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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995

AND IN THE MATTER OF LM (A CHILD)

_____

STEPHENS J

Introduction and background.

[1] This is an appeal by FH against the decision of Her Honour Judge Loughran making a care order in respect of LM. LM was born on 6 December 2000 and is presently 6 years of age.

[2] The general background to the case can be summarised as follows:-

(i) The appellant was born on 1 January 1964 and is 43 years of age.

(ii) LH and HH are twins. They were born on 28 March 1984 and are now 23 years of age. They are the daughters of the appellant. The appellant has one other daughter namely NH born on 29 December 1986 who is now 18 years of age.

(iii) In March 1997 LH and HH made criminal allegations against the appellant of a sexual nature.

(iv) The appellant attended Armagh RUC station and was interviewed in respect of the allegations on 31 March 1997.

(v) The appellant was arrested and cautioned prior to interviews in respect of allegations of rape, incest, gross indecency and an indecent assault.

(vi) The appellant was subsequently charged by police on 31 March 1997 in respect of various offences alleged to have been committed between 1 January 1995 and 2 March 1997.

(vii) The appellant was subsequently indicted on charges alleging rape, indecent assault and gross indecency said to have been committed between 27 May 1995 and 20 March 1997.

(viii) The appellant denied those allegations. There were four criminal trials. LH and HH gave evidence at the first three trials. The appellant was convicted at two of those trials but in respect of those convictions he successfully appealed. At the fourth trial the prosecution presented no evidence and the appellant was acquitted.

(ix) In 2004 the appellant formed a relationship with NM.

(x) LM is the daughter of NM. The appellant is not her father. The Trust were concerned about the safety of LM on the basis that the appellant was living in the same household as her and they believed that he had in the past sexually abused LH and HH.

(xi) The Trust initiated care proceedings in respect of LM and those proceedings were transferred to the Family Care Centre. Her Honour Judge Loughran determined that a necessary preliminary issue affecting the threshold criteria in respect of the care proceedings was the issue as to whether the appellant had in fact committed acts of sexual abuse against his own daughters, LH and HH, as had been alleged in the criminal trials.

(xii) The judge in the event held that he had sexually abused LH and HH. She determined that the threshold criteria were met and she made a care order on 3 May 2007.

[3] Mr Hutton appeared in this case on behalf of the appellant, Ms Sholdis appeared on behalf of the Southern Health & Social Care Trust and Ms Lindsay appeared on behalf of the guardian ad litem.

[4] On this appeal Mr Hutton put forward three propositions and I will deal with each in turn.

The admission of video evidence

[5] The appellant complains that in deciding whether he had sexually abused his daughters the judge admitted in evidence and relied upon a video of his daughter's evidence in chief which had been admitted by way of special measures in three previous criminal trials. That accordingly during the course of the hearing before the judge he did not have an opportunity by his counsel to cross-examine his daughters. Furthermore that this was unfair to him in that if he chose to give evidence he would then be subjected to cross examination.

[6] It was accepted that both of his daughters had been cross-examined on three previous occasions during the course of the earlier criminal trials. It was also accepted that transcripts were available of those cross examinations. Those transcripts were not complete but that it was unlikely that the parts that were missing were significant. Furthermore it was accepted that due to their medical conditions his daughters could not have given evidence in court in relation to these care proceedings. However it was submitted that there was a failure to give adequate consideration to the question as to whether his daughters could have given evidence in these proceedings if special measures had been put in place so that their evidence in chief was given by video and that they would then be cross examined by CCTV link.

[7] Dr Alice Swann, of the Child Protection Consultancy and Training Service, prepared a report dated 18 October 2002 for the purposes of the fourth criminal trial. She had met with both LH and HH. The background at that stage was that both LH and HH had given evidence against their father on three previous occasions. Their evidence had been given by video and they had been cross-examined by a CCTV link. However in October 2002 both of them were 18 years of age and as the law then stood, they could not give evidence in this manner at the fourth criminal trial. Paragraph 3 of the Dr Swann's report states:-

> "In this general conversation the most striking issue that arose for LH and HH was the fact that now they are 18 years of age this trial will be different, that is, they will be giving evidence in chief in person in an open court and they will not be able to use CCTV."

[8] In her report she then went on to consider both LH and HH individually. In relation to LH she stated:-

> "12. The most striking feature is the fact that feels drained. She is sick of fighting and is literally saying that she has not the energy to go on. She wants to feel that she has control of the situation.
>
> 13. She feels a lot of responsibility in her coming to a decision not to give evidence, particularly towards HH.
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> …
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> 15. She had made her decision on that day that she does not want to give evidence and feels this right for her, especially with the new circumstances.
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> 16. Comment – I agree with LH's own assessment. I am concerned about her mental state and I feel it is imperative that she is referred to her GP, as I feel there should be an assessment as to whether or not she is clinically depressed at present. I have no doubt that if she gives evidence her mental state will worsen."

[9] In relation to HH she stated:-

> "17. I am more concerned about HH than I am about LH …
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> …
>
> 20. She spoke a lot about the serious overdose that she had taken. She has liver and kidney damage. She is adamant this was not a 'cry for help' but it was a serious attempt to end her life. She feels if she gives evidence, that no matter what the outcome is that she will take another serious overdose. She frequently feels the need to take tablets.
>
> …

> 22. She is having a lot of flashbacks at present.
>
> …
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> 26. Comment – Irrespective of HH's decision it would be my opinion that HH should not give evidence. I am very concerned about her mental state and, again, I would wish to alert her to General Practitioner with HH's permission."

[10] It was submitted by Mr Hutton, who appeared on behalf of the appellant, that the historical background was that both LH and HH were able to give evidence using special measures and accordingly that the judge in this case should not have accepted the proposition that they were unable to do so.

[11] I do not consider that the report from Dr Swann dated 18 October 2002 establishes that at that date either LH or HH were able to give evidence if special measures had been available to them. Dr Swann was not asked to give consideration to this issue because at that date special measures could not have been made available to either LH or HH. Mr Hutton, on behalf of the appellant, accepted during the hearing of this appeal, that Dr Swann was not at that stage considering whether they could have given evidence using special measures and he also accepted that she did not reach any conclusion in relation to that issue.

[12] The learned judge in her judgment at paragraph 11(28) summarised Dr Swann's October 2002 report in the following way:-

> "According to Dr Swann's report of October 2002 the position then, at the time of the fourth trial, was that 'the most striking issue that arose for HH and LH is the fact that they are now 18 years of age and will not be able to use CCTV' and her condition was that, while the girls could tolerate giving evidence by video and by television link, they were distressed at the prospect of giving evidence without special measures."

I do not consider that the report dated 18 October 2002 from Dr Swann establishes that LH or HH could then have tolerated giving evidence by video and by television link.

[13] The historical context, whilst important, should not detract from the main issue and that is whether LH or HH could have given evidence by video and had been cross-examined by CCTV at the hearing before Her Honour Judge Loughran in April 2007.

[14] By an application dated 11 January 2007 in these proceedings the Trust applied for discovery of the transcripts of the evidence which had been given in one of the criminal trials. That application was made on the basis that LH and HH were unable to attend court. The application was adjourned by Her Honour Judge Loughran:-

> "To enable the Trust to provide evidence as to the inability of the two adult daughters of Mr FH to attend court and as to the reasons for that inability."

[15] At the adjourned hearing Helen Dougan, social worker with the Southern Health and Social Care Trust, gave evidence before Her Honour Judge Loughran. Her evidence was as follows:-

> "The young women by which she meant LH and HH,
>
> - Are afraid of their father and his family and have applied successfully for a non-molestation order against him;
> - Do not want their father to know where they are living and have therefore not applied for electoral registration;
> - Feel let down by the criminal process having given evidence in two trials (sic) against their father and having seen his convictions overturned;
> - Were both self-harming up until 1998 the time of the first trial;
> - Received counselling after the trials and they continue to be prescribed medication by their GPs.
>
> When Ms Dougan saw them 3-4 weeks before she gave evidence
>
> - HH presented as angry and aggressive feeling betrayed by her father and the legal process; she talks in her sleep and is then questioned by her partner about matters which she has not disclosed to him;
> - LH is weepy."

[16] At that adjourned hearing it also was evident that both LH and HH were willing to be psychologically assessed in respect of giving evidence. Her Honour Judge Loughran further adjourned the discovery applications so that reports could be obtained from Dr Gerry McDonald, consultant clinical psychologist.

[17] Dr McDonald prepared separate reports in relation to LH and HH. Both reports are dated 7 March 2007. It has subsequently been accepted that prior to preparing his reports he was not asked to consider the question as to whether LH or HH could give evidence if special measures were deployed. His reports revealed that both LH and HH were intrinsically vulnerable and at risk of significant rupture of their fragile emotional state. Extracts from the report in relation to LH are as follows:-

> "2.8 [LH] is a person with limited intellectual competence. Her global level of intellectual efficiency falls within the upper mild/lower borderline range of learning disability. The lady's intrinsic vulnerabilities associated with her cognitive status were markedly evident during clinical interview.
>
> 2.9 The lady is easily precipitated to distress when referencing her abusive life history. She readily gave acknowledgement that she is afflicted of feelings of tension, frustration and pressure, and is subject to a low mood throughout significant periods of the daytime period. She has been on anti-depressant medication, at times, over the previous two year period.
>
> …
>
> 2.14 Any reference to the lady's abusive life history precipitates distress within the lady. The lady had exceptional difficulty referencing her abusive life history in any detail, due to the high prevalence of troubling thoughts and feelings associated with same.
>
> <u>Opinion</u>
> 3.1 It would be considered that the lady would be unable to address the traumas associated with her abusive life history. Providing evidence within a court setting would heighten the lady's emotional frailty, which was markedly significant,

and it would be considered that the telling of her life history within such a setting would result in a significant rupturing of her fragile emotional state. Presently, she does require the assistance of her general practitioner to access an anti-depressant medical regime, in addition to which due to the lady's extensive vulnerabilities associated with her limited intellect and abusive life history, she would require the advice, counsel and support from competent adults.

3.2 It would not be recommended that [LH]be placed in a court setting to re-live the traumas of a chronically abusive life history."

[18] In relation to HH extracts from the report are as follows:-

"2.10 The lady referenced that she had been on anti-depressant medication during the time of the previous court attendance. The lady referenced that she was afflicted with post-natal depression following the birth of her child, ….

2.11 The lady gave emphasis that she is trying to establish stability within her life domain at the present moment. She readily gave acknowledgment to the supportive role of her partner, who is aware of her life history. She readily gave acknowledgment that she is subject to a low mood and melancholic introspection within routine of daily life. She readily gave acknowledgment that she is embarrassed and 'feels terrible' when reference is made to her life history, but gave equal emphasis that she has responsibilities to look after her child and 'I can't be sad around him'.

2.12 The lady gave emphasis that she does not wish to revisit or recall of her abusive life history in any setting. She gave repeat emphasis that references to her life history precipitates troubled feelings within her, which were markedly evident during clinical interview.

2.13 The clinical picture is that of a person whose global level of intellectual competence falls within the borderline range of learning disability. The lady's

> fragile emotional state was markedly evident during clinical interview. The lady is attempting to engender a level of stability within her life domain, but she readily acknowledged that she worries excessively about her sister, LH, whom she would consider to be a markedly vulnerable person who is prone to depression and distressed episodes. There was clear evidence of a closeness between the sisters.
>
> 2.14 There were no indicators that the lady's presentation during clinical interview was exaggerated for effect or potential secondary gain.
>
> …
>
> 2.16 [HH] had difficulty recalling in detail the nature of her abusive life history. It would be considered that the lady's efficiency to give evidence would be significantly compromised by her fragile emotional state and, within the setting, undoubtedly her emotional frailties and vulnerabilities would be markedly evident. Provision of evidence within a court setting would be a marked risk factor to the lady's emotional health."

[19] Both reports refer to evidence being given "in a court setting". During the hearing before Her Honour Judge Loughran Mr Hutton on behalf of the appellant cross-examined Dr McDonald. It was clear that when he was interviewing LH and HH and was preparing his reports dated 7 March 2007 he had not been asked to consider and had not considered whether with special measures they could have given evidence. He however stated in his evidence before Her Honour Judge Loughran that his opinion was the same whether or not special measures were deployed. That is that there would have been a marked risk factor to the emotional health of both LH and HH. There was no contrary evidence before Her Honour Judge Loughran.

[20] The appellant's advisors received the reports dated 7 March 2007 on 16 March 2007. They were then immediately aware that Dr McDonald had not addressed the question as to whether LH and HH could give evidence by deploying special measures. They were at liberty to have written direct to him for his views in relation to this issue prior to the trial. They were also at liberty to retain their own medical evidence in relation to this issue. They chose not to follow either course.

[21] I consider that the judge was entirely correct based on the evidence before her to introduce the video evidence and I would have come to exactly the same conclusion.

[22] The appellant was perfectly capable of giving evidence. The difference between his own mental condition and the mental condition of LH and HH must have been readily apparent to and understood by him. His counsel has proffered his explanation that he failed to give evidence because he considered it unfair to be placed in the position that he could be subject to cross examination and yet LH & HH would not be cross examined. I reject that explanation. It was readily apparent to him that LH and HH were in an entirely different position to him. I consider that the explanation was a device.

[23] I also reject the suggestion that it was unfair to introduce the video evidence of LH and HH because there were matters that the appellant wished to put in cross examination to them that had not been put in cross examination at the three criminal trials in which they were cross examined by CCTV link. The appellant had three previous opportunities to put those matters to LH and HH and I do not consider that in those circumstances it is unfair to introduce their video evidence.

The medical evidence.

[24] It was submitted on behalf of the appellant that in considering the medical evidence as to defects found in the hymens of both LH and HH the judge failed to properly take into account that these defects could have been caused by the innocent insertion with a finger by the appellant's wife of Canesten cream into LH and HH's vulvas up the hymens. The Canesten cream being for the treatment of infection. The explanation that the defects could have been caused in both girls by the insertion of a Canesten pessary being unsustainable in view of the fact that a Canesten pessary was a treatment used only in respect of HH and therefore it could not account for the defects in both LH and HH.

[25] The defects to the hymens were found as a result of an examination by Dr Cupples of both HH and LH in March 1997. His findings were as follows:-

(a) **LH.** Her hymen was not intact. There was a healed defect posterily although not extending to the vaginal wall. LH was then aged 13.

(b) **HH.** The hymen was not intact. It also had a healed defect posterily although not extending to the vaginal wall. HH was also then aged 13.

[26] The medical evidence was that these defects were inconsistent with full or repeated penile penetration of the vagina. However the defects were

consistent with sexual activity in the area of LH and HH's vulvas. Dry intercourse is where the vagina is not lubricated or used. Generally the girl's legs are apart, the penis is pushed against the front part of the pelvic bone or in between the legs or up against the vulva. For the perpetrator there is still a sensation of penetration particularly up against the legs. If there is penetration of the vulva, even to the slightest degree, there is a sensation by child of penetration. Penile penetration of the labia and the vestibule and abutment or the penis against the hymen is a possible explanation for the defects in both HH and LH. In addition Dr Cupples, who gave evidence before Her Honour Judge Loughran, was of the opinion that the findings did not exclude penetration of the hymen by a penis by a few millimetres.

[27] It was clear on the medical evidence that HH had been treated with Canesten cream and a Canesten pessary had been inserted into her vagina by a nurse on the direction of a doctor. Canesten creams are to be applied externally. If properly applied such creams are not inserted by a finger or by an applicator into the vulva or vagina. Accordingly if a Canesten cream is being correctly applied it will not have caused the defect to HH's hymen.

[28] Dr Swann's evidence was that the damage to both hymens was posterior damage and this would be consistent with deliberate sexual penetration. The direction of force in sexual activity is along the posterior wall and leads to the kind of damage found to LH and HH's hymens.

[29] The Canesten pessary may explain why HH has a defect to her hymen. Skilful insertion of a Canesten pessary does not necessarily cause such a defect but it is a possible explanation. There was no medical evidence that LH had been prescribed a Canesten pessary or Canesten cream. Professor McClure's view was that:-

> "the fact that a similar defect was found in both girls whilst one had a documented pessary insertion does cast doubt on this explanation".

I understand him to mean by this that it casts doubt on that explanation not only in respect of LH but also in respect of HH. The defects in the hymens are consistent with sexual activity in relation to both LH and HH but the fact that only HH had a Canesten pessary inserted is inconsistent with that explanation being acceptable.

[30] The appeal in relation to the medical evidence was on a limited basis. It was submitted on behalf of the appellant that whereas one could exclude a Canesten pessary as a cause of the defect to the hymen in relation to LH it was not possible to exclude the possibility of cream having been applied manually to LH by her mother in that area. The defect in the hymen was consistent with cream being inserted with a finger past the hymen (not vigorous or repeated) and this could have caused the defects to the hymens in both HH and LH.

[31] Mr FH chose not to give evidence before Her Honour Judge Loughran but she had available to her his statement dated 16 February 2007. Paragraph 15 of that statement relates to the question as to whether the defects in both HH and LH's hymens could have been caused by the application of Canesten cream. That paragraphs, insofar as it relates to the matter raised in this appeal, is in the following terms:-

> "I note that the medical evidence does disclose some sort of defect in the hymen of both girls but I believe that there may be other explanations for such defects. For example the girls have had cream applied to this area by my wife previously and one of the girls had a Canesten pessary inserted in that area previously."

[32] It is submitted that the judge incorrectly rejected that evidence or did not give it sufficient weight.

[33] The appellant chose not to give evidence. Accordingly the hearsay evidence contained in paragraph 15 of his statement was not tested in cross examination. I consider that the judge was entirely correct in not accepting the evidence contained within paragraph 15 of his statement. The suggestion was being made for the first time in that paragraph that "the girls" had cream applied in this area. There had been no previous suggestion that both girls had had cream applied in this area. There is no corroboration in any medical note or record that LH had an infection in this area. There was no evidence of cream being prescribed for LH. The paragraph lacks particularity. It is unclear as to how the appellant knew that LH had cream applied in this area. Was it something he saw or something he was told? If he was told who told him and when and what exactly was said. If he saw cream being applied then what was the nature and quality of the view that he had. What was the cream? What was the condition for which it was used? How long had that condition lasted? When did it occur? The statement does not say whether the cream was applied externally as it should have been or whether mistakenly it could have entered the vulva up to the hymen. There is no evidence as to the number of times that the cream was used in relation to LH. There was no valid explanation as to why the applicant did not give evidence and the decision as to what weight if any to give to this statement was a matter for Her Honour Judge Loughran. I consider that no weight should be given to the contents of paragraph 15 of his statement. I consider that the decision arrived at by her Honour Judge Loughran in relation to this issue was entirely correct.

Assessment of the credibility of LH & HH's evidence.

[34] The appellant submits that Her Honour Judge Loughran correctly set out the authorities in relation to the approach to be adopted in assessing the

credibility of the evidence of HH and LH but failed to apply that approach. The authorities to which the judge referred were *In the matter of P and others* (2006) NI Fam 2, *Onassis and Calogeropoulos v. Vergisi* (1968) Lloyds Law Reports, page 341 and *R v. Murphy Moen and Gilmour* (Court of Appeal unreported 4 January 1993). The appellant does not challenge the approach that should be adopted but rather submits that in order to follow that approach the judge ought to have undertaken a detailed analysis of the evidence of HH and LH along the lines of the analysis undertaken by Mr Justice Gillen *In the matter of P and Others*. That instead the judge having set out the approach came to the conclusion that she accepted the testimony of HH and LH as credible. That she failed to undertake a detailed analysis to explain why various "inconsistencies" in their evidence did not lead her to reject their evidence.

[35] I do not accept that the judge did leave out of her judgment an analysis of the inconsistencies. Accordingly I do not accept the underlying proposition upon which this part of the appeal is based, namely that having set out the approach the judge arrived at a conclusion without demonstrating how she arrived at that conclusion. The major "inconsistency" in the evidence of HH and LH is that their evidence was of full penile penetration of the vagina. This was completely inconsistent with the medical evidence. The judge clearly recognised this inconsistency as is apparent at paragraph 41 of her judgment. That paragraph is in the following terms namely:-

> "There were factual errors in some of the details of the evidence of LH and HH. I have already referred to the most significant of these namely the conclusive medical evidence that full penile penetration on more than one occasion of the vagina of either girl, as alleged by each girl, had not occurred. Another example of an error – and I emphasise that this is but one example – is that the film The Bodyguard was not broadcast on a Saturday as alleged by LH but on Monday 24 February 1997."

[36] At paragraph 37 of her judgment Her Honour Judge Loughran dealt with this major inconsistency between the evidence of LH and HH on the one hand that full vaginal penile penetration had occurred and the medical evidence on the other hand that this could not have occurred by virtue of the limited defects to their hymens. That paragraph is in the following terms:-

> "The medical evidence showing that neither girl was subjected to repeated penile penetration of the vagina is of great significance. It casts a really serious doubt on the credibility of all the allegations made by LH and HH. That this was recognised by the Director of Public Prosecutions was reflected in a decision to

> consult Dr Swann. In the absence of a persuasive explanation of glaring inconsistencies between the medical findings and the allegations of repeated penile penetration of the vagina the inevitable conclusion is that each girl is lying. The explanation relied on by the Trust is that of Dr Swann. However, based on her qualifications and experience of many child abuse cases – as investigator, as researcher, as therapist – is that the girls were confused as between the vagina and the vulva and that what they described as penile penetration of the vagina was what is known as dry sex, thus described because there is no lubrication of the vagina. None of the medical experts challenged this view as a possible explanation."

[37] That is the view that she accepted. It is indeed supported by the evidence of Dr Cupples. At the hearing of the care proceedings Dr Cupples gave evidence to the effect that the most likely explanation for the defects in the hymens of both HH and LH was penile penetration of the vulva. Professor McClure, the appellant's expert, did not give evidence before the judge.

[38] I do not consider that it was necessary for the judge to consider each and every one of the inconsistencies when giving her judgment though she did deal with a number of those inconsistencies for instance the location at which the assaults are alleged to have occurred for which see paragraph 35 of her judgment and the "inconsistency" as to when the film The Bodyguard was being shown. I consider that the approach to credibility was correctly set out by the judge. That is accepted on behalf of the appellant. I consider that the judge followed that approach. I also identify the major inconsistency as being in relation to penile penetration. I also accept the evidence of Dr Swann. I come to the conclusion that all the "inconsistencies" individually and collectively are insufficient to undermine the credibility of LH and HH especially bearing in mind that at three criminal trials they both gave evidence that was consistent.

Conclusion.

[39] I dismiss the appeal.