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ONE SIZE DOESN'T FIT ALL

Overuse of Shaken Baby Syndrome may have led to many miscarriages of justice

By Julius (Jay) Wachtel. Things hadn't been going well for Shirley Ree Smith. After four years of bouncing from one relative's home to the other, the grandmother wound up in a single-room occupancy "hotel" on Los Angeles' infamous skid row. Thankfully, she can finally leave. Released in 2006 after serving ten years in a California prison, Ms. Smith recently received permission to relocate to Illinois, where she will stay with her daughter and three grandchildren.

What makes the story unique is that Smith was convicted of killing her daughter's 7-week old infant by shaking her to death. What makes it extraordinary is that if prosecutors prevail Smith will be returned to prison to finish serving out her term of 15 years to life.

"Shaken baby syndrome" (SBS) made its first appearance in the medical literature of the 1970's. Within a few years the concept had become an entrenched component of the prosecutorial arsenal. In the first known appellate case on point, decided in 1984, an Ohio court affirmed a conviction based on expert testimony that retinal bleeding and a subdural hematoma indicated a baby was shaken to death. There are 1,500 SBS diagnoses and an estimated 200 SBS-related convictions each year. About 800 SBS cases have been argued before appellate courts in the last two decades, with 258 during 2005-2008 alone.

SBS diagnoses have typically been based on:

(a) The presence of a "triad" of symptoms – retinal hemorrhage, subdural hemorrhage and cerebral edema (brain swelling)

(b) No evidence of another causal mechanism. Experts have claimed that for a blow to cause the same trauma as SBS it would have to be equivalent to falling from a second or third-story window or being struck by a car traveling 25-30 miles per hour.

It has also been widely assumed that the effects of severe shaking are immediate and catastrophic. That's why an SBS diagnosis virtually proves a case: not only was a crime committed, but the caregiver who had charge of the baby when symptoms appeared must be the one responsible.

In 1997 Wisconsin day-care provider Audrey Edmonds, a mother of three, was sentenced to 18 years in prison for shaking an infant to death. The victim had been dropped off at Edmonds' home and reportedly began convulsing after drinking formula. As usual, no one was present other than the caregiver. Twelve years later a string of physicians – including the county pathologist who helped convict Edmonds – testified at her habeas hearing that modern techniques, including magnetic resonance imaging, had undermined if not completely disproved the "common medical wisdom" that once underpinned SBS. When asked by the judge whether he now believed that "some" shaking took place the pathologist replied "I don't know."

Edmonds was released. A new trial was granted but the charges were soon dismissed.

On July 1, 2001 the influential American Academy of Pediatrics issued its first official policy paper on SBS. Its abstract highlighted the perceived severity of the problem:

> Shaken baby syndrome is a serious and clearly definable form of child abuse. It results from extreme rotational cranial acceleration induced by violent shaking or shaking/impact, which would be easily recognizable by others as dangerous. More resources should be devoted to prevention of this and other forms of child abuse.

Various indicators of SBS were mentioned, including cerebral edema and subarachnoid and subdural hemorrhage. However, the actual diagnosis was left to the judgment of physicians, who were encouraged to consider a host of factors including the caregiver's "psychosocial" characteristics.

Eight years later, in a superseding paper, the Academy supplanted SBS with the more inclusive diagnosis of Abusive Head Trauma (AHT). It acknowledged the difficulty of distinguishing between the effects of shaking and impact and conceded that internal injuries caused by blows had been mistakenly attributed to shaking. In passing it even mentioned that medical diseases can "mimic" the effects of trauma. Physicians were encouraged to "consider alternative hypotheses" to AHT and to use "restraint" in making diagnoses where evidence of physical abuse was unclear.

The old and new policies are in stark contrast. The old was written during the waning years of a decades-long wave of child abuse hysteria that led to many wrongful convictions. It emphasized the prevalence of child abuse and encouraged physicians to diagnose SBS. The new policy takes a more measured approach; while physicians are urged to look into the possibility of child abuse, they are also cautioned about the devastating legal consequences of making a wrong call.

Shirley Ree Smith's release in 2006 was not an acquittal. After exhausting her state remedies – she had appealed her conviction to the California Supreme Court without success – Smith filed a habeas motion in Federal District Court. Turned away, she then appealed to the Ninth Circuit.

Fortunately for Smith, the justices took her seriously. Poring over the trial evidence they discovered some very interesting things. Finding no sign of trauma during the preliminary examination, the admitting physician diagnosed SIDS (sudden infant death syndrome.) But then the autopsy surgeon found a minor abrasion and a small amount of pooled blood in the brain. Although these weren't by themselves sufficient to diagnose SBS, a prosecution expert witness advanced the theory, unsupported in the medical literature, that violent shaking tore the brain stem, making death instantaneous and minimizing bleeding. Circularly, that's also why the tear wasn't detected during autopsy.

Defense experts disagreed. One attributed the death to SIDS, the other to a recent or old fall. Both said that a torn brain stem would have caused significant hemorrhage. Smith was nonetheless convicted, essentially on the expert witness' uncorroborated speculation. That, the Ninth Circuit decided, was so unreasonable as to warrant a new trial.

State prosecutors appealed to the Supreme Court. It granted certiorari, then sent back the case to the circuit for reconsideration in light of Jackson v. Virginia, which requires that Federal appeals courts

evaluate the factual basis of state convictions "in a light most favorable to the prosecution." The Ninth Circuit did so and in 2008 reaffirmed its original judgment. Prosecutors appealed once more, and a decision by the Supreme Court is pending.

There is no doubt that severe shaking can harm or kill an infant. There's also no doubt that it has been over-diagnosed as a cause of death, and not only in the U.S. Canadian prosecutors recently moved to set aside the 1992 conviction of Toronto man Dinseh Kumar, who pled guilty to shaking his newborn to death. Kumar later said he confessed because the pathologist's report made it unlikely that he could prevail and because he was offered a 90-day sentence, far less than what he would receive if convicted of murder. Since then the pathologist has been thoroughly discredited and fourteen other child abuse convictions have been brought under serious question.

In her 2009 article in the *Washington University Law Review*, "The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts," Deborah Tuerkheimer worries that the deference given to SBS by the criminal justice system may encourage scientists to shade their testimony in the direction of guilt:

> The construction and persistence of SBS raises the distinct possibility that our adversarial system of criminal justice may be corrupting science. It may do so by placing pressure on scientists to articulate opinions more extreme — and certainly with more confidence — than those they actually hold.

For Shirley Ree Smith the consequences of transforming SBS into the Swiss Army knife of child abuse prosecution are all too palpable. When asked last month what she would do if her conviction was reinstated she was unusually blunt. "I would never go back to prison. I'll take my own life first, but I won't go back there."