FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 45
XA50/19

Lord President
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the remit from the Sheriff Appeal Court

in the cause

RG

Appellant

against

(FIRST) GLASGOW CITY COUNCIL and (SECOND) SA

Respondents

Appellant (mother): JM Scott QC, Aitken; Drummond Miller LLP (for Lee Doyle, Glasgow)
First Respondent: Richardson QC, Inglis; JK Cameron, Glasgow
Second Respondent (father): Innes QC, Donachie; Balfour & Manson LLP (for McIntosh McCann, Glasgow)

27 August 2019

Introduction

[1] This appeal, which has been remitted by the Sheriff Appeal Court, raises the issue of whether a sheriff, when considering an application for a permanence order (Adoption and Children (Scotland) Act 2007, s 80), may rely on facts established earlier after a proof before the, or another, sheriff on a ground of referral before the Children's Hearing.

The application

[2] The first respondents applied to the sheriff at Hamilton for a permanence order removing parental rights and responsibilities from a child's mother and father (the appellant and the second respondent) and vesting them in the first respondents and the child's foster carers. In the course of the proceedings, the first respondents lodged a motion for the sheriff to order that they were:

> "entitled to rely upon the original findings of the Sheriff in respect of the grounds of referral established on 26 June 2015 in relation to the established ground and the corresponding statements of fact".

[3] The application related to an interlocutor (*sub nom* "Note of Reasons") by the sheriff at Glasgow, dated 26 June 2015, which found the following established:

1. [AB] was born on … 2013. She normally resides at … Glasgow with her mother [the appellant] and her father [the second respondent]…;
2. [T]hroughout 14 May 2013 up until [AB] was admitted to the Victoria Infirmary… on that date, [AB] was in the sole charge, care and control of her mother and/or father;
3. On 14 May 2013 [AB] was presented at the Victoria Infirmary … in the company of both her parents because she was red/flushed, fitting and foaming around the mouth and suffering reduced conscious levels. She was transferred to the Royal Hospital for Sick Children … on the same day; where she remained until 18 June 2013;
4. … [AB] was found to have the following:

    (a) bilateral subdural haematomas;
    (b) swelling of the brain;
    (d) an extensive hypoxic ischemic brain injury;
    (e) extensive bilateral haemorrhages; and
    (f) a bruise to the anterior abdominal wall;

5. As a result … [AB's] health and wellbeing has been permanently impaired and she now suffers from the following:

   (a) global development delay and motor deficit;
   (b) cerebral visual impairment; and
   (c) possible epileptic seizures;

6. [The appellant and the second respondent] are responsible for safeguarding and promoting [AB's] health, development and welfare. They have not provided an adequate explanation for the injuries … No history of accidental trauma was given by either parent. There is no medical explanation for these injuries;

7. … [O]n or around 14 May 2013, [AB] was the victim of a non-accidental injury caused by [the appellant and/or the second respondent] resulting in the injuries ...; and

8. Statement of Fact 7 demonstrates an offence of … bodily injury to a child … which is an offence specified in schedule 1 [paragraph] 3 of the Criminal Procedure (Scotland) Act 1995.

[4] The sheriff held the ground of referral, that an offence under schedule 1 of the Criminal Procedure (Scotland) Act 1995 had been committed in respect of AB, to be established under section 67(2)(b) of the Children's Hearings (Scotland) Act 2011. In terms of section 108(2), he directed the Principal Reporter to arrange a Children's Hearing to decide whether to make a compulsory supervision order. He made an interim CSO requiring AB to live at a particular address in Carluke pending the Hearing, with the parents having supervised contact at least three times per week for 3 hours. Although the direction to the Principal Reporter from the Children's Hearing had been made on 22 April 2014, it was not until 16 March 2015 that a proof before the sheriff commenced.

[5] The proof lasted 15 days. Each parent was separately represented by counsel. Each had the services of an interpreter; Bulgarian for the appellant and Urdu for the second respondent. The Reporter was represented by a solicitor. The safeguarder appeared personally. The Reporter led evidence from eight witnesses: a health visitor; two consultant paediatricians; two consultant opthalmologists; a consultant paediatric neurologist; a consultant in paediatric neurodisability; and a consultant neuroradiologist. The appellant gave evidence and led evidence from a consultant neuroradiologist. The second respondent also testified. The sheriff had little difficulty in finding statements of fact 1 to 5 established. In relation to the crucial findings in statement 6, there had been no substantial concerns on the part of the health visitor about the parents' care up until, and including, her last visit on 15 April 2013. There had been no report from the parents to the health visitor about seizures or fitting, although there was reference to what appeared to have been colic. The appellant and the second respondent testified that, on the contrary, from about three weeks of birth, AB had been crying very loudly, gasping for air, turning blue (or red and yellow) when crying and making arm and leg movements. Her tummy would go hard. This, they said, had been reported to the health visitor. The sheriff did not believe the accounts given by the parents. It conflicted with the health visitor's version and the records.

[6] The sheriff examined the written records of the parents' accounts which had been given on the day of the incident. Earlier in the day, AB had been her normal self; happy and smiling. She had been taken on a shopping trip with both parents. She had been asleep in her baby seat in the car. Her parents went to pick up the appellant's seven year old son from school just after 3.00pm. When the second respondent came out of the school, the appellant told him that AB was not breathing properly and not waking up. Her arms were stiffly flexed and her eyes were rolling. "Bubbling white stuff" was coming from her mouth.

She was driven straight to the hospital. A later account said that, before arriving at the school but after the appellant had gone into a shop and the second respondent had remained in the car and had been holding AB, AB had been crying. Her face had been red and her limbs curled up. In her testimony, the appellant said that, when she had come out of the shop, AB was being held by the second respondent. She was crying as if hysterical. When the appellant took her from the second respondent, AB was gasping for air and initially stiff. She did calm down. After the second respondent had come out of the school with her son, AB, who had been sleeping in her car seat, suddenly screamed and continued to do so whilst turning her arms. She was struggling for air, turning blue and red, with bubbles coming from her mouth. The second respondent said that, when the appellant had come out of the shop, AB was crying only a little and had been put in her car seat. When the second respondent had come out of the school, the appellant had told him that AB was not right. She could not breathe and was frothing at the mouth.

[7] The medical evidence, which described the extensive testing which had been carried out on AB, was that there was no evidence that AB had any bleeding disorder or that there was an infective cause. The bleeding in her brain had not been caused by birth trauma. There was a bruise on a soft tissue part of AB's abdominal wall. A child, who was not independently mobile, should not have bruises without there being a clear explanation for their presence. There had been none. According to the medical evidence led by the Reporter, which the sheriff accepted, the four separate bleeds on AB's brain were all likely to have been caused by a traumatic event. They were acute and not chronic. Hence, the sheriff found supporting fact 6 established.

[8] The sheriff had regard to the Royal College of Paediatrics and Child Care Health Protection Companion 2013 (2nd ed). This stated (at para 9.6.5) that it was widely accepted

that "... abusive head trauma (AHT) arises from severe repetitive rotational, acceleration-deceleration injury (from shaking) with or without additional impact, or impact alone". All investigations appropriate to AB's condition had taken place. These included the finding of retinal haemorrhages which, in a child of her age, had a 71% probability of having been caused by AHT. The sheriff concluded from all the evidence that AB had been well, up to the point at which the appellant had gone into the shop. On supporting fact 8, he accepted the medical evidence that the cause of the injury was a shaking mechanism, involving some rotation and a significant backwards and forwards movement of the head. The perpetrator would have realised that the change in the child's behaviour had been caused by his actions. The sheriff was satisfied that AB had been subjected to severe violent and wilful shaking by one or other of her parents. Nevertheless, the sheriff commented that, prior to the incident, the parents were loving and caring. They had sought immediate medical attention and were clearly upset and concerned for AB. He added that AB:

> "will need a great deal of love, care and attention as she grows up and [the sheriff could] see no reason why, once the authorities are satisfied that sufficient arrangements are in place for her care and protection, that those best placed to give her all that she needs are her parents".

The sheriff's decision

[9] On 4 February 2019, following closely the wording of the motion, the sheriff at Hamilton ordered that:

> "the petitioner is entitled at any proof to follow hereon to rely upon the original findings by way of certified copy interlocutor of the sheriff ... at Glasgow in respect of the grounds of referral relating to the child [AB] … established on 26 June 2015 in relation to the established ground and the corresponding supporting facts…".

[10] The parties were agreed that *res judicata* did not apply to the circumstances because the two litigations did not involve the same parties. The first, which was to establish a

ground of referral, was at the instance of the Principal Reporter. The second, which was an application for a permanence order, was at the instance of the first respondents. The sheriff considered that, while they were two separate proceedings under two different Acts, both depended on a fact-finding exercise by the same judicial officer holder; namely a sheriff. The sheriff concluded that:

> "… a consequence of the congruity of the form [of] two sets of proceedings is that the second court may, if appropriate and competent, safely depend on the findings in fact made by the first."

The rule of evidence founded on by the appellant, that the findings of one court could not be used to prove fact before another, was not apposite to the two statutory proceedings. Any such rule had been established long before either statute had been passed.

[11] The sheriff relied on *McGregor* v *H* 1983 SLT 626. *M* v *Constanda* 1999 SC 348 had reached the opposite view, but only on the basis that in the earlier proceedings the ground of referral had not been contested. *West Lothian Council* v *MB* 2017 SC (UKSC) 67 emphasised that the threshold test for a permanence order under section 84 of the 2007 Act could only be met if there were appropriate findings-in-fact based on evidence. That simply begged the question at issue; ie how the facts could be established. The sheriff adopted the approach in *In Re B (Minors) (Care Proceedings: Issue Estoppel)* [1997] 3 WLR 1 and *In re Z (Children) (Care Proceedings: Review of Findings) Practice Note* [2015] 1 WLR 95. It was too simplistic to say that the ground of referral proof and the permanence order application were different proceedings. The reasoning in *McGregor* v *H* (*supra*) should be applied. The court could take into account the consequences, including the waste of the time of the court, witnesses and parties, the public expense, delay, and the public interest in there being an end to litigation.

[12] The course of allowing a party to rely on previous findings was open in view of the extensive powers and tools available to the sheriff to secure the expeditious progress of the case. The sheriff could restrict and exclude evidence (Sheriff Court Adoption Rules 2009 (Act of Sederunt (Sheriff Court Rules Amendment (Adoption of Children (Scotland) Act 2007) 2009), rules 36(2)(d) and (3)(d)). The welfare principle supported the first respondents' position.

[13] The sheriff took into account that: the ground of referral proof and the permanence application related to the same child and family; evidence had been led at the referral proof; the appellant and the second respondent had attended and had been represented at the proof, and had given evidence; neither had appealed the sheriff's 2015 findings or requested a review of the CSO (2011 Act, ss 132(2) to (4)) following the establishment of the ground of referral; and the facts which the first respondents sought to have established were identical to the ones proved in 2015. Those factors, the welfare principle, rule 36(3)(d) and the persuasive English *dicta*, prompted the sheriff to decide that it was competent to make use of the facts established at the ground of referral proof.

[14] The sheriff observed that his decision was that the facts established in 2015 would not be treated as established for the purpose of the permanence application, but they could be relied on by the lodging of a certified copy of the interlocutor. That would constitute sufficient and admissible evidence of those facts. The weight to be given to them would be decided by the sheriff hearing the proof on the permanence order. The burden of proof for the making of the order would remain on the first respondents, but they would not need to lead further evidence to prove the facts which had already been established. At the pre-proof hearing, the sheriff could be persuaded that there was new information which should be heard. If that information was merely speculative, or an attempt to persuade the court to

re-hear the original evidence in the hope of persuading a different judge to reach a different decision, the sheriff would be entitled to refuse to hear such evidence under rule 36.

Submissions

Appellant

[15] The appellant maintained that, in the absence of a plea of *res judicata*, which the other parties were not advancing, or a statutory provision, a finding of fact in an earlier litigation was not admissible to establish fact in a subsequent litigation. In particular, findings of fact made by a sheriff after a proof on ground of referral could not be treated as findings for the purposes of a later application for a permanence order.

[16] In advance of the hearing, the court requested parties to address the issue of *res judicata*, and in particular the requirement for the parties to be the same, under reference to, for example, *Allen* v *McCombie's Trs* 1909 SC 710 and *Glasgow Shipowners' Association* v *Clyde Navigation Trs* (1885) 12 R 695. The appellant submitted that *res judicata* was not applicable because the parties were different. The Reporter was independent of the local authority. They had different roles and responsibilities and could litigate against each other. They did not represent each other, as was the position in the examples cited by the court (see also *AB and CD* v *AT* 2015 SC 545). A decision by the Children's Hearing was not binding on the local authority. In addition, the subject matter of the two litigations was not the same (*Dollar Land (Cumbernauld)* v *CIN Properties* 1996 SC 331 at 346-7). In the ground of referral proof, the sheriff had only been concerned with whether the child was correctly before the Children's Hearing. In the current proceedings, the issue was whether there should be a permanent change in the child's care (*S* v *Locality Reporter* [2014] Fam LR 109 at paras [6-8], endorsed in *JM* v *Brechin* 2016 SC 98 at para [56]).

[17] The sheriff had erred in taking into account the English cases on "issue estoppel". In *In re B (Minors) (Care Proceedings: Issue Estoppel)* (*supra*) it had been suggested (at 120) that issue estoppel may not apply in cases involving children, or could be relaxed because of the duty to inquire into the interests of the child (*ibid* at 124-5). The court had a discretion to decline to allow a full hearing (*ibid* at 128 citing (at 126) *Thoday* v *Thoday* [1964] P 181 at 197). The application of the approach in *In re B* had not been straightforward (*In re Z (Children) (Care Proceedings: Review of Findings)* (*supra*)). Apart from *res judicata*, the interlocutor of one judge was not evidence of fact in another case (Dickson: *Evidence* (3rd ed) paras 385-390; Walker & Walker: *Evidence* (4th ed) para 19.15.2; Stewart: "*Evidence*" in *Stair Memorial Encyclopaedia* (Re-issue) para 105). Issue estoppel did not exist in Scots law (*Clink* v *Speyside Distillery* 1995 SLT 1344 at 1345, *Anderson* v *Wilson* 1972 SC 147 at 150, considering *Grahame* v *Secretary of State for Scotland* 1951 SC 368 at 387). In the case of criminal convictions, there was a specific statutory provision allowing them to be used in subsequent proceedings (Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 s 10; see *Caldwell* v *Wright* 1970 SC 24). The extract conviction was not determinative. If the previous findings of the sheriff in the ground of referral proof were taken as conclusive, the appellant would be in a worse position than if a conviction had existed.

[18] The practice in relation to a ground of referral relating to different children was only superficially helpful. *McGregor* v *H* (*supra*) was concerned with statutory interpretation. It had its limits (*M* v *Kennedy* 1995 SC 61; *M* v *Constanda* (*supra*)). Reliance on the English position failed to take into account the differences between an application to the sheriff for the establishment of ground for referral and one for a permanence order (*S* v *Locality Reporter* (*supra*) at paras [7-8], [26],[29], [36-7] and [40]). Once the sheriff had remitted a case to the Reporter to arrange a Children's Hearing, the findings in fact in that process had

fulfilled their function (*JM* v *Brechin* (*supra*) at para [56]). If the court were to adopt the approach in *In re B*, it would be importing it from a different legal system with a different history, different legislation and different rules. The English procedures were inquisitorial whereas the Scottish ones were adversarial.

[19] The appellant had approached a new consultant paediatric neurosurgeon. Would he be required to provide a preliminary report? Who would lead at the proof? What would the effect of a joint minute at the ground of referral proof be? The proposal was that the earlier decision of the sheriff should be given an effect which it had not been intended. The sheriff's interlocutor did not wholly reflect his reasoning. His intention was that the first respondents could rely on the earlier findings, but that the parents could seek to lead evidence to refute these findings, in which event the first respondents could lead further evidence themselves; the onus remaining on them. These matters should have been spelled out in the interlocutor.

[20] The sheriff had erred in relying on the welfare principle. This applied when a decision was made. It could not be used to change the rules of evidence. There was a factual test which could not be affected by treating welfare as a paramount consideration (*West Lothian Council* v *B* 2017 SC (UKSC) 67 at paras 13 and 15). It was in the interests of children that the rules of evidence were applied in establishing fact. Welfare was not promoted by the adoption of *ad hoc* procedures or speedy decision making.

Second Respondent

[21] The second respondent's approach differed radically from both that of the appellant and his own earlier written Note of Argument. He had offered to enter into a joint minute which agreed that the ground of referral and the supporting facts had been established after

the ground of referral proof. That did not mean that the facts became automatically binding in the present process. The sheriff could rely upon them and, in the absence of contrary evidence and in the light of other evidence, the sheriff could conclude that the threshold test had been met. If there were contrary evidence, for example from another expert, the sheriff could conclude that neither parent had assaulted the child.

[22] The sheriff had case management powers. There were two extremes. First, the facts found could be treated as *res judicata* and not susceptible to challenge. Secondly, all of the evidence could be reheard. Neither was correct. It was sufficient for the sheriff to rely on the earlier findings in fact in the absence of other evidence. Alternatively, evidence could be led to challenge the findings. The legal, but not the evidential, burden remained on the first respondents. The procedure to follow could be decided at the case management hearings (preliminary and pre-proof). A middle course between the two extremes could be achieved.

[23] The proposition that the earlier findings had no evidential value was wrong. The sheriff could rely on the previous findings. *Res judicata* was not applicable because the subject matter was different. Nevertheless, the court had an interest to ensure that matters were not re-litigated (*Grahame* v *Secretary of State for Scotland* (*supra*) at 387). The tension in relation to the welfare of the child could be resolved by allowing the facts found to be relied upon. The second respondent's offer to agree the facts would supersede the sheriff's interlocutor and would leave it to the sheriff to deal with the matter by case management.

First Respondents

[24] The first respondents adopted the position of the second respondent. There was no need for the appeal to be allowed. The sheriff's interlocutor only allowed the first respondents to rely on the earlier findings in fact. It did not state what evidence the parents

could lead. The sheriff would determine the next steps at a case management hearing. He had been correctly guided by the approach in England.

[25] There was no principle preventing a sheriff from relying on facts previously found. The rule was a practical one which had evolved over time (Dickson (*supra*) at paras 385-7). In so far as any rule existed, it did not apply to Children's Hearing referrals (*McGregor* v *H* (*supra*); *M* v *Constanda* (*supra*)). The question was one of evidence and not bar. The English use of issue (as distinct from action) estoppel had not been followed in Scotland. The policy underlying the remedy of *res judicata* could be applied. The court was not bound by *Anderson* v *Wilson* (*supra*) or *Clink* v *Speyside Distillery* (*supra*). The approach in *McGregor* v *H* (*supra*) could be used in a variety of situations. The statutory provision in relation to criminal convictions was adopted from an English law reform measure (McPhail: *Evidence* para 11-22).

[26] The sheriff had been correct to apply the case management approach in *In re B (Minors) (Care Proceedings: Issue Estoppel)* (*supra*). This had been based upon practicalities rather than issue estoppel. Proceedings in Scotland were not adversarial but mixed (*West Lothian Council* v *MB* (*supra*)). The court had the power under rule 36(3)(d) to make decisions which could prevent the re-litigation of issues. There were no practical difficulties with this. The welfare test could not trump the laws of evidence.

Decision

[27] The principle of *res judicata* can be applied in either a negative or a positive way. In the former, it acts as a plea of bar to prevent a litigation which mirrors an earlier one whose merits have already been determined. In the latter it operates to allow facts, which have been established in earlier litigation, to be founded upon conclusively to support a

subsequent action based upon those facts. As was said in *Grahame* v *Secretary of State for Scotland* 1951 SC 368 (LP (Cooper) at 387):

> "The plea is common to most legal systems, and is based upon considerations of public policy, equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis".

The reference to the "same parties" should not be construed too strictly. It is sufficient if the interest of the parties in the first and second action is the same (*Gray* v *McHardy* (1862) 24 M 1043, LJC (Inglis) at 1047; *Glasgow Shipowners' Association* v *Clyde Navigation Trs* (1885) 12 R 695, Lord Shand at 699; *Allen* v *McCombie's Trs* 1909 SC 710, LP (Dunedin) at 715). Equally, in relation to the *media concludendi*, excessive concentration on the precise nature of the remedies sought in each action should be avoided in favour of a simple inquiry into "What was litigated and what was decided?" (*Grahame* v *Secretary of State for Scotland* (*supra*) at 387).

[28] In the public law context, it is doubtful whether the interests of the Reporter and the local authority are truly different for the purposes of the applicability of *res judicata*. Both are manifestations of the state. Their particular functions simply reflect the manner in which the state has decided to divide its powers and responsibilities. The state could hardly avoid the consequences of a plea of *res judicata* which was advanced against it by founding on divisions in its own personality. That apart, there is no doubt that the interests of both the appellant and the second respondent were fully represented at the ground of referral proof.

[29] The essential question *in limine* in this process is whether AB's residence with her parents, or one or other of them "... is, or is likely to be, seriously detrimental to the welfare of the child" (Adoption and Children (Scotland) Act 2007, s 84(5)(c)(ii)). If that question is answered affirmatively, the substantive question is whether the making of a permanence order "... would be better for the child ... than that it should not be made (*ibid* s 84(3)). That

is a different, and wider, question from the one answered earlier after the ground of referral proof concerning whether, in practical terms, AB's parents, or one or other of them, had assaulted the child and thus committed an offence specified in Schedule 1, para 3, of the Criminal Procedure (Scotland) Act 1995. In this way, the *media concludendi* in the two processes are different and *res judicata* cannot therefore apply with full force and effect.

[30] Nevertheless, the principle behind *res judicata* (*supra*) continues to resonate. Although *McGregor* v *H* 1983 SLT 626 is distinguishable on the basis that it related to successive applications to establish the same grounds, the Lord President (Emslie) (at 629) was alert to the need to avoid undesirable consequences in terms of public time and expense. Fortunately, in the modern era, with a move away from a strict reliance on an adversarial process to one in which the court takes an active part in case management, as Hale J said in *In re B (Care Proceedings: Issue Estoppel*) [1997] Fam LR 117 at 128:

> "... the court undoubtedly has a discretion as to how the inquiry before it is to be conducted. This means that it may on occasions decline to allow a full hearing of the evidence on certain matters even if the strict rules of issue estoppel would not cover them ... [This] seems ... to encompass both the flexibility which is essential in children's cases and the increased control exercised by the court rather than the parties which is already a feature of the court's more inquisitorial role in children's cases ...".

Those sentiments are precisely those which the Sheriff Court Adoption Rules 2009 (SSI 2009 no. 284 as amended) are intended to address. They provide:

> "Pre-proof hearing
>
> 36. ... (3) At the pre-proof hearing the sheriff may –
>
> ...
>
> (d) make such other order as he considers appropriate to secure the expeditious progress of the case including restricting the issues for proof and, on the motion of either party, on cause shown, or of the sheriff's own motion, excluding specified documents, reports and/or witnesses from proof."

[31] It is for the sheriff to ascertain what issues are in dispute (rule 35(1)(b)(i)). Thereafter it is entirely a matter for the discretion of the sheriff to determine what requires proof (rule 36(3)(b)) and what evidence, whether oral, documentary or otherwise, he or she wishes to hear in order to resolve such issues as he or she considers ought to be addressed before determining whether the statutory tests have been met, and with what effect. In a case such as the present, the sheriff is entitled, when determining what evidence to hear, to take as a starting point the fact that the ground of referral and the supporting facts have already been established after proof. That is not to say that the sheriff is bound to find the same facts.

[32] If it is a party's intention to lead the same, or substantially the same, evidence as was presented at the ground of referral proof, and to seek only to persuade the sheriff to reach a different decision on the same evidence, the sheriff would be entitled to refuse to rehear that evidence and to find these facts established on the basis of the evidence previously heard (see now, in any event, the Civil Evidence (Scotland) Act 1988, s 2; see also Dickson: *Evidence* (Grierson ed) 268). In so doing he would be paying due heed to the principle behind the plea of *res judicata* (*supra*) that issues should not be litigated repeatedly between the same parties on substantially the same basis. A sheriff ought to take that approach if no new material is presented.

[33] There will be situations in which the findings in fact of the sheriff after a ground of referral proof may legitimately be challenged. It is not possible to define these exhaustively. In so far as they involve the introduction of different evidence, they are of the same nature as would be allowed to support a plea of *res noviter veniens ad notitiam* in the context of an appeal or an action of reduction on the merits. As the Lord President (Clyde) said in *Miller* v *MacFisheries* 1922 SC 157 (at 160-1) (cited by Lord Reed in *Rankin* v *Jack* 2010 SC 642 at 655):

> "The allowance of *res noviter* is always more or less in the nature of an indulgence. Accordingly, it may present to the Court a delicate problem of discretion. But it is an indispensable condition of the allowance that the *res noviter* should be material to the justice of the cause; and it is inconceivable that it should be refused if it is seen to be such that to exclude it from the materials of judgment would prevent justice being done."

[34] In a case involving the future welfare of a child and the rights and responsibilities of her parents, a broad approach to this has to be taken. It would not be in the best interests of a child for decisions to be taken which are based on erroneous fact. It is also in the best interests of a child that final decisions upon his or her welfare are taken expeditiously. It is for the sheriff to weigh these considerations in the balance and to make a decision at the pre-proof hearing concerning the legitimate scope of the proof. In the present case, for example, if the appellant does seek to adduce the evidence of a new consultant paediatric neurosurgeon, she will have to provide the sheriff, at the pre-proof hearing, with a report from the neurosurgeon which at least outlines that evidence. The sheriff will have to decide whether it is of such quality and strength that it may successfully undermine the material findings of non-accidental injury made by the sheriff after the ground of referral proof. If it has that capacity, the sheriff may determine that this should be heard first before affording the first respondents the opportunity to lead such evidence in replication as might be allowed.

[35] The question is not, as the motion and the relative interlocutor suggest, one of whether the first respondents are "entitled to rely upon the original findings", but whether the sheriff can do so. In this respect, the interlocutor is, as it is framed, somewhat meaningless. Nevertheless, the sheriff's reasoning is essentially sound. He may rely on the original findings. It is for him to decide what, if any, new information should be adduced at the proof. If it is speculation or repetition, it may be excluded at the pre-proof hearing. If it

is of substance and in the nature of *res noviter*, it may be introduced and could prove decisive in persuading the sheriff that the child's injuries were not deliberately inflicted.

[36] Meantime, however, the appeal is refused.