Re W-P (Children) [2009] EWCA Civ 216 (19 February 2009)

Case No: B4/2008/3052

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM COVENTRY COUNTY COURT

(HIS HONOUR JUDGE HOOPER QC)

(LOWER COURT No CV08C00095)

Royal Courts of Justice

Strand, London, WC2A 2LL

19th February 2009

B e f o r e :

THE PRESIDENT OF THE FAMILY DIVISION

(SIR MARK POTTER)

LADY JUSTICE SMITH

and

LORD JUSTICE WILSON

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IN THE MATTER OF W-P (CHILDREN)

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(DAR Transcript of

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Official Shorthand Writers to the Court)

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Mr Jonathon Sampson (instructed by Finance and Legal Services, Coventry City Council) appeared on behalf of the Appellant, the local authority.

Mr Nicholas Goodwin (instructed by Penmans, Coventry) appeared on behalf of the First Respondent, the mother.

Mr Lawrence Messling (instructed by Rotheram & Co, Coventry) appeared on behalf of the Second Respondent, the father of K.

Ms Claire Howell (instructed by Bate Edmonds Snape, Coventry) appeared on behalf of the Third Respondent, the father of J.

The Children's Guardian did not appear and was not represented.

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HTML VERSION OF JUDGMENT

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Lord Justice Wilson:

With permission granted by this court earlier today, Coventry City Council ("the local authority") appeal against certain findings of fact made in care proceedings by His Honour Judge Hooper QC

sitting in the Coventry County Court on 28 November 2008. The proceedings relate to two young male infants born to the mother, albeit by different fathers, namely J, who was born on 2 January 2006 and so is now aged three, and K, who was born on 18 February 2008 and so had his first birthday yesterday. The first respondent to the proceedings was the mother. The second respondent was K's father. The third respondent was J's father. The fourth and fifth respondents were the boys, by their Children's Guardian. In that J's father plays only a minor role in the relevant history, it will be convenient to refer to K's father as "the father".

The mother and the father presented K to hospital at 1.31am on 6 April 2008, thus when he was aged seven weeks. There it was discovered that he had sustained, first, a transverse fracture of the lower end of his right femur ("the fracture"); second, two circular bruises, each 1cm in diameter, on the left side of his lower chest ("the bruising"); and, third, a scratch, 2.5cm long, above and behind his right ear ("the scratch"). A fourth area of injury, namely bruising to his right lower leg, can be ignored. By the time of the hearing before the judge it had become common ground, in the light of the expert evidence, that at any rate the fracture -- and very possibly also the bruising and the scratch --had been sustained within a few hours of his presentation to hospital. Following K's discharge from hospital, he and J were placed in the care of others, where they remain; and the expert reports were obtained to which I will shortly refer.

The hearing which led to the judgment on 28 November 2008 had been arranged as an inquiry into whether the threshold to the making of care orders in relation to the boys had been crossed and, in particular, to whether K's three injuries had been sustained non-accidentally. The contention of the local authority was that the evidence should lead the judge to find that the injuries had all been inflicted upon K non-accidentally, by which they meant intentionally; that it was the father alone who had perpetrated them; but that, were the judge unable to conclude that he was their sole perpetrator, he should make a Lancashire finding that they had been perpetrated either by the father alone or by the mother alone or by both of them in conjunction. The mother and father, who separated in the course of the proceedings, contended that the fracture had been sustained accidentally in the manner which I will describe; that the bruising was non-accidental but that neither of them had perpetrated it and that they could not explain it; and that the scratch had been inflicted accidentally by K himself with one of his fingernails.

The hearing was arranged to proceed for the entire week beginning on 24 November 2008 albeit on the basis that the first day would be devoted by the judge to reading the filed documents. During exchanges with counsel following judgment the judge was to explain that he had been deprived of his ability to read any of the documents on 24 November because of the listing before him of other matters for hearing on that day. The chief clerk of the Coventry County Court must be careful to ensure in future that his judges' reading days are not thus eroded. At all events the hearing proceeded

from 25 to 28 November; and it was on that last day that the judge gave judgment. We should allow for the fact that the judgment was unreserved.

The judge's conclusion was that the fracture, the bruising and the scratch were all inflicted by the father between -- so I surmise from the evidence -- about 8 pm and somewhat before 11pm on 5 April 2008, when, as I will explain, the mother was out at bingo; and that they were inflicted in the course of two separate incidents. The judge found that the separate incidents were both instances of reckless behaviour on the part of the father but that he had not intended to inflict any of the injuries upon K. The judge's finding about the fracture was that it had occurred at about 9pm when K was sitting propped up in the right hand corner of a sofa and when the father recklessly sat down on the sofa, partly to the left of K and partly on top of him, with the result that he broke his femur. The judge's finding about the bruising and the scratch was that they had been inflicted by the father at a somewhat earlier stage that evening, when he had changed K's nappy and, in the course of so doing, had roughly and recklessly inflicted both the bruising with his finger tips and also the scratch. The judge made certain criticisms of the mother, which he loosely categorised as a failure to protect K and which it is unnecessary further to consider.

It is the local authority's contention in this appeal, in which they are supported by the Children's Guardian albeit, very properly, only by letter to the court, that the judge's findings as to the causes of the injuries were so contrary to the weight of the evidence that it was not open to him to make them. In an attractive presentation by Mr Messling the father defends the judge's findings. The mother's stance is essentially neutral. She adds, however, that, were this court minded to substitute findings different from those made by the judge, they should not encompass her own inclusion in any pool of possible perpetrators of K's injuries and that, were it on the other hand minded to remit the matter to the county court, the rehearing should not be allowed to revisit the judge's exclusion of her as a possible perpetrator.

At no time did the local authority challenge the fact, as opposed to the relevance of the fact, that on 4 April 2008, being the day before the date upon which the judge found the injuries to have been inflicted, J, then aged just over two years old, had tripped up over K, who was lying on the floor while his nappy was being changed, and had fallen on top of him. As I will explain in [8] below, the parents were to ascribe the fracture and the bruising to J's fall on top of K. There was also no challenge to the fact that on the evening of 4 April, and more relevantly also of 5 April, the mother had gone to bingo. On both evenings the father had taken her to bingo by car, with both boys in the back, and had collected her from bingo by car, again with both of them in the back. Although their evidence as to times was understandably imprecise, the broad thrust of the parents' evidence seems to have been that the father and the boys returned to the family home at about 8pm, following their delivery of the mother to bingo, and that, following their collection of her at the end of bingo, they all arrived back in the home at about 11pm. Thus there was a period of rather less than three hours in the evening of 5

April when the father was alone with the boys at the home. Both parents gave evidence that, shortly after the mother's arrival home from bingo, one or other of them (there was a conflict between them in that regard) undertook the task of changing K's nappy, that he then screamed and that the parent (whichever it was) then noticed that K's right leg was limp, whereupon they had fairly swiftly taken him to hospital.

At the hearing the local authority relied heavily upon the subsequently admitted falsity of the explanation for K's injuries which the parents had given at the hospital and had maintained for the following five months. The explanation had been that, while K had inflicted the scratch upon himself, the fracture and the bruising had been sustained as a result of J's fall on top of him on 4 April. Such was the explanation in respect of which two experts were consulted, namely Dr Halliday, a consultant paediatric radiologist, and Dr Kanabar, a consultant paediatrician. In the light of their specialisms, the contribution of Dr Halliday was limited to an analysis of the likely cause of the fracture, whereas that of Dr Kanabar also extended to the bruising and to the scratch. In July and August 2008 both doctors made reports to the effect that, in the light (among other things) of the weight of evidence of family members that during the daytime on 5 April K showed no signs of being in pain, it was highly unlikely that J's fall on top of him on 4 April could have caused the fracture; and, for other reasons, Dr Kanabar dismissed J's fall on top of K as an explanation for the bruising, although he did not at that time reject the parents' different explanation for the scratch. In reality therefore the parents then needed to offer a different explanation for the fracture and the bruising. A different explanation -- at any rate of the fracture -- was first given by the father to the Children's Guardian upon her visit to the family home on 19 September 2008. In the mother's presence the father told the guardian that, on the evening of 5 April, while the mother was at bingo, he had propped K up on the sofa; that J had been playing and messing about; that the father had got up to chase him; that K must have moved down the sofa to some extent; and that, without looking, he, the father, had sat back on the sofa without realising that he was sitting down on top of K. Since the sofa was in the room in which the guardian and the parents were then sitting, the father demonstrated to the guardian, by reference to the sofa, what, according to him, had happened. The parents made clear, and the guardian seems to have accepted, that the father had first recounted this version of events to the mother only minutes before his revelation of it to the guardian. He told the guardian that he had been too ashamed to make the admission previously. It appears that, at the mother's insistence, she and the father separated soon after the date of that discussion.

Thus it was that the focus of the enquiry suddenly changed; that J's fall on top of K on 4 April lost its alleged significance; and that the doctors were invited to comment upon the revised explanation, at any rate of the fracture.

It was Dr Halliday's evidence, both in her supplementary letter and in her oral evidence, that it was possible, albeit unlikely, that the fracture had been sustained by the father's sitting on top of K upon

the sofa. In his supplementary report, however, Dr Kanabar ruled out the revised explanation of the fracture. In his oral evidence he modified his stance only to the extent of suggesting that, while physically possible, it was highly unlikely. In explaining his conclusion Dr Kanabar suggested that, at his age, K would be unable either to shuffle, to slide or otherwise to move down or along the sofa; and that it was extremely difficult to conceive of a mechanism in which K's right leg rather than his left leg, and indeed a mechanism in which his right thigh rather than his right lower leg, would suffer a fracture, especially in circumstances in which the father's sitting on top of him caused no fracture of any other part of his body, for example his arms or ribcage. Dr Halliday -- so we are told -- did not agree with all of Dr Kanabar's suggestions in this respect.

The father's revised explanation could not, of course, explain the localised bruising or the scratch. In relation to the scratch, the father appears to have continued to maintain that K had done it to himself. In relation to the bruising, the father said, in the words of his written response to the schedule of findings sought by the local authority, that:

"I accept that I said to [the hospital] that these were caused when [J] fell on [K]. This was speculation on my part. I accept that it was unlikely that they were caused during that accident. I have no alternative explanation."

In cross-examination the father continued to maintain that he could not explain the bruising and he accepted that it was non-accidental. One area of his questioning in that regard now carries significance. He was asked when he had first noticed the bruising and, in that respect, was asked whether, during the period when the mother was out at bingo on the evening of 5 April, he had changed K's nappy and thus might then have noticed it. His response was that he had not changed K's nappy during that period.

The format of the judge's judgment was in my experience unusual and arguably unwise. Following a brief introduction in which, to be fair, he described all three of K's injuries compendiously, the judge decided to address them separately. In paragraphs 6 to 31 he addressed the fracture; in paragraph 32 and the first part of paragraph 33 he addressed the bruising; and in the second part of paragraph 33 he addressed the scratch. There was danger in that approach in that the presence of the bruising and the scratch, which, according to the expert evidence, might well have been sustained at the same time as the fracture, albeit clearly not by the same mechanism, might very well be relevant to a proper analysis of how the fracture was caused; and vice versa. As I have already indicated, the judge, having divorced his consideration of the fracture from his consideration of the bruising and of the scratch, came to the conclusion that they had been caused by two entirely different incidents in which the father had behaved recklessly but without intention to injure K. But the judge never even then stood back and asked himself whether it was probable that a child would sustain injuries, at the hands of the

same man, in two unrelated incidents of reckless behaviour on his part within the space of rather less than three hours.

Even within the 26 paragraphs in which the judge addressed the fracture the sequence of his analysis was, with respect, eccentric. He first addressed Dr Halliday's evidence that it was "possible" that, if, as an adult weighing 17 stones, the father had sat down on top of K, he could have caused a transverse fracture of the femur. In fact counsel tell us today that Dr Halliday's evidence was that such causation was possible but unlikely. Second, the judge addressed Dr Kanabar's evidence to the effect that the father's revised explanation, although possible, was highly unlikely. Third, he found reasons, to which I will return in [14] below, for in effect discounting Dr Kanabar's reference to high unlikelihood. Only then, fourth, did he address the detail of the revised explanation of the father and the circumstances in which it was given; and then, fifth, he gave brief reasons for rejecting the significance of the facts that the father had for fully five months suppressed this version of events and that he had then replaced it with an explanation which, as the local authority contended, was full of internal inconsistencies. It seems to me that, in that the experts were commenting upon a hypothesis as to how the fracture had been sustained, the logical order of analysis would have been to begin with the father's revised explanation and then to consider the rival arguments as to its credibility put forward by the parties, by reference, in particular, to the medical evidence.

So how did the judge justify discounting Dr Kanabar's profound scepticism? The judge said:

"In his evidence Dr Kanabar confirmed that the account given by [the father] was a possibility but was highly unlikely. In my judgment the approach to the issue which I am by these circumstances required to decide must be first to strip out from Dr Kanabar's opinion and reasoning certain elements of factual speculation, namely as to [K's] precise position before [the father] got up if [the father] did get up, [K's] movement, if any, while the father was up, [K's] position when [the father] sat down, and precisely where [the father] sat down. I must reduce Dr Kanabar's opinion and reasoning in this way because these features of his evidence are either some usurpation of my function of finding fact or at least anticipation of findings of fact or speculation or some combination of these.

Performing this exercise I judge this evidence of Dr Kanabar … as not excluding the possibility of [the father's] account. So far as concerns one particular aspect of it which I will summarise as the diffusion of force represented by the impact of [the father's] posterior on the limb in question, if indeed the incident happened at all, I deduce sufficient possibility of fracture mechanism as again not to exclude this. What I have achieved, in my judgment, is that I have, as I said a moment ago, reduced Dr Kanabar's opinion and reasoning so as to remove what ought not to form part of the expert opinion which it represents or which anticipates findings of fact which I may not make."

I am afraid that I have great difficulty in subscribing to the view that Dr Kanabar was guilty of improper factual speculation or usurpation of the judge's fact-finding role. It was necessary for Dr Kanabar to analyse how likely it was that a baby aged seven weeks, propped up in the corner of a sofa, could suffer a fracture of his right thigh as a result of his father's sitting on top of him; and thus it was necessary for him to analyse, step by step, what movements on the part of the father and/or of K would have been required to be undertaken in order to generate the fracture in such circumstances. In my view therefore there was a flaw in the judge's analysis of Dr Kanabar's contribution to the inquiry into the fracture.

In the event the judge's findings in relation to the fracture were that, as described by the father, he was sitting next to K on the sofa; that J, who was elsewhere in the room, threw his bottle or beaker of milk in such a way as to splash the television screen; that he thereby irritated the father; that the father got up and, with his hand, wiped the milk from the screen; that, in the judge's own words, "he then returned to the sofa with his back to it, not facing it as he claims, or, at least, not noticing where [K] was … if he did face it at all"; that K had not moved his position; that the father sat down upon him; and that he did so recklessly, in other words not caring whether, in the light of K's presence on the sofa, it was safe to sit down on that part of it; that, had the father intended to cause harm to either of the children, it would have been directed at J, whose conduct that evening had been continually irritating to him; and that, following perpetration of the fracture, K (in the father's own words) "screamed like never before".

It will have been noticed that, in making those findings, the judge departed from the father's own revised explanation in two respects. The first was that in his oral evidence the father had said that, after he had wiped the screen, he had turned round to face the sofa and had walked back to it while facing it, until the point where he had turned in order to sit down. The primary conclusion of the judge, by contrast, was that he had walked backwards from the television to the sofa. The second was that, inevitably in the light of Dr Kanabar's evidence and, no doubt, of the judge's own experience, he found that, then aged only seven weeks, K had not, of his own motion, slid or shuffled across the sofa. The judge described the father's suggestion in that respect as "an unnecessary exaggeration". A judge is clearly entitled to accept part, but not all, of the evidence of a witness. But, in circumstances in which the rejection is both of an admission against interest, such as the father's acceptance that he was facing the sofa when he walked back to it, and also of what the judge generously described as exaggeration, namely the absurd suggestion that K had moved his position, a degree of judicial caution is required and, so it seems to me, is preferably to be recognised in express terms.

The most extraordinary feature of the judge's analysis of the case was, however, in relation to the causation of the bruising and the scratch. In this regard the judge accepted the evidence of Dr Kanabar that the bruising was the result of the hard application of adult fingertips and his oral evidence that it was most unlikely that, at his age, K himself could have inflicted the scratch. The judge's conclusion

was that both injuries had been sustained when the father had undertaken a change of K's nappy; that in that respect the father's handling of K had been rough; that, in causing the bruising, the father's roughness of handling may have been either in the course of play or as a result of the father's irritability that evening; that the scratch was probably caused not in the course of play but, irrespective of irritability, by "plain rough handling"; and that the father's perpetration of both injuries in that way had been reckless.

Having in effect identified the time of the perpetration of the fracture upon K as 9pm on 5 April, the judge said in judgment that the nappy-changing incident which had given rise to the bruising and to the scratch had taken place "earlier". It was implicit in the judgment however that he thereby meant that it had taken place earlier that evening but after the father and the boys had returned from delivering the mother to bingo. Following the judgment there was a dialogue between the judge and counsel, which has been transcribed and which, among other things, related to the precise expression of the findings to be incorporated into the judge's order. In relation to the scratch, the judge thereupon expressly confirmed that his finding was that the nappy-changing incident had occurred that evening, when the father was alone with the boys, albeit prior to the perpetration of the fracture. When, however, the dialogue turned to formulation of the finding in relation to the bruising, the judge suggested a formulation that it had been recklessly caused by the father "in the days preceding his admission to hospital". Speaking as a judge who, at the end of a long week, has himself once or twice momentarily forgotten some detail of the findings which he has just made, I consider that we should be indulgent about that momentary, if unfortunate, departure from the findings which the judge had just made.

There is, however, a much wider problem about the judge's ascription of the bruising and the scratch to a nappy-changing incident. For, to put the matter crudely, the judge invented the incident. The facts are that:

(a) there was no evidence that the father had changed K's nappy at any time when he had been alone with the boys that evening;

(b) the father himself expressly denied that he had changed K's nappy at any time that evening;

(c) there was no evidence that the father was prone to rough handling of the boys (as opposed to the perpetration of domestic violence upon the mother);

(d) indeed both the father and more significantly the mother expressly averred that he had never handled either of the boys roughly;

(e) the father accepted that he had no explanation for the bruising and that, in the light of the medical evidence, it was non-accidental;

(f) the judge did not ask Dr Kanabar to comment on the hypothesis that the bruising and the scratch had been sustained in the course of nappy-changing;

(g) the judge did not ask counsel, whether in final submissions or at any earlier stage, to comment on the hypothesis; and

(h) in insinuating his finding of a nappy-change into a central part of the history, the judge did not even advert to any of the factors to which I have adverted in (a) to (g) above. It follows that how he felt able to overcome the problems for his finding which each of them presented remains entirely unexplained.

I am, of course, completely conscious of the advantage which the judge has over this court in reaching determinations of fact. In particular we lack the benefit of receiving the father's evidence from the witness box, as a result of which the judge was persuaded to find that he loved K, that, albeit defensive and resentful, he was neither devious nor manipulative and that, on the balance of probabilities, his revised explanation of how the fracture was sustained was broadly true. It is clear, as Mr Messling stresses, that, having had the advantage of receiving evidence from the guardian, the father and presumably also the mother, about the circumstances surrounding the purported confession on 19 September 2008, the judge was convinced that what the father had then said was broadly true. There is a fairly wide margin within which this court would wish findings of fact to stand and criticisms of ex tempore judgments to fail. My conclusion however is that this case falls outside the margin. I believe that the criticisms which I have ventured go beyond minor carping and that this case is a relatively rare example of one in which this court should intervene. What, for me, has readily secured the success of the appeal is the invention of the nappy-changing incident but, in so saying, I do not wish to devalue my other criticisms.

In the result my view is that the appeal should be allowed, that the judge's findings should be set aside and that the fact-finding exercise should be remitted for early rehearing by another judge of the Coventry County Court, preferably His Honour Judge Bellamy as the designated family judge of that court. As I have foreshadowed, Mr Goodwin, on behalf of the mother, makes an energetic submission that, while remitting the matter for rehearing, we should nevertheless be sufficiently confident about the judge's exculpation of the mother from possible perpetration of any of the three injuries to direct an exclusion of any re-inquiry in that regard. After considerable thought, I would reject Mr Goodwin's submission if only on the general basis that, for a variety of reasons, it can prove extremely problematical for a judge conducting a hearing to be required not to enter upon certain areas even when developments in the evidence may seem to him to require him to do so.

Lady Justice Smith:

I agree.

Sir Mark Potter:

I also agree; the appeal will therefore be allowed and the matter remitted for rehearing to the Coventry County Court for trial by a different judge to be listed for further hearing before HHJ Bellamy, if available.

Order: Appeal allowed