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Open Letter on Shaken Baby Syndrome and Courts: A False and Flawed Premise

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Preamble

The Open Letter on Shaken Baby Syndrome and Courts has been prepared under the auspices of the *International Public Health Research Group* [IPHRG]. It was developed from initial drafts by Bill Bache and Charles Pragnell. Final drafting and editing was by Dr Lynne Wrennall, Executive Director of the *International Public Health Research Group* and the Managing Editor of *Argument & Critique.* The process of writing the letter has relied on the published research in the field, much of it, published research by the signatories to the letter. The process has also drawn on the iterative contribution of insights by the signatories to the letter. For the purpose of developing the letter, The *International Public Health Research Group* has functioned as a Delphi group, advising on the process and content relating to the letter.

For the names and details of international experts who have signed their agreement with the letter please see the list of signatories below.

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We, the undersigned members of various professions worldwide have deep concerns regarding the protection of children from abuse, neglect, and exploitation. Our professional training, experience, and expertise are in medicine, child protection, psychology, epidemiology, biomechanics, physics, engineering, research, academia, medical journalism, law, social work and criminology. We are researchers, authors, teachers and practitioners.

We write because we are deeply concerned about the use of the construct of what is commonly known as Shaken Baby Syndrome [SBS], although it has variously morphed into Shaken Impact Injury, Abusive Head Trauma (AHT), Acquired Brain Injury [ABI] and other similar variants.

Introduction

Parents and carers in many countries have been falsely accused of injuring or killing a child and face allegations of child abuse, manslaughter or murder. SBS and its variants have been conceptualised in several ways. Generally speaking the 'Triad' of symptoms involves retinal haemorrhages, subdural haemorrhages and ischaemic encephalopathy being interpreted as signs of child abuse. Many such accused parents and carers are given long prison sentences and their children are permanently removed from their families. In some jurisdictions, they can even be sentenced to death.

A major concern is that the 'diagnosis' of SBS risks blurring the line between diagnosis and verdict. As the Honourable Mr Justice Charles explained in *A County Council v. K, D and L [2005] EWHC 144 (Fam), [2005] 1 FLR 851 @ para [89]*, this blurring of the line, that

occurs in the construct of SBS, means that medical experts are at risk of usurping the role of the Judge, Coroner or jury. The construct of SBS presupposes an explanation by experts who are not in possession of all the facts of the case.

It can be shown in many such instances that the evidence of the prosecution experts alleging death or serious injury from SBS is demonstrably flawed. The scientific basis for the assertion that these injuries are the consequence of deliberately inflicted violent shaking is highly contentious. Biomechanical evidence has shown that shaking without contact would only produce the triad of injuries in association with other injuries to the neck and spinal column that are typically not found in alleged SBS cases. Over the past decade it has been found that many of the accused parents/caregivers do not fit the conventional profile of those who commit child abuse and the pattern of injuries has been found to result from alternative aetiologies than shaking.

The scientific and academic literature shows that the construct of SBS is open to significant critique. SBS is lacking in scientifically-conducted validation and forensic rigour. To date, the scientific research which has been conducted, casts considerable doubt on the SBS construct. Moreover, while this diagnosis continues to be used, babies are denied the investigations they need to establish the correct cause, treatment and prevention of recurrence, of their symptoms and signs

In short, we would inform members of the judiciary and legal profession in those countries which utilise the SBS construct, that it does not have the undivided support of the relevant professional community, an essential consideration in the assessment of expert testimony.

In the U.S.A., the US Supreme Court has ruled in *Daubert vs. Merrill Dow [1993]* that based on the US Federal Rules of Evidence, the court should assess whether the underlying reasoning or methodology of expert evidence "is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community." Courts in both the U.S.A. and the U.K. have commented that neither the criminal nor the civil jurisdictions should be the place for fanciful speculations to be offered in evidence.

In the U.K. courts, in criminal and civil cases involving the deaths of children, Lord Justice Judge in the Angela Cannings appeal hearing determined that, "if the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed". He also pointed out that today's medical certainty is soon superseded, a point that has been made in several subsequent rulings that have been collated by Mr Justice Moyston in *Lancashire County Council v R [2013] EWHC 3064 (Fam) (11 October 2013).*

The Courts

There are draconian consequences for those found by the courts to have abused children. The criminal courts will impose the severest sentences on those found guilty of murder, manslaughter or causing severe harm to children.

In the civil courts the state can, if satisfied on the balance of probabilities, ultimately impose forced closed adoptions to sever the ties between children and their parents. In a speech to the *Society of Editors* in London, Lord Justice Munby, currently President of the Family Division of the High Court, has said of these powers that in the absence of the death penalty, "orders of the kind which family judges are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. When a family judge makes an adoption order in relation to a twenty-year old mother's baby, the mother will have to live with the consequences of that decision for what may be upwards of 60 or even 70 years, and the baby for what may be upwards of 80 or even 90 years. We must be vigilant to guard against the risks."

Those found in either type of court to have abused children will be unlikely ever again to be allowed to care for their own or anyone else's children.

Shaken Baby Syndrome

Abuse comes in many forms. This letter concentrates on one alleged form in which certain findings such as subdural haemorrhage, retinal haemorrhage and encephalopathy are said to be pointers to the abusive shaking of babies usually under one year of age. Many of those propounding the allegations fall short of asserting that these symptoms (the Triad) are diagnostic, but infer that they are, largely on the basis of the assertion that they can think of no other explanation.

Although those propounding the SBS construct tend to represent their views as the mainstream scientific view, SBS has never been proved as anything more than an hypothesis. Too often, specialists are unaware of, or may disagree with, the alternative explanations that may be provided by other specialisms, or even from other viewpoints within the same specialism. Moreover, there is an increasing body of entirely respectable science, published in peer-reviewed literature, which challenges the whole concept. Noticeably, the requirement for scientifically based evidence is far more rigorous in medical negligence cases than in the family or criminal courts where believing something to be true appears to have achieved sufficient evidential value to sway the determinations of the court.

The Issue

Given the evident difficulties in interpreting correctly the observed data in a field of science which is at present on the frontiers of human knowledge and given the draconian powers that the courts can impose, it seems a reasonable proposition that the Court system should provide the utmost safeguards to prevent mistakes when adjudicating on such matters. However the safeguards are woefully inadequate.

When matters of this scientific complexity and controversy are raised it must be right that the courts should encourage the full array of sensible interpretations of the data to be put before them. For any system of justice that claims to be fair (and there is no point of maintaining one if it does not) there are certain irreducible requirements which must be managed, irrespective of financial constraints. Given that what is at stake is so important, this is a situation where fairness must be paramount.

Unfortunately, in the family courts the procedures are such as to militate strongly in favour of having one expert per discipline. This is contrary to the principles of the adversarial system and unreasonably stifles appropriate debate, so there is no scope for airing reasonable alternative possibilities. In practical terms the effect is to stifle the voicing of alternatives for the court to consider. Those procedures involve:

1. Heavy restrictions in disseminating the data on which expert evidence is sought.
2. Restrictions on the number and type of experts to be used.
3. Restrictions on using experts from overseas
4. Financial constraints on experts' fees.
5. Time constraints.

The situation in the criminal courts is more liberal but becoming less so, especially in relation to financial and time constraints. It has to be said that there are powerful vested interests in suppressing any open discussion in, or outside, the courts about the viability of the SBS construct. The motives are financial and the preservation of reputations. One of the consequences has been the vilification of experts prepared to advance competing theories and the suppression of sensible debate.

The Result

Many courts are making insufficiently informed and consequentially, frequently wrong decisions with dire and chronic consequences for parties who may well have done nothing wrong. The debate about the viability of the SBS hypothesis in the courts and elsewhere is being suppressed when it should increasingly be aired. There may be a temptation on the part of some members of the judiciary in search of *an* explanation for the presenting symptoms, to accept SBS as *the* explanation. The provision of training to the judiciary by proponents of the SBS theory may have contributed to this. Practical measures need to be introduced in the judicial system to facilitate rather than suppress the full range of expert views on these topics. This must also be a matter for government.

Fortunately over time, some courts are becoming aware of the problems with SBS. For example, in finding that "The experts were fairly evenly divided in their opinion (which it is acknowledged is fashioned by current level of understanding) as to whether the accelerated fall (as described) would have generated sufficient force to cause X's ocular and cerebral injuries," the Honourable Mr Justice Cobb, gave leave for the Local Authority to withdraw the application for a Care Order (in *J, A, M and X (Children) [2013] EWHC 4648 (Fam) (22 February 2013).* In *Lancashire County Council v R [2013] EWHC 3064 (Fam) (11 October 2013, s31i),* Mr Justice Mostyn, agreed with the position that "the triad is an indicator of injury only, not of how it occurred." In *Del Prete V. Thompson 90710 F.Supp.3d 907 (N.D.Ill. 2014, f10, pp 957-958)* in the U.S., District Judge Matthew Kennelly further noted that the available evidence "arguably suggests that the claim of shaken baby syndrome is more an article of faith than a proposition of science."

The Request

In conclusion, we would recommend to all criminal and civil Courts that they give a full account of the ruling of Lord Justice Judge that it would be unwise and unsafe to proceed to draconian outcomes, "if the outcome of the trial depends exclusively or almost exclusively on

a serious disagreement between distinguished and reputable experts." In relation to SBS and its variants, precisely such a disagreement is evident. These differences in expert opinion must be properly represented before the courts.

Court determinations need to be based on an evaluation of the full range of plausible explanations. Critical appraisal requires an open mind because as Justice Judge has pointed out, in science, current explanations are frequently replaced by new knowledge. Therefore, given the difficulty of making decisions in this context and the seriousness of the matters which come before the courts, the appropriate approach is one in which court decisions seek to produce outcomes which are least harmful to all concerned.

Special Notice

Since publication the letter has been endorsed by Honorary Alderman, The Honorable John A. M. Hemming MP, MA (Oxon), FRSA. Member of Parliament for Birmingham, Yardley.

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