RE M (FACT-FINDING HEARING: BURDEN OF PROOF) [2012] EWCA Civ 1580

Court of Appeal

Ward, Lloyd and Rafferty LJJ

22 October 2012

Fact-finding hearing – Appeal – No explanation for injuries to child – Judge concluded parents possible perpetrators – Whether the local authority had discharged the burden of proof

When the child was 8 weeks old he sustained a number of bruises to his arms and legs. The local authority initiated care proceedings believing the injuries to have been non-accidental and the perpetrator to be one or other of the parents and that the other had failed to protect the child. At the fact-finding hearing the consensus of the experts was that the injuries were unexplained. The judge analysed the expert opinion in light of the totality of the evidence: in particular she found the parents' evidence to be not wholly credible. In conclusion she found both the parents to be possible perpetrators of the injuries. The parents appealed.

Held – allowing the appeal –

(1) The judge had fallen into error. Her view of the case had been that, absent a parental explanation, there was no satisfactory benign explanation, ergo there had to be some malevolent explanation. The judge had not properly respected the burden of proof which was on the local authority to demonstrate that the parents had deliberately gone about in some unknown way, with some unknown implement, to inflict the injuries on the baby (see paras [16], [17]).

(2) The judgment, on lack of protection, was so short of reasoning and so difficult to understand that the local authority did not seek to uphold it. That part of the reasoning was flawed (see para [17]).

Statutory provisions considered
Children Act 1989, s 31

Sarah Morgan QC and *Sophie Hill* for the appellant mother
Frank Feehan QC and *Judith Mayhew* for the appellant father
Pamela Scriven QC and *Monica Ford* for the respondent local authority
Caroline Topping for the child by his children's guardian

WARD LJ:

[1] This is the parents' appeal against the order made by Her Honour Judge Hammerton sitting in the Medway County Court on 24 February 2012. As is so typical with fact-finding matters coming from the Family Division, no order has been drawn which is strictly capable of being appealed, because nobody bothers to formulate preliminary issues which the judge can then decide and encapsulate in an order which is the proper subject of the appeal. Instead, what frequently happens, and has happened, the order simply recites:

> 'And upon HHJ Hammerton handing down a written judgment following a fact finding hearing, in which the court found that the child had suffered non-accidental injuries and that the parents are both possible perpetrators of those injuries
>
> The Court Orders …'

And then there were a series of directions being made. But I have said that before; nobody takes any notice. The rantings of an old man are simply passing into the ether. But we understand what it is all about: it is about the judge's conclusion in para [89] of her judgment, when she said this:

> 'In the light of the above findings, this is a case where I am satisfied that the threshold has been crossed, that M [that is the child with whom we are concerned] has suffered significant harm as a result of injuries inflicted by one of his parents. I am unable to identify which parent, I am satisfied the other parent has failed to protect him.'

[2] The child is a little boy called M, as you have heard. He was born in July 2011. When he was barely 8 weeks old, he suffered injuries which were described by the paediatricians at the hospital where he was eventually treated to be as follows:

(1) a one-centimetre horizontal dark red bruise (linear) on the extensor surface of his left forearm;
(2) a two-centimetre dark bruise (linear) horizontal on the extensor surface of the left forearm;
(3) two thin linear red bruises, one measuring two centimetres, the other measuring 1.5 centimetres, parallel to each other, spaced by about 1.3 centimetres, again on the extensor surface of the left forearm overlapping with bruise number 2;
(4) a one-centimetre dark red bruise (linear), which was vertical below the elbow on the extensor surface of the left forearm;
(5) a 0.5 centimetre dark red circular bruise just below the elbow on the extensor surface of the left forearm;
(6) a one-centimetre fading bruise on the flexor surface of the left wrist;
(7) a one-centimetre linear bruise on the extensor surface of the right arm just above the elbow;
(8) a faded blue bruise measuring approximately 0.6 centimetres on the right thigh, inner surface, just above the knee.

[3] M's grandmother had bathed him at about 8.00 pm on the evening of 5 August and had put him to bed. There were no marks visible on his body at that time. The bruises were discovered, it seems, at about midday on the following morning. The mother's first reaction was to accuse the father of hurting their baby. She was concerned enough to take photographs of the marks she saw and then to send them via her mobile telephone, which was used as the camera, to the paternal grandmother. The paternal grandmother had some experience working as a nurse in a children's ward, and the mother wanted her view, which was to take him to the doctor. She phoned her own mother, and the maternal grandmother made enquiries of the local hospital, who advised her to get in touch with NHS Direct. The baby by then was not showing any undue signs of stress, and since the mother had an appointment with her general practitioner, and the sum of the advice she received was to take the baby to the doctor, she waited until Monday for that appointment to take place.

[4] The general practitioner seemed, as I understand it, simply to say: 'Well, you had better take the baby off to the hospital, in case there is something wrong', and to the hospital he duly went. He went to the hospital on 8 August, and he was seen by Dr Gupta on 9 August. Dr Gupta has been in his present consultant paediatric post since 2007. He is a general paediatrician, caring for children from their birth until their adolescence. The judge was impressed with his evidence. He explained that he had, as he always did, asked parents for an explanation. The mother did not have an explanation, but what was noticeable as far as he was concerned was that the mother was herself questioning the medical staff as to how the bruises could have been caused. He thought she was being proactive in giving answers and asking questions, somewhat in contrast to the more taciturn father, from whose lack of reaction he drew no adverse inference, and nor as I understand it did the judge.

[5] The continuing investigation led to concern that these were non-accidental injuries. The police became involved. They took no subsequent action, but the local authority very properly felt that this was a matter which needed investigation and which needed the care proceedings which have followed. The local authority invited the court, as frequently happens, to hold a fact-finding inquiry in order to establish whether the threshold requirement of s 31 of the Children Act 1989 had been met. That threshold alleged that the injuries had been caused non-accidentally; that the possible perpetrators were the mother and father; and that whomsoever did not cause the injuries nonetheless failed to protect M. By an amendment, it was also suggested that the injuries were not sustained as a result of the ordinary day-to-day care of a baby of M's age. It was said that when the injuries were sustained M would have been in pain and his reaction would have been obvious to the perpetrator of his injuries. Thus they invited this conclusion that the parent who did not inflict the injuries on M:

(a) failed to notice M's pain, distress, discomfort and significant change in presentation due to the inflicted, non-accidental injuries; and
(b) failed to consider the possible credible explanation for those injuries.

[6] That was the matter Her Honour Judge Hammerton had to resolve. In her long and careful judgment, she set out the law which she was obliged to apply. I have no intention of elaborating on the law, because the essential propositions are self-evident. The burden of proof lies on the local authority to prove the case against the parents. The standard of proof is the balance of probabilities, and that means the same in this kind of case as in every other, a simple balance of probability. Suspicion is not proof, and the burden must always remain on the local authority and should not be reversed. Whilst it is necessary to establish that the injuries are, as has been described in this case, non-accidental, it is not necessary to identify the perpetrator, and it is permissible for the court to say that those who are within the pool of possible perpetrators remain possible perpetrators, and the local authority must then manage the case as best it can in the light of those findings.

[7] So there is no real error in the judge's recitation of the law she had to apply. She had the benefit of evidence from three medical men. First, Dr Gupta, who had seen the child on presentation at the hospital, had taken certain photographs. The police had also taken certain photographs, and a huge bundle has been presented to us. Dr Rouse is a consultant in forensic medicine and pathology. The papers and police photographs were referred to him by the police. Dr Essex, a consultant neuro-developmental paediatrician, gave his opinion on the joint instruction of the parties. The judge, having gone through that evidence, recited it in para [33] onwards of her judgment. She observed, as Dr Essex had done, that the injuries could be grouped into those to the left forearm, the further injury to the right arm, and the right thigh. She properly discounted a mark on the baby's face, which plays no part in the matter at all.

[8] The injuries to the left forearm were really divided into three. There was, firstly, the circumferential mark around nearly all of the forearm, with two small, almost parallel marks perpendicular to it. Dr Essex said of that mark in his written report that it was:

> '… consistent with some restriction or pressure effect from something causing pressure on the skin of the forearm. I cannot explain the two additional marks perpendicular to the circumferential mark. The linear and angular nature of the marks on the forearm looks like the effect of something "mechanical". In other words, an *object* having pressed on the skin.' (His emphasis.)

In an addendum to the report, he spoke of the child coming into contact with a firm/hard inanimate object. I interpose by stating the obvious: these are not marks consistent with finger pressure or the use of the hand, save perhaps for holding the object pressed against the child's left arm.

[9] The second category of injury to the left forearm was the red, circular bruise below the elbow. Dr Essex did not know how that was caused. The third injury was the bruise to the left wrist, which again Dr Essex could not explain, save that he observed it was a very unusual place for a baby of that age to get a bruise. The judge recorded in para [34] that Dr Rouse agreed with Dr Essex about the mark on the left forearm. He, too, was unable to explain the marks. He agreed that they seemed to have some mechanical cause. Dr Rouse stressed these were an imprint type of injury. He agreed it was impossible to say how the bruise below the elbow had been caused. He agreed the bruise on the inside of the left wrist was a very unusual place for a bruise given that it is a naturally protected area, and that the underlying tissues are tightly bound down with little space for a bruise to develop. The judge noted that there was agreement in respect of the linear bruises to the right arm, and Dr Rouse emphasised that, where the general impact is with a body, a round or oval-shaped bruise will develop; where there is a pronounced V-shape, it implies something with an angled edge which must be mechanical, in other words man-made. In respect of the bruise on the inside of the left thigh, both experts agreed this was an unusual case for a bruise. Dr Rouse regarded it as a different type of bruise from the ones on the arm; he described it as being a

more diffuse injury. He described it as having a pronounced rhomboidal outline; the straight line suggested more of an impact which is associated with a traditional bruise.

[10] Various explanations were proffered for those bruises, and the judge went through each and every one of them. First, it was suggested that M's arms may have been trapped under the straps of the baby seat; for reasons given, that was rejected. It was suggested that swaddling may have been responsible; that, too, did not find favour. Although Dr Rouse felt that possibly the bars of the cot may have been responsible, Dr Essex did not. Both dismissed the baby bath as the object which could have caused the injury; it had been suggested that the baby had been thrashing around in the bath, which was highly unlikely. There was a suggestion that perhaps the family dog had jumped on poor little M, but nothing in the injuries was compatible with that. The judge's conclusion was that, insofar as Dr Essex and Dr Rouse held different views, she preferred the evidence of Dr Essex. The possibility of some cotton thread explaining the injury around the child's arm was raised; Dr Essex thought it unlikely and he did not agree about the cot being a possible instrument for harm.

[11] So the judge came to the conclusion, which she expressed in para [51] in these terms:

> 'Apart from the two issues identified above [that is the cotton thread and the cot], there was a consensus between the experts. In their view the injuries were unexplained. Dr Rouse described the injuries as being unusual for non-accidental injury [but] he confirmed to counsel for the guardian that they were unusual for accidental injuries.'

The judge recited Dr Essex's view when asked for his overall conclusion. She said at para [56]:

> 'He said he reached this having looked at "all reasonable and unreasonable possibilities and explanations. It was against the overall picture, the age of the child, the number of injuries and the site of the injuries." Putting all these together he could not find a "benign explanation." I found that his opinion was a considered opinion. I reject the submission that his conclusion was predicated on the fact that if there was no explanation, the injury must be non accidental.
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> [57] The suggestion that Dr Essex has overstepped the line which demarcates the field of responsibility of the expert from that of the court is not in my judgment made out. Dr Essex was asked in specific terms whether the marks shown in the photographs are likely to be accidental or non-accidental. He provided an answer that in his professional opinion they were non-accidental.
>
> [58] I did not form the impression that there was a great difference between the evidence of the experts, it seems to me there was broad consensus. I am not persuaded that the evidence of Dr Essex was in any way unreliable, to the contrary I found his evidence compelling.'

[12] The judge recognised, however, and said so in para [73] of her judgment, that the experts had provided their opinion, but that it was

important that those opinions were examined in the light of all the evidence, including the oral evidence of the parties, of which the experts were unaware. So she set about analysing that evidence, and the possible explanations the parents had offered for the baby's injuries. She found at para [82]: 'Having examined all the possible causes which have been suggested for the injuries there are none that come up to scrutiny'. She found in para [84] that there was:

> '… no substantive conflict in the medical evidence and nothing further has emerged which is capable of providing an explanation for the bruises. The expert evidence is clear, the bruises were caused by pressure being imposed on the baby, this could not have been done by himself. Whilst the parents' evidence was fluent, it was not wholly credible.'

She again said in para [85] that she found the evidence of the parents in respect of the events of the night of 5 August and the morning of 6 August to be unimpressive. She found that in fact that they had a disturbed night, and she felt that piece of evidence was important because it suggests a background of an unsettled baby, and the additional pressure on parents who clearly were being deprived of sleep to an even greater degree than would be expected with a newborn baby. So I come to the judge's conclusions:

> '[86] Weighing all the evidence in the balance I return to the fact that the medical evidence is clear, the distribution and number of bruises could not have been caused by the baby himself and there was no medical explanation. It was submitted that unless the doctors can provide an explanation of the precise mechanism of injury, it is impermissible to infer that the injury must have been non-accidental. I find that statement to be too sweeping. The doctors are agreed that pressure has been applied to the skin which has been sufficient to cause bruising. Whilst these are described by Dr Rouse as being towards the lower end of the scale for the amount of force used, the marks are to be distinguished from the superficial marks caused by, for example, the elasticated edge of a sock. The marks were described as vivid red; they remained clearly visible for 3–4 days. Further and importantly, the marks were unusual in their number, in their distribution and position.
> [87] In the face of medical evidence where there is no substantive disagreement between the experts, this is a case where I am satisfied that the injuries sustained by M were non-accidental. I am not persuaded by the evidence of the parents. The impression I gained was that I was not being told the entire truth as to the events of Friday evening and Saturday morning.
> [88] In terms of identifying the perpetrator I am unable to do so. There is evidence that the mother was the principal carer for M. She did the lion's share of the tasks of feeding and changing and clearly took the lead in decision making. The father did some of the tasks, he would make up bottles and comfort M while bottles were being made up. He was responsible for swaddling. It was clearly the mother's decision to delay taking M to the doctor until the Monday, having said that it was

> she who was proactive in asking questions and significantly providing photographs which showed the bruises as being more serious than their presentation on Monday. During the material time frame when the injury must have been sustained, both parents were present in the home. Save for the period during Saturday morning when M was downstairs in his baby chair, he was in the bedroom with his parents. The father emphasised there were no carpets upstairs and accordingly it was possible to hear what was happening downstairs. This is a case where if one parent injured M the other parent would be aware. Both deny there was any incident. In the circumstances both must remain in the pool of potential perpetrators.'

That led to the conclusion in para [89] which I recited at the beginning of this judgment.

[13] The appeal is brought by both parents. The mother attacks the judgment that the parents had failed to protect, and Ms Sarah Morgan QC, who now appears on her behalf, submits that the reasoning, or rather lack of reasoning, in that finding gives the clue to the way the judge misdirected herself on the other aspect of the case. The father, on the other hand, criticises the judge's approach, and Mr Frank Feehan QC, also now appearing for the first time for the father, submits that the lack of parental explanation was the chief factor in the reasoning both of Dr Essex and of the judge in the conclusion of harm by one or other or both of the parents.

[14] The local authority's case, supported by the child's guardian, was advanced by Ms Pamela Scriven QC for the local authority, and Ms Caroline Topping appears again for the guardian. The local authority recognise that the threshold involves two elements. One is that the child has suffered significant harm, and I do not understand that the appellants can, or do, contend that this was not significant harm, even if at the lower end of the scale of injuries which unfortunately the family courts have to deal with day in and day out. But the second element of the threshold is the causation element. The harm must be attributable to the care given to the child not being what it would be reasonable to expect a parent to give. That is the language of s 31 of the Children Act. So Ms Scriven mounts a very persuasive argument that the constellation of injury, and site of the injury, the mechanism for the injury, and the narrow timeframe of perhaps up to 18 hours or less during which these injuries were inflicted, all lead ineluctably to the conclusion that this was non-accidental injury.

[15] The elements I have outlined do establish a case to answer that the care given to this baby was not reasonable care, but outside the ordinary course of events, and that justified the inference that the threshold had been crossed unless the parents could discharge the *evidential* burden which would have shifted to them. It was a persuasive argument, but the difficulty I find in accepting it is that that was not the case the court was required to consider. The judge was not considering, as might have been the case, whether there was some general failure to provide proper care. She was being invited to find, and she did find, that these injuries were deliberately inflicted by one or other, or both, of the parents.

[16] On the medical evidence, at least some of those marks were imprint or pressure marks made by some inanimate object coming into contact with the

child's arm. But what object, or even what sort of object, remains unexplained. Also unexplained is how that pressure was exerted. Was it a hard jab, causing the momentary infliction of pain, which might have caused the baby to cry, or was it more sustained and consistent pressure, which may not have been as painful to M? The truth, as acknowledged by the experts, is that we simply do not know. This is not a case like a child with a broken leg, or a shaken baby, or a cigarette burn, or finger pressure marks. We simply do not know what happened to M and we do not know how it happened. The conclusion that it must have been non-accidental injury was formulated by Dr Essex, and it was that which was accepted by the judge and formed the basis of her judgment. Dr Essex put his case, it seems to me, at its best under cross-examination of Miss Topping for the guardian, and this exchange seems to me to encapsulate what this case is about, at 25 of the transcript of his evidence:

> 'Question: You conclude, Dr Essex, that in the absence of any plausible explanation for the injuries you see on [M] you would have to consider them to be non-accidental. You say, [and this is quoting from his addendum report] "As no satisfactory explanation has been put forward on the balance of probabilities I must consider these injuries non-accidental", at E28.
> Answer: Yes. I am afraid, having looked at the possibilities, at the explanations, and at the reasonable possibilities, and even the unreasonable possibilities, I cannot find a satisfactory explanation, your Honour.
> Question: Are you fortified in that by the fact that there were so many suddenly presenting bruises?
> Answer: Well, it is always the overall picture: the age of the child, the number of injuries, the site of the injuries, and so on, and the developmental stage of the child. Putting all those pieces together, I do not find a satisfactory benign explanation.'

That, too, was the effect of the judge's view of the case: that absent a parental explanation, there was no satisfactory benign explanation, ergo there must be a malevolent explanation. And it is that leap which troubles me. It does not seem to me that the conclusion necessarily follows unless, wrongly, the burden of proof has been reversed, and the parents are being required to satisfy the court that this is not a non-accidental injury.

[17] I fear, therefore, that in this case, despite her careful analysis of the evidence, the judge did fall into that error. The judgment on the lack of protection by the parties is so short of reasoning and in fact, with respect to her, here so difficult to understand that the local authority do not seek to uphold it. We do not know whether the child cried, whether loudly and at length, or whether this was a sustained injury which caused discomfort not noticeable to anybody else. So that part of the finding is, as Ms Morgan submitted, flawed, but in finding as she did that this was a non-accidental injury, I fear the judge has not properly respected the burden which is on the local authority to demonstrate that these parents had deliberately gone about in some unknown way, with some unknown implement, to inflict these injuries on the baby.

[18] I would allow the appeal, accordingly.

LLOYD LJ:
[19] I agree.

RAFFERTY LJ:
[20] I agree.

Appeal allowed.

Solicitors: *Clarke Kiernan* for the appellant mother
Max Barford & Co for the appellant father
A local authority solicitor
Evans Main for the child by his children's guardian

SAMANTHA BANGHAM
Law Reporter