IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2012-412-52
[2013] NZHC 240

BETWEEN	QH AND LH Appellants
AND	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Hearing: 13 December 2012

Counsel: Nicolette Levy for Appellants
R P Bates for Respondent
Lynne Harrison for Child

Judgment: 18 February 2013

JUDGMENT OF PANCKHURST J

Introduction

[1] The appellants seek leave to adduce additional evidence in relation to this appeal. The context is a care and protection proceeding. The appellants' daughter, C, was removed from her parents care, following which the Ministry of Social Development (MSD) applied for a declaration that C was in need of care and protection. Following an eight day hearing in the Family Court, Judge Coyle in a judgment dated 15 December 2011 made a declaration that C was in need of care and protection, with the result that she was placed in the care of a paternal aunt in Hawkes Bay.

[2] The parents (QH and LH) appealed against the Family Court decision on the grounds that the Family Court Judge had erred in concluding that this case involved non-accidental injuries. Coincidentally, a similar case was decided in England in early 2012, culminating in a decision that a child should not have been taken into care: *London Borough of Islington v Al Alas and Wray*[1]. The decision in that case, delivered on 19 April 2012, led to the present application to adduce further evidence.

[3] The parents seek leave to adduce evidence from Professor Stephen Nussey, a Professor of Endocrinology and Consultant Endocrinologist. I heard submissions for and against the application shortly before the Christmas vacation. I regret that it did not prove possible to deal with the matter by way of an oral judgment and that some time has now elapsed. I trust that the cause of this delay will be apparent from a reading of the reasons for the decision.

The Family Court hearing

[4] C was born on 6 April 2011. Her parents are aged in their late twenties and C is their first child. On 11 July 2011 LH (the mother) took C to the family doctor who arranged an immediate admission to the paediatric ward of Dunedin Public Hospital fearing that the child was suffering from an inverted bowel. A paediatric examination revealed multiple fractures to the ribs, limbs and skull. These were viewed as non-accidental injuries. Child, Youth and Family Services were contacted and a without notice order was obtained by which C was removed from her parents care.

[5] Commencing on 29 November 2011, Judge Coyle heard eight days of evidence in relation to a care and protection application, including a large volume of medical evidence. He accepted MSD's case that the child's injuries were non-accidental and therefore made a declaration as sought.

[6] C was about 14 weeks when removed from the parents care, but is now approaching two years of age. As the Judge said at the outset of his judgment, this was a complex case and also 'incredibly difficult'. On the one hand there was no

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1 *London Borough of Islington v Al Alas and Wray* [2012] EWHC 865 (Fam).

evidence of mistreatment of C at the hands of her parents. To the contrary the Judge accepted that they were caring and responsible people, as well as being 'intelligent, articulate young people'. LH is a trained social worker, and her husband a landscaper. They were doting parents and there was 'nothing in their presentation to indicate that they presented a risk to C'. Their lifestyle was not reclusive, C was regularly seen by a midwife, plunket nurse and the family doctor. The parents enjoyed wider family support, but there was no evidence to indicate that opportunity existed for anyone else to have injured C.

[7] Following C's admission to hospital, tests revealed that she suffered from severe vitamin D deficiency. This deficiency can result in rickets, and in C's case the Judge found there was no dispute that she suffered from 'severe vitamin D deficiency rickets'. Without going into detail, vitamin D deficiency impairs calcium absorption which can lead to rickets, a bone disorder characterised by failed bone formation in growing children. This, in turn, can result in unintended or accidental bone fractures in some cases.

[8] Medical investigations confirmed that C had numerous fractures to the ribs (six), the left wrist, both ankles and the left knee. In addition she had a skull fracture. The cause of these fractures was debated in great detail in the Family Court. MSD called evidence from three paediatricians (two Dunedin based and one from Starship Hospital, Auckland), two paediatric radiologists (one from Dunedin and one from Starship) and a paediatric neurologist (from Starship). The parents adduced evidence from two forensic paediatricians, one from Adelaide and the other from California. The evidence was voluminous, including numerous and extensive medical papers concerning rickets related issues.

[9] Judge Coyle found:

> If I accept the proposition advanced by the parents, then C is the first child in medical history, who is not mobile, who does not have radiologically significant rickets, and who presents with this number of fractures. I am unable to accept on the balance of probabilities that C's injuries occurred through a combination of normal parental handling and severe vitamin D deficiency rickets. The research evidence simply does not support that proposition. It is my finding that the evidence establishes on the balance of

> probabilities that is more likely that C's rib and metaphyseal fractures occurred as a result of non-accidental injury.[2]

[10] As to the skull fracture the Judge concluded:

> It is my finding, on the balance of probabilities, that it is more likely than not that C's skull fracture occurred after birth as a consequence of a significant application of force to her head. .... I am unable to determine the timing of the subdural haemorrhage(s) on the evidence before me. What I am quite clear on in the evidence however, is that after C's birth she suffered a severe head trauma resulting in a fracture to her right parietal lobe, and at the time of her admission, she had a subdural haematoma which was directly causative of the seizures which initially alerted LH to become concerned enough to take C to her general practitioner, Dr Hall.[3]

[11] These findings prompted the ultimate conclusion:

> While I am not required to make a finding, on the evidence before me I am compelled to the view, despite the counter-intuitive factors that I have referred to, the inescapable conclusion is that C's non-accidental injuries have been caused by one of her parents. There is simply no-one else who could have caused these injuries ... .[4]

In essence, Judge Coyle rejected the parents denials and the medical evidence called on their behalf, and accepted medical evidence adduced by the MSD that accidental causation of the injuries was simply implausible.

The *Wray* case in England

[12] Professor Nussey was one of many medical experts who gave evidence in what I will term the *Wray* case heard in the High Court, Family Division in London. The case concerned a girl aged 17 months who had been in care since birth. When this child was born in October 2010 the parents were awaiting trial on a charge that they had murdered another child, Jayden, who died in July 2009. The criminal trial lasted six weeks before the Judge directed the jury to acquit the accused. This precipitated the Family Court hearing, which occupied four weeks, and resulted in the daughter being restored to her parents' custody. An exhaustive examination of

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2 *Chief Executive of the Ministry of Social Development v LETH* FC Dunedin FAM-2011-012-573, 15 December 2011, at [82]

3 At [91].

4 At [101].

Jayden's death was the sole focus of the hearing and determinative of the final outcome.

[13] There are significant parallels between this and the *Wray* case. C was 14 weeks when admitted to hospital, while Jayden was 19 weeks. Both had vitamin D deficiency rickets. C had the fracture injuries described above, and Jayden also had multiple fractures including of the ribs, left hand, both arms and both legs. In addition, both children had a skull fracture and associated subdural haemorrhaging. Jayden however, also had an eye injury, described as 'fresh retinal haemorrhages'. Prior to the admissions to hospital the rickets from which the two children suffered was undiagnosed. The most significant difference was that Jayden died from his injuries, whereas C made a full recovery.

[14] The English parents, likewise denied abusing Jayden and there was no evidence suggestive of a tendency for them to do so. Jayden was well loved, received appropriate medical care and thereby was seen by a range of health professionals over his lifetime. No-one observed anything untoward. Nor were there any external signs of injury when C and Jayden were admitted to hospital.

[15] Justice Theis approached the *Wray* case with regard to principles laid down in *Re U; Re B (Serious Injury: Standard of Proof)*[5], in which the Court of Appeal said:

> We adopt the following:
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> (i) The cause of an injury or an episode that cannot be explained scientifically remains equivocal.
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> (ii) Recurrence is not in itself probative.
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> (iii) Particular caution is necessary in any case where the medical experts disagree, one opinion declining to exclude a reasonable possibility of natural cause.
>
> (iv) The court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour propre is at stake, or the expert who has developed a scientific prejudice.

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5 *Re U; Re B (Serious Injury: Standard of Proof)* [2004] 2 FLR 263, at [23].

> (v) The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark.

[16] Following an exhaustive examination of the expert evidence Justice Theis in essence concluded that while the subdural haemorrhage was likely the result of trauma, the body fractures were probably due to bone fragility caused by rickets, and the birth process could not be ruled out as the cause of the skull fracture. As she put it, 'when you put it all together, it (trauma) stops being probable'[6].

[17] Given the quite striking similarities between this and the *Wray* case, the parents wish to draw on the latter in support of the appeal. In addition, they wish to adduce evidence from Professor Nussey directed to various medical issues that played a part in the *Wray* decision, and are said to be of similar importance to this appeal. I shall return to the intended content of the evidence shortly.

Further evidence on appeal

[18] Rule 20.16 of the High Court Rules governs the receipt of further evidence on appeal. Leave of the Court is required: Rule 20.16(3) provides the test:

> The Court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.

Appeals are by way of rehearing, on the basis of the lower Court record supplemented by fresh evidence, if any. Hence, special reasons must exist before leave to adduce further evidence is appropriate. Fresh or new evidence, being evidence that was not reasonably available at the original hearing, is commonly admitted under the rule. But other reasons may justify leave, provided the proposed evidence is both material and cogent. That is, the evidence must have the capacity to influence the determination of the appeal.

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6 *Wray*, above n 1, at [233].

[19] In supporting the application Ms Levy drew attention to the case of *H v MSD*[7], where Potter J stated:

> ... if the welfare and best interests of children required it, or would be promoted by leave being granted to adduce further evidence on appeal, then an arguably broader and less restrictive test than generally applied may be appropriate.[8]

I agree. The proposed evidence is derived from a proceeding in England, which post dated the hearing of this case and which concerned a strikingly similar factual situation.

[20] Undoubtedly it will be necessary to have regard to the decision in *Wray*, because of the example and guidance it may provide in deciding the appeal. But whether evidence from one of the expert witnesses in *Wray* should be admitted on appeal depends upon the content of the proposed evidence and its cogency and capacity to influence the outcome.

The rival contentions

[21] Ms Levy instructed Professor Nussey by letter in October 2012 to provide a report concerning issues raised in the *Wray* case which had the capacity to impact on the conclusions reached in this case. To assist preparation of the report counsel identified 18 issues from the *Wray* decision which might be of particular relevance. Unfortunately, Professor Hussey's report contained a response to each of the 18 issues and a lesser emphasis upon the expert medical evidence in this case. In any event Ms Levy candidly accepted that the report, as the basis of the further evidence, was not well focused and required attention. Nor is it in the form of an affidavit, this being a requirement of r 20.16(4) unless there is a direction to the contrary.

MSD's opposition

[22] Dr Benjamin Wheeler, one of the Dunedin based paediatricians who gave evidence in the Family Court, swore an affidavit in support of MSD's opposition. After considering Professor Nussey's report Dr Wheeler is of the opinion that it

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7 *H v MSD* [2008] NZFLR 1069 (HC).
8 At [30].

contains nothing new or significant capable of affecting the findings of the Family Court. Dr Wheeler notes that:

> If there had been any way to give C's parents the benefit of any doubt at the Family Court hearing or if Professor Nussey's report allowed me to do so, I would change my view.

Dr Wheeler is also of the opinion that three factors of true significance distinguish this case from *Wray*, namely:

(a) While C suffered from severe vitamin D deficiency, she had a mild – moderate case of vitamin D deficiency rickets. Significantly, radiologists could find no radiographic changes to C's bone presentation consistent with severe rickets.

(b) There is no medical evidence or research to support the contention that the bones of an immobile infant can become so brittle that they could be broken in the course of normal handling. In fact fractures are 'a relatively rare event', the more so multiple fractures (as in C's case) and in the context of 'normal radiology'.

(c) C's head injuries cannot be explained in any way by vitamin D deficiency rickets. The medical literature contains no examples of skull fractures arising in the context of rickets.

[23] Mr Bates made equally strong submissions directed to the weight of the medical evidence and also questioned aspects of Professor Nussey's report. Counsel noted that the professor is an endocrinologist, whereas radiological interpretation of the bone x-ray evidence is of central importance in this and like cases. Mr Bates submitted that while Professor Nussey's comments and commentary on the *Wray* case may be interesting, they would not assist the determination of the appeal. Hence, he concluded that the proposed evidence should not be introduced.

Lawyer for the child

[24] Ms Harrison was the lawyer for C in the Family Court and remains so in this Court. She adopted a neutral stance during the Family Court hearing. Only after she had heard the medical evidence did Ms Harrison felt constrained to support the making of a declaration that C was in need of care and protection. Like Judge

Coyle, counsel thought that the medical evidence was compelling of the fact that C's injuries were non-accidental.

[25] Nonetheless, Ms Harrison supported the parents' application to introduce Professor Nussey's evidence. She regarded it as in C's best interests for this evidence to be heard, no doubt I think because this is such a difficult and complex case that demands special care be taken.

The parents' submissions

[26] Ms Levy advanced several issues said to be raised by both *Wray* and C's case that she said had the capacity to influence the outcome of this appeal. Without being drawn into the medical detail, there were at least three general areas that were worthy of examination. The first concerned whether severe vitamin D deficiency rickets produces highly variable results in relation to bone fractures. Some patients may not sustain fractures, while others do; and whether this variability is well understood may be of significant consequence. Secondly, in the *Wray* case a comparison was made between radiological evidence of rickets on the one hand, and histological changes observed following a post-mortem examination on the other. It was suggested there are lessons to be learnt and applied in C's case arising from this evidence. Thirdly, Professor Nussey expressed views about the limitations of medical literature and clinical data concerning matters of direct relevance to rickets. This, it was said, may affect the weight to be accorded even strongly expressed medical opinions.

Should Professor Nussey's evidence be received?

[27] Obviously the decision in the *Wray* case will be debated and no doubt relied upon in the context of the appeal hearing. It may be that the approach adopted by the Judge in *Wray*, and the principles applied in England in assessing complex medical evidence, will prove to be influential. There is of course no dispute that the parties to the appeal can make such use as they choose of the *Wray* decision.

[28] Whether Professor Nussey's evidence should be received, is however, a contentious issue. I appreciate the weight of Mr Bates' submission that the outcome in C's case was dictated by the strength of the medical evidence accepted by Judge Coyle. As the Judge put it the evidence compelled him to the 'inescapable conclusion' that C's injuries were non-accidental.[9] That evidence may prevail on appeal, but the fact remains that this is a very anxious case on account of the parents' adamant denials and the absence of anything to indicate a propensity on their part to harm their baby daughter.

[29] In these circumstances I am in sympathy with Ms Harrison's viewpoint that it is in C's best interests to receive the further evidence unless it can be shown that it will be of no assistance. I am not satisfied of that; to the contrary, I consider that Professor Nussey's proposed evidence 'may be relevant to the determination of the appeal' in terms of r 20.16(3) largely for the reasons advanced by Ms Levy.

[30] For these reasons the application for leave is granted.

Some further directions

[31] Professor Nussey's present report is not suitable to be received in evidence. An affidavit is required, which must be limited and tailored to a consideration of matters of application to this case. The affidavit should be filed as soon as is reasonably possible, since the appeal has already been outstanding for a considerable time.

[32] As soon as it is, there will likely be a need for further directions. Mr Bates rightly raised concerns in relation to the potential for Professor Nussey's evidence to require a response from other medical experts. Counsel also expressed the concern that there was scope for the appeal hearing to descend into a wholesale re-litigation of the medical evidence. I agree. Once Professor Nussey's affidavit has been filed, and considered, a telephone conference is to be convened to enable further directions to be made as to the scheduling of the hearing and concerning arrangements for the hearing.

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9 *MSD v LETH*, above n 2, at [101].

[33] Leave is also reserved for counsel to revert to me in the meantime, if necessary.

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