

# Ironic Simplicity: Why Shaken Baby Syndrome Misdiagnoses Should Result in Automatic Reimbursement for the Wrongly Accused

*Jay Simmons\**

## I. INTRODUCTION

Shaken baby syndrome (SBS) gained notoriety in the United States during the mid-1990s due to the Louise Woodward trial. Ms. Woodward, a British au pair residing in Boston, began working for the Eappen family in November 1996, caring for eight-month-old Matthew and his brother.<sup>1</sup> On the afternoon of February 4, 1997, Ms. Woodward allegedly shook Matthew, causing him to have severe head injuries that led to his death on February 9, 1997.<sup>2</sup> A jury convicted Ms. Woodward of second-degree murder, which the judge reduced to involuntary manslaughter.<sup>3</sup> The judge imposed a 279 day sentence—the time Ms. Woodward served while incarcerated awaiting trial.<sup>4</sup> The Woodward trial burst SBS onto the national headlines, lighting the fuse for future debates regarding a controversial diagnosis.

SBS has been diagnosed for approximately fifty years, gaining its first proponents, C. Henry Kempe, in 1962,<sup>5</sup> followed by John Caffey.<sup>6</sup> As it evolved, the basic tenet became that an infant or toddler is violently shaken, causing the child's head to forcefully snap back-and-forth, resulting in a "triad" of symptoms many medical providers consider pathognomonic of SBS: retinal hemorrhaging (bleeding of the inside surface

---

\* J.D. Candidate, Seattle University School of Law, 2015; B.A., Biology, Central College, 2002. I would like to thank Heather Kirkwood, Myers, Myers, Danks & Smith, and Thomas Squire.

1. *Commonwealth v. Woodward*, 694 N.E.2d 1277, 1281 (Mass. 1998).

2. *Id.*

3. *Id.* at 1281–82.

4. *Id.* at 1282.

5. Genie Lyons, *Shaken Baby Syndrome: A Questionable Scientific Syndrome and a Dangerous Legal Concept*, 2003 UTAH L. REV. 1109, 1119 (2003).

6. John Caffey, *The Whiplash Shaken Infant Syndrome: Shaking by the Extremities with Whiplash-Induced Intracranial and Intraocular Bleedings, Linked with Residual Permanent Brain Damage and Mental Retardation*, 54 PEDIATRICS 396, 402–03 (1974).

of the back of the eye), subarachnoid or subdural hemorrhaging (bleeding between the membranes surrounding the brain), and cerebral edema (brain swelling).<sup>7</sup> The medical community generally accepted SBS diagnoses for roughly twenty years, from approximately the early-1980s to the late-1990s/early-2000s, substantially aided by improved imaging techniques that provided more accurate radiographic imaging.<sup>8</sup>

The common SBS event begins with a medical provider evaluating a sick or injured child, finding a subdural hematoma, then either consulting his or her peers or making the diagnosis independently. The provider then contacts law enforcement, child protective services (CPS),<sup>9</sup> or both, to report the child abuse findings. Then law enforcement or CPS takes custody of the child, who, if alive, frequently remains hospitalized due to the severity of the injuries. Finally, the last caregiver, almost always a parent or daycare provider, is questioned by the medical provider(s), law enforcement, and CPS, who begin their criminal and custody investigations.<sup>10</sup>

Ironically, while the Woodward trial unquestionably raised child abuse and SBS awareness, it arguably spawned a louder voice to SBS's detractors. The primary medical and biomechanical criticism of SBS is that the fundamental components of the triad, identified as a "constellation of symptoms," which individually would not substantiate an SBS diagnosis, has not been validated.<sup>11</sup> Furthermore, there are other triad causes besides shaking.<sup>12</sup> Simple Google searches identify SBS proponents and opponents,<sup>13</sup> including a number of very sad, tragic examples of the consequences of SBS diagnoses and misdiagnoses. The factions within the SBS field appear very rigid, and many of the same names are repeatedly noted as proponents and opponents.

---

7. Deborah Tuerkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 514, 514–15 (2011).

8. Comm. on Child Abuse and Neglect, *Shaken Baby Syndrome: Rotational Cranial Injuries—Technical Report*, 108 PEDIATRICS 205, 206 (2001).

9. CPS is usually a subdivision of a Department of Social and Health Services agency, although the names may vary from state to state.

10. Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 2 (2009).

11. *Id.* at 17–18; See Keith A. Findley et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right*, 12 HOUS. J. HEALTH L. & POL'Y 209, 231–34 (2012).

12. Edward J. Imwinkelried, *Shaken Baby Syndrome: A Genuine Battle of the Scientific (and Non-Scientific) Experts*, 46 NO. 1 CRIM. L. BULL. 1, 11 (2010).

13. Noteworthy Google results included the [www.dontshake.org](http://www.dontshake.org) website, including its list of upcoming conferences. Other prominent results include: DERMOT GARRETT, NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, OVERCOMING DEFENSE EXPERT TESTIMONY IN ABUSIVE HEAD TRAUMA CASES (2013), available at [http://www.ndaa.org/pdf/Abusive%20HeadTrauma\\_NDAA.pdf](http://www.ndaa.org/pdf/Abusive%20HeadTrauma_NDAA.pdf); Findley et al., *supra* note 11.

Another prominent criticism is that the medical providers diagnosing SBS occupy multiple roles—they diagnose SBS, they play a law enforcement role because an SBS diagnosis substantially suffices as a law enforcement investigation, and they function as prosecutorial fact and expert witness. This undoubtedly puts pressure on medical providers to diagnose SBS correctly because the diagnosis identifies a child as being abused, which initiates criminal and custodial investigations. An SBS diagnosis commences a conflicted relationship between medical providers, law enforcement, and CPS personnel, and the child’s parent(s), who are frequently accused of shaking.

Culturally, we want medical providers to diagnose abuse where they genuinely believe it exists. However, when abuse did not occur and families endure the gamut of criminal and CPS investigations and legal proceedings, likely spending substantial sums of money defending themselves and being separated from their families, those wrongfully accused deserve recourse. Unfortunately, recourse seems extremely unlikely, particularly in civil suits against medical providers, law enforcement, or CPS personnel.

SBS’s shortcomings include the debatable science behind SBS theory and diagnosis—the questioning of which has grown more vociferous—and the arguably biased, discriminatory treatment of the accused. Professor Deborah Tuerkheimer notes that the evolving SBS skepticism and contentious debate has resulted in “chaos” in many SBS adjudications and within the medical and biomechanical fields, with the same SBS proponents and opponents continually crusading for and clashing over their beliefs.<sup>14</sup> The issues surrounding the medical and biomechanical components of SBS diagnoses have been repeatedly examined and discussed, and are not the focus of this Note. This Note recounts those issues primarily to evidence the substantial tension surrounding SBS in the context of misdiagnoses and the treatment of the accused parties.

The solution proposed here is to remove the qualified immunity clause in each state’s reporter statute and provide automatic reimbursement for economic damages incurred if any investigation is deemed “unfounded” (meaning the CPS investigation concluded there was no evidence substantiating child abuse). Each state has a reporter statute, which requires medical providers to report child abuse, and these statutes provide qualified immunity if the reporter acted in “good faith.”<sup>15</sup> If the medical provider, law enforcement, or CPS personnel acted in good

---

14. Tuerkheimer, *supra* note 7, at 519.

15. Caroline Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 194–95 (1998).

faith, they would not face civil liability and the damages would be strictly limited to reimbursement for economic damages. However, I also propose that if there is evidence any medical provider, law enforcement, or CPS personnel acted in bad faith or engaged in ethically suspect behavior, any wrongly accused party may pursue non-economic damages. If there is evidence of manipulation or intentional nondisclosure of medical evidence, or unethical or other forms of unscrupulous treatment of the accused, the strict economic damages cap should be voidable and the medical providers, law enforcement, and CPS personnel would become exposed to non-economic damages claims. This should be determined on a case-by-case basis.

Theoretically, an economic damages cap is beneficial because it holds medical providers accountable and promotes thorough investigation of a child's injuries before diagnosing SBS, while also ensuring law enforcement and CPS personnel conduct objective investigations. The cap would also provide those professionals some security regarding their financial liability in the event of an incorrect diagnosis or an unfounded investigation, presuming they are not acting in bad faith or unethically. Additionally, eliminating qualified immunity and incorporating automatic reimbursement for unfounded diagnoses would provide financial relief to those wrongly accused of shaking, but it would also limit their recovery to economic costs associated with post-SBS diagnosis expenditures, such as additional housing and daycare costs, lost wages, and legal costs and fees. Finally, the voidable nature of the cap would provide additional compensation for those wrongly accused who endured unfair or unethical treatment from medical providers, law enforcement, and CPS personnel.

Part II of this Note tracks the relevant history of SBS, specifically noting its initial and inherent biomechanical and medical developments. Part III discusses the inherent tension between parents' fundamental right to the care and custody of their children and a state's interest in protecting children it believes were abused. Part IV details the multiple, arguably conflicting, roles physicians occupy in SBS proceedings, and Part V relays two anecdotes of failed SBS diagnoses and their disastrous consequences on two families. Part VI discusses the voidable economic damages caps and why they would provide a suitable balance between competing interests, and Part VII provides a brief conclusion.

## II. SBS DIAGNOSIS HISTORY

### *A. Scientific Background*

A central premise of SBS is that infants have weak, unstable necks and oversized heads;<sup>16</sup> the parent or care provider becomes frustrated with the child's behavior, grabs the infant by the torso or shoulders, then repeatedly shakes the child back and forth causing the child's head to violently bob, experiencing acceleration-deceleration forces as the child's chin or occipital bone strikes its torso.<sup>17</sup> The theoretically violent acceleration-deceleration forces result in the eye and brain symptoms identified as the "triad."<sup>18</sup> The bleeding and swelling damages brain tissue, and increased pressure due to the blood displacement and tissue swelling may intensify, potentially leading to brain damage and death.<sup>19</sup>

The development and eventual evolution of SBS began in the early 1960s and is often attributed to C. Henry Kempe's article, *The Battered-Child Syndrome*.<sup>20</sup> Kempe identified symptoms in children believed to be more indicative of abuse than accident, including external and internal evidence of abuse.<sup>21</sup> Prior to 1962, child abuse was generally not diagnosed as an observable medical condition and did not gain widespread American acceptance until the 1970s.<sup>22</sup> In 1968, three researchers—Ayub Ommaya, Fred Faas, and Philip Yarnell—performed experiments mimicking rear collision motor vehicle accidents using rhesus monkeys.<sup>23</sup> The research was to determine if whiplash injuries in simulated motor vehicle accidents could occur "without direct impact to the head."<sup>24</sup> The monkeys were subjected to varying degrees of force in simulated motor vehicle accidents, and their brains were studied post-accident, evidencing subdural hematomas.<sup>25</sup> While some have identified

---

16. *Physical Consequences of Shaking*, NAT'L CTR. ON SHAKEN BABY SYNDROME, <http://www.dontshake.org/sbs.php?topNavID=3&subNavID=23> (last visited Apr. 14, 2014).

17. Joseph D. Hatina, *Shaken Baby Syndrome: Who are the True Experts?*, 46 CLEV. ST. L. REV. 557, 561 (1998).

18. Tuerkheimer, *supra* note 7, at 515.

19. *Physical Consequences of Shaking*, *supra* note 16.

20. Imwinkelried, *supra* note 12, at 3; *See also* C. Henry Kempe, *The Battered-Child Syndrome*, 181 JAMA 17 (1962).

21. *Id.*

22. Brian G. Fraser, *A Glance at the Past, a Gaze at the Present, a Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 641 (1978).

23. Ayub Ommaya, Fred Faas & Philip Yarnell, *Whiplash Injury and Brain Damage: An Experimental Study*, 204 J. AM. MED. ASSOC. 285 (1968).

24. *Id.* at 285–86.

25. *Id.* at 286.

the Ommaya study as a “cornerstone” of SBS,<sup>26</sup> the researchers noted their conclusion should not be extrapolated to humans.<sup>27</sup> At the Louise Woodward trial, Ommaya testified for the defense, noting that his 1960s experiments should not be applied to the Woodward case because his experiments had been misinterpreted, and that violent shaking would have caused neck injuries before it damaged the brain because the neck is much more sensitive.<sup>28</sup>

In 1972, John Caffey formulated the term “whiplash shaken baby syndrome”<sup>29</sup> based on twenty-seven cases of child shaking with hematoma injuries.<sup>30</sup> In 1974, Caffey authored another article expanding on his earlier work,<sup>31</sup> although he derived a more definitive conclusion that “manual whiplash shaking of infants . . . appears to be the major cause in these infants who suffer from subdural hematomas and intraocular bleedings.”<sup>32</sup> In the 1974 article, Caffey’s language is considerably more measured,<sup>33</sup> specifically stating that “whiplash shaking may be responsible” for the identified symptoms.<sup>34</sup> Despite prominent, integral, disputed SBS-related research<sup>35</sup> since Caffey’s articles, the 1974 Caffey article

26. Matthew D. Ramsey, *A Nuts and Bolts Approach to Litigating the Shaken Baby Syndrome or Shaken Impact Syndrome*, 188 MIL. L. REV. 1, 25 (2006).

27. Ommaya et al., *supra* note 23, at 287–88.

28. See, e.g., Geoff Watts, *Obituary: Ayub Khan Ommaya*, 372 THE LANCET 1540 (2008); Harold Levy, *Shaken Baby Syndrome: Medill Justice Project (Northwestern University) Article Demonstrates How Wobbly the Underpinnings of the So-called Syndrome Really are in an Article Called “Monkey Business”*, THE CHARLES SMITH BLOG (Dec. 18, 2013), [http://smithforensic.blogspot.com/2013/12/shaken-baby-syndrome-medill-justice\\_18.html](http://smithforensic.blogspot.com/2013/12/shaken-baby-syndrome-medill-justice_18.html); Alison Fitzgerald, *British Au Pair Louise Woodward Takes Stand in Her Trial in the Death of an 8-Month-Old*, ASSOCIATED PRESS (Oct. 23, 1997), <http://www.apnewsarchive.com/1997/British-Au-Pair-Takes-the-Stand-in-Her-Trial-in-the-Death-of-an-8-Month-OldBy-ALISON-FITZGERALD/id-edf7739bb3f7e7f9128ef55f7481274d>.

29. John Caffey, *On the Theory and Practice of Shaking Infants: Its Potential Residual Effects of Permanent Brain Damage and Mental Retardation*, 124 AM. J. DISEASES CHILDREN 161, 166 (1972).

30. *Id.* at 162–64.

31. See Caffey, *supra* note 6.

32. *Id.* at 402 (emphasis added).

33. Imwinkelried, *supra* note 12, at 4.

34. Caffey, *supra* note 6, at 402.

35. Aside from Dr. Caffey’s work, arguably the next most influential SBS research was conducted by Dr. Ann-Christine Duhaime and her colleagues. See Ann-Christine Duhaime et al., *The Shaken Baby Syndrome: A Clinical, Pathological, and Biomechanical Study*, 66 J. NEUROSURG. 409 (1987). Dr. Duhaime and her colleagues used models of one-month-old infants to study the acceleration-deceleration and impact forces an infant’s neck could tolerate in simulated violent shaking and impact scenarios. *Id.* This found that shaking alone only produced a fraction of the necessary acceleration-deceleration forces required to cause SBS. *Id.* at 413–14.

British neuropathologist Dr. Jennian Geddes conducted additional critical research. J.F. Geddes et al., *Neuropathology of Inflicted Head Injury in Children, I. Patterns of Brain Damage*, 124 BRAIN 1290 (2001); J.F. Geddes et al., *Neuropathology of Inflicted Head Injury in Children, II. Microscop-*

arguably became the established, definitive source for the burgeoning SBS diagnoses and convictions in the 1980s and 1990s,<sup>36</sup> eventually leading to today's medical, biomechanical, and legal "chaos."<sup>37</sup>

### B. Speculation

The tension between SBS proponents and opponents is palpable. One critic of SBS research is Dr. Mark Donohoe, who described SBS evidence as an "inverted pyramid,"<sup>38</sup> "with a small database (most of it poor-quality original research, retrospective in nature, and without appropriate control groups) spreading to a broad body of somewhat divergent opinions."<sup>39</sup> The biomechanical logic for SBS has also been criticized by Wayne State University biomechanical engineer Chris Van Ee, who commented that "[s]haken baby syndrome is described as an adult shaking a child holding him by the torso with the head flopping resulting

---

*ic Brain Injury in Infants*, 124 BRAIN 1299 (2001). Dr. Geddes's research involved studying the brains of infants that had reportedly died from abuse, and concluded the brain pathology was contradictory to SBS theory. *Id.* See also Findley et al., *supra* note 11, at 229–30.

The final piece of detrimental SBS research was conducted by the revered and reviled John Plunkett, MD. John Plunkett, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 22 AM. J. FORENSIC MED. & PATHOLOGY 1 (2001). There was general consensus that short-distance falls could not cause the SBS triad—only shaking or high impact could cause the constellation of injuries. See Brian K. Holmgren, *Prosecuting the Shaken Infant Case*, in SHAKEN BABY SYNDROME 275, 307 (Stephen Lazaritz & Vincent J. Palusci eds., 2001). Mr. Holmgren's exact words regarding the practicality of short falls are: "[S]ome experts still maintain that based on their experience short falls can produce life-threatening injuries. The expert who offers this opinion exposes himself to the rejoinder that his experience must be from a different gravitation field because it is certainly not based on scientific data." *Id.* at 313. Mr. Holmgren's comment is particularly noteworthy in light of Dr. Plunkett's opinion. See John Plunkett, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 22 AM. J. FORENSIC MED. & PATHOLOGY 1, 4 (2001). "Case 5" in Dr. Plunkett's article provides an example of a short fall in which a twenty-three-month-old child fell twenty-eight inches from her plastic gym onto carpeted concrete, later dying. Post-fall the child exhibited retinal hemorrhaging and a subdural hematoma. *Id.* at 3–4. The child's grandmother had been videotaping the child, and the video conclusively proved short-distance falls may mimic SBS. *Id.* at 4. See also Joseph Shapiro, *Dismissed Case Raises Questions on Shaken Baby Diagnosis*, NPR (Dec. 21, 2012, 3:16 PM), <http://www.npr.org/2012/12/21/167719033/dismisssed-case-raises-questions-on-shaken-baby-diagnosis>; See also anecdotal evidence in Part V(A)–(B) *infra*.

The evident tension between SBS proponents and opponents and divergent perspectives regarding Dr. Plunkett is additionally evidenced by the suit he endured after testifying for an Oregon daycare worker accused of SBS. Mark Hansen, *Battle of the Expert: A Forensic Pathologist Successfully Fights Criminal Charges Stemming from His Testimony in a Shaken Baby Case*, A.B.A. J. (Dec. 29, 2005, 6:29 AM), [http://www.abajournal.com/magazine/article/battle\\_of\\_the\\_expert/](http://www.abajournal.com/magazine/article/battle_of_the_expert/).

36. Ramsey, *supra* note 26, at 8.

37. Tuerkheimer, *supra* note 7, at 519.

38. Mark Donohoe, *Evidence-Based Medicine and Shaken Baby Syndrome, Part I: Literature Review, 1966–1998*, 24 AM. J. FORENSIC MED. & PATHOLOGY 239, 241 (2003).

39. *Id.*

in bleeding of the brain and retinal hemorrhage is fundamentally flawed from a biomechanics perspective. It's not valid. There's nothing to support it."<sup>40</sup>

In direct contradiction, SBS proponents Robert Block, MD and Cindy Christian, MD steadfastly hold to their SBS beliefs. Dr. Block commented that SBS detractors "[are] not representing a scientific argument. . . . They're propagating this notion that they've come upon some new revolution that we don't know about, which is not only insulting, but it's ridiculous."<sup>41</sup>

Strikingly, SBS proponents and opponents are increasingly concurring on one very important, fundamental principle: that SBS is a speculative theory and diagnosis. Oxford neurosurgeon and SBS proponent Dr. Peter Richards stated, "We have enormous gaps in our knowledge. Anything anyone says is informed speculation, not scientifically proven fact, including what I say in the reports."<sup>42</sup> Drs. Block and Christian's article notes that the SBS nomenclature shift to "abusive head trauma"<sup>43</sup> evidences this speculation, stating, "In reality, all models and theories have known limitations, and many clinicians and researchers acknowledge that precise mechanisms for all abusive injuries remain incompletely understood."<sup>44</sup> SBS proponent Carole Jenny, MD's September 20, 2011 PowerPoint slide stated, "No trained pediatrician thinks that subdural hemorrhage, retinal hemorrhage and encephalopathy equals abuse. The "triad" is a myth!"<sup>45</sup> Naomi Sugar, MD also provided more measured comments in an interview while assisting the prosecution in a child abuse case:

[T]he concept of infant abusive head trauma has changed a lot in the last 20 years. . . . I started working more in child physical abuse in

---

40. See John Sweeney, *Doubts About Shaken Baby Syndrome*, BBC NEWS (Mar. 8, 2008), <http://news.bbc.co.uk/2/hi/uk/7283998.stm> (quoting Wayne State University biomechanical engineer Dr. Chris Van Ee).

41. Josh Stockinger, *Woman Convicted of Shaking Baby Has New Hope*, DAILY HERALD (July 9, 2012), <http://www.dailyherald.com/article/20120709/news/707099938/>.

42. Gloucestershire Cnty. Council and RH, KS and JS, Case No. GF11C00125 (High Court of Justice, Family Division, Bristol District Registry, Mar. 29, 2012) at para. 59 (addressing subdural hematomas in infants).

43. Cindy W. Christian & Robert Block, *Abusive Head Trauma in Infants and Children*, 123 PEDIATRICS 1408, 1409 (2009).

44. *Id.*

45. Carole Jenny, *The Mechanics: Distinguishing AHT/SBS From Accidents and Other Medical Conditions* 11 (Sept. 20, 2011) (unpublished PowerPoint presentation). Dr. Jenny is also on the International Advisory Board of the National Center on SBS. *International Advisory Board, THE NAT'L CTR. ON SHAKEN BABY SYNDROME*, <http://dontshake.org/sbs.php?topNavID=2&subNavID=15&navID=72> (last visited Apr. 14, 2014).



1996, and it's changed a lot since then. . . . So the terminology has changed. The understanding of the mechanisms has changed. Our differential diagnosis has changed. . . . [I]n this field of child abuse pediatrics we are much more aware of possible lookalikes or mimics. We are aware of an expanded causation for certain head injuries in infants and certain eye findings. So . . . the base of information, the base from which we work from, has become much broader. . . . [B]rain injury can be because of trauma. It can be because of infection. It can be because of a bad way the brain was made. It can be because of bad circulation. I mean, there are all sorts of things. . . . I don't remember what I said twenty years ago. . . . [M]edical knowledge changes. I don't think it's changed actually terribly radically in this area, but I would have said with more confidence that I thought it was shaking. I wouldn't say that now, nor would my colleagues in the field. More of us would say we don't know exactly what the mechanism is. . . . I would have said then rotation / acceleration injury, either from shaking or impact. . . . That's what we were saying in 1996. And now we're a little softer than that and say shaking or impact or maybe something else that we don't understand.<sup>46</sup>

Dr. Sugar's interview testimony also addressed retinal hemorrhaging, specifically that only "about 85% of babies . . . assessed as having inflicted head injury have retinal hemorrhages . . . and 15% don't."<sup>47</sup> But when questioned about the 15% not evidencing retinal hemorrhages, Dr. Sugar commented, "I don't think we have a mechanism to explain it. . . . [W]e don't understand the mechanism for retinal hemorrhages in the first place. There's not agreement on that."<sup>48</sup> Dr. Sugar's comments are perplexing and substantiate SBS criticisms. Retinal hemorrhages are found in 85% of situations identified as inflicted head injury cases, indicating abuse, but the mechanism causing retinal hemorrhages is not understood—yet, it is still diagnosed as indicating abuse in the 15% where retinal hemorrhages are not exhibited.

Superficially, SBS proponents' speculation seems favorable for those accused of shaking. However, in practice it provides flexibility for SBS proponents to modify and manipulate their findings to substantiate their diagnoses and testimony to achieve their medical opinions.<sup>49</sup>

---

46. Interview of Naomi F. Sugar, M.D. at 5:15–6:9, 27:6–24, 51:3–19, *State v. David J. Paul*, No. 1JU-11-823 CR (Alaska Super. Ct. May 25, 2012) [hereinafter Sugar Interview].

47. *Id.* at 38:23–39:1.

48. *Id.* at 41:22–42:3.

49. *See* Declaration of Stacy Lowry at para. 4, *Felix v. Grp. Health of Wash.*, 2:11-cv-0197 (W.D. Wash. Mar. 5, 2013), ECF No. 103 [hereinafter Stacy Lowry Dec.]; Declaration of Melissa Phillips at para. 9, *Felix v. Grp. Health of Wash.*, 2:11-cv-0197 (W.D. Wash. Mar. 5, 2013), ECF

### III. THE FUNDAMENTAL CLASH

The Supreme Court held that the Due Process Clause of the Fourteenth Amendment provides parents a fundamental right to custody of their children, noting “a natural parent’s desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right.”<sup>50</sup> However, this right is not absolute, as the government occupies a *parens patriae*<sup>51</sup> interest in protecting citizens.<sup>52</sup> When parents are deprived of the care and custody of their children, frequently by governmental agencies or those protected via statute, parents often file claims under 42 U.S.C. § 1983, which “authorizes private citizens to bring an action against persons acting under color of state law who violate rights that are secured by the Constitution and federal law.”<sup>53</sup>

The Supreme Court also held that government officials are entitled to either absolute or qualified immunity “to shield them from undue interference with their duties and from potentially disabling threats of liability.”<sup>54</sup> As state employees, law enforcement and CPS personnel are thus entitled to qualified immunity.<sup>55</sup> Qualified immunity claims are frequently resolved via a two-step sequence detailed in *Saucier v. Katz*:

First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. . . . Second, if the plaintiff has established this first step, the court must decide whether the right at issue was “clearly established” at the time of the defendant’s alleged misconduct.<sup>56</sup>

However, the *Pearson* court specifically noted the rigid two-prong *Saucier* qualified immunity test is not mandatory in determining if a par-

No. 106 [hereinafter Melissa Phillips Dec.]. Ms. Lowry (formerly Ms. Stacy Ahrens) and Ms. Phillips were two CPS employees heavily involved in handling the Felix investigation. *See infra* Part V.A.

50. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (internal quotation marks omitted).

51. *Parens patriae* is a doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, especially on behalf of someone who is under a legal disability to prosecute the suit. BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

52. *Santosky*, 455 U.S. at 766 (specifically noting “[The state has] a *parens patriae* interest in preserving and promoting the welfare of the child.”).

53. Eric P. Gifford, *42 U.S.C. § 1983 and Social Worker Immunity: A Cause of Action Denied*, 26 TEX. TECH L. REV. 1013, 1015 (1995).

54. *Harlow v. Fitzgerald*, 457 U.S. 800, 806–07 (1982).

55. Qualified immunity is immunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights. BLACK’S LAW DICTIONARY 818 (9th ed. 2009).

56. *Pearson v. Callahan*, 555 U.S. 223, 232–36 (2009) (citing *Saucier v. Katz*, 533 U.S. 194 (2001)).

ty is entitled to qualified immunity.<sup>57</sup> The Court said judges should use their discretion to determine how qualified immunity defenses should be addressed.<sup>58</sup> This is vital in the SBS context because recourse against any government official becomes considerably more challenging, if not non-existent, if the official is statutorily afforded qualified immunity.

Today, every state has child abuse reporter statutes that are generally comprised of the following components: a purpose clause; a child abuse definition; an indication of who must or may report; a description of how, when, and to whom to report; an immunity provision; abrogation of certain privileged communications; and a penalty provision for failure to report.<sup>59</sup> Federal funding for state child abuse programs is peculiar because it is contingent on states enacting reporting requirements.<sup>60</sup> Through the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 1983, the federal government incentivizes child abuse reporting for states to gain additional funding despite the potential for exaggerated reporting with limited recourse,<sup>61</sup> arguably creating a vicious cycle of unjustified diagnoses for increased funding. Equally concerning is that reporting medical providers simply need to assert they reported in “good faith” to avoid liability and receive qualified immunity. Additionally, many states read a good faith presumption into their immunity statutes.<sup>62</sup>

Parents accused of child abuse are deprived of their fundamental Fourteenth Amendment rights to care and custody of their children, which leads them to assert claims under 42 U.S.C. § 1983 or other state claims. Medical providers, law enforcement, and CPS personnel respond to the civil claims by asserting their qualified immunity defenses, claiming they acted in “good faith,” and the claims appear almost universally dismissed. Qualified immunity defenses also provide background for the potentially broad spectrum of activities government officials may engage in, yet still avoid liability.<sup>63</sup> Parents rarely prevail<sup>64</sup> because to disprove

---

57. *Id.* at 236–37.

58. *Id.* at 236.

59. Trost, *supra* note 15, at 194–95.

60. Ellen Wright Clayton, *Children’s Health Symposium: To Protect Children from Abuse and Neglect, Protect Physician Reporters*, 1 HOUS. J. HEALTH L. & POL’Y 133, 134 (2001).

61. Richard A. Gardner, *Apparatchiks Turn “Child Abuse” into “Witch Hunt”*, 133 N.J. L.J. 17 (1993).

62. Trost, *supra* note 15, at 199.

63. One dubious example of qualified immunity is *Humphrey v. Sapp*, a case involving a CPS investigation resulting from Plaintiff Humphrey’s one-month-old daughter falling, striking her head on the Humphreys’ linoleum floor. *Humphrey v. Sapp*, No. 2010-CA-002278-MR, 2012 Ky. App. Unpub. LEXIS 32, at \*2–3 (Ky. Ct. App. Jan. 13, 2012), *cert. denied*, 2012 Ky. LEXIS 279 (Ky. Sept. 12, 2012). Due to the fall, Humphrey took his daughter to be evaluated by medical providers, who later commented to defendant Sapp, a CPS employee, that the Humphrey child’s injuries were

good faith they must usually demonstrate the immunized entity acted maliciously.<sup>65</sup> While medical providers, law enforcement, and CPS personnel may act in ethically questionable manners under the guise of protecting children in “good faith,” *Humphrey, supra*, and Part V, *infra*, exemplify that prevailing against these entities in a civil suit remains extremely unlikely.

#### IV. THE MEDICAL PROVIDER CONUNDRUM, CONTROVERSIAL DIAGNOSES, AND SYSTEMATIC FAILURE

Medical providers are responsible for making the initial SBS diagnosis and are compelled to report the suspected abuse,<sup>66</sup> as each state has enacted reporting statutes.<sup>67</sup> SBS diagnoses and reporting are unique in that not only does the medical provider diagnose SBS, he or she is also one of the primary prosecution witnesses<sup>68</sup> and occupies a substantial law enforcement role due to the conclusiveness of an SBS diagnosis.<sup>69</sup> Not surprisingly, an SBS diagnosis has been labeled “medically diagnosed murder”<sup>70</sup>—the diagnosis itself establishing both the crime’s *mens rea*<sup>71</sup>

---

more severe than would be expected from an accidental fall and consistent with SBS. *Id.* at 3–5. However, no medical provider ever formally diagnosed SBS or informed Sapp of an SBS diagnosis. *Id.* at 6. Sapp nonetheless pursued an SBS investigation of Humphrey, intentionally excluding an ophthalmology report that indicated a retinal exam evidenced no signs of SBS to obtain an emergency order to gain custody of Humphrey’s children. *Id.* at 6–7. This resulted in Humphrey being required to live outside his home and away from his family until the matter was resolved. *Id.* Sapp’s allegations of abuse were later unsubstantiated and Humphrey was allowed to return to the family home. *Id.* at 7–8. Despite providing false information to obtain the emergency order to gain custody of Humphrey’s children, Sapp was not held liable for her actions based on a qualified immunity defense. *Id.* at 15. Although this is an uncommon example of an overzealous government employee acting unethically, it is unsettling recognizing that immunized employees can pursue knowingly false, drastic measures and not be held accountable to compensate the aggrieved party. *Id.* at 14–15 (specifically noting a lack of evidence “that Sapp acted willfully, maliciously, with a corrupt motive, or with intent to harm them” and that “absent bad faith, Sapp is entitled to qualified immunity”).

64. See, e.g., *Foster v. State*, No. 3:06-689-ST, 2012 U.S. Dist. LEXIS 122852 (D. Or. Mar. 20, 2012); *Humphrey v. Sapp*, No. 2010-CA-002278-MR, 2012 Ky. App. Unpub. LEXIS 32 (Ky. Ct. App. Jan. 13, 2012), *cert. denied*, 2012 Ky. LEXIS 279 (Ky. Sept. 12, 2012); *Bryant-Bruce v. Vanderbilt Univ.*, 974 F. Supp. 1127 (M.D. Tenn. 1997), *remanded*, No. M2002-03059-COA-R3-CV, 2005 Tenn. App. LEXIS 615 (Tenn. Ct. App. Sept. 27, 2005); *Hazlett v. Evans*, 943 F. Supp. 785 (E.D. Ky. 1996).

65. *Younes v. Pellerito*, 739 F.3d 885, 890 (6th Cir. 2014) (noting that “[a] government employee ‘enjoys a right to immunity if . . . the employee undertook the challenged acts in good faith or without malice.’” (quoting *Bletz v. Gribble*, 641 F.3d 743, 757 (6th Cir. 2011))).

66. Stephanie A. Wolfson, *Screening for Violence and Abuse Through the Lens of Medical Ethics*, 11 DEPAUL J. HEALTH CARE L. 1, 4 (2007).

67. *Trost, supra* note 15, at 194–95.

68. *Clayton, supra* note 60, at 137.

69. *Wolfson, supra* note 66, at 13.

70. *Tuerkheimer, supra* note 7, at 52.

and *actus reus*.<sup>72</sup> Under this scheme, the only remaining law enforcement duty is to determine the timing of the abuse and who was with the child, that frequently being the person who brought the child in to be evaluated by the medical provider.<sup>73</sup> As Professor Tuerkheimer states, “In the typical SBS case, the expert is the case: there is no victim who can provide an account, no eyewitness, no corroborative physical evidence, and no apparent motive to kill.”<sup>74</sup>

Because medical providers hold the fundamental role in an SBS diagnosis and prosecution, they occupy positions of substantial authority and liability. Most, if not all, medical providers are advised of the severe consequences of an SBS diagnosis and very likely consult other specialists before diagnosing SBS, including radiology, ophthalmology, neurosurgery, neurology, and other subspecialists.<sup>75</sup> There is also evidence that some medical providers have not educated themselves with updated medical and biomechanical research and developments that could influence their decisions regarding SBS diagnoses or their treatment of the accused.<sup>76</sup> One study revealed some medical providers not only are unfamiliar with the signs and symptoms of abuse, but they had also received no continuing medical education in the five years prior to the study.<sup>77</sup> Yet, there are medical providers advocating for absolute immunity.

Dr. Ellen Wright Clayton specifically argues that medical providers should receive absolute immunity when reporting child abuse.<sup>78</sup> Superficially, this argument sounds plausible: medical providers base their diagnoses on facts;<sup>79</sup> litigation costs medical providers time, money, and effort;<sup>80</sup> medical providers almost always prevail in civil lawsuits involving abuse diagnoses;<sup>81</sup> and there is no documented evidence of an epidemic

---

71. *Mens rea* is the state of mind that the prosecution, to secure a conviction, must prove a defendant had when committing a crime. BLACK'S LAW DICTIONARY 1075 (9th ed. 2009). In the SBS context, the physical damage theoretically evidences the shaker's mental state.

72. *Actus reus* is the wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability. BLACK'S LAW DICTIONARY 41 (9th ed. 2009).

73. Tuerkheimer, *supra* note 7, at 552.

74. Tuerkheimer, *supra* note 10, at 27.

75. Christian & Block, *supra* note 43, at 1410.

76. Wolfson, *supra* note 66, at 8.

77. *Id.*

78. Clayton, *supra* note 60, at 135. Absolute immunity is a complete exemption from civil liability, usually afforded to officials while performing particularly important functions. BLACK'S LAW DICTIONARY 818 (9th ed. 2009).

79. Clayton, *supra* note 60, at 140.

80. *Id.* at 144.

81. *Id.*

of bad faith reporting.<sup>82</sup> And as interpreted, qualified immunity already seems close to absolute immunity, as few medical providers, law enforcement, or CPS personnel are held liable for any ethically dubious acts done during SBS diagnoses and investigations. Yet in the SBS realm, the deficiencies supporting an SBS diagnosis combined with examples of ethically questionable diagnoses and treatment of the accused make notions of absolute immunity very unattractive.

One initial response to the absolute immunity proposal is that the support for the SBS triad is circular: medical providers examine children for the questionable triad; SBS is diagnosed and reported based on the triad; confessions are obtained, theoretically evidencing shaking as substantiating the triad; and the fallacy is repeated and diagnosed to the point of common belief, all based on initially suspect scientific evidence.<sup>83</sup> Additionally, medical providers diagnose SBS without definitive triad symptoms, contorting the triad as needed to identify SBS,<sup>84</sup> which contributes to the SBS controversy.

Most importantly and unlike most other criminal matters, once SBS is diagnosed the burden of proof effectively shifts to the parents (or last caregiver) to disprove a medical diagnosis—classic *res ipsa loquitur*,<sup>85</sup> evidencing the alleged strength of the diagnosis and our culture's deference to the judgment and diagnoses of medical providers.<sup>86</sup> However, when parents did not shake or injure their child, they begin brainstorming ideas to explain their child's condition—sometimes a short fall or other random act the parent did not cause. As parents “search” their memories for causes of their child's symptoms, this is characteristically viewed as lying or a changing story and is used against them.<sup>87</sup> Dr. Eli Newberger commented:

If a parent does not know exactly what's happening, very frequently the first conclusion is that they're trying to hide something. And sometimes parents are racking their brains, coming up with one or two possibilities. Then it looks like they're changing their stories. That can be used to damn them.<sup>88</sup>

---

82. *Id.* at 145.

83. Findley et al., *supra* note 11, at 235–36.

84. Daniel G. Orenstein, *Shaken to the Core: Emerging Scientific Opinion and Post-Conviction Relief in Cases of Shaken Baby Syndrome*, 42 ARIZ. ST. L.J. 1305, 1309–12 (2010); Felix v. Grp. Health of Wash., No. 2:11-cv-0197 (W.D. Wash. Nov. 28, 2011).

85. Findley et al., *supra* note 11, at 226.

86. Tuerkheimer, *supra* note 10, at 27.

87. Aleman v. Vill. of Hanover Park, 662 F.3d 897, 902 (7th Cir. 2011).

88. Mark Anderson, *Does Shaken Baby Syndrome Really Exist?*, DISCOVER (Dec. 2, 2008), <http://discovermagazine.com/2008/dec/02-does-shaken-baby-syndrome-really-exist>.

This burden shifting based on an SBS diagnosis and belief in the scientific support for an SBS diagnosis is also used by law enforcement to elicit confessions.<sup>89</sup> An example of the strategies police use when questioning parents or caretakers in the SBS context is evidenced in *People v. Kovacevich*:

The detectives told appellant “Every time a baby come[s] into the hospital, they document every sign and symptom. Every last minute detail. Okay? And what happened to Justin [the injured child] . . . we know exactly what happened. . . . But what you’re telling us, doesn’t fit the science. Okay? It’s just, it’s impossible.” Then, later, “It’s about science and it’s about you can’t . . . dispute science in this case. The injuries that he has are not from his breathing. They’re from being shaken. Period.” Then, “In a shaken baby case, absolutely 100%, they know what happened. Everyone knows what happened.” Later they told him [defendant], “I think Dana’s trying to . . . outsmart science. There’s certain things you . . . can’t do. It’s like . . . if you leave your DNA on this doorknob and leave this room and then lie to somebody and say you were never here. Well, the DNA is gonna [sic] say you’re here. The injuries this child has, paint the picture for us, okay?”<sup>90</sup>

Defendant Kovacevich confessed and was found guilty of shaking.<sup>91</sup> But considering his situation and having not shaken his child—being told scientific evidence definitively confirms he did something that absolutely did not occur—that would be an extremely precarious situation.

Dr. Clayton’s argument that litigation costs medical providers time, money, and effort<sup>92</sup> is valid, but begs the question of the severe, dire consequences of an SBS misdiagnosis. An SBS diagnosis almost assuredly separates parents from their child or children and initiates law enforcement and CPS investigations and legal proceedings.<sup>93</sup> As noted above, medical providers occupy a multifaceted role in SBS diagnoses,<sup>94</sup> although CPS initiates an investigation into the child’s care and a legal proceeding in which a court determines if the child will be allowed to be returned to the parents’ custody, including establishing plans to monitor

---

89. Holmgren, *supra* note 35, at 277.

90. *People v. Kovacevich*, H037257, 2013 WL 696844, at \*22–23 (Cal. Ct. App. Feb. 27, 2013).

91. *Id.* at \*19.

92. Clayton, *supra* note 60, at 144.

93. WASH. REV. CODE § 26.44.056 (2014) is an example of a statute providing for detaining a child without parental consult.

94. *Id.*

the child's well-being for multiple months.<sup>95</sup> The court's determination is based on numerous factors, including the professional judgment of CPS personnel.<sup>96</sup> However, CPS personnel frequently, if not exclusively, rely on medical provider diagnoses and opinions to interpret medical evidence because it is not within the purview of CPS personnel to evaluate this information.<sup>97</sup> Instead of acting as a system of checks and balances on a medical provider's diagnosis, CPS investigations appear wholly predicated on the SBS diagnosis, and their investigations presuppose the guilt of those being investigated. CPS personnel are generally not equipped or trained to contradict medical provider diagnoses,<sup>98</sup> and the challenge CPS personnel face contradicting or questioning a medical provider in an SBS diagnosis could be daunting, specifically in light of the deference we grant medical providers and the potential consequences of a child remaining in an abusive home.

The volume of back-and-forth, "he said, she said" comments, interpretations, and alleged threats involving CPS personnel is noteworthy.<sup>99</sup> While many accusatory comments may or may not be true, they evidence the considerable influence and authority CPS personnel wield in determining custodial and visitation rights and living situations during abuse investigations. As evidenced in *Humphrey*, *supra*, and alleged by the Felixes and Corey Lavigne, *infra*, parents accused of shaking generally

---

95. WASH. REV. CODE § 26.44.056(2) (2014).

96. *Id.*

97. Email from Dianna Cooper Bolinsky, Assistant Professor and Field Coordinator in the Dept. of Social Work at Indiana State Univ., to Jay Simmons (Oct. 19, 2013, 5:23 EST) (on file with Jay Simmons).

98. *Id.*

99. Declaration of Nathan Felix at para. 38, *Felix v. Grp. Health of Wash.*, No. 2:11-cv-0197 (W.D. Wash. Mar. 28, 2013), ECF No. 122 [hereinafter Nathan Felix Dec.] (that a conversation with a CPS social worker allegedly became heated when Nathan informed her the Felixes had retained legal counsel and that if the Felixes failed to fully cooperate with CPS, all the social worker had to do was sign papers and the Felix children would be taken from them); First Amended Complaint for Damages in Response to Order for More Definite Statement at para. 2.115, *Felix v. Grp. Health of Wash.*, No. 2:11-cv-0197 (W.D. Wash. May 4, 2012), ECF No. 70 [hereinafter Felix Complaint] (that a CPS social worker visited the Felix children's daycare provider and allegedly told the provider that "we know these people are guilty"); Declaration of Robyn Felix at para. 33, *Felix v. Grp. Health of Wash.*, No. 2:11-cv-0197 (W.D. Wash. Mar. 28, 2013), ECF No. 123 [hereinafter Robyn Felix Dec.] (that a CPS employee allegedly told her, "If your husband would only admit what he has done, then I can put services into the home"; and that various social workers threatened the Felixes that if they did not comply with their demands all the Felix children would be taken away); Draft of First Amended Petition at Law and Jury Demand at paras. 214–15, *Lavigne v. Meric*, No. LACL127281 (Polk Cnty. D.C. Iowa 2013) [hereinafter Lavigne Draft Amended Petition] (that a DHS caseworker allegedly recommended Corey Lavigne divorce his wife to retain custody of his daughter and that the Lavigne investigation could successfully close once Corey and Ms. Lavigne take responsibility for their daughter's injuries that led to her being physically abused). It should be noted none of these allegations have been confirmed.



cooperate with CPS personnel because there is a very strong likelihood of negative consequences. While we prefer CPS to conduct thorough investigations to ensure safe living environments for children, they should not be permitted to issue threats to achieve compliance. CPS employees generally base their investigations on medical providers' diagnoses and treatment. Their role is a subsequent reaction to a medical provider's diagnosis. Thus, it seems shortsighted to argue medical providers deserve absolute immunity in light of the overwhelming authority they wield in the SBS context and serious consequences of an SBS diagnosis.

The nomenclature of the SBS debate is also arguably engineered against those accused of shaking a child: the name alone infers an infant has been shaken;<sup>100</sup> a single medical provider may occupy a multifaceted role; and the accused are left defending themselves, arguing the burden of proof and trying to disprove medical arguments from professionals occupying positions of substantial esteem and authority. SBS symptoms are also frequently portrayed as a child suffering a "multi-story fall" or "high-speed motor vehicle accident," often exaggerating the severity of the symptoms and creating distorted images of the alleged violence of the shaking.<sup>101</sup> Regardless of actual shaking, the deck is stacked against the accused the instant an SBS diagnosis occurs, even without questionable diagnoses and suspect professional conduct.

#### V. CASE EVIDENCE OF CONTROVERSIAL PROFESSIONAL CONDUCT

The best examples of SBS misinterpretation and bias come from cases. Dr. Clayton claims that there is not a documented epidemic of bad faith reporting.<sup>102</sup> However, if parents or caregivers accused of shaking are asked how they were treated pre- and post-diagnosis, their responses would likely not evidence objective treatment by medical providers, law enforcement, or CPS personnel. Irrespective of bad faith, there are reported examples of controversial, ethically questionable behavior by pro-

---

100. This has partially already occurred, as "abusive head trauma" is frequently used to describe SBS, although it encompasses a broader range of abuse symptoms. *Abusive Head Trauma: A New Name for Shaken Baby Syndrome*, AM. ACAD. OF PEDIATRICS (Apr. 27, 2009), <http://www.aap.org/en-us/about-the-aap/aap-press-room/pages/Abusive-Head-Trauma-A-New-Name-for-Shaken-Baby-Syndrome.aspx>; CHRISTIAN & BLOCK, *supra* note 43, at 1409. While better than the SBS alternative, "abusive head trauma" arguably still has unfortunate connotations.

101. Findley et al., *supra* note 11, at 246.

102. Clayton, *supra* note 60, at 145. However, there is arguably a chronic epidemic of medical providers who refuse to openly admit and discuss their mistakes, to the degree that the Georgetown University Kennedy Institute of Ethics recently held a bioethics "conversation" regarding medical error. See *Medical Error*, CONVERSATIONSinBIOETHICS.ORG, KENNEDY INST. OF ETHICS, GEORGETOWN UNIV., <http://www.conversationsinbioethics.org/topic> (last visited Apr. 14, 2014).

professionals diagnosing and investigating those accused of shaking.<sup>103</sup> Two recent SBS diagnoses in Washington and Iowa provide anecdotal evidence.

*A. Felix v. Group Health*

In *Felix v. Group Health*,<sup>104</sup> Nathan Felix accidentally dropped his slippery infant son while bathing him and the infant struck his side against the bathtub.<sup>105</sup> Nathan, a career military serviceman occupying medical roles as a line-medic, aeromedical evacuation technician, and medical technician,<sup>106</sup> examined his son and did not believe he was injured.<sup>107</sup> Later that evening, fearing their son may have injured his back or side in striking the bathtub, Nathan and his wife, Robyn Felix, took him to Seattle Children's Hospital where three pediatricians examined the infant and assured the Felixes they could take their son home.<sup>108</sup>

The following morning, Nathan took his infant son to his regular pediatrician due to ongoing fevers and asked the pediatrician's opinion regarding the bathtub fall.<sup>109</sup> The pediatrician did not believe there were any signs of injury.<sup>110</sup> Because their son had other medical issues, including vomiting and unresolved fevers, the Felixes later took him to Dr. Susan Egaas, who recommended a lumbar puncture.<sup>111</sup> This was an arduous and ultimately unsuccessful procedure for the infant, requiring multiple attempts from various positions, resulting in the infant later leaking cerebral spinal fluid and blood.<sup>112</sup>

Five days after the lumbar puncture, the Felixes returned to Seattle Children's Hospital because their son had increased symptoms of fevers, vomiting, and feeding intolerance.<sup>113</sup> Preparing for discharge after a four-day hospital stay, the infant's care was entrusted to Dr. Naomi Sugar.<sup>114</sup> A hospital MRI indicated fluid around the infant's brain, potentially indicative of non-accidental trauma, and the Felixes had an extended conversation with Dr. Sugar relaying their son's lengthy medical history—

---

103. See *infra* Part V.A–B.

104. See generally *Felix v. Grp. Health of Wash.*, No. 11-01974 (W.D. Wash. Nov. 28, 2011).

105. Nathan Felix Dec., *supra* note 99, at para. 14.

106. *Id.* at para. 3.

107. *Id.* at para. 14. Robyn Felix, Nathan's wife and the infant's mother, is an obstetric registered nurse. Robyn Felix Dec., *supra* note 99, at para. 1.

108. Nathan Felix Dec., *supra* note 99, at para. 17.

109. *Id.* at para. 18.

110. *Id.*

111. *Id.* at para. 19.

112. *Id.* at paras. 19–26.

113. *Id.* at para. 30.

114. *Id.* at paras. 30–31.

specifically detailing the numerous pediatricians confirming their infant son did not sustain serious injuries in the bathtub fall.<sup>115</sup> A bone survey indicated rib fractures, a potential sign of a child being grabbed and shaken.<sup>116</sup> However, the rib fractures were allegedly in the exact location the nurse held the infant down while assisting Dr. Egaas conduct the lumbar puncture.<sup>117</sup> Despite being told of the infant's recent and lengthy medical history, including the bathtub fall and lumbar puncture, Dr. Sugar asserted that the infant was shaken,<sup>118</sup> and after consulting with her colleagues, she concluded the Felixes had inflicted non-accidental trauma on their infant.<sup>119</sup> The Felixes requested a neurology consult to possibly provide more information regarding their son's condition, but the hospital allegedly ignored this request.<sup>120</sup>

Either Dr. Sugar, Seattle Children's Hospital medical providers, or both contacted CPS to initiate a child abuse investigation.<sup>121</sup> The Felixes asked the medical personnel and CPS workers to contact Dr. Egaas and the nurse who helped perform the lumbar puncture procedure<sup>122</sup> because they believed the lumbar puncture medical records did not accurately reflect everything involved in the procedure.<sup>123</sup> The Felixes also researched the lumbar puncture and other medical procedures and provided that information to Dr. Sugar and CPS.<sup>124</sup>

Regarding the Felix infant, Dr. Sugar's application of the SBS triad is peculiar, particularly the retinal hemorrhaging component and her interview testimony.<sup>125</sup> The infant had an ophthalmology consult (eye anatomy examination) during his hospital stay and was diagnosed with "hemorrhagic retinopathy."<sup>126</sup> Ophthalmologist Dr. Avery Weiss's inter-

---

115. *Id.* at para. 31.

116. *Id.* at para. 32; Nancy Wright & Eric Wright, *SOS (Safeguard Our Survival): Understanding and Alleviating the Lethal Legacy of Survival-Threatening Child Abuse*, 16 AM. U. J. GENDER SOC. POL'Y & L. 1, 63–64 (2007).

117. Nathan Felix Dec., *supra* note 99, at para. 32.

118. *Id.* at para. 31.

119. Defendants Univ. of Wash. and Seattle Children's Hosp.'s Answers to Plaintiffs' First Amended Complaint for Damages at para. 2.10, *Felix v. Grp. Health of Wash.*, No. 2:11-cv-0197 (W.D. Wash. June 1, 2012), ECF No. 75 [hereinafter UWSCH Answer].

120. Nathan Felix Dec., *supra* note 99, at para. 31.

121. UWSCH Answer, *supra* note 119, at para. 2.10.

122. Nathan Felix Dec., *supra* note 99, at para. 32.

123. *Id.*

124. *Id.* at paras. 35–36.

125. Defendants Univ. of Wash. and Seattle Children's Hosp.'s Motion for Summary Judgment Dismissal at 14, *Felix v. Grp. Health of Wash.*, No. 2:11-cv-0197 (W.D. Wash. Feb. 28, 2013), ECF No. 98 [hereinafter UWSCH MSJ].

126. Exhibit 22 of the Declaration of Kimberly D. Baker in Support of Defendants Univ. of Wash. and Seattle Children's Hosp.'s Motion for Summary Judgment Dismissal at 19, *Felix v. Grp.*

pretation was later described as “Dr. Weiss also concluded nonaccidental [sic] trauma was a high probability for N.F.’s retinal hemorrhages and subdural hemorrhages.”<sup>127</sup> While Dr. Weiss’s ophthalmologic impression stated there was a probability of non-accidental trauma, it also noted “there are no specific findings that point to a shaken baby syndrome.”<sup>128</sup> This is disconcerting because retinal hemorrhaging as evidence of abuse is repeatedly referenced in CPS personnel declarations regarding the Felix infant,<sup>129</sup> evidencing their reliance on medical provider diagnoses, despite the medical providers’ apparent uncertainty of symptom causes. As noted in the subsection on speculation in Part II.B above, Dr. Sugar’s comments regarding the cause of retinal hemorrhaging become extremely relevant, most notably that “we don’t understand the mechanism for retinal hemorrhages in the first place. There’s not agreement on that.”<sup>130</sup>

The Felixes visited Dr. Egaas approximately one month after the SBS diagnosis to discuss their situation and Dr. Sugar’s interpretation of the lumbar puncture, yet reportedly neither Dr. Egaas nor any Group Health representative spoke with Dr. Sugar or CPS to explain the events and consequences of that procedure.<sup>131</sup> Dr. Egaas potentially could have explained the infant’s injuries and resolved the Felix’s SBS situation by contacting Dr. Sugar and CPS to disclose the entirety of the lumbar puncture. Instead, Dr. Egaas felt “she needed to have an individual from Risk Management or Group Health Legal involved in the conversation.”<sup>132</sup> Dr. Sugar’s testimony and interpretation of the ophthalmology diagnosis is controversial, but Dr. Egaas’s refusal to potentially remedy the situation is equally suspect since she may have been unintentionally responsible for the Felix’s entire ordeal. However, Dr. Egaas undoubtedly felt she faced liability concerns, as evidenced by her choice to speak with Group Health’s risk management or legal departments.<sup>133</sup> Nonetheless, Dr. Sugar could have just as easily contacted Dr. Egaas. It regrettably appears medical providers may be averse to contacting each other, as

---

Health of Wash., No. 2:11-cv-0197 (W.D. Wash. Feb. 28, 2013), ECF No. 99-5 [hereinafter Weiss Ophthalmology Report].

127. UWSCH MSJ, *supra* note 125, at 15.

128. Weiss Ophthalmology Report, *supra* note 126.

129. Stacy Lowry Dec., *supra* note 49, at para. 4; Melissa Phillips Dec., *supra* note 49, at para. 9.

130. Sugar Interview, *supra* note 46, at 41:22–42:3.

131. Felix Complaint, *supra* note 99, at para. 2.111; Defendant Susan Egaas, MD and Grp. Health’s Answer to the Plaintiffs’ First Amended Complaint for Damages at para. 2.111, Felix v. Grp. Health of Wash., No. 2:11-cv-0197 (W.D. Wash. May 23, 2012), ECF No. 71 [hereinafter Egaas Answer].

132. Egaas Answer, *supra* note 131, at para. 2.111.

133. *Id.*

Dr. Sugar's counsel asserted, "Any argument that Dr. Sugar should have . . . talked with Dr. Egaas, or consider other medical conditions, such as the lumbar puncture, fails as such investigative steps are not required."<sup>134</sup>

On November 20, 2008, approximately four weeks after their son's SBS diagnosis, Nathan and Robyn Felix endured polygraphs in an attempt to resolve their SBS issue.<sup>135</sup> The next evening at approximately 10:30 PM, CPS employee Jane Powers and a Snohomish County police officer arrived at the Felix residence to take custody of the Felix's young daughter and arrest Nathan on two counts of assault.<sup>136</sup> Snohomish County Detective Leyda stated the Felixes "showed deception in some of their answers on the polygraph[s]," resulting in Nathan's arrest and the removal of their young daughter.<sup>137</sup> Earlier that evening, CPS personnel had removed the Felix's infant son from their friend who had been caring for him since the SBS diagnosis.<sup>138</sup>

After Nathan was released from jail, CPS would only allow the Felix children to return to the family home if Nathan vacated.<sup>139</sup> Nathan complied in part because of alleged continuous threats by CPS employees that if the Felixes did not do exactly as CPS requested, CPS would take custody of their children.<sup>140</sup> In total, Nathan lived outside the family home from late November 2008 until late May 2009.<sup>141</sup> Aside from a very brief visit on Christmas, he was not allowed to see his children from late November 2008 until January 2009.<sup>142</sup> Department of Social and Health Services (DSHS) defendants claim that on January 28, 2009, CPS employee Stacy Ahrens, who was investigating the Felixes in response to the SBS diagnosis, was prepared to make an unfounded finding.<sup>143</sup> However, DSHS employee Sandy Kinney was uncomfortable closing the Felix investigation,<sup>144</sup> requiring Nathan to remain outside the home another four months. In late May 2009, Nathan was allowed to return to his fami-

---

134. UWSCH MSJ, *supra* note 125, at 16.

135. DSHS Defendants' Answer to Plaintiffs' First Amended Complaint for Damages in Response to Order for More Definite Statement at para. 2.29, *Felix v. Grp. Health of Wash.*, No. 2:11-cv-0197 (W.D. Wash. Nov. 28, 2011), ECF No. 73 [hereinafter DSHS Answer].

136. *Id.* at para. 2.29.

137. *Id.* at paras. 2.29–2.30.

138. Nathan Felix Dec., *supra* note 99, at para. 40.

139. *Id.* at para. 44.

140. *Id.*

141. *Id.* at paras. 44–45.

142. *Id.*

143. DSHS Answer, *supra* note 135, at para. 2.34.

144. *Id.*

ly,<sup>145</sup> and on June 11, 2009—over four months after Stacy Ahrens was prepared to make unfounded findings—CPS employee Melissa Davis submitted an “unfounded findings” report, indicating the abuse allegations were unsubstantiated.<sup>146</sup> On July 27, 2009, the State’s dependency petitions were withdrawn,<sup>147</sup> closing the CPS investigation.

In addition to the emotional upheaval, the Felix’s experience also illustrates the financial costs those accused of shaking endure.<sup>148</sup> The family paid an additional \$600 per month rent for six months for Nathan to live outside the family home;<sup>149</sup> Nathan had to take a leave of absence from the Air Force Reserve, costing them approximately \$700 per month;<sup>150</sup> the family incurred approximately \$1,200 per month in additional child care expenses because Nathan was precluded from caring for his children,<sup>151</sup> and they incurred approximately \$35,000 in attorney’s fees.<sup>152</sup> While these costs may be justifiable as medical providers, law enforcement, and CPS personnel try to protect children, fairness dictates that the Felixes should be reimbursed if these costs are incurred due to an unfounded SBS diagnosis. In this situation, the proposed damages cap should be lifted due to the debatable diagnosis and treatment of the Felixes. The Felixes settled their civil suit for \$55,000—just enough to cover their attorney’s fees and costs.<sup>153</sup> Their home was foreclosed upon, they were nearly bankrupted, and they have since relocated to Gainesville, Florida, where both Nathan and Robyn are employed in health care.<sup>154</sup> While not financially ideal, the Felix family is intact.<sup>155</sup>

---

145. Nathan Felix Dec., *supra* note 99, at para. 47.

146. *Id.*

147. *Id.*

148. The Kristian Aspelin story exemplifies the pivotal role finances play in SBS adjudications. The linked article notes that “[t]o pay for his defense, Aspelin went through his savings, sold his house and borrowed from family and friends to raise more than \$1 million. It cost about \$100,000 just for the expert medical witnesses—a price that makes them unavailable to many defendants.” Joseph Shapiro, *Dismissed Case Raises Questions on Shaken Baby Baby Diagnosis*, NPR (Dec. 21, 2012, 3:16 PM), <http://www.npr.org/2012/12/21/167719033/dismissed-case-raises-questions-on-shaken-baby-diagnosis>.

149. Felix Complaint, *supra* note 99, at para. 2.127.

150. *Id.* at para. 2.128.

151. *Id.* at para. 2.129.

152. *Id.* at para. 2.130.

153. James Ross Gardner, *The Trouble With Shaken Baby Syndrome*, SEATTLE MET (Apr. 1, 2014), <http://www.seattlemet.com/news-and-profiles/articles/the-trouble-with-shaken-baby-syndrome-april-2014>.

154. *Id.*

155. *Id.*

*B. Lavigne v. Meric*

The Taylor Lavigne situation is another example of an SBS diagnosis gone awry.<sup>156</sup> In March 2011, Corey Lavigne and his wife were at home with their nine-month-old daughter, Taylor, when she climbed onto her swing, fell a short distance backward, and struck her head on the floor.<sup>157</sup> Corey was napping on the couch next to his wife, who witnessed Taylor's fall.<sup>158</sup> Soon after her parents consoled her and changed her diaper, Taylor lost consciousness and the Lavignes immediately phoned 9-1-1.<sup>159</sup> An ambulance arrived and Taylor and Ms. Lavigne traveled to Mercy Hospital, while Ankeny Police Department (PD) cars arrived at the Lavigne residence.<sup>160</sup> Ankeny police officers required Corey to stay at his residence for questioning for approximately one hour, allegedly threatening to arrest him if he did not comply.<sup>161</sup>

Following the questioning, Corey went to Mercy Hospital where he encountered Drs. Bala Napa and Albert Meric.<sup>162</sup> Dr. Napa was the first medical provider the Lavignes met, and was initially friendly and accommodating, but allegedly never questioned the Lavignes regarding Taylor's medical history.<sup>163</sup> After Taylor vomited, Dr. Napa ordered a CT scan, and after speaking with Dr. Meric, Dr. Napa's attitude toward the Lavignes allegedly changed, becoming very short-tempered and intolerant of any questions they asked him or comments they made to him.<sup>164</sup>

The Lavignes also encountered Dr. Meric at Mercy Hospital, and before being introduced to the Lavignes, Dr. Meric allegedly told them he had to "crack her [Taylor's] skull open" to relieve the bleeding on her brain.<sup>165</sup> The Lavignes purportedly told Dr. Meric of Taylor's short fall, to which he supposedly responded that her "brain bleed was not just from

---

156. *Lavigne v. Meric*, No. LACL127281 (Polk Cnty. D.C. Iowa 2013). The Lavigne case lasted only slightly longer than seven months, so the case was not fully developed and information is limited.

157. Interview with Corey Lavigne (Dec. 20, 2013) [hereinafter Corey Lavigne Interview]. Corey was a willing participant in this article; Ms. Lavigne was not. Corey claims Ms. Lavigne prefers to no longer discuss the matter and has left Iowa because she fears repercussions from the initial incident and SBS diagnosis.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Plaintiff's Answers to Mercy Hosp.'s First Set of Interrogatories at Interrogatory No. 19, *Lavigne v. Meric*, No. LACL127281 (Polk Cnty. D.C. Iowa 2013) [hereinafter Lavigne Interrogatories Responses].

163. *Id.*

164. *Id.*

165. *Id.*

the fall she had that day,” apparently evidencing Dr. Meric’s belief that the Lavignes had intentionally hurt their daughter.<sup>166</sup> The Lavignes claim Dr. Meric was generally very cold, rude, and accusatory, going so far as to call them “liars.”<sup>167</sup>

The Lavignes also encountered Judith Ann Heggan, DO at Mercy Hospital the day of Taylor’s fall. She allegedly told the Lavignes that their “story did not match her [Taylor’s] injury,” that she (Dr. Heggan) “should not allow [them] to see [their] daughter because of what [they] did,” and that “this was clearly a case of shaken baby.”<sup>168</sup> The Lavignes claim that the intensive care unit nursing staff heard Dr. Heggan’s comments and that Dr. Heggan treated the Lavignes with contempt, acting in an uncompassionate, distant, and accusatory nature.<sup>169</sup>

Kenneth McCann, DO treated Taylor two days after the initial incident, purportedly stating that Taylor’s injuries were very likely the result of abuse by Corey or his wife.<sup>170</sup> Dr. McCann is a medical director in the Regional Child Protection Program at Blank Children’s Hospital in Des Moines, Iowa, and is very accomplished in researching the child abuse arena.<sup>171</sup> Dr. McCann’s professional affiliations are noteworthy,<sup>172</sup> specifically associating with the American Academy of Pediatrics (AAP) Section on Child Abuse and Neglect and the American Professional Society on the Abuse of Children (APSAC).<sup>173</sup>

Within a few days after Taylor’s short fall, the Lavignes were individually questioned by the hospital—both purportedly telling the same story—then questioned again by Ankeny police officers under threat of arrest.<sup>174</sup> The Lavignes claim the police said they did not need attorneys for their Ankeny PD interviews, yet upon arrival at the Ankeny police station both Lavignes were immediately read their Miranda rights.<sup>175</sup> The Lavignes allegedly continued to tell the same story regarding Taylor’s short fall, to which the Ankeny PD supposedly accused both parents of lying, repeatedly telling each parent that if they would simply confess to

---

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Lavigne Draft Amended Petition, *supra* note 99.

171. Kenneth McCann, DO Curriculum Vitae (on file with author).

172. Dr. McCann also authored *Child Abuse and Neglect: Diagnosis, Treatment and Evidence*—interestingly edited by Carole Jenney, MD, an outspoken SBS proponent noted in Part II.B, above.

173. Kenneth McCann, DO Curriculum Vitae, *supra* note 170.

174. Corey Lavigne Interview, *supra* note 157.

175. *Id.*



intentionally harming their daughter this issue would go away.<sup>176</sup> The Lavignes refused to confess, which prolonged their ordeal.

Shortly after the Ankeny PD interviews, the Iowa Department of Human Services (DHS) determined Taylor would not be allowed to return to the Lavigne family home unless both parents vacated.<sup>177</sup> Corey's mother came to stay with Taylor at the family residence; Corey initially stayed at an extended-stay residence for \$800 per month; and Ms. Lavigne stayed with a neighbor and friend from church.<sup>178</sup> Comparable to Nathan Felix, Corey was not allowed to live at the Lavigne family home for approximately nine months; instead, he lived in his employer's basement for the last seven months of his required exile.<sup>179</sup>

Corey Lavigne individually met Dr. Thomas McAuliff and counselor John Stanley approximately six months after Taylor's hospitalization.<sup>180</sup> Counselor Stanley assisted with Taylor's child custody evaluations, and at this meeting Dr. McAuliff allegedly explained to Corey how his wife intentionally hurt Taylor and that there were no medical alternatives explaining Taylor's injuries.<sup>181</sup> However, Dr. McAuliff allegedly could not explain what medical procedures were performed to rule out other causes of Taylor's condition,<sup>182</sup> and never asked Corey anything regarding Taylor's medical history, despite never having spoken with the Lavignes.<sup>183</sup> At this meeting Corey told Dr. McAuliff that another neurosurgeon had reviewed Taylor's injuries and indicated the cause may not be SBS, to which Dr. McAuliff responded that that doctor's opinion "is never believed when he has to testify in cases such as theirs, although he is a highly respected and well-known neurosurgeon."<sup>184</sup> In addition to accusing Ms. Lavigne of intentionally harming Taylor, Dr. McAuliff and counselor Stanley allegedly recommended Corey divorce his wife to retain custody of Taylor.<sup>185</sup>

During the investigation, the Lavignes endured Child in Need of Assistance (CINA) legal proceedings to determine their custodial rights and criminal charges regarding the SBS diagnosis.<sup>186</sup> Ms. Lavigne was

---

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. Lavigne Draft Amended Petition, *supra* note 99, at para. 38.

181. *Id.* at para. 65.

182. Lavigne Interrogatories Responses, *supra* note 162, at 19.

183. Lavigne Draft Amended Petition, *supra* note 99, at para. 67.

184. Lavigne Interrogatories Responses, *supra* note 162, at 19.

185. Lavigne Draft Amended Petition, *supra* note 99, at para. 64.

186. *Id.* Additional information regarding CINA proceedings is available at *Child in Need of Assistance*, IOWA JUDICIAL BRANCH, [http://www.iowacourts.gov/About\\_the\\_Courts/Juvenile\\_Court/](http://www.iowacourts.gov/About_the_Courts/Juvenile_Court/)

arrested approximately seven months after Taylor's fall, spending two days in the Polk County Jail until Corey paid a bail bondsman \$3,000 for her release.<sup>187</sup>

Eventually Steve Foritano, a Polk County criminal prosecutor, accepted that the Lavignes would not plead guilty and charged Ms. Lavigne with felony child endangerment resulting in serious injury,<sup>188</sup> allegedly telling the Lavignes that if a jury found Ms. Lavigne guilty he would ensure she "sat in prison for years."<sup>189</sup> After the first day of the criminal trial, Foritano offered the Lavignes a deal: if they passed polygraphs all charges would be dropped.<sup>190</sup> If they failed the polygraphs, Ms. Lavigne would face alternate misdemeanor charges and be on probation for a year.<sup>191</sup> The Lavignes passed the polygraphs and Foritano agreed to dismiss the charges, allegedly offering the parting comment, "I'm dismissing this case, but if that kid even goes to the doctor for a cold, I'm arresting you both."<sup>192</sup>

After all charges were dismissed in the CINA and criminal proceedings, Ms. Lavigne immediately left Iowa because she was in the Iowa state child abuse registry,<sup>193</sup> which is very detrimental to employment.<sup>194</sup> Ms. Lavigne purportedly packed her van with as many personal belongings as it could hold and headed east, and she refused to leave the van until it entered Illinois.<sup>195</sup> Ms. Lavigne's attorney recommended that she leave Iowa due to the consequences of being on the child abuse registry, and Ms. Lavigne and Taylor relocated to New York.<sup>196</sup> Corey is a former Air National Guardsman who served multiple tours in the Middle East; a guilty plea by him would have meant sacrificing his entire military pension built over his 20-year military career.<sup>197</sup> He remained in Iowa and is currently an insurance salesman. Before Taylor's fall, Corey had built a list of approximately 1,500 clients, and he stayed in Iowa because he felt that relocating would only retard the family's financial reconstruction.<sup>198</sup>

---

Child\_in\_Need\_of\_Assistance/ (last visited Aug. 19, 2014).

187. Corey Lavigne Interview, *supra* note 157.

188. Lavigne v. Meric, No. LACL127281 (Polk Cnty. D.C. Iowa 2013).

189. Corey Lavigne Interview, *supra* note 157.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Iowa's Child Abuse and Dependent Adult Abuse Registries*, IOWA LEGAL AID (Feb. 6, 2013), <http://www.iowalegalaid.org/resource/iowas-child-abuse-and-dependent-adult-abuse-r>.

195. Corey Lavigne Interview, *supra* note 157.

196. *Id.*

197. *Id.*

198. *Id.*

The financial toll taken on the Lavigne family has been substantial. Corey estimates the SBS diagnosis cost his family \$200,000, including the family's 20-year life savings, additionally affecting their credit.<sup>199</sup> Corey and Ms. Lavigne are now divorced, and at forty-one, he compares himself to an eighteen-year-old starting his adult life anew.<sup>200</sup> Corey retained the family home, although he currently rents two of the bedrooms to supplement his income.<sup>201</sup>

Corey and Ms. Lavigne filed a civil suit against many of Taylor's treating doctors and Mercy Hospital alleging negligence, loss of consortium, intentional infliction of emotional distress, and negligent supervision claims.<sup>202</sup> The claims alleged the medical providers failed to detect and test for other injuries Taylor may have suffered that would have led to alternate explanations for her injuries,<sup>203</sup> failed to believe the Lavignes' explanation regarding Taylor's injuries and asserted the injuries were caused by the intentional acts of a third party,<sup>204</sup> and diagnosed Taylor as suffering from abusive head trauma without properly analyzing her medical, social, and family history.<sup>205</sup> Due to financial shortcomings and what they believed was the lack of a realistic positive outcome, the Lavignes voluntarily dismissed their suit.<sup>206</sup> Drs. McCann and Meric had also asserted immunity claims.<sup>207</sup>

## VI. DAMAGES CAPS

As noted above, each state has a reporter statute requiring certain entities to report child abuse that provides qualified immunity if the reporter is acting in "good faith."<sup>208</sup> Unfortunately, in the SBS context, this frequently means those accused of shaking endure substantial financial costs defending themselves due to shaking allegations, and they usually have little or no recourse. The removal of qualified immunity clauses and

---

199. *Id.*

200. *Id.*

201. *Id.*

202. See Lavigne Draft Amended Petition, *supra* note 99, at paras. 43, 48, 50, 54, 59, 61, 68–71, 75, 80, 82, 86–89, 91, 93, 104–09, and 111–16.

203. *Id.* at paras. 43, 54, 75, and 86.

204. *Id.* at paras. 43, 54, 65, 67, 75, and 86.

205. *Id.* at paras. 43, 54, 75, and 86.

206. Voluntary Dismissal, Lavigne v. Meric, No. LACL127281 (Polk Cnty. D.C. Iowa 2013).

207. Answer, Affirmative Defenses and Jury Demand of Dr. Kenneth McCann at para. 4, Lavigne v. Meric, No. LACL127281 (Polk Cnty. D.C. Iowa 2013); Answer by Defendant Dr. Albert McCann at Affirmative Defenses para. 2, Voluntary Dismissal, Lavigne v. Meric, No. LACL127281 (Polk Cnty. D.C. Iowa 2013).

208. Trost, *supra* note 15, at 194–95.

incorporation of economic reimbursement and damages caps offers a solution to this SBS conundrum.

My proposal is that upon any not guilty verdict or unfounded findings by any criminal or CPS investigations, those wrongly accused of shaking should be automatically reimbursed for their economic damages. Simple fairness dictates that those wrongly accused of shaking be compensated for the hardship they endured, specifically when that hardship includes substantial legal costs and fees that may easily soar in excess of \$100,000. When medical providers, law enforcement, or CPS personnel act ethically and in good faith, they should not face inflated damages claims and the recovery of anyone falsely accused should be strictly limited to economic damages that should also be simple to calculate—additional rent for living outside the home, additional daycare costs, attorneys' fees and costs, etc.

The second prong of my proposal is that those falsely accused of shaking may pursue non-economic damages if any medical provider, law enforcement, or CPS personnel acts unethically or in bad faith regarding the diagnosis or subsequent investigations. This is in addition to the automatic reimbursement that would accompany any unfounded findings. I do not propose a cap on non-economic damages, although they are already enacted in twenty-three states.<sup>209</sup> All parties in subsequent civil suits would be responsible for their own costs and fees.

The pivotal component of the non-economic damages is that when parents are deprived of their constitutional right to the care and custody of their children due to an erroneous SBS diagnosis, their children are very young and parents remain extremely attached. This deprivation deserves some form of compensation. However, the diagnosing and investigating parties also deserve protection, and there needs to be a balance between compensating those wrongly accused and continuing proper SBS diagnoses and investigations. Any loss of consortium or other claims related to the deprivation of the care and custody of children should be limited to situations evidencing bad faith or unethical treatment. While fairness dictates those wrongly accused deserve compensation, it also dictates those acting in good faith deserve to be shielded from unnecessary litigation. There are numerous pros and cons in trying to balance this approach.

---

209. Andrew C. Cook, *Tort Reform Update: Recently Enacted Legislative Reforms and State Court Challenges*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES (Jan. 10, 2013), <http://www.fed-soc.org/publications/detail/tort-reform-update-recently-enacted-legislative-reforms-and-state-court-challenges>.

### *A. Benefits*

The obvious benefits start with reimbursement for those falsely accused of shaking. Another potential benefit is medical providers being more certain regarding an SBS diagnosis. Theoretically, medical providers could continue to consult with necessary subspecialists and diagnose SBS, and, barring ethically suspect behavior or bad faith, these medical providers would not face additional damages claims if the diagnosis was unfounded.

Additionally, because parents and care providers currently file suits against medical providers, law enforcement, and CPS personnel, these parties may face less litigation if a structured reimbursement system is created. Medical providers lament being involved in lawsuits, and it is presumed law enforcement and CPS personnel feel similarly. If economic damages are statutorily available and these entities have acted in good faith, it is possible any wrongly accused party would be satisfied with his or her compensation.

This proposal also potentially initiates a stronger system of checks and balances and possible power shift within the medical provider-CPS relationship. Medical providers could obviously still diagnose SBS; however, CPS personnel would now be empowered to investigate and verify the diagnosis, rather than investigate from a position of presupposed guilt.

### *B. Detriments*

One detriment of my proposal is that medical providers, law enforcement, and CPS personnel would face an increased risk of liability and exposure due to the elimination of their qualified immunity. Wrongly accused parents deserve compensation for the costs they incur defending themselves responding to SBS diagnoses. Likewise, medical providers, law enforcement, and CPS personnel deserve protection when they act ethically and in good faith.

Another disadvantage is medical providers potentially not diagnosing SBS and practicing defensive medicine, along with CPS investigations being less likely to result in unfounded findings. There is also potential that those falsely accused may incur exorbitant legal fees and other costs to drive up expenses, only to potentially recoup it later, forcing the responsible parties to pay excessive reimbursement costs.

Another shortcoming is the potential for an increase in medical malpractice insurance premiums, as, presumably, medical providers would be at least partially responsible for reimbursing those falsely accused. Medical malpractice damages caps have been thoroughly researched and examined, specifically regarding the premise that statutory

limits will reduce medical malpractice insurance premiums.<sup>210</sup> The success of curtailing medical malpractice premiums due to economic and non-economic damages caps is debatable, but the potential for increased premiums exists.

A final shortcoming is the difficulty in determining responsibility for reimbursing those falsely accused. There are no recent figures to determine annual SBS diagnoses; a commonly cited reference from 2003 notes approximately 1,300 per year.<sup>211</sup> Statistics were also not located evidencing how many SBS diagnoses were determined unfounded, but it is presumed the majority are not. One option regarding reimbursement for the wrongly accused is for each state to create a fund to draw the economic damages from, comparable to client protection funds established by bar associations to reimburse clients whose attorneys have misappropriated funds. Due to the limited diagnoses, it should not be a substantial financial burden on the state or those responsible for diagnosing and investigating. This proposal does not offer detailed methods to finance a reimbursement fund, but funding schemes on medical providers and state funding are two potential sources. Medical providers begin the SBS process with their diagnoses, and law enforcement and CPS personnel are state employees; thus, those groups superficially seem appropriate. Dispersing the funding would also contribute to this proposal's fairness by not requiring medical providers, law enforcement, and CPS personnel to individually finance each reimbursement. Once the fund becomes well financed, the collection efforts could then be reduced.

### C. Synopsis

The benefits and detriments identified above are certainly not exhaustive, and unfortunately other proposals to provide relief to those falsely accused of shaking appear limited. Most articles focus on individual tragedies, the science behind SBS, recent developments in the medical and biomechanical fields, or a combination thereof. One noteworthy alternative is creating SBS review panels.<sup>212</sup> While that proposal seems plausible, the author recognizes the shortcomings of the North Carolina Innocence Inquiry Commission and the Illinois Commission on

---

210. Nancy L. Zisk, *The Limitations of Legislatively Imposed Damages Caps: Proposing a Better Way to Control the Costs of Medical Malpractice*, 30 SEATTLE U. L. REV. 119, 120 (2006).

211. *SBS Statistics*, NAT'L CTR. ON SHAKEN BABY SYNDROME, <http://dontshake.org/sbs.php?topNavID=3&subNavID=27> (last visited Apr. 14, 2014).

212. Rachel Burg, Note, *Un-Convicting the Innocent: The Case for Shaken Baby Syndrome Review Panels*, 45 U. MICH. J.L. REFORM 657 (2012).

Capital Punishment,<sup>213</sup> two comparable schemes. However, if a review panel is successfully structured and funded but the ongoing SBS medical and biomechanical issues remain unchanged, are the review panels not likely to perpetuate SBS findings and child abuse convictions? Hopefully they would shed more light on the SBS dynamics and provide a more in-depth review of any SBS diagnoses and investigations, but if opinions persist regarding the medical and biomechanical components, review panels may have minimal effect.

Irrespective of my proposal's benefits and detriments, the most attractive aspect of this proposal is its ironic simplicity—the role reversal between the accuser and the accused and the reversed financial burdens. Medical providers, law enforcement, and CPS personnel generally face little, if any, liability regarding SBS diagnoses and investigations due to qualified immunity, while those accused frequently incur sizable financial debts defending themselves. Barring evidence of unethical treatment, bad faith, or malicious conduct, this proposal should not have a substantially negative impact on the parties diagnosing and investigating abuse. There are realistically not enough SBS diagnoses to have a sizable impact. In its simplest form, this proposal reimburses those wrongly accused of shaking. Does fundamental fairness not require that if a medical provider, law enforcement, or CPS personnel causes someone to incur a considerable financial burden, and it is later determined the medical provider, law enforcement, or CPS personnel were wrong, that they should be responsible for compensating the wrongly accused?

## VII. CONCLUSION

Child abuse occurs. It is a terribly tragic reality that infants and young children are abused and suffer severe health consequences including death, and shaking is a part of this. However, SBS is also diagnosed when it has not occurred, at times based on manipulated evidence, denying parents their fundamental right to the custody and care of their children. Parents' civil suits regarding false SBS diagnoses consistently fail due to reporting statutes' qualified immunity and "good faith" reporting justifications.<sup>214</sup> Precedent indicates medical providers, law enforcement, and CPS personnel are almost universally not held liable, sometimes regardless of suspect diagnoses and investigations. Qualified immunity amounts to an almost free pass as long as these entities act in "good

---

213. *Id.* at 680–84.

214. *See* *Humphrey v. Sapp*, No. 2010-CA-002278-MR, 2012 Ky. App. Unpub. LEXIS 32 (Ky. Ct. App. Jan. 13, 2012), *cert. denied*, 2012 Ky. LEXIS 279 (Ky. Sept. 12, 2012).

faith,” leaving no one responsible for the damage done to families and costs incurred by those accused of shaking.

As a society, we prefer medical providers reporting abuse, law enforcement and CPS investigations and legal prosecutions, and we understand these entities’ vigor in protecting children. Yet those entities should be held accountable for incorrect, unfounded SBS diagnoses and questionable treatment of the accused. An SBS diagnosis includes severe consequences, and starting with more uncontroverted medical evidence and objective treatment of the accused is a very realistic first step in perfecting an SBS diagnosis. The next practical step is removing the qualified immunity clause in reporter statutes and instituting voidable damages caps to reimburse those wrongly accused of shaking. In the event of bad faith or unethical treatment of the accused, the economic damages cap becomes voidable to allow those wrongly accused to pursue additional civil claims and damages against the offending parties.

The twisted irony of the Felix and Lavigne situations is that they are extremely fortunate. Their children are alive, both families have custody of all their children, and none of the parents are imprisoned. Although financially devastated, there are dim silver linings in their hardships, and both families recognize their children are more important than any financial challenges. However, relocating and reconstructing their lives evidences they ran the SBS gamut and fared much better than those now residing in prisons. Corey Lavigne’s emotion, anger, and disbelief is challenging to convey, but when he recounts needing to pull over to compose himself while traveling to sell insurance to rural Iowans, his frustrations become easier to understand. However, only the Felixes and Lavignes truly know what happened when their children were injured.

Despite Dr. Clayton’s justified lamentations regarding litigation inconveniences for medical providers, she is very likely not a parent who has lost custody of her child, endured accusations of highly-respected professionals potentially depriving her of the fundamental right to the care and custody of her children, nor had to relocate due to an SBS diagnosis. Dr. Clayton very likely understands the consequences of an SBS diagnosis, consults appropriate medical provider subspecialists when necessary, and is very likely well-intended in her efforts to protect children. We prefer to believe medical providers are unbiased and infallible, and it seems our natural inclination is to vigorously protect those who cannot protect themselves—specifically infants and young children. The problem is not that medical providers are not protecting children—it is that in the SBS context their methodology is suspect and at a minimum needs fine-tuning, and they need to be held accountable for the impact unfounded SBS diagnoses and ethically suspect behavior has on families



during investigations. Providing multiple forms of relief to the wrongly accused should create more accurate SBS diagnoses and better treatment of parents seeking medical treatment for their children.