

Dealing with rare or unknown conditions in non-accidental injury (M v St Helens Borough Council and others)

22/02/2018

Local Government analysis: Sarah Jennings, barrister at 3PB, examines the case of M v St Helens Borough Council, which considered the approach of medical witnesses when dealing with rare or unknown conditions in cases of suspected non-accidental injury.

M v St Helens Borough Council and others [\[2018\] EWFC 1](#)

What are the practical implications of this case?

The court accepts that 'rare and unknown conditions do exist. In each case, the court must give proper consideration to the possibility that it is dealing with a case where something has been missed because the search that might have found it has not been carried out, or because we do not know what we are looking for' (para [13] of the judgment). This is important because it acknowledges the continued medical advances and discoveries that are being made each year. It also allows the court to keep an open mind.

This case also provides a clear reminder as to how fact-finding hearings should be approached:

'The court will consider each possibility on its merits. There is no hierarchy of possibilities to be taken in sequence as part of a process of elimination. If there are three possibilities, possibility C is not proved merely because possibilities A and B are unlikely, nor because C is less unlikely than A and/or B. Possibility C is only proved if, on consideration of all the evidence, it is more likely than not to be the true explanation for the medical findings...Where, as here, there is a genuine dispute about the origin of a medical finding, the court should not assume that it is always possible to know the answer.'

In short, a fact-finding requires a non-linear approach.

The court will treat these cases like any other fact-finding exercise. It is therefore important to have clear and concise evidence from everyone involved in a professional role, and also anyone who has had care of the child during the relevant period. It is clear that Jackson LJ relied on the chronology of professional involvement and medical testing as well as relevant parental/family observations. A detailed document will always assist the court.

It should be noted that in this case, all professionals agreed that the x-ray results were 'highly unusual'. It is clear that there were no concerns about the parenting demonstrated by the parents during the course of the proceedings, nor were they known to Children's Services prior to the fractures being identified.

This case also highlights the importance of using respected and independent experts. Jackson LJ is clear that one of the experts who gave evidence, Dr David Ayoub, would not have been approved as a Part 25, single joint expert in the Family Court, as he treats adults in his clinical practice but provides paediatric legal opinion. It is also clear that Dr Ayoub was not objective, and through his evidence sought to advance his position 'with the tenacity of an advocate' (para [43]).

This case could be considered as a warning to professional witnesses (and those that instruct them) as to the need for experts to be willing to consider other possible concepts—Dr Ayoub refused to consider anyone else's opinion on causation of the fractures.

What was the background?

A baby boy (C), aged four months, was presented to hospital and found to have no fewer than 26 fractures affecting all four limbs, the ribs and the shoulder blades. The parents were unable to explain the fractures. All the medics agreed that C did not have any known medical condition that would explain the fractures, but also noted that there are features in the skeletal survey which are 'highly unusual'.

The following findings were made at the fact-finding hearing in June 2014:

- C did not have a known or unknown medical condition predisposing him to fractures
- the fractures were caused by the application of excessive force to his limbs and torso
- one of the parents was responsible, but it was not possible to say which

In preparation for the criminal trial, the parents obtained expert reports from Dr Ayoub, an American radiologist practising in Springfield, Illinois, and, Professor Stephen Nussey, a consultant endocrinologist. The parents were acquitted.

The mother made an application for a rehearing of the fact-finding in the care proceedings.

Jackson LJ reminds himself that 'the reopening of settled findings is a serious matter, but it is a step that will be taken in those rare cases where justice dictates' (para [10]). He also reminds himself that there must be a 'solid case to justify' re-opening findings (*Re ZZ, AZ, FA, ARA, KA and ASA (children)* [\[2014\] EWFC 9](#), [\[2014\] All ER \(D\) 143 \(Jun\)](#)).

Based on the report of Professor Nussey, Jackson LJ concluded there were solid grounds for the original findings to be reconsidered.

What did the court decide?

Jackson LJ noted: '(w)hen considering undiscovered conditions, the court is in the realm of the unknown. Consideration must be given to the possibility of a new unknown condition, and also to a syndrome that results from a combination of known conditions whose interplay is not understood' (para [134]).

The court rejected the suggestion that the C suffered from a rare condition, but stressed that 'this conclusion is not based upon consideration of how rare it would be if C had had a condition of this kind' (para [129]). It concluded that there was a lack of primary evidence in support of the suggestion that C had a rare and unknown condition, and actually an amount of evidence that suggested otherwise.

For example, Professor Nussey suggested that medication that C was prescribed during a hospital stay may have affected calcium absorption, leading to an increased risk of fractures. The court noted that the medication was only prescribed for one week, which Professor Nussey confirmed would not have had a significant impact on calcium absorption. Crucially, the prescription of that medication post-dated many of the fractures.

Dr Ayoub, a general radiologist, gave evidence in this case. His evidence was strongly rejected by Jackson LJ, in particular noting that 'the family or criminal courts in England and Wales are unlikely to find that Dr Ayoub meets the requirement that an expert witness must be objective and unbiased' (para [44]). If it is proposed that Dr Ayoub should give evidence in future cases, Jackson LJ requests that the court should be referred to this judgment.

This case reminds us of the importance of expert witnesses being objective and unbiased. The expert opinion must also arise from a trustworthy process.

Interviewed by Alex Heshmaty.



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