I cannot be certain from the records I have seen and it would be important to have the original brain scans reviewed.....There appears to have also been brain swelling and hypoxic-ischaemic injury, findings which could also occur with sinus thrombosis.....The presence of subdural haemorrhage and brain swelling does not, of itself, indicate NAI although it has been accepted by some*

as a pointer towards it. Venous sinus thrombosis could be a cause of all three findings.

In my opinion the evidence presented is not diagnostic of abuse: I would strongly recommend that the brain scans be reviewed. I would very much like to see then but a formal opinion should be sought from an experienced paediatric neuroradiologist."

17. It was unsurprisingly this report which gave substance to the parents' application to re-open this matter and which no doubt informed their acceptance by local authority and guardian that this would indeed have to be done. Certainly it influenced the court's decision to investigate the application.

18. Dr. Squier reported again on 17th September 2008. She had seen the medical notes and the original neuroradiological reports. However, the brain scans themselves could not be found and there was no further experienced paediatric neuroradiological input. At this stage she found no references to a sinus thrombosis and indeed she was ultimately to abandon that hypothesis. Instead she discerned another mechanism and concluded her report thus –

In my opinion there is absolutely no evidence in the notes available to me that [Y] suffered shaking or impact or any other sort of inflicted injury. It is far more likely that [Y] suffered a re-bleed into a growing chronic subdural haemorrhage either spontaneously or as the result of trivial injury during normal handling."

19. Once Dr. Squier had confirmed her rejection of NAHI after seeing the records, the local authority sought and obtained leave to instruct Dr. Neil Stoodley a consultant neroradiologist at Bristol. Dr. Stoodley has a specific interest in the neuroimaging of children and is also experienced in giving evidence in cases of alleged NAHI caused by shaking. As a result of an oversight not the fault of any party or witness, Dr. Squier's report came rather late to Dr. Stoodley. Nevertheless he was able to report by 22nd December. His view was that the most likely explanation for what the radiologists saw on the brain scans in 1999 was, as Dr. Nelson had said, a NAHI caused by shaking. Thus it was that the issue I had to try emerged.

20. Despite extensive searches the original brain scans have never been found and the parties now accept that they cannot be found. That is very much less serious than it might have been for the experts were able to agree both that the radiological reports enabled one to understand what was there to be seen on the scans and also they could agree as to what it was that would have been there to be seen. In other words, Dr. Squier and Dr. Stoodley could agree on the primary evidence although each accepted that there were serious differences between them as to the interpretation of that primary evidence and the conclusions on causation to which it led. All other medical evidence thought by each expert to be necessary was available to them. It is necessary to say something of the evidence which each of them gave.

21. Dr. Squier drew attention to research that up to 46% of babies are born with subdural haemorrhage of which most are symptomless, heal and go away but some of which may persist. At the time of his admission to hospital 'Y' may have had a subdural haemorrhage which originated at birth. There could have been a re-bleed from some

trivial event into the chronic subdural haemorrhage which is capable of producing the symptoms seen. She said that 85% of autopsies in established shaking cases have additional bruising or other injury. It is common ground that no other injury was found here. Moreover she was of the view that the force required to produce subdural bleeing would inevitably cause damage to the neck. The presence of the triad (i.e. subdural haemorrhage, retinal haemorrhage and hypoxic-ischaemic damage) without any other evidence should make one very worried that there could be another cause. Moreover she said that 'sunset eyes' had been seen on 'Y' and that she had never seen that in a shaken baby. She thought that there may have been a gradual bleed from birth which would cause raised intercranial pressure (often evidenced by 'sunset eyes') and that this could explain what had happened in this case. She said the presence of dark blood (as indeed there was) meant that it was not acute blood; this reinforced her view of a gradual bleed over time.

22. Dr Stoodley's evidence was rather different. He said that he could only express opinions based on the radiological evidence. It was clear that the triad was present and that there was no evidence of a naturally occurring condition. He accepted that up to 46% of babies could have subdural haemorrhage at birth but pointed out that these followed up were found with no haemorrhage at four weeks save one where they was in any event a supervening cause. Thus whilst he could not absolutely rule out 'Y' having a birth related subdural haemorrhage in March 1999, he regarded it as most unlikely. There was, he said, bright blood to be seen on the scans which meant that it would not be more than two weeks old. Moreover, he saw subdural haemorrhages at the back of the head as well as the front and he rejected Dr. Squier's view that they could move with gravity. He had never seen such movement. His view was that the dark blood to be seen was a traumatic effusion and he could see nothing to support the view that this was a chronic condition. He said that the commonest cause of subdural haemorrhage in head injury is NAHI. Dr. Stoodley accepted that there was no evidence of impact injury or any other injury but said that the absence of other injury was so in the majority of NAHI cases by shaking. He said in particular that the absence of neck injury was not significant and that all that was really known about the forces required was that it must be beyond ordinary (even rough) usage for were it otherwise there would be very many more cases. In short his view was that on the neuroradiological evidence, the primary facts and the case notes there was no evidence of a naturally occurring cause that would reasonably explain it and, given the absence of any history of trauma, then NAHI was far and away the most likely cause. Although acknowledging that it was a clinical issue, he said there was no evidence of 'sunset' eyes prior to admission, indeed the evidence of it, without comment as to cause, came from the specialist hospital's retrieval team, which was well after first admission to hospital.

23. What do the parties say about the medical evidence? The contention of the local authority (supported by the guardian) is that the evidence of Dr. Stoodley is very much to be preferred. First they submit that he is an experienced neuroradiologist with a specific interest in the neuro-imaging of children. Not only is that the specific discipline required in this case but was expressly recommended by Dr. Squier. The court, they submit, should be cautious of Dr. Squier's rejection of the conclusions of the very investigation that she recommended. Mr Tughan effectively submitted that the decisive factor on the facts of this case was that interpretation of the brain imaging reports was the crucial issue (as opposed, for example, to the examination of human

tissue), and that needed the skills of a neuroradiologist and not those of a neuropathologist, however distinguished in her specialised field she may be. Secondly they submit that Dr. Squier has her own beliefs about NAHI by shaking which are not shared by others. This relates both to her views about the high levels of force that would be required to produce a subdural haemorrhage and also to her innate scepticism about the significance of the presence of the triad. Indeed it was submitted that she had attempted to 'shoehorn' the facts to fit her hypothesis as for example in asserting that the subdural haemorrhage was birth related or as in the original diagnosis of cerebral venous sinus thrombosis.

24. The parents contentions are that the court should firmly prefer the evidence of Dr. Squier and on that basis conclude that the original evidence of Dr Nelson as to causation was mistaken and thus the finding of District Judge Bradley based on that evidence was wrong. It would, they submit, follow from that that the placement order in respect of 'A' made by HHJ Horowitz,Q.C. was made on an unsound basis. The father reminds me that, apart from the hospital admission, there had been nothing to doubt the parenting skills of the parties. Indeed in relation to 'A' there was nothing to doubt the parenting skills of either of her parents. The local authority had pointed to violent, obstructive or unco-operative conduct on the part of the father and, whilst not seriously disputing the facts, he maintained that all of it was nothing more than might be expected from a grievously wronged parent. The father points out that the scans show chronic as well as acute subdural haemorrhages and says that there is nothing to show how old the chronic ones are and therefore, he submits, they could have been there from birth. He is critical of Dr. Stoodley's evidence and maintains that it was uncertain: 'never say never' was a phrase used more than once by Dr. Stoodley. He points out that 'sunset' eyes may be consistent with a birth related condition. He submits that Dr. Stoodley was avoiding giving him answers and that the uncertainty in his evidence makes it invalid. He concluded his submission by saying that 'Y' had been very ill but that the finding amounted to a miscarriage of justice, that he and his present wife have been wrongly deprived thereby of 'A' and have lost valuable time with her; indeed they have not seen her for two years. Even now, he says, wrongs can be righted and it is not too late for them to catch up with her life.

25. I have pondered long and hard over this matter, giving it my closest and most anxious attention. I remind myself that I am in effect concerned only to resolve the medical issue. The parenting of 'Y' before his admission to hospital is of course of some relevance to causation. Matters accruing later than that and in the early life of 'A', if relevant, would be relevant to the welfare issues to be determined within a contested adoption were the parents to succeed on the medical issue but in my judgment have no direct relevance to that issue and so I have accorded the alleged misconduct of the father no weight. This judgment is concerned with one question: can it be shown on the evidence that I now have that the finding made in relation to 'Y' was erroneous? That issue is to be determined on a balance of probability. I said to the parents at the beginning of this case that they bore the evidential burden of proof but that I hoped that the case would not be determined on that basis but that I could decide clearly the medical issue. I remind myself too, as Dr. Stoodley has pointed out in an article to which the father drew my attention, and is contained in his bundle, that the consequences of judicial error in these cases are calamitous: a false finding may mean the destruction of a family whereas a failure to make a finding that should be

made involves returning a child to face grave or even fatal risk. No-one is more aware of these matters than I.

26. In the end I have arrived at a clear conclusion that I should reject the evidence of Dr. Squier. However regrettable it may have been that she proffered an initial diagnosis that she was ultimately constrained to abandon as plainly wrong, namely the cerebral venous sinus thrombosis, it is not on that basis that I come to my conclusion though it did nothing to inspire confidence in her views, especially as she had added the additional general comment that the evidence presented was not diagnostic of abuse. This latter comment, though technically correct because it uses the word 'diagnostic', was in the context of this case an unwonted hostage to fortune. It had the sad effect, as I find, of raising wholly false hopes in the parents. I come to my conclusion because on the central issue I find both that she is wrong and that Dr. Stoodley, on a clear balance of probabilities is right. It is noteworthy, and in my view of some significance, that Dr. Squier expressed the view that she strongly recommended the need for a neuroradiological opinion. Such an opinion was provided and then rejected by her. In the end she simply opposed her view to the very expertise she had indicated was required. Whilst I cannot of course exclude the chronic subdural haemorrhages as birth related, I regard that as most unlikely noting that, in the study referred to by Dr. Squier, no child who was followed up (although many were not) was found with a subdural haemorrhage after four weeks save one whose haemorrhage clearly had a different aetiology. I am satisfied that there is real force in the criticism that Dr. Squier has (as it was put) shoehorned the evidence to fit a conclusion which accorded with her well known (but currently distinctly minority) view as to the forces required to produce the triad and her scepticism over shaking injuries. In my judgment Dr. Stoodley is right in saying that other injury is often absent in shaking cases, a momentary loss of self control being all that is needed, though of course not every shaking produces serious injury. Of course, the presence of the triad is not diagnostic of shaking injury but it is trauma related, trauma of sufficient gravity that the carer of the moment would know that something untoward had happened. Where, as here, no account is given of trauma, shaking tends to head the list of differential diagnosis where (as here) the process of disease has been excluded. In my judgment Dr. Squier's account, amongst its weaknesses, cannot properly explain in this context acute subdural haemorrhage or such haemorrhages in more than one place and recent (on the scan, bright) blood.

27. The court can having nothing but admiration for the persistence of the parents in this case or any doubt but that the father's belief in his innocence and the injustice done to his families is genuinely held. However, on the evidence that has been presented to me, I am satisfied that the findings made by District Judge Bradley were in fact correct and there is nothing new that can undermine the subsequent processes given that all other matters were disposed of by Munby J on 30th April 2007 in refusing permission to appeal. A transcript of this judgment must, of course, be placed in the current adoption proceedings. There is nothing further to be said about the press injunction which I am not prepared to vary although of course all that is in this judgment is in the public domain as is all that transpired in evidence save as to the identification of anyone other than lawyers and expert witnesses.