Non Accidental Injury and the Children's Court

Some Legal and Practical Observations

Simon Handebo, Senior Children's Registrar

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Disclaimer: The views expressed in this paper are those of the author and do not necessarily reflect the views of the Children's Court of New South Wales

Contents

Introduction

At the outset, it is worth noting that there are many useful articles already in existence in relation to the issue of non-accidental injury in Children's Court proceedings.[1] I have had the opportunity to review much of this material in my preparation of this paper, and I am conscious not to "re-invent the wheel". To some extent, overlap is inevitable, but where possible I would encourage readers to review the material referred to in this paper rather than rehashing the same issues in this paper.

I would also like to point out that much of the literature and case law surrounding non-accidental injury appears to focus on traumatic brain or head injuries, or "shaken baby syndrome", but many of the practical observations in this paper are equally relevant to other types of non-accidental or unexplained injuries.

To set the tone for this paper, I would echo the comments made by Judge Peter Johnstone, President of the Children's Court of NSW (in which His Honour cites the work of Dr Amanda Stephens):

> *Cases involving instances of shaken baby syndrome are among the most emotive, controversial and challenging within the care and protection jurisdiction of the Children's Court of NSW.*
>
> *Decision making in care and protection proceedings is complex, and necessitates that judicial officers engage in the difficult task of considering and evaluating the multiple factors which combine to impact on the child's future safety, welfare and well-being. This process is especially complex in cases involving non-accidental head injury where there is typically no direct evidence to the alleged abuse, and the explanations offered by carers are usually inconsistent with the physical findings.*[2]

The discussion in this paper is divided into two parts. The first part of this paper will discuss the law as it relates to non-accidental injury, including some commentary on the application and development of the "unacceptable risk test". For most practitioners this will simply be a refresher course, however it is my observation as a Children's Registrar that some practitioners, particular those who do not regularly appear in the Children's Court, are under a misapprehension as to the applicable law (particularly when viewing the proceedings through the lens of a criminal defence lawyer). This misapprehension has significant implications on the case theory advanced, and accordingly, the evidence available to assist judicial officers in undertaking an already complex evaluation.

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[1] I would suggest the following as essential reading for anyone conducting non-accidental injury matters: Stephan Herridge, "Fact-Finding and Risk Assessment in Non Accidental Injury Cases", *Children's Law News* 1 (2019).

[2] Judge Peter Johnstone, President of the Children's Court of NSW, "Forensic evidence in child protection proceedings", *International symposium on shaken baby syndrome and abusive head trauma*, 16 September 2019, Sydney; A Stephens, "Legal outcomes in non-accidental head injury ("shaken baby syndrome") cases: inevitable inconsistencies", PhD Thesis, The University of Sydney, 2011.

The second part of this paper focuses on a number of practical considerations in relation to the conduct of the proceedings and the nature of the evidence available to assist the judicial officer in undertaking their evaluation as to the child's future safety, welfare and wellbeing. It is acknowledged that there is not a "one size fits all" approach to these matters, and that while some of these practical considerations may work in one matter, they may not be appropriate in the next. These considerations are not designed to be proscriptive, but rather to allow practitioners to reflect on the way in which non-accidental injury cases are conducted, and to consider other strategies that may be deployed in the conduct of such matters.

Part I – The Legal Framework

Legislative Overview

At the outset it is noted that the *Children and Young Persons (Care and Protection) Act* 1998 (herein referred to as "the Care Act") does not make any express provision in relation to the determination of non-accidental injury matters. Such matters are still subject to a threshold finding under section 71 of the Care Act to ground the jurisdiction of the Court, and an assessment under section 83 of the Care Act as to whether there is a realistic possibility of restoration to the child's parents.

In relation to the issue of establishment, in a non-accidental injury case it would normally be asserted by the Secretary that the ground under s71(1)(c) of the Care Act applies, namely that the child is in need of care and protection as they have been, or are likely to be, physically or sexually abused or ill-treated. Depending on the circumstances of the case, and whether other risk issues are alleged, other grounds may also be advanced. Some practical considerations relating to the issue of establishment are discussed in Part II below.

Section 83 of the Care Act requires the Secretary to undertake an assessment as to whether there is a realistic possibility of restoration to the parents within a reasonable period of time, having regard to the circumstances of the child, and the evidence (if any) that the parents are likely to be able to satisfactorily address the issues that led to the removal of the child or young person. The Court must then determine whether to accept the Secretary's assessment.

The test applied in non-accidental injuries is whether there is an "unacceptable risk", but the Care Act does not actually refer to the term "unacceptable risk". Rather, the test is derived from case law, namely *M v M* (1988) 166 CLR 69, being a High Court decision decided under the Family Law Act. The test is discussed in more detail below, though I note at this point that the Family Law Act is also silent on the issue of "unacceptable risk". *M v M* makes it clear that the unacceptable risk test is applied in family law matters due to the best interests of the child being the paramount consideration. A similar paramountcy principle applies under the Care Act at section 9(1), which provides:

> *This Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount.*

It is essentially due to the similarities in these paramountcy principles that *M v M* has been applied, with authority, in matters conducted under the Care Act absent an express legislative provision in relation to "unacceptable risk".[3]

M v M – The Genesis of the Unacceptable Risk Test

In the matter of *M v M*, the Court was faced with allegations that the father had perpetrated sexual abuse against the parties' four year old daughter. The allegations arose from disclosures made by the child to the mother, though a physical examination of the child proved inconclusive.

At first instance the trial judge was unable to determine whether the father had sexually abused the child, but concluded that there was a possibility that it had occurred, and terminated contact between the father and the child. That decision was upheld by the Full Court of the Family Court. The father appealed to the High Court. The father argued that it was necessary for the Court to determine, on the balance of probabilities, whether he had abused the child. It was submitted that if such a finding could not be made, it was not open to the Court to make a finding that there was a risk of sexual abuse occurring if an access order were made.

The High Court rejected the father's argument, stating the following:

> *The fact that the proceedings involve an allegation that the child has been sexually abused by the parent who seeks custody or access does not alter the paramount and ultimate issue which the court has to determine, though the court's findings on the disputed allegation of sexual abuse will naturally have an important, perhaps a decisive, impact on the resolution of that issue…. the resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the court's determination of what is in the best interests of the child.*
>
> *…*
>
> *In resolving the wider issue the court must determine whether on the evidence there is a risk of sexual abuse occurring if custody or access be granted and assessing the magnitude of that risk. After all, in deciding what is in the best interests of a child, the Family Court is frequently called upon to assess and evaluate the likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child's welfare. The existence and magnitude of the risk of sexual abuse, as with other risks of harm to the welfare of a child, is a fundamental matter to be taken into account in deciding issues of custody and access…*

The High Court also makes the following point clear:

> *..it is a mistake to think that the Family Court is under the same duty to resolve in a definitive way the disputed allegation of sexual abuse as a court exercising criminal jurisdiction would be if it were trying the party for a criminal offence.*

[3] For comparative discussion regarding unacceptable risk in the family law and care jurisdictions, see Richard Chisolm, "Unacceptable Risk – A Comparison of the Family Law and Care Jurisdictions", *Childrens Law News* 1 (2011).

The unacceptable risk test set down in *M v M* can be summarised as follows:

- It is not necessary to make a positive finding that abuse has occurred. There will be some cases where the Court is able to make a positive finding on the evidence before it, but there will be many cases where the evidence falls short. In cases where the evidence would justify a positive finding being made, there are may be reasons why the Court should refrain from doing so unless impelled to do so by the particular circumstances of the case.

- In the event that a positive finding is to be made, the standard of proof to be applied is in accordance with the Briginshaw standard.[4]

- In relation to what form of order is in the child's best interests, the Court must determine on the evidence whether there is a risk of abuse occurring, and if so, assess the magnitude of that risk. If the risk is assessed to be unacceptable, custody or access should not be granted.[5]

The Evolution of Unacceptable Risk – The Family Court Approach

M v M was decided over thirty years ago, but remains the most authoritative decision on the issue of risk in parenting matters. Unsurprisingly, the decision has been subject to substantial judicial comment since that time. Noting that the unacceptable risk test has its origins in Family Law, it is useful to pay attention to the string of subsequent decisions that guide its application in that jurisdiction.

Of utmost importance to the current discussion is the decision in *A v A* (1998) FLC 92-800. The factual matrix associated with the conception of the unacceptable risk test related specifically to the risk of sexual abuse. In *A v A* the principle of unacceptable risk as enunciated in *M v M* was extended to apply to "other risks of harm".

In *Johnson v Page* (2007) FLC 93-344, it was held that the Briginshaw standard only applies to determinations of allegations of actual past abuse, not the analysis of whether there is an unacceptable risk of harm in the future.[6] In relation to the latter, it is the ordinary civil standard, being the balance of probabilities, that applies.

Talking extra-judicially, Justice Stewart Austin of the Family Court of Australia says this about the issue of unacceptable risk:[7]

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[4] *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 362 (now s140 Evidence Act).

[5] It is acknowledged that "custody" and "access" are not the terminology currently used under the Family Law Act – reference to such terms reflects the terminology used at the time *M v M* was decided.

[6] At paragraphs 75-77.

[7] Justice Stewart Austin, "Understanding the Enigma of Unacceptable Risk", *Hunter Valley Family Law Conference*, 31 July 2015, Hunter Valley.

…The assessment of risk of harm to a child is an exercise in foresight, not hindsight. The concept of "risk" to the child's health and safety implicitly requires contemplation of what the future holds for the subject child… The word "risk" denotes "chance". The concept of "chance" is concerned with probability. But chances are not just "probabilities", they are also "possibilities". By definition then, the "risk" of future harm to a child may range through a spectrum of chance, the polar extremes of which are "highly probable" and "remotely possible". To enable quantification of risk as unacceptably high, two features require consideration – first, the likelihood of the feared outcome occurring, and secondly, the severity of the consequences if it does.

…

As was recognised by Hale LJ in Re C and B (Care Order: Future Harm) [2001] 1 FLR 611 at [28], a comparatively small risk of really serious harm can justify action, while even the virtual certainty of slight harm might not. Describing a risk in qualitative terms such as "unacceptable" only serves to exclude outlying possibilities from consideration, but not possibilities that still remain a substantial chance of occurrence.

Does the establishment of an unacceptable risk of harm to a child have to meet a standard of probability, or merely possibility? … In Partington v Cade (No 2) [the Full Court] observed that parenting cases are not decided exclusively by probabilities and that the process of making orders that are intended to meet a child's best interests into the future also require advertence to possibilities (at [56] – [61]).

…

Judges may be satisfied about the existence of harm to a child even though such a risk is not proven on the evidence as a mathematical probability.

The Family Court has also shared some cautionary tales about the application of the unacceptable risk test. In the matter of *Hemiro & Sinla*[8] Justice Brown (albeit a first instance decision) provides some useful discussion about the "null hypothesis" – a term utilised in some expert evidence, and essentially akin to a presumption of innocence. Her Honour discusses this issue in detail in the context of sexual abuse allegations, and makes it strikingly clear that, when considering the best interests of a child, the starting point ***cannot*** be a presumption that the abuse did not occur unless that presumption is disproven.

The other cautionary tale is in relation to the treatment of a denial of the alleged abuse. In the matter of *Napier & Hepburn*[9] the Full Court (per Bryant CJ, Kay & Warnick JJ) considered an appeal in circumstances where the allegation could not be rejected as groundless, but the conduct remained strenuously denied by the father. At first instance the Court essentially determined that, due to the

[8] [2009] FamCa 181 at 20-51.

[9] [2006] FamCA 1316.

allegation not being rejected as groundless, and the denial being maintained by the father, a finding of unacceptable risk ***necessarily*** followed. The Full Court rejected this:

> *In order to reach [a conclusion of unacceptable risk] the trial judge needed to evaluate not only the seriousness of the behaviour if it occurs, that is that the behaviour would be unacceptable, but also the risk that the behaviour is likely to occur… the future likelihood of that event occurring needs to be evaluated not only in terms of the cogency of the evidence that it has occurred in the past, but also in the context of the father's denials and the vigilance of the parties, given the events that have led them to litigate over these issues so early in the child's life. What potential there was for these events to continue to occur if they had previously occurred in the past, might well be diminished by the bright lights that have been shone upon the parties and their conduct, in the course of these proceedings (at [82]).*

A denial by a parent in circumstances where abuse has been established may well be relevant to the determination of unacceptable risk (an indeed many of the leading cases in the care jurisdiction acknowledge this), however it is important to remember that such denial is not the beginning and end of the risk assessment – it is but one factor to be considered.

Unacceptable Risk – The Care & Protection Approach

It appears that it took some time for the unacceptable risk test to be applied in the care jurisdiction. In 2007 Senior Children's Magistrate Mitchell decided the matter of *Re Maree* [2007] NSWLC 35, a case involving risk of sexual harm, and then in 2008 the matter of *Re Anthony* [2008] NSWLC 21, in relation to non-accidental injury. In both of those matters the unacceptable risk test as stated in *M v M* was applied by His Honour.

In *Re Anthony*, at paragraph [40], SCM Mitchell held:

> ***The question which the Children's Court must resolve in the present case, then, is not whether a parent and, if so, which parent is responsible for inflicting non-accidental injury upon [the child] but, rather, whether, on the balance of probabilities, the proposals of the parents are in the best interests of his safety, welfare and well-being.*** *In order to do so, the court must make an assessment of the risk and the magnitude of the risk to Anthony in the arrangements proposed by the parents and must assess whether that risk is acceptable or unacceptable in the circumstances. If the risk posed by the parents is not an unacceptable one, they are entitled to have their son restored to them as expeditiously as practical* (emphasis added).

SCM Mitchell, in *Re Anthony*, also expressed some concern about the use of actuarial risk assessment in non-accidental injury cases. At paragraph [34] His Honour comments:

> *I am not sure that the court is much assisted by reference to these actuarial calculations. In the first place, the actuarial risk assessment makes no distinction between accidental trauma and deliberately imposed trauma. Secondly, insofar as the actuarial tables refer to non-accidental injury, they are not specific for abuse of the "shaken baby" type although I would have thought that some of the factors leading to the latter are specific to that type of abuse. Thirdly, Dr. Lennings admitted that, had one undertaken the actuarial assessment of risk in*

October, 2007, the result would have been an assessment of "no risk" because, as he explained, one needs an initial event in order to commence the exercise.

In 2009 SCM Mitchell handed down the decision in *Re Lincoln and Raymond* [2009] CLN 5, and provided a list of relevant factors in his determination as to unacceptable risk:

> *The question for the Children's Court in the present case, then, is not whether the parents 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 the father 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.*
>
> *Taking all those matters into account and having considered them in detail, my assessment is that the proposal of [the parents] that Lincoln be restored to their care involves an unacceptable risk to the child and is not consistent with his safety, welfare and well-being. Accordingly, there is no realistic possibility of a restoration in his case.*

Since *Re Anthony*, the Children's Court has consistently applied the unacceptable risk test in relation to non-accidental injury matters, with *Re Anthony* also being cited with approval in appellate decisions.

An area of distinction between the decisions of the Family Court and the Children's Court, however, appears to be in relation to the significance of a denial of wrongdoing by the parents or caregivers. As noted in *Napier & Hepburn,* in the Family Court a stringent denial does not necessarily equate with a finding of unacceptable risk, whereas the decisions in the Children's Court (discussed below) appear to more readily reach this conclusion. This is perhaps explained by the subject matter of the proceedings. Most decisions in the Family Court regarding unacceptable risk focus on the issue of alleged sexual abuse, where in many cases the existence of the abuse itself is an issue in dispute. In non-accidental injury matters in the Children's Court, the injury/abuse itself is usually well documented, with the unknown factor being the mechanism of injury and the perpetrator of the abuse. Where there is no doubt that a child has suffered significant injury in the care of his or her parents (often traumatic head or brain injuries), the maintenance of a denial of wrongdoing, and the absence of an alternative plausible explanation for the injuries, will more readily lead to a finding of unacceptable risk (without necessarily the need for a positive finding that the parents or either of them were responsible for inflicting the harm).

Although decided prior to the enactment of the Care Act, and prior to the High Court's decision in *M v M*, the unreported decision of Justice Hodgson of the Supreme Court remains an apt summary of the position taken by the Children's Court in many non-accidental injury matters:

> *... 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.*[10]

In *SS v Department of Human Services (NSW) [2010] NSWDC 279*, Judge Johnstone (at that time sitting the District Court hearing an appeal from the Children's Court) concluded:

> *"...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."*

In *MXS v Department of Family and Human Services (NSW) [2012] NSWDC 63* (also a decision of Judge Johnstone in the District Court) His Honour held:

> "*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."*

[10] *T v H and Ors* (NSWSC 19 December 1985, unreported) per Hodgson J.

Further, in *Department of Family and Community Services (NSW) and the Bell Collins Children [2014] NSWChC 5,* Judge Johnstone (as President of the Children's Court) held:

> *"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".*[11]

It has at times been argued that the approach taken in non-accidental injury matters essentially reverses the onus of proof from the Secretary to the parent(s). In *SL v Secretary, Department of Family and Community Services* [2016] NSWCA 124 (a matter involving judicial review of a District Court appeal), it was contended by the Applicants:

> *…that the approach adopted by the primary judge "resulted in an onus of proof being impermissibly … placed on the mother to disprove that the injuries to the child were caused by intentional abuse of the child, rather than requiring the Secretary … to prove that the child was in need of care and protection due to alleged intentional abuse of the child."*

The Supreme Court, per Basten JA at [18] rejected this argument, stating:

> *…to describe the judge's reasoning as placing an impermissible burden on the mother to explain what happened was not right.* ***There was the inescapable fact that the child had suffered a life-threatening and almost fatal injury****. Further, the mother had recounted a cause of the injuries which was found to be no more than a possible explanation. Finally, the mother's account was entirely inconsistent with the possible intervention by a third person, with the inevitable conclusion that she alone was the cause of the injuries, whether through neglect, involuntary conduct in the course of an epileptic seizure or some form of intentional abuse* (emphasis added).

It is also worthwhile to note that the Judge Olssen (who determined the District Court appeal in *SL*) made a finding that the injuries were "unexplained" and "non-accidental" notwithstanding a **possible** explanation for the injuries being advanced by the mother. In the Supreme Court it was contended that such findings were not reasonably open to Her Honour, an argument that was rejected as having "no substance". Accordingly it is important to remember that the availability of possible alternate explanations does not preclude such a finding being made (particularly if relying on expert evidence that goes no further than stating that the alternate explanation cannot be excluded).

A final note about the legal framework in care matters relates to the issue of establishment, and specifically, whether the unacceptable risk test applies to the issue of establishment, or whether it is only relevant to the placement phase of the proceedings. In his 2011 paper[12] Richard Chisolm says this about the issue:

[11] This decision was affirmed on appeal *Bell-Collins Children v Secretary, Department of Family and Community Services (No. 2)* [2016] NSWSC 853.

[12] Above at 3.

> *… the 'unacceptable risk' test is applied when the court is considering what orders are most likely to be in the child's interests. On the face of it, then, the test is relevant to the dispositional phase of care cases, not the establishment phase.*
>
> *Is this correct? I think it is. The relevant language of the establishment phase is that the court may make a care order if the child is in need of care and protection for any of the [reasons provided for in s71]. I have not had a chance to check any case law on this, but this language does not seem to me to invite application of the 'unacceptable risk' test.*

I respectfully disagree with the suggestion that the 'unacceptable risk' test has no application in the establishment phase. Suppose that section 71(1)(c) was relied upon in a non-accidental injury case, and the matter listed for an establishment hearing (as a distinct hearing, rather than consolidating the issues of establishment and placement). I would struggle with the suggestion that a positive finding of abuse must be made at the establishment phase, but is not necessary at the placement phase. If this were the case, the father's unsuccessful arguments in *M v M* (i.e. if there is not a positive finding in relation to the abuse, there can be no basis to find a risk of future abuse) would appear to have some traction. I would also suggest that the application of the unacceptable risk test to the issue of establishment is bolstered by the fact that the paramountcy principle under section 9(1) – the basis upon which the test is applicable to care matters – is couched in terms of "any action or decision concerning a particular child" rather than the Family Law Act equivalent, which specifically refers to the making of orders.

There is limited case law on the issue of unacceptable risk in the establishment phase of the proceedings. In *Department of Family and Community Services (DFaCS) and Nicole* [2018] NSWChC 3, Judge Johnstone commented, by way of obiter, that certain issues, including the issue of unacceptable risk of harm, "are properly matters for the placement stage of protection proceedings". This appears to have been that approach that has traditionally been adopted. More recently, however, in *A v Secretary, Department of Communities and Justice (No. 4)* [2019] NSWSC 1872, Justice Lindsay, dismissing an appeal from a decision of the President, appears to have adopted the unacceptable risk test in relation to the issue of establishment (at [120]-[121]). In *The Secretary, Department of Communities and Justice v B* (unreported decision of Dicker DCJ, 25 November 2020)[13], the Court upheld an appeal by The Secretary and established the matter on the basis of unacceptable risk, without the need to make a finding on any of the grounds listed under s71.[14] I suspect that the issue of unacceptable risk as it relates to establishment will be the subject of further judicial determination in light of these recent decisions.

[13] At the time of preparing this paper it is not known if there will be legal challenge to this decision.

[14] Note that in this matter the issue of unacceptable risk was specifically pled as a ground for a finding by way of Amended Summons.

Part II – Practical Considerations

Establishment

As outlined above, in many cases involving alleged non accidental injury, the issue of establishment is often resolved by being consented to "without admissions", or otherwise being disposed of in tandem with the issue of placement. It is my view that the practice of consenting without admissions is problematic in cases involving alleged non accidental injury.

In many matters in this jurisdiction, being matters where there are a multitude of risks identified, the practice of consenting without admissions appears to be a common sense approach – if it is acknowledged by the parent(s) that at least some of the risks identified by the Secretary exist, and would be sufficient to warrant a finding under s71, then is there any real utility in debating the specifics of those risks, or is time better spent embarking on a course of action to address those risks.

However, in matters involving alleged non accidental injury, it is often the case that the family has come to the attention of the Secretary due to an isolated incident (being the injury), and that other risk issues are not identified. In such matters, if established on a without admissions basis, the task of assessing realistic possibility of restoration would arguably be much harder. How can one make an assessment of realistic possibility of restoration, *"…having regard to … the evidence, if any, that the… parents are likely to be able to satisfactorily address the issues that have led to the removal of the child… from their care"*[15] if those issues are still fiercely contested?[16]

Stephan Herridge, in his 2009 article[17] makes the following points about the issue of establishment in non-accidental injury matters:

> *It is submitted that the threshold stage is dealt far more flippantly and casually in the NSW Children's Court than in the UK and probably at the expense of a thorough enquiry and optimum case planning. Here in NSW the threshold stage is often regarded as little more*

[15] Section 83(1)(b) Children and Young Persons (Care and Protection) Act 1998.

[16] Note also the concept of "runs on the board", recently endorsed by Judge Johnstone in the matter of *DFACS & the Steward Children* [2019] NSWChC 1 following the 2019 amendments to the Care Act. His Honour endorsed the submissions made by Senior Children's Magistrate Mitchell to the Wood Inquiry where he stated: "*The Children's Court does not confuse realistic possibility of restoration with the mere hope that a parent's situation may improve. The body of decisions established by the Court over the years requires that usually a realistic possibility be evidenced at the time of hearing by a coherent program already commenced and with some significant 'runs on the board'. The Court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can be confidently predicted…"*

In the current context, I would suggest that such an assessment would be almost impossible in circumstances where the matter is established on a without admissions basis, and the evidence available at hearing is focussed not on actions taken to ameliorate risk, but rather a contest as to even the existence of such risk.

[17] Stephan Herridge, "Non-Accidental Injury in Care Proceedings – A Digest for Practitioners", Childrens Law News 6 (2009).

than an administrative hurdle and is often vaulted over (or perhaps rather walked around) by parents' representatives "not opposing without admissions"…

It is respectfully submitted that it behoves any protective court to ensure that the threshold stage in care proceedings is used not only, as parliament intended, to filter out unwarranted state intervention in the lives of children. Rather the court should ensure as full an enquiry as necessary should be carried out into the factual basis for the application.

…

…it is also suggested by this writer that in a NAI case, the court should only accept concessions from parents who are possible perpetrators if they include a medically plausible explanation of how the injuries occurred. Otherwise the court is bound to conduct a full enquiry because permanency planning in these cases demands it in a jurisdiction where determining the acceptability of the risks associated with restoration is a mandatory first consideration.

In his article, Mr Herridge also references earlier comments by Magistrate Crawford:[18]

There are also many cases where the issues and evidence is such that they will always only be resolved by a contested hearing. It may not only be more convenient that they be resolved at the "threshold" stage, but that the preparation of a care plan and a determination by the Director-General of whether or not restoration of the child to the care of the parents is a realistic possibility, can only occur after the factual situation of the child has been determined by the court.

The arguments against consenting without admissions in non-accidental injury matters are clearly expressed above. The decision on how to address establishment in such cases is a forensic one, and must be considered in light of the available evidence and the circumstances of your client and the child. Possible alternatives would include either

1. Requesting a split hearing; or,
2. Deferring the issue of establishment until all evidence is available and requesting the Court to conduct a consolidated hearing on the issues of establishment and placement.

For clarity I should note that the reference to a "split hearing" does not necessarily involve conducting an "establishment hearing" and a "placement hearing". In the UK split hearings are conducted as the exception to the rule (with most matters being determined in a consolidated hearing), and are defined by the President's Guidance on Split Hearings (May 2010) as follows:

[18] John Crawford CM, "The Threshold Test – Limited Concession by parents that a child is in need of care – implications of a finding being made on some only of the grounds alleged in the care application?", Childrens Law News 8 (2003).

> *A split hearing is a hearing divided into two parts, during the first of which the Court makes findings of fact on issues either identified by the parties or the Court, and during the second part of the hearing the Court, based on the findings it has made, decides the case.*

It follows that a hearing could potentially be conducted to allow necessary findings of fact to be made (relevant to both the issues of establishment and placement), with the matter being adjourned part-heard to allow permanency planning to be addressed in light of such findings (noting of course that the conduct of the hearing falls squarely within the discretion of the presiding judicial officer).[19]

The Parent's Evidence

As noted by Judge Johnstone, in non-accidental injury cases "…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."[20]

The reality in many non-accidental injury matters, however, is that the evidence filed by the parents often is contradictory to expert evidence, is extremely succinct, and focusses almost exclusively on denying their involvement as the cause of the injury, rather than providing cogent evidence that allows the court to undertake a more thorough risk assessment. Such evidence misses the mark when considering the test outlined by Senior Children's Magistrate Mitchell in *Re Anthony* at [40]:

> *The question which the Children's Court must resolve in the present case, then, is not whether a parent and, if so, which parent is responsible for inflicting non-accidental injury upon [the child] but, rather, whether, on the balance of probabilities, the proposals of the parents are in the best interests of his safety, welfare and well-being.*

The starting point, no doubt, is providing an explanation for the injury if such explanation can reliably be provided (see the discussion below in relation to privilege against self-incrimination), but that is not the beginning and the end of the issue. The Court will require evidence to help better understand the circumstances of the child prior to the injury, and the steps taken by the parents to mitigate the risk of such injuries occurring in the future. Without this evidence, and in the face of an inescapable finding that the child has been the subject of an unexplained, non-accidental injury whilst in the primary care of his or her parents, it matters not whether the injury was inflicted by a

[19] Note however the argument against split hearings as expressed by Ryder LJ in the UK Court of Appeal in the matter of *S (A Child) [2014] EWCA Civ 25: "The oft repeated but erroneous justification for them (split hearings) that a split hearing enables a social care assessment to be undertaken is simply poor social work and forensic practice…In so far as it is necessary to express a risk formulation as a precursor to an analysis or a recommendation to the Court, that can be done by basing the same on each of the alternative factual scenarios that the Court is being asked to consider."*

[20] Above at 2.

parent, by a third party, or due to neglect. The fact remains that the Court cannot safeguard the child if returned to that parent.

Certainly there are cases where parents will rely on conflicting expert evidence suggesting a plausible medical (i.e. non-inflicted) cause of injury (see the discussion below in relation to expert evidence). Even in such cases there is a distinct possibility that the Court may not accept that evidence, leading to a finding that the injury was non-accidental. Accordingly, more detailed evidence from the parents remains a necessity (if for no other reasons to allow for an alternative argument to be mounted).

Mr Herridge, in his 2019 paper, talks at length about the need to identify a pool of perpetrators, and the difficulty faced by the Court when the identity of the perpetrator remains uncertain.[21] I do not intend to repeat that discussion here, other than to note that this needs to be the starting point for any evidence provided by the parents. Although medical evidence is not great for pinpointing the timing of many injuries (particularly head injuries), it will often provide a time frame during which the injury is said to have occurred. A detailed account of the child's movements during this period may be warranted, including identification of any possible perpetrators (note that unless there is evidence to the contrary, such evidence should remain factual rather than accusatory – it is not intended to incite a witch hunt).

In non-accidental injury matters it is not uncommon for one solicitor to act for both parents. This is obviously fraught with ethical concerns that need to be carefully managed. These concerns become more pronounced in cases where the pool of possible perpetrators is limited to the parents. It is hard to see how one parent who maintains no wrongdoing can give cogent evidence in relation to the circumstances leading to the injury without at least acknowledging the possibility of the other parent being the perpetrator, and outlining steps that would be taken to mitigate the risk if such findings were made.

Solicitors acting for multiple parties need to be mindful of the evidence to be led by their clients. In this jurisdiction evidence in chief should be provided by way of affidavit. Although there is no obligation for a parent to file, prospects of success are limited if such evidence if absent. This is not a jurisdiction where a parent could just mount an "affirmative defence". Mirror affidavits from each parent simply acknowledging the nature of the allegation and asserting a denial of any wrongdoing are little more than submissions, and arguably ought not be filed in the first place. Mirror affidavits which go further than that, detailing the circumstances of the child leading up to the injury, and outlining possible causes or perpetrators, potentially run afoul of Rules 24 and 25 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015.

Potential Self-Incrimination & s128 Evidence Act

While in some matters a parent may genuinely be unable to provide evidence explaining the source and mechanism on the injury, in other cases they choose not to. This often stems from the initial

[21] Above at 1.

advice provided by a criminal law solicitor to say nothing – which is of course sensible advice in the criminal law jurisdiction. But in the care jurisdiction, maintaining a right to silence will only get your client so far.

There are many reasons why a parent may choose to remain silent. If they inflicted the injury themselves (whether intentional, accidentally or by neglect), they may be scared to speak up for fear of criminal prosecution, or they may be embarrassed or ashamed. They may feel a loyalty to protect the person who did inflict the injury, or be pressured or coerced into covering for them. Or they may simply have the misguided belief that their prospects of restoration are improved by not offering the explanation.

To repeat Judge Johnstone's observations from *the Bell Collins Children*:

> *"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".*

It is not suggested that an explanation will necessarily equate to restoration, but where available, it will go a long way to assisting the Court in determining if and how the risk can be mitigated. This is true even if the injury was intentionally inflicted (of course with a need to also address the steps since taken to mitigate the risk of further injury).

Lawyers acting for parents in non-accidental injury matters should give careful consideration to whether their client can give evidence as to the source of the injury, and if so, they should file accordingly. I appreciate that lawyers may be reluctant to take instructions on this issue – one of the basic rules in criminal law is to never ask your client if they "did it", because you are then precluded from running evidence to the contrary. But in care matters, whether they "did it" or not (or whether they know who did) is one of the most important aspects of the evidence – perhaps more so than in criminal law proceedings due to not being able to rely on an affirmative defence. The advice that can be provided, and the case theory advanced, is necessarily dependent on the answer to that fundamental question. Certainly ethical issues arise if your client makes admissions and instructs you to prepare evidence to the contrary, but that is not a reason to avoid asking the question in the first place.

Assuming your client does provide instructions as to the source of the injury, lawyers must then consider whether the evidence, if provided, may tend to prove that your client has committed an offence. If there is potential, lawyers should consider the appropriateness of a section 128 certificate (and in consultation with their criminal lawyer, consider the pros and cons of providing the evidence should a certificate not issue).

The law surrounding s128 certificates is not overly clear, and in recent years (in other jurisdictions) there has been quite a lot of litigation in relation to the issue, primarily in relation to the compellability of a person to give the evidence that would be subject to the certificate, and their objection to doing so.

In their 2014 paper, Magistrate's Sbrizzi and Mulroney discussed the use of s128 certificates, and the divergence in interpretation between the Family Court and the Supreme Court.[22] At the time, Their Honours concluded that the Family Law decisions were more aligned with the approach in the Children's Court "to facilitate admission of evidence in order that the needs and interests of the child are properly dealt with", whilst opining that the approach in the Supreme Court was more likely to prevail. Their Honours were correct.

The Family Court decision of *Ferrall*[23] permitted the use of s128 certificates in circumstances where evidence would be voluntarily given subject to the issuing of a certificate. The Supreme Court Decision in *Song v Ying*[24] focussed on interpretation of the words of the section, rather than facilitating the admission of evidence. The Supreme Court held that a person who is willing to give evidence in response to questions from their own legal representative but only with the benefit of a s128 certificate, does not object, and therefore cannot benefit from a s128 certificate.

More recently, the Full Court of the Family Court in *Field & Kingston* [2018] FamCAFC 145 agreed with the Supreme Court in applying *Song v Ying*. They held that even a duty of disclosure does not amount to compellability to enliven an objection to providing evidence, with the determination that *Ferrall* is no longer good law. Accordingly, the authorities are now aligned on the issue. Assuming that the Children's Court adopts the approach taken in *Song v Ying* and *Field & Kingston*, (and noting that the Children's Court is not generally subject to the rules of evidence: s98(3) Care Act), it would appear that there may be some hurdles to be overcome before a parent could lead evidence in relation to the cause of a non-accidental injury with the benefit of a s128 certificate. Those hurdles, however, are not insurmountable.

In *Pendergast & Pendergast*,[25] a first instance Family Court decision decided after the decision in *Field & Kingston*, the Court considered circumstances in which evidence may be voluntarily given and still subject to a s128 certificate. I would suggest that the approach adopted in *Pendergast* could have application in the Children's Court, and would be consistent with facilitating the admission of necessary evidence. The approach taken in *Pendergast* was essentially as follows:

- Orders were made for the husband to file certain evidence (it is worth noting that the orders were made by consent and in anticipation of a s128 application);
- The husband applied for a s128 certificate on the basis that the evidence would tend to incriminate him;

[22] Magistrate Albert Sbrizzi and Magistrate Paul Mulroney, "Avoiding the Minefield When Care and Crime Collide", Legal Aid NSW Care and Protection Conference 22 August 2014, Sydney.

[23] *Ferrall and McTaggart as Trustees for the Sapphire Trust and Ors and Blyton and Blyton and Attorney-General of the Commonwealth* [2000] FamCA 1442

[24] [2010] NSWCA 237.

[25] [2019] FamCA 136. At the time of preparing this paper I was not able to locate any subsequent authority to ascertain how this argument has been received in the family law jurisdiction.

- The Court held (even though made by consent and in anticipation of a s128 application) that the orders provided the requisite level of compellability to enliven the husband's ability to object to the giving of evidence;

- The Court relieved the husband of his obligation to file, but granted a s128 certificate in the event that he "nevertheless willingly gives the evidence".

In light of the above decision, it is suggested that the following approach could be taken to facilitate the giving of evidence in the Children's Court in relation to the issue of non-accidental injury[26]:

- The party seeking a s128 certificate should file (not addressing the issues that may be subject to a s128 certificate), including a statement to the effect that they are concerned that any account provided by them in relation to the injury may tend to incriminate them;

- Orders could be sought from the Court (at the request of any party) directing the party to file specifically in relation to the events surrounding the child's injuries (I would suggest that a general filing direction would be insufficient to enliven the provisions of s128);

- If such a direction is made, the party seeking the benefit of a s128 certificate could then make an application for the certificate. Note that due to s98(3) it would appear necessary that such application would also need to seek the application of the rules of evidence to that particular issue.

Expert Evidence

Due to the nature of non-accidental injury cases, it is of no surprise that expert evidence is heavily relied upon in such cases to assist the Court in making any necessary findings. As noted by Judge Johnstone in his 2019 paper[27]:

> *Judicial officers rely on medical professionals to conduct timely and high-quality clinical investigations in suspected shaken baby cases to facilitate the decision-making process in court.*
>
> *…*
>
> *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 all other available evidence. Thus there may be cases, if the medical opinion evidence is that there is nothing diagnostic of non-accidental injury, where a judicial officer, having*

[26] Note this approach is purely theoretical in the absence of any recent published decisions of the Children's Court on the issue.

[27] Above at 2.

considered all the evidence, reaches the conclusion that is at variance from that reached by the medical experts.

I make a number of practical observations about the use of expert evidence in non-accidental injury matters.

Firstly, although the rules of evidence do not necessarily apply in care proceedings, the Court does tend to apply the usual rules in relation to expert testimony. Accordingly, it is essential, as a starting point, that practitioners are aware of the principles in *Makita (Australia) Pty Ltd v Sprowles.*[28]

It is also important to recognise that expert evidence in non-accidental injury matters often involves a multi-disciplinary approach. When engaging an expert, it is necessary to consider what their relevant field of "specialised knowledge" actually is, and to recognise that multiple experts may be required, each confining their expert evidence to their relevant field of expertise (and deferring to others on matters that are outside of their expertise). Although a medical practitioner may be *willing* to express a view on certain issues, doing so may undermine the credibility of their entire evidence.

Similarly, when engaging expert witnesses for the purpose of disavowing the evidence led by the Secretary (often the report of a Consultant Paediatrician from a hospital's Child Protection Unit), it is important to give consideration to the reasons why the Court may prefer the evidence from your expert in the event that there are differing opinions. Selecting experts with the appropriate specialised knowledge is the first step. Selecting experts with appropriate standing in their field is equally necessary. In matters where there is competing expert evidence (as is often the case in non-accidental injury matters), your client's case is not advanced by reliance on expert evidence when the expert's views are "fringe views", or not generally accepted by the medical community (READ: just because you can pay an expert to advance a particular opinion does not mean that you should).

In *SS*, Judge Johnstone commented as follows in relation to the state of the competing expert evidence:

> *An overall assessment of the medical evidence revealed the Director General's evidence to be the more objective. Dr Gabaeff and Dr Gardener approached the task from a prejudiced and pre-judged perspective. Their evidence, which was wholly concerned to debunk the notion of shaken baby syndrome, is to be approached with considerable caution. The medical evidence led by the Director General, on the other hand, involved a logical evaluation of all available material, was concerned to consider other possibilities, and was carefully and logically reasoned. That evidence is consistent with mainstream paediatric medical opinion. By their own admission, Dr Gabaeff and Dr Gardener are outside that conventional paradigm.*
>
> *…*
>
> *The plaintiffs' experts… were unashamedly partisan, and the totality of their evidence must be viewed with suspicion.*

[28] (2001) 52 NSWLR 705 at [85].

> *Their evidence was found wanting in a number of important respects. Dr Gardner's position, upon analysis, is to the effect that there were other possible explanations for J's presentation. But, because Dr Gardner does not accept shaken baby syndrome as a valid diagnosis, the explanation must be otherwise. To my mind that was circular reasoning. Dr Gabaeff's position was entirely premised on the diagnosis of meningitis. Flaws in his reasoning process were exposed in cross-examination, including for example his reliance on an incorrectly assumed fever, and a theory as to the possible mechanism of infection being the immunisation injections, which was discredited.*

In *Re Lincoln and Raymond*, Senior Children's Magistrate Mitchell made the following observations:

> *Secondly, as I think Dr Innes would recognise, Dr Stachurska, when she gave her evidence and expressed her clinical opinions … represented the majority of medical opinion in this country and around the world. Unlike Dr Innes, she has no axe to grind and no special theory to advance. She is not a crusader for or an apostle of any particular medical theory whereas Dr Innes is a man seized of a theory, convinced of its truth and eager to proselytise. Dr Stachurska presented her evidence calmly and respectfully. She did not accuse her medical colleagues of "talking nonsense" and treat their opinions with derision as Dr Innes did… It seemed to me that, in contrast to Dr Innes' evidence, Dr Stachurska's evidence was sober, well considered and internally consistent and that there was no suggestion that she was grasping at straws upon which she might build a hypothesis.*

Give careful consideration to the areas in which any existing expert evidence may be in dispute, and make concessions when appropriate to do so. It may be more appropriate to secure an expert opinion on a specific clinical finding, rather than seeking a critique and second opinion in relation to the entire report (for example, do you need a neurologist to comment on the findings from intracranial investigations, or do you need a forensic pathologist to comment on the likely mechanism of injury).

It is also important to recognise your own deficits when evaluating the existing medical evidence, and seek help where required. The likelihood that you are a legal practitioner who also has medical training is slim. It is very likely that you will not understand much of the expert evidence (that is why there are experts), which means that without participating in some sort of medico-legal consult, the areas where further comment is necessary may not be apparent. A proper understanding of the existing expert evidence is necessary to inform a proper response to same (including appropriate identification of an alternate expert and their terms of reference).

Finally, give careful consideration to the intended purpose of any expert evidence you intend to obtain, and whether the Court is actually assisted by the evidence. For example, since the adoption of the unacceptable risk test there is little scope for an actuarial risk assessment to be of benefit to the Court – the presiding judicial officer is capable of assessing risk based on the evidence before the Court without the need for such expert evidence.[29]

[29] See, for example, the comments by SCM Mitchell in *Re Anthony* at [34].

Joint Conference of Expert Witnesses

In cases where there are multiple expert witnesses, Practice Note 5 mandates that consideration be given to the use of a Joint Conference of Experts prior to matters being set down for hearing. Furthermore, paragraph 4.1 of Practice Note 9 creates an obligation on parties to raise with the Court as soon as practicable whether directions should be made for an experts conference to be convened (i.e. this should not just be considered when the matter is being set down for hearing).

It is important to note that the objectives of a joint conference of experts include[30]:

- Identifying and narrowing the issues for determination by the Court;
- Requiring the expert witnesses to reach a conclusion on the evidence; and
- Avoiding or reducing the need for the expert witness to attend court to give evidence.

It is my opinion that the success or otherwise of the joint conference depends largely on the preparation for the conference. Experts at the conference are limited to the questions that are put to them, subject only to the opportunity to identify further questions that could have helpfully been put to them (though this does not authorise them to provide an answer to such questions). It is often the case that questions are not developed prior to the matter being set down for a joint conference (contrary to the Practice Note), with the questions put to the experts not always as helpful as they potentially could have been.

In regards to the preparation of questions for a joint conference of experts, and preparation for the conference generally, I would make the following observations:

- Prepare the questions on the basis that the questions would be a substitute for cross-examination at hearing, with the witnesses giving evidence concurrently. Ideally, tendering the joint report could then avoid the need for each witness to give evidence, or at least, limit any subsequent issues for cross-examination to the issues that remain in dispute.
- Avoid the use of double-barrelled (or more) questions. Questions should be capable of a yes or no answer, or a brief response. Double-barrelled questions can be difficult for the experts to answer clearly, and run the risk of only a partial answer being provided.
- Remember that the Practice Note includes scope for draft questions to be circulated to the experts for their comment prior to approval from the Court. It appears that this opportunity is rarely taken, but it would allow experts to identify any areas of confusion, any areas where they are being asked to express a view outside of their expertise, or any areas where the lawyers drafting the questions may have missed the mark due to their limited understanding of medical terminology.
- Also remember that experts should have the opportunity to seek clarification from the instructing lawyers or the court concerning any questions put to them. Adequate

[30] Practice Note 9: Joint Conference of Expert Witnesses in Care Proceedings, paragraph 3.1.

preparation is the key here – if the questions (and any further material) are not provided to the experts with sufficient time to prepare, they cannot seek clarification prior to the conference. This potentially leads to circumstances where the expert expresses at the conference that they do not understand the question being put to them (or the context of the question).

- It should be clear to all parties, to the experts, and to the Children's Registrar convening the conference, what documents are to be relied upon by the experts. Ideally a list should be prepared indexing all documents to be considered so that there is no dispute as to what material is to be relied upon. When there is reliance on photographs or medical imaging, care should be taken to ensure that images of sufficient quality are available to the experts – for example when one expert is relying on a high definition digital photograph, and the other is relying on a photocopy, there may be some issues in relation to the opinions that can be expressed.

- Finally, remember that the experts may be assisted by the preparation of a chronology. A chronology should be prepared as a matter of course (and unless otherwise directed, by the ILR) unless the experts indicate that it is not required. A chronology prepared for these purposes would differ from a chronology prepared pursuant to Practice Note 5 in that its focus would be on the evidence relating to the onset of symptoms and the timing of clinical interventions.

Dispute Resolution

Some lawyers may question the utility of a dispute resolution conference in cases involving alleged non-accidental injury due to these cases being matters in which prospects of settlement are often limited. This view, however, misconstrues the purpose and aims of a DRC (as provided at paragraph 3 of Practice Note 3). A DRC, while intended to promote resolution of a dispute, is not ***only*** focussed on settlement. It provides an opportunity for all parties to engage in frank and open discussion in a confidential setting, and for parents, it should provide them with an opportunity to be directly heard (rather than being filtered through their legal representatives). Even in cases where no valid explanation has been provided by the parents, and it is their intent to progress the matter to hearing to disprove the allegations against them, a dispute resolution conference can still be useful to discuss the arrangements for the children in the event that the Court does not order restoration.

A DRC in non-accidental injury cases will, of course, be much more productive if all participants approach the dispute resolution conference with a correct understanding of the unacceptable risk test, and also if the evidence is responsive to the concerns raised in the above discussion. A dispute resolution conference approached from a perspective where the relevant parties simply seek a concession from the parents that they were responsible for the harm, or a concession from the Secretary that the parents were not responsible for the harm, will be of little utility.

Although dispute resolution conferences are confidential in accordance with Chapter 15A of the Care Act, that confidentiality is not absolute. It particular it is important to note that the Children's

Registrar may disclose information provided in the DRC if, as a result of obtaining that information, they have reasonable grounds to suspect that a child or young person is at risk of significant harm.[31] Accordingly, for a parent seeking to make an admission, the dispute resolution conference may not be the appropriate place to do so if the admission has not otherwise been previously made. I would suggest that the admission would be more appropriately made in the first instance by way of Affidavit, perhaps with the benefit of a s128 certificate. If the dispute resolution conference is the first time the admission has been made, whether or not the admission should be disclosed by the Children's Registrar in accordance with s244C(2)(c) of the Care Act (and following from that, whether the disclosure is admissible in accordance with s244B(4)(b)) would, in my view, depend on the nature of the admission, and the circumstances of the particular case.[32]

In non-accidental injury matters, where so much turns on the expert evidence of medical professionals, I would encourage lawyers to have regard to the possibility of the said expert(s) participating in a dispute resolution conference. Lawyers are reminded that expert witnesses are permitted to attend dispute resolution conferences upon request of a party and subject to leave being granted by the Children's Registrar (attendance is not limited to authorised clinicians from the Children's Court Clinic).[33] Where possible, the procedures outlined in paragraph 9 of Practice Note 6 should be followed in relation to such attendance.

In matters where an expert witness is proposed to attend the conference, I would suggest that their attendance should ordinarily be limited to part of the conference, with an opportunity for the participants to discuss any opinions offered by the expert once their attendance has concluded. In appropriate cases, consideration may need to be given to splitting the conference to allow the participants to digest the opinions provided by the expert and obtain appropriate advice prior to resuming discussion (note a standard 2-3 hour conference may not be sufficient in these circumstances).

One of the primary arguments advanced against attendance by an expert at a dispute resolution conference is the confidentiality of the conference. Many practitioners (particularly those acting in the capacity of ILR) will say that their views must be based on evidence, and that opinions advanced by an expert in this confidential setting are of no utility if they cannot later be relied upon. In relation to this argument, I would say that there are many advantages to an expert attending the conference, and that there are a number of practical ways to overcome the issue of confidentiality (discussed below).

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[31] Note that the exception under s244C(2)(c) applies only to the person conducting the DRC, being the Children's Registrar – the section does not permit confidentiality being breached by another person participating in the DRC on the grounds of a child being at risk of significant harm.

[32] For example, an admission by a parent to intentionally inflicting a traumatic head injury to an infant, where that parent is seeking restoration, would likely fall within the exception, whereas an admission to accidentally inflicting an injury in circumstances where the parent concedes that supervised contact is appropriate may not.

[33] Practice Note 3: Alternative Dispute Resolution Procedures in the Children's Court, paragraph 4.2.

I think most would agree that, absent further evidence, it is unlikely that an expert would retract their opinion under cross-examination. What this means is that cross-examination of an expert witness would often centre on their views based on evidence that was not previously available to them at the time of preparing their report, clarification of their recommendations, or asking further questions on matters arising from the contents of their report. Noting that an expert would attend a dispute resolution conference in an advisory capacity, all of these areas are potentially areas that the expert could advise upon during a dispute resolution conference. In matters where the case theory advanced centres on the evidence from the expert, clarification of that evidence at a dispute resolution conference may ultimately avoid the need for a hearing, and assist with earlier resolution of the matter. At the very least, it may help to limit the areas of dispute. Even if their attendance does not achieve these goals, participation by an expert may assist in a better understanding of the medical evidence at hand (and whether further medical evidence is required).

The issue of confidentiality can be overcome by the consent provisions provided for in s244C(2)(a) and s244B(4)(a) of the Care Act. Subject to the consent of all parties, the expert, and the Children's Registrar, the opinions expressed by the expert at a dispute resolution conference may be exempt from the confidentiality provisions, and admissible in the proceedings.[34] It is possible for the parties to agree that the exemption to the confidentiality extends only to the opinions expressed by the expert, and not to any subsequent discussion between the parties. I would suggest that if this approach is to be taken, such arrangements need to be made with all involved well-prior to the conference. It would not be fair to any person involved to be asked to make a decision regarding this at the commencement of the conference and without prior notice.

I conducted a dispute resolution conference recently in a non-accidental injury matter where the above approach was taken. It was agreed between all parties that I would take detailed notes of the opinions expressed by the expert. Those notes were then settled by the expert, annexed to the Bench Sheet, and circulated to the legal representatives, with the understanding that the document prepared would be admissible should the matter proceed to hearing. I do not suggest that this is the approach to be adopted in all cases, but it was appropriate in that particular case.

It may not always be the case that the views expressed by the expert at a dispute resolution conference need to be documented – simply hearing from the expert may be sufficient (with or without the nature of their opinions being disclosed by the Children's Registrar). If, however, the views do need to be documented, it may be appropriate for the following to occur:

- Requesting an addendum to the report (whether privately funded, or in the case of an authorised clinician, through the Clinic). Consideration needs to be given to whether the

[34] Note that s244C(2)(a) makes provision for disclosure of information by the person conducting the dispute resolution conference, namely the Children's Registrar. It does not permit disclosure by any other participant. Accordingly, for the opinions expressed by the expert to fall within this exemption, it will be necessary for the Children's Registrar to disclose, at least in summary form, the opinions expressed. This would, in my view, be achieved by recording the opinion on the Bench Sheet. The opinion having then been disclosed by the Children's Registrar, the opinion becomes admissible in the proceedings (whether in written form or in the nature of cross-examination).

addendum is prepared solely from the issues discussed at the dispute resolution conference, or whether a further terms of assessment need to be provided to the expert. In the latter case, even if the expert is an adversarial expert, I would suggest that any such terms should be agreed between the parties to avoid further dispute.

- In the case where there are views from multiple experts, requesting a joint conference of experts (though, in the case of multiple experts, the joint conference should ideally have occurred prior to the dispute resolution conference having been conducted, with the joint report informing the discussion at the dispute resolution conference).

Parties should be mindful of the circumstances of the expert and the circumstances in which any expert evidence was obtained. For example, if the relevant expert opinion is that of the consultant paediatrician who authored the CPU Report, their capacity to prepare an addendum to the Report may be limited, and such options should be canvassed prior to the conference.

It is also sometimes advanced that an expert witness should not attend a dispute resolution conference as doing so may compromise their evidence. I respectfully reject that argument. The relevant Practice Notes specifically displace such arguments by making express provision for attendance at alternative dispute resolution by expert witnesses. The argument also undermines the integrity of the expert witness, who is required to comply with the *Expert Witness Code of Conduct*, including an obligation to exercise his or her independent, professional judgment. An expert witness who is no longer able to exercise his or her independent, professional judgment as a consequence of participating in a dispute resolution conference is perhaps not an appropriate witness to have engaged in the first place.

Conclusion

We are all aware that care and protection is quite a specialist area of law, and that those not familiar with the jurisdiction could easily struggle to understand the law and practice of the Children's Court. Non-accidental injury matters are some of the most difficult matters to litigate in this jurisdiction. It is my observation, however, that many parents involved in such litigation are represented by lawyers who may not have a firm understanding of the jurisdiction. Often parents will initially engage representation due to concerns about possible criminal implications, and retain the same representation in subsequent care proceedings. There is nothing wrong with this approach, but it is important that any legal representative understands the nuances of care matters, the underlying principles of the Act, and the detriment that flows from applying a criminal law approach (being the right to silence) to care proceedings. I have observed that many non-accidental injury cases are still litigated on the basis of whether the Secretary can prove that a parent was the person responsible for causing harm to a child. This approach shows a fundamental misunderstanding of the relevant tests that apply in this jurisdiction, and often leads to cases being unnecessarily prolonged, with reliance on evidence that does not necessarily go to the core of the issue that needs to be determined.

I do not suggest that I am an expert on non-accidental injury matters. I have, however, had the benefit of approaching this paper from the unique perspective of someone who is completely nonpartisan. I have had the benefit of reviewing and analysing the evidence advanced in such cases without the lens of a particular case theory. I have had the benefit of engaging with experts during dispute resolution conferences and joint expert conferences. And I have been privy to the legal and factual arguments that are advanced by a range of legal practitioners. It is from this perspective that I share these observations.

For those fluent in care, I hope that this paper serves as no more than a refresher, and perhaps an opportunity for you to reflect on your own practices in such matters. For those perhaps not as well-versed in the care jurisdiction, I hope that this paper may give you some guidance in how you may choose to approach non-accidental injury matters. Each case will, of course, need to be carefully managed based on the facts and circumstances relevant to that case.

I return now to where I started this paper, with the comments from Judge Johnstone:

> *Cases involving instances of shaken baby syndrome are among the most emotive, controversial and challenging within the care and protection jurisdiction of the Children's Court of NSW.*
>
> *Decision making in care and protection proceedings is complex, and necessitates that judicial officers engage in the difficult task of considering and evaluating the multiple factors which combine to impact on the child's future safety, welfare and well-being. This process is especially complex in cases involving non-accidental head injury where there is typically no direct evidence to the alleged abuse, and the explanations offered by carers are usually inconsistent with the physical findings.*[35]

Non-accidental injury cases will never be easy cases for a judicial officer to decide, or for a legal practitioner to conduct. But they can be made ***easier*** - by ensuring that the case is not advanced on the wrong legal premise, and by ensuring that the evidence available to the Court is the best evidence possible, targeted to the issues that actually need to be determined, with a focus on the child's future safety, welfare and well-being.

[35] Above at 2.