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Re BK-S (Children) (Expert Evidence & Probability) sub nom BK-S v Hampshire County Council & Ors (2015)

[2015] EWCA Civ 442

07/05/2015

Barristers
Private: Jonathan Cohen QC

Court
Court of Appeal (Civil Division)

Practice Areas
Public Children Law

Summary
A judge's conclusion, in relation to a six-month-old baby that had ingested an anti-psychotic drug, that the mother had administered the drug, was based on proper inference from the factual evidence and the uncontradicted scientific evidence regarding the speed at which the drug would dissipate from the body.

Facts
The appellant mother appealed against a finding that she was the sole perpetrator of harm to one (Z) of her four children, who were the subject of the proceedings.

Z, who was six months old at the time, was discovered to have an anti-psychotic prescription drug, Olanzapine, in his body on three occasions. It had not been prescribed to any relevant person. It had some sedative effects and could alter consciousness. In large doses it could be fatal to a child but recovery from moderate doses was relatively swift leaving no identified lasting injury. Z had been admitted to hospital on three occasions: the first was thought to be for gastro-enteritis, the second and third were for an undiagnosed illness with an overlay of altered consciousness. On the third occasion a blood test was taken; it showed a concentration of Olanzapine in Z's blood of 257 micrograms per litre (ug/L). Nine days later another test found 43 ug/L. All of the children were removed as a consequence. The potential perpetrators were the mother, the father and the paternal grandmother. There was no evidence of accidental ingestion and they all denied responsibility or having any access to the drug. The mother was Z's primary carer, and he had contact with his father and paternal grandmother for a four-hour period about once a week. There was no evidence that Z had been unwell during the contact with his father and grandmother three days before the 43 ug/L test. To assist the judge in deciding when the drug was likely to have been administered, an expert toxicologist gave evidence about the speed at which the drug would dissipate from the body, which was predicted by its half-life. The judge accepted his evidence that a half-life between 21 and 13.7 hours would be likely, and that working on a half-life of

18 hours would be safe. Extrapolating back from the day of the test, if the father or paternal grandmother had administered the drug, Z would have had a concentration of the drug in his blood sufficient to make him extremely ill, possibly fatally so, at the time of that contact. The judge decided therefore that the mother was the sole perpetrator.

The mother submitted that the judge had wrongly attributed a set time for the excretion of the drug from Z's body and wrongly conducted a calculation for the time of the likely dose which purported to identify her as the sole perpetrator of its administration.

Held

(1) The judge's conclusion about the administration of Olanzapine discovered in Z's system by the second blood test was neither his own speculation nor an unwarranted calculation or deduction of his own. It was a proper inference drawn from the available factual evidence and the uncontradicted scientific opinion evidence. He had decided that the symptoms reported on the second and third admissions to hospital were the consequences of ingestion of Olanzapine; he relied on medical evidence which impressed him to come to that conclusion. Given the material he had, he was able to make a safe finding as to perpetration relating to the three-day period between Z's contact with his father and the second blood test. He drew inferences from that finding and other circumstances including the symptoms reported on the second hospital admission to conclude that the mother was the perpetrator. It was not a case of two or more improbable propositions being inappropriately elided together to make a probable conclusion. The inherent improbability of a parent poisoning a child did nothing to dislodge the actual evidence that was available and relied on by the judge. His conclusion was unassailable (see paras 20-22 of judgment). (2) The hearing at which the finding had been made was a split hearing, namely a hearing limited to a discrete issue of fact without a full analysis of the welfare context. The decision to have a split hearing could not have been right given that the issue to be decided was perpetration in the context of an incident of harm, rather than whether the harm occurred. In a case such as the instant case, there was no discrete issue that would determine the proceedings in a case such as the instant where harm had been suffered and the perpetrator was unknown. The social work assessments of those in the pool of potential perpetrators might cast important light on the allegations that were to be determined and on the reliability of those in the pool and other witnesses and materials. The clear guidance in S (A Child) (Split Hearing: Fact Finding), Re [2014] EWCA Civ 25, [2014] 1 F.L.R. 1421 should not be ignored, S followed (paras 23-24).

Permission

Lawtel