Care proceedings where there are serious allegations of non-accidental injury (A Local Authority v US and Others)

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Family analysis: Gemma Kelly, barrister at 1 Garden Court, and Nina Hansen, partner at Freemans Solicitors, examine the decision in A Local Authority v US and Others (in which they represented the mother) and its practical implications—specifically, those relevant for practitioners involved in care proceedings involving serious allegations of non-accidental injury and a concurrent criminal investigation.

A Local Authority v US and Others [2017] EWHC 3707 (Fam), [2017] All ER (D) 147 (Dec)

What are the practical implications of the judgment?

This judgment has practical implications for those involved in care proceedings in which there are serious allegations of non-accidental injury and about which there is a concurrent criminal investigation. In his judgment, Francis J put forward informal guidelines regarding the handling of police disclosure in such cases.

The judgment also provides useful examples of:

- the types of deficiencies that can arise within a forensic investigation of a child's death by the police
- consideration of the treatment of third-party perpetrators
- when the burden of proof might come to the court's rescue

A caveat to the analysis below is that the decision is currently the subject of an appeal.

Briefly, what was the background to the case?

The case centred around the tragic death of a child, 'L', who was found dead in her bedroom at home in November 2016, with decorative netting around her neck. Her death was originally thought to have been the result of an accident. However, the Home Office pathologist concluded that it was a sexually motivated homicide.

The father and one of the child's older brothers were arrested by the police, although neither were charged. Care proceedings were initiated and findings sought by the local authority that L's sexual abuse and death was perpetrated by one of her parents, or one of her two older brothers.

At the fact-finding hearing, the judge found that the oral evidence of the medical witnesses was 'far less conclusive' in respect of the genital injuries. He noted that the evidence included male DNA in L's intimate clothing, which had been excluded as being from any of the male family members. He took account of the positive wider canvas of evidence about the family. He was also concerned that third party perpetrators had not been properly investigated by the police, among many other failures in the forensic process that had 'severely prejudiced' the task he had to undertake (see a full list of the deficiencies in the police evidence at para [43], and also the judge's criticism of the police's interview and arrest of one of the older brothers).

Regarding L's death, Francis J considered the 'three unlikely eventualities' of accident, suicide and homicide. He did not consider that the local authority had discharged its burden of proof that homicide or sexual assault had been perpetrated, or that it had been perpetrated by the family

members against whom findings were sought. He considered there to be a real possibility that an intruder had come into the home. Accordingly, the threshold was not met.

The judge was particularly troubled by the 'woefully inadequate' police disclosure, a huge volume of which was only served during the fact-finding hearing itself. He went on to offer informal guidance (albeit that he had previously raised with the President of the Family Division) regarding police disclosure in cases involving the death or serious assault against a child.

He also made several criticisms of the local authority's handling of the cultural and religious aspects of the case.

How did the court approach issues in the case as to the burden and standard of proof and 'the pool of perpetrators'?

The court identified at the start that the burden of proof rested throughout on the local authority, both as to proof of non-accidental injury, and as to identification of a perpetrator of any injury found to have been non-accidental.

The judge identified the relevant case law and provided a helpful summary of those cases, in particular *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2008] 2 FLR 141—in which Baroness Hale stated that 'The standard of proof in finding the facts necessary to establish the threshold under section 31(2) of the Children Act 1989 (ChA 1989), or the welfare considerations in the ChA 1989, s 1 is the simple balance of probabilities, neither more nor less' (para [70]). In particular, Francis J used the 'eight point test' set out in Baker J's judgment *Re L and M (children) (fact finding: Non-accidental injury)* [2013] EWHC 1569 (Fam), [2013] All ER (D) 275 (Jun).

The court had to consider looking at all the facts and taking into account the 'whole canvas' whether on the balance of probabilities 'this was an act perpetrated by a third party' (para [96]). In doing so Francis J acknowledged that all the experts agreed on the cause of death (ligature strangulation), but there was no clear evidence as to how it was caused. He detailed the medical and other expert evidence available—including the DNA and other police evidence—together with evidence about and from the family.

Having done so the judge found no clear evidence pointing directly to any of the possibilities, save that suicide in a happy healthy child of ten years of age seemed unlikely. He then attempted to aggregate all the possibilities but none met the required balance of proof. He therefore found that on balance it was not possible to identify if there had been a tragic accident or the child had been murdered (with possible sexual assault) or the child had committed suicide.

Quoting from Mostyn J in *A County Council v M and F* [2011] EWHC 1804 (Fam), [2012] 2 FLR 939, 'that the judge is not always bound to make a finding one way or the other when faced with rival hypotheses', Francis J then went on to discuss the rival hypotheses concluding that this was one of those cases where the burden of proof came to his rescue saying (at para [98]):

'…that the local authority has not discharged the burden of proof which is upon it. I am not satisfied, on the balance of probabilities, that this was a perpetrated act, albeit that I recognise that it is one of three possibilities.'

He then went on to confirm that as there could be no finding that this was a perpetrated act, he therefore did not need to try and identify a perpetrator. However, he did look at the local authorities contention that there was a pool of perpetrators.

The local authority did not suggest that there was a conspiracy, and also acknowledged that the evidence (in advance of the fact finding) did not point to a particular perpetrator. They sought to suggest that there was a pool of perpetrators, namely the mother, father, and the child's two older

brothers. On behalf of the mother it was argued that for a 'pool of perpetrator' case the pool needed to be closed—ie that it had to be possible to say, in respect of everyone in the pool, that there was a reasonable possibility that they were a perpetrator and that it could not be said that there was it was a reasonable possibility that anyone else was a perpetrator of what was alleged.

Having heard the evidence and argument on the subject the judge found that he could not conclusively rule out that there may have been an unknown intruder, and therefore it was not possible to argue that one of the people in the pool must have carried out the 'act'. The pool was therefore open so that even if he had found the death followed from a perpetrated act, it was not possible to say with certainty that it was on the 'pool' as the pool was 'open'.

What were the judge's views on the police disclosure and the requirements of the 2013 protocol in relation to linked care and criminal proceedings?

Francis J was careful to limit his suggestions about police disclosure to cases involving a child's death or serious assault and he did not elevate them to formal guidance.

In such instances, he pointed out that while the 2013 Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings (2013 protocol) rightly limits police disclosure to that which is relevant and necessary in family proceedings, this relies upon the police deciding what is needed (rather than, for example, those specialising in this type of family case).

He therefore recommended the additional steps set out below, which were devised in collaboration with all counsel involved in the case.

To what extent is the judgment useful for practitioners dealing with cases where there are concurrent criminal and care proceedings?

The judge's suggestions, for this kind of case, are found at para [110]. They include a clear timetable and procedure for obtaining (and withholding) police disclosure at an early opportunity and then at specific points in the proceedings leading up to a fact-finding hearing and final hearing.

Of particular assistance is the suggested provision of a list of material by the police, with a short description of what each item is (to be actively revisited during the proceedings and specifically updated just before the fact-finding and final hearing), and the requirement for an update from the police at the case management hearing as to the status of the criminal investigation.

These guidelines are required reading for those representing a local authority or the police, as there are specific obligations on them in terms of active management of police disclosure during the course of proceedings.

However, it is still important reading for those representing respondents, to ensure compliance. Having been involved in this case as junior counsel and solicitor for the mother, we cannot over-emphasise the care that should be taken in similar cases in ensuring all relevant police disclosure is obtained. Some of the police documents we received at a very late stage, and only after counsel noticed many were missing, which had a profound impact on the outcome of the case.

Also, evidence which the police told us was irrelevant, turned out to be quite the opposite when we saw it for ourselves. We therefore welcome the judge's recommendations.

Interviewed by Alex Heshmaty.

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