To Fact-Find or not to Fact-Find in Child Injury and Death cases? An Analysis of Lincolnshire CC v CB and Ors [2021] EWHC 2813 (Fam)

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1. This article analyses the recent decision of *Lincolnshire CC v CB and ors [2021] EWHC 2813 (Fam)* which deals with the question of whether to list a separate fact-finding hearing. Such hearings can be lengthy, costly and import significant delay into proceedings, leading to children waiting for months before final decisions are made about their welfare. However, fact-finding hearings deliver a factual foundation upon which assessments are undertaken and from which final decisions are made about children's futures and therefore can be necessary.

2. The question of whether a fact finding hearing should be listed was examined in *Re S (A Child) [2014] EWCA Civ 25* in which Ryder LJ sets out the proper approach. Only in exceptional circumstances should the factual element of a case be severed from their welfare context. This is based on the need to consider factual issues within the broader landscape. The court~~,~~ should only list a hearing to determine primary facts outside of their secondary factual context in exceptional circumstances. The interesting feature of this case is it involves the interaction between those primary and secondary facts as does most of the relevant case law.

3. In *Lincolnshire*, Lieven J was dealing with four children. A (10), B (5), C (3) and XE (11 and unfortunately deceased). XE died in January 2021. The other children were accommodated under an ICO in the same month. The mother and DE didn't live together but DE would visit the children's home to assist with the care of XE who had additional needs. In January 2021, A was outside the property shouting 'my dad is killing my brother'. An ambulance was called and XE was pronounced dead upon arrival at hospital through drowning in the bath.

4. DE's account was that he put XE in the bath, told the mother he had put XE in the bath and then went out to deliver some 'cookies' for her. Mother says DE told her XE was in bed, not the bath. XE then drowned. The parents were not charged with murder or

manslaughter by the police. The question was: What did DE say to the mother and who left the taps in the bathroom on. Therefore, the factual issue to be determined was– who is responsible for the death of XE?

5. The court was faced with two competing options: (a) List for a 5 day composite hearing or (b) List for a 20 day fact-finding hearing. Option (b) consisted of 29 witnesses dealing with the aftermath and wider circumstantial evidence such as the adults' demeanour. Lieven J found that it was unnecessary and disproportionate to hold a separate fact-finding hearing. Part of the learned Judge's reasoning was based on the lack of direct evidence as to causation of XE's death and the fact it was one of a number of findings sought by the local authority in respect of the family, some of which were not in dispute.

6. At first blush, the decision not to deal with the disputed factual issue of the cause of XE's death appears to be a bold one. Lieven J considered there to be limited forensic value in hearing evidence as to demeanour and aftermath. Lieven J went on to say that a decisive factor in the instant case was delay, not just in terms of the children waiting longer for a stable placement to be identified but also that A and B would have to wait longer for the counselling to deal with the extreme trauma they have experienced. The counselling could not commence until the children were in a long term placement. The learned judge refers to a 'speedy outcome' for the children as a 'decisive factor'.

7. It is also important to note that the impact of the pandemic played a role in the court's decision making. At paragraph 22 of the judgment, Lieven J references the guidance of the President of the Family Division in *The 'Road Ahead' (2020 and 2021 addendum)*. The court notes the impact of the pandemic upon the family justice system and the fact the courts do not have the resources to undertake hearings which do not meet the strict test of necessity. Lieven J outlines the importance in the court properly applying the necessity test, with appropriate scrutiny, even if the parties are all in agreement with the need for a fact-finding hearing. The pandemic has caused delays to become more lengthy and only through 'very rigorous' case management will the delays be reduced.

8. In respect of whether the court orders a separate fact-finding hearing, such hearings will 'relatively rarely' be necessary or proportionate [Paragraph 26], as they build a great

deal of delay into the system and lead to a significant amount of wasted resources. The court found that where the threshold findings go well beyond the area of factual dispute, it is unnecessary to have a separate fact-finding hearing. Lieven J goes on to reference the '*Road Ahead'* again and indicates the essential need for the Family Court to use its time more effectively with the inevitability that individual cases will take less time. This should involve:

(a) Focused cross-examination,
(b) Less Repetition, and
(c) Close scrutiny of witness templates before a hearing.

9. On the above basis, the local authority was directed to prepare its final evidence on the basis of alternative scenarios. Whilst it is accepted that social work assessments are not contingent on facts being identified and found to the civil standard *Oldham MBC v GW and PW [2007] EWHC 136 [Fam],* to construct an assessment based on alternative scenarios, one of which involving a disputed finding of alleged murder/manslaughter would be a task of great complexity.

10. In order to analyse the decision we must look under the bonnet and see how the court came to its decision. The court listed the factors set out in *HDH (Children) [2021] 4 WLR 106*, re-iterating the principles set out in *A CC v DP [2005] 2 FLR 1031 (paragraphs 24 and 25):*

(a) The child's interests (relevant not paramount);
(b) The time an investigation will take;
(c) Cost;
(d) Evidential result;
(e) Necessity;
(f) Impact of the result on future care planning;
(g) Impact of the fact-finding process on other parties;
(h) The prospect of a fair trial on the issue; and
(i) Justice.

11. The application of the above criteria should be set within the context of the *Overriding Objective, FPR rule 1.1:*

"Dealing with a case justly includes, as far as practicable

(a) Ensuring that it is dealt with expeditiously and fairly

(b) Dealing with a case in a way that is proportionate to the nature, importance and complexity of the issue

(c) Ensuring the parties are on an equal footing

(d) Saving expense; and

(e) Allotting to it an appropriate share of the court resources, while taking into account the need to allot resources to other cases."

12. In *HDH*, the Court of Appeal goes into further detail on the relevant factors to be applied and at paragraph 22 focuses on the question of evidential result:

"The evidential result may relate not only to the case before the court but also to other existing or likely future cases in which a finding one way or another is likely to be of importance. The public interest in the identification of Child Abuse can also be considered."

13. There is clearly an imperative to identify child abuse where it is possible to do so. The more grave the alleged harm, the greater the public interest and in *Lincolnshire* the court elected not to conduct a fact-finding hearing in respect of an allegation of possible murder/manslaughter involving a child. This leads on to consideration of the importance to the other children in the family (A, B and C) of knowing how their sibling died. If the court adopted as a decisive factor the need to deal with the case speedily given the need for therapy, it is difficult to understand how such therapy could yield the correct therapeutic outcome in circumstances where the causation of death of their

sibling has not been ventilated. How would professionals working with the children develop a narrative as to why they are not living with their mother? The death of their sibling and the cause could become the elephant in the room, some would argue.

14. *Re K (Non-Accidental Injuries: Perpetrator: New Evidence)* [2004] EWCA Civ 1181, [2005] 1 FLR 285 is the authority cited in support of the need for children to know who has injured them and how it has happened. It is in the public interest for those who cause serious non accidental injuries to be identified, wherever such identification is possible…any process which encourages frankness…is to be welcomed in principle [paragraph 57]. Furthermore, as a second background proposition, children have the right, as they grow into adulthood, to know the truth about who injured them when they were children and why. Children who are removed from their parents as a result of NAI have in due course to come to terms with the fact that one or both of the parents injured them. This is a heavy burden for a child to bear. In principle, children need to know the truth of the cause of the injuries if that can be ascertained.

15. There is force in the proposition that the *Re K* dicta applies to cases involving children who need to know why they have been removed from a parent as a result of death of a sibling. Logically speaking, the same considerations apply. One can therefore ask the question as to whether A, B and C had the right to have the court ventilate the issue and make a finding on the balance of probabilities one way or the other.

16. When a court is dealing with the question of whether to list the matter for a fact-finding hearing or a composite hearing, the *Oxfordshire* Criteria in *Oxfordshire CC v DPRS and BS [2005] EWHC 1593 (Fam)* is often the point of reference. In that case, all parties agreed there was no need for a public law order, the primary residence would be with the mother and the father would have supervised contact for one hour per week. The court was faced with the question of how to deal with the allegations against the father of fracturing the child's arm and causing a respiratory collapse. The arguments in support of litigating the factual allegations are set out in paragraph 27 of the judgment and are summarised below:

(a) The very substantial gulf between the limited concessions made by the father and the serious allegations of physical assault and attempted smothering go nowhere near the justice of the case.
(b) Without a finding, there is little to preclude the father from seeking more extensive contact in the future.
(c) The evidence now is as fresh as it is going to be.
(d) There is a public interest for those who cause NAI to be identified if possible.
(e) A child has a right to know the truth about how they were injured and, if so, who by.
(f) In this case the court considered the public interest in the child's right to know the truth about past abuse to be a powerful factor.
(g) Father's position may change and he may have taken the non-opposition stance out of a sense of opportunism to see away the serious allegations he faces.

17. Two applicable factors flow from the above arguments: First, the question of *justice.* The most grave allegation one could make within family proceedings is murder/manslaughter and associated allegations of failure to protect from the same. The same substantial gulf existed between the father and the LA on the question of XE's death. The allegation is arguably more serious than that in the Oxfordshire case which, it could be argued, generates a strong justice argument in support of the litigation of the issue. The question of the freshness of the evidence also impacts on the question of *justice.* The question of causation of XE's death is not one that will vanish and at some point may need to be litigated as the composition of the family develops over time and the local authority and court become involved in future proceedings. The evidence before the court in *Lincolnshire* was as fresh as it is ever going to be.

18. The second salient issue arising from the *Oxfordshire* arguments is the impact of the allegations on the care plan and the possibility of future applications and changes in position on the part of the parents. It is a rule of human behaviour that positions change and nothing is certain. Where one can achieve clarity by way of findings, especially on such a critical issue of such gravity, there is a strong argument to say the court should take the opportunity to do so.

19. One of the interesting factors in the *Lincolnshire* case is that usually the tension lies between separation of the primary from the secondary facts and if the court is not in favour of a separation, the facts are usually dealt with together which does not circumvent the opportunity to deal with the primary facts in some way. However, in this case, it is difficult to see how the court was able to satisfactorily deal with the causation of XE's death within a 5 day composite trial window so the court's decision possibly distinguishes this case from the classic scenario and it could be argued the opportunity to deal with the primary facts was taken away from the parties on the basis the judge had a view on the forensic value of the evidence on the papers.

20. The pandemic has brought significant challenges to the family justice system which cannot be ignored. The proposition that each case should be dealt with in a focused, efficient way, is beyond contrary argument. However, there is a responsibility upon professionals and those working with children to ensure the relevant criteria is carefully considered as decisions such as those set out above have a significant impact on children throughout their lives and can have a far reaching impact upon the narrative within which their future is framed at the conclusion of proceedings.

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