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MUNCHAUSEN SYNDROME BY PROXY (MSBP)

Some medico-legal issues

Dr Helen Hayward-Brown*

The integrity of expert medical evidence concerning MSBP has been seriously questioned by recent developments in the United Kingdom and Australia. Cases leading to convictions on the basis of this evidence are under review in the UK and serious infringements of human rights in relation to this "diagnosis" in civil and criminal cases have been revealed. This article explores some of these problematic issues and alerts readers to the substantial risks of wrongful removal of children from families or the imprisonment of innocent parents.

MSBP describes a parent who purportedly induces or exaggerates illness in her or his child to gain attention from the medical profession. It is a recent and controversial "diagnosis". Debate about MSBP has centred on whether or not it actually exists. In very rare circumstances, parents may harm their child in a medical context. It is submitted, however, that the "diagnosis" of MSBP is largely unhelpful. It is preferable to abandon the label and describe what is actually happening — if it is thought to be poisoning or suffocation, call it that.[1] The issue should not be whether real cases of MSBP exist but whether child abuse has actually occurred. Abandonment of the label should not result in alternative labels or "invisible" labels which still use the MSBP profile. In this way, parents who are guilty of harming their children may be better identified and innocent parents protected.

Recent Developments in the UK

1. Investigation into Sir Roy Meadow

Professor Meadow is credited with devising the term MSBP as a result of his seminal article in *The Lancet*.[2] He has been widely regarded as the world's leading expert on MSBP. He has acted as an expert witness in criminal cases where mothers have been accused of infanticide using his much quoted "Meadow's Law" — "one cot death is a tragedy, two is suspicious, and three is murder". Meadow's literature has generally served as the basis for most MSBP allegations in Australia. His "diagnosis" and testimony have been used in court cases in Australia.[3]

The British General Medical Council will conduct a full public inquiry in 2004 following a preliminary investigation into Professor Meadow for alleged professional misconduct. Lawyers in the UK have been warned to treat any evidence by Meadow with extreme caution and any cases involving his testimony have not progressed since these allegations were made.[4]

2. Re-examination of convictions

As a result of the landmark *Cannings* judgment,[5] the UK Attorney General, Lord Goldsmith, announced an immediate re-examination of 258 criminal cases involving harm to children by parents where there was dispute between expert witnesses. A further 18 have since been added. Cases in which parents are still in prison will be given priority. A further 15 cases under consideration by the Crown Prosecution Services will also be re-examined.

3. Review of civil cases involving MSBP

Civil cases in which there has been a dispute between expert witnesses will be reviewed following an announcement by Harriet Harman, Solicitor General (UK) in January 2004. The first two appeals have been quashed on evidentiary grounds despite contradictory court warnings about the expert who is "over-dogmatic" or who has "developed a scientific prejudice".[6]

Recent developments in Australia

The Queeensland Court of Appeal set aside the guilty verdicts of a mother convicted of torturing her child and unlawfully wounding two of her other children and ordered a new trial.[7]

The court ruled that the medical evidence about MSBP given by a psychiatrist was inadmissible because of its minimal probative value and potential to be extremely prejudicial. The court held that the term "factitious disorder by proxy" (MSBP) was merely descriptive of a behaviour and did not specifically identify a psychiatric illness or condition. The evidence was inadmissible as expert evidence because it did not relate to an organised or recognised reliable body of knowledge or experience. The court held that the wrongly admitted evidence may have deprived the appellant of the chance of a fair trial as the jury was likely to place great weight on the evidence about the mother's alleged behaviour rather than whether the prosecution had established beyond reasonable doubt that the appellant had harmed her children by causing unnecessary medical procedures to be performed on them.[8]

Questionable diagnostic criteria[9]

The recent cases indicate that the risk of an inaccurate allegation of MSBP increases if one or more of the indicators, shown in the table below, are present.

Poor scientific validity

MSBP is not a definitive "diagnosis". It is a research "diagnosis" only, appearing in the appendix of the DSM IV(R) as "factitious disorder by proxy".[10] Proponents of MSBP have exhaustively worked towards redefining this "diagnosis" in order to give it some semblance of scientific credibility. It has variously been described as a psychiatric or paediatric "diagnosis", a disorder, syndrome or behaviour.

A close study of Meadow's seminal article in *The Lancet* reveals two highly problematic case studies as "evidence" of the existence of MSBP. The second case study is of particular concern, as it describes a child presenting with hypernatremia (excessive sodium in the blood). This child was force-fed 20 g of sodium, with difficulty, by Meadow and his colleagues. Despite accusing the mother of MSBP, Meadow admits he had no idea how the mother was able to successfully feed large amounts of salt to the child. The child later died.[11]

MSBP has not been subjected to replicated controlled studies in order to determine the legitimacy of its existence. Peer reviewed literature is often based on the literature of other case studies rather than on direct experience with cases. The literature is recursive.[12] In other words, MSBP has been written about frequently and this is erroneously regarded as evidence of its existence.

Profile Indicator	Critique
Unexplained medical problems	• "Diagnosis" by default – assumes medical knowledge is finite • "Diagnosis" by default – assumes medical knowledge of individual practitioner is finite • Ignores medical debate over illnesses such as chronic fatigue syndrome, multiple chemical sensitivity • Ignores drug and vaccination effects (eg Cisapride, now banned in UK and withdrawn in US) • Ignores pre-existing problems such as whether a child was born prematurely or has suffered reflux or other gastric problems
Child's health improves away from mother	• Many illnesses resolve spontaneously, especially as toddler grows, eg reflux • Removal from primary carer with intimate knowledge of child's difficulties places child's health at risk • Faulty records ignore continued illness of the child (eg temp charts, weight gain) • Ignores changes in drugs (started or finished) and changes in environment
Parent has knowledge of medical terminology and/or has asked lots of questions about child's medical care	• Fits all intelligent, concerned parents • A parent has the right to engage in debate over treatment of his/her child • MSBP "diagnosis" used against parent who has made or threatened to make a complaint about medical negligence • Specialist doctor with keen interest in MSBP uses MSBP diagnosis to deal with difficult parent
Highly attentive parent ("over-protective")	• Any parent of a sick child will be anxious
"Doctor shopping" and frequent visits to medical practitioners	• Search for a diagnosis is normal behaviour for concerned parents • What is a "normal" number of visits? • Number of visits recorded are generally inaccurate or do not take into account surgery and its effects • It is a parent's right to seek a second or third opinion

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FAMILY LAW TODAY AND TOMORROW

Complexity and change

Dr Tom Altobelli*

The relentless pace of change in Australian family law continues unabated. The *Family Law Amendment Act* 2003 (Cth), Family Law Rules 2004 and Family Law Amendment Bills 2004 herald some of the most significant changes in family law and practice since the *Family Law Act* came into operation in 1976. These changes will have an impact on all courts exercising jurisdiction under the Act, including the New South Wales Local Courts.

The *Family Law Amendment Act* 2003 was enacted on 17 December 2003 and represents the 64th amendment to the Act. It enacts a number of changes, some of which are quite far reaching.

The need to register parenting plans has been removed, and there are renewed statutory exhortations for parents to use these agreements, supported by new provisions dealing with registration, revocation and variation. Parenting plans are rarely used in practice, and there is nothing to suggest that this will change in the near future.

There has been a range of amendments intended to facilitate greater use of audio and video links including provision for split courts where two or more judges are sitting but at different places in Australia. Testimony may be given by video, audio link or other appropriate means.

Amendments give effect to changes in the management structure of the Family Court. For example, the Principal Mediator replaces the Principal Director of Court Counselling and the concept of Registry Manager has changed in such a way as to reflect a reallocation of roles from the Registrar's position.

Of practical relevance to courts dealing with the parenting compliance regime under the Act, the new s 65LA empowers courts to order a person to attend a post-separation parenting program at any stage during proceedings for a parenting order, and not just during enforcement proceedings. The best interests of the child remain paramount, even when issues of compliance arise. There has been clarification of the relevance of findings of previous contraventions. Significantly, increased flexibility is created by the removal of the requirement to attend a particular post-separation parenting program and the need for the Attorney General to provide an approved list of providers has been obviated.

The regime for binding financial agreements has been changed slightly, partly in response to concerns expressed by the legal profession and partly in response to concerns arising out of the high profile case of *ASIC v Rich* [2003] FamCA 1114. Parties can no longer exclude the courts' power to make a maintenance order if at the time the agreement was made the party seeking maintenance was unable to support himself/herself without governmental income support. Legal practitioners will no longer be required to provide advice about the financial advantage or otherwise and the prudence of entering into an agreement, but they must provide legal advice about the advantages and disadvantages of doing so. There has been a range of other amendments following the decision of O'Ryan J in *ASIC v Rich*. Third parties such as creditors now have standing to apply to set aside binding financial agreements in certain circumstances where the interests of creditors might otherwise be defeated. These amendments were implemented with remarkable speed and are retrospective in operation.

Perhaps the most dramatic changes give courts exercising jurisdiction under the Act the power to bind third parties in order to give effect to property settlements and/or make injunctions. This amendment, if it is within power constitutionally, will reverse decades of jurisprudence to the effect that a court could not direct a third party to do certain things that he, she or they were not otherwise required to do. Third parties such as trustees, financial institutions, corporations, creditors, liquidators and even bankruptcy trustees may find themselves amenable to the court's jurisdiction under the Act, provided they are accorded procedural fairness. Such an order can only be made if it is reasonably necessary or appropriate to effect the division of property. The order cannot be made if it is unlikely that the result would be a debt not being paid in full. The use

of the third party power in the context of an injunction might lead, for example, to a mortgagee being restrained from exercising a power of sale or repossession, at least pending the final resolution of a property settlement. The commencement of operation of the new third party orders provisions is postponed until December 2004, no doubt to give the commercial community time to contemplate its implications.

The Family Law Rules 2004 commenced on 29 March 2004. In terms of practice and procedure, these are the most significant changes since the Act commenced. Never in the history of Australian family law have Rules been used as such overt instruments of cultural change. The Woolf reforms to UK civil procedure have formed the basis for most of the major changes.[1] There are clear statements of main purpose, for example, Rule 1.04 provides:

> "The main purpose of these Rules is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case."

There are strong themes of proportionality and accountability in the Rules. The cost to the court (that is the community) is as relevant a factor as the cost to the parties. There is a strong emphasis on active case management and the new Rules signal the presence of a far more interventionist court than has ever existed in Australian family law. The duties of parties and their lawyers are clearly articulated. Comprehensive pre-action procedures are prescribed that emphasise mandatory pre-filing alternative dispute resolution, disclosure and giving notice of claims. There are new forms, of course. The expert evidence provisions are dramatically different, with a clear preference for a single joint expert. There is mandatory disclosure of all experts' reports in children's matters and legal professional privilege is expressly negatived in this regard. Experts have a duty to the court and not to the person instructing them. It is, in effect, a brave new world of family law practice, but one that promises better outcomes for clients.[2]

The Family Law Amendment Bills 2004 continue this relentless pace of change. As at the date of writing this article, the main features of the proposed legislation cover family law and bankruptcy, enforcement of court orders, more changes to terminology, referral of powers from the States in relation to de facto couples and some interesting changes having an impact on courts of summary jurisdiction.

Third party creditors will be given standing to intervene in family law property proceedings and to apply to set aside orders after they have been made. Third parties will also be able to apply for injunctions preventing the disposition of property. There will be greater clarification of the need to give notice to third parties in matters involving property orders.

The courts' power to vary orders relating to children on its own motion is also clarified, particularly in the context of contravention proceedings which seem to be taking up increasing amounts of court time and resources. Dissolutions of marriage, decrees nisi and absolute will go, to be replaced by divorce and divorce orders.

Of particular interest to New South Wales Local Courts will be proposed amendments to s 46 and s 69N of the Act. The Federal Magistrates' Court will be one of the courts to which the court of summary jurisdiction is required to transfer proceedings unless each party consents to the court hearing and determining the matter. If such a consent is given, then neither party may subsequently object to the proceedings being so heard and determined. There are similar amendments to s 69N as regards parenting orders. In addition, there will be a new provision enabling recovery of monies paid under child maintenance orders where the payer has later discovered that he was not the child's parent. Such recovery may now occur in a court having jurisdiction under the Act.

A drastic new cost provision is also proposed. A new rule making power will lead to Rules of Court that aim to reverse the general rule so that a party to proceedings under the Act is to bear the costs of another party to those proceedings unless a court orders otherwise. Moreover, the court will be empowered to make orders for civil penalties where a party has failed to comply with the Rules of Court. ❑

Endnotes

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1. Lord Woolf, "The Court's Role in Achieving Environmental Justice" (2002) 4.2 *Environmental Law Review* 79 at 79.
2. A copy of Dr Altobelli's paper on the new Rules: "Family Law Rules 2004: A Brave New World of Family Law Practice" is available on request to <taltobelli@wattsmccray.com.au>.

RECENT DECISIONS

HIGH COURT

Negligence

Duty of care—pure economic loss—defective building—subsequent purchaser—vulnerability

In 1992, the appellant purchased a five-year-old warehouse and office complex in Townsville. The contract for sale did not include any warranty that the building was free of defects, nor any assignment of the vendor's rights against others in respect of such defects. The appellant had not retained an expert to inspect the premises.

Less than two years later, structural distress due to settlement became apparent.

The respondent carried on the business of consulting engineers. It designed the foundations of the building. To save money, the developer of the building had rejected the respondent's advice to conduct soil tests before construction.

The appellant commenced proceedings in the Supreme Court of Queensland. On a case stated, the Court of Appeal held that on the agreed facts the appellant's statement of claim did not disclose a cause of action in negligence against the respondent.

The court (Gleeson CJ, Gummow, Hayne and Heydon JJ in a joint judgment; McHugh and Callinan JJ in separate judgments; Kirby J dissenting) dismissed the appeal.

The majority characterised the appellant's damage as pure economic loss. Neither the facts alleged in the statement of claim nor those set out in the case stated showed that the appellant was vulnerable to the economic consequences of any negligence of the respondent: *Perre v Apand Pty Ltd* (1999) 198 CLR 180. The facts did not show that the appellant could not have protected itself, either by obtaining warranties or by taking steps to discover any defects.

Kirby J considered that vulnerability was not confined to cases of poverty, disability, social disadvantage or lack of economic power, but extended to those carrying on a profitable business who were exposed to an insidious risk against which they could not reasonably protect themselves, as was the case here (at [168]).

The appellant had sought an extension of the liability recognised in *Bryan v Maloney* (1995) 182 CLR 609, a case in which the builder of a dwelling house was held liable for economic loss to a subsequent owner. While McHugh J distinguished that case on its facts (at [71]), and Callinan J questioned its correctness (at [211]), in the joint judgment their Honours said that case should not be understood as depending on the distinction between dwellings and other buildings (at [17]). The existence of a duty of care to subsequent purchasers in that case depended on the conclusion that the builder owed the original owner a duty of care to avoid economic loss, based on the assumption of responsibility by the builder and known reliance on the part of the owner.

In this case it could not be said that the respondent owed the first owner a duty to avoid economic loss.

Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16

COURT OF CRIMINAL APPEAL

Sentencing

Effect of amendment of s 44 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW)—impact of standard non-parole period legislation on sentencing law

This case was a successful appeal in which the court considered in detail the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW). The following extracts the principles from the case. A summary of the facts and outcome of the appeal can be found on JIRS. The decision determines the effect of the amendment of s 44 of the *Crimes (Sentencing Procedure) Act* 1999 and the impact of the introduction of a standard non-parole period for certain offences. This summary is not intended to be exhaustive.

Amendment of s 44

The court held that the amended s 44 of the *Crimes (Sentencing Procedure) Act* 1999 which now provides that "the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence)" does not require the court to first set a non-parole period which is thereafter "immutable". The terms of s 44 need not involve a two-step or sequential process (at [111]). The newly enacted s 44 has reverted to the position which applied under s 5 of the repealed *Sentencing Act* 1989.

Standard non-parole period provisions

The standard non-parole period provisions of Pt 4 Div 1A of the *Crimes (Sentencing Procedure) Act* 1999 do not stand alone and "must be read in the light of several other provisions" (at [41]), including ss 3A, 21A, 22, 22A, 23, 44, 45 and 101A. There is nothing in Div 1A to suggest that the statutory maximum penalty for an offence should cease to act as a "benchmark or reference point" in sentencing (at [53]). The maximum penalty continues to be the primary expression of legislative intention as to the seriousness of a particular offence. If there was a positive legislative intention to compel courts to impose harsher sentences this would be evinced through Parliament increasing the maximum available penalty (at [51]–[52]). There "is no basis for assuming that guideline judgments of this Court are to have any less relevance, or that there is to be a departure from settled principles of sentencing practice, or an abandonment of the discretion that is essential to any system calling for individualised justice" (at [55]). Section 21A(1)(c) preserves the well-established body of common law principles.

The approach to s 54B

In order for the legislation to have "practical utility", a sentencing judge must ask the question, "are there reasons for not imposing the standard non-parole period?" That question is to be answered by considering the following factors (at [118]):

> "(i) the objective seriousness of the offence, considered in the light of the facts, which relate directly to its commission, including those which may explain why it was committed, so as to determine whether it answers the description of one that falls into the mid range of seriousness for an offence of the relevant kind;
> (ii) the circumstances of aggravation, and of mitigation, which are present in the subject case, or which apply to the particular offender, as listed in s 21A(2) and (3), and as incorporated by the general provisions in s 21A(1)(c) and by the concluding sentence to s 21A(1)."

If that question is answered in the affirmative, then:

> "the Court should exercise its sentencing discretion in accordance with established sentencing practice and by reference to the matters identified in sections 3A, 21A, 22, 22A and 23 of the Act. The ultimate objective remains one of imposing a sentence that is just and appropriate, having regard to all of the circumstances of the offence and of the offender, and so as to give effect to the purposes mentioned in s 3A of the *Sentencing Procedure Act*" (at [121]).

The standard non-parole period then, takes its place as "a reference point, or benchmark, or sounding board, or guidepost, along with the other extrinsic aids such as authorities, statistics, guideline judgments and the specified maximum penalty, as are applicable and relevant" (at [122]).

A reason for departing from the standard non-parole period is that the individual offence falls outside the middle range of objective seriousness (at [67]). The standard non-parole periods in the Table must also be taken as having been intended for a middle-range case where the offender was convicted after trial.

What is the "middle range" of objective seriousness?

The court must consider what constitutes an abstract mid-range offence to make a "meaningful comparison… between the offence at hand, and the offence for which the standard non-parole period is prescribed" (at [76]). Parliament intended that the assessment of objective seriousness:

> "would take into account the actus reus, the consequences of the conduct, and those factors that might properly have been said to have impinged on the mens rea of the offender. This would extend to matters of motivation (for example duress, provocation, robbery to feed a drug addiction), mental state (for example, intention is more serious than recklessness), and mental illness, or intellectual disability, where that is causally related to the commission of the offence, in so far as the offender's capacity to reason, or to appreciate fully the rightness or wrongness of a particular act, or to exercise appropriate powers of control has been affected" (at [85]–[86]).

Factors often taken into account in sentencing such as youth or a history of sexual abuse are more accurately described as matters pertaining to the offender. Matters related to the objectives of punishment such as the antecedent criminal history of an offender or the fact that the offender was subject to conditional liberty are not included in the assessment of objective seriousness of an offence. They are not circumstances "which go to the seriousness of the offence". The court said at ([87]):

> "Questions of degree and remoteness arise which will need to be developed in the case law. There are potential areas of overlap. For example, impaired mental or intellectual functioning can go to either, or both, the seriousness of the offence and punishment, so far as deterrence is concerned."

Section 54B(3)

Section 54B(3) provides "[t]he reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A". This restriction is not as stringent as it appears because the factors "referred to in section 21A" are not limited. Common law and statutory sentencing principles continue to operate (at [104]) and are all a proper basis for departure from a standard non-parole period.

R v Way [2004] NSWCCA 131

Suspended sentences

Crown appeal—suspended sentences—requirement to set non-parole period—revocation of bond

The respondent pleaded guilty to knowingly taking part in the manufacture of a prohibited drug pursuant to s 24 of the *Drug Misuse and Trafficking Act* 1985 (NSW). A Form 1 with a further drug offence and two unregistered firearm offences was also taken into account. He was sentenced to two years' imprisonment suspended on

him entering into a good behaviour bond pursuant to s 12 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW).

In the Court of Criminal Appeal, the Crown submitted that the sentence was manifestly inadequate. In the course of dealing with that submission, the court analysed ss 12, 99 and 47 of the *Crimes (Sentencing Procedure) Act* 1999 governing suspended sentences.

The court (Howie J; Hodgson JA and Levine J agreeing) allowed the appeal and sentenced the respondent to imprisonment with a non-parole period of one year and a balance of term of one year. The sentencing judge erred in failing to set a non-parole period at the time the sentence of imprisonment was suspended (see s 12(3)). After commenting that he was "exasperated" by the difficulty of the legislation, Howie J posed the questions (at [43]):

> "Does the revocation of a bond under s 12 reactivate the whole of the suspended sentence so that, subject to s 47(2), it commences from the date of revocation or does it merely reactivate that part of the sentence that is the equivalent to the unexpired period of the bond? The answer to that question will reveal whether a suspended sentence in this State is a sword or a butter knife."

The preferred view is that the sentence of imprisonment commences on the date of the revocation of the bond. It does not commence on the day of the imposition of the suspended sentence notwithstanding the terms of s 47 that a sentence commences "the day on which the sentence is imposed". This reading of the legislation will allow the courts to backdate the activated sentence of imprisonment under s 47(2). Further, s 100 will have work to do. Section 100 provides: "Action may be taken under this Part in relation to a good behaviour bond even if the term of the bond has expired, but in respect only of matters arising during the term of the bond." This will also enable breaches of a s 12 bond to be dealt with even though the bond may have expired by the time the matter reaches court.

The sentences imposed were manifestly inadequate but in recognition of the fact that the respondent has been at liberty, the court should not vary the non-parole period and should date the sentence from the time the respondent was taken into custody.

R v Tolley [2004] NSWCCA 165

COURT OF APPEAL

Negligence

Duty of care—"wrongful life"—compensatory principle—non-existence as comparator—damage as gist of action

This was one of three appeals heard together. The appellant was born with profound disabilities, the result of her mother contracting rubella during pregnancy.

In her Supreme Court action against the respondent general practitioner, the appellant alleged negligence in the failure to diagnose rubella and to advise her mother accordingly. Had she been so advised, the mother would have obtained an abortion.

The trial judge held the appellant was not born disabled because of any breach of duty by the respondent.

The court (Spigelman CJ and Ipp JA in separate judgments; Mason P dissenting) dismissed this and the other appeals.

Each of the heads of damage claimed faces the obstacle of the compensatory principle, that damages must be based on a comparison between the appellant's current position and her position had the respondent not been negligent (Ipp JA at [232]). This requires a comparison with non-existence.

Damage being the gist of the action, the question of whether the damage claimed is actionable is fundamental.

For damage to be actionable it must be capable of calculation. While the compensatory principle relates to assessment rather than the determination of liability, if damages are not capable of measurement, the damage claimed will not be actionable and no duty of care will arise (at [252]).

Counsel for the appellant had argued that damages should be assessed by comparing her condition and needs with a person born without disability. Such a measure of damage would create a special category of claims for negligence (at [286]). This argument was not supported by the underlying theme of the majority in *Cattanach v Melchior* (2003) 199 ALR 131, where the claim was for a head of damages recoverable under general and unchallenged principles.

Spigelman CJ said the compensatory principle concerns the measure of damages, not liability (at [6], Mason P agreeing at [126]). The preferable starting point is identification of the loss suffered and determination of whether there is a duty with respect to that kind of loss.

Such cases require attention to ethical foundations. A duty in negligence must reflect values generally, or at least widely, held in the community. The duty asserted here does not reflect widely held values (at [21]).

Any duty to avoid harm to the child could not be discharged merely by providing information to the parents. This indicates that the relationship between the child and the tortfeasor is not sufficiently direct (at [28]).

The only permissible perspective on the issue of damage is that of the appellant. A parent's statement that he or she would not have permitted a child to be born is not determinative of whether the child has suffered damage, in the sense that non-existence is preferable to life with disability (at [50]).

Harriton (by her tutor) v Stephens [2004] NSWCA 93

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MSBP's lack of scientific validity is illustrated by the difficulty of applying the *Daubert*[13] five factor non-exclusive test.[14]

- ***Factor 1:*** Whether the expert's theory can be or has been tested. No attempts have been made to replicate any controlled studies of MSBP.
- ***Factor 2:*** Whether the theory has been subject to peer review and publication. The literature is generally based on limited case studies. Recursivity of the literature gives a false air of legitimacy.
- ***Factor 3:*** Whether the potential rate of error of a technique or theory is known. It is not known for MSBP.
- ***Factor 4:*** Whether standards and controls exist and are maintained. There is no consensus on MSBP diagnostic criteria and no official adoption of criteria by DSM IV(R).
- ***Factor 5:*** The degree to which the theory has been accepted. The medical profession cannot agree on the acceptability of MSBP.

Concluding Statements

Child protection practices are a priority in any civilised society. Such practices can only be safeguarded if they are accountable and transparent. This is not the case with MSBP allegations. Emphasis should not be placed on MSBP, but on whether or not a child has been harmed. ❑

Endnotes

* Dr Helen Hayward-Brown is a medical anthropologist/sociologist who completed her doctorate on false and highly questionable accusations of MSBP. She is currently completing a research fellowship with the Social Justice and Social Change Research Centre at the University of Western Sydney, in addition to her teaching and advocacy work.

1 C Morley, "Practical Concerns about the Diagnosis of Munchausen Syndrome by Proxy" (1995) 72 *Archives of Disease in Childhood* 528.

2 R Meadow, "Munchausen Syndrome by Proxy, The Hinterland of Child Abuse" (1977) 310 (8033) *The Lancet* 343.

3 See H Hayward-Brown "Misdiagnosed Children, Misdiagnosed Parents: Chronic Illness and the Spectre of Munchausen Syndrome by Proxy", 2003 PhD Dissertation, Charles Sturt University, Bathurst, pp 163–197.

4 An example of Meadow's inaccurate testimony and unsound use of statistics can be found in *R v Sally Clark* [2003] EWCA Crim 1020; 2 FCR 447. The Court of Appeal described his testimony as having "misled the jury" and "grossly" overstated the risks. His evidence in two other cases *R v Angela Cannings* [2004] 1 All ER 725 and *R v Patel* (cited in [2004] EWHC 411 (Fam)) has been discredited and these mothers acquitted.

5 *R v Angela Cannings* [2004] 1 All ER 725.

6 *Re LU and Re LB* [2004] EWCA Civ 567.

7 *R v LM* [2004] QCA 192.

8 A number of US cases have successfully argued that evidence about MSBP should not be admissible eg *State v Lumbrera* 845 P 2d 609 (Kan 1992) and *Commonwealth v Robinson* 565 NE 2d 1229 (Mass 1991).

9 For a more comprehensive table see H Hayward-Brown, "False And Highly Questionable Allegations Of Munchausen Syndrome By Proxy", available url: <http://www.pnc.com.au/~heleneli/paper.htm>.

10 *Diagnostic and Statistical Manual of Mental Disorders*, 1994, 4th ed, American Psychiatric Association, Washington, p 725.

11 Meadow, op cit n 2 at 344.

12 D Allison and M Roberts, *Disordered Mother or Disordered Diagnosis? Munchausen Syndrome by Proxy*, 1998, The Analytic Press, Hillsdale.

13 *Daubert v Merrell Dow Parmaceuticals* 509 US 579 (1993).

14 E Mart, *Munchausen's Syndrome by Proxy, Reconsidered*, 2002, Bally Vaughan Publishing, Manchester.

SELECT LEGISLATION

- *Bail Amendment (Terrorism) Act* 2004 (No 34) commenced on the assent date of 4 June 2004 (s 2). This amendment to the *Bail Act* 1978 removes the presumption in favour of bail and provides that bail is not to be granted in respect of offences relating to terrorist activities unless the accused person satisfies the officer or court hearing the bail application that bail should not be refused. These amendments apply to offences committed before the commencement of the Act.
- *Children Detention Centres Amendment Act* 1998 (No 28) commenced on the assent date of 13 May 2004 (s 2).
- *Freedom of Information Amendment (Terrorism and Criminal Intelligence) Act* 2004 (No 30) commenced on 28 May 2004. Gazette 91, 2004, p 3220.

JUDICIAL MOVES

District Court

- *His Honour Judge O'Reilly QC* has retired.

Commission wins silver award

The Judicial Commission's 2002–2003 Annual Report received a silver award from the Australasian Reporting Awards in May 2004.

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