

Neutral Citation: [2019] NIFam 20

Ref: OHA10291

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 2/7/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF THE CHILDREN (NI) ORDER 1995

Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant;

and

F AND M

Respondents.

O'HARA J

Introduction

[1] All of the parties in this judgment have been anonymised so as to protect the identities of the children to whom the proceedings relate. Nothing must be disclosed or published without the permission of the court which might lead to their identification or the identification of their adult relatives.

[2] This judgment deals only with a part of the case but it is an important part. In September 2015 the son of the family C, was 5½ years old and his sister E, was 2½ years old. As a result of earlier events they were living with their paternal grandmother (PGM) under an interim care order, rather than with their mother and father who had separated in 2013. On Saturday 12 September 2015, shortly after 6pm, PGM noticed injuries to E while she was changing her nappy. These prompted her to contact the out of hours social worker. The result was that E was brought on Sunday 13 September 2015 for medical examination to the Rowan, the Northern Ireland referral centre for adults and children in cases where a sexual assault has been alleged or is suspected.

[3] E was examined by Dr D Primrose, Consultant Paediatrician, and Dr R Middleton, a General Practitioner with additional qualifications including being

a forensic medical physician. They were in agreement as to E's injuries and their likely cause or causes. Later Dr J Nelson, also a Consultant Paediatrician was engaged on behalf of the parents to provide a report for these proceedings. As will appear below there is a very large degree of consensus between Doctors Primrose and Nelson on the injuries. In essence they agree that the injuries were not caused accidentally. There is no probable innocent explanation for them. That being the case, it became necessary to conduct a fact finding hearing in order to determine on the balance of probabilities who inflicted the injuries on E. If a single individual cannot be identified, the next question is which individuals are in the pool of possible perpetrators. That pool has to be defined to include any individual of whom it can be said, on the balance of probabilities, that there is a realistic possibility that he/she mistreated or assaulted E thereby causing injuries.

[4] For the purposes of this fact finding hearing the people who have been considered for inclusion in the pool of perpetrators are as follows:

- F, the father, who was represented by Ms McGreenera QC and Miss G Murphy.
- M, the mother, who was represented by Mr McGuigan QC and Miss L Casey.
- PGM, the paternal grandmother, who was represented by Ms Smyth QC and Ms B Dargan.
- MGA, a maternal great aunt, who was represented by Mr Toner QC and Mr K Morgan.
- PA, a paternal aunt, who was represented by Ms McCormick QC and Ms K Cunningham.
- MU, a maternal uncle, who had to represent himself because he was not eligible for legal aid and could not afford to pay for legal representation.

[5] The applicant Trust was represented by Ms S Simpson QC with Ms Martina Connolly. The interests of the children were represented by the Guardian ad Litem for whom Ms Dinsmore QC and Ms C Robinson appeared.

Relevant Background

[6] The injuries which were found on E in September 2015 were not, sadly, the first which had been inflicted on her. In May 2013 when she was only three months old she was found to have a fracture to her right femur which had been inflicted by pulling and twisting her leg with a degree of force well in excess of that used in normal day to day handling of a baby. It was a non-accidental injury. While F and M deny causing it, they agree that they alone had care of E at that time. Accordingly, they alone made up the pool of possible perpetrators. One of them must have inflicted the injury on E.

[7] At that time there was a great degree of acrimony between F and M with each of them making serious allegations against the other. They did not protect C, who was then only 3, or E from their conflict. Once E's fracture was diagnosed she and C were removed from the care of F and M so as to protect them from further harm, physical or emotional.

[8] From May 2013 until July 2015 the children lived with MGA. So as to minimise the disruption to the children MGA moved out of her own home into the children's home. During those two years both F and M had their separate contact with the children supervised by other adults, again so as to protect the children. In July 2015 the children moved from MGA to PGM because MGA could no longer cope with the stress of the caring role which she had filled for so long. In effect therefore the children were removed from the mother's side of the family to the father's side, from a great aunt to a grandmother.

[9] The move from MGA to PGM did not affect the supervisory restrictions imposed on the contact which F and M continued to enjoy. It obviously meant a much reduced role for MGA but she continued to see the children, without the need for any supervision in light of her extended care for them. PA, the sister of F, saw more of the children because she lived with her mother, PGM, and helped PGM with their care. MU's involvement was as a brother of M but also as an adult who supervised M's contact with C and E, including her contact for approximately 7 hours on Saturday 12 September 2015.

[10] A particularly unhappy and complicating feature of this case is what Ms Simpson described accurately as the "toxic relationship" between these families. Many serious allegations have been made by members of each family against the other family. Those allegations are not restricted to F and M and some of them have to be considered below.

The 2015 injuries to E

[11] Dr Primrose and Dr Middleton examined E between 4pm and 6pm on Sunday 13 September 2015 at the Rowan. They found her to have a blue/black bruise measuring 1.5cm by 1.5cm on the right side of her perineum. In addition she had two blue/black bruises each measuring 0.5 by 0.5cm on the right side of the perianal area. It is not possible to date bruising so they found it impossible to state with any degree of certainty when the injuries were sustained although the bruising had disappeared by the time E was reviewed two weeks later. In a short addendum report Dr Primrose was asked to provide her clinical opinion as to whether the injuries were indicative of having been sustained in an accidental or non-accidental manner. Her answer was that:

"Where bruising is found in the anal/perianal region and in the absence of a clear history of accidental trauma, sexual abuse should always be considered."

[12] Dr Nelson was not engaged to provide an opinion on behalf of the parents until 2016. Obviously she did not see the bruising itself but she saw the notes and reports of Dr Primrose and Dr Middleton and she saw DVDs with a recording and photographs of the injuries which were taken on 13 September 2015. For the purposes of preparing her report and to get a context for the relevant events she interviewed F, M and PGM. From what she saw and read from the papers, she agreed that there were three bruises as described above. In addition however she was confident that she could make out three small abrasions in the perianal area close to the two perianal bruises.

[13] On 22 June 2016 the three medical experts met and reviewed these findings and related issues. At that time there was agreement from Dr Primrose and Dr Middleton that there might be abrasions as suggested by Dr Nelson in addition to the three bruises.

[14] Doctors Primrose and Nelson gave oral evidence in the course of the fact finding hearing before me. It is important to record that not only are the two doctors consultant paediatricians but they have also specialised and have extensive experience in identifying, diagnosing and treating sexually abused children. There was a considerable degree of consensus between them and their evidence can be summarised as follows:

- (i) Dr Nelson was 99.9% certain that there were abrasions.
- (ii) Dr Primrose concurred with Dr Nelson that there were in fact three small abrasions in addition to the bruises.
- (iii) The abrasions could possibly be explained by E scratching herself inside her nappy or by a carer having long nails but the fact that there was bruising in the same area rendered those suggestions less likely.
- (iv) The injuries might have been caused at different times but the inference is that they were caused at the same time.
- (v) The injuries were probably inflicted at a time when E did not have the protection of a nappy because a nappy would hinder access to that part of her body.
- (vi) The nature of the injuries, especially the bruising, strongly suggested that they were not inflicted accidentally but were inflicted by blunt force being deliberately applied. That force was significant because it is hard to bruise fatty tissue in these areas.

- (vii) The injuries are not clinically diagnostic of sexual assault and neither doctor could say what the motivation of the attacker was but the injuries are consistent with a sexually motivated assault, specifically with actual or attempted anal penetration.
- (viii) While Dr Primrose had never seen perianal bruising before, Dr Nelson had seen it and only in a context where there was other evidence tending to prove sexual motivation.
- (ix) While they could not say when the trauma was inflicted, it would have caused a mark or marks which developed quite quickly into bruising.
- (x) No assistance was to be gained from the colour of the bruises because colouring is highly variable.
- (xi) The trauma would have caused pain and upset to E which would have been noticeable to any reasonably observant adult.
- (xii) Any reasonable person who saw the bruises would know immediately to notify the authorities of this disturbing development.
- (xiii) There are many possible ways in which the injuries might have been inflicted. Dr Nelson's suggestions included the application of force by a finger, penis, a vibrator or any other firm object including a Play-Doh cutter. Dr Primrose agreed with those possibilities but added that the list could not be regarded as being exhaustive.

[15] As already stated, the doctors agreed on the difficulties inherent in attempting to estimate when the bruises seen on Sunday 13 September were caused. Dr Primrose suggested somewhat tentatively that they might possibly have been about 48 hours old but emphasised that this opinion was not supported by research. Dr Nelson extended that period of 48 hours to 7 days but again with some hesitation. What was undisputed however was that the injuries would be visible from the traumatic event onwards because the trauma would cause marks which would develop into bruising quite quickly.

[16] While Dr Nelson was instructed on behalf of F and M to provide her report, she was not influenced by the identity of the parties who engaged her. In other words, she did not tailor her report to suit the interests of those parties. It is striking to note how disturbed Dr Nelson was by what she saw and read. She described the injuries inflicted on E as "among the most severe I have examined" and "deeply troubling". In her oral evidence she added that these were among the worst injuries she had ever seen and that they "caused me a sharp intake of breath".

Legal principles

[17] It is not necessary to set out yet again the legal principles which apply to the identification of a pool of possible perpetrators in detail. The following principles can be taken from the well-established authorities:

- (i) The standard of proof applicable is the balance of probabilities.
- (ii) The court should not strain to identify an individual perpetrator.
- (iii) If no single individual can be identified, it is important to identify the pool of possible perpetrators.
- (iv) The test in each case is whether there is a real possibility that a particular person was involved.
- (v) Where no single perpetrator can be identified, it is all the more important to scrutinise the evidence and carefully consider whether anyone, and if so, who, should be included in the pool of possible perpetrators. The test for inclusion is not set high so that as a matter of legal policy it acts as an effective protective mechanism for children.

Relevant surrounding circumstances

[18] In reaching my decision on this fact-finding hearing I have considered all the materials put before me, the evidence I heard and the helpful written submissions of the parties. If some issues which were raised in the course of the evidence or the submissions are not referred to in this judgment it is because they are not of sufficient relevance or importance. There are however some matters which merit reference because they have the potential to bear on any analysis of what happened on or about 12 September 2015.

(i) Supervision of Parental Contact

[19] From July 2015 when the children moved to the PGM (and to the PA) the parents continued to have separate contact with them. Each had contact twice per week supervised by the Trust. In addition they had alternative weekend contacts supervised by family members. The MU generally supervised the mother's contact while the PGM generally supervised the father's. From September 2015 the father's midweek contact, supervised by the Trust, moved to his own home. In addition the father was allowed to take his son to football on Friday nights provided that he did not enter the home of the PGM before training to collect his son nor after training to drop him off. Instead he was accompanied by his sister, the PA.

[20] After 13 September 2015 all parental contact was supervised by the Trust. The children stayed with the PGM until they were moved to foster care on 30 December 2015.

[21] The reason for setting out this detail is that a series of allegations was made that with the connivance of the PGM, the father did not adhere to these restrictions. In an interview with social workers on 30 November 2015 the PA suggested that her brother, the father, was in the family home for a while on Friday 11 September. This suggestion was challenged during the course of the hearing, particularly by reference to the fact that the PA is a limited and vulnerable young woman who may have been confused and who did not have a supportive non-social work adult with her. I accept the risk of relying too heavily on this interview but there is other evidence suggesting that on some occasions at least the paternal family did not adhere strictly to the conditions for contact impressed on them by the Trust.

[22] That other evidence includes the father arriving into the house on Friday 21 August when the MGA was there, the evidence that in his own home the children referred to their aunt's chair and their granny's chair, the sighting of the PGM's car near his home which is in a cul-de-sac and the paternal family being seen together in their county town in December 2015 when the Christmas lights were turned on despite the father knowing he was not to be there.

[23] On balance I conclude that there were indeed some breaches of the supervision plan which had been put in place to ensure the safety of the children. These were undoubtedly inappropriate but I believe that their significance is limited. If there had been wholesale breaches of the safety plan I believe that the Trust would have been well aware of that fact since it had significant and regular contact with the paternal family at this time.

(ii) The Mother's Background

[24] The mother gave evidence that she suffered sexual abuse within her family home from an older brother (not the MU) when she was between 9 and 13 years old. This was disclosed a few years later following which her own parents asked that brother to leave the family home. They provided alternative accommodation for him nearby. Since then this brother has sometimes been allowed back into the family home and in October 2014 he arrived one evening and stayed for a time at the home of the MGA while C and E were there.

[25] It was not suggested during the evidence that this brother had access to E on or about 12 September 2015 and might have caused her injuries. What was suggested, somewhat vaguely, was that there were unresolved issues within the maternal family about sexual abuse. This included suggestions about events involving the maternal grandparents. I do not rely on this strand of evidence. It is too unclear to lead to anything more than unhelpful and potentially misleading speculation.

(iii) Various "Disclosures" by E and C

[26] During the course of their years in the care system there have inevitably been occasions when the children have said things which might be interpreted in a certain

way to put one side of the family or other in a bad light. It is important not to over analyse what they have said. Only where a child speaks and/or behaves in a manner which points clearly towards neglect, mistreatment or abuse should conclusions be drawn from the actions and/or words in question.

[27] It is also important to track the precise origin of a child's "disclosure" before relying on it. That involves understanding the context in which words were spoken and being able to rely with confidence on the person reporting them. Without that context and confidence the dangers of reading too much into a purported disclosure are obvious.

[28] Except where the contrary appears in this judgment I have not been able to assign evidential value to the disclosures allegedly made by the children about physical treatment or mistreatment by either parent.

Events on and around Saturday 12 September 2015

[29] On Friday 11 September E was at nursery as usual. Nothing untoward was noticed while she was there. She was collected at 3.30 pm by the MGA who took her to the home of a relative. At about 4.30 pm the MGA changed E's nappy. She did not observe any injury. At some point around 5.00 pm she then took E to the home of the PGM where E was living. The MGA stayed until about 6.40 pm with E, C and the PGM. Then she left. The fact that no injury was noticed then or later that evening satisfies me beyond any doubt that the MGA did not cause E's injury.

[30] The PA arrived home at about 6.15 pm. Soon afterwards she left with C to accompany him with his father to football, thus observing the supervised contact plan.

[31] The PGM bathed E and put her to bed. She was in bed before the PA returned from football with C. It is possible that, as the PA suggested to social workers, the father came into the house that night after the football. Even if that is correct, it is beyond doubt that he did not injure E on that occasion because the major injury to her was not noted or reported until 6.10 pm on Saturday.

[32] On Saturday 12 September both children got up, were dressed and had breakfast. They were then collected by their mother and the MU at about 10.00 am for contact. Before they left the PGM had changed E's nappy. Once again no injury was observed.

[33] The children were with their mother and MU from 10.00 am until they were returned at about 5.20 pm. They went to a local swimming pool, then had lunch out. After that they went briefly to the MU's house to see his cat before going on to the mother's house. No other person was reported to have been with the children during that day.

[34] The reason for the MU having been with his sister was to supervise her contact with the children. Perhaps inevitably there are some differences in the various detailed accounts they gave to social workers, the police and the court of their interaction on that day. To a degree those are to be expected – stories told multiple times will rarely coincide precisely.

[35] There are however two areas in which the differences in the accounts given appear to me to be significant:

- (i) The first is in relation to the time at the swimming pool. There are two concerns here. One is that C said that his uncle took him to a “hot room” which he did not like so he returned to his mother who was cross that her brother was taking so long there. This was denied by both adults who said all four were together at all times. The second concern in relation to the swimming pool is about the family changing room which they all shared and which included a shower. A late addition to the mother’s evidence was that after the swim she had showered E behind a half door. This is an entirely normal thing to do of course but it is something which had not previously been mentioned despite multiple opportunities to do so.
- (ii) The second significant difference in accounts is about what happened at the mother’s house which they were in for a few hours before leaving the children back to the PGM. At some point after 3.00 pm the mother described E going upstairs for a nap but not actually having one. On the evidence it appears that the mother was upstairs in the bedroom with her. The mother and the MU denied this but they gave unconvincing descriptions of what the MU could have seen from his seat downstairs and about how far up the stairs the mother went to check on her daughter in the bedroom.

[36] As best as can be confirmed there were nappy changes at approximately 11.00 am and 3.00 pm (before E went upstairs to the bedroom). Both adults testified that they saw a bruise on E’s upper thigh at both nappy changes but the mother in particular contradicted herself as to which side it was on and where exactly it was. Furthermore, what she and her brother described was definitely not the injury which so concerned the PGM at 6.10 pm or the doctors the next day.

[37] The children were returned to their PGM at about 5.20 pm. The mother told the PGM that E had gone for a nap but had not slept. Curiously she did not mention any bruising on the upper thigh. This was not a protracted handover – the mother said it was kept short because her brother was running late for his Saturday night out.

[38] There is no evidence that the father was in the PGM’s home when the children were returned or at any time in the next 50 minutes before his mother rang the out of hours social worker to report the significant injury she had found when she was

changing E. It is possible that he was there during that time because there had been previous breaches of the safety plan but I do not find it likely or probable that he was. The PA was there during this time, with her mother.

[39] Before drawing any further conclusions on the pool of possible perpetrators it is relevant to note two further relevant strands of evidence:

- (i) The evidence of the doctors was that PGM acted appropriately by contacting the out of hours social worker on 12 September, that she was a warm, concerned and reassuring carer for E when she brought her to Antrim the next day and that when she brought E back for two further reviews she continued to act in the same way. I regard this evidence as significant both in relation to the PGM herself and in relation to the suggested possibility that although she sought medical help for her granddaughter she knew that she was covering up for some gross mistreatment of that child by her own son.
- (ii) When the mother was told on the Saturday evening by the out of hours social worker what the PGM had reported, she said that she had noticed bruising on E's vaginal area that day. That is not what she told Dr Nelson when Dr Nelson took a history from her and she told the police that the mark she had seen was absolutely not to the vaginal area.

Conclusions on the Pool of Possible Perpetrators

[40] I have already indicated that in light of the medical evidence and the timing of her contact with E, I am satisfied that the MGA did not cause the injury to E.

[41] So far as the PA is concerned, I am satisfied that she had no time alone with E to inflict this injury. More to the point there is in reality no suggestion by any party that she is remotely likely to have done so.

[42] The PGM is in my judgment not in the pool of possible perpetrators either. The sequence of events is simply not consistent with her being the perpetrator or even one of a number of possible perpetrators. She has not been entirely reliable on adherence to the safety plan but that is not enough to place her in the pool. Moreover, her interaction with E and the doctors after she herself had reported the injury is simply not consistent with her being a likely perpetrator or of her covering up for someone she knew or suspected to be the perpetrator.

[43] The position of the father is a little more difficult. He is in the pool of perpetrators with the mother for the 2013 injury. That is significant and is aggravated by some breaches of the safety plan. It is however a considerable jump to say that because he might have been in his mother's home on Friday night there is a real possibility that he inflicted the injury on E. If he did, is it likely that it only appeared at around 6.00 pm on Saturday after she had been with her mother all day? I do not

think it is. I exclude him from the pool of possible perpetrators in relation to this injury.

[44] The MU's involvement is as a supervisor of his sister's contact. For the reasons given above I am satisfied that while he was around in a general sense, there were at least two occasions, at the pool and in his sister's home, when he was less than vigilant. It is possible that he himself was the perpetrator but no party suggested that he should be in the pool and there is no evidence to turn that possibility into a real likelihood. I exclude him from the pool.

[45] This leaves only the mother. I consider that I must not put her in the pool of perpetrators only because I have excluded everyone else. I do however find that she is the likely perpetrator because of the following combination of factors:

- (i) She is in the pool for the 2013 injuries.
- (ii) When she collected E on Saturday morning E was uninjured.
- (iii) Her contact during Saturday, for more than 7 hours, was not fully supervised by her brother.
- (iv) E's injury was discovered and reported within 50 minutes of her returning E.
- (v) The medical evidence is clear that once E was harmed the injury would have been quickly apparent and would have remained so.
- (vi) Her accounts of the events on Saturday are significantly contradictory and unpersuasive.

[46] I cannot say with certainty how exactly E's injury was caused. I certainly cannot say that its infliction was sexually motivated. It is almost unthinkable that adults can injure E or other young children in this way but they do. No explanation has been advanced for this injury to E. On all the evidence before me, but especially the medical evidence which is very specific, I conclude that the injury is a non-accidental injury and that the only person in the pool of possible perpetrators is the mother.