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Examining child protection practice in New South Wales: Non-accidental injury and the principle of strict liability

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Article

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Abstract

This article examines child protection practice when the Department of Communities and Justice in New South Wales takes the view that an injury to a child is non-accidental. The position taken in this paper is that once a child protection caseworker takes the position that an injury is non-accidental, then a strict liability or absolute liability approach is adopted. In effect, any of the child's parents or caregivers are identified as persons who may have caused the injury or harm. What follows is the decision that a child must never be restored to the parents or caregivers, unless a person confesses to causing the harm and completes specific child protection counselling. Our concern is with the process of investigation, the reliance on one medical opinion in a context where the parents or caregivers are not in a financial position to obtain a second opinion, the failure to observe the rules of evidence when considering medical opinion, and the manner of substantiation of the non-accidental injury. In addition, we argue that there is a lack of knowledge about the factors that influence a paediatrician's decision-making and that the guidelines for judicial decision-making derived from case law need to be examined further.

Introduction

No child or young person should ever be the subject of a non-accidental injury (NAI). If a child or young person has been injured in this way, then it is right that the child should be removed from parents or caregivers so that they are protected from any potential further injury.

To our knowledge, the term non-accidental was first used by Kempe et al. (1962) in his landmark article titled *The battered child syndrome*. In one sense, using the term non-accidental is simply fiction. It is a way to avoid confronting parents or caregivers with what child protection caseworkers may think happened, namely, that the parent or caregiver deliberately injured a child.

When an alleged case of NAI comes before the New South Wales (NSW) Children's Court, the court makes an interim care order allocating parental responsibility for the child to the Minister for Communities and Justice (DCJ). What follows is a process that allows for the presentation of evidence about the injury or harm caused and the rebutting or challenging of such evidence. At the end of proceedings, either by consent orders or by judicial determination, the most likely result in a NAI case is a permanent care order. The child or young person is then placed with other family members or in the care of the Minster, usually until they reach the age of 18 years. Restoration to a parent or caregiver is possible, but our observation of this process has found it to be infrequent. To our knowledge, the Children's Court does not collect cumulative data about restorations of this type.

Definitions

What is the meaning of "accident" and of "non-accidental"? Legal remedies in relation to injuries have been developed from the law of torts which includes negligence and other less well-known wrongs (Australian Law Reform Commission, Report 127, 2015, 455–456). The common law of torts has been changed by Parliaments through legislation, changing these precedents in relation to many situations where injuries occur, including civil liability for injury, workers' compensation and injuries from transport accidents.

In the early 20th century, an appeal in relation to the English Workers' Compensation Act examined what is meant by accident (*Fenton v J Thorley & Co*, 1903 AC 443). In that case, Lord Lindley provided a summary definition as follows:

> The word accident is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. (p. 463)

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In the English case, the examination of the meaning of accident arose in a situation where the statute did not contain a definition of accident. The same is true in relation to the NSW *Children and Young Persons (Care and Protection) Act* 1998 (The Care Act) which does not include a definition of accident nor of "non-accidental injury".

Accepting Lord Lindley's definition of accident, if an injury is not found to be accidental, then the inference is that there was some deliberate or at least reckless act that caused the injury. This is applied in the Children's Court when no-one accepts responsibility and it is assumed that one or both parents or caregivers injured the child or young person deliberately, or the child was harmed through serious neglect. It is a matter of logic that if an event is not an accident, then it is a "non"-accident ("non" is defined as "a prefix indicating 1. Exclusion from a specified class or group" (Macquarie Dictionary, 2004).

Where NAI is the issue, there are no specific guidelines in the Care Act for judicial officers. In all child protection matters, the paramountcy of the best interests of the child (section 8) and the assessment of unacceptable risk of harm (*M v M* (1988) 166 CLR 69; *In the matter of the Steward children*, 2019; *Bell-Collins Children* 2016) are essential considerations. The guidelines about unacceptable risk are from case law and from a family law context. In relation to NAI, the guidelines for judicial officers are found in the case law.

There have been a number of cases heard in the NSW District Court and Supreme court which have produced the guidelines or "rules". Some of these rules are as follows (Herridge, 2019): "If the cause of the injuries is known, and acknowledged by the person responsible . . . [it is possible to] assess the likelihood of that person acting again so as to cause the injuries . . . in the absence of any explanation, it is far more difficult to assess and weigh the relative advantages and disadvantages [of restoration]" (*T v H & Ors* [1985] NSWSC, Unreported 19 December 1985 at 18; *Bell-Collins Children v Secretary, Department of Family and Community Services (No2)* [2016] NSWSC 853 at 32, 159).

The Department does not have to prove the allegations against parents or carers at the level of "beyond reasonable doubt" because the standard of proof required for child protection is only "the balance of probabilities", which means "more likely than not". The Department does not have to prove that all other possible explanations for injuries are not feasible (*DW & KW v Department of Community Services: Re Sophie No 2* [2008] NSWDC 344 at 67–68).

> "If the case is based on actual harm, the court must be satisfied on the balance of probabilities that the child was actually harmed. Second, if the case is based on the likelihood of future harm, the court must be satisfied on the balance of probabilities that the facts upon which that prediction was based did actually happen. It is not enough that they may have done so or that there was a real possibility that they did. Third, however, if the case is based on the likelihood of future harm, the court does not have to be satisfied that such harm is more likely than not to happen." (*S-B Children* [2009] UKSC 17 (HL) at 8–9, Lady Hale, see Fact-finding and risk assessment in non-accidental injury cases (Herridge, 2019).

It is expected that the finding of fact that a child has been deliberately or recklessly harmed must be evidence-based or derived by inferences taken from evidence and not arrived at by speculation (Herridge, 2019, 8).

In a situation where the parents were the only people who had the opportunity to cause harm to the child, both are held to be potential abusers and the examination of the parents is both about who may have been the perpetrator and who should have noticed harm being done and should have responded protectively (Herridge, 2019).

These "rules" and the case law raise several questions about decision-making in these cases.

Most often the evidence from the paediatrician establishes that an injury has occurred and usually does not identify the mechanics of the injury or who was responsible for the injury. Establishing the mechanics of the injury is rarely easy.

The principle of strict liability

In law, the concept of 'strict liability' is applied in various areas of law including "corporate and commercial regulation, environmental regulation, work health and safety, customs and border protection, counter terrorism and national security and copyright" (ALRC, 2015, p. 17, 14.4). The use of strict liability contravenes the traditional common law freedoms that require proof of an illegal act and the knowledge of the wrongful act (*mens rea*) before a person may be found guilty and penalised.

> The imposition of strict or absolute liability is a departure from the common law principle that a criminal offence must include a *mens rea* element. The general principle is that strict liability may be imposed where a person is placed on notice to guard against the possibility of inadvertent contravention.
>
> (ALRC, 2015, p. 291, 10.28).

In strict liability, the perpetrator, the company or individual person, is held to be liable without the need to prove that the defendant was negligent or directly at fault. It arises not from any proven wrongdoing but from the fact that the activity or product was inherently hazardous or defective. Where strict liability applies, there can be a defence of reasonable mistake (ALRC, 2015, p. 287,10.15), but there are some situations where this defence does not apply, and then absolute liability is operational.

We argue that in the context of the NSW Children's Court, this principle is used in cases involving NAI to a child, and the parents or caregivers are held strictly liable for any injury. This is regardless of whether it can be proved that any adult who had care of the child at the time of the incident was responsible for the injury. The fact that the rules of evidence do not apply in Children's Court (*Children and Young Persons (Care and Protection) Act 1998, section 93(3)* makes the finding of NAI easy to substantiate on the basis of the case law guidelines and other rules of thumb or heuristics applied to specific types of contexts such as shaken baby syndrome or other injuries (Kahneman, 2011. Appendix A)).

Substantiation by caseworkers alone

There are occasions where there is no medical evidence, or the medical evidence is inadequate[1]. There is a Joint Child Protection Response program (JCPR) that combines Police, Health and Communities and Justice that operates whenever NAI is suspected. The Health Department provides specialist medical examinations, and the Police and Community Service team investigate. The JCPR investigation decides whether the allegations are substantiated and, if the evidence is sufficient, a brief may be prepared for prosecution of parents or others.

[1]While the authors would prefer to give case examples to support the position put forward in this paper, the confidentiality provision of the NSW *Children and Young Persons (Care and Protection) Act 1998* and the penalty for disclosure of case details makes this impossible.

Even if JCPR concludes that the allegations are not substantiated, DCJ caseworkers can and do make decisions that allegations are substantiated in specific cases.

When the caseworkers substantiate abuse, they do not have to produce evidence to the court. A casework substantiation is presented in evidence through an affidavit. But affidavit evidence in the Children's Court does not have to comply with the *Evidence Act 1995* and therefore hearsay, rumour and anonymous reports may be included as "facts" by caseworkers to prove their substantiation.

In one matter, caseworkers presented information about the wrong person; the identity of the alleged perpetrator was mistaken and someone else's JCPR history was attached to one of the child's parents. That parent had never had a child and did not have a JCPR history. Despite the evidence of mistaken identity, the caseworkers substantiated the abuse.

In 2011, there was a judicial review of caseworker's substantiation of this kind. A Children's Magistrate concluded that when a caseworker substantiates abuse, they do so "by way of value judgment" (*Re Benji & Perry*, 2011, para 15). In this case, following a Supreme Court appeal, the conclusion was that the subject Children's Magistrate's comment about caseworker substantiation was correct (*Re Benji & Perry*, 2011). The decision in that case was that the subject children were not in a situation of unacceptable risk because it was the caseworker alone who claimed substantiation of risk and the court did not accept the caseworker's conclusions.

Two spheres – responsibility and blame

Together with others (Gillingham & Bromfield, 2008; Hansen & Ainsworth, 2007), we have noted how a blame ideology pervades child protection agencies and their practitioner workforce. In our view, this has led to confused thinking about responsibility for injury or harm to a child and being blamed for that harm.

While there have been changes to child protection services towards prevention and a focus on working with the family before deciding to assume children into care (Legislative Council Second Reading Speech 2018), when NAI cases are discussed in the child protection world, the emphasis is on the risks of further abuse and the repugnance of the behaviour of adults who hurt children (Herridge, 2019). The risk focus dominates to the point where once a NAI is alleged, the immediate response is forensic and investigative (JCPR, 2018).

The forensic approach rules out the possibility of a broader assessment of family dynamics, individual stress and cultural norms for parenting (Tomison & Stanley, 2001). The forensic approach means that parents do not need to be advised about the purpose of interviews conducted by JCPR investigators. What matters is exploration of the injuries and gathering evidence to be used against the alleged perpetrators. Child welfare concern about the needs of children and families is sometimes absent. The tension between different principles that apply in child protection work have been articulated by Duerr Berrick (2017). Her analysis shows how the impossible imperative to prevent all risk conflicts with the need to address the welfare needs of children and parents.

In this section, we describe what may happen in practice. Some child protection caseworkers indicate to one of the parents or caregivers that if they separate from the other parent or caregiver (the suspect husband, wife or de facto partner), then consideration will be given to restoring the child to their care, once they are the sole parent or caregiver. This applies in other child protection cases, and not just in cases of suspected NAI. As far as we can see, this practice is not to be found in departmental documents or described in Court papers. But it is what can and does happen. This process happens quite frequently as we have directly observed in our Court practice.

The placement hierarchy now embedded in legislation *(NSW Children and Young Persons (Care and Protection) Act 1998, section 10 A)* makes foster care the least preferred outcome for children, with caseworkers attempting to find family members or close kin to care for a child. In some NAI cases, caseworkers may see a parent who has a history of violence as a preferable parent, to the one they identify as the alleged perpetrator of the NAI. When this does apply, caseworkers are, in effect, deciding which parent or caregiver was responsible for the non-accidental (deliberate) injury to a child, even though this may not have been established in Children's Court proceedings or in a criminal court. This then places the nominated parent or caregiver in the invidious position of having to choose between regaining custody of their child by dissolving the relationship with their partner or forever relinquishing the care of their child to the state.

The medical expert

In matters involving NAI, a decisive factor is the medical report submitted to the court by a paediatrician. Invariably, these cases involve severe bruising, a broken or badly strained limb, traumatic brain injury, the shaken baby syndrome or factitious illness caused by a parent or caregiver deliberately inducing illness in a child (Camm, Arbabi, & Long, 2012; Clarke et al., 2012; Hamilton & Kouchi, 2018; Malik, Malik, Theobald, & Jones, 2012).

Thus, the paediatrician has a special place in court as an expert and, as such, the paediatrician may offer "an opinion" which is only admissible in court when the person giving the opinion is an expert.

The Evidence Act (1995), section 79 specifies:

> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
> *(Evidence Act, 1995. s79)*

All the factors need to be in place for the expert evidence to be admissible. The expert must demonstrate that they have specialised knowledge that is based on training, study and experience, and the report must be wholly or substantially based on that specialist knowledge (*Evidence Act* section 79(1)). There is also case law which considers what is meant by these terms and what is meant by expert evidence (*Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *Dasreef Pty Ltd v Hawchar* [2011] HCA 21). In the High Court case, the majority judgement emphasised that the ordinary meaning of the statute is to be used to determine whether expert evidence is admissible and that the two criteria are whether the expert has specialised knowledge and whether the expert opinion is "wholly or substantially based on that knowledge" (para. 32, page 12). In the minority judgement in *Dasreef*, Justice Heydon repeated the requirements specified in section 79(1) and reviewed common law as well as the 1995 *Evidence Act*. Justice Heydon made it clear that "The evidence must reveal the expert's reasoning – how the expert used expertise to reach the opinion stated . . . admissibility does depend on reasoning being stated" (para. 129).

Does this mean that there is an avenue for the court to review the expert evidence in terms of whether it meets the rules for admissibility? The court will review admissibility in relation the

statute and common law, but the court cannot appoint itself as another expert to accept or reject the expert evidence. It has been concluded

> that there is a real limit rejecting expert evidence on the basis that there is an inadequate explanation as to how the specialised knowledge applies to the facts where this would involve evaluation and judgement acquiring the very expertise under consideration.
>
> (Odgers, 2012. p. 374).

As the judicial officer is not an expert in the specific field of specialist knowledge, it is not open to the court to reject the expert evidence unless there is another expert with a different opinion who is more persuasive.

In child protection cases, there are rarely multiple experts. This does not mean that there is certainty in the specialist knowledge of paediatrics. The lack of contest about the opinion of the paediatrician about how the injuries or physical harm have been caused is invariably because the parent or caregiver being held liable for the NAI is without the financial resources that would allow them to engage a second expert. Furthermore, when a parent or caregiver is granted aid by Legal Aid, as is the case in many child protection cases, that organisation is unlikely to fund a second medical opinion.

The myth of certainty in medical opinion

There is also the complex issue of proof. In the NSW Children's Court, the standard of proof is 'on the balance of probability' and the rules of evidence do not apply unless on application by one of the parties a Magistrate rules otherwise [*Children and Young Persons (Care and Protection) Act 1998, section 98 (3)]*. This rarely happens. The result is that medical personnel gives evidence about the cause of injuries or harm to a child which may sometimes be conjecture or the subject of disputed professional opinion. Yet, this evidence may go untested against the higher standard of 'beyond a reasonable doubt'. It can be argued that medical evidence from paediatricians should be subjected to the higher standard of proof, namely 'beyond a reasonable doubt', and the rules of evidence should apply to their testimony. The reason for the higher standard is that the finding of deliberate or reckless harm has life-long consequences, for both the child and parents, if a child is removed permanently from parental care.

The paediatrician may be sure that the traumatic brain injury to a child was caused by either of the parents deliberately throwing the child to the ground or striking the child with a hard object, rather than, for example, accept the parent's explanation that the baby was dropped because of the involuntary medical condition the parent was experiencing at the time. Another paediatrician may be certain that the child suffered shaken baby syndrome because of retinal haemorrhages, even though the science of proving shaken baby syndrome is not certain or agreed by all medical practitioners (Tuerkheimer, 2014; Vinchion, 2017). Another paediatrician may be convinced that the grandmother caring for a disabled child with a PEG feeding tube in the stomach is deliberately breaking the tube so that there can be another visit to the hospital where the grandmother and child feel cared for (Sanders & Bursch, 2019). In many matters where NAI is confirmed there is an absence of high-quality evidence about the mechanism of the injury or evidence that might exclude other possible causes. The medical expert may be convinced that "the parent did it" regardless of being able to prove it with certainty in a medico-legal sense.

In practice, paediatricians may rely on the demeanour of the parents as well as the scientific test results, and on the behaviour and emotional reactions of the subject parents or caregivers.

The use of socio-economic data or insurance status in the US to act as indicators of likelihood of NAI, rather than accidental injury, is worrying because this assumes that an indicator is as good as actual proof. Vinchion (2017), in the US, suggests that parents who are less educated and are classified as dysfunctional families should have targeted prevention services in case they are inclined to shake or beat their child. A team in Texas (Lopez et al., 2018) found that non-insured families, otherwise thought of as families who are poor, are more likely to inflict non-accidental trauma and have also recommended prevention programmes that target lower socio-economic groups.

Factitious illness: a special category

Factitious Illness Imposed on Another (FIIA), formerly called Munchausen's Syndrome by Proxy, is when a parent exaggerates a child's symptoms of illness and presents the child for medical treatment. This may be done by introducing infectious material to the child's body or causing some other action which makes the child appear ill, even when the child does not have an identifiable illness (Bass & Glaser, 2014; Davis, Murtagh, & Glaser, 2018; Kozlowska & Foley, 2006; Sanders & Bursch, 2019). In these types of situations, the parent, probably without an understanding of their motivations, attempts to meet their own needs through having a sickly or disabled child.

FIIA is a situation where a parent deliberately harms a child. This is a very serious issue as the intervention by the parent may cause the death of a child, and it is for this reason that paediatricians and legal practitioners are usually very firm in their conclusion that children should be removed from the care of the suspected parent and that the parent does not have parental responsibility for a child ever again.

As with other examples of NAI, the decision-making about who is the alleged perpetrator of the injury or harm can happen with speed and without any objective evidence of the causation. There is not usually film of a parent introducing foreign substances into an intravenous tube or deliberately breaking an essential piece of equipment that is needed to keep the child alive. The evidence is often medical test results which show the extent of injury or prove the introduction of an infection. It seems that as soon as medical personnel suspect that the parent is deliberating exaggerating symptoms or causing physical harm, the usual NAI child protection protocols are put in place.

A problem with the current system is that there may be identifiable psychological processes and stressors which are impacting on the parent, which, if explored and understood, may be amenable to intervention (Sanders & Bursch, 2019). It may be that the parent is under severe stress combined with anxiety and depression or some other psychological processes which impair the parent's judgement (Davis, Murtagh, & Glaser, 2018; Kozlowska & Foley, 2006; Sanders & Bursch, 2019). This should be the first point of investigation. The first point should not be allocation of the label of factitious illness. Unfortunately, it is not general practice for an extensive unbiased exploration of the possible alternative explanations for symptoms of factitious illness to occur before this potentially flawed diagnosis is attached to a parent or caregiver.

After final orders

At the time of final orders in Children's Court, there is frequent mention that the parent will complete the tasks set out by case-workers in the Summary of Proposed Plan produced for each care application. The Summary of Proposed Plan sets out what the parents must achieve before restoration of their children will be considered. Parents who face substantiation of allegations of abuse do not have an easy road with their attempts to vary the care orders by a further application to the court. A parent with a drug problem or an anger management problem can complete rehabilitation and education and present themselves to court as being able to resume care of the children with little risk to the children. Whereas in NAI cases, the parents can have a more difficult time convincing a Magistrate that restoration will not constitute an unacceptable risk to a child. The strict liability approach underlines this position and means that once having caused harm to a child, the parent presents a risk forever, unless they have confessed and completed child protection counselling. In Factitious Illness cases, there is often a view that the parent perpetrator has a flawed personality and morality and therefore is not a person who should be allowed to have care of children.

The need for further examination and information

Many articles about child protection end with a plea for more research on a particular topic.

Our plea is for the NSW Children's Court to begin to collect basic information about the number of cases that come before the Court where the DCJ has categorised the case as NAI. There are many gaps in information about how decisions are made and what criteria (such as scientific data from physical tests) are used to establish or substantiate a finding of NAI. The current forensic processes of investigation and substantiation of NAI sometimes allow decisions to be made without clear evidence, frequently based on evidence from a single expert, with use of undeclared value and moral judgements about the worth of parents who are suspected of deliberately or recklessly harming a child. Therefore, we would like to see more interest in examining the processes and decisions surrounding NAI, as well as more variety in the approaches used to assess what has happened and what continues to happen for the children and the family. The work of clinicians working with those accused of FIIA (Davis, Murtagh, & Glaser, 2018; Kozlowska & Foley, 2006; Sanders & Bursch, 2019) is an example of rational and innovative work with a critical eye that addresses a range of potential factors that contribute to the individual or family processes and that embraces opportunities to develop new techniques to manage risks without assuming that removal and separation of parent and child must be the resolution.

In this examination of NAI cases, the argument is that we need to re-consider the current practices and use up to date knowledge about psychological processes and family dynamics.

It is hoped that there may be attention given to:

- unravelling the paediatricians process of determining that the parent has not given an adequate explanation and then finding that there has been a NAI;
- a broader exploration of issues when the question of NAI injury is first raised, including assessment of individual psychological functioning, family functioning and stressors faced by parents.

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