

## IV. Circumstantial Proof

Proving child abuse or child neglect would be difficult enough if all the facts about a child's care were known. However, child maltreatment usually occurs in the privacy of the home; unless the child is old enough (and not too frightened) to speak out, or unless a family member steps forward, it is often impossible to have direct evidence of abuse. That is why circumstantial evidence is frequently the only way to prove that a child has been abused.

Many people assume that circumstantial proof is somehow less reliable than direct proof. While circumstantial evidence lacks the superficial certainty of direct evidence, it can be just as definitive – and just as persuasive – if presented properly. In fact, given the problems of bias, poor perception, and faulty memory that can distort eyewitness testimony, circumstantial evidence can be more trustworthy.

Like all other evidence, [circumstantial evidence] may be strong or weak; it may be so unconvincing as to be quite worthless, or it may be irresistible and overwhelming. The gist of it, and the key to it, is the inference, or process of reasoning by which the conclusion is reached. This must be based upon the evidence given, together with a sufficient background of human experience to justify the conclusion.<sup>1</sup>

This section describes the patterns of circumstantial evidence which can establish that a child has been physically abused.

### "res ipsa loquitur"

The child's body, tragically, often provides the most telling evidence of physical abuse. Unsatisfactorily explained injuries suggestive of physical assaults are the single most important means of detecting child abuse. For children too young or too frightened to tell what happened to them, such injuries may be the only way to discover child abuse, and the only way to prove it, should court action be necessary.

Almost any traumatic injury could be the result of a parental assault, but most are not. Childhood is a time of bumping, banging, and falling down. It is a rare child that has not been cut or bruised, at some time or other. Indeed, physical injuries, some minor and some not so minor, are signs of the physical activity, the carefree exuberance, and the rapid growth and associated awkwardness that mark a normal childhood. Thus, most traumatic injuries cannot be the basis of an adjudication – unless the statements of the parents, the child, or other witnesses indicate that the child was assaulted.

Some traumatic injuries, though, have telltale characteristics that distinguish them from the expected injuries of childhood and that strongly suggest physical abuse. These injuries are so distinctively associated with physical assaults that they are, *by themselves*, sufficient proof of child abuse. If not satisfactorily explained by the parents (as described below), these "apparently inflicted" injuries are a sufficient ground for a finding. No further evidence of the parents' culpability is needed.

The evidentiary significance of apparently inflicted injuries is that they fall within the doctrine of *res ipsa loquitur* and are, thus, strong circumstantial evidence of child abuse. Translated, the phrase *res ipsa loquitur* means "the thing speaks for itself." Its use in modern law originated in the field of tort liability for negligence. In the 1863 English case of *Byrne v. Boadle*,<sup>2</sup> the plaintiff sued a warehouse owner for negligence when a barrel of flour fell upon the plaintiff as he walked past the warehouse. Applying the principle of *res ipsa loquitur* for the first time, the court in effect held that barrels of flour usually do not fall out of second story warehouses and onto pedestrians' heads unless someone has been negligent.

The earliest reported Family Court case recognizing the evidentiary significance of such circumstantial proof is *Matter of S*.<sup>3</sup> In this 1965 case, Judge Felix was presented with evidence that a one-month-old infant was a victim of the battered child syndrome. There apparently was no direct evidence connecting the child's injuries to the parents. Judge Felix held:

Therefore in this type of proceeding affecting a battered child syndrome, I

1. *Prosser on Torts* §39, p. 212 (4th Ed., 1971)

2. 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

3. 46 Misc. 2d 161, 259 N.Y.S.2d 164 (Fam. Ct., Kings Co., 1965).

am borrowing from the evidentiary law of negligence the principle of "*res ipsa loquitur*" and accepting the proposition that the condition of the child speaks for itself, thus permitting an inference of neglect to be drawn from proof of the child's age and condition, and that the latter is such as in the ordinary course of things does not happen if the parent who has the responsibility and control of an infant is protective and non-abusive. And without satisfactory explanation I would be constrained to make a finding of fact of neglect on the part of a parent or parents and thus afford the Court the opportunity to [inquire] into mental, physical or emotional inadequacies of the parents and/or to enlist any guidance or counseling the parents might need. This is the Court's responsibility to the child.<sup>4</sup>

This use of the *res ipsa loquitur* rule of circumstantial evidence to prove child abuse was soon endorsed by other Family Court Judges.<sup>5</sup> However, many judges remained hesitant to use the *res ipsa* rule, so, in 1970, the Legislature codified the rule for child protective proceedings. Family Court Act §1046(a)(ii)(1983) provides that:

Proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be *prima facie* evidence of child abuse or neglect, as the case may be. . .

### The Prima Facie Case

Subdivision 1046(a)(ii) is careful to make apparently inflicted injuries only *prima facie* evidence of child abuse. It does not shift the burden of proof from the petitioner to the respondent.<sup>6</sup> It also does not create a presumption, even a rebuttable one, of child abuse.

*Prima facie* evidence is different from a presumption. A presumption is binding on the court, unless rebutted. (There are no irrebuttable presumptions.) *Prima facie* evidence simply establishes the petitioner's direct case; it enables the petitioner to withstand a respondent's motion (made at the close of the petitioner's direct case) to dismiss for failure to establish a *prima facie* case. However, *prima facie* evidence does not necessarily satisfy the petitioner's ultimate burden of proof. In reaching a decision at the close of all the evidence, the judge is free to disregard *prima facie* evidence whether or not it has been directly rebutted, in fact, whether or not the respondent introduced any evidence at all.<sup>7</sup> Prosser explains how this works in an ordinary negligence case:

This means that the inference of negligence to be drawn from the circumstances is left to the jury. They are permitted, but not compelled, to find it. The plaintiff escapes a nonsuit, or a dismissal of his case, since there is sufficient evidence to go to the jury; but the burden is not shifted to the defendant's shoulders, nor is any 'burden' of introducing evidence cast upon him, except in the very limited sense that if he fails to do so, he runs the risk that the jury may, and very likely will, find against him.<sup>8</sup>

Thus, instead of creating a rebuttable presumption of child abuse, subdivision 1046(a)(ii) creates a "permissible inference" of child abuse –

4. *Id.*, 259 N.Y.S.2d at 165.

5. See, e.g., *In the Matter of Young*, 50 Misc. 2d 271, 270 N.Y.S. 2d 250, 252 (Fam. Ct., Westchester Co., 1966); *In the Matter of Frances*, 49 Misc. 2d 372, 267 N.Y.S. 2d 566, 588 (Fam. Ct., New York Co., 1966); cf. *In the Matter of Vulon Children*, 56 Misc. 2d 19, 288 N.Y.S. 2d 203, 207-208 (Fam. Ct., Bronx Co., 1968).

6. *In the Matter of Tashyne L.*, 53 A.D. 2d 629, 384 N.Y.S. 2d 472, 474 (2nd Dept., 1976).

7. Annotation, "Power of Court Sitting as Trier of Fact to Dismiss at Close of Plaintiff's Evidence, Notwithstanding Plaintiff Has Made Out *Prima Facie* Case," 55 A.L.R. 3d 272 (1974); 9 *Wigmore on Evidence* §2487 and 2494 (3rd Ed., 1940); *McCormick on Evidence* §338 "Satisfying the Burden of Producing Evidence" (2nd Ed., 1972); 32A *Corpus Juris Secundum* p. 624, et seq. (1964). See e.g., *In the Matter of John Children*, 61 Misc. 2d 347, 361, 306 N.Y.S. 2d 797, 812 (Fam. Ct., N.Y. Co., 1969), expressly disregarding *prima facie* evidence of child abuse, as provided in the original version of Article 10. See generally *In the Matter of JR*, 87 Misc. 2d 900, 386 N.Y.S. 2d 774, 779-780 (Fam. Ct., Bronx Co., 1976).

8. Prosser, *supra* n. 1, at §40, p. 229.

which the court may accept or reject.<sup>9</sup> The drafters of this provision were well aware of this distinction. The *prima facie* approach was adopted to give Family Court Judges what was deemed needed discretion in deciding whether specific situations justified a finding of child abuse.

However, as Prosser points out, there are cases in which "the inference of negligence is so clear that no reasonable man could fail to accept it; and in such cases, if the defendant offers no explanation, a verdict should be directed for the plaintiff. In other words, the procedural effect of a *res ipsa* case is a matter of the strength of the inference to be drawn, which will vary with the circumstances of the case."<sup>10</sup> And, whether knowingly or not, New York courts have adopted the position that proof of apparently inflicted injuries presents such a strong circumstantial case that, unless rebutted, a finding of abuse must be made.<sup>11</sup> In fact, the evidence is considered so strong that, unless it is effectively countered by the parents, appellate courts will reverse the Family Court Judge's failure to make a finding of abuse.<sup>12</sup> Thus, in the reported caselaw, one often sees the effect of subdivision 1046(a)(ii) described as follows:

... once the petitioner has established the existence of injuries sustained by the child which are substantial in character while the child was in the lawful custody of his parents or other person legally responsible for his care, then petitioner is deemed to have established a *prima facie* case and the burden of coming forward with proof shifts from the petitioner to the respondent who is then required to offer a satisfactory explanation concerning these injuries.<sup>13</sup>

In most cases, this is the practical effect of proof of apparently inflicted injuries. However, it is a somewhat misleading statement of the legal rules involved. Under appropriate circumstances, the court remains free to dismiss a petition for reasons other than a direct rebuttal of the *prima facie* evidence. For example, the court might dismiss a petition because the parents made a "favorable impression" on the judge. In a case that was later reversed on appeal, one judge explained why, in refusing to place a child in protective custody, he disregarded *prima facie* evidence of abuse (the child had "horrible injuries" for which the parents had no explanation):

Would it not be for the extraordinary favorable impressions they have made in terms of their concern and genuine bewilderment as to why this befell them, the Court would not have made the determination that it did.<sup>14</sup>

The foregoing decision was reversed on appeal, but it illustrates the court's potential power to disregard a *prima facie* case. One can easily imagine a situation in which the child's injuries were less severe or the inference of their being inflicted less strong, so that a decision to disregard would not be reversed.

Therefore, petitioners make a major mistake, if, relying on the *prima facie* rule, they fail to introduce other evidence they might have tending to show that the respondent has maltreated the child. Even if not needed to convince the judge that a finding should be made, such evidence bolsters the petitioner's request for a disposition that effectively protects the child.

The respondent has an absolute right to challenge the *prima facie* evidence, through argument, cross examination, or counter evidence.<sup>15</sup> If uncontradicted by the petitioner's

9. See Prosser, *supra* n. 1, §40, p. 229.

10. Prosser, *supra* n. 1, at §40, p. 229-230.

11. See *In the Matter of JR*, *supra* n. 7.

12. See, e.g., *In the Matter of Charmine W.*, 61 A.D.2d 769, 402 N.Y.S.2d 19 (1st Dept., 1978); *In the Matter of Mathew L.*, 60 A.D.2d 898, 401 N.Y.S.2d 529 (2nd Dept., 1978).

13. *In the Matter of Tashyne L.*, 53 A.D.2d 629, 384 N.Y.S.2d 472, 474 (2nd Dept., 1976), quoting *In the Matter of Young*, 50 Misc. 2d 271, 273, 270 N.Y.S.2d 250, 253 (Fam. Ct., Westchester Co., 1966); accord, *In the Matter of Rose "B."*, 79 A.D.2d 1044, 435 N.Y.S.2d 185, 186 (3rd Dept., 1981), holding that "after the establishment of a *prima facie* case, the burden of proof shifts to the respondent who is then required to present a satisfactory explanation;" *In the Matter of Roman*, 94 Misc.2d 796, 405 N.Y.S.2d 899, 903 (Fam. Ct., Onondaga Co., 1978).

14. *In the Matter of Corey T.*, 81 A.D.2d 785, 439 N.Y.S.2d 18, 19 (1st Dept., 1981).

15. Cf. *Nasser v. Abraham*, 86 A.D.2d 973, 448 N.Y.S.2d 286 (4th Dept., 1982); *Foley v. Foley*, 73 A.D.2d 623, 422 N.Y.S.2d 465 (2nd Dept., 1979), both Article 4 cases.

evidence, otherwise plausible testimony from the respondent can rebut any *prima facie* case established by this subdivision, and there may not be a finding of child abuse.<sup>16</sup> Prosser describes how the respondent's testimony should be weighed against the *res ipsa* evidence:

When the defendant in turn offers evidence to show that the event was not due to his negligence, there is the further question of the extent to which the principle of *res ipsa loquitur* will survive in the face of such proof. It is generally agreed, except in two or three jurisdictions, that the burden of proof is not upon the defendant, and that he is required to do no more than to introduce evidence which, if believed, will permit the jury to say that it is as probable that he was not negligent as that he was. Against this evidence must be balanced the inference of negligence to be drawn from the circumstances of the case, which has weight so long as reasonable men may still draw it from the facts in evidence. Probably no more than this is meant by most of the cases which have said that the "presumption" of *res ipsa loquitur* is itself evidence, to be weighed against that of the defendant.<sup>17</sup>

Chart #3 summarizes the two elements of the *prima facie* case and the three ways that it can be countered. These are discussed in the remainder of this chapter.

Since subdivision 1046(a)(ii) places such pressure on parents to explain their children's injuries, a few observers have claimed that it violates the respondent parents' privilege against self-incrimination. However, given the Court of Appeals decision in *People v. Henson* (discussed below),<sup>18</sup> there is no reason to question the correctness of the trial court decisions that have unanimously sustained the constitutionality of this provision.<sup>19</sup> In upholding the constitutionality of subdivision 1046(a)(ii), one court explained:

### Chart #3

#### CIRCUMSTANTIAL PROOF OF CHILD ABUSE

**A *prima facie* case of child abuse is established by proof that:**

- The child had apparently inflicted injuries which were substantial in character, and
- The child was in the parents' general custody during the relevant time.

**A *prima facie* case is countered by argument or proof establishing that:**

- The child's injuries were more likely the ordinary injuries of childhood, consistent with the parents' lack of fault; or
- The child was not in the parents' custody during the time when the injuries were sustained; or
- The parents have provided a satisfactory explanation of the child's apparently inflicted injuries.

Today, once a *prima facie* case of child abuse or neglect is established, the burden of coming forward with proof shifts to the Respondent. *Matter of Tashyne L.*, 53 A.D.2d 629, 384 N.Y.S.2d 472 (2nd Dept. 1976). Such a shifting of the burden does not offend the due process to which Respondent is entitled. Even in a criminal prosecution, it is permissible to cast a like burden on the defendant if the prosecutor has proved enough to make it just to shift the burden, or, based upon a balancing of opportunities for knowledge, if the shifting of the burden would aid the accuser without subjecting the accused to hardship or oppression. *Morrison v. California*, 291

16. See, e.g., *In the Matter of Vulon*, 56 Misc. 2d 19, 288 N.Y.S.2d 203 (Fam. Ct., Bronx Co., 1968).

17. Prosser, *supra* n. 1, §40, p. 233 (citations omitted).

18. See the text at *infra* n. 24.

19. See, e.g., *In the Matter of Roman*, 94 Misc.2d 796, 405 N.Y.S.2d 899 (Fam. Ct., Onondaga Co., 1978); *In the Matter of JR*, 87 Misc. 2d 900, 386 N.Y.S.2d 774 (Fam. Ct., Bronx Co., 1976); *In the Matter of Fred S.*, 66 Misc. 2d 683, 322 N.Y.S.2d 170 (Fam. Ct., Richmond Co., 1971).

U.S. 82, 88-89, 54 S.Ct. 281, 78 L.Ed. 664 (1934); *Speiser v. Randell*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). With respect to civil cases, "[l]egislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred." *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639, 642, 49 S.Ct. 445, 447, 73 L.Ed. 884 (1929). Based upon the experience of the Family Court and others, there is clearly a rational connection between proof of unusual injuries which bear the hallmark of the child abuse syndrome and the inference of child abuse. See generally, Helfer & Kempe, *The Battered Child* (2nd ed. 1974); *People v. Henson*, 33 N.Y.2d 63, 349 N.Y.S.2d 657, 304 N.E.2d 358 (1973).<sup>20</sup>

Nothing in subdivision 1046(a)(ii), however, requires the respondent parents to explain how the injuries were sustained, and the Family Court may not compel them to testify.<sup>21</sup>

On the other hand, many judges will draw an inference against parents for their failure to testify. The 1983 Court of Appeals decision in *Commissioner of Social Services v. Phillip DeG.* is encouraging more judges to do so. This decision, although reached in a paternity proceeding, is considered sufficiently analogous to be cited as authority in child protective proceedings. In it, the Court of Appeals described how courts should interpret the respondent's failure to testify:

Filiation proceedings are civil proceedings and it is now established that in civil proceedings an inference may be drawn against the witness because he exercises his privilege to prevent another from testifying, whether the privilege is constitutional or statutory. The failure of respondent

to testify does not permit the trier of the fact to speculate about what his testimony might have been nor does it require an adverse inference. It does, however, allow the trier of fact to draw the strongest inference against him that the opposing evidence in the record permits.<sup>22</sup>

### Apparently Inflicted Injuries

The *res ipsa loquitur* rule codified by subdivision 1046(a)(ii) is sometimes equated with the Battered Child Syndrome. First coined in 1962 by Dr. Kempe and his associates, the Battered Child Syndrome is now an accepted medical diagnosis in cases where a child (generally under the age of three) exhibits "evidence of fracture of any bone, subdural hematoma, failure to thrive, soft tissue swelling or skin bruising, in any child who dies suddenly, or where the degree and type of injury is at variance with the history given regarding the occurrence of the trauma."<sup>23</sup> In 1973, the Court of Appeals approved the use of the Battered Child Syndrome to prove parental culpability in *criminal prosecutions*. In *People v. Henson*, the Court described how the Syndrome provided circumstantial proof of parental culpability:

Initially developed following extensive research more than a decade ago, "the diagnosis of the 'battered child syndrome' has become an accepted medical diagnosis." (*People v. Jackson*, 18 Cal.App.3d 504, 507, 95 Cal.Rptr. 919, 921, *supra*; see, also, *State v. Loss*, 295 Minn. 171, , 204 N.W.2d 404, 408-409, *supra*, and, generally, Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered Child Syndrome*, 13 *Journal of American Med. Assn.* [1962], p. 105.) "A finding \* \* \* of the 'battered child syndrome,'" the court in *People v. Jackson* pointed out (18 Cal.App.3d, at

20. *In the Matter of Roman*, *supra* n. 19, 405 N.Y.S.2d at 903.

21. See, e.g., *In the Matter of Fred S.*, *supra* n. 19; *In the Matter of Tesch*, 66 Misc. 2d 900, 322 N.Y.S.2d 538 (Fam. Ct., Wayne Co., 1971).

22. *Commissioner of Social Services v. Phillip DeG.*, 59 N.Y.2d 137, 463 N.Y.S.2d 761, 763 (1983), citing, among other authorities, *Noce v. Kaufman*, 2 N.Y.2d 347, 353, 161 N.Y.S.2d 1, 141 N.E.2d 529, and Ann., "Property and Prejudicial Effect of Comment or Instruction by Court with Respect to Party's Refusal to Permit Introduction of Privileged Testimony," 34 A.L.R.2d 775.

23. Kempe, Silverman, Steele, Droegemueller & Silver, "The Battered Child Syndrome," 181 *Journal of Amer. Med. Assoc.* 17 (1962).

p. 507, 95 Cal.Rptr. at p.921), "is not an opinion by the doctor as to whether any particular person has done anything" but, rather, it "simply indicates" that a child of tender years found with a certain type of injury "has not suffered those injuries by accidental means." Thus, although the decision to admit such expert testimony is within the discretion of the trial court (see, e.g., *People v. Jackson*, 18 Cal.App.3d 504, 507, 95 Cal. Rptr. 919, 920, *supra*), there is little doubt of its relevancy in prosecutions of the kind before us.

As indicated, the diagnosis is used in connection with very young children, around three or four years old, and is based upon a finding that such a child exhibits evidence among other injuries, of subdural hematoma, multiple fractures in various stages of healing, soft tissue swellings or skin bruising. Also pertinent to the diagnosis is evidence that the child is generally undernourished and that the severity and type of injury in evidence on his body is inconsistent with the parents' story of its occurrence. (See, e.g., *People v. Jackson*, 18 Cal.App.3d 504, 507, 95 Cal.Rptr. 919, *supra*; *State v. Loss*, 295 Minn. 171, , 204 N.W.2d 404, 408-409, *supra*; Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered Child Syndrome*, 13 *Journal of American Med. Assn.* [1962], p. 105.) This sort of expert medical testimony – that the victim is a "battered child" – coupled with additional proof – for instance, that the injuries occurred while the child was in the sole custody of the parents – would permit the jury to infer not only that the child's injuries were not accidental but that, in

addition, they occurred at the culpable hands of its parents. (See, e.g., *State v. Loss*, 295 Minn. 171, 204 N.W.2d 404, 409, *supra*.)<sup>24</sup>

The Battered Child Syndrome is certainly encompassed by the *res ipsa* rule of subdivision 1046(a)(ii). However, it is merely one example of the types of circumstantial evidence that the subdivision makes *prima facie* evidence of child abuse. The Syndrome involves a series of injuries, some of which are serious. Subdivision 1046(a)(ii), on the other hand, applies whenever the child has injuries which "would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent." Thus, this section applies to apparently inflicted injuries – whether or not they are part of a discernable pattern, and whether or not the child is diagnosed as being a Battered Child.<sup>25</sup>

Most minor injuries – whether or not apparently inflicted – do not trigger the *prima facie* rule of subdivision 1046(a)(ii). Under Article 10, state intervention is limited to situations of serious danger to children. As described above, however, to justify intervention, injuries need not be "serious" or life threatening, although many are. To be *prima facie* evidence of abuse, apparently inflicted injuries must be "substantial in character."<sup>26</sup> In keeping with the terminology adopted by this monograph, this means that the injuries must appear to be the result of an assault which "caused or was capable of causing" serious injury.<sup>27</sup>

Some injuries, such as belt buckle marks, are obviously inflicted; that they would not ordinarily have been sustained but for the acts or omissions of the parents is a matter of "common knowledge."<sup>28</sup> The inflicted origin of other injuries can be established by the testimony of a qualified child protective worker. However, in many cases, medical testimony will be needed to convince the judge that the injuries are apparently inflicted – and that parental explanations are inconsistent

24. *People v. Henson*, 33 N.Y.2d 63, 74, 304 N.E.2d 358, 349 N.Y.S.2d 657, 665 (1973).

25. By referring to the "condition of the child," subdivision 1046(a)(ii) also provides for the circumstantial proof of child neglect. See, e.g., *In the Matter of Rose "B,"* 79 A.D.2d 1044, 435 N.Y.S.2d 185, 186-187 (3rd Dept., 1981), finding the *prima facie* evidence of neglect established, in part, by "scratches and bruises about the face and neck" and "numerous open sores and scabbed surfaces on her buttocks, thighs, and shoulders."

26. *In the Matter of Tashyne L.*, *supra* n. 6, 384 N.Y.S.2d at 474; *In the Matter of Young*, *supra* n. 5, 270 N.Y.S.2d at 253.

27. See the section entitled "'Seriously Harmful' Parental Conduct," on *supra* p. 3.

28. *Prosser*, *supra* n. 1, at §39, p. 217.

with the nature of the injury.<sup>29</sup> And, of course, expert medical opinion may determine that the injury was not apparently inflicted. For example, in one case the petitioner called a physician to testify concerning a one inch laceration of a ten year old girl's vagina. The physician testified that "he could not estimate the source of the laceration with any certainty except that rape probably was not the cause; that the condition was probably due to 'trauma' of some other type and could have been self-inflicted."<sup>30</sup>

Sometimes, medical testimony is criticized for not establishing *to a certainty* that the child was abused. While medical testimony often leaves much to be desired, this particular criticism is unjustified. To establish a *prima facie* case, the petitioner need not prove that child abuse is the only possible cause of the child's injuries. As Prosser describes in relation to *res ipsa* proof in general:

The plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that he must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable men can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not.<sup>31</sup>

Thus, for a child's injuries to fall under subdivision 1046(a)(ii), that is, to establish that they are "apparently inflicted," the petitioner must prove that:

- (1) the child's injuries are traumatic in nature,
- (2) the injuries are more likely than not the result of an assault, and
- (3) the apparent assault caused or was capable of causing a serious injury.

*Matter of Corey T.* provides a good example of the kind of medical testimony that should be expected:

The child, aged two months, was brought to a hospital by his parents and found to be suffering with a bulging fontanel (the "soft spot" in the front part of an infant's head), and multiple seizures. An examination of the child revealed hemorrhages in the right and

left parietal areas and the right occipital area, and bilateral subdural hematoma, which the only medical witness testified were compatible with multiple foci of brain contusion. X-rays further revealed callus formation in the ribs, fractures in the right femur and the tibia, and the left fibula. There was also evidence of injuries to the child's right ankle, right knee and right rib cage. These injuries posed a substantial risk of death to the child. The Family Court judge properly described these injuries as "serious, horrible and near-fatal injuries." The hospital performed various tests and examinations which *essentially ruled out non-traumatic causation of these injuries*. The doctor said that these types of injuries are classically described in children who have sustained traumatic injuries to the ribs, knees and ankles. The doctor testified that *in his opinion the injuries were caused by trauma, and that his testimony was given "with a great degree of certainty, I would say 95% in my mind."* He stated that the injuries could have been caused by someone picking up the child by the chest, vigorously shaking the child and placing the child down on a flat surface causing the damage to the knees and ankle.<sup>32</sup>

Two things should be noted about the physician's testimony in *Matter of Corey T.* First, he was able to state with great, though not total, certainty that the injuries were caused by trauma. Second, he was much less certain about the type or nature of the traumatic event (or assault) that caused the injury. But that is the frequent reality of these cases, and that is the reason for the *res ipsa* rule.

A number of factors, either individually or in combination, lead to the conclusion that an injury was apparently inflicted:

- *The child's level of development:* It takes a certain level of physical development to injure oneself. For example, it is next to

29. See the section entitled "Unsatisfactory Parental Explanations," on *infra* p. . . See generally Note, "Evidence - Child Abuse - Expert Medical Testimony Concerning 'Battered Child Syndrome' Held Admissible," 42 *Fordham Law Review* 935 (1974); Annotation, "Admissibility of Expert Medical Testimony on Battered Child Syndrome," 98 A.L.R. 3d 306.

30. *In the Matter of Vulon*, 56 Misc. 2d 19, 288 N.Y.S.2d 203, 207 (Fam. Ct., Bronx Co., 1968).

31. Prosser, *supra*, n. 1, at §39, p. 218.

32. *In the Matter of Corey T.*, 81 A.D.2d 785, 439 N.Y.S.2d 18, 19 (1st Dept., 1981) (emphasis added).

impossible for a pre-toddler to fracture a femur (upper thigh). In fact, given the limited ability of infants to move about and to harm themselves, any traumatic injury and any poisoning to pre-toddlers should be considered apparently inflicted.

- *The shape of the injury:* Many assaults are inflicted by identifiable objects. The child's body often shows the outline of a belt buckle, human teeth, a hand, a coat hanger, or a hot iron. (See Illustrations A through F.) Similarly, the shape of some immersion burns suggests an intentional dunking. (See Illustrations I through J.)
- *The location of the injury:* When children fall or bang into things, they tend to injure their chins, foreheads, hands, elbows, knees, and shins. The same is not true for injuries to the thighs, upper arms, genital and rectal areas, buttocks, and the back of the legs or torso. Only rarely are such injuries caused by anything other than a physical assault. (See Illustrations G through H.) Similarly, "45 percent of inflicted burns involve the perineum or buttocks – sites which are almost always chosen as punishment for enuresis or toilet-training resistance."<sup>33</sup>
- *The degree of force needed to produce the injury:* Children do not injure easily. It takes substantial force to cause a bruise that remains visible for more than a few hours. (See Illustrations A through F.) It takes even more force to break a young bone or to cause serious abdominal injuries.
- *The type of injury:* It is almost impossible for some injuries to be self-inflicted. Epiphyseal-metaphyseal fractures, for example, are caused by violently shaking a child or by violently pulling, jerking, or twisting one of the long bones. (See Illustrations L through M.) The origin of choke marks on the child's neck is equally clear.
- *The number of old and new injuries:* Physical abuse is rarely a one time, isolated event; it is usually a steadily escalating pattern of physically assaultive

behavior.<sup>34</sup> Multiple injuries, on various parts of the body, unlikely to be hurt in a fall, and in various stages of healing, are not signs of an accident prone child. They are signs of child abuse. However, the absence of prior injuries should not be taken as conclusive evidence that the child is not abused. The injuries may have healed, leaving no trace; or, they may be undiscovered. The absence of prior injuries is but one factor to be weighed in deciding whether a child's present injuries are "apparently inflicted."

The traumatic injuries described on Chart #4 satisfy the elements of subsection 1046(a)(ii) because they are "substantial in character" and because they almost always are caused by physical assaults against the child which caused or which were capable of causing serious injury. If the child was in the parents' general custody during the relevant time, they are a sufficient ground for an adjudication of child abuse – unless informed medical opinion determines that a differential diagnosis, also described on the Chart, establishes an alternate cause for them or unless the parents can provide a satisfactory explanation. The Chart, as well as the foregoing discussion, is necessarily an abbreviation of a substantial body of literature. Readers wishing more detailed information about apparently inflicted and other suspicious injuries should refer to the many fine treatments of the subject.<sup>35</sup>

33. Schmitt, B., ed., *The Child Protection Team Handbook: A Multidisciplinary Approach to Managing Child Abuse and Neglect*, p. 44 (1978).

34. See, e.g., Gil, D., *Violence Against Children: Physical Child Abuse in the United States* 113 (1970).

35. E.g., Ellerstein, N., ed., *Child Abuse and Neglect: A Medical Reference* (1981); Schmitt, *supra* n. 33, especially at Chapter II.



## Chart 4 pg 1

## Chart #4

## APPARENTLY INFLICTED INJURIES\*

**Note:** *The following are examples of traumatic injuries which are "substantial in character" and which are not ordinarily sustained by children except by reason of the acts or omissions of their parents. Unless satisfactorily explained, they are, in themselves, prima facie evidence of child abuse – if the child was in the parent's general custody during the relevant time.*

## Injuries to Pre-Toddlers

- Any traumatic injury, from a bruise to a broken bone.

**Bruises, Welts, Lacerations, and Scars**—which last at least 48 hours

- Distinctively shaped injuries suggesting the object used to inflict them, such as a belt buckle, a looped wire or cord, a coat hanger, scissors, a spatula or other cooking utensil, or a whip, rope or strap;
- Pressure bruises on the neck that resemble finger tips, whole fingers, and entire hands, suggesting that the child was choked; similar bruises on the torso, shoulders, or around the elbows or knees, suggesting an intense grip for throwing or shaking the child (often associated with subdural hematoma and/or retinal damage, as described below);
- Human bite marks (identified as paired crescent shaped bruises, often showing individual tooth marks, and distinguished from animal bite marks by the latter's deeper, narrower, often incisive character);
- Extensive pinch marks (identified as small, crescent shaped bruises facing each other);
- Circumferential tie marks on ankles, wrists, or waist, suggesting that the child was bound by a rope, cord, or dog leash;
- Tattoos or other forms of mutilation,

- Puncture wounds that resemble the end of a fork, comb or other distinctive object;
- Injuries to areas unlikely to be traumatized in a fall, such as the thighs, upper arms, genital and rectal areas, buttocks, and the back of the legs or torso;
- Clustered injuries, suggesting repeated traumas to a selected site (often the buttocks);
- Injuries on several different body planes, suggesting that the child was hit from several different directions; and
- Multiple, apparently inflicted injuries, in different stages of healing, suggesting repeated beatings (for bruises, identified by different coloring of each bruise or group of bruises).
- **EXCLUDED** are minor injuries caused by *reasonable* corporal punishment and more serious injuries which are the unintended – and unforeseeable – consequence of otherwise reasonable corporal punishment.<sup>36</sup>

**Differential Diagnosis**

- Birthmarks, particularly "Mongolian spots," should not be mistaken for bruises. "Mongolian spots" are present at birth and generally last until the child is two to three years old. These spots are greyish blue, do not change color with time and are commonly located on the buttocks and back. Incidence of the discoloration varies for groups of different racial descent. The following percentages of babies have Mongolian spots: 95 percent Negro babies, 80 percent Oriental and Native American babies, 70 percent Chicano babies, and 10 percent Caucasian babies."<sup>37</sup>
- Erythema—abnormal redness of the skin due to capillary congestion (or inflammation);

\* Quoted from: Besharov, D., *Reporting Child Abuse* (1984, in press).

continued on next page

36. See text at p. 60.

37. Illinois Department of Child and Family Services, *Child Abuse and Neglect Investigations Decisions Handbook* Appendix E, p. 3 (1982).

## Chart 4 pg 2

- Pettechiaie (pin-point hemorrhages) or purpuric spots (which are larger) on skin or mucous membranes caused by infectious diseases such as typhus or typhoid; and
- Bleeding disorders, such as hemophilia and von Willebrand's disease, which may make the child susceptible to easy bruising.

**Burns**

- Distinctively shaped dry or "contact" burns, suggesting the object used to inflict them, such as a heated wire, an iron, a space heater or radiator, or a hot plate;
- Flame burns, especially on the ends of fingers or toes, suggesting that a match or candle was held to them;
- Small, circular lesions, especially on the palms, soles, abdomen, neck, buttocks, or genitals, suggesting that the child was burned with a cigarette, cigar, match tip, or incense punk;
- Splash burns on the child's back, suggesting that, rather than an accidental spill, the burns were caused by someone throwing the hot liquid as the child sought to escape;
- Immersion burns that are glove-like on the hands, sock-like on the feet, and doughnut shaped around the buttocks, perineum, or genitals, suggesting that part of the body was intentionally dipped – and held – in hot water. Inflicted burns are distinguished from accidental hot bath water burns by (1) the severity of the burn, suggesting that the child was held in the water and (2) a distinct boundary line between burned and unburned areas and the absence of splash marks, suggesting that the child was tightly gripped and carefully lowered into the hot liquid.  
*Note:* Second degree immersion burns can be produced by hot tap water in less than 5 seconds; and
- Multiple burns, in different stages of healing, suggesting repeated burnings (indicated by new burns, blisters, ulcers, and old pigmented scars).

**Differential Diagnosis**

- *For small, circular burns* – Bullous Impetigo, which is characterized by

lesions of various sizes, that occur in groups, that have purulent crust, and that increase in number while the child is in the hospital; in rare cases, the lesions may be mosquito bites the child has scratched; and

- *For hot water burns* – scalded skin syndrome or toxic epidermal necrolysis, caused by Staphylococcus Aureus and characterized by generalized red and tender skin and unexplained blebs at such scattered sites that it would be nearly impossible to have inflicted them with hot water; they continue to appear after hospitalization.

**Mouth and Facial Injuries**

- Marks, bruises, or lacerations at the corners of the mouth, suggesting that the child has been gagged;
- Torn or lacerated frenula (the membrane connecting the gum and lips), suggesting a severe pulling or twisting of the lips or forced feeding of the child;
- Swollen lips, extensively broken or chipped teeth, and lacerated or bruised gums or frenula, suggesting repeated blows to the mouth or forced feeding;
- Ulcers or caustic burns in the mouth, suggesting that the child was fed lye, cleaning fluid, or other caustic substances;
- Two black eyes without accompanying injury to the nose; (it is virtually impossible to sustain this kind of injury in a fall or other accident unless there is an injury to another part of the head which may or may not appear to be inflicted); and
- Retinal hemorrhages and detachments, when accompanied by other evidence of severe shaking (such as subdural hematomas and/or pressure bruises or grab marks on the torso, shoulders, or around the legs or upper arms).

**Head Injuries**

- Bald patches on the scalp apparently caused by severe hair pulling, often accompanied by bleeding on the scalp and/or hemorrhaging or swelling beneath the scalp;

continued on next page

Chart 4 pg 3

- Skull fractures apparently caused by a blow rather than a fall (a blow is suggested by a coup injury, *i.e.*, an injury on the same side of the brain as the head trauma indicating a stationary head; a fall is suggested by a contra-coup injury, *i.e.*, a brain injury opposite the site of head impact, indicating a moving head); however, children often fall when they are hit, so that a skull fracture suggestive of a fall does not rule out child abuse;
- Skull fractures with a shattered egg-shell pattern, suggesting that the child's head struck a hard surface with an extremely forceful impact, for example, by the child's being thrown to the floor or against a wall; and
- Subdural hematomas, *i.e.*, bleeding between the brain and the skull, whether or not accompanied by visible trauma to the head, suggesting that the child was struck on the head or severely shaken.

#### Bone Injuries

- Spiral, transverse, or other bone injuries suggestive of twisting or pulling, and which younger children are unlikely to inflict upon themselves. However, on older children, spiral injuries to the arms and legs are not, in themselves, suggestive of abuse. (Other evidence, though, may lead to the conclusion that they are inflicted injuries upon which to base a finding of abuse.)
- Metaphyseal or corner fractures of long bones (a kind of splintering at the end of the bone), epiphyseal separations (a separation of the growth center at the end of the bone from the rest of the shaft), and periosteal elevations (a detachment of the periosteum from the shaft of the bone, with associated hemorrhaging) suggesting that the child was violently shaken or that the long bones were pulled, jerked, or twisted;
- Rib fractures, especially if accompanied by pressure bruises (shaped like fingers or hands) on the rib cage, suggesting that the child was squeezed so hard that the ribs broke; and
- Multiple fractures, in different stages of healing, suggesting repeated assaults (identified by a complete bone survey).

- **CAVEAT:** Certain fragile bone diseases can cause otherwise suspicious fractures.

#### Abdominal Injuries

- Any traumatic injury to internal organs, such as the spleen, liver, or intestines (whether or not accompanied by external signs of trauma), suggesting that the child was kicked or punched with extreme force.
- **NOTE:** Non-medical personnel should suspect traumatic abdominal injuries when they note swelling, tenderness, or black and blue marks on the abdomen or constant vomiting with no apparent reason. Abdominal injuries are often life-threatening. Even apparently minor black and blue marks, which could be caused by harsh finger poking, may signal severe injuries. Immediate medical attention is often needed.

#### Starvation

- Severe malnutrition or dehydration, while usually signs of child neglect, sometimes suggest the intentional withholding of food and water.

#### Ingested Substances

- Any poisoning, although usually the result of negligence or a true accident, may be intentional, especially if the child is less than one year old;
- Any ingestion of sedatives, tranquilizers, narcotics, or other drugs, again, especially if the child has a sleep problem that bothers the parents (suggesting that the drugs were used to quiet a restless or crying baby); and
- Ingestions of excessive amounts of salt or diuretics, which by raising the level of salt in the blood, may cause seizures and brain damage.

#### Repeated Injuries

- A history of repeated, traumatic injuries (a fracture today, a burn the month before, a laceration before that, and so forth), suggesting an on-going pattern of physical abuse.
- **CAVEAT:** The absence of prior injuries, or the failure to discover them, is not conclusive evidence that the child is not abused.

continued on next page

## Chart 4 pg 4

<p><b>Untreated Injuries</b></p> <ul style="list-style-type: none"> <li>• Severe injuries that are untreated or signs of delays in seeking treatment, such as infected burns, suggesting that the parents are indifferent to, or do not want others to know, about the child's condition.</li> </ul> <p><b>Death</b></p> <ul style="list-style-type: none"> <li>• Any death due to traumatic injuries or poisoning; and</li> </ul>	<ul style="list-style-type: none"> <li>• Any other unexplained death, whether or not there are visible signs of trauma or other wrong-doing.</li> <li>• <i>NOTE:</i> In cases of unexplained fatalities, the possibility of Sudden Infant Death Syndrome should have been considered in the autopsy.</li> </ul>
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Identifying – and obtaining – an object or implement that matches the size and shape of the child's injuries can fortify the determination that they are apparently inflicted. Such "real" evidence can also be decisive in court. And, as described earlier, the child's statements, even when not a clear description of abuse, can help assess ambiguous injuries.<sup>38</sup>

After weeks of hospital or foster care, even the most seriously abused or neglected child may show no signs of past maltreatment. Cuts and bruises may have healed; body weight and muscle tone may have improved; in fact, the child's entire physical appearance may have changed. A previously battered or emaciated child may have been transformed into a healthy, flourishing one. Under such circumstances, it may be difficult to convince the judge of the need for protective measures.

Long after memories have faded, photographs and x-rays can provide graphic and incontestable evidence of the severity of a child's past injuries. Hence, photographs should be introduced into evidence whenever they are available to document visible abuse or neglect on a child's body. This includes signs of malnutrition and failure to thrive as well as all bruises, lesions, scabs, burns, or other marks. X-rays should be introduced whenever they document internal or skeletal injuries suggestive of maltreatment.

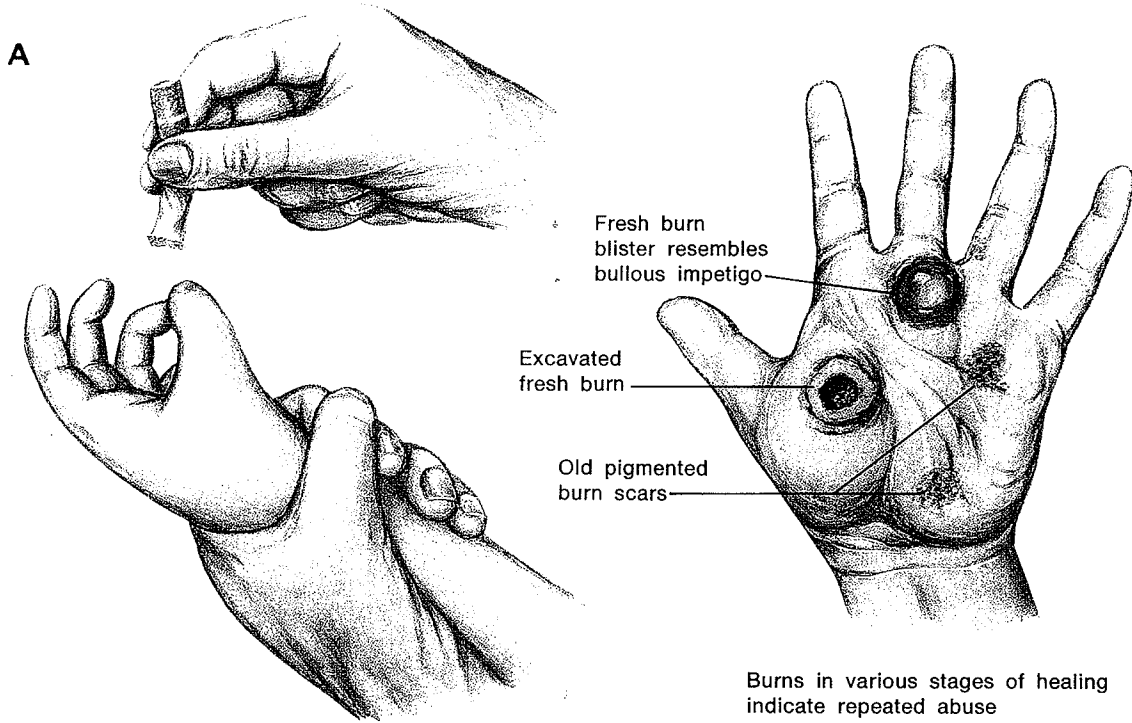
Photographs of home conditions also should be used. They can be used to document health or physical hazards, such as exposed wiring, inadequate plumbing, and extreme filth. If the parents claim that the child was injured in an accidental fall, a photograph of the area where the accident allegedly occurred may be crucial.

38. See the section entitled "The Child's Statements," on *supra* p. 14.

Illustrations A through B

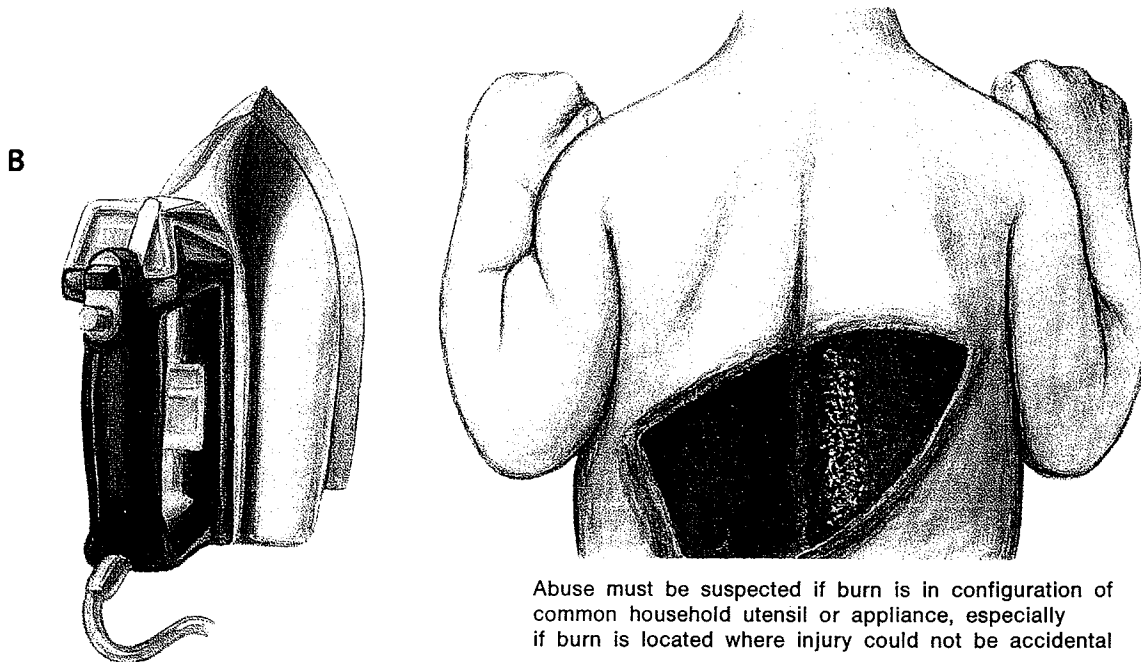
The Shape of Apparently Inflicted Injuries

Burn Injuries



Cigarette burns are usually inflicted on palms, soles, and buttocks

JOHN A. CRAIG AD  
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# Illustrations C through E

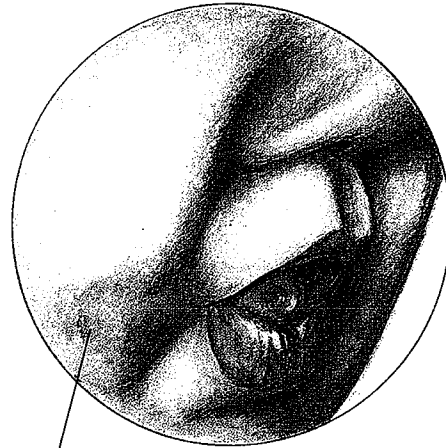
## The Shape of Apparently Inflicted Injuries

### Restraint Injuries



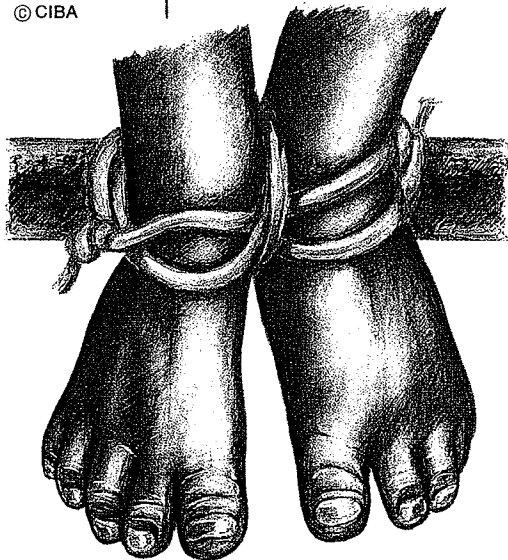
Child may be gagged as punishment or to stop persistent crying

C



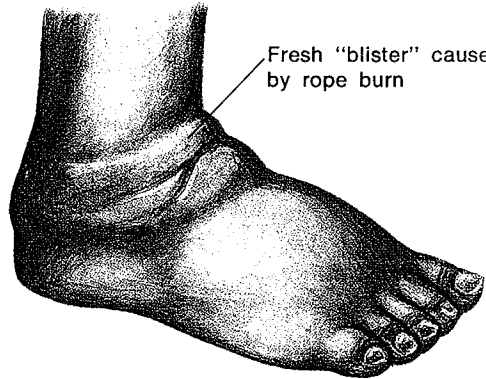
Gag leaves characteristic bruises at corners of mouth

JOHN A. CRAIG - AD  
© CIBA



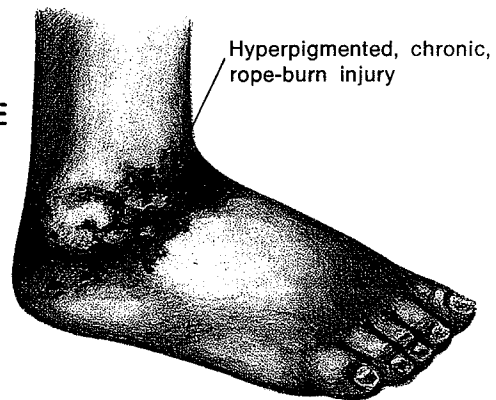
Wrists and/or ankles may be tied as form of punishment or to keep child "safe"

D



Fresh "blister" caused by rope burn

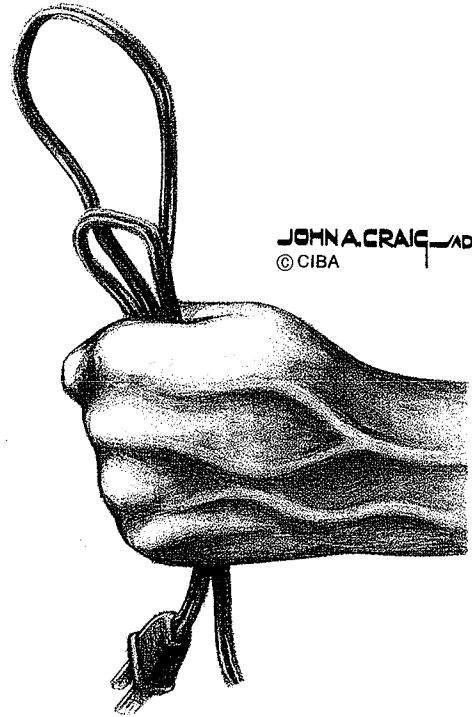
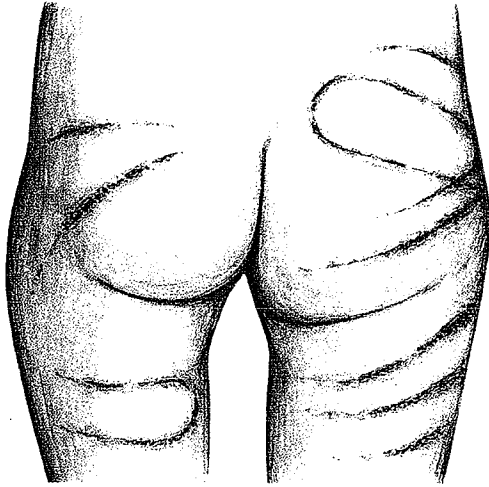
E



Hyperpigmented, chronic, rope-burn injury

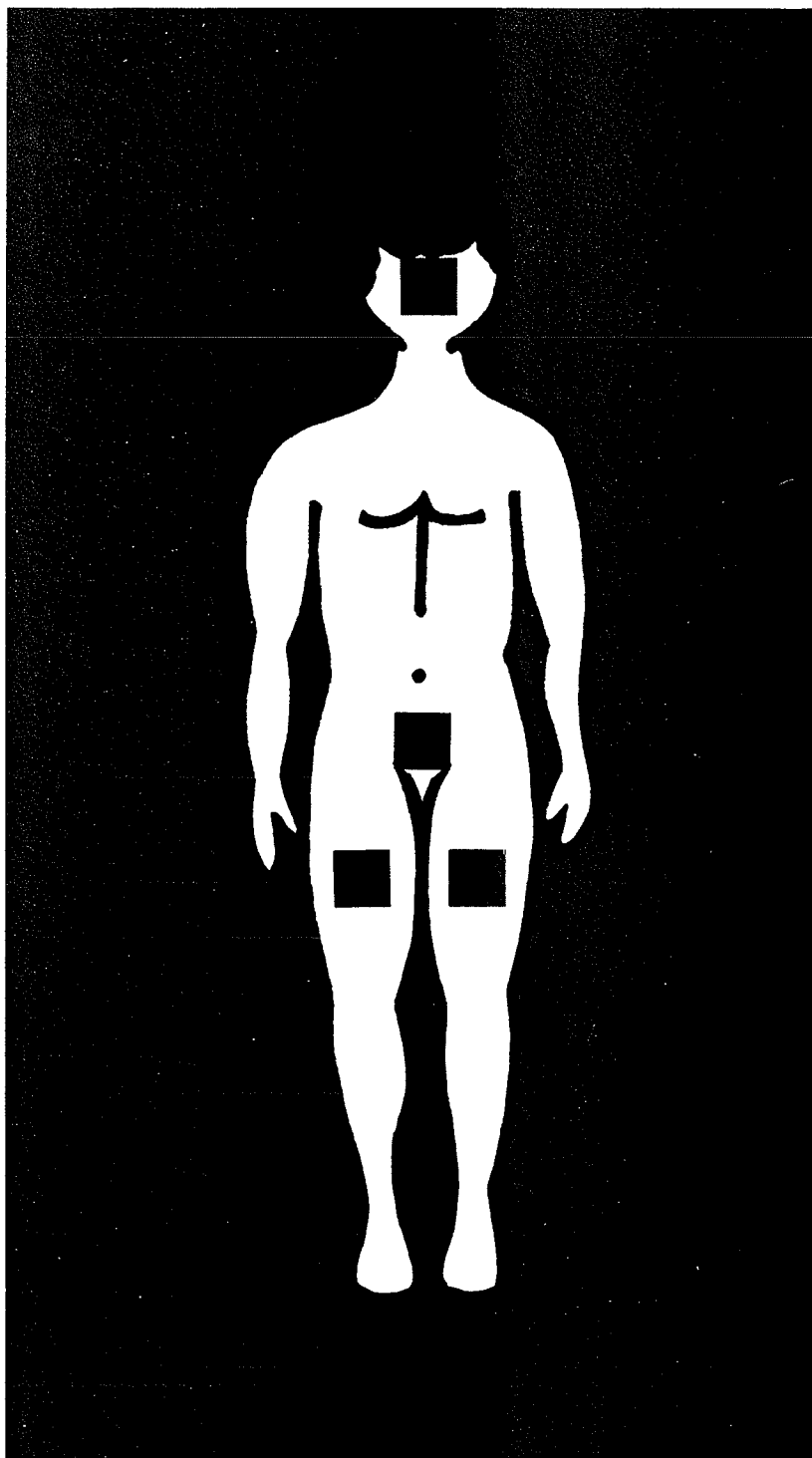
Illustrations F  
The Shape of Apparently Inflicted Injuries

F



Looped cord injury. Bruises caused by abuse may resemble shape of instrument used to inflict injury

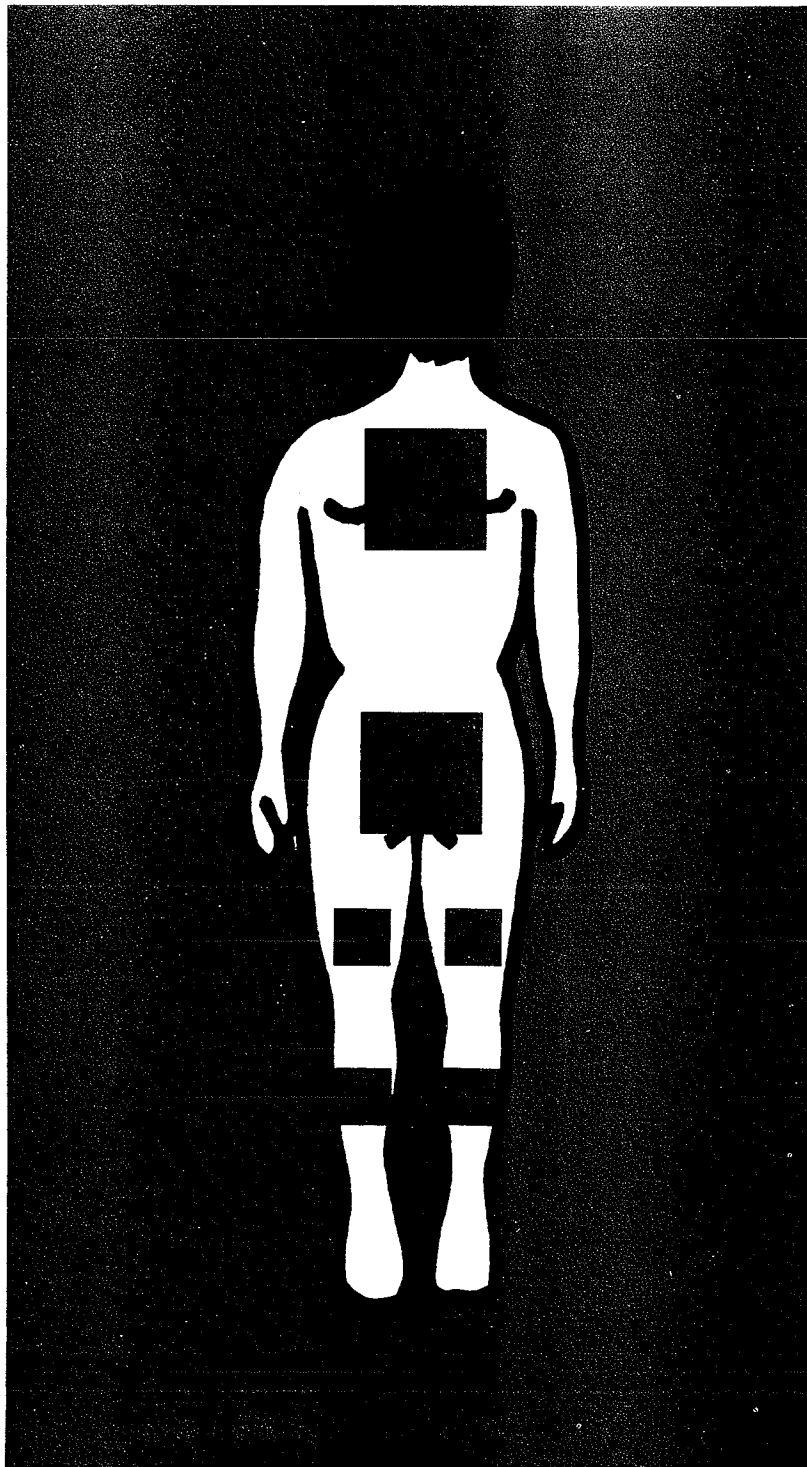
Illustration G  
The Locations of Apparently Inflicted Injuries



G

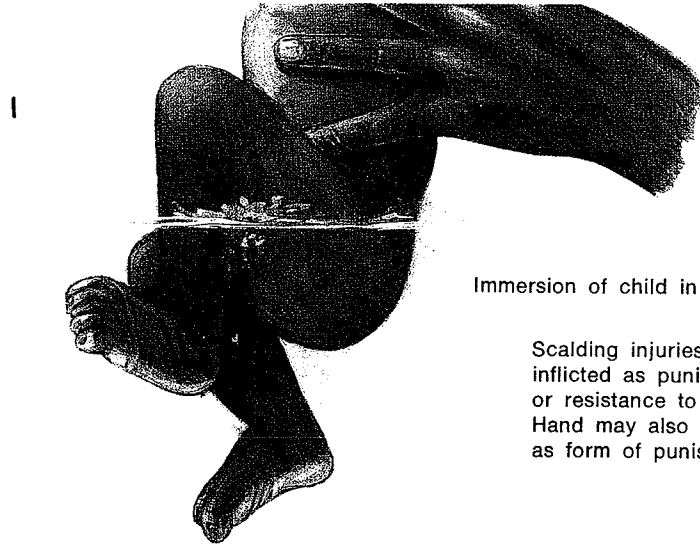


Illustration H  
The Locations of Apparently Inflicted Injuries



H

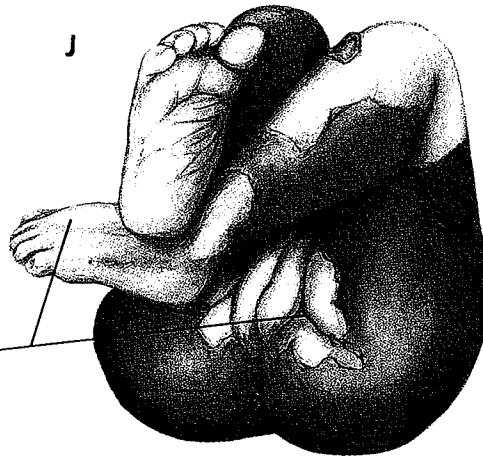
### Illustrations I through K Apparently Inflicted Immersion Burns



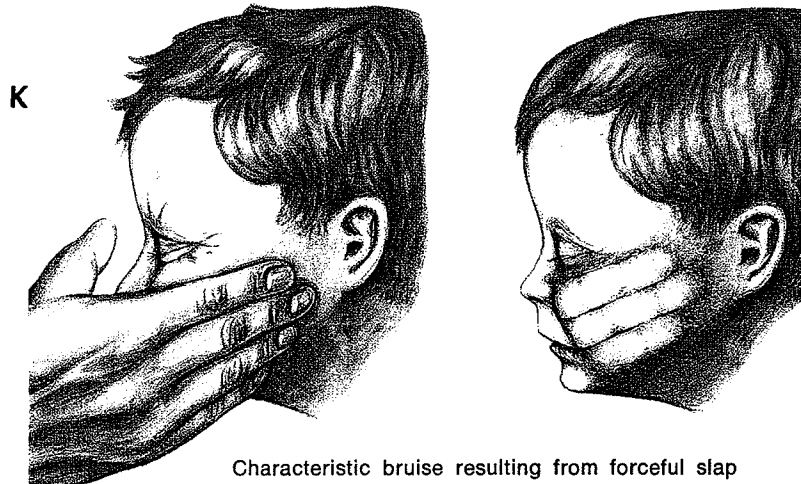
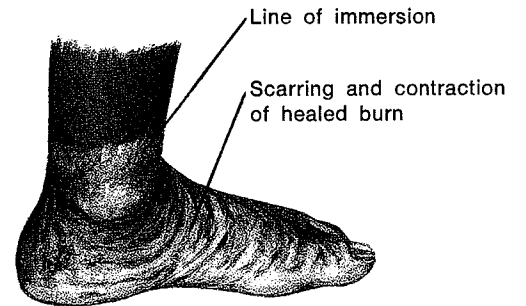
Immersion of child in hot water

Scalding injuries are usually inflicted as punishment for enuresis or resistance to toilet training. Hand may also be forcibly immersed as form of punishment

Scalding injury to feet, perineum, and buttocks; burns correspond to child's posture on "dunking"



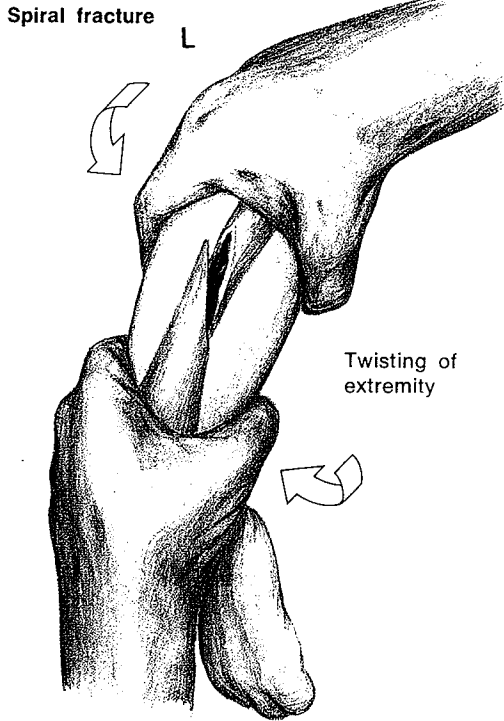
Fresh second- and third-degree burns on feet and perineum



Characteristic bruise resulting from forceful slap

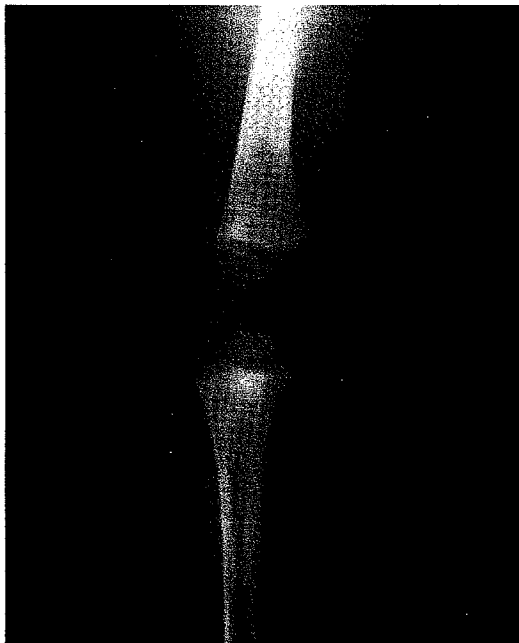
# Illustrations L through M Twisting Bone Fractures Suggestive of Physical Abuse

## Skeletal Injuries

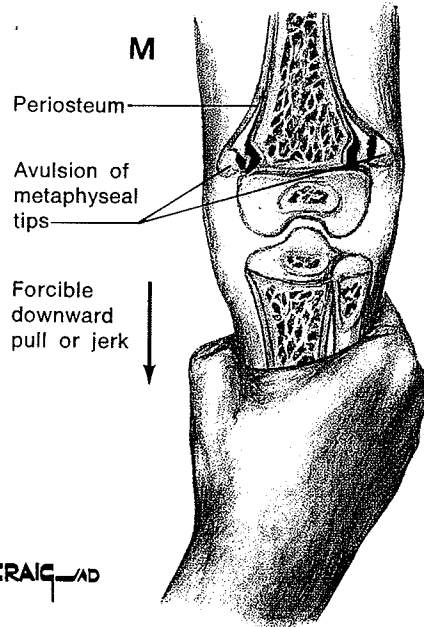


Spiral fracture of femur in infant

In toddlers, spiral fractures in lower extremities may occur; in nonambulatory children, such injuries are rare and suggest abuse



## Metaphyseal injury



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Avulsion of metaphyseal tips by tight periosteal attachments

### In the Parents' Custody

It is always possible that someone other than the parents inflicted the child's injuries. Therefore, although not expressly required by subdivision 1046 (a)(ii), in addition to proving the existence of injuries which "would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent" (*i.e.*, apparently inflicted injuries), the petitioner also must prove that the child was under the "exclusive control" of the parents or, to use the terminology of *People v. Henson*, in the "sole custody of the parents."<sup>39</sup>

This does not mean that the petitioner must prove that the child was in the parents' immediate custody at the precise time of the injury. Most injuries cannot be dated with that degree of precision and specific proof of the parents' hourly comings and goings is generally not available. Hence, to trigger the *prima facie* rule, the petitioner need only prove that the apparently inflicted injuries were sustained during a general period of time when the child was in the parents' general custody. It is then up to the parents to present evidence that the child was not actually in their custody at the time in question.

A custodial parent, for example, "could well defend himself by explaining that a child's injuries had occurred while visiting with the non-custodial parent."<sup>40</sup> (This subject is further discussed below.)<sup>41</sup>

In many cases, the petitioner does not know (or is unable to prove) which parent has abused the child. Under the *res ipsa* rule, it is not necessary to establish which one is responsible for the child's injuries. If both parents had general custody of the child during the relevant time, the injuries establish a *prima facie* case against each of them.<sup>42</sup> This often leads one parent to describe how the other inflicted the child's injuries.

### Unsatisfactory Parental Explanations

Under certain limited circumstances, injuries that are apparently inflicted may have an alternate explanation that obviates the need for a finding of child abuse, and that takes them out from under the provisions of section 1046 (a)(ii). The injuries may have been caused by an unusual, or freak accident. Or, they may have been the unintended – and unforeseeable – consequence of otherwise reasonable corporal punishment.<sup>43</sup> Or, someone other than the parents may have inflicted the injury. Thus, by their testimony, the parents may be able to convince the judge not to make a finding.<sup>44</sup> (In fact, they may be able to convince the child protective worker not to commence court action or the attorney presenting the petition to withdraw it.)

Obviously, if the parents cannot explain how a young child received an apparently inflicted injury, a finding should be made. "A frequent statement is that the parents do not know what has happened but the child was well when he was put to bed last night and when he was awakened, he appeared unable to use his arm or his leg" (because it was broken). Such claims of ignorance are sometimes accompanied by the parents' "guess" that the injuries may be self-inflicted. For apparently inflicted injuries in younger children, such claims should be given little credence. "Normal parents know to the minute where and when their child was hurt. They also show complete willingness to discuss it in detail."<sup>45</sup>

As children grow older, and spend increasing amounts of time out of the house and outside of the immediate supervision of parents, though, it becomes less possible for parents to account for apparently inflicted injuries, and it becomes less reasonable to hold parents responsible when they cannot explain how a child was injured (especially since the child should be old enough to tell what happened). Thus, for older children, the court may well conclude that certain types of injuries were inflicted by siblings or playmates.<sup>46</sup>

39. *People v. Henson*, *supra* n. 24, 349 N.Y.S. 2d at 665. See generally *Prosser*, *supra* n. 1, at §39, pp. 218-221.

40. *In the Matter of Maureen G.*, 103 Misc. 2d 109, 426 N.Y.S. 2d 384, 389 (Fam. Ct., Richmond Co., 1980)

41. See the section entitled "Unsatisfactory Parental Explanations," on *infra* p. 40.

42. See *Prosser*, *supra* n. 1, at §39, pp. 221-224.

43. See the section entitled "'Reasonable' Punishment," on *supra* p. 4.

44. See, e.g., *In the Matter of Vulon*, 56 Misc. 2d 19, 288 N.Y.S. 2d 203 (Fam. Ct., Bronx Co., 1968).

45. Ruddle, R.D., ed., *Missouri Child Abuse Investigator's Manual*, p. 51, Institute of Public Safety Education, College of Public and Community Services, University of Missouri - Columbia (1981)

46. Schmitt, *supra* n. 33, at p. 40.

On the other hand: "Just because the parents provide an explanation for a child's injury does not mean that the explanation is true. Although many abusive parents will not invent a story of an accident to cover up injuries they have inflicted, some will."<sup>47</sup> In ambiguous situations, abusive parents may be able to convince the court that their child's injuries were accidentally inflicted, or inflicted by someone else. In a society like ours, which presumes the innocence of persons accused of wrong-doing, such mistakes are unavoidable. Some abusive parents have had long experience lying, and they do it quite convincingly.

There is no excuse, however, for accepting farfetched, illogical, or contradictory explanations.<sup>48</sup> The need for court action is not lessened when the parents blame a child's injuries on an unidentified baby-sitter or a mysterious stranger whose name and address they do not know. Although their story could be true, it is up to them to provide some corroboration for their testimony.

Explanations at variance with visual observations and clinical findings also should not be accepted. In fact, sufficiently implausible explanations can be inculpatory.<sup>49</sup> Injuries inconsistent with the parents' explanation are one of the most common reasons for making a finding of abuse. For example, the parents' claim that a child pulled a pot of hot water off a stove does not explain extensive splash burns on the child's back (which were more likely suffered as the child tried to run away from the parent).

Black eyes are frequently explained by the adults with the child as resulting from a fall; however, these are less frequently found in accidents....When two black eyes are present in a home setting, it virtually must have arisen from another person. Two black eyes with no accompanying damage to the

nose is highly suspect since it is virtually impossible to sustain accidental injuries of this type.<sup>50</sup>

The only alternate explanation for two black eyes is a severe injury to another part of the head. If no such injury is found, the black eyes should be considered inflicted. If there is a head injury, that injury must be assessed to determine if it appears to be inflicted.

Likewise, numerous bruises on different parts of the body – and at different stages of healing – conflict with a parent's claim that the child "ran into a coffee table."

Bruises and scars found at multiple stages of healing are extremely important diagnostically and imply repeated beatings. Most falls give bruises on just one body surface. Bruises on multiple body planes are usually inflicted, unless there is a history of a tumbling accident. It is true that tumbling accidents often cause minimal bruises and abrasions, but if there are many, they will predominate on the elbows, knees, and shoulders. "Falling down a stairway" is commonly offered as a last minute explanation for unexplained bruises on a child. However, the lack of bruises in the above locations makes this explanation doubtful.<sup>51</sup>

As the Court of Appeals explained in *People v. Henson*, "the credibility of the 'accident' explanation diminishes as the instances of similar alleged 'accidental' injury increase."<sup>52</sup> *Matter of Rose "B"* provides a good example of inadequate parental explanations for a series of apparently inflicted injuries:

The respondent's explanation was patently feeble. Although he stated he

47. For a discussion of how medical evidence may support or rebut this possibility, see this section, *infra*.

48. Schmitt, *supra* n. 33, at p. 302.

49. See, e.g., *In the Matter of Mathew L.*, 60 A.D. 2d 898, 401 N.Y.S. 2d 529 (2nd Dept., 1978), reversing a Family Court dismissal of a petition and holding that the Family Court should not have accepted a mother's explanation for the child's injuries.

50. See, e.g., *In the Matter of Baby Boy Santos*, 71 Misc. 2d 789, 336 N.Y.S. 2d 817, 819 (Fam. Ct., N.Y. Co., 1972), describing how the child "was brought to the hospital because a friend of the mother noticed the depressed area in the child's skull. Respondent mother explained this was the first time she saw the injury and believed it occurred when the child fell back in her crib on to the mattress, striking her head on a toy. The doctor testified, as does the hospital record indicate, that there was no pericranial swelling. This, in the doctor's opinion, suggests an 'old process' which could not have occurred in the manner described by the mother."

51. *Missouri Child Abuse Investigator's Manual*, *supra* n. 44, at p. 46.

52. Schmitt, *supra* n. 33, at pp. 42-43.

was completely unaware of his daughter's condition until it was brought to his attention by the school authorities, he attributed the presence of the sores on her body to excessive scratching of insect bites and to allergies. As to the presence of linear abrasions, he assigned the wearing of too tight a belt as the reason, a theory clearly belied by the color photographs in evidence. He had no explanation for the blackened eyes save for the mention of the possibility that Rose had fallen from her bed. While respondent generally denied striking the infant, he did concede that some time before the discovery of her condition he had disciplined her with his belt.<sup>53</sup>

Chart #5 describes how to gauge the relative age of bruises.

"Sometimes, there is a discrepancy between the histories offered by the two parents, or the history changes in regard to dates, times, and causes."<sup>54</sup>

Some parents will be reluctant to elaborate on the possible cause of the injury. They may state, "We just found him that way" and claim there are not witnesses. When pressed, they may even become evasive. Some will give a vague explanation, such as "He might have fallen down" or "His brother may have hit him." These explanations are self-incriminating.<sup>55</sup>

Parental claims that a child's injuries were self-inflicted should be assessed within the context of the child's age and stage of development – and the likelihood of the claimed behavior. Few one-year-olds can fill a tub with scalding hot water; few six-month-olds can climb out of a crib.

The child who is under six months of age is unlikely to be able to induce any accident. Absurd stories, such as the baby rolled over on his arm and broke it, or he got his head caught in the crib and fractured it, are pure nonsense. Histories implying that the child is masochistic are also uniformly false,

53. 33 N.Y. 2d 63, 304 N.E. 2d 358, 349 N.Y.S. 2d 657, 664 (1973).

54. 79 A.D. 2d 1044, 435 N.Y.S. 2d 185, 186-187 (3rd Dept., 1981).

55. Schmitt, *supra* n. 33, at p. 40.

56. *Id.*

#### Chart #5

#### GAUGING THE RELATIVE AGES OF BRUISES\*

*A bruise results from an injury or trauma to the body which breaks the small blood vessels beneath the skin; a bruise is the external manifestation of this subsurface bleeding. Over time, a bruise changes color as this subsurface blood changes color. Exact dating of bruises is difficult because different bruises and different people heal at different speeds. Nevertheless, the following chart will help in determining the relative age of bruises:*

Age	Color
0-2 days	swollen, tender
0-5 days	red, blue, purple
5-7 days	green
7-10 days	yellow
10-14 days	brown
14-28 days	clear

\* Derived from: Schmitt, B., *Child Abuse/Neglect: The Visual Diagnosis of Non-Accidental Trauma and Failure to Thrive*, p.3. (American Academy of Pediatrics 1979).

such as the child who hurts himself badly during a temper tantrum, gets subdural hematomas by hitting himself with a bottle, climbs up onto a hot radiator, or burns himself up to the elbow by immersing his arm in hot water. Children rarely injure themselves deliberately.<sup>56</sup>

Similarly, parental claims that the child's injuries were caused by another child should be assessed within the context of the other child's ability to cause the kinds of injuries involved. In *Matter of JR*, a three-month-old had "subdural hematomas on both sides of the head; linear fracture of the skull; retinal hemorrhage; and bruises on both cheeks and the lower left portion of the abdomen. The only explanation of these injuries was the possibility that Virgin (three years old), in a fit of jealousy, threw him to the

floor and beat him." The court concluded that: "No direct evidence of abuse is before the court. The injuries are consistent only with sustained widespread assault and by themselves negate the possibility of a 'single-fall' or a 'flash-beating' administered by a jealous three-year-old's physical capabilities. Moreover, even conceding the mother's explanation and assigning unwarranted credibility to it, her sheer act of leaving the baby in a position where this or similar injuries could be proximately anticipated shows her actions wanting of that standard of care required by law."<sup>57</sup>

Often, medical evidence is needed to assess such claims. In one criminal prosecution, for example: "Two Nassau County medical examiners, one of whom was a karate expert, testified that the death dealing blows to the child's liver and kidneys were caused by karate chops or fingers poked into the abdominal area and that the child's siblings, aged five and eight years, could not have caused the fatal injuries."<sup>58</sup>

A visual examination of the site of an alleged accident also can assist in the assessment of the parent's explanation:

For example, a 2-year-old boy was examined with a burn on his right buttock that allegedly occurred when he fell onto the stove while trying to get cookies out of a kitchen cabinet. A home evaluation found it was impossible for the boy to have sustained the injury as described.<sup>59</sup>

Therefore, the child protective worker should be careful to note the physical setting and other circumstances surrounding a claimed accident (taking photographs as appropriate), and counsel should insist on such documentation.

### Ambiguous Situations

All unsatisfactory explanations of apparently inflicted injuries should be rejected. But some childhood injuries are of ambiguous origin; an accidental cause may be as likely, or almost as

likely, as an inflicted one. And some parental explanations are sufficiently consistent with the nature of the injuries so that they cannot be dismissed out-of-hand. To help assess these ambiguous situations, the court sometimes can be guided by the behavior of either the child or the parent.

Over the years, many behavioral "profiles" of abusive parents have been developed. These behavioral profiles are uniformly *unreliable* when used to identify abusive parents *before* the child has been assaulted. They falsely label many innocent parents as abusive while, at the same time, missing many actual abusers.<sup>60</sup>

Nevertheless, the behavior of abused children and of abusive parents does tend to fall within certain recurrent patterns. *If the child has apparently inflicted or ambiguous injuries*, such behavior patterns can form the basis of a definitive determination of child abuse. For example, abusive parents often delay seeking medical help for their children, for fear of being discovered, because of indifference to the child's needs, or, perhaps "hoping that the event never occurred, or that the injury will not require medical care."<sup>61</sup>

Normal parents come in immediately when their child is injured. Some abused children are not brought in for a considerable period of time despite a major injury. In extreme situations, children are brought in nearly dead. One study showed that 40 percent of children weren't brought in until the morning after the injury. Another 40 percent came in one to four days after the injury.<sup>62</sup>

Proof that the parent previously abused the same child or a sibling of the child is strong evidence that the suspicious injuries were indeed inflicted by the parents. Subdivision 1046 (a)(ii)(1983) makes such evidence admissible.

Similarly, some abused children evidence – in their behavior – the emotional scars caused by repeated abuse. Thus, in one case, the Family Court Judge cited, as evidence that the child's

57. *Id.*, at p. 40-41.

58. 87 Misc., 2d 900, 386 N.Y.S. 2d 774, 776 and 777 (Fam. Ct., Bronx Co., 1976).

59. *People v. Eisenman*, 39 N.Y. 2d 810, --N.E. 2d --, 385 N.Y.S. 2d 762, 763 (1976).

60. Schmitt, *supra* n. 33, at p. 302.

61. See generally Starr, R., ed., *Child Abuse Prediction: Policy Implications* (1982). See also the section entitled "The Child In Danger of Serious Injury," on *supra* p. 6.

62. Schmitt, *supra* n. 33, at p. 41.

injuries were inflicted, the fact that the child developed nervous behavior each time she was returned to the custody of her parents. (She also evidenced further unexplained injuries each time she was returned.) The nervous behavior cited by the court was: "A pattern of abnormal nervous behavior involving nose picking, apprehension, and withdrawal, as evidenced by jerking of the head and shoulders and staring into space."<sup>63</sup>

Therefore, although *not an independent ground for an adjudication* of abuse, the presence of one or more of the child or parental behaviors described in Charts #6 and #7 reinforces the significance of apparently inflicted or ambiguous injuries and bolsters the evidence in support of the petition. However, their absence does not necessarily mean that the child has not been abused.

The experience and training of many Family Court Judges enable them, on their own, to use these behavioral indicators to assess ambiguous situations. However, it is far more preferable for the petitioner to call a qualified expert witness to explain the significance of the specific behavioral indicators proven in the petitioner's case. (Depending on the circumstances, a medical doctor, a psychiatrist, a psychologist, or a child protective worker could be qualified to give expert testimony on this issue.)



Chart 6 pg 1

## Chart #6

**CHILD BEHAVIORS USED TO ASSESS AMBIGUOUS SITUATIONS\***

**Note:** *Many abused children look and act little different from other children. However, some abused children react to physical abuse by suppressing or exaggerating certain aspects of their own personality. This adaptive behavior may begin as early as infancy, and it may continue long into adulthood. Hence, although not an independent ground for a finding of abuse, the following extremes of child behavior can assist in the assessment of ambiguous injuries and parental explanations of borderline plausibility.*

- **Extremely fearful behavior:** Some abused children may feel in constant danger of being attacked. They may regularly and overtly display fear of their parents, for example, by pulling away in fright or by being overly compliant with parental wishes. Or, they may display fear indirectly. They may not want to go home, for example, and yet, when the parent arrives, they may instantaneously agree to leave. Some abused children are unusually wary of any physical contact, shrinking from the touch or approach of any adult. They also may seem unduly apprehensive when other children cry, as if expecting that the child will be hit for bothering the adults around him.
  - **Extremely aggressive, demanding, or rageful behavior:** Such provocative behavior may be the child's attempt to gain attention. Some abused children are so emotionally starved for adult attention that they will provoke it by any means possible, even if the attention results in punishment and physical assault. In addition, children who frequently pick fights with their playmates or disrupt other children may be imitating the behavior of their parents. Such displaced retaliation against peers may seem like a safe way to vent the anger these children carry within themselves.
  - **Overly compliant or passive:** Some abused children have learned that any attention from the parent may lead to a violent assault. To avoid such hurtful
- confrontations, these children suppress the normal childhood drives of curiosity, anger, playfulness, self-assertion, and the need to say "No." They withdraw into the background as much as possible. When asked to do something, they quickly respond. These children sometimes submit to painful medical procedures without complaint or crying, suggesting that they have learned to tolerate pain or suffering.
  - **Extremely dependent behavior:** Some abusive parents meet their own emotional need to feel in control by keeping their children dependent on them. They will punish any signs of independence in the child. Hence, an abused child may evidence unusual clinging, babyish behavior long after a child in a more healthy family situation would be relatively self-reliant.
  - **Role reversal behavior:** Some abusive parents cannot meet their own emotional needs, and so turn to their children for nurturance and support. Their children may have learned to comfort and care for them as a defense to being attacked by a frustrated or unhappy parent. These children become unusually responsive to changes in their parents' mood, even anticipating them. In times of stress they often will be seen hugging, stroking, and kissing their parents.
  - **Indiscriminantly friendly behavior:** Some abused children are so insatiably hungry for affection that they are inappropriately friendly with strangers and playmates. At the same time, they are unable to relate normally to other children or adults.
  - **Extreme lags in development:** When children must use the energy normally directed toward growth and development to protect themselves from abusive parents, they often fall significantly behind in toilet training, motor skills, language development, and social skills. The attention of these children may seem to wander, and they may easily become self-absorbed. Developmental lags also

*continued on next page*

## Chart 6 pg 2

may be the result of emotional deprivation or organic brain damage caused by physical assaults or nutritional neglect. Conversely, children with serious physical handicaps or other disabilities are sometimes at higher risk of being abused because they are so difficult and frustrating to care for.

- Signs of physical neglect: Many, but by no means all, abused children are also physically neglected by their parents. Besides suspicious injuries, these children may evidence the signs of physical neglect; they may appear hungry or malnourished, tired or listless, dirty and unbathed; and, they may have apparently unattended physical, medical or dental problems.

**CAVEAT:** *In weighing the significance of the behaviors described above, the court should consider whether the behavior is extreme when viewed within the context of how other children of the same age and social situation normally behave. In addition, explanations for the child's behavior other than abuse always should be considered.*

\* Derived from: U.S. National Center on Child Abuse and Neglect, *We Can Help: A Curriculum on Child Abuse and Neglect: Resource Materials*, p 25 (U.S. DHEW 1979).

## Chart 7 pg 1

## Chart #7

**PARENTAL BEHAVIORS USED TO ASSESS  
AMBIGUOUS SITUATIONS\***

*Note:* There is no behavioral profile of abusive parents that does not falsely label many innocent parents while, at the same time, missing many actual abusers. Nevertheless, the behavior of many abusive parents does tend to fall within certain recurrent patterns. Hence, although *not* an independent ground for a finding of abuse, the following *extremes* of parental behavior can assist in the assessment of ambiguous injuries and parental explanations of borderline plausibility.

**Suspicious Actions**

*Abusive parents often behave in a way that suggests that they are trying to conceal a child's injury or how it was received.*

- *Abusive parents often respond inappropriately to the seriousness of the child's condition: either by overreacting, seeming hostile or antagonistic when questioned even casually; or by under-reacting, showing little concern or awareness and seeming more preoccupied with their own problems than those of the child.*
- *Abusive parents often are unable to explain how a child was injured; they frequently claim that they just "don't know what happened."*
- *Abusive parents often give explanations for their children's injuries which are farfetched or at variance with clinical findings; they also often change explanations (and social histories) upon close questioning.*
- *Abusive parents often blame their children's injuries on a babysitter or stranger who they cannot identify.*
- *Abusive parents often attempt to conceal the extent of their children's present (and past) injuries; they frequently refuse to consent to diagnostic studies.*

- *Abusive parents often delay seeking medical help, suggesting that they fear being discovered or that they have little concern for the child's welfare; they frequently seem to hope that the child will recover without medical care.*
- *Abusive parents often bring their children to a hospital late at night for what they claim are accidental injuries; the lateness of the hour, however, suggests that the child was abused for not going to bed, or that the child was awakened and abused during a parent's violent rage, or that the parents delayed seeking help in the hope that the child would recover or that the parents realized that the child's condition was worsening.*
- *Abusive parents often change hospitals or doctors in the hope that their abuse will not be discovered through knowledge of past injuries (or, ironically, they may be looking for someone who will notice their problems and offer help).*
- *Abusive parents often seek medical assistance for minor or non-existent ailments as a way of seeking help; they frequently bring a child in for a cold, a headache, or a stomach ache when the child has serious physical injuries.*

**Personality Characteristics**

*While less reliable than suspicious actions, certain personality characteristics – revealed by the following parental behaviors – are sufficiently associated with child abuse to be useful in assessing ambiguous situations.*

- *Abusive parents often have rigid and unrealistic expectations of their children, expecting or demanding behavior that is beyond the child's age or ability; they frequently are unaware of the normal developmental stages and milestones of childhood.*
- *Abusive parents often have little understanding of their children's physical and emotional needs; they may ignore their child's crying or react with impatience.*

\*Derived, in part, from: U.S. Headstart Bureau & U.S. National Center on Child Abuse and Neglect, *Child Abuse and Neglect: A Self-Instructional Text for Head Start Personnel*, pp. 61-62, U.S. DHEW 1977.

*continued on next page*

## Chart 7 pg 2

- *Abusive parents often are overcritical of their children and seldom, if ever, discuss their children in positive terms. They frequently describe their children, even infants, as unloving or ungrateful. In more extreme cases, they sometimes describe their children as "different," "bad," "all trouble," "a monster," or "a witch." (Some mothers will say that a male child is "just like his father," who, often, will have deserted her.)*
  - *Abusive parents often are isolated from family supports such as friends, relatives, neighbors, and community groups; they may consistently fail to keep appointments, discourage social contact, and never participate in school activities or community events.*
  - *Abusive parents sometimes blame their children for the problems they have.*
  - *Abusive parents sometimes vigorously defend their right to punish misbehaving children, even if the child has been seriously injured.*
  - *Abusive parents sometimes seem unable to relate to their children; they may avoid touching or looking at them.*
  - *Abusive parents sometimes describe how they, themselves, were abused or neglected as children.*
  - *Abusive parents sometimes are unable to describe their young children's eating habits or daily activities.*
  - *Abusive parents sometimes seem to encourage a parent/child role reversal, with the child being expected to comfort the parent.*
  - *Abusive parents sometimes misuse alcohol or drugs.*
  - *Abusive parents sometimes live in situations of chronic family discord, financial problems, or other personal stresses.*
  - *Abusive parents sometimes have recently undergone a major personal crisis, such as the loss of a job or of a loved one.*
  - *Abusive parents sometimes appear to lack control, or to fear losing control.*
  - *Abusive parents sometimes are of borderline intelligence, psychotic, or psychopathic. Such diagnoses are the responsibility of a psychiatrist, psychologist, or psychiatric social worker, but even the lay observer can sometimes make an initial determination that the parent seems intellectually incapable of child-rearing, exhibits generally irrational behavior, or seems excessively cruel and sadistic.*
- CAVEAT:** *In weighing the significance of the behaviors described above, the court should remember that the parent is being observed in an obviously stressful situation. The court should also take into account the parent's social situation and likely inexperience with and fear of the court process. To be useful in assessing the significance of the child's injuries, the parent's behavior should be extreme. In addition, explanations for the parent's behavior other than abuse always should be considered.*

Chart #8 summarizes the questions that the court should consider before accepting a parent's explanation of a child's apparently inflicted or ambiguous injuries. In the great majority of cases, parental explanations can be satisfactorily judged by reference to the questions listed there. In a small number of cases, though, ambiguous injuries or parental explanations of borderline plausibility make a definitive determination impossible. As a general rule, if these doubtful situations seem more likely than not to point to abuse, they should be resolved in favor of protecting the child. The law, after all, authorizes a finding based on a "preponderance of the evidence."<sup>64</sup> Moreover, as Judge Dembitz points out: "The Family Court, fortunately can . . . guard a child from further harm when his injury must have resulted either from parental battering or from inadequate parental attention, under the court's general power to protect him from 'neglect' and 'improper guardianship.'"<sup>65</sup>

This latter point bears elaboration. Even if the parent's explanation is believed, there still may be grounds for a finding of abuse, or, more likely, of neglect. For example, in explaining how a child was injured, the parent may have described reckless behavior toward the child.<sup>66</sup> Similarly, the parent may have described how no action was taken to protect the child from a dangerous adult. On this basis, the court might conclude that the parent "allowed" the child to be abused.<sup>67</sup> Or, the parent may have described gross inattention to the child's need for physical safety.<sup>68</sup> The parent, for example, may have described how the child ingested a dangerous substance that was not properly kept out of the child's reach. Because such negligence suggests that the child might be in continuing danger, a finding of neglect might be possible.<sup>69</sup>

#### Chart #8

##### DETERMINING WHETHER TO ACCEPT A PARENT'S EXPLANATION OF APPARENTLY INFLICTED OR AMBIGUOUS INJURIES

- *Does the parent have an explanation for the child's apparently inflicted injury?* Claiming ignorance of the cause of the injury is no explanation.
- *Is the parent's explanation consistent with the nature of the injuries?* For example, does the parent claim that the child sustained a fractured skull or a serious subdural hemorrhage from falling off a bed or a changing table? Does the parent claim that a child with scalding burns on the buttocks (but not the feet) "stepped into a tub of hot water?"
- If the parent claims that the injuries were the result of an accident, *is the parent's description of the child's behavior or other circumstances plausible?* For example, does the parent claim that injuries on an apparently docile infant were self-inflicted? Or, is the physical setting of the claimed accident inconsistent with the nature or severity of the child's injuries? (Injuries resulting from the parent's gross negligence also can be the basis of a finding.)
- *Do other situational factors suggest that the parent's explanation should not be accepted?* For example, does the parent describe difficulties in toilet training or discipline with a young child suffering from immersion burns to the perineum or buttocks?
- In situations where the origin of the injuries is ambiguous or the parent's explanation is of possible plausibility, *does the behavior of either the child or the parent suggest abuse?* For example, when pressed for details, does the parent give contradictory descriptions of the same events?

64. *In the Matter of Young*, 50 Misc.2d 271, 270 N.Y.S.2d 250, 253 (Fam. Ct., Westchester Co., 1966).

65. Fam. Ct. Act §1046 (b) (1983).

66. Dembitz, "Child Abuse and The Law - Fact and Fiction," 24 *Record of the Bar Association of the City of New York*, 613, 618 (1969).

67. See the section entitled "Allowing a Child to Be Abused." on *supra* p. 8.

68. See, e.g., *In the Matter of JR*, 87 Misc.2d 900, 386 N.Y.S.2d 774 (Fam. Ct., Bronx Co., 1976), discussed at *infra* n. 57.

69. See the section entitled "Abuse or Neglect?" on *infra* p. 55.