Law, Psychiatry, Society and Child Abuse

Introduction

As will become apparent, the identification of child abuse is a multi-disciplinary affair, drawing upon the combined but not necessarily compatible wisdom of medicine, law and sociology. This book seeks to provide an account of the journey of child abuse through the evolution of these different perspectives culminating in the legal, clinical and sociological discourse which prevails today. It is hoped that this discussion will serve as a useful backdrop and prelude to examination of the legal issues which have arisen in the context of abuse claims, and that it will assist in explaining judicial attitudes to abuse claims and some of the peculiar difficulties which abuse claimants face.

Evolving constructions of child abuse

The concept of child abuse has been described as ‘more like pornography than whooping cough’:\(^1\) in other words, it is a socially constructed phenomenon which reflects the operative values and opinions of a particular culture at a given point in time rather than an objectively defined occurrence. A striking example of this fact is the story of the Pitcairn Islanders recently convicted of having sex with adolescent girls from the age of 12.\(^2\) The case for the defence (although ultimately unsuccessful) was built upon the revelation that the practice of sex with adolescent girls on the islands had become the cultural norm and was an accepted ritual in Pitcairn Islands’ society.

Real shifts in the portrayal of child abuse are also evident when a longitudinal assessment is made of such abuse in the UK. Generally

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speaking, the socially constructed concept of child abuse has undergone a process of redefinition from being depicted largely as a medical concern to being defined as a problem requiring a multidisciplinary focus. In the 1960s child abuse was defined by the medical or disease model of abuse, a fact which was attributable in no small part to the seminal research into physical abuse by Kempe et al. which ascribed many cases of childhood skeletal lesions/fractures to parental abuse.3 The label applied to this discovery (the 'battered child syndrome') was a deliberate ploy to attract the attention and support of the medical profession to the issue and to alert them to the danger of misdiagnosing physical injuries as accidental or unexplained without considering the possibility of trauma being inflicted by the parent.4 By the 1980s child abuse was being portrayed less as a private family matter requiring an emphasis on medical diagnosis and therapeutic intervention, and increasingly as a social phenomenon requiring bureaucratic solutions. The many public inquiries which have been conducted into exposed incidents of child abuse have progressively imposed the social phenomenon construction by focusing on social and economic depravation within the family, outlining the role and functions of the various welfare agencies involved and producing a set of legislative and policy recommendations for the future – a pattern which, although originally noted in 1985,5 remains evident in inquiries published 20 years later.

From medicalised and sociological conceptualisations of the problem of abuse we have now moved to an era in which concerted efforts are made to adopt a multidisciplinary approach to the problem of child abuse; a methodology which draws upon medical, social and legal expertise.6 This has been the result of concerns regarding both over-reliance on single methodologies or paradigms for the purposes of identifying child abuse (false positives)7 and incidents where a lack of coordination between public bodies has been blamed for missed signs

4 See also the follow up in Britain under the banner the ‘battered baby syndrome’ by D. L. Griffiths and F. J. Moynihan in ‘Multiple Epiphyseal Injuries in Babies (Battered Baby Syndrome)’ (1963) 11 BMJ 1558.
6 This is the essence of Department of Health, Working Together to Safeguard Children (Home Office, Department for Education and Employment, 1999), the government’s guidance to doctors and social workers issued under s. 7 of the Local Authority Services Act 1970.
7 As appears to have occurred in the Cleveland story, see below.
and missed opportunities to prevent abuse (false negatives). The rationale of the multidisciplinary approach is that it serves as a network of checks and balances which are designed to optimise the number of accurately identified cases of child abuse. Whilst the net of accountability for identifying and dealing with child abuse has been cast wider than ever before, this multidisciplinarity has had some unexpected legal consequences. Interestingly, the complexity introduced by the multidisciplinary approach was relied upon by the House of Lords as a ground for denying liability on the part of social services towards children who were not rescued from abuse, as it would be too difficult to define the lines of accountability. One other consequence of multidisciplinarity is allegedly that once a child is labelled as a cause for concern, or the child’s parents are labelled as abusers, these classifications become more thoroughly entrenched because they are often legitimated by both medical and police authority.

Categorisations of abuse

The common law’s mechanisms of compensation in England and Wales do not recognise a concept of child abuse as such, only forms of tort actions such as battery, negligence or misfeasance. There are, however, legal instruments which do recognise abuse as a concept and which, to a lesser or greater degree, have influenced the evolution of claims for compensation:

- Article 3 of the European Convention of Human Rights (‘ECHR’) (as incorporated into UK law via the Human Rights Act 1998), recognises the right to freedom from inhuman and degrading treatment. This provision has been explicitly associated with cases of child abuse and neglect.

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8 For example, the death of Victoria Climbié in 2000.
9 X (Minors) v. Bedfordshire CC [1995] 2 AC 633 (see Chapter 2).
11 The criminal law has long recognised an offence of child cruelty which is broadly compatible with abuse and would include all four types of abuse discussed in this book. Section 1 of the Children and Young Persons Act 1933 makes it an offence for anyone with custody, charge or care of a child to ‘wilfully assault, ill-treat, neglect, abandon or expose the child in a manner likely to cause unnecessary suffering or injury to health’.
The Convention on the Rights of the Child which echoes the above prohibition in Article 37 states that "No child shall be subjected to torture or other cruel, inhuman or degrading treatment". The Convention provides further in Article 19 that:

State parties shall take all appropriate legislative, administrative, social and educational measures to protect children from physical or mental violation, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardians or other persons who have the care of the child.

This last provision illustrates that child abuse is a generic term used to refer to a multitude of acts or omissions which society defines as wrongs against the child.

Although the law of torts does not define child abuse, the civil procedures designed to protect children from abuse employ four categories of child abuse which will be adopted for the purposes of this book: physical abuse, sexual abuse, emotional abuse and neglect. The definitions reproduced here are largely taken from Working Together to Safeguard Children, a document published by the Department of Health in 1999 which has become the working manual for professionals dealing with child abuse. Entries on the Child Protection Registers by category of abuse for the year ending 31 March 2005 were as follows:13

- Physical abuse – 15%.
- Sexual abuse – 9%.
- Emotional abuse – 20%.
- Neglect – 44%.
- Mixed (i.e. more than one of the above categories) – 12%.

Despite the fact that sexual abuse represents the category of abuse with the smallest number of annual registrations, it is this category with which the majority of claims for compensation have been concerned and which the courts have devoted most time to. The reasons for this apparent disparity will be explored below.

1. Physical abuse

Physical abuse may involve hitting, shaking, throwing, poisoning, burning or scalding, drowning, suffocating, or otherwise causing physical harm to a child. Physical harm may also be caused when a parent or carer feigns the symptoms of, or deliberately causes ill health to a child whom they are looking after. This situation is commonly described using terms such as factitious illness by proxy or Munchausen syndrome by proxy.14

As the definition suggests, there are many forms of physical abuse and the term is used here to include corporal punishment by parents, teachers and others with the care of children, playground bullying and the fabrication or induction of illness in a child.

Corporal punishment

Although neither tort law nor criminal law defines physical abuse, the legal position outlined below suggests that any force used to punish a child which leaves a mark is now to be regarded as physical abuse. Thus, the ‘physical harm’ threshold implied in the Working Together definition is applied so as to require medically diagnosed harm or at least visible evidence of force which is more than transient. A higher threshold is applied in schools and childcare facilities where smacking (whether harmful or not) is outlawed. Ironically, the moves towards banishing corporal punishment were originally articulated in the guise of protecting parental rights. In Campbell and Cosans v. UK,15 corporal punishment in grant-aided schools against the wishes of the parent was held by the European Court of Human Rights (‘ECtHR’) to be a violation of the parents’ rights under Article 9 of the ECHR (the right to freedom to manifest beliefs, namely the belief that children ought not to be the subject of disciplinary force). The ban on corporal punishment introduced in 1986 after Campbell and Cosans extended only to state schools.16 Then in 1998 the ban was extended to fee paying schools,17 and has thereafter been applied to childminders and day care providers.18 It should be noted that these absolute prohibitions on corporal punishment go further than is strictly necessary for the protection of the child from inhuman and

16 S. 47 of the Education (No. 2) Act 1986, followed by s. 548 of the Education Act 1996.
degrading treatment under the ECHR. In *Costello-Roberts v. UK*, punishment of a 7-year-old by three smacks on the buttocks through clothing and causing no visible injury was found by a narrow majority not to attain the minimum level of severity to amount to a violation of Article 3. This judgment suggests that corporal punishment in itself does not violate the ECHR, but rather that compliance with the ECHR requires explicit controls on the severity of the punishment so as to preclude harm which is more than transient or trivial.

In *R (on the application of Williamson) v. Secretary of State for Education and Employment*, the claimants (parents and teachers from four independent schools) unsuccessfully challenged the ban on corporal punishment in all schools as a violation of parents’ Article 9 rights to manifest their religious beliefs. Such rights were based on the allegedly widely held Christian tenet that moderate use of physical punishment was an essential form of discipline if children were to be deterred from unacceptable or ungodly behaviour. The House of Lords ruled that the outright ban on corporal punishment in schools did interfere materially with the parents’ rights under Article 9, but decided that such interference was justified as necessary in a democratic society. This was on the grounds that interference with the parents’ rights was necessary for the protection of the rights and freedoms of others; children were vulnerable citizens and the ban was necessary to protect them from distress and the other harmful effects of physical violence. Baroness Hale of Richmond remarked: ‘if a child has a right to be brought up without institutional violence, as he does, that right should be respected whether or not his parents and teachers believe otherwise.’

The issue of corporal punishment by parents was raised in *A v. UK*, where the ECtHR ruled that the defence of reasonable chastisement as then expressed did not give sufficient protection to the child from inhuman and degrading treatment prohibited under Article 3. This inadequacy had led a jury to acquit a man of assault causing actual bodily harm, despite the fact that use of the garden cane on his 9-year-old ‘stepson to be’ had caused several bruises on his legs. The court

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found that hitting a nine-year-old child with a garden cane on more than one occasion, and with enough force to leave bruises, was sufficient to reach the level of severity prohibited by Article 3. Therefore, the availability of the reasonable chastisement defence\textsuperscript{26} in this case was a violation of the state’s obligation to protect vulnerable children from treatment contrary to the ECHR. Section 58 of the Children Act 2004 now removes the defence of reasonable chastisement, from offences of wounding and causing grievous bodily harm,\textsuperscript{27} assault causing actual bodily harm\textsuperscript{28} and cruelty to children.\textsuperscript{29} As actual bodily harm includes superficial injuries such as bruising, scratching or reddening of the skin which persists for hours or days\textsuperscript{30} and also psychiatric injury,\textsuperscript{31} the effect of this provision is to ban smacking where it leaves a mark on the child that is more than transient or trifling. The defence of reasonable chastisement remains available to parents for minor forms of common assault\textsuperscript{32} on their children.

Thus, there exists a real (but not always easy to apply) demarcation between the absolute prohibition on corporal punishment as applied to schools and childcare facilities and the ban on ‘harmful’ corporal punishment applied to parents and guardians. During the passage of the Children Bill, the Joint Committee on Human Rights\textsuperscript{33} expressed concerns that whilst s. 58 probably fulfilled the UK’s obligations under Article 3 as expressed in \textit{A v. UK}, the retention of a diluted reasonable chastisement defence for common assault violated other international commitments (for example, the Committee for the Rights of the Child’s

\textsuperscript{26} Dating from 1860 – see \textit{R v. Hopley} (1860) 2 F & F 202, where Cockburn CJ ruled that a parent, or a person who has the parental authority ‘may for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment’.

\textsuperscript{27} S. 18 or 20 of the Offences Against the Person Act 1861.

\textsuperscript{28} S. 47 of the Offences Against the Person Act 1861.

\textsuperscript{29} S. 1 of the Children and Young Persons Act 1933.

\textsuperscript{30} Current Crown Prosecution Service (‘CPS’) charging standards would still allow the charge of common assault against a parent who hit their child causing reddening of the skin (\textit{Offences Against The Person, Incorporating Charging Standard}, accessible via the CPS website (www.cps.gov.uk), although this is to be revised so as to require reddening of the skin which persists for more than hours or days. CPS charging standards are not binding on the courts but are used to guide police and prosecutors and represent the interpretation of the ingredients appropriate to an offence.

\textsuperscript{31} \textit{R v. Chan-Fook} [1994] 1 WLR 689 (to qualify the psychiatric harm must be something more than a strong emotion, e.g. extreme fear or panic).

\textsuperscript{32} An offence under s. 39 of the Criminal Justice Act 1988.

\textsuperscript{33} Joint Committee on Human Rights – 19th Report: Children Bill (2003–4) HL 161/HC 537 at 135.
interpretation of Article 19 of the Convention on the Rights of the Child (see above)). There remains pressure to outlaw any corporal punishment applied to children, with references made to the example set by Sweden, where smacking was outlawed in 1979. The supporters of a complete ban argue that retaining the defence of reasonable punishment, albeit in a reduced form, conveys the message to parents that smacking is acceptable and discriminates against the child, given that adults would have the protection of a common assault charge in cases of minor hitting, whereas a child’s claim to this effect would be subject to the defence of reasonable chastisement.

Given that the concept of reasonable chastisement outside schools has diminished so as to allow only de minimis corporal punishment, it is perhaps no coincidence that entries on the child protection registers under the heading of physical abuse have dropped dramatically from 1995 (8,700 entries) to 31 March 2004 (4,100 entries).34

Abuse by fabrication or induction of illness

The popularised term ‘Munchausen’s Syndrome by Proxy’ (‘MSBP’) was first coined by paediatrician Professor Sir Roy Meadow, whose evidence has since been rejected in several high-profile cot death cases.35 The discrediting of Professor Meadow, along with the fact that the MSBP label focuses attention on the perpetrator of the harm rather than the child, explains why many professional bodies involved in child protection are now using the term FII (fabricated or induced illness (by proxy)).36

There are two main ways in which FII occurs:37

- **fabrication** of signs and symptoms. This may include fabrication of past medical history, falsification of hospital charts and records, specimens of bodily fluids or letters and documents;

34 Referrals, Assessments and Children and Young People on Child Protection Registers, at table 3C.
36 Psychiatrists focusing on the perpetrator’s mental state would be more likely to refer to ‘factitious disorder by proxy’ as it is known in the *Diagnostic Statistical Manual Fourth Edition, Text Revision* (American Psychiatric Association, 2000): ‘the deliberate production or feigning of physical or psychological signs or symptoms in another person who is under the individual’s care.’ (at 781).
37 Safeguarding Children in Whom Illness is Fabricated or Induced (Department of Health, 2002).
induction of illness (e.g. by poisoning, starvation, forced vomiting, suffocation).

The perpetrator of this type of abuse is usually identified as the parent (more often the mother than the father) or carer, or even healthcare worker.\(^{38}\) The result for the child can include physical harm inflicted to induce illness in the child or even death,\(^{39}\) unnecessary clinical investigations or treatment (‘medical abuse’) and psychiatric disturbance resulting from the dysfunctional nature of the child’s relationship with the perpetrator.

Despite widespread media attention, FII is thought to be very rare, with a national survey suggesting there were only around 50 new cases each year in the UK.\(^{40}\) Given the level of deception implicit in FII, the fact that almost any disorder can be mimicked (giving rise to a wide range of FII scenarios) and that children may adopt their parents’ perception of illness and comply with the presentation of bogus symptoms,\(^{41}\) it is notoriously difficult to distinguish the parent who is fabricating or inducing illness from the over-anxious parent. Clinicians and social workers are instructed to look out for unexplained and persistent illness in the child and hypervigilance in the carer who is eager for clinical intervention despite the lack of medical indication. Signs of FII are largely behavioural or relate to conflicts in clinical evidence (e.g. therapy for the supposed illness is inexplicably ineffective or the symptoms are unexplained or are followed by negative diagnostic results). Of course, these indicators have to be viewed against the backdrop of the knowledge-base of medicine which is constantly subject to review and realignment, meaning that

\(^{38}\) Interestingly, in Munchausen’s Syndrome the perpetrator of the fraud is usually identified as male (F. Raitt and S. Zeedyk, ‘Mothers on Trial: Discourses of Cot Death and Munchausen’s Syndrome by Proxy’ (2004) 12 Feminist Legal Studies 257 at 259), whereas in MSBP the perpetrator is usually female. This distinction illustrates the arbitrariness with which the labels of Munchausen’s Syndrome and Munchausen’s Syndrome by Proxy have been applied to very different ‘disorders’.

\(^{39}\) E.g. the conviction of Petrina Stocker for manslaughter of her 9-year-old son by administering salt into his hospital drip: ‘Mother found guilty in case of fabricated illness’ (2005) BMJ 330.


\(^{41}\) Royal College of Paediatrics and Child Health, Working Party Report: Fabricated or Induced Illness by Carers (London, RCPCH, 2002).
inconsistencies in medical data should not necessarily be assumed to constitute evidence of foul play.

Litigation associated with FII in England and Wales has tended to take the form of parents claiming compensation for having been wrongly accused of deliberately injuring or falsifying injury in their child, as to which see later in Chapter 3.42

Bullying at school

Bullying is defined as ‘the use of strength or power to frighten or hurt weaker people’.43 The suggestion that the victim of bullying is weak is not uncontroversial and, in the context of psychiatric damage claims, this definition might be taken as suggesting that the claimant does not possess ordinary phlegm, a fact which might have an impact on liability. A preferable definition might therefore be: ‘deliberately hurtful behaviour repeated over a period of time in circumstances where it is difficult for those being bullied to defend themselves.’44

Whilst bullying can occur in any interpersonal context, it is particularly associated with the playground. A Department for Education and Employment Circular identifies three types of bullying; physical (kicking, hitting and theft), verbal (e.g. name-calling or racist remarks) and indirect (spreading rumours, excluding from social groups).45 The effects of bullying are similarly diverse. Bullying is increasingly being associated with psychological harm, and may result in a detrimental impact on the victim’s schooling and subsequently their earning capacity, and, in extreme cases, can be blamed for suicide.46

So how is bullying to be identified? First, the term ‘bullying’ suggests ongoing behaviour and not single events. Secondly, although bullying is

44 Protecting Children from Abuse: The Role of the Education Service (Department for Education and Employment Circular 10/95).
45 Protecting Children from Abuse. The proposition that bullying can be non-physical was also supported by Wright J in H v. Isle of Wight (2001) WL 825780 (see below).
46 It has been estimated that there are around 16 suicides by minors in the UK each year which are the direct result of bullying: N. Marr and T. Field, Bullycide: Death at Playtime (Success Unlimited, 2000).