Neutral Citation No. [2013] NICA 76 | *Ref:* **MOR9104**

Judgment: approved by the Court for handing down | *Delivered:* **20/12/13**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

CM

Appellant;

-and-

CL and NORTHERN HEALTH AND SOCIAL CARE TRUST

Respondents.

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Before: Morgan LCJ, Higgins LJ and Coghlin LJ

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MORGAN LCJ (delivering the judgment of the Court)

[1] The appellant is the mother of a child who is now 5 years old. The first respondent is the child's father. The appeal is from a threshold judgment by Weir J on 30 June 2011. The issue was the identification of the person responsible for the ingestion of salt by the child as a result of which she suffered significant harm. The learned trial judge did not believe the mother's evidence that the father had been left alone for a short period with the child while she went to the toilet and found on the balance of probabilities that the mother had caused the child to ingest salt, thus placing her at significant risk of harm. The issues are whether the judge's conclusion was sustainable on the evidence and whether he had given sufficient reasons for it.

[2] Nothing should be published which would lead to the identification of the child or her family.

Background

[3] There is no material dispute about much of the background except for the issue of whether the father had an opportunity to cause the ingestion of salt by the child. The child who is the subject of care proceedings suffers from dystonic cerebral palsy as a result of a near-drowning accident in the bath when she was some 7 months old. Following the accident, she has significant physical disabilities, and is spoon fed soft foods and also given food and medication via a naso-gastric tube. A proprietary supplement called Duocal is sometimes added to her food.

[4] There has been social services involvement with the family. Following a parental separation in August 2009, there was a shared care arrangement, with the child mostly living with the mother, but staying for part of the week with the father, who lived with his parents. There were difficulties from time to time in the arrangements and the father started keeping a diary in November 2009 of matters which he alleged concerned him about the appellant's parenting.

[5] On the evening of 22 January 2010, the father was due to look after the child but did not wish to do so as he wanted to attend a concert. He asked the appellant if she would look after the child in the circumstances. She declined, as did the first respondent's father. Although the father did eventually look after the child that evening, he was annoyed with both his father and the appellant about the matter.

[6] The child returned to the care of her mother on 24 January 2010. The appellant's account was that on 26 January she arose at about 7.30 a.m. - 8.00 a.m., prepared the child's morning medicines and boiled some water for use during the day which she set aside to cool in a container on the kitchen work top. She used water boiled the previous day to give the child her medicines and breakfast. During the morning she took the child to a physiotherapy appointment, then to the chapel, and then home. Salt was kept by the appellant in a kitchen cupboard above the kitchen worktop and in a salt cellar on the kitchen table.

[7] The appellant said that between 12.30 pm and 12.45 pm the appellant used some of the water that had been boiled and set aside that morning to flush the naso - gastric tube, and then gave the child her milk feed through the tube. The child vomited a little, but this was not unusual. It is not disputed that the first respondent arrived at the appellant's home some time before 1.00 pm for a pre-arranged visit with a social worker. He was displeased that the child was wearing soiled clothes and some words were exchanged with the appellant about this. The social worker arrived and had a meeting with the parents about benefits to which the child might be entitled, and then left a little before or a little after 2.00 pm. The first respondent had taken the child off her milk feed and was nursing her while the social worker was there.

[8] The appellant alleged in a statement made on 9 December 2010 and in her evidence that after the social worker left she went upstairs to the toilet for between 2 and 4 minutes and the first respondent was alone downstairs with the child. The first respondent denies this. It is common case that the first respondent left about 5 or 10 minutes after the social worker left, at the latest a little before 2.30 p.m.

[9] The appellant alleged that she forgot to give the child her flush after her lunch time milk feed that she had not finished. She put the child to bed upstairs at 3.20 pm. At about 4.00 pm the appellant gave the child her 3 medicines through the naso–gastric tube with a flush of cooled water between each medicine and a final flush of cooled water. At about 5.00 pm the child awoke and was brought downstairs to the living room. The appellant tried to feed her a heated up jar of Cow and Gate cauliflower cheese to which was added 5 scoops of Duocal. The child was reluctant to take it and spat most of it out.

[10] Shortly after 5.30 pm the child was sick. The appellant lifted and changed her. She started retching again 15 minutes later. The appellant phoned the first respondent. He told her to get in touch with the hospital. The appellant phoned the hospital at about 6.30 pm and was advised to keep the child under observation and bring her to hospital at 9.00 pm if she was no better. The appellant phoned the hospital again 20 minutes later because the child was getting worse. The first respondent arrived and phoned the hospital, and phoned his father to give them a lift to the hospital. They were admitted directly to the ward 5 to 10 minutes later.

[11] The following day the treating doctors enquired about salt ingestion. The appellant had brought the Duocal box which she had been using into the hospital. On 8 February 2010 the doctors raised their suspicions that the child had been poisoned by ingestion of salt. The police carried out a search of the appellant's home but nothing of evidential value was found. On 10 February 2010 the appellant tasted the Duocal added to the child's feed and noted that it was salty. The Duocal box was sent to the forensic services on 12 March 2010 who omitted to investigate it for about 6 months. The learned trial judge was rightly critical of this lack of application. When the Duocal was tested it transpired that 15.4 grammes of salt to 100 grammes of product were present which ought not to have been there.

[12] On 11 March 2010 the father was interviewed by police in respect of the alleged attempted murder of the child. On the following day the mother was similarly interviewed. The child was being cared for by the first respondent's parents and on 28 June 2010 the mother agreed that the father could return to live in that house. On 29 September 2010 the forensic service reported its finding of salt in the Duocal. The mother and father were interviewed by police on 4 October 2010.

[13] On 19 November 2010 a consultant paediatric nephrologist advised that child's hypernatraemia was due to her ingesting somewhere in excess of 1-2 teaspoons full of salt. He put a time scale of between 1 and 3 hours before the alarm

was raised by the appellant phoning the hospital. The salt must have been administered by another person. The possibilities were that she may have been forcibly encouraged to eat or drink it, or that it was dissolved and administered through her naso - gastric tube. Administration can be achieved easily in a child of her age through the tube if care givers are capable of using this form of fluid administration.

[14] On 9 December 2010 the appellant made her second court statement in which she said that before the father left on the afternoon of 26 January 2010 she went to the toilet for a couple of minutes. She said that she had not mentioned this before because she hoped that the consultant nephrologist would have produced an innocent explanation. She did not know who added the salt but the only person with the opportunity was the father.

[15] The father denied that he had been alone with the child at any time and specifically denied that the mother had left the father to go to the toilet as alleged. It was also suggested that the father might have added the salt by entering the appellant's premises on the morning of 26 January 2010 when she was out, using a key that he had in his possession. Evidence was called to establish that the father was the person running the family business on his own that day. It would not have been possible for him to make a journey of 3 to 4 miles to the appellant's home and back again. This latter possibility is not relied upon in this appeal.

The judge's conclusion

[16] The judge applied the correct legal test set out by Lady Hale in S-B children [2209] UKSC 17. The only possible perpetrators were the father or the mother or both. The issue for the learned trial judge was whether there was a reasonable possibility that the father or the mother administered the excessive salt to the child.

[17] The judge first excluded the possibility that the mother and father were acting in concert. The relationship between the parents at the time was so fractured and the father in particular so hostile to the mother in relation to the quality of her care and so intent on undermining her position by keeping his diary about that care that the judge was entirely satisfied that there was no possibility that they could have jointly agreed to poison the child.

[18] He then considered the position of the father. He recognised that at the time the father remained afflicted by a significant animus against the mother. The learned trial judge attributed this to anger as a result of the mother forming a relationship with another man in the middle of 2009. He accepted that if the father found any opportunity to paint the mother in a poor light in relation to the care of the child he would have been glad to take it. He noted that the father was quick to hand over to the social worker his diary of the alleged shortcomings of the mother when the question of excessive salt was mentioned. The learned judge concluded, therefore,

that it may well be that he would have welcomed an opportunity to create a situation from which the mother would receive blame with the result that he would be entrusted with the sole care of the child.

[19] The learned trial judge then looked at the question of the father's opportunity. He noted that if the mother's evidence about the amount of Duocal the child was fed on the day is correct there was insufficient salt in the adulterated tin to cause the overdose. The learned judge therefore concentrated on the opportunity to adulterate the boiled water. He rejected the notion that the father had made his way from the family business to the appellant's home and this argument is not pursued on appeal. The learned trial judge concluded that he was not satisfied that the mother did in fact go to the toilet leaving the father on his own. He concluded that this was an afterthought devised by the appellant very late in the day in order to manufacture a window of opportunity for the father to have adulterated the boiled water.

[20] The mother's evidence about her visit to the toilet was reviewed by the learned trial judge at paragraph 6 of this judgement. He noted that this assertion was not mentioned in her first statement for the court nor in her interview with the police and it was not until 9 December 2010 that she first mentioned it. He recognised that it was of fundamental importance to the fact finding exercise.

The submissions of the parties

[21] The appellant submitted that the learned trial judge failed to give sufficient reasons for his decision. It was further submitted that the learned trial judge neglected to take into account the context and timeframe of the evidence indicating that the child had been poisoned. The mother's explanation was that she had not mentioned the father's opportunity to adulterate the boiled water while at her home because until the expert report was received from a consultant nephrologist she hoped for some innocent explanation.

[22] The Trust and the father supported the reasoning of the learned trial judge. The Guardian expressed no view on the issue in the appeal and did not take part in the submissions.

Consideration

[23] This court recently examined the duty to give reasons in the context of the statutory requirement imposed on Industrial Tribunals in Ferris and Gould v Regency Carpet Manufacturing Ltd [2013] NICA 26. Those principles are also broadly applicable in this case.

> "[7] The leading authority on the adequacy of reasons for judicial decisions is English v Emery Reimbold & Strick Limited [2002] EWCA Civ 605.

Lord Phillips MR stated that justice will not be done if it is not apparent to the parties why one has won and the other has lost and gave the following guidance:

> '[I]f the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon. …
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> When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision.'

[8] The issue was addressed in this jurisdiction in Johansson v Fountain Street Community Development Association [2007] NICA 15 where

> Girvan LJ quoted with approval a passage in the judgment of Donaldson LJ in UCATT v Brain [1981] ICR 542:
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> > 'Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law. … Their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or as the case may be win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based on any such analysis. This, to my mind is to misuse the purpose for which reasons are given'."

[24] Applying those principles in this case we consider that it is plain that the learned trial judge concluded that the failure of the appellant to mention the father's opportunity to adulterate the boiled water before 9 December 2010 led him to the conclusion that the mother had contrived that allegation. There is no suggestion that the learned trial judge was not aware of the explanation advanced by the mother but it is clear that he did not accept it. We consider, therefore, that it is perfectly clear why the learned trial judge has found against the mother on this issue.

[25] In respect of the challenge to the conclusion reached by the learned trial judge there was no dispute that the legal principles applicable in such an appeal were set out by this court in SH v RD [2013] NICA 44.

> "[24] Where an appellate court is reviewing the balance struck between several competing factors it should only intervene if the exercise of discretion or judgement is plainly wrong. The principle was stated by Lord Fraser in G v G [1985] FLR 894.
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> > 'I entirely reject the contention that appeals in custody cases, or in other cases concerning the welfare of children, are subject to special rules of their own. The jurisdiction in such cases is one of great difficulty, as every judge who has had to exercise it must be aware. The main reason is that in most of these

> cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so, it will leave his decision undisturbed.'

The reasons for that approach were explained by Lord Hoffmann in Piglowski v Piglowski [1999] 2 FCR 481.

> 'First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc. v. Medeva Ltd. [1997] R.P.C. 1:
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> > "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision

> as to emphasis, relative weight, minor qualification and nuance. . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."
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> The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself'."

[26] The first enquiry in relation to the ingestion of salt by the child occurred on 28 January 2010 when the treating consultant asked the parents about anything the child may have been given which contained salt. The suspicion that the child had been poisoned by salt was conveyed to the parents of 8 February 2010. It must have been apparent to both parents at that stage that they constituted the only likely to perpetrators. Police interviewed both parents in March 2010 in respect of an allegation of attempted murder of the child as a result of salt ingestion. The learned trial judge was perfectly entitled to take the view that in light of those factors to which he referred the suggestion by the mother that it was only in November 2010

that the importance of her visit to the toilet occurred to her was unsustainable. We consider that there was a firm evidential base for the conclusion reached by the learned trial judge and are far from satisfied, therefore, that the conclusion of the learned trial judge was plainly wrong.

Conclusion

[27] For the reasons given we consider that the submissions on appeal have not been made out and the appeal is dismissed.