Re: D and A (Fact Finding: Research Literature) [2024] EWCA Civ 663

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Introduction

1. The recent Court of Appeal decision in ***D and A (Fact Finding: Research Literature)* [2024] EWCA Civ 663** considered issues about the use of medical research literature as evidence in care proceedings under Part IV of the Children Act 1989. This case is an important decision, reminding practitioners of the importance of oral evidence and the evidence provided by expert witnesses in a time when the Government is running a pilot programme which might limit both of those things.

The Facts

2. The case concerned two children referred to as 'A' and 'D' in the judgment. When A was nearly 7 months old, his parents took him to the hospital and reported that he had fallen on the sofa and hit his head on the arm rest. At the time of the "sofa incident", both parents were present together with the children's maternal grandmother and step-grandfather. Medical examinations revealed intracranial and retinal haemorrhages.

3. The local authority commenced care proceedings in respect of both A and D. The maternal grandmother and step-grandfather were joined as intervenors. In addition, the court granted permission for the joint instruction of the following experts: Dr Kieran Hogarth, paediatric neuroradiologist, Ms Benedetta Pettorini, paediatric neurosurgeon, Dr Russell Keenan, paediatric haematologist, Mr Richard Markham, ophthalmologist, and Dr Alun Elias-Jones, paediatrician.

4. At the fact-finding hearing, the local authority sought findings that A's injuries had been inflicted by one of four adults present, and if the injuries had been inflicted by one of those four adults, that the parent, or parents, who had not inflicted the injuries had failed to protect A from harm.

5. In the course of their reports, the experts referred to a number of research papers which were included in the court bundle. At least one further paper was sent to the judge after

the conclusion of the evidence. Those papers were later summarised by the judge and annexed to her judgment.

6. Following conclusion of the evidence, the local authority sought leave to withdraw the proceedings on the following grounds:

   a) the medical expert opinion was inconsistent and in oral evidence all the experts, save for Ms Pettorini, acknowledged that the injury could be accidental as per the accounts of the four adults;
   b) the parents and intervenors presented well in their evidence and were largely and materially consistent;
   c) the social worker's evidence in respect of the sofa was persuasive and supportive of the parents' account;
   d) the social worker continued not to have any concerns about the parents or the intervenors throughout the proceedings;
   e) the local authority submitted that this was a case where they were unable to satisfy the threshold based on the oral evidence.

   The application was supported by all parties.

7. After hearing submissions, the judge delivered an ex-tempore judgment refusing the application for leave to withdraw. She determined that this was not a case in which it was appropriate for the local authority to withdraw their application summarily. Following the parties filing written submissions - within which no party invited the court to make findings - the judge handed down her judgment. A lengthy summary of the research papers (nearly 7,000 words) was annexed to the judgment.

8. The judge found that the injuries were as a result of an acceleration/deceleration mechanism prior to the sofa incident which could have been accidental or non-accidental in nature, and which involved more significant force than the sofa incident. She found that the injury had been sustained by A in the care of one of his parents, though she was unable to identify which one was responsible.

9. Permission to appeal was granted to the parents by the Court of Appeal.

Appeal

10. The focus of the appeal was on the judge's treatment of the research literature. Giving the leading judgment, Baker LJ acknowledged that the judge was entitled to scrutinise the research cited in the experts' opinion evidence. However:

> "*the judge must exercise caution. First, she should not use analysis of research as a stand-alone method of trying to decide what happened. It can help to confirm the accuracy or reliability of the expert's opinion. It is not a tool for the judge to use herself independently when analysing the evidence. She is not the expert*." [85]

11. The Court of Appeal felt that the judge erred in her treatment of the research evidence in a number of ways, including that:

    a) The judge's detailed analysis of the medical literature and the expert evidence was unnecessary and disproportionate. The preponderance of expert opinion is that low-level falls do not usually cause intracranial and retinal bleeding of the sort suffered by A, but it may do in rare occasions. The presence of intraspinal bleeding (as in this case) is thought to be indicative of abusive shaking, but this is a grey area and the causes of such bleeding are not well-understood. Nothing in the research literature extensively analysed by the judge materially added to this.

    b) There was a strong impression that the judge *"treated the research literature as the primary source of the opinion evidence and the experts' testimony as ancillary to it.*" [93]

    c) The judge elevated her analysis of the research literature such that "*it became the prism through which she assessed the rest of her evidence*." [91] For instance, she concluded that the acceleration/deceleration mechanism prior to the sofa incident "*best explains the particular constellation of injuries from a medical perspective <u>by reference to the literature in [her] view</u>*." [94, emphasis added] None of the experts were asked about this possible explanation, save for one question put by the judge to Ms Pettorini.

12. In addition, the Court of Appeal further concluded that:

    a) The judge failed to reach her decision on the basis of the totality of the evidence, including wider evidence about the family which pointed *away* from the injuries being inflicted.

    b) While the judge was not confined to the cases advanced by the parties, if the judge was considering findings that were materially different to those advanced by any party, she should have given counsel the opportunity to make submissions about them.

    c) There are flaws in the judge's ultimate conclusion about the cause of the injuries.

> "*At no point did the judge stand back and consider the implausibility of the scenario she eventually concluded had happened – that the child, living with parents about whom there were no other material concerns and who had demonstrated a close and loving relationship with their children, had suffered an earlier incident that day, either accidental or deliberate; that following that incident he had not displayed any symptoms that were noted by any of the adults; that he had been seen by his grandmother to be playing happily with his toy octopus; that in the presence of four adult family members he had then suffered a fall onto the hard arm of the sofa after which he developed clear symptoms of encephalopathy, which led his parents to take him to hospital immediately and thereafter to co-operate entirely transparently with the professional agencies*." [112]

13. The appeal was allowed and the order was substituted with one granting the local authority leave to withdraw proceedings (in fact, by this point, the proceedings had already concluded with the making of no public law order in respect of either child).

Discussion

14. This judgment from the Court of Appeal is a timely reminder of the importance of standing back and taking into consideration all of the evidence in a case, including the oral evidence provided by court-appointed medical experts in fact-find hearings. It is also a reminder that suspected non-accidental head injury cases are complex, involving a multitude of medical disciplines. Analysis of mechanisms, medical features, and injuries seen on scans, remains a controversial exercise and often produces differing expert opinions.

15. The primary issue in the case was the judge's extensive reliance on medical research literature to make factual findings about the cause of the child's head injuries. The Court of Appeal found that the judge had elevated her analysis of this literature to such an extent that it overshadowed other evidence, such as the oral evidence given by the experts and the factual evidence. The court emphasised that while research can inform the understanding of expert opinions, it should not replace or dominate the consideration of other evidence.

16. This decision comes at a time when the gathering of medical evidence in non-accidental head injury cases is currently being reviewed. The announcement of the Suspected Inflicted Head Injury Service (SIHIS) pilot has generated significant controversy. Under this pilot, a multi-disciplinary clinical hub will report on suspected inflicted head injury cases and produce a report. Leading practitioners in head injury cases are rightly

concerned that the SIHIS pilot will lead to a standard format for examining and reporting upon head injury cases. It may also make the appointment of experts within family proceedings harder, the fear being that the standard multidisciplinary report will be used by local authorities as the medical evidence in a case and therefore render independently appointed experts unnecessary.

17. The disadvantage of this approach is that, under the pilot, the medical evidence will be obtained in a clinical setting where each clinician has a specific job to do, and an area to examine. The clinicians undertaking the reporting will be involved in the treatment of the injury at a time when there is limited input from the family involved or the child injured. This is in contrast to a court-appointed expert who examines the medical picture as a whole; who has access to all of the evidence available, particularly from the carers and the family; and who has the benefit of input from lawyers for the relevant family members and on behalf of the child.

18. One of the aims of the pilot is to provide a uniform report, which no doubt would be set within a standard framework. Uniform procedures and protocols could potentially lead to a situation where the unique perspectives and interpretations of individual medical experts are overshadowed by a rigid framework. This could result in experts being less able to convey nuanced views or to consider exceptional factors that fall outside the uniform assessments. While consistency is beneficial for ensuring high standards of care and clear guidelines, it may also lead to a "one-size-fits-all" approach that does not account for the variability in individual cases. The scenario in this case outlines how important it is for all things to be considered, and how sometimes rare accidents do occur (and have an explanation, no matter how implausible). The case also shows how frequently medical experts' opinions differ when discussing and reviewing mechanisms of head injuries.

19. Finally, there is a fear that that the SIHIS pilot could lead to a greater reliance on written reports and restrict the oral evidence given by jointly instructed experts within court proceedings. There is a significant disadvantage in restricting oral evidence. An increased emphasis on uniform written reports might limit the opportunity for experts to provide spontaneous, clarifying, or contextual explanations that can be pivotal during cross-examination or when explaining complex medical issues. Practitioners will be able to recall countless times when experts have provided different opinions in their oral evidence to those that were provided in their written reports. A number of these changes of opinion will have significantly changed the outcome of a case, often leading to children returning to their families.

20. This case is an example of how crucial oral evidence is. Here, the judge relied upon written material and placed her own weight and evaluation on the research literature above that of the oral evidence given. Clearly, this was the wrong approach and

highlights the importance of listening to the oral evidence. A uniform report from a multidisciplinary clinical team should never replace the need for skilled cross-examination of medical experts giving oral evidence during a fact-find.


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Law is correct as at 8th August 2024

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