

A Reflection on Re: A [A Child] [non-accidental injury].

Lessons for Professionals working with Children and Families.

Since the Office of the Children's Convenor was established in 2010 a very small proportion¹ (2.9%) of all referrals received have been made on the grounds of physical or sexual abuse. The case of **A (A child)(non-accidental injury)** heard before the Guernsey Juvenile Court (the "**Court**") in May 2019, indicates that this may in part be due to professionals' differing understanding of what precisely 'physical abuse' is and how to deal with it. This case provides an opportunity to reflect on professional practice and the lessons we can learn from this case.

The legal framework in Guernsey and Alderney for intervention when non-accidental injury is suspected is the Children (Guernsey and Alderney), Law 2008 (the "**Children Law**"). Section 35(1) sets out the criteria for compulsory intervention:-

35 (1) The question of whether compulsory intervention may be needed in respect of a child shall only arise if

- (a) There is, or appears to be, no person able and willing to exercise parental responsibility in such a manner as to provide the child with adequate care, protection, guidance and control, and*
- (b) At least one of the conditions referred to in subsection (2) is satisfied, in respect of that child.*

¹ Source: Annual Reports of the Children's Convenor for years 2010-2018.

Section 35(2) lists a range of concerns relating to children's welfare. This includes the following;

(a) the child has suffered or is likely to suffer significant impairment to his health or development

(b) the child has suffered or is likely to suffer, sexual or physical abuse

Introducing the case of A

A was a young child aged four at the time of the Court hearing. A had suffered a number of unexplained injuries throughout her life, some of which were minor in presentation (bruises, scratches). The Children's Convenor (the "**Convenor**") decided to refer A to a hearing of the Child, Youth and Community Tribunal (the "**CYCT**") on the basis that she had suffered physical abuse. The child's parents did not accept the reasons for concern and therefore the Convenor made an application to the Court for a finding on the matters that they did not accept. There had been previous legal proceedings involving the child and her family two years prior to the referral of the child to the Convenor when an application for a residence order was made by one of the child's parents. The fact-finding hearing in this earlier application, had considered two of the injuries and had found one injury to be accidental and the other to be unexplained. The Convenor sought findings in respect of five unexplained injuries, including the two that had been considered in the private law hearing. The Convenor sought to establish that the injuries were inflicted injuries and that they individually or collectively amounted to physical abuse of the child. The matter was heard in the Court in May 2019. [The full case has been reported and can be found on the Guernsey Legal Resources website].

A second bite of the cherry?

Given that the Court had already ruled in respect of two of the injuries in the earlier private law application, the Court had to consider whether the evidence surrounding those injuries could be re-heard in the Convenor's application. The Court concluded that it could, the

principle of res judicata² was found not to apply. The judge following the Scottish Authority of **McGregor v D**³ accepted that the court was bound to hear all the evidence which the Convenor wished to put forward in relation to the application. The Judge however also concluded that the proceedings were qualitatively different. In his words:-

“Whilst you cannot have a second bite of the same cherry, this is not the same cherry”.

Defining Physical Abuse

The term ‘physical abuse’ is not defined in the Children Law. The Court therefore had to consider how to interpret this term for the purposes of section 35(2)(b). No assistance could be sought from either the English or Scottish legislation as ‘physical abuse’ does not form a threshold condition for statutory interventions in either England (e.g. supervision orders and care orders) or Scotland (e.g. compulsory supervision orders and permanence orders).

Professionals working in the Bailiwick of Guernsey and the UK are familiar with the term ‘physical abuse’ in the context of child protection where being at risk of physical abuse forms a specific category for child protection registration. Guidance has been produced in each of these jurisdictions defining physical abuse for practitioners working in this field. The Court considered these definitions and accepted that the definition in *‘Working Together to Safeguard Children 2018’* issued by the Department of Education in England and Wales were workable definitions for the purposes of this case.

‘Working Together to Safeguard Children’ states that physical abuse is *‘a form of abuse which may involve hitting, shaking, throwing, poisoning, or otherwise causing physical harm to a child’*. Abuse is defined as *‘a form of maltreatment to a child. Someone may abuse or neglect a child by inflicting harm, or by failing to act to prevent harm.’*

² Res judicata is a legal principle that once a matter has been finally decided on its merit by a court it cannot be subject to legal proceedings again between the same parties

³ . McGregor v D 1981 SLT (Notes) 97. Case Number 19, the Court of Session found that the Sheriff was bound to hear all the evidence the reporter proposed to tender in relation to a referral, and the principle of res judicata did not apply. This principle was confirmed in the Inner House Court of Session 1986 SLT 679.

The Court accepted that physical harm caused to a child through negligence or neglect can amount to physical abuse. Therefore physical abuse will include deliberate, reckless or negligent action or inaction resulting in physical harm to a child.

Who caused the harm? How was it caused?

Is it necessary to determine who it was that perpetrated the harm and what the mechanism of injury was? No.

Whilst it is always preferable to identify the perpetrator (when this information is known), it is not necessary to show who caused the harm to establish that a child has suffered or is likely to suffer physical abuse. In many cases the person who caused the harm and/or the child's carers will be unable or unwilling to provide an explanation for how the injuries occurred. The fact that the person responsible for the injuries cannot be identified does not prevent legal steps being taken to protect the child.

The nature of child abuse is such that there are unlikely to be independent witnesses to the incidents that lead to harm. In many situations, for example, where the child is too young to give an account of events and no one is able to provide an explanation for the injury, it will not be possible to know exactly how the injury was caused. Often there will be a range of factual possibilities and the Court does not need to identify the exact mechanism to establish that physical abuse has occurred.

Totality of injuries

Where the child has received a number of injuries over a period of time as well as looking at each of the injuries separately the court will also look at the totality of the injuries. Often injuries when looked at in isolation may appear minor in nature, for example unexplained bruising. However when a number of minor injuries are considered together a pattern or similarity may emerge that may give rise to concern. The judge in the A case made reference to a recent English case stating

“In A Local Authority and A Mother and A Father and A [2019] EWCA Civ 799, the danger of looking at injuries separately and not “at each in the context of all the other injuries and evidence” was stressed emphatically by Baker LJ (especially at paragraphs 47-48). The court must “balance the totality of the evidence”. (This is how the evidence in the present case must be assessed.)”

In the A case the court found that A had “suffered from a number of repeated injuries notable for their unusual site, unusual nature and lack of clear history as to how they were caused”

Key messages and lessons

The Convenor has identified the following key messages and lessons from the issues that arose in the A case and makes the following suggestions and observations that may assist professionals in identifying and responding to children who have suffered or who are likely to suffer physical abuse;

- Physical abuse encompasses physical harm caused deliberately, recklessly or negligently and can include failing to act to prevent a child from being harmed. It is therefore important for professionals working with children and families to be aware that physical harm caused to a child as a result of recklessness or negligence may amount to physical abuse as well as action or inaction that is caused deliberately.
- Physical abuse can result in bumps, bruises and scratches as well as more significant injuries. In deciding whether an injury gives rise to concern, the site of the injury should be considered and professionals should refer to the guidance issued by the Islands Safeguarding Children Partnership (the “**ISCP**”) on recognising the indicators of abuse (as set out below).
- Although the term ‘non-accidental injury’ is often used by medical professionals in describing an injury this is not the threshold for compulsory intervention. Wherever possible medical reports for child protection or legal proceedings should include the following:-

- a description of the injuries sustained or physical harm caused to the child;
 - comment on the likely cause or mechanism of any injury or harm sustained;
 - comment on whether it is possible to time the causation of the injury and if not why not;
 - details of any explanations provided for the injury; and
 - whether or not these explanations are consistent with the likely cause or mechanism of the injury.
- When considering whether or not an injury is accidental or whether or not it gives rise to concern it is helpful to bear in mind Lord Justice Ryder's comments at paragraph 9 in the English case of **Re S(A Child) [2014] EWCA Civ 25** *"The term non-accidental injury may be a term of art used by clinicians as shorthand and I make no criticism of its use but it is a catch-all for everything which is not an accident. It is also a tautology: the true distinction is between an accident which is unexpected and unintentional and an injury which involves an element of wrong. That element of wrong may involve a lack of care and/or an intent of a greater or lesser degree that may amount to negligence, recklessness or deliberate infliction."*
 - The concept of 'element of wrong' can be helpful in distinguishing between instances where a child may be inadvertently harmed through a parent trying to protect them (e.g. from running into a busy road) and instances where there has been over-chastisement, over-harsh discipline or neglect.
 - Injuries that are unexplained may give rise to concern. However, professionals should not infer non-accidental injury or physical abuse solely on the basis of a lack of explanation.
 - Child protection professionals should consider all injuries that a child has sustained when assessing the risk of harm to a child or young person. Often injuries when looked at in isolation may appear minor in nature, for example unexplained bruising. However

when a number of minor injuries are considered together a pattern or similarity may emerge that may give rise to concern.

- Professional should follow the ISCP guidance on *Injuries in non-mobile babies and children*. This states that when a child under two years old presents to any professional with an injury (including bumps and bruises), no matter how minor the injury may appear, that professional should ensure that the baby is immediately referred for examination by a paediatrician. Practitioners should immediately seek an explanation for the injury from the parent or carer and make a record of both the injury and the explanation. This guidance should be followed even where a plausible explanation is given by the parent or carer. Bruising may be an indicator of an underlying medical condition, but equally it can represent a precursor to future abuse.
- It is not possible to age a bruise from its colour. There may however be other factors or information that can assist in identifying the time period within which an injury is likely to have occurred. For example, the time period between the injury being first noticed and the last time the child was seen with no injury. These factors should be explored during child protection investigations.
- Where a child is seen by a GP and an injury noted, the injury, however minor, should be recorded with a clear description of the size, shape and location. GPs should seek an explanation for the injury from the child and parent or carer, and record clearly any explanation given.
- When considering whether or not to hold a child protection strategy discussion practitioners should consider the injury to the child in the context of the child's medical and social history. Where the injury is unusual in nature or is in an uncommon area a strategy discussion should take place. In deciding whether the injury is unusual in nature or site social work professionals may wish to seek advice from the on-call paediatrician. When a child protection strategy meeting is held to consider a child who has suffered an injury a paediatrician should be invited to attend. As stated on the ISCP

website it is vital that strategy discussions take place in a way which ensures that all key people are available and are able to be fully involved.

- When a child undergoes a medical examination, the numbers of professionals present should be kept to the minimum necessary. Wherever possible the strategy discussion should be used to plan the location and timing of the examination (having regard to the child's age and routines), the professionals who will attend and the purpose for which they are attending. Consideration should also be given as to whether or not the examination will be recorded and if so all involved should be made aware. Care must be taken during an examination to ensure that conversations regarding causation or mechanism do not take place within the presence of the child.
- Where a child is the subject of a child protection investigation or child protection plan the child's carers should be given clear guidance on their role in supporting both the child and the child protection process. This may include guidance on their role during a child protection medical examination or investigation so that they do not inadvertently lead the child. It may also include guidance on photographing injuries or recording conversations and how to ask open questions of a child on the discovery of injuries.

References

All paediatricians use the RCPCH Child Protection Companion which provides comprehensive information and data in respect of injuries to children. Further information can be accessed via:-

<https://www.rcpch.ac.uk/key-topics/child-protection>