The Importance of Lay Evidence in Fact-Finding Hearings-a consideration of Re W (A Child) (Inflicted Injury) (Delay) [2024] EWCA Civ 418

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Introduction

1. The decision by the Court of Appeal in Re W serves as a reminder of the importance in fact-finding hearings of the evidence of lay parties being considered alongside that given by medical experts.

Background

2. This case involved a 10-month-old child, who had suffered a broken femur when falling off the sofa at home. The cause of this injury was accepted by the doctors, and all parties, to be accidental. When the child underwent a skeletal survey in hospital, however, two older healing fractures were found to her left and right tibial bones. No explanation was provided for these injuries and the local authority issued care proceedings. The child was removed from the care of her parents and placed with foster carers.

3. Prior to the discovery of the injuries, the family had not been known to the local authority. There were no risk factors associated with the family. A parenting assessment completed by the local authority was wholly positive.

4. Reports were obtained from several independent medical experts. The unchallenged opinion of the expert radiologist was that in the event the child suffered from bone fragility, any weight bearing activity may have caused the fractures, having regard to the child's age and stage of development. A key factor in this case was the child's prematurity; she was born at 33 weeks' gestation and spent several weeks in hospital after her birth. Furthermore, as a result of reflux, the child was prescribed omeprazole at a very early age and continued to take this medication until she was admitted to hospital for the fractures.

5. Omeprazole is a proton pump inhibitor. Bone fractures are regarded as an uncommon side effect of proton pump inhibitor medication for children. The research into this association is, however, limited, and the interpretation of this research was a major issue at trial.

6. In order to address the possible role of omeprazole as a contributing factor to bone fragility, the court ordered that a report be obtained from a pharmacologist. This expert regarded omeprazole as a possible, but unlikely, explanation for the injuries. The opinion of the expert paediatrician was that the child's fractures were likely to be inflicted injuries.

7. As the title suggests, this case experienced significant delay. Proceedings were issued in October 2021 but the fact-finding hearing, for various reasons, did not commence until July 2023. The judgment itself was not delivered until the end of November 2023. After hearing from the paediatrician, pharmacologist, the parents and the grandparents (who were interveners), the trial judge decided that the fractures were inflicted injuries. The judge excluded the grandparents from the list of potential perpetrators and found that the injuries were inflicted by one or other of the parents.

8. The mother, supported by the father, appealed to the Court of Appeal.

Arguments on appeal

9. The mother argued that the learned judge had erred in five material respects: (1) the judge had given insufficient weight to the fact of the accidental femoral fracture; (2) the judge considered each possible cause of bone fragility in isolation rather than together; (3) the judge placed excessive weight on the absence of an explanation by the parents; (4) the judge gave excessive weight to the opinion of the pharmacologist in light of the limited application of the research; (5) the judge failed to place sufficient weight on the positive wider canvass of evidence.

10. The appeal was resisted by the local authority and the guardian, who invited the Court of Appeal to uphold the judge's findings.

The decision of the Court of Appeal

11. The Court of Appeal acknowledged the challenges faced by appellants in seeking to disturb findings of fact made at a trial but in this case decided that the learned judge had fallen into a number of errors of principle such that the appeal must be allowed.

12. Central to the reasoning of King LJ (giving the lead judgment) was the failure of the judge to consider the medical evidence alongside the evidence of the lay parties. At paragraph 28, her Ladyship said:

> *28. At no stage in the judgment was this whole evidential picture put together. As will be explained, the judge reached his finding that the tibia fractures were inflicted injuries based largely on his conclusion that W did not suffer from bone fragility and on the failure of the parents to give any sort of history as to how the fractures occurred against the backdrop of what he found to be W's likely reaction to the fractures. Only having made the finding that the fractures had been inflicted by one of her parents, did the judge move on, for the purpose of identifying the likely perpetrator, to consider the parents' evidence, their credibility and whether they were likely to have caused the injuries.*

13. King LJ was also critical of the reliance placed by the judge on the pharmacologist's evidence in circumstances where the child would have been excluded from the main study cited by the expert on grounds of her prematurity and other factors. At paragraph 57, her Ladyship held:

> *With respect to the judge, his findings turned substantially on the evidence of the forensic pharmacologist who was saying that, based on the limited and somewhat contradictory research, she had concluded on the balance of probabilities that the Omeprazole had not contributed to the bone fractures with heavy emphasis being laid on the fact that W was so young when she sustained the fractures, but without the benefit of any research covering a cohort of babies who had been born prematurely and consequently had an increased risk of bone fragility.*

14. On the issue of the accidental femoral fracture, the Court of Appeal considered that this had not been given sufficient weight in the judge's analysis. As the Court observed in paragraph 69, citing the comments of Peter Jackson J in ***Re BR (Proof of Facts)*** **[2015] EWFC 41**, unusual events occur all the time although the probability of an individual event occurring is extremely low. In this case, though, the unlikely event had happened as the child had suffered a separate fracture from a low-level fall.

15. Whilst King LJ agreed that the judge was entitled to take into account the absence of a history, in this case her Ladyship considered that the judge had given this factor excessive weight on the basis that inadequate analysis had been applied to the lay evidence. In particular, the judge had accepted the evidence of the interveners at the trial and removed them from the list of possible perpetrators. In doing so, however, the judge also accepted the interveners' evidence that they had not noticed a pain response when the child's legs were moved in the days and weeks leading up to her hospital admission. This was also the evidence given by the parents, which the judge did not accept.

16. The Court of Appeal were referred to the recent decision in ***Re R (Children: Findings of Fact)* [2024] EWCA Civ 153**, which had been published a week before the appeal hearing in Re W. This case involved a head injury suffered by a child. The medical evidence was that the injury was likely to have been the result of a shaking event. The parents in that case, however, explained that the child had been dropped. This explanation was supported by a number of witnesses who said they were present at the time of the fall. The trial judge went on to reject their evidence and found that the injuries were caused by a shaking event. In doing so, however, the trial judge did not find that the lay witnesses had colluded to invent the explanation they had given to the court.

17. Peter Jackson LJ, giving the lead judgment of the Court of Appeal in Re R, allowed the appeal. His Lordship said at paragraph 34:

> *I do not agree with the judge's concept of speculation at paragraph 204. Of course he was right to say that the court's task was to determine whether the local authority had proved its case on threshold on the balance of probability. However, that involved grappling with and drawing conclusions from all of the evidence, medical and lay. The medical appearances were clear and the explanation for them was highly likely; but it was not certain, as the judge acknowledged by his finding at paragraph 178i. Against that, the court had the accounts of six people who were with C at the time she was injured. It is wrong to describe the medical evidence as the canvas against which the other evidence was to be considered. Medical and non-medical evidence are both vital contributors in their own ways to these decisions and neither of them has precedence over the other.*

18. King LJ decided that the judge had fallen into the same error in Re W and that he had treated the evidence, medical and lay, in separate compartments. Only after the judge had decided that the fractures were inflicted, and that the child did not suffer from bone fragility, did the judge begin any discussion of the lay parties' credibility. This was regarded as a flaw in his reasoning (paragraph 88):

> *Because the judge did not consider the evidence and credibility of the grandparents and their account of W's presentation during the fracture window until after making his finding that there had been an inflicted injury, this important piece of evidence (namely that the grandparents gave honest evidence and that they had not seen signs of distress in W in the relevant period) was not put into the evidential equation when considering the significance of the parents' inability either to give a history of how W came to have her injuries, or to note any specific distress or discomfort in the ensuing period. As a consequence, the judge did not have in mind evidence which should have served to remind him that there is no hard and fast rule that the carer of a young child who suffers an injury must invariably be able to explain when and how it happened.*

The outcome

19. For the reasons set out above, the Court of Appeal decided that the appeal should be allowed. Notwithstanding that this was a fact-finding decision, the Court of Appeal declined to remit the case for a re-trial and was satisfied that it was in a position to substitute an alternative finding, namely that the threshold was not met.

20. The consequence of this decision is that the public law proceedings were dismissed and the interim care order was discharged. The child had been removed from her parents when she was 10 months old and had spent over two years in foster care. After confirmation of the Court of Appeal's decision, the parties were able to agree a reunification plan, which resulted in the child returning to her parents within a few weeks.

21. Alongside the decision in Re R, the judgment serves as an important reminder of how crucial it is that all of the evidence in fact-finding hearings is considered and that there is no special status afforded to medical evidence. This is particularly important in cases such as Re W, where the medical picture is so complex.

Matthew Fiddy acted for the successful appellant mother in Re W, led by Timothy Bowe KC, on the instructions of Claire Sumner of HRS Family Law solicitors.

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Law is correct as at 2 May 2024

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