Hair Strand Testing – A Cautionary Tale

Re D (Children: Interim Care Order: Hair Strand Testing) [2024] EWCA Civ 498

Introduction

This Court of Appeal Judgment sets out the reasons for granting the Appellant mother permission to appeal, and allowing an appeal, against a decision of Her Honour Judge Jacklin KC sitting at the Central Family Court on 26 March 2024.

The Judge authorised the Local Authority to remove three children subject to interim care orders from the care of their maternal grandmother and maternal uncle, with whom they had lived since August 2023. That decision was very largely based upon three sets of hair strand testing reports.

This case includes details as to the Court's approach to hair strand testing and the steps that advocates must take in all cases involving this common type of evidence. Mr. Justice Cobb summarizes this appeal as bringing into focus the science of hair strand testing - its evidential value in context, its inherent reliability, and its limitations.

Background

The case before the Court of Appeal concerned four children – three girls, A (aged 13), C (aged 6) and D (aged 4), and a boy, B (aged 10).

On 27 July 2022, C was admitted to hospital where subsequent blood testing confirmed a likely overdose of topiramate, a medication which had been prescribed for her older sister, A. One year later, C was again admitted to hospital, suffering auditory hallucinations, tonic seizure activity, and loss of vision. The blood tests again confirmed high levels of topiramate.

Around 30 July 2023, the Local Authority placed the children with their maternal grandmother (supported by the maternal uncle) under section 20 Children Act 1989. On 20 September 2023, the Local Authority applied for care orders and an interim care order was granted on 12 October 2023.

The maternal grandmother and uncle were assessed as 'connected persons' under Regulations 24 and 25 of the Care Planning, Placement and Case Review (England) Regulations 2010. This was a positive assessment and so approval of the placement was given on 5 December 2023.

In the meantime, on 26 October 2023, hair samples had been taken from each of the children and submitted for analysis by the Forensic Testing Service ('FTS') who provided hair strand test reports ('Reports #1') which revealed that all of them showed signs of passive exposure to topiramate, with likely ingestion in the case of C. The reports recommended further testing of unknown additional compounds identified.

The addendum reports from FTS were filed on 29 January 2024 ('Reports #2'). These reports indicated that the children had been passively exposed to a range of Class A drugs (including cocaine, ketamine and MDMA) and cannabinoids throughout the testing period (October 2022 to October 2023).

On 30 January 2024, the Local Authority applied for orders for hair strand testing of the maternal grandmother, maternal uncle, and mother. This was granted at a case management hearing at which neither the maternal grandmother nor uncle were present.

On 29 February 2024, the Local Authority requested "a case management hearing to deal with the continued placement of the children with the maternal grandmother in light of the fact that the maternal grandmother and uncle have refused to submit to hair strand testing" and had "thus far refused to commit" to further social work assessment, rendering the current placement "unregulated".

On 14 March 2024 the results of hair strand tests on the mother, undertaken by DNA Legal, were filed and served ('Report #3'). This report revealed no evidence of any of the proscribed drugs over the period from February 2023 to February 2024.

A further case management hearing took place on 22 March 2024 which set up a one-hour hearing before HHJ Jacklin KC on 26 March 2024. This was upon the Local Authority informing the Court that the placement of the children was no longer regulated and that they would be seeking permission to remove the children.

By the time of the hearing before HHJ Jacklin KC, there were three available sets of hair strand test reports (Reports #1, #2, #3) as well as updating position statements on behalf of the local authority, the mother and the Children's Guardian. The hearing took place on an urgent basis listed at short notice and was conducted on submissions.

The Judge came to the conclusion that 'given the seriousness of the findings in that drug test, that the children's safety does require their removal, and it would be a necessary and proportionate response to the risk that has been presented to them for some months now, and it has got to stop'.

The Appeal Hearing

It was not disputed at the hearing on 26 March that B should move to live with his father, so the appeal focused on the Judge's decision in relation to removing the three girls to foster care. The Court of Appeal considered the three testing reports in detail

including an analytic comparison of the general summary sections with the specific data findings, which were not always consistent in their conclusions.

The Court concluded at paragraph 24 that:

"*At the conclusion of our review of Reports #1 - #3, within the limitations of an appellate hearing and without the benefit of expert analysis from Dr John Douse, we could see that:*

i) The general summary in Reports #1 did not draw attention to the apparently significantly diminishing traces of topiramate in the children following August 2023;

ii) The general summary in Reports #2 gave a somewhat misleading impression in relation to timeframes, given that the data appeared to show limited evidence that any of the children had tested positive for Class A drugs in the period after August 2023 when they moved to live with their grandmother;

iii) If was or is to be the Local Authority's case (by allegation or inference) that the children's positive drug tests during the period up to August 2023 were attributable to exposure to drugs used by their mother, this did not appear to be supported, on the toxicology evidence, by her full set of negative results (Report #3); this of itself might be thought to have given rise to a need for further investigation."

Following the 26 March 2024 hearing, further testing of the children was undertaken by Cansford Laboratories; and the reports were filed on 5 April 2024 (Reports #4). Nail testing was undertaken of the maternal grandmother by the same laboratory, and a report filed on 4 April 2024 (Report #5). Hair strand testing of the maternal uncle was undertaken and a report prepared and filed on 4 April 2024 (Report #6).

Having first considered the appeal on its merits without regard to the fresh evidence, and in accordance with the principles of ***Ladd v Marshall [1954] 1 WLR 1489*** (and with regard also to ***Re E (Children) [2019] EWCA Civ 1447; [2019] 1 WLR 6765 at [25],*** and CPR r.52.21.(2)(b)), the Appeal Court then admitted this additional evidence into the appeal; as no material opposition was offered by the Respondents.

The Court concluded at paragraph 41 that:

"At the conclusion of our review of Reports #4 - #6, again within the limitations of an appellate hearing and without the benefit of expert analysis from Dr John Douse, we could see that:

i) Contradictory findings about the presence/absence of Class A drugs in the samples provided by the children are revealed by a comparison of Reports #4 and Reports #2; this is a particularly notable discrepancy in respect of the period March 2023 – October 2023, in respect of which period samples had been tested by both laboratories;

ii) If it is to be the Local Authority's case (by allegation or inference) that the children's positive drug tests for cannabinoids in the period from March 2023 – March 2024 was attributable to exposure to drugs used by their mother and/or maternal grandmother and/or uncle, this does not appear, on the basis of the hair strand test results alone, to

be supported by the full set of negative results returned in respect of each of the adults who have cared for the children in the relevant period (Reports #3, #5 and #6)."

The Court of Appeal notes that previous caselaw has cautioned that hair strand testing has its limitations and is still an evolving field. The variability of findings from hair strand testing does not call into question the underlying science but emphasises the need to treat data with proper caution.

The Court of Appeal ultimately concluded that on closer analysis, the evidence was not as stark or as disturbing as it had been presented to the Judge, or as she had understood it, and was satisfied that the evidence before the Judge fell short of demonstrating the 'high standard of justification' for the removal of the children.

Legal Principles

Of course, in any case considering the removal of a child from a parent or other primary family care giver the Court must give due consideration to the legal principles set out within ***Re C (A Child) (Interim Separation) [2019] EWCA Civ 1998,*** most notably paragraph 2 which cites, amongst other things that removal can only be justified where necessary and proportionate.

In ***Re DE [2014] EWFC 6***, Baker J (as he then was) also stated that in such circumstances when the care plan for placement of a child at home under a care order or interim care order changes the removal of the child should only be effected on notice to the family; if there is a perceived urgency in the situation, removal could/should be authorised only if the child's "safety and welfare requires that he be removed immediately" (see [35]). Baker J gave guidance as to suggested notice periods (fourteen days' notice for a child who is the subject of a final care order except in an emergency: see [49]) which should otherwise be respected prior to any planned removal.

In respect of the legal principles surrounding hair strand testing, Mr. Justice Cobb cites that the science of hair strand testing was considered in two High Court decisions, namely, ***London Borough of Islington v M and another [2017] EWHC 364 (Fam) (Hayden J),*** and ***Re H (A Child: Hair Strand Testing) [2017] EWFC 64, [2018] 1 FLR 762 (Peter Jackson J, as he then was).***

The Judge notes that particularly paragraph [28] of ***Re H*** provides a useful guide to interpretation of hair strand test results, and he goes on to highlight three themes from these judgments which have particular resonance to this appeal:

1) Hair strand test drug results cannot be viewed in isolation, separately from the wider environmental factors.
2) The need for experts to fully and faithfully explain their findings.
3) The need for proper preparation and interpretation of hair strand test reports.

The third theme is of particular relevance to advocates seeking to rely upon hair strand test results to support their clients case. Peter Jackson J states at paragraph 57:

"The writer [of a hair strand test report] must make sure as far as possible that the true significance of the data is explained in a way that reduces the risk of it becoming lost in translation. The reader must take care to understand what is being read, and not

jump to a conclusion about drug or alcohol use without understanding the significance of the data and its place in the overall evidence."

Consequently, Mr. Justice Cobb sets out at paragraph 58 that: *"In all cases involving this type of evidence, it is vital that the advocates:*

> *i) Draw the Judge's attention to what the science can and cannot tell you, as explained in Islington v M and Re H;*
>
> *ii) Carefully examine the hair strand test reports in full; as far as it is thought helpful or appropriate to do so, they should distil their contents accurately so as to provide with Judge with a reliable summary, not just a rehearsal or précis of the general 'Summary' or 'Opinion' section;*
>
> *iii) Assist the Judge to consider the hair strand test results in the context of the whole of the evidence, including:*
>
> > *a) The statements of those who are alleged to have exposed the children to the drugs identified;*
> > *b) Other evidence (i.e., from observation) which may suggest drug use within the home;*
> > *c) Other evidence which may suggest that drugs are not used within the home;*
> > *d) The presentation of the children and the adults;*
> > *e) The history of the family generally."*

<u>Analysis & Conclusions</u>

Mr. Justice Cobb made the following summarized conclusions at paragraph 56, that the Judge was wrong to attach presumptive weight to the test results for at four reasons:

1) The decisions of ***Islington v M*** and ***Re H*** shine a light on the recognised and inherent occasional anomalies in hair strand testing science which should be factored into judicial evaluation in all cases, especially at an interim stage where the court is working without the benefit of independent expert review;
2) The data contained deeper within each of the reports reviewed by the Judge painted in some highly material respects a different, more complex or nuanced picture than the plain opinions/summaries offered by the experts in the narrative sections of the reports suggested;
3) The Judge did not consider sufficiently "the context of the broader picture" ***(Islington v M)*** of evidence, and/or that the "test result is only part of the evidence" ***(Re H).***
4) There were yawning gaps in the evidence which will inevitably have impaired the Judge in her ability to reach an informed assessment of risk.

Mr. Justice Cobb does however acknowledge early on within his Judgment at paragraph 22 that the Appeal Court had more time available to them than plainly had been available to the Judge at the hearing on 26 March 2024, and that they were afforded a greater degree of care and focus in the analysis of the reports from mother's Counsel at the appeal hearing, than was offered by the advocates at the hearing in the first instance.

Further, he notes at paragraph 60 that Family Court judges operate under very considerable pressure of time, overwhelmed by the weight of a significant backlog of cases and congested daily court lists, which imposes real constraints on their ability to give time to deal fully and fairly with urgent applications. He states it is thus all the more regrettable that the application was presented on all sides in a manner which failed in material respects to explain the evidence fully and fairly.

This commentary, in my view, highlights the significant influence advocates have over the Courts decision-making when presenting their client's cases, and consequently the importance of presenting those cases in a manner which is fair, accurate, and assists the Court in line with our professional and ethical duties.

Peter Jackson LJ added commentary at paragraph 67 of this Judgment about the apparent effect of the evidence in this case and how it was misdescribed and misunderstood. He suggests that even if it was taken at face value, it gave rise to a perplexing state of affairs that cried out for investigation and careful consideration, not for the peremptory removal of the children before any investigation had taken place. He states that the Judge should have adjourned for a short time until the further tests that she was ordering could be considered, as that would have given the parties and the court the opportunity to look more closely at the scientific picture.

My interpretation of his comments are that this would suggest it is the advocates responsibility on behalf of their clients to make strong submissions for adjournments, drawing indeed on this Judgment, if there is outstanding evidence which could have a significantly material effect on the determinations being made. Especially given the potentially stark consequences of removing a child into foster care, even for a temporary period.

Finally, I would wish to draw the reader's attention to paragraph 61 of this Judgment where Mr. Justice Cobb raises several points of procedural fairness which are again relevant to all cases involving removal and may assist advocates when advising local authorities.

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