

Care work

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Garden Court North Chambers

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Agenda

- General principles in cases involving non-accidental injury
- Fractures and bruising
- Non-Accidental Head Injury (previously ‘Shaken Baby Syndrome’)
- Cases involving ingestion of drugs

General principles in cases involving NAI

- Primary issues:
- Allegations often arise from visit to medical expert or injuries witnessed e.g. in school
- Safeguarding procedures followed
- Inadequate or conflicting explanations given for injuries
- Local Authority may issue care proceedings (possible simultaneous police investigation)
- Medical evidence sought (discussed below)
- Pool of 'possible perpetrators' (discussed below) and consideration of possible timeline of injury
- Fact-finding hearing

General principles in cases involving NAI

- Carers generally expected to provide explanation for injuries but legal burden of proof rests on LA to prove that injuries were non-accidental
- *Re M (A Child)* [2012] EWCA Civ 1580:



“[The expert’s opinion] 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 it is not a non-accidental injury”.

General principles in cases involving NAI: *Re S*

Consider:

- Disclosure, incl. hospital records (midwifery, obstetric, health visitor, any 999 call) and GP records; police disclosure; post-mortem reports
- Need for expert evidence – choose expert evidence wisely and beware the ‘dogmatic’ expert (more below)
- Pool of perpetrators (more below)
- Interim contact/placement etc

General principles in cases involving NAI: *Re JS*

***Re JS* [2012] EWHC 1370 (Fam):**

Alleged 'shaken baby syndrome' (Non-Accidental Head Injury) case with intracranial injuries, retinal haemorrhaging and episodes of lethargy

Issues:

- 1) Whether child's injuries were non-accidental;
- 2) If non-accidental, who inflicted them;
- 3) Whether there was more than one incident that caused the injuries.

General principles in cases involving NAI: *Re JS*

Ten principles for court to apply to medical evidence:

1. Burden of proof is on LA to prove NAI;
2. Standard of proof is balance of probabilities (NB: compare to criminal proceedings, which often wait for outcome of family proceedings).
Binary system - if finding not made, incident did not happen;
3. Findings must be based on evidence;
4. Take account of each piece of evidence, in the context of all the other evidence (range of facts to be taken into account can be 'infinite': *Re B-T (A Child: Threshold Conditions)* [2020] EWCA Civ 697);

General principles in cases involving NAI: *Re JS*

5. Pay appropriate attention to expert evidence but consider it in the context of all the other evidence. Roles of court and expert are distinct;
6. “In assessing the expert evidence I bear in mind that cases involving an allegation of shaking involve a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bringing their own expertise to bear on the problem. The court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others.”

General principles in cases involving NAI: *Re JS*

7. “Evidence of the parents and any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them.”
8. Common for witnesses to tell lies, for many reasons. Fact that witness has lied about one matter does not mean that he/she has lied about everything.
9. Court must resist the temptation to believe that it is always possible to identify the cause of injury to the child.

General principles in cases involving NAI: *Re JS*

10. Finally, when seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators is whether there is a likelihood or a real possibility that he or she was the perpetrator. ... In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injury to be identified but where impossible to find that one parent caused the injury, neither can be excluded from the pool of perpetrators.

General principles in cases involving NAI: *Re B*

Re B (Children: Uncertain Perpetrator) [2019] 4 WLUK 64 :

“a decision to place a person within the pool of perpetrators is not a finding of fact in the conventional sense” (para 47).

“The concept of the pool of perpetrators....does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did it. No one can be placed into the pool unless that has been shown” (para 48).

General principles in cases involving NAI: *Re B*

Instead of 'excluding' individual from the pool (i.e. risking reversal of burden of proof), change in language and approach was recommended.

- a. Consider whether there is a 'list' of people who had the opportunity to cause the injury.
- b. Then consider whether the Court can identify the actual perpetrator on the balance of probabilities.
- c. If not, consider: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" – leading to placement in the pool.

[See para 50 re. possible carers and *Re: R (A Child)* [2019] EWCA Civ 895]

Concurrent criminal and family proceedings

- Pending criminal trial is not sufficient reason on its own to adjourn care proceedings – court must balance all factors (incl. risk of prejudice to accused and risk to child) and welfare of child takes priority over detriment to family member facing criminal proceedings (*Re TB (Care Proceedings: Criminal Trial)* [1995] 2 FLR 801, CA).
- **But always case specific** – e.g. if allegations of murder, such as in *LB of Islington v Al Alas and Wray* [2012] EWHC 865 (Fam), family proceedings may await outcome of criminal proceedings

Criminal court findings contradicting family court

Re Q (Fact-Finding Rehearing) 2019 EWFC 60

- ❁ Criminal court found mother guilty of (inter alia) inflicting head injuries which family court had found were inflicted by father
- ❁ Father was acquitted of all charges inc head injury
- ❁ Principal purpose of s. 11 Civil Evidence Act 1968 is to establish a rule to be applied in circumstances in which the criminal trial and conviction occurred *before* the civil fact-finding process. It cannot have been the intention of Parliament that a subsequent conviction would lead to a presumption that a prior contrary finding in civil proceedings would be overturned on appeal. The weight to be attached to a conviction in these circumstances would vary depending on all the circumstances: look behind the conviction at the evidence [99]

Criminal court findings contradicting family court

- ❁ Family court had found father particularly unconvincing in relation to inconsistencies between his police interview and evidence in family proceedings.
- ❁ Prosecution in criminal proceedings did not challenge this – accepted his account in support of case building against mother.
- ❁ Not criticising prosecution but looking behind the conviction at the evidence included looking at the course taken by the prosecution. The weight to be attached by the family court to the prosecution's assessment of what family court found particularly unconvincing was very limited. Mother's account had not substantially changed. Nothing in father's evidence to criminal court would cause judge to revise opinion (father had not attended to give further evidence to family court)

NAI: fractures, bruising and timing

- ❁ Fractures - consider:
- ❁ Causation of fracture – consider type and location (e.g. metaphyseal, greenstick, long bone), number of fractures, mobility of child
- ❁ Age of fracture(s) – timing (opportunity to injure and knowledge of injury, although not all fractures cause pain/distress)
- ❁ Amount of force required and rate of healing: NB possible underlying conditions, e.g. vitamin D deficiency (rickets), autoimmune disorder, brittle bone (osteogenesis imperfecta) etc can affect both

C.f. A Local Authority v M & Others [2013] (11 01 13)

NAI: fractures, bruising and timing

- Bruising – consider:
 - Age: Timing of bruising is very challenging – hard to be precise
 - Causation/force required: Mobility of child and developmental stage
 - Siblings – opportunity to injure as well as parents?
 - Nature and location (e.g. away from bony prominences; bruising to face, back, abdomen, arms, buttocks, ears or hands)
 - Pattern of bruising (e.g. grip marks or symmetrical bruising)
 - NB: May also involve skin injuries, e.g. blistering and bites, or bleeding from nose or mouth

Non-Accidental Head Injury (previously “SBS”)

- Seminal case: *LB of Islington v Al Alas and Wray* [2012] EWHC 865
- Law as per *Al Alas and Wray*:
- Triad – can be strong pointer to NAHI but is not diagnostic. All circumstances to be taken into account, incl. other signs/symptoms of trauma (para 9)
- Look at the ‘wide canvas’ of the evidence (para 11)
- Court can depart from expert evidence given sound reasons to do so; frontiers of medical science are always expanding (paras 13 and 14)

Non-Accidental Head Injury (previously “SBS”)

- Where there is disputed medical evidence, see *Re U; Re B (Serious Injury: Standard of Proof)* [2004] 2 FLR 263 at para 23:
- (i) The cause of injury or an episode that cannot be explained scientifically remains equivocal;
- (ii) Recurrence is not in itself probative;
- (iii) Particular caution is necessary in any case where the medical experts disagree;
- (iv) Be on guard against the over-dogmatic expert;
- (v) “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.”

Non-Accidental Head Injury (previously “SBS”)

- *Al-As* provides comprehensive summary of medical aspects of ‘shaken baby syndrome’ (as then sometimes called; now termed Non-Accidental Head Injury)
- NAHI is highly controversial area, legally and medically.
- ‘Triad’ includes:
 - Bilateral thin film subdural haemorrhage
 - Retinal haemorrhage
 - Encephalopathy
- NB: Other potential medical pointers (excluding bodily injuries) include skull fracture, axonal injury etc –full explanation in *Al-As*

Non-Accidental Head Injury (previously “SBS”)

- Particular problem in NAHI cases can be number of experts – four weeks of evidence in *Al Alas and Wray*, including (i) primary treating professionals; (ii) experts instructed by prosecution and defence (in criminal proceedings, adopted by family proceedings)
- NB: Beware of any potential overlap between roles and purpose of instruction
- Enormous amount of conflicting theory and evidence
- Still very little agreement in medical community more widely

Non-Accidental Head Injury (previously “SBS”)

- ❁ It may not be possible to determine cause of injury - *Re R (Care Proceedings: Causation)* [2011] EWHC 1715]
- ❁ Not all subsequent attempts to dismiss allegations on basis of rickets have been successful, e.g. *Re A (A Child)* [2012] EWCA Civ 1477
- ❁ CPS guidance can also be useful in linked cases:
<https://www.cps.gov.uk/legal-guidance/non-accidental-head-injury-cases-nahi-formerly-referred-shaken-baby-syndrome-sbs>

Ingestion of drugs: *Re K*

- ***Re K* (Threshold – cocaine ingestion – failure to give evidence) [2020] EWHC 2502 (Fam)**

- Four children - K, aged 3, died in April 2019. Cocaine found in system. LA alleged cardiac necrosis caused by deliberate or accidental ingestion of cocaine

- Case involved drug use and dealing by a number of adults – causation can be complex

Mother did not give evidence (c.f. useful guidance on approach to hearsay and weight to be given to Mother's evidence)

Ingestion of drugs: *Re K*

- 7 expert witnesses: two forensic toxicologists; consultant general paediatrician; two consultant paediatric pathologists; consultant forensic pathologist; consultant in congenital & paediatric cardiology. Paediatric neuropathologist provided a report but did not give evidence.
- NB: Useful consideration of the toxicological evidence and complexities of hair strand testing in children.

Ingestion of drugs: *Re K*

- Findings made re. drug use of mother, father and paternal grandmother; and K ingesting cocaine
- F bore responsibility for bringing the cocaine into the home and leaving it carelessly so as to be ingested by K
- M was aware of F bringing cocaine into the home/processing it and did not prevent this
- PGM did not bear direct responsibility for K's ingestion but bears indirect responsibility as head of family steeped in Class A drug use over many years

Dealing with a NAI case remotely

- ❁ [Lancashire County Council v M \(COVID-19 Adjournment Application\)](#) [2020] EWFC 43
- ❁ Macdonald J considered separately represented parents' objections to adjourn part heard final hearing (listed at Manchester CJC for 10 days in July 2020, with possibility to be partially remote)
- ❁ Baby had been admitted to hospital following collapse and was found to have sustained numerous injuries, believed by local authority on basis of expert evidence to have been inflicted by 1 or both parents
- ❁ Father's moderately severe depression meant he had some difficulties processing new information/making decisions; he required an intermediary

Dealing with a NAI case remotely

- ❁ Final hearing in Preston was adjourned on its 2nd day (17 March 2020) as unable to ensure safety from infection of participants & court staff
- ❁ 14 May 2020 Manchester CJC confirmed could accommodate case in large courtroom; LA said could pay for taxis for parents if LAA did not
- ❁ Father very anxious about travelling to Manchester – argued he could not participate effectively and this cannot be outweighed by stress of foster carers (who were prospective adopters) by continuing delay
- ❁ Court referred to s1(2) and 32 CA 1989, guidance inc. the Road Ahead and *Re P (A child: remote hearing)* [2020] EWFC 32 and *Re A (children) (remote hearing: care and placement orders)* [2020] EWCA 583

Dealing with a NAI case remotely

Relevant factors summarised as:

- i) The welfare of the subject child or children;
- ii) The statutory duty to have regard to the general principle that delay in determining the question is likely to prejudice the welfare of the child;
- iii) The requirement to deal with cases justly, having regard to the welfare issues involved;
- iv) The extent to which a remote or hybrid hearing will provide the judge with a proper basis upon which to make a full judgment;

[Credibility of the parents' evidence falls to be evaluated primarily by reference to matters such as the internal consistency of their evidence, its logicality and plausibility, details given or not given and the consistency of their evidence when measured against other sources of evidence (including evidence of what the witness has said on other occasions) and other known or probable facts, para 57]

Dealing with a NAI case remotely

- v) The steps that can be taken to reduce the potential for unfairness by enabling the cases to proceed fairly when previously it may have been adjourned, having regard in particular to the need to make every effort to accommodate and enhance the ability of lay parties to engage fully in the remote or hybrid process, including the extent to which it is possible to arrange for a lay party to engage with that process from a location other than their home where they can be supported by at least one member of their legal team and, where appropriate, any interpreter or intermediary;
- vi) The impact of the COVID-19 pandemic on the likely timescales for a fully face to face hearing in preference to a remote or hybrid hearing and the need to evaluate any potential unfairness against that timescale;
- vii) The statutory requirement that all public law children cases are to be completed within 26 weeks and that any extension to the 26 week timetable must be necessary to enable the court to resolve the proceedings justly;
- viii) The requirement, so far as is practicable, to allot to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases, evaluated in the context of the limitations placed by the COVID-19 pandemic on the resources currently available to give effect to fully face to face hearings; and

Dealing with a NAI case remotely

ix) Individual circumstances of the case/parties inc. but not limited to:

- ❁ a) Whether the parties **consent to or oppose** a remote or hybrid hearing;
- ❁ b) The **importance and nature of the issue** to be determined bearing in mind that parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be limited to that which it is necessary for the court to hear;
- ❁ c) Whether there is a **special need for urgency**, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;
- ❁ d) Whether the parties are **legally represented**;
- ❁ e) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to **engage with and follow remote proceedings meaningfully**, including access to and familiarity with the necessary technology, funding, intelligence/personality issues, language, ability to instruct their lawyers (both before and during the hearing) and other matters;

Dealing with a NAI case remotely

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Dealing with a NAI case remotely

- f) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;
- g) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;
- h) The scope and scale of the proposed hearing;
- i) The available technology. A telephone hearing is likely to be a less effective medium than using video;
- j) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;
- k) Any 'Covid-safe' alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge;
- l) Any other factors idiosyncratic to the particular case.