

1. On 18 August 2020, the Court of Appeal delivered their judgement in the case of ***R v P (Children: Similar Fact Evidence) [2020] EWCA Civ 1088***, providing guidance on the general approach to be taken to similar fact evidence in family proceedings.

The Facts

2. The Mother and Father married in 2014, and in the same year the older child was born. In September 2017, Mother left the Father and later that year the younger child was born. The Father had not seen the older child since separation and had never seen the younger child.
3. The Father issued an application for a Child Arrangements Order in October 2017, for contact with the children. Mother opposed this application and made allegations of coercive and controlling behaviour by Father and mistreatment of the children.
4. In 2018, the Father began a new relationship, with Mrs D. Mrs D was also involved in court proceedings in Wales regarding her own children and their Father, Mr D. The court in Wales ordered a Section 37 report, which raised concerns in relation to her children's welfare and the nature of the relationship between Mrs D and Father. On the advice of the police, the Welsh local authority contacted the local authority in London who were involved with Father's application for a Child Arrangements Order. The Section 37 report revealed that Mrs D had abruptly resigned from her teaching job and moved to Wales with Father and her children, ceasing all contact between the children and Mr D.

5. In December 2018, the court in Wales had ordered that Mrs D's children should be removed from her care and placed in the care of Mr D under an interim order. Since the removal of the children, Mrs D did not engage with the local authority or make attempts to see her children. The Welsh local authority concluded that Father had behaved in a coercive and controlling way towards Mrs D.
6. In February 2019, the Welsh local authority filed a Section 7 report recommending a final order for the children to live with Mr D. The court in Wales made this order, without participation from Mrs D. The report described her as an intelligent individual who had been a committed and doting Mother, the author shared her concerns for the welfare of Mrs D. The report referred to accounts given by Mrs D's children of being mistreated by Father.

The issue

7. Mother sought to have the Welsh evidence adduced into the proceedings, on the basis that it showed that Father had subjected Mrs D to the same kind of coercive control that had been directed against her.

The initial decisions in relation to the Welsh evidence

8. The issue of the admission of evidence arose at five hearings:
 - a. In February 2019, the court ordered the Mother's solicitors to write to the court in Wales seeking disclosure and recited that the court was of the view that the reports would be of assistance in the current proceedings.
 - b. In May 2019, a deputy district judge directed an updating Section 7 report from the London local authority to take account of the contents of the Welsh reports.

- c. In July 2019, the order recorded that the court would not be assisted at the fact-find hearing by the evidence of KS. It was unclear until the appeal, what this was referring to, which in fact was the attendance of a witness on behalf of Father. Father suggested that this showed that the court had excluded the Welsh reports.
 - d. In September 2019, the court recorded that Mother had sought permission to rely on the Welsh reports but that permission was refused on the basis it had been refused at the July hearing.
9. The matter was before the court again on 24 June 2020, for a pre-trial review, with a view to a final hearing in August. The issue in relation to the admission of the Welsh evidence was dealt with again. The Judge stated the reports contained hearsay and she did not see how the Father could have a fair trial if the report was admitted on the basis everything in it was true. Counsel for Mother replied that there was no suggestion that it be admitted on the basis everything in it was true, and that Father would have the opportunity to challenge the contents. The Judge directed that the Welsh reports were to be removed from the trial bundle and that all references to them should be redacted from Mother's statement.

The appeal

10. The Mother appealed to the High Court. On 28 July 2020, Cohen J granted permission to appeal and assigned the appeal to the Court of Appeal pursuant to FPR 2010, rule 30.13.
11. On behalf of the Mother, it was argued that:
 - a. The Judge was wrong to exclude the evidence as it was highly relevant to both the fact-finding hearing and any welfare decision;
 - b. The evidence was logically probative as showing a propensity for the Father to act in a coercive and controlling manner, which is often difficult to prove due to this behaviour being a pattern rather than an event;

- c. The updated Section 7 was prepared on the direction of the court, to take account of the Welsh reports;
- d. The Judge failed to consider their relevance or carry out the necessary analytical exercise in relation to admission of exclusion.

12. On behalf of the Father, it was argued that:

- a. It was a case management decision for the Judge and she was entitled to exclude such evidence;
- b. Much of the Welsh reports were hearsay and speculation;
- c. The Judge had carried out the necessary analysis and reached a decision which should not be interfered with.

The Legal Principles

13. The Court of Appeal considered the following principles and authorities when reaching their decision.

Evidence in cases of alleged domestic abuse

14. The **Family Procedure Rules 2010 ('FPR'), Rule 22.1**, gives the court the power to control evidence, by way of admission and exclusion.
15. By virtue of the **Children (Admissibility of Hearsay Evidence) Order 1993**, hearsay evidence is admissible in proceedings concerning children. **Part 23 of the FPR** includes the provisions for the management of such evidence.

16. **Practice Direction 12J** applies when it is alleged or admitted or there is other reason to believe that the child or a party has experienced domestic abuse perpetrated by another party or that there is a risk of such abuse. Domestic abuse includes incidents or controlling or coercive behaviour. Paragraph 19 of the Practice Direction contains a list of matters that the court must consider when making directions for a fact-finding hearing in a case of this kind, including the following:

- a. What are the key facts in dispute;
- b. What evidence is required in order to determine the existence of coercive, controlling or threatening behaviour, or of any other form of domestic abuse;
- c. Whether documents are required from third parties;
- d. Whether oral evidence may be required from third parties, and if so, directions for the filing of written statements from third parties.

17. The final report of the expert panel to the Ministry of Justice in June 2020: ***Assessing Risk of Harm to Children and Parents in Private Law Children Cases***, notes that domestic abuse does not consist of only isolated incidents, but of harmful patterns of behaviour. The report notes that a focus on just recent incidents may fail to acknowledge a pattern of behaviour over a long period of time, and expresses concerns about Scott Schedules which may tend to disguise the subtle and persistent patterns of behaviour involved in coercive control.

18. This concern was also discussed by Baker J, in ***Re GL (Re-opening of Fact-Finding) [2017] EWHC 2626 (Fam)*** at Paragraph 27:

“Not infrequently, a party alleging domestic violence is directed to identify and rely on a few allegations as “specimen” allegations on which to seek findings. In taking this course, however, parties and the court must be careful to ensure that significant issues are not overlooked. Sometimes a pattern of harassment and other forms of domestic abuse is only discernible by conducting a broader examination of the allegations.”

Similar fact evidence

19. In *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26, the House of Lords considered the issue of similar fact evidence in civil cases. The Court of Appeal found that the analysis in this case, applies also to family proceedings. Leading to two questions that a Judge must address in a case where there is a dispute about the admission of evidence of this kind:

- a. Is the evidence relevant, as potentially making the matter requiring proof more or less probable?

If so, it will be admissible.

- b. Is it in the interests of justice for the evidence to be admitted?

This requires an assessment as to the significance of the evidence in the context of the case as a whole.

Three factors were identified: whether the evidence would distort the trial and distract attention from the issue to be decided, a balance of the potential probative value of the evidence against its potential for causing unfair prejudice, the burden which admission would lay on the resisting party in terms of their ability to challenge such evidence.

20. The similar fact evidence in this case involved the issue of propensity, so the Court of Appeal went on to consider, to what extent do the facts relating to the other occasions have to be proved for propensity to be established?

21. The Supreme Court in the criminal case of *R v Mitchell* [2016] UKSC 55 dealt with this. In summary, the Court must be satisfied on the basis of proven facts that propensity has been proven, to the civil standard.

22. The Court of Appeal also considered the timing of similar fact evidence. In *Re S (A Child) [2017] EWCA Civ 44*, similar fact evidence was excluded on the basis that evidence about a rape of a previous partner had only recently surfaced and the previous partner was not being called to give evidence. The Court of Appeal in this case distinguished the facts, as the Father had been aware of the allegations against him contained within the professional reports for over a year.

The Outcome of the Appeal

23. The Court of Appeal were unanimous in allowing the appeal and setting aside the previous order excluding the Welsh evidence.

24. The basis for the Court of Appeal's decision, in summary was as follows:

- a. The necessary analysis concerning whether the disputed evidence should be admitted was not carried out;
- b. The Welsh reports were relevant and therefore admissible;
- c. The evidence should be admitted in the interests of justice;
- d. The evidence may be capable of establishing propensity that may be of probative value in relation to the core allegations.

Conclusion

25. When an issue arises in respect of the admissibility of similar fact evidence, the court must conduct the necessary analysis in relation to whether the disputed evidence should be admitted or not. This analysis is to include consideration of not only the court's case management powers, but also the legal principles outlined above.

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