REGINA V FI SHAKEN BABY: A TRICKY CASE AND THE DEVELOPMENT OF CAUSATION

*At the end of a long trial in London, FI represented by RICHARD BARRACLOUGH QC leading KATE KELLEHER was acquitted by direction of the judge of causing grievous bodily harm to his baby daughter with intent to do so but convicted by the jury of wilful neglect.*

*Almost the entire trial was undertaken remotely with experts giving evidence form many parts of the UK and from abroad*

*This was a sad story of an epileptic father who on two occasions caused fractured ribs, a fractured collar bone and then catastrophic brain injury to his baby daughter. The child suffered the usual subarachnoid, subdural and retinal haemorrhaging.*

*The essence of the jury’s verdict was that FI deliberately caused some injury to his daughter.*

*It is an interesting case because theories of causation were debated before the jury, including the theory of reperfusion, the consequences of overlaying and the number of shakes required to cause such brain injury.*

*A number of possibilities were deployed before the jury ranging from birth related injury (discounted) to overlaying whether without or during an epileptic fit.*

*As to the general theory of SBS, one neurosurgeon gave evidence in relation to the Swedish research ”Traumatic shaking: The role of the triad in medical investigations of suspected traumatic shaking: A systematic review 2016”, in terms of the mainstream and minority view of SBS and opined that in many important respects the medical profession is still at the frontiers of knowledge.*

*Thus 10 years ago Dr Gadaeff and Bandak and Ommaya and others were voicing concerns about the very idea that one might shake a baby and cause brain injury without causing injury to the neck and ligaments.*

*The Swedish review suggested that “There is insufficient scientific evidence on which to assess the diagnostic accuracy of the triad …)”*

*The neurosurgical opinion in this trial was to the effect that: “we may be wrong and the minority may be right but they have not given us an alternative….You cannot get scientific evidence- we will do the best we can with what we have got or not accept the diagnosis at all….no one knows with scientific certainty. We can really just go with what we understand at the moment”*

*The pathologist who gave evidence for the Defence opined that the minority view is causing a shift in approach to this type of case.*

*Thus, it was agreed that the theory has moderated so that it is no longer that the carer must have shaken the baby backwards and forwards multiple times to cause the injuries.*

*The neurosurgical opinion was that but one jolt with more force than acceptable would suffice. The consequences of a shake or jolt will then depend on the size of the head, the integrity of neck muscles and the position of the head so that whether the baby suffers no or a little or serious harm is a matter of good or terrible fortune.*

*As to the amount of force, the neurosurgical opinion was, “although (the child) may have been shaken excessively it does not necessarily mean that it was with the intention of causing harm to her eyes or brain”.*

*Hence FI was acquitted of S18 causing grievous bodily harm with intent by direction of the judge.*

*FI suffered epilepsy. A question arose whether he might have overlain the child during an epileptic fit. That he denied but it remained the only potential cause of certain injuries if birth injury was to be excluded as the majority of experts had concluded it should be.*

*FI told paramedics “It should not have happened….I rolled on the baby”; he had fallen asleep and when he woke up the baby was not responding. The baby was blue and hypoxic. He was later heard to say “… that he had been asleep on the bed with the baby and had woken up partly lying on the baby”.*

*A neurologist expert in epilepsy described what can happen during a fit with jerks, lashing and amnesia following a seizure. He monitored epileptics who can suffer attacks and end up in the same position as that in which they went to sleep.*

*We had to consider whether it was possible that the injuries might have been caused by overlaying either during sleep or during an epileptic fit.*

*One radiologist opined: “The action of rolling on a child could cause compression of the chest…If an adult rolled onto a child and then pressed down with their weight this probably would cause rib fractures….”.*

*A second radiologist gave evidence that the posterior rib fractures could not have been caused by overlaying that is until she was confronted with the Family Division case of Re ABC (2020 EWFC 57) where 23 fractures of the ribs (including microfractures) were found, many at the very site of which she was speaking. The pathological opinion in that case was that “the pathology of overlaying particularly with rib fractures (is) not well understood… overlaying was a plausible mechanism for the posterior rib fractures..”.*

*There was both subdural and subarachnoid haemorrhaging. The jury had to consider the possibility of overlaying causing asphyxiation and brain damage.*

*In Re ABC “The recent ischaemia…was consistent with death by asphyxia. When co sleeping a young baby could die from the parent lying on the child and occluding the airway or as a result of the baby’s face being in a micro climate which was low in oxygen but high in carbon dioxide or by overheating”*

*It was argued that what may have happened is that FI fell asleep. He suffered an epileptic fit and over lay the child thus creating the micro climate causing asphyxiation. She was not breathing oxygen, she was breathing cardon dioxide and she foamed at the mouth because the lungs were damaged. They bled. The brain was deprived of oxygen and then blood. It started to die. Subarachnoid bleeding may be caused by overlaying. Overlaying could not however account for the subdural haemorrhage. The theory therefore continued that the subdural haemorrhaging came from the blood and oxygen put into baby so that they impact on the dying brain by way of reperfusion. The baby needed considerable pressure to support her breathing and for her circulation. She was profoundly acidotic and needed support for her blood pressure.*

*Reperfusion was considered by one pathologist to be a possible but unlikely cause of bleeding. The generality of neurosurgical opinion was that it would be very rare and only when the brain cells are wrecked. The pathological opinion was not so sure.*

*Retinal bleeding was noted in the child to be explained. One neurologist opined that the bleeding to the eye is highly unlikely to have been caused by asphyxiation with this caveat: “Smothering/choking /asphyxiation cannot be excluded but is extremely rare”.*

*Opthalmic opinion was: “the retinal haemorrhages…the recent brain subdural and subarachnoid haemorrhages are possibly the consequences of a shaking and or impact type of head injury…non accidental head injury needs to be seriously**considered as the cause of the retinal findings…the combination of injuries including (old) rib fractures and a more recent collar bone fracture (mean that) consideration should be given to the potential cause being an undisclosed accident or non accidental injury with excessive shaking and/or impact which may be episodic and possibly very brief but intensive. There are big concerns about the co sleeping arrangement and details are lacking about how (the child) came to be so injured. It is not possible at this stage to exclude as a mechanism of injury a combination of suffocation and/or smothering and/or asphyxiation” described as “a more complex mechanism of asphyxiation and/or suffocation and /or choking” although “it is very possible that (the child’s) head was shaken and/or hit and this must be considered the most likely cause of the retinal haemorrhages”*

*Falling asleep he opined “needs to be considered (in) that a possible mechanism of injury was suffocation and/or asphyxiation/choking” and “Co sleeping with her father (as a) mechanism of injury (asphyxiation or smothering) leading to retinal haemorrhages cannot be excluded”. It was he said “not possible to distinguish clearly (between) trauma to the head by shaking and/impact (and) smothering/ choking/ asphyxiation.” His final opinion was “…..if he brain haemorrhage is traumatic in origin then non accidental cause (shaking type injury) has to be strongly considered as the cause of the significant retinal haemorrhages described and that the retinal bleeding may have been caused by some form of asphyxiation or smothering an event which may not have been intentional”*

*A complex and difficult case where the child survived but with catastrophic injuries caused by a father who it was said otherwise so loved the child.*