

APPSAC

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Special Points of Interest:

- *Litigation regarding AHT/SBS has increased in recent years.*
- *SBS as one theory of causation of AHT is nearly universally accepted in the medical community.*
- *AHT is diagnosed after a comprehensive assessment of medical condition.*
- *AHT is not diagnosed by the presence or absence of any "triad" of injuries.*
- *Some courts prohibit the use of the term "abusive head trauma" during expert testimony.*

Five Recent Developments in the Prosecution of Abusive Head Trauma

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Recently, there has been considerable appellate litigation regarding abusive head trauma (AHT) / shaken baby syndrome (SBS). This *Alert* provides an overview of five issues raised by defendants and the response of several appellate courts.

1. Invalid theory

Defendants may argue that, "Shaken Baby Syndrome is ill-founded and no longer supported by the scientific and medical communities." Havard v. State, 312 So. 3d 326, 330 (Sup. Ct. Miss. 2020); see, also, State v. Allen, 489 P. 3d 555, 563 (Ct. App. Ore. 2021) ("defendant argues . . . that the theory of SBS or AHT itself is not a scientifically valid theory of medical causation."). This is incorrect. AHT is a widely accepted diagnosis in the medical

community. Choudhary, et al., *Consensus Statement on Abusive Head Trauma in Infants and Young Children*, 48 *Pediatric Radiology* 1048 (2018); Clark v. State, 315 So. 3d 987, 997 (Sup. Ct. Miss. 2021).

In Sissoko v. State, 182 A.3d 874 (Ct. Sp. App. Maryland 2018), the court rejected the "invalid theory" analysis, writing that the "argument that the controversy over the diagnosis of abusive head trauma makes it no longer . . . generally accepted" is not persuasive because the "controversy exists largely in the legal community, not the medical communities relevant to our inquiry." Id. at 898. It continued, "The main controversy over abusive head trauma involves a minority of physicians and other scientists. . . ." Id. at 902-903; see Sandeep K. Narang, et al., Abusive Head Trauma in Infants and Children

Pediatrics (2020) 145 (4): e20200203.

2. The So-Called “Triad”

Defendants may attempt to oversimplify the diagnostic process by referencing the so-called “triad” of injuries (brain swelling, subdural hematoma, and retinal hemorrhages). For example, in Allen, *supra*, the court wrote: “Defendant frames the issue as the validity of SBS/AHT theory, which he defines as ‘a theory that a child who suffers subdural hemorrhages and retinal hemorrhages with minimal evidence of impact has been subjected to abuse.’ . . . Defendant asserts that . . . ‘the SBS/AHT theory that subdural and retinal hemorrhaging is ‘diagnostic’ of abuse is not generally accepted.” Allen at 285-286; *see also*, Havard at 331; Sissoko at 885. One challenge with the triad argument is that medical professionals have sometimes framed the diagnosis in this way, presumably for ease. For instance, in Havard, the medical examiner who conducted the child’s autopsy testified that, “he reached his diagnosis by using the ‘classic triad for Shaken Baby Syndrome,’ which he described as ‘subdural hemorrhage; presence of retinal hemorrhage; and the absence of other potential lethal causes of death.’” Id. at 331. Yet, AHT/SBS has never been diagnosed based upon the presence—or absence—of any “triad” of injuries. A leading treatise on the diagnosis of child abuse published in 1994, for instance, made clear that the diagnosis of AHT was based upon medical history, “thorough and competent physical examination,” “[a] careful ophthalmological evaluation,” and imaging tests (e.g., CAT scans, MRI). Further, it stressed the importance of “consider[ing] all potential origins and causes of the findings. . . [T]he physician must weigh each diagnostic possibility” including mimics of abusive head trauma. Robert M. Reese Child Abuse: Medical Diagnosis and Management 8-12 (1994).

Multiple policy statements by the American Academy of Pediatrics have confirmed this approach.

3. Exclude Expert Testimony

Defendants frequently move to exclude expert testimony from the government’s witnesses on reliability grounds. In State v. Hatfield, 60 Kan. App. 2d 11 (2021), the defendant moved to exclude the testimony of the treating pediatrician on several grounds. First, she argued that the process of differential diagnosis, in which possible alternative causes of a child’s condition (e.g., accident or metabolic disease) are ruled out to arrive at a diagnosis of AHT, is not a “reliable method;” that because it involves medical history, it is a forensic investigation and not a medical evaluation. The Kansas appellate court rejected these arguments. “[T]here is significant medical and legal literature documenting differential diagnosis as a manner of ascertaining whether a child has suffered abusive head trauma.” Id. at 21.

4. Unfair Prejudice

Defendants may argue that medical testimony about AHT/SBS is unfairly prejudicial. Juries, they argue, will give too much weight to medical testimony and forgo their own credibility determination. They often analogize to cases of child sexual abuse in which there is no physical evidence but a medical professional is permitted to testify to a diagnosis of “child sexual abuse” or “probable child sexual abuse.” Courts, however, tend to reject this argument because there is physical evidence in AHT cases. In so concluding, the Allen court stated that, “the diagnosis of abusive head trauma was not based singularly on crediting or not crediting any person’s statements; it was about evaluating [the child’s] physical injuries and whether those injuries

medically matched up to the proffered causes for those injuries.” Id. at 567. See also, People v. McFarlane, 926 N.W. 2d 339 (Mich. Ct. App. 2018) (Markman, J., concurring).

5. Invading the Province of Jury

Defendants may challenge the admission of expert medical testimony about the term “abusive head trauma” as a usurpation of the jury’s role. This approach has had mixed results. In *Hatfield*, the defendant argued that the trial court erred when it allowed a treating pediatrician to testify that the child’s “injuries were caused by nonaccidental abusive head trauma,” which, she argued, “usurped the role of the jury by opining on the question of intent.” Id. at 17. The court rejected this argument. In Michigan, however, courts hold that allowing the physician-expert to testify that the child was diagnosed with “abusive head trauma” invades the province of the jury. McFarlane, supra, lev. app. den. 943 N.W. 2d 84 (Mich. Sup. Ct. 2020). Importantly, AHT is a widely recognized medical diagnosis with an ICD code established by the World Health Organization. (See <https://www.who.int/standards/classifications/classification-of-diseases>). A jury instruction that the medical expert is testifying to a

medical diagnosis rather than a legal conclusion may be in order.

Conclusion

Defendant Litigation regarding AHT/SBS cases has grown in recent years, with defendants seeking to re-litigate previous convictions, challenging the admission of expert testimony, and presenting dubious evidence from a small group of expert witnesses holding iconoclastic views of the phenomenon. You should anticipate that defendants will seek to exclude the testimony of mainstream experts such as board-certified child abuse pediatricians while seeking to admit testimony about fringe theories of causation. You will want to oppose both of these efforts.

For a more detailed treatment of these issues, you may wish to review Promoting Justice for Victims of Abusive Head Trauma, [available from the APSAC Center for Child Policy here](#). Other helpful resources are available from the [National Center on Shaken Baby Syndrome](#) as well as the [Shaken Baby Alliance](#).

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News from APSAC

Child maltreatment work is by nature multidisciplinary; we all share the same goal of ensuring health, safety and justice for children and families. APSAC and the New York Foundling have developed a comprehensive, multidisciplinary Online Course for professionals to help expand their perspective and knowledge base to support effective practice in any child welfare setting. Learn more at apsac.org/online



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