FACT-FINDING AND RISK ASSESSMENT IN NON ACCIDENTAL INJURY CASES[1]

INTRODUCTION

Serious non-accidental injury (NAI) is a discrete area of harm with a number of complicating indicators, often unexplained, which do not sit easily within the usual conventions and risk management tools that may be applied to other more easily quantifiable sources of risk.

This discussion is divided between the two constituent parts of first-instance care proceedings in New South Wales (NSW) and in the United Kingdom (UK) which, in spite of the differing vernacular, share a similar purpose and process:

A. Threshold (otherwise: need of care/fact-finding of actual or likely harm) Stage
    - Setting the scene
    - Standard of proof
    - Uncertain perpetrator cases
    - Fact finding checklist

B. Disposition (Disposal/placement/welfare/risk assessment) Stage

The majority of the cited law in part A is from the UK because the threshold stage is more carefully litigated in there than in NSW where the greater emphasis is on permanency planning.

THRESHOLD STAGE: 1. SETTING THE SCENE AT THE OUTSET

Whilst their factual landscape will obviously vary, the evidential road map of NAI cases will always be the same. The following should be clearly identified and logged at the outset in tabular or other easily referable form and continually updated as further evidence is gathered:

1. <u>Injury/ies</u>

It is recommended that these be clearly listed comprising:

- Medical description of each injury (if necessary, also set out in lay terms for easy reference)
- Timing where possible
- Distinction of those injuries which, according to medical opinion, could be accidental from those which could not.

2. <u>Explanations</u>

The explanation(s) (or their absence) given by carers of a child that has suffered non-accidental is/are fundamental to an assessment of whether or not that child can be restored to, or remain in a household which includes that/those carer(s).

In each case there will be three possibilities:

[1] Note: This article is a revised and updated version of *Non-accidental injury in care proceedings – A digest for practitioners (CLN June 2009)*

a) no explanation is given
b) explanation is given which is regarded by appropriately qualified medical opinion to be consistent with the injury suffered
c) explanation is given which is regarded by appropriately qualified medical opinion to be inconsistent with the injury suffered

The uncertainty flowing from an unexplained injury will often be aggravated by:

a) one person giving multiple conflicting accounts
b) different caregivers giving conflicting accounts
c) both of the above

3. Compiling the list of possible perpetrators

Any enquiry, whether criminal or civil, into injury suffered by a child, needs to begin with identifying the pool of possible perpetrators. This exercise is fraught with hazard not least because it will often not be possible for an injury to be timed with sufficient precision to be able to identify the person(s) in whose care the injury could have occurred. Narrowing a pool to a workable number, particularly where there is a large body of friends and extended family regularly coming to a household is a challenge. However, by way of a starting point, the pool of perpetrators is naturally narrowed:

a) by the timing of the injury where the evidence allows:

   i) this can often be narrowed to a range of days upon physical examination and the application of medical science

   ii) using the child's presentation as a barometer. As a general rule, children tend not to conceal pain and it will often be possible by to recall when adverse presentation was first noticed

b) by social isolation in cases where possible perpetrators actually have very few others entering their household with such frequency that would cloud the enquiry into possible carers. Equally though the opposite is as likely to be true which then broadens the pool.

THRESHOLD STAGE: 2. STANDARD OF PROOF OF ACTUAL HARM AND THE LIKELIHOOD OF FUTURE HARM

Section 93(4) *Children and Young Persons (Care and Protection) Act 1998* provides affirmation, if any were needed, that the Children's Court, being a civil court, is a bound by the civil standard of proof.

In proceedings where especially serious allegations are made, the leading Australian authority which has withstood nearly a century of challenges is *Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 (30 June 1938).* Dixon J:

> *When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues…but consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.*

Two relatively recent cases in the UK set out the principle thus:

Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563; [1995] UKHL 16: Lord Nicholls at paragraph 73:

> *"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury... "*

However, where the egregious event is known to have happened rather than alleged, Lady Hale said in *S-B Children [2009] UKSC 17 (HL)* at para 73:

> *"It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied."*

The context of this passage from *S-B* is an important examination of the distinction between findings of actual harm suffered in the past and the likelihood of future harm:

Lady Hale at paragraph 8 and 9:

> *8. The leading case on the interpretation of these conditions is the decision of the House of Lords in Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563. Three propositions were established which have not been questioned since. First, it is not enough that the court suspects that a child may have suffered significant harm or that there was a real possibility that he did. 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. It is enough that there is "a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case" (per Lord Nicholls of Birkenhead, at p 585F).*
>
> *9. Thus the law has drawn a clear distinction between probability as it applies to past facts and probability as it applies to future predictions. Past facts must be proved to have happened on the balance of probabilities, that is, that it is more likely than not that they did happen. Predictions about future facts need only be based upon a degree of likelihood that they will happen which is sufficient to justify preventive action. This will depend upon the nature and gravity of the harm: a lesser degree of likelihood that the child will be killed will justify immediate preventive action than the degree of likelihood that the child will not be sent to school.*

In other words, whilst it is necessary for the facts upon which likelihood is based must be proved on the balance of probabilities, it is *not also* necessary that the likelihood itself is.

THRESHOLD STAGE: 3. UNCERTAIN PERPETRATOR CASES

The often vexing issue in NAI cases, or indeed in any case which involves harm caused by human intervention, is what does that court do in circumstances where it cannot be satisfied to the requisite standard who inflicted the injury?

<u>The appropriate test for identifying the perpetrator</u>

In *North Yorkshire County Council v SA & Others [2003] EWCA Civ 839* Dame Butler-Sloss considered the merit of the "no possibility test"[2] (i.e. everybody is a possible perpetrator until the court finds that there is no possibility that they could be) which had been applied by the judge in the court below, and found that he had fallen into error.

Her Ladyship then considered what the correct test was and in so doing referred to the phrase "real possibility" used by Lord Nicholls in *re H (infra)* which was concerned with standard of proof and now applied it in the context of identification of the perpetrator: At paragraph 26:

> *"It seems to me that the two most likely outcomes in 'uncertain perpetrator' cases are as follows. The first is that there is sufficient evidence for the court positively to identify the perpetrator or perpetrators. Second, if there is not sufficient evidence to make such a finding, the court has to apply the test set out by Lord Nicholls as to whether there is a real possibility or likelihood that one or more of a number of people with access to the child might have caused the injury to the child. For this purpose, real possibility and likelihood can be treated as the same test. As Lord Nicholls pointed out in re O and N (Minors); re B (Minors) the views and indications that the judge at the first part of a split trial may be able to set out may be of great assistance at the later stage of assessment and the provision of the protection package for the injured child. I would therefore formulate the test set out by Lord Nicholls as, 'Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?'. There may perhaps also be the third possibility that there is no indicator to help the court decide from whom the risk to the child may come, in which eventuality it would be very difficult for the local authority and for the court to assess where the child might be at most risk."*

In *S-B Children (infra),* Lady Hale acknowledged the possible confusion caused by the two uses of "real possibility" but affirmed that this was the test:

> *41. In North Yorkshire County Council v SA [2003] EWCA Civ 839, [2003] 2 FLR 849, the child had suffered non-accidental injury on two occasions. Four people had looked after the child during the relevant time for the more recent injury and a large number of people might have been responsible for the older injury. The Court of Appeal held that the judge had been wrong to apply a "no possibility" test when identifying the pool of possible perpetrators. This was far too wide. Dame Elizabeth Butler-Sloss P, at para 26, preferred a test of a "likelihood or real possibility".*
>
> *43. … there are real advantages in adopting this approach. The cases are littered with references to a "finding of exculpation" or to "ruling out" a particular person as responsible*

[2] Regarded by the trial judge to be the test in Re B (Children: NAI)[2002] EWCA Civ 902 [2002]

for the harm suffered. This is, as the President indicated, to set the bar far too high. It suggests that parents and other carers are expected to prove their innocence beyond reasonable doubt. If the evidence is not such as to establish responsibility on the balance of probabilities it should nevertheless be such as to establish whether there is a real possibility that a particular person was involved. When looking at how best to protect the child and provide for his future, the judge will have to consider the strength of that possibility as part of the overall circumstances of the case.

More recently in *Re B (A Child)[2018] EWCA Civ 2127 Peter Jackson LJ:*

19. The proper approach to cases where injury has undoubtedly been inflicted and where there are several possible perpetrators is clear and applies as much to those cases where there are only two possible candidates as to those where there are more. The court first considers whether there is sufficient evidence to identify a perpetrator on the balance of probabilities; if there is not, it goes on to consider in relation to each candidate whether there is a real possibility that they might have caused the injury and excludes those of which this cannot be said: North Yorkshire County Council v SA [2003] EWCA Civ 839, per Dame Elizabeth Butler-Sloss P at [26].

20. Even where there are only two possible perpetrators, there will be cases where a judge remains genuinely uncertain at the end of a fact-finding hearing and cannot identify the person responsible on the balance of probabilities. The court should not strain to identify a perpetrator in such circumstances: Re D (Care Proceedings: Preliminary Hearing) [2009] EWCA Civ 472 at [12].

21. In … a simple binary case like the present one, the identification of one person as the perpetrator on the balance of probabilities carries the logical corollary that the second person must be excluded. However, the correct legal approach is to survey the evidence as a whole as it relates to each individual in order to arrive at a conclusion about whether the allegation has been made out in relation to one or other on a balance of probability. Evidentially, this will involve considering the individuals separately and together, and no doubt comparing the probabilities in respect of each of them. However, in the end the court must still ask itself the right question, which is not "who is the more likely?" but "does the evidence establish that this individual probably caused this injury?" In a case where there are more than two possible perpetrators, there are clear dangers in identifying an individual simply because they are the likeliest candidate, as this could lead to an identification on evidence that fell short of a probability. Although the danger does not arise in this form where there are only two possible perpetrators, the correct question is the same, if only to avoid the risk of an incorrect identification being made by a linear process of exclusion.

<u>Desirability of trying to identify the perpetrator</u>

Whilst, in the words of Peter Jackson LJ (just cited), the court should not strain to identify a perpetrator, the benefits of so doing, if within reach, had been succinctly set out in an earlier case, *Re K [2004] EWCA Civ 1181* by Wall LJ:

57. As a general proposition we think that it is in the public interest for those who cause serious non-accidental injuries to children to be identified, wherever such identification is possible. It is paradigmatic of such cases that the perpetrator denies responsibility and that those close to or emotionally engaged with the perpetrator likewise deny any knowledge of

how the injuries occurred. Any process, which encourages or facilitates frankness, is, accordingly, in our view to be welcomed in principle

58. As a second background proposition, we are also of the view that it is in the public interest that 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 non-accidental injuries have in due course to come to terms with the fact that one or both of their parents injured them. This is a heavy burden for any child to bear. In principle, children need to know the truth if the truth can be ascertained.

The first of these two propositions serves to remind that in addition to identifying those within the pool that represent a direct risk to a child, also crucial to the enquiry is the historical role and future protective capacity of those close by who failed to protect the child from that direct source.

In determining the extent to which the failure to protect is a child protection issue in the future, the court then needs to ask:

Did (the) person(s) who has/have been found to have failed to protect the child know, or at some point during the critical period, discover that the perpetrator was a risk?

a) If yes then the court goes on to enquire whether, upon finding out that the perpetrator was a risk, they acted protectively either by insulating the child still in the household from that risk or, in cases where the child has already been removed, demonstrated a genuine belief that the risk existed?

b) If not, does their ignorance indicate a lack of care, attention or insight?

The answer in each case can then be factored into a subsequent assessment of that person as a protective factor in future care arrangements for the child. In either case if, as if often the case, the non-perpetrator is the partner or co-parent of the perpetrator whose entire belief system is anchored to a person who is then found to present an unacceptable risk to a child, making appropriate remarks to authorities about remaining separated from such a person would require enormous adjustment. It follows that the acknowledgment of the risk will not always be immediate or unequivocal but this would not necessarily be suggestive of a prohibitive and decisive lack of insight.

Wall J in *Re CB and JB (Care Proceedings: Guidelines) [1998] EWHC Fam 2000:*

"Had the facts shown on the balance of probabilities that the father and not the mother was responsible, the court would have needed to look carefully at her role to see (a) if there was a failure by her to protect CB from injury, and... if so, how serious it was. If the evidence had been sufficient for a finding of fact that there was a serious failure to protect, the court would then have needed to make an assessment of the risk involved in placing both children in the mother's care. This is a different situation from that which arises from an inability to decide which parent was responsible, and requires a different approach".

<u>Where only one child in a sibling group has suffered harm, is the other in need of care? Where at least one of two persons is known to have caused harm, do both persons represent a risk?</u>

Re CB and JB (Care Proceedings: Guidelines) [1998] EWHC Fam 2000 Wall J:

Where:

> *(a) parents have two children;*
> *(b) one child has been non-accidentally injured in the care of her parents and the other has not been injured;*
> *(c) there is no other possible perpetrator, but*
> *(d) the court is unable on the Re H standard to decide which parent inflicted the injuries;*

can it be argued either (i) that the threshold criteria are not met in relation to the uninjured child, alternatively (ii) that where one parent is off the scene (as here, where the father is in prison) both children can properly be returned to the other parent, because there is no factual basis upon which it can be said that either child is at risk of harm in the future?

The answer to both parts of this question, in my judgment, is an emphatic 'no'… it strikes at the whole philosophy of child protection embodied in the Children Act 1989 and seeks to import into care proceedings the unsatisfactory rule of criminal law that if a jury cannot decide which of two people is responsible for the death of a child, or serious injury to a child, each is entitled to an acquittal.

…accordingly, in my judgment, a finding of fact that a child in CB's position has been non-accidentally injured by one or both of her parents whilst she was in their joint care is sufficient to satisfy the threshold criteria under s 31(2) of the Children Act 1989 in relation to both children, notwithstanding the fact that only one has suffered non-accidental injury and that on the available evidence the court cannot be satisfied on the balance of probabilities that it was one parent rather than the other who inflicted those injuries. To hold otherwise would in my judgment not only be illogical, but would render the statutory provisions ineffective to deal with a commonplace aspect of child protection.

This case:

a) removes any doubt, should it exist, that even though only one child in a sibling group has been harmed, the whole sibling group is equally at risk
b) confirms that where there is sufficient evidence to prove that at least one of two persons caused the injuries but there is insufficient evidence to prove which one then they are both seen as representing a risk

On the latter point in the landmark House of Lords decision given in *In re O and N (minors) (FC) In re B (minors) (2002) (FC) [2003] UKHL 18)* Lord Nicholls affirmed the approach of Wall J in *CB and JB:* and said this:

> *"Quite simply, it would be grotesque if such a case had to proceed at the welfare stage on the footing that, because neither parent, considered individually, has been proved to be the perpetrator, therefore the child is not at risk from either of them. This would be grotesque because it would mean the court would proceed on the footing that neither parent represents a risk even though one or other of them was the perpetrator of the harm in question"*

Lucas Direction as to credibility

R v Lucas (Ruth) [1981] QB 720 is the origin of a direction given by and to tribunals of fact that a witness may give truthful evidence as to one matter without necessarily being truthful about all matters and vice versa.

In *H v City and County of Swansea and Others [2011] EWCA Civ 195* the Court of Appeal found that the trial judge had erred in including a person in the pool of possible perpetrators in spite of the preponderance of evidence suggesting that she was not. However the finding was made because she had lied about other issues. The appeal was allowed because:

> *(1) The judge's finding about the pool of perpetrators had been flawed. It had been essential for him to weigh up the mother's lies and her presence during part of the critical period, against the factors – such as the text messages, her reaction to the injuries and the steps she took in the immediate aftermath of their discovery – that pointed away from her having been responsible, but he had not completed that part of the exercise. Had he considered all the relevant factors he would have concluded that it was not appropriate for her to remain in the pool of possible perpetrators.*
> *(2) A Lucas direction would have been helpful to the judge particularly where, as here, presence and lies seemed to be the primary (and possibly the only) foundation for the finding against the mother.*

THRESHOLD STAGE: 4. PULLING IT ALL TOGETHER – THE FACT FINDING CHECKLIST

In what has now become the standard go to reference for judges in fact-finding cases in the UK, in *Re JS [2012] EWHC 1370 (Fam)* Baker J set out the following principles to be applied in fact finding hearings:

> *36. In determining the issues at this fact finding hearing I apply the following principles. First, the burden of proof lies with the local authority. It is the local authority that brings these proceedings and identifies the findings they invite the court to make. Therefore the burden of proving the allegations rests with them.*
>
> *37. Secondly, the standard of proof is the balance of probabilities (*Re B [2008] UKHL 35*). If the local authority proves on the balance of probabilities that J has sustained non-accidental injuries inflicted by one of his parents, this court will treat that fact as established and all future decisions concerning his future will be based on that finding. Equally, if the local authority fails to prove that J was injured by one of his parents, the court will disregard the allegation completely. As Lord Hoffmann observed in* Re B*:*
>
> > *"If a legal rule requires the facts to be proved (a 'fact in issue') a judge must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1."*
>
> *38. Third, findings of fact in these cases must be based on evidence. As Munby LJ, as he then was, observed in* Re A (A Child) (Fact-finding hearing: Speculation) *[2011] EWCA Civ 12:*
>
> > *"It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation."*

39. Fourthly, when considering cases of suspected child abuse the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. As Dame Elizabeth Butler-Sloss P observed in Re T [2004] EWCA Civ 558, [2004] 2 FLR 838 at 33:

> *"Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."*

*40. Fifthly, amongst the evidence received in this case, as is invariably the case in proceedings involving allegations of non-accidental head injury, is expert medical evidence from a variety of specialists. Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. The roles of the court and the expert are distinct. It is the court that is in the position to weigh up expert evidence against the other evidence (*see A County Council & K, D & L [2005] EWHC 144 (Fam) *per Charles J). Thus there may be cases, if the medical opinion evidence is that there is nothing diagnostic of non-accidental injury, where a judge, having considered all the evidence, reaches the conclusion that is at variance from that reached by the medical experts.*

41. Sixth, in assessing the expert evidence I bear in mind that cases involving an allegation of shaking involve a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bringing their own expertise to bear on the problem. The court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others (see observations of King J in Re S *[2009] EWHC 2115 Fam**).***

42. Seventh, the evidence of the parents and any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them (see Re W and another (Non-accidental injury) [2003] FCR 346).

43. Eighth, it is common for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear and distress, and the fact that a witness has lied about some matters does not mean that he or she has lied about everything (see R v Lucas *[1981] QB 720).*

44. Ninth, as observed by Hedley J in Re R (Care Proceedings: Causation) *[2011]* EWHC 1715 Fam*:*

> *"There has to be factored into every case which concerns a disputed aetiology giving rise to significant harm a consideration as to whether the cause is unknown. That affects neither the burden nor the standard of proof. It is simply a factor to be taken into account in deciding whether the causation advanced by the one shouldering the burden of proof is established on the balance of probabilities."*

The court must resist the temptation identified by the Court of Appeal in R v Henderson and Others [2010] EWCA Crim 1219 *to believe that it is always possible to identify the cause of injury to the child.*

45. Finally, when seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators is whether there is a likelihood or a real possibility that he or she was the perpetrator (see North Yorkshire County Council v SA [2003] 2 FLR 849*. In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injury to be identified both in the public interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judge should not strain to do so (see* Re D (Children*) [2009] 2 FLR 668,* Re SB (Children) [2010] 1 FLR 1161*).*

B. RISK ASSESSMENT (DISPOSITION)

Approaches to risk assessment: Overview

NAI is an area of harm which historically in NSW has been treated differently to other indicators of unacceptable risk. That is to say:

- Sexual abuse is not tolerated at all and is not regarded as something from which a perpetrator can be redeemed
- Drug use, domestic violence and neglect are not suffered gladly and certainly require parents to show benefit from engagement with remedial services

NAI, on the other hand, 10 years ago when the original version of this article was written and published, was the one category of harm where children were routinely restored or allowed to remain in households in which NAI was suffered and little had changed because:

- parents would not usually disclose the cause of the harm…
- …which an actuarial assessment could not therefore attribute to them and
- …absent other indicators of risk,
- the risk assessment tools recommended restoration unless they were overridden

The inherent mischief in that approach to risk assessment is particularly exposed in NAI cases where the source of harm can be pathological without being socio-economic.

Since then though, with the regular application of the "unacceptable risk test" a more protective approach has emerged bringing NAI into line with those other areas of harm, so that, as with drug use, violence and neglect, if parents fail to take ownership of the harm and benefit from remedial action then the risk of restoration would remain unacceptable. In the context of NAI, a plausible explanation and acknowledgement of responsibility is increasingly seen as mandatory so that properly tailored services and education can be put in place to minimise the likelihood of a recurrence.

Approaches to risk assessment: Cases

Lord Nicholls in *In re O and N (minors) (FC) In re B (minors)* (infra) (at paragraph 24):

> *The matters the court may take into account are bounded only by the need for them to be relevant, that is, they must be such that, to a greater or lesser extent, they will assist the court in deciding which course is in the child's best interests. I can see no reason of legal policy why, in principle, any other limitation should be placed on the matters the judge may take into account when making this decision.*

That decision is particularly resonant now in an era where the Children's Court of NSW refers to its risk assessment scheme as the "Unacceptable Risk test", the current lead authority being *DFaCS re Eggleton [2016] NSWChC 4* in which Johnstone P concluded [at paragraphs 17 and 18]:

> *17. Central to the decision in the present case is the application of the unacceptable risk of harm test formulated in the High Court decision in* M v M [1998] HCA 68*. Importantly in the present case the Court is required not only to consider whether there exists an unacceptable risk of harm but to evaluate the seriousness of that risk and the prospect of the identified harm actually occurring. In* Napier v Hepburn [2006] FCA 1316*, the Full Court of the Family Court discussed the balancing act to be undertaken in the following extract from a judgment given by Fogarty J (the author of the paper entitled, "Unacceptable Risk: a Return to Basics", referred to with approval in* Johnson v Page [2007] FamCA 1235 *at [68] and [71]):*
>
> > "In assessing the unacceptable risk question the Court must undertake a qualitative analysis. For instance, that determination cannot appropriately be made through a process which counts the number of considerations which favour access and those which militate against access, and then asks on which side the balance falls. Rather the essential weight must be attached to the magnitude of the harm to which the risk relates. The notion of unacceptable risk must be assessed in the light of the grave consequences...to a child's development and safety as well as the effects of future contact with the party."
>
> *18. It seems to me….that the unacceptable risk of harm that is said to be presented to the child by his parents needs to be evaluated against the prospect of it actually occurring, and against the protective measures that might be put in place to ameliorate or minimise that risk to an acceptable level.*

The genesis of the emergence of the unacceptable risk test in the NSW Children's Court over the last 10 years were two NAI cases decided by Scott Mitchell SCM.

The two cases, *Re Anthony [2007] CLN 8 (*also cited as *[2008] NSWLC 21)* and *Re Lincoln & Raymond [2009] CLN 5),* cited and applied the acceptability of risk approach set out in the judgment of the High Court of Australia in *B & B and M & M [1988] HCA 66 and 68* (the essence of which is to be found at paragraph 25):

> *"Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a "risk of serious harm" (*A v. A (1976) VR 298*, at p 300), "an element of risk" or "an appreciable risk" (*Marriage of M (1987) 11 Fam LR 765*, at p 770 and p 771 respectively), "a real possibility" (*B. v. B. (Access) (1986) FLC 91-758*, at p 75,545), a "real risk" (*Leveque v. Leveque (1983) 54 B CLR 164*, at p 167), and an*

> *"unacceptable risk" (*In re G. (a minor) (1987) 1 WLR 1461*, at p 1469). This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse."*

In *Anthony* Mitchell SCM applied the acceptability of risk test by firstly setting out the inherent problem when injuries are unexplained[3] (at paragraph 18):

> *"If the cause of the injuries was known and was acknowledged by the person responsible, one could assess the likelihood of that person acting again so as to cause the injuries. It would be possible to assess the risk involved to the plaintiff and to weigh that against the advantages of returning him to his parents. However in the absence of any explanation, it is far more difficult to assess and weigh the relative advantages and disadvantages in this matter."*

In that context His Honour then considered and balanced the risks associated with restoration against those in alternate (out of home) care (at paragraph 44):

> *"It follows then that, in assessing whether the risk posed to a child by a parental proposal is acceptable or unacceptable, one of the factors which will be considered is the risk of disadvantage posed by alternate proposals for the care of the child advanced by the Director-General or any other party. There will be cases where the risks posed by parents are so egregious that they quite overwhelm the disadvantages posed by a proposal of long term out-of-home care but, in other cases, such as* Re Nellie [2004] CLN 4*, where there had been serious injury to the child caused by an unexplained shaking incident, the risks posed by a restoration to the parents and the disadvantages involved in the Director-General's proposals were much more evenly balanced."*

In *Anthony* the alternative to restoration was a family placement and His Honour was therefore not troubled with the need to compare the inherent hazards of foster care but, in affirming the proposal that Anthony should be placed with those family members, acknowledged the complications arising from missing out on *"...the intimate relationship with his mother and father that is the birthright of a child "*.

The second case*, Lincoln and Raymond (2009) CLN5* also concerned unexplained shaking injuries with the parents comprising the pool of possible perpetrators. In finding that there was no realistic possibility of restoration to either parent, Mitchell SCM applied, as he had done in *Anthony,* the *M v M* model and added a list of relevant factors to be considered in assessing the acceptability of the risk (at paragraph 58):

---

[3] See also *T v H and Ors* (NSWSC 19 December 1985, unreported) per Hodgson J: *"... on the balance of probabilities, it seems to me that the Plaintiff (child) would be in danger if he was at this time returned to the care of the Second Defendants (parents). Had there been an explanation of his injuries, the result may have been different. If the cause of injuries was known, and was acknowledged by the person responsible, one could assess the likelihood of that person acting again so as to cause the injuries. It would be possible to assess the risk involved to the Plaintiff, and to weigh that against the advantages of returning the Plaintiff to his parents. However, in the absence of any explanation, it is far more difficult to assess and weigh the relative advantages and disadvantages in this manner."*

"The question for the Children's Court in the present case, then, is not whether Ms. Smith or Mr. Jones or, for that matter, any other person is responsible for Lincoln's injuries but whether the proposals put to the court for his care and for the care of his brother constitute an acceptable or unacceptable risk so far as the safety, welfare and well-being of each of the children is concerned. In assessing risk, the court should have particular regard to the following:-

- *the egregious nature and extent of the injuries which have been inflicted on Lincoln;*
- *the fact that neither parent has offered an acceptable explanation of those injuries;*
- *the opportunity which each of Lincoln's parent has had to inflict injury;*
- *the relative lack of opportunity which any other person has had to mistreat Lincoln;*
- *the on-going extreme vulnerability of Lincoln in particular and his and Raymond's need of and entitlement to protection;*
- *the extent of Lincoln's continuing disabilities and the degree to which his on-going care will call for special skills and special qualities including patience and empathy;*
- *the reservations regarding the reliability and suitability of his parents which prudently are entertained in the circumstances of Lincoln's injuries while in the care of his parents;*
- *the consequences of Lincoln's long term separation from his parents, particularly with regard to his attachments;*
- *the attachments of each of the boys;*
- *the suitability of Mr. Smith as a carer for Raymond and the boy's progress while in his father's care;*
- *the unavailability of any other family member to take care of the children;*
- *the risks and unknowns necessarily involved in out-of- home care and separation from parents.*

The following year saw the first of a cluster of cases decided by Judge Peter Johnstone in which the unacceptable risk test was applied to unexplained non-accidental injury cases and in which His Honour found that there was no realistic possibility of restoration:

SS v Department of Human Services (NSW)[2010] NSWDC 279 concerned a child who suffered brain damage found by His Honour to have been caused by one or both of his parents who then concluded (at paragraph112):

"...in this case there is in fact strong evidence to support the notion that the refusal, or failure, to acknowledge the abuse, leads to a comfortable satisfaction that there remains a continuing likelihood of physical abuse or ill-treatment, in respect of [subject children]. That evidence, in my view, accords with common sense."

Similarly, in *MXS v Department of Family and Human Services (NSW) [2012] NSWDC 63* His Honour at paragraph 63:

"*MXS and MS both deny having been the perpetrator, deny that the other was the perpetrator and maintain that the other was not and is not capable of occasioning the sort of harm caused to RL that involved the application of significant force. Absent an acknowledgement or an acceptance of the potential for further harm by the carers, proper safeguarding of the children is impossible. The refusal, or failure, to acknowledge the issue further exacerbates the continuing risk of future physical abuse or ill-treatment of both children."*

In *Department of Family and Community Services (NSW) and the Bell Collins Children [2014] NSWChC 5*[4] His Honour, now as President of the Children's Court, found that serious injury was inflicted by one or both parents and that therefore the risk of restoration was unacceptable:

> *"Simply put, if injuries cannot be explained then any children in the care of the parents are at risk because without knowing the cause of the injuries there is no way to mitigate the risk"*

Elsewhere, in *SL & AB v The Secretary, Department of Family and Community Services & LA NSW - 371286 of 2013 (NSW District Court unreported)* Olsson DCJ[5] :

- found on the balance of probabilities that the injuries sustained were non-accidental and that the risk associated with restoration was unacceptable
- cited with approval and relied upon *Re Anthony* , in particular the passage regarding inability to assess the risk of recurrence because the injury was unexplained and unacknowledged
- found that the risk of the factors posed by alternate care is a factor for consideration.
- rejected a submission by the ILR the effect of which was that if the child was at risk when the injuries were sustained, he were not at risk now but
- found that absent other psycho-social risk factors, as the child's age and self-protective capacity increases, so his vulnerability is likely to reduce

More recently in the UK High Court, in *D (A Child), Re (Rev 1) [2017] EWHC 3075 (Fam) (29 November 2017)* Roberts J re-heard a fact-finding case remitted by the Court of Appeal at which it was agreed that the court would also deal with disposition (not uncommon in the UK although less common in NAI cases). The court:

- found that whilst the medical evidence was not conclusive, when measured against the father's evidence (found not to have been entirely truthful) and the domestic circumstances at the time (drug use and violence), the possibility that the injuries had an unknown cause could be excluded. Therefore the injury was the result of trauma, inflicted by the father through some form of shaking (from which the child had mercifully made a complete recovery)
- made a care order (i.e. not recommending restoration at that time) but
- nevertheless approved a care plan which foreshadowed continued therapeutic work with the parents and further risk assessment with a view to the child ultimately being restored. In other words the court did not see the failure (by either parent) to acknowledge or explain the injuries as an impediment to restoration in the future.

EPILOGUE

The recent cases cited in this article appear to show that the NSW courts are less tolerant of the failure to explain or acknowledge an inflicted injury than they appeared to be before the advent of this unacceptable risk era. However back then, cases were getting to court with far greater frequency than they appear to be now. One can only speculate whether this is because the reliability of risk assessment tools is compromised by the current tension between family preservation and protection.

[4] This decision was affirmed on appeal *Bell-Collins Children v Secretary, Department of Family and Community Services (No. 2)*

[5] The appeal against this decision (for Judicial Review as the DC decision was an appeal from the Children's Court) was dismissed: SL v Secretary, Department of Family and Community Services [2016] NSWCA 124

Either way, continued resolve and diligence from advocates for children and judicial officers are needed to protect the advances made in the judicial approach to NAI cases at this time when, more than ever, Family and Community Services are inclined to leave children in, or return them to, known peril.

Stephan Herridge
Solicitor
April 2019