B v DERBYSHIRE COUNTY COUNCIL

Family Division

Sir Stephen Brown P and Waite J

30 July 1991

Care proceedings – Father of little boy convicted of indecent assault on girl within family unit – Local authority applying for care orders concerning the little boy and three other girls – Justices making care orders regarding the girls but dismissing application concerning the boy – Justices concluding that res judicata applied – Local authority appealing by way of case stated – Whether doctrine of res judicata applying to care proceedings brought under the Children and Young Persons Act 1969, s 1

The appeal concerned a little boy, now aged 6 years. He was the grandson of the woman now in the position of his stepmother as she was now married to his father. The stepmother was originally married to Mr B and they had six children who were all now grown up. One of the children of that marriage was the mother of the child, the subject of the present proceedings. The parties divorced. Mr B, who remarried, had four daughters by the second marriage. The girls were, at the time of the relevant proceedings, aged between 11 and 17 years. Subsequently, Mr B's second marriage was dissolved and he remarried his first wife. They were granted custody of all the four girls. The parties divorced for the second time and the first wife was granted the sole custody of all the four girls, who were now her stepdaughters. The stepmother then married her present husband, who was, the father of the little boy. The stepmother and her present husband lived as a family unit with the four stepdaughters and the little boy. The stepmother then made a complaint to the local authority that her present husband was indecently assaulting one of her stepdaughters. The husband was convicted of indecent assault as charged and put on probation for one year. A full care order was made in respect of that girl. Subsequently, the husband returned home. Concerned with the welfare of the other children of the family, including the boy, the local authority instituted care proceedings concerning all the children. The justices made supervision orders in respect of the three girls, but dismissed the application in respect of the little boy. The only court records showed that they ruled that there was no prima facie case to answer in his case; no issues of fact and no other notes were recorded. The husband, whilst on a rehabilitation programme, committed breaches of the supervision requirements concerning the three girls: he visited them and the family when he was not supposed to do so. The local authority sought to convert the supervision orders made in respect of the three girls into full care orders. Concerning the boy, they made a fresh complaint seeking a care order on the ground, inter alia, that he was exposed to moral danger. The justices granted the local authority's application concerning the girls. However, in relation to the boy, they concluded that the doctrine of res judicata applied to care proceedings under s 1 of the Children and Young Persons Act 1969, so as to prevent them hearing evidence adduced in earlier proceedings. In the absence of new evidence, they would make no order. The local authority appealed by way of case stated on that point, namely, whether the doctrine of res judicata was applicable to care proceedings under s 1 of the Children and Young Persons Act 1969.

Held – allowing the appeal – where the local authority was exercising a continuing responsibility for children within its area of concern, it was unlikely that the doctrine of res judicata would be applicable to care proceedings brought under s 1 of the Children and Young Persons Act 1969. The doctrine was not applicable where time had elapsed since the proceedings which it was alleged had

previously resolved the issues before the court, as a continuing and developing situation existed in the life of a young child.

(2) Res judicata was a fundamental doctrine which must be treated as a branch of the law of estoppel. As estoppel could only apply where specific issues of fact had been decided and as there was no indication as to what, if any, issue of fact was decided in the first proceedings, the doctrine was not applicable to the present circumstances.

Per curiam: the Children Act 1989 required the court to have regard to the whole welfare of the child. The court's task was to investigate in an inquisitorial manner, if necessary, the child's interests. It was hoped that the adversarial approach to care proceedings would disappear to a large extent.

Statutory provision considered
Children and Young Persons Act 1969, s 1

Case referred to in judgment
Frost v Frost [1968] 1 WLR 1221; sub nom *F v F* [1968] 2 All ER 946, CA

APPEAL by way of case stated from the decision of the justices sitting in the petty sessional division of Alfreton, Derbyshire

Jane Drew for the local authority
Mhairi McNab for the stepmother

SIR STEPHEN BROWN P:

This is an appeal by way of case stated from the justices sitting in the petty sessional division of Alfreton in Derbyshire on 10 October 1989.

The facts giving rise to the appeal involve a somewhat complex family history. The appeal concerns a little boy, S, who was born on 19 November 1984. He is the grandson of the lady now in the position of his step-parent because she is now married to his father. He is the son of the daughter of Mrs B and of Mr B (the elder) who has married Mrs B. The family history is not without relevance and I should shortly state it.

Mrs B was originally married to a Mr X and they had six children who are all now grown up. One of the children of that marriage was a lady called M, who is the mother of little S, the subject of these proceedings. Mrs B, as she now is (then X), was divorced in 1972 and her husband, Mr X, married another lady, a Miss C, by whom he had four daughters. Those four daughters were, at the time of the relevant proceedings, aged between 11 and 17 years. In 1980 Mr X and his second wife (formerly Miss C) were divorced and Mr X remarried his first wife, who is now Mrs B. They were granted, jointly, the custody of all the four girls of Mr X's marriage to the former Miss C.

However, in 1983 Mr X and the lady now named Mrs B were divorced for the second time and Mrs B (as she now is) was granted the sole custody of all the four girls who are the daughters of Mr X. They are therefore her stepdaughters.

In 1985 Mrs B (as she now is) married her present husband Mr B and they lived as a family with the four stepdaughters of Mrs B and the little boy, S, who was born on 19 November 1984 to Mrs B's daughter, M. The father is not known.

In the family unit there were Mrs B and her husband Mr B, the four stepdaughters of Mrs B and her grandson, who is little S.

The position then became more complicated because in 1987 Mrs B made a 'referral', as it is called, to the social services department, complaining that her stepdaughter, D – then aged 14½ – was complaining that Mrs B's husband, Mr B, was 'playing about with her', that is to say, indecently assaulting her.

That matter was investigated first of all by the social services and then by police. In due course, Mr B was arrested and charged with indecently assaulting his stepdaughter. On 8 September 1987, at Ilkeston Magistrates' Court, he pleaded guilty to an offence of indecently assaulting that girl and a probation order for one year was made as a result.

Prior to the hearing at Ilkeston Magistrates' Court, the girl concerned in those proceedings, D, was made the subject of care proceedings under the Children and Young Persons Act 1969 and, in due course, a full care order in favour of the Derbyshire County Council was made in her case on 27 October 1987.

By this time, Mr B, having been placed on probation, had returned to the matrimonial home and the social services department was concerned with the position of the other three girls, that is to say, the stepdaughters of Mrs B who were still living at home in the family.

In due course, care proceedings were instituted under the provisions of the Children and Young Persons Act 1969 in respect of those three girls and also in respect of little S who was also living with them. Those care proceedings were launched upon the basis that Mr B had pleaded guilty to, and had been convicted of, an offence of indecent assault against one of the children of the family unit and it was alleged that the children were exposed to moral danger and in need of care and control.

The care proceedings came before the Ilkeston Juvenile Court on 29 February 1988. On that occasion, the justices heard the application which was made in respect of all the four children of the family unit – that is to say, the three girls (other than D who had already been made the subject of a full care order) and also little S.

The grounds alleged in the complaint were those set out in s 1(2)(b) and (c) of the Children and Young Persons Act 1969. It appears that in due course the justices made supervision orders under the provisions of the Children and Young Persons Act 1969 in respect of the three girls. However, in respect of little S, the court records show that the court ruled that there was no prima facie case to answer. It appears, therefore, that at what is sometimes called 'the close of the proof' stage of the care proceedings, the application was dismissed in the sense that the magistrates decided to make no order in respect of the little boy, S. That was how matters were left on 29 February 1988.

Thereafter, the matters proceeded in the following manner: the father, Mr B, was still on probation and it appears that steps were taken to help him to become rehabilitated with the family. In particular, he was assisted by a child protection officer, Mr Bannister of the NSPCC, and the rehabilitation work proceeded.

However, during 1989, it is clear, on the evidence subsequently before the justices, that Mr B became the subject of dissatisfaction on the part of the social services department (and, indeed, Mr Bannister), because it appeared to them that he had broken the terms of the supervision requirements following the making of the supervision orders in respect of

the three girls and had been visiting them and the family when he was not supposed to do so. The matter reached a serious stage in May 1989 when Mr Bannister decided to bring to an end the programme of rehabilitation because of the breaches (as he regarded them) of the 'contract' which he had made with Mr B in implementing the rehabilitation programme.

It appears that during this period there were difficult relationships between the grandmother of little S, Mrs B and her husband, Mr B. There were injunction proceedings, but they came to a conclusion when an injunction which had been granted lapsed. However, it is clear that the social services department was very concerned about the position with regard not only to the three girls but also to little S.

A fresh complaint was then made under the provisions of s 1 of the Children and Young Persons Act 1969, eventually before the magistrates at Alfreton on 5 October 1989. The Derbyshire County Council sought to convert the supervision orders made in respect of the three girls into full care orders. In respect of S, they made a fresh complaint under s 1 of the Children and Young Persons Act, seeking a care order on the ground that he was exposed to moral danger, specifically on the grounds set out in s 1(2)(b), (bb), (c) and, further, in the terms of the subsection, 'that he was in need of care or control which he was unlikely to receive unless the court made an order under the section'.

That matter came before the magistrates on 5 October 1989. In the result, the magistrates converted the supervision orders into full care orders in respect of the girls and they are not the subject of the appeal which is presently before this court. The appeal before this court relates solely to the position of the boy, S.

The case, as stated by the magistrates, records, in para 1, the fact that the county council issued the notice which eventually brought the matter before the court on 5 April 1989.

Then para 2 of the case states that the justices heard the case on 5, 6 and 10 October 1989 and found the following facts: subpara (a):

> 'The juvenile court sitting at Alfreton on 29 February 1988 heard proceedings in respect of the said child brought by the Derbyshire County Council under s 1 of the Children and Young Persons Act 1969 and that the court made no order.'

Subparagraph (b):

> 'That the said child was a member of the same household as three children in respect of whom another court had found that their proper development was being avoidably prevented or neglected or their health was being avoidably impaired or neglected or they were being ill-treated.'

Subparagraph (c):

> 'That it was not probable that any of the conditions specified in the said notice were made out.'

And subparagraph (d):

> 'There was no reference to any evidence that was available to the court sitting on 29 February 1988 that was not adduced in the proceedings of

> that date or that was not known about then but which has come to light since.'

They then go on in para 3 to say:

> 'It was contended on behalf of the child's grandparent . . .'

I interpolate there 'Mrs B';

> 'and parent . . .'

That is Mr B:

> 'That under the doctrine of res judicata, evidence relied upon in the earlier proceedings could not be relied upon in the present proceedings to justify the making of an order without additional evidence of facts or matters which had either not been known about at the hearing of 29 February 1989 or of events or matters which had happened since that hearing.'

Paragraph 4:

> 'It was contended on behalf of the Derbyshire County Council that the doctrine of res judicata does not apply to proceedings under the said s 1, but quoted no authorities to support that contention.'

Paragraph 5:

> 'It was contended on behalf of the said child that the doctrine of res judicata could seldom, if ever, apply to care proceedings under the said s 1 because, by reference to 16 Halsbury's Laws of England (4th edn) para 1527, it was clear that if the doctrine was pleaded by way of estoppel to an entire course of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, and that could not be so in care proceedings where the court has to be satisfied not only on the primary grounds but also on the care and control test. In the circumstances of the particular case, it was contended that the justices had heard evidence which must necessarily be different from that heard on the previous occasion, because it related to events which had occurred since 29 February 1989 and which went to some or all of the following questions:
>
> (1) whether the Sch 1 offender was likely to become a member of the same household as the child;
> (2) whether the child was in moral danger;
> (3) whether the child was in need of care or control, which he would not receive unless an order was made.'

In para 6 the justices state:

> 'We were of the opinion that the doctrine of res judicata would apply to any proceedings under the said s 1 so as to prevent us hearing evidence

> adduced in earlier completed proceedings in the absence of new evidence. Accordingly, we made no order in respect of the said child.'

They pose, for the opinion of this court, the following two questions:

> '1. Whether the doctrine of res judicata is applicable to proceedings under s 1 of the Children and Young Persons Act 1969.
> 2. If the doctrine of res judicata is applicable to such proceedings, whether we were correct in finding that it applied in this case, given the evidence which had been adduced.'

There is, annexed to the case as stated by the justices, an agreed note of the evidence which was adduced before the justices on 5, 6 and 10 October 1989. It is clear from these notes of evidence that, in fact, evidence which was additional to evidence which had been available at the previous hearing in February 1988 was adduced before these justices. In particular, there was evidence from Mr Bannister, the child protection officer for the NSPCC, who had undertaken the rehabilitation work with Mr B, the father of little S, from January 1989.

There was also the evidence of a health visitor, Janet Cartwright, as to occasions when she had seen Mr B apparently visiting the family at times when it was not expected that he should do so.

There was evidence from a social worker, Phillipa Williams, who came into the matter during that period and who had to say (and did say in evidence) that she did not feel that Mrs B was being honest with the department.

There was the evidence from a Sarah Goring, a probation officer with the sex offenders group, who was in fact called by Mrs B's solicitor. In the course of her evidence, she spoke of the possibility of a person convicted of indecently assaulting a girl being likely possibly to offend also against boys. All that evidence was clearly before the justices. It was additional to, and related to, events subsequent to the evidence given in February 1988.

At p 45 of the agreed note of evidence, the ruling of the justices is recorded in these terms:

> 'The submissions of res judicata were then made and submissions in opposition were also put. The magistrates retired and then returned to give a decision that res judicata applied on the basis that they had heard no new evidence.'

The magistrates then proceeded to make no order in respect of little S. They then proceeded to hear further evidence and submissions in relation to the three girls.

It is right that I should say that the agreed notes of evidence also disclose that before the magistrates began to hear evidence in relation to all the complaints brought before them, they decided to hear all the matters together, that is to say, they decided to hear evidence directed to the cases of all four children, including little S.

The submission was made on behalf of Mrs B, the grandmother and 'mother in loco parentis' to little S, that the proceedings before the justices

in 1988 had decided the issues which were before the court in October 1989 and that the doctrine of res judicata should apply to preclude the justices from considering the case any further in relation to little S.

As appears from the justices' stated case, the submission was made, on behalf of the Derbyshire County Council, that this was inappropriate and could not apply to these proceedings, but no authority was adduced in support.

Res judicata is a fundamental doctrine of the Court that there must be an end to litigation, but, in fact, it has to be treated as a branch of the law of estoppel. In this case, it is clear that the plea of res judicata was raised by the representative of Mrs B on the basis that the whole of the issues raised in respect of little S had been decided at the earlier hearing in 1988. In my judgment that is a fallacious submission. The proceedings brought in 1989 were brought at a later date and alleged that in 1989 the conditions set out in s 1(2) applied to little S's case and that he was, at that date, exposed to moral danger and was in need of care or control which he was unlikely to receive unless the court made an order under the section.

The passage of some 20 months between the hearing in February 1988 and the making of the complaint in 1989 could not, in my judgment, justify a submission that the issues had been decided on 29 February 1988.

However, the matter is not concluded merely by that consideration, because it is clear from the certified extract of the entry in the records of the court at Ilkeston Magistrates' Court in relation to the proceedings in 1988, that no issues of fact were then decided. None were recorded. All that is recorded is, 'no prima facie case to answer'.

Estoppel can only apply where a specific issue of fact has been decided. There is no indication in the case as to what, if any, issue of fact was decided. There is no indication as to whether the matters specified in subparas (b) or (c), or the provision in subs (2), that the child is in need of care or control which he is unlikely to receive unless the court made an order, were specifically decided. All that is indicated is that the court, at the stage when the evidence for the county council had been called, made a ruling that there was no prima facie case to answer. It is inconceivable, in my judgment, that estoppel could apply to prevent a further case being considered in 1989, when fresh evidence was to be adduced.

This court is now told that, even if this appeal is allowed the county council do not propose to take any further care proceedings in relation to little S. Accordingly, the matter before the court is now largely academic.

However, the matter has received attention because it is important, in my judgment, that it should be made clear that there are serious limitations to the application of the doctrine of res judicata in cases of this kind.

I accept the submissions of the county council that, where proceedings are brought under s 1 of the Children and Young Persons Act 1969, the court is considering a continuing responsibility of the county council for a child within its area for whom it has concern; accordingly, the matter is not static. The situation must be considered as a continuing one. It is therefore difficult to see how the doctrine of res judicata could be applied to a state of affairs existing 20 months after previous court proceedings, when further events had occurred. I suspect that what took place was that the solicitor for Mrs B made a stirring submission that really the matter

had been sufficiently investigated and dealt with in February 1988 and that they ought not to entertain the matter any further – and then used the daunting Latin phrase res judicata, which perhaps impressed the magistrates.

It has to be borne in mind that the stated case does not specify what matters had been established as matters of fact in February 1988. It does not state what specific matters, therefore, could be the subject of an estoppel. The magistrates, in effect, stopped the case at what may be called 'half-time'.

I have to say that the making of a submission of 'no case to answer' is to be regretted in a children's care case. At that stage, the justices had not seen the guardian ad litem's report and they had not had the opportunity of hearing evidence on behalf of the father – or the stepmother in this case – matters which must be material to their investigation.

The court has been referred to a number of decisions which are on the fringes of this matter. There are cases in which the question of res judicata has been referred to in the context of custody proceedings, but I must say that I do not derive any help from those decisions. The facts are very different. The cases were different because there were two parties at issue over the custody of a child. Nevertheless, it is to be observed that in *Frost v Frost* [1968] 1 WLR 1221; sub nom *F v F* [1968] 2 All ER 946, Salmon and Fenton-Atkinson LJJ expressed a reservation as to whether res judicata as a doctrine could apply in custody cases. I share their reservation, particularly in relation to care cases. I think that the submission in this case was misconceived and was inevitably misunderstood by the justices. It was wholly inapplicable, in my judgment, to the facts of the case before them.

In answer to their second question, I answer in these terms: they were not correct in finding that the doctrine of res judicata applied in the proceedings before them to prevent them hearing further evidence in the case.

As to the first question, which is framed in very wide terms, 'whether the doctrine of res judicata is applicable to proceedings under s 1 of the Children and Young Persons Act 1969', I would answer in this way: I find it very difficult to conceive of any situation or circumstance in which the application of the doctrine of res judicata could be applicable, but it is impossible to consider every hypothetical set of circumstances which might come before a court. However, in the context of care proceedings, it is most unlikely ever to be applicable. It will certainly not be applicable where time has elapsed since the proceedings which it is alleged have previously resolved the issues before the court. That must follow because there is a continuing and developing situation in the life of a young child.

I would add that whilst allowing the appeal – because in any event I take the view that the doctrine was not applicable to the circumstances of the case being heard by the justices on this occasion – I would not make any further order, it being clearly stated that no further proceedings are, in fact, contemplated by the local authority at this stage.

Of course, if further facts should arise which give rise to concern for the welfare of little S, it would be the duty of the local authority to take such steps as they might consider appropriate in the context of their duty as at present laid down by the Children and Young Persons Act 1969.

On 14 October 1991 the Children Act 1989 is going to become effective and, when that takes place, I very much hope that the adversarial approach to care proceedings will disappear to a very large extent. What has happened in this case is symptomatic of the adversarial approach, where technical points are taken in order to secure a particular result. What will become more apparent from 14 October 1991 is that what the court is concerned with is the whole welfare of the child and that its task is to investigate, in an inquisitorial manner if necessary, the interests of the child.

For the reasons that I have given, I would allow this appeal and answer the questions in the way which I have stated.

WAITE J:

I agree. The scope in child care proceedings for a 'plea in bar' on the ground that the question has already been decided elsewhere must, in the nature of the jurisdiction, be severely limited. That is not because child care cases enjoy immunity from the ordinary rule that courts at all levels will treat as vexatious any attempt to go over the same ground twice. It is because the jurisdiction requires the court to look, in each case, at the totality of the circumstances as they affect the child on the day of the hearing; and, in the lives of children, events seldom stand still for long enough to make it likely that a tribunal considering the same child at successive hearings will find itself confronted at the second hearing with the same facts, requiring assessment from the same perspective, as at the first. The Latin rubric res judicata pro veritate habetur is particularly liable, therefore, to find itself at odds, in child care cases, with the homelier English principle that 'circumstances may alter cases'.

The issue investigated by the first hearing before the magistrates was whether a 4-year-old boy would be at risk (in the statutory sense under s 1(2) of the Children and Young Persons Act 1969) of abuse by an adult male carer whom it was proposed to keep away from contact with the girls in the child's household, on the ground that he had abused a girl. There was no evidence available at that stage to indicate the extent to which a male child might be at risk from someone whose only known abuse has been of a female child.

The issues which arose at the second hearing had something, it is true, in common with the first, in that they concerned the same parties, the same child, and the same risk from the same abuser. The circumstances of the second hearing were, however, wholly different. The child was by then 20 months older, and his vulnerability to abuse had to be assessed in the light of that greater maturity. The interval between the two hearings had provided an opportunity for the trustworthiness of the abuser, in regard to keeping away from the girls in the household, to be put to the test, and one of the matters to be investigated at the second hearing was his record in that regard. The second hearing had to consider, moreover, general medical evidence (not available at the first hearing) as to the risk involved for a boy in contact with an adult male known only to have abused a girl.

The issues at the two hearings have only to be stated in that way to show how different they were. The essential element of estoppel per rem judicatam, namely that the same issue should arise as between the same parties, was absent. There were, moreover, no 'findings' (properly so

called) made at the first hearing at all. The bench at that hearing simply recorded a verdict that there was 'no prima facie case to answer'. Where there are no findings, there can be no estoppel (16 Halsbury's Laws of England (4th edn) para 1527). It would no doubt be possible to make an intelligent guess as to the findings that were implicitly involved in that verdict, but estoppel is too summary and too drastic a doctrine to be allowed, with safety, to rest on mere surmise as to the findings that underlay the previous decision alleged to constitute the estoppel.

I share the President's doubts as to the suitability in general in child care cases of tactical submissions like res judicata or 'no case to answer': they belong to jurisdictions more adversarial in character than those in which the principal concern is the welfare of a child. I, too, would reply to the questions raised by the case stated in the terms proposed by the President.

SIR STEPHEN BROWN P:
The appeal will be allowed and no further order made, except, no doubt, costs for legal aid taxations for a number of you.

Order accordingly.

Solicitors: The names of instructing solicitors are omitted in the interest of preserving anonymity for the parties.

VIVIAN HORVATH
Solicitor