

B v B (CHILD ABUSE: EVIDENCE)

Family Division

Johnson J

7 February 1989

Evidence – Child – Sexual abuse – Child interviewed by hospital with regard to possible sexual abuse by father – Parents seeking care and control of child – Request by hospital for ruling that transcripts and videos of interviews should not be seen by child’s parents – Factors to be considered

In the course of proceedings in which the parents were applying for their daughter, who was at the time placed with foster-parents, to be returned to their care, the judge was asked to make an interlocutory ruling on a submission made by the Hospital for Sick Children at Great Ormond St that the video-recordings and written transcripts of two interviews with the child which had taken place at the hospital, in which she made allegations of sexual abuse by the father, should not be seen by anyone other than the doctors and lawyers involved and, in particular, should not be seen by the parents. The psychiatric social worker at the hospital based her submission on the child’s right of confidence.

Held – there was no privilege attaching to the material in question, and the child had no more right of confidence than anyone else coming before the court. However, she did have a right to have the matter decided in her best interests, and the court must approach the case on that basis, taking into account the court’s duty to do justice to the parents, who were entitled to expect that the ultimate decision would be made on the basis of material they had seen or heard, but also having regard to the potential damage to the child if the parents saw the videos and transcripts, first because they might confront her with the fact in a hurtful manner, and, secondly, because such a disclosure might inhibit the child from seeking help or from making frank revelations in the future. Balancing all those factors in the present case, it must be concluded that neither the transcripts nor the videos should be seen by the parents, though the court would do its best to ensure that the ruling was not detrimental to their case.

Case referred to in judgment

Re S (A Minor) (1988, unreported)

Michael Connell QC and *Barbara Slomnicka* for the first interveners

Eleanor Platt QC and *Elizabeth Lawson* for the petitioner

James Townend QC and *Stephen Bellamy* for the respondent

Philip Moor for the second intervener

Andrew Kirkwood for the minors

Richard Tyson for the Hospital for Sick Children at Great Ormond St

JOHNSON J:

I am now required to rule on a submission made by Mr Tyson on behalf of the Hospital for Sick Children at Great Ormond St. The submission is that the records which exist of two interviews taking place at the hospital and involving the little girl with whom I am concerned, S, should not be seen by anyone other than the professionals involved, namely the doctors (using that word in its widest sense) and the lawyers; in particular, that the material should not be seen by S’s mother and father.

Initially, the grandmother was asking to see the material, but I have been told by Mr Moor, on her behalf, that she no longer wishes to do so, for reasons which he summarised briefly and which I can do no more than commend.

As is so often the case, I suppose, in interlocutory rulings, the court has to rule on a matter on the basis of information which is not entirely complete. But I recognise that I have to do the best I can on the information that is available to me now. The particular material which is the subject of Mr Tyson's submission are the written transcripts of the two interviews and also the video-recordings of the two interviews.

I approach the matter on the basis that the ordinary rule in our courts is that there is no privilege attaching to such material, and the difficulty arises only from the fact that this case involves a child and, as in any case involving a child, I must make my ruling with a view to advancing the best interests of S.

Miss Tranter gave evidence before me in relation to this particular submission. Miss Tranter is well known in these courts as being a psychiatric social worker at Great Ormond St, and she it was who had interviewed S. She put her objection to the parents seeing the transcripts and the videos on the basis of what she described as S's right of confidence. It seems to me that this is not a question of a right of confidence in the way that such a phrase might ordinarily be understood. So far as her right of confidence is concerned, S is really in no different position to anyone else coming before the court. It seems to me, however, that the submission is more properly based on S's right to have the matter decided in her best interests, or, putting it another way, that in making my ruling the paramount consideration in my mind should be the best interests of S, and it is on that basis that I approach what I have found to be a very difficult question.

My starting-point is that the parents are entitled to expect that the ultimate decision in this case should be made only on the basis of material that they themselves have seen or heard. They are S's parents; they are asking that for the future she should be brought up in their care. The matter is one of extreme seriousness for them, and certainly, as a matter of fairness and justice, they are entitled to say that they should see or hear all the material on which the court's decision is based. This is not a criminal court, but even so I find their claim to be extremely compelling.

My attention has been drawn to a decision on this same point made by Lincoln J in a case called *Re S (A Minor)* (1988, unreported) and, so far as I am able, I have sought to follow that decision. The factors that I should take into account seem to me to be as follows. First, there is the duty of the court to do justice to the parents and to conduct the case in such a way that they do not leave the court feeling aggrieved that decisions have been made on material of which they have not been made properly aware. I think, in deciding how much weight to attach to that consideration, I can properly take account of my preliminary view of the outcome of the issue of sexual abuse. Did the father sexually abuse S or not? I have read the written material that was put before me yesterday morning. It took me a very long time to do it. I think I am right in saying that I read nineteen affidavits, three psychiatric reports, one of which was quite long, seven other medical reports, two transcripts of interviews and a lengthy report

from the Official Solicitor. It would, I think, be naive to believe that I had not formed at least a tentative view about the strength of the evidence relating to this allegation of sexual abuse. From my reading of the written material (and I emphasise again that I am conscious of not having heard any oral evidence on the topic, of not having seen the video and of not having heard argument), my preliminary view is that I am unlikely to rule out altogether the possibility that the father has abused S. But, equally, I am unlikely to find on the balance of probabilities, still less on the basis of reasonable doubt, that he has done so.

The other factors relate to the potential damage to S if her parents see the transcripts and the videos. The danger, I think, is twofold. First, there is a risk that the parents may confront S with what they glean from the transcripts or the video, and that such a confrontation would be hurtful and damaging to S. Secondly, the knowledge that what she had said to Miss Tranter in the interviews had come to the knowledge of her parents would be detrimental to S because it would inhibit her from making further disclosures if sexual abuse occurred in the future, and would damage her confidence in the therapists who are seeking to help her.

Suppose, for example, that I were to hold that the father had not abused S in the past and was unlikely to do so in the future. But suppose that my decision was wrong, and suppose that S were to be abused in the future by her father. It would be very much in S's interests that she should feel able to communicate that fact to adults and, in particular, to Miss Tranter or someone in Miss Tranter's position. I think it is very important in making the ruling that I am asked to this afternoon that I should do nothing that would inhibit this little girl turning to adults, and in particular to doctors and psychotherapists, for help.

I accept the evidence of Miss Tranter that if I rule that the parents should be able to see either the transcripts or the videos, it will be necessary for S to be told that that has happened. In my judgment, that is not based on any esoteric assessment of what is right, but is based on the very practical consideration that it would be detrimental to S's trust in those in whom she has confided if she were to find out that her parents had seen either the video or the transcripts without her being told. However, on the material that is available to me – and I recognise that I have not seen either the mother or the father in the witness-box-it seems to me that there is a high probability that if the parents were to see the transcripts or the videos there might be an occasion in the future when, for some reason or another, emotions ran high and the mother or the father would say something to S, which no doubt they would immediately regret, but which meanwhile would have put pressure on S, would have upset her and added to her difficulties.

So far as the father is concerned – and subject to hearing his explanation, and subject to hearing argument – I have the affidavit evidence of the foster-mother about a telephone call which the father made to S in June 1988, from which, on the basis of the material before me at present, I infer that the father was willing to put pressure on S to persuade her to withdraw the suggestions that she had made.

So far as the mother is concerned, there is material which I have read and which, subject to seeing her in the witness-box, leads me to believe that she can become very angry and emotional when faced with these

difficult questions. In particular, on the basis of the material that I have, I am impressed by the incident described by Dr Bentovim at p. 2 of his report of 3 February 1989, that is to say, last week; an incident in which Dr Bentovim describes the mother as turning to S in his presence and saying: 'You haven't been abused, have you?'

There may be considerations which relate to the videos which do not relate to the transcripts. The videos, of course, are a particularly graphic means of communicating what happened at the interview. The difference between the transcripts and the videos can be characterised as being the difference between what one reads in one's newspaper and what one sees on the television. It seems to me that the sight of their little girl making the suggestions which are described may prove too much for the parents who I see described in the written material. So I believe that in relation to the videos, the risk of them perhaps not immediately but at some stage in the future blurring out to S what they have seen is a very high probability.

As to the transcripts, it seems to me the position is somewhat different. I was strongly impressed by Mr Townend's submission that insofar as damage would flow from the parents seeing the transcripts, the damage was already done. The transcripts themselves are of ten and thirty-six pages respectively, and in respect of each of them no less than some five pages are set out in detail in the report from Great Ormond St, which has been seen by both the parents already. To the extent that there is a risk of the parents confronting S with the contents of the transcripts, it seems to me that it can fairly be said on behalf of the parents that that risk is no higher than the risk of them confronting S with that which they have already learnt from the Great Ormond St report.

However, there is the other aspect of the damage to S to which I have already referred, namely the realisation by S that she could not trust the adults to keep a confidence. It is, I think, recognised by everyone who is concerned with sexual abuse cases that the great problem is to overcome the reluctance of children to bring the sexual abuse to the attention of some responsible adult, and, in that, trust seems to me to be vital. It is not a question of a child having a right of confidence, in the sense of having a right of privilege to what the child discloses, but it seems to me it is a question of maintaining the trust of the child, not as a matter of general proposition or of public policy, but of what is best for this particular child.

In the ordinary child abuse case, the issue lies between the child making its home with its parents or with a long-term foster-parent, who is a comparative stranger and sometimes a total stranger, with a view to ultimate adoption. The unusual feature here – and one to which I think I should pay particular regard – is that whether S goes back to her parents or stays with the present foster-parents, she will be within the family. Whatever my decision may be, there is a risk that I would not wish altogether to exclude – and I have in mind particularly the father, but not only the father – that at some stage in the future someone may sexually abuse S. It seems to me that an important factor in my consideration is that I should do nothing that would in any way inhibit S's willingness to turn for adult help when it is necessary.

Weighing up all those factors as best I can, I have come to the conclusion that neither the transcripts nor the videos should be seen by the mother and father and, in the light of Mr Moor's concession on her behalf,

by the grandmother. I make it plain that, having arrived at that conclusion, I shall do my best to ensure that the consequence of my ruling is not detrimental to the case put forward by the mother and the father and, so far as I am able, I shall seek to inhibit any cross-examination of them based upon what S said at the interview, other than what is in the Great Ormond St report.

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PATRICIA HARGROVE
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