Have you ever defended any of the following types of cases?

- Injury to a child?
- Injury to a child resulting in death?
- Aggravated sexual assault of a child?

As a general rule, these cases are guaranteed to get your client a very long sentence if he is convicted?what some lawyers call the ?slow death penalty.? 

And as a general rule, these cases are among the most complicated cases to defend. This is doubly important in light of the sentences that juries are likely to impose upon conviction. Unfortunately, most lawyers don?t really understand just how complicated they are, or the land mines they are filled with. In other words, they don?t know what they don?t know.
Even well-meaning lawyers who don’t know what they don’t know help create bad case law. And we have an overabundance of bad case law created by lawyers who did not know. These attorneys cannot properly protect the appellate record, and this leads to even more bad case law. Lawyers who do not know there is a special body of science dealing with all aspects of child abuse do not know what they do not know.

Not knowing what you don’t know often leads to convictions. When only three of thirteen alleles match, it is an absolute exclusion, not an absolute match. But there was testimony in a rape case, which apparently went unchallenged, that the DNA was an exact match when only three alleles matched. The defendant was convicted. The authors suggest that the defense counsel did not know what he did not know.

If you’re honest with yourself, you would probably rather defend a straight-up murder case than an injury to a child or a sexual assault of a child. Why? Because you may be able to sneak in the old “S.O.B. needed killing?” defense. But the authors have yet to meet the first juror who ever thought that a child needed injuring, or killing. In other words, your ordinary defenses are missing. That alone is a tremendous hurdle to overcome.

And if you didn’t realize that a straight-up murder case is easier to defend than one of these cases, then you don’t know what you don’t know.

The work-up on these cases is critical. Whether the child is dead or injured or allegedly abused or sexually assaulted, there are going to be volumes of records to go through. Invariably, there are even more records and evidence that will need to be obtained. Do you even know what you are looking at, much less looking for, in the records?

Consider an infant who has died from what the State says is ethylene glycol poisoning? Do you know what to look for in the medical records to see if it could be the result of a genetic defect? Do you know which experts to consult with? Do you know what testing has to be done to confirm the genetic defect? If you don’t, then you don’t know what you don’t know.

Consider a case involving an allegation of sexual assault of a child where the physical findings are normal, or inconclusive? The alleged assault is said to have occurred years before, and the State is relying upon the “outcry witness” and psychologists who have interviewed, counseled, and treated the child. Who and what are the experts you need to defend this case? If you can’t name them, then you don’t know what you don’t know.

Consider a case involving scald injuries to a child. Do you know how to look at the photos and tell the difference between accidental and intentional scalds? Do you know who to send the photos to for an expert opinion on same? Again, if you can’t or don’t, you don’t know what you don’t know.

Consider the following hypothetical scenario. A father finds his six-month-old child unresponsive in a crib. He calls 911 and tries CPR. EMTs arrive and the child is still unresponsive. EMT records show periods of anoxia during transport. The child is received in ER, followed by more periods of anoxia. The first CT scan is clear, but the second shows a subdural hematoma and rib fracture. The child ultimately dies. Multiple bleeds are found in and around the brain, and an autopsy finds fractures of the ribs, of different ages?some new and some healing. The case is indicted as injury to a child resulting in death. The DA refers to it as a “shaken-baby” case. Who and what are the experts you need to defend this case? If you can’t name them, then you don’t know what you don’t know.

In that hypothetical case, what medical records would you need to obtain, other than those of the EMTs and the hospital to which the child was taken? If you can’t name them, then you don’t know what you don’t know. And if you can’t say why these particular records are important, then you don’t know what you don’t know.
Who is the State going to call as its experts? How are you going to deal with each of them?

Did you know that the American Academy of Pediatrics now offers a Board Certification in Child Abuse? Imagine, doctors who are now board certified in diagnosing crimes. And those doctors testify with great conviction (and efficacy) as to the ?proof? that they find of the crimes your client has committed. Never mind the very serious flaws in the studies they rely upon?they are board certified, after all, and by the American Academy of Pediatrics, at that. Do you even know the names of the studies that these experts rely upon to say that certain types of retinal hemorrhages are pathognomonic of abuse, much less the research that shows how deeply flawed these studies are? If you didn?t know this, then, again, you don?t know what you don?t know.

The State?s expert (an M.D.) is going to testify that the forces that the child was subjected to are equivalent to the forces that would be experienced in a fall from a third story onto concrete?and that it is this type of force that caused the injuries the child or the child?s brain suffered. Anything wrong with that analysis or analogy? If you said no, or if you cannot articulate what is wrong, then you don?t know what you don?t know. Interestingly, there is at least one forensic pathologist who will testify, and who has performed autopsies on persons who committed suicide by jumping off of third-story balconies onto pavement. Needless to say, what he found in his autopsies bears no resemblance to what will have been found on the autopsy of the child in your case. And if you don?t know who this pathologist is, you don?t know what you don?t know.

Do you know what questions you need to ask the State?s witnesses to try to establish your defense? Do you know what questions you need to ask your experts? If you didn?t know this, then, again, you don?t know what you don?t know.

The voir dire on these cases is critical. What is your expertise in preparing to voir dire for one of these cases? Not what is your experience (read: number of cases) in conducting voir dire, but what is your expertise in preparing to voir dire for one of these cases? If you did not realize that expertise in preparing voir dire for this particular type of case was necessary, then, again, you don?t know what you don?t know.

When is the last time that you attended a seminar dedicated exclusively to the science involved in defending these types of cases? If it is more than a year ago, then, in the authors? opinion?and in the words of Wolf-brand Chili®?that?s too long. And again, you don?t know what you don?t know.

How many books do you have in your personal library dealing with the issues that arise in these types of cases? How recent are they? If your answer is only a few, and if they are older than ten years, then you probably don?t know what you don?t know.

What do you do to stay current on the latest developments in the science of these cases? What do you do to stay abreast of which experts to use and which experts to avoid (and why) and which experts fall in the middle? If you don?t do anything in this regard, then you probably don?t know what you don?t know.

Is there a solution to overcoming not knowing what you don?t know? The authors, who between them have 67 years of experience as attorneys, suggest there is. Interestingly, they came to the same solution independently?one 10+ years ago and the other within the last year. But they write together because they are so convinced of the value of the solution that they each came to.

That solution is this: They have both resolved to never undertake one of these cases without the assistance of Kim Hart. Who, you may ask, is Kim Hart?

Kim Hart is listed on TCDLA?s List of Experts under child abuse. She is a trial consultant living in Toledo, Ohio, and has more than 25 years? experience assisting attorneys defending these type of cases all over the country?actually, the world. During that period of time, she has helped lawyers defend over 2,000 of these
types of cases. Does your experience come anywhere near that? The authors’ combined experience is but a fraction of a percentage of that number.

In addition, she is the Executive Director of the National Child Abuse Defense and Resource Center (NCADRC). NCADRC is a 501(c)(3) entity that hosts its own seminar every two years on defending these cases. NCADRC has also co-sponsored CLE seminars with other criminal defense associations on these same topics in various parts of the country.

Because of this work, Ms. Hart deals with the foremost experts in many fields related to defending allegations of child abuse. She also stays current on the most recent developments in the fields, either through reading or in speaking directly to the various experts. Because so many of the very best experts have presented at the NCADRC seminars and hold her in such high regard, Ms. Hart is able to call them and get through to them, especially when time and answers are critical.

The insight she brings to these cases is invaluable. In a case in Toledo, Ohio, one of the state’s experts claimed to have been part of Dr. Ommaya’s team that did the research with rhesus monkeys. Ms. Hart located Dr. Ommaya in retirement and got him to come testify that the expert had never been part of the research team. Would you have thought to try to contact Dr. Ommaya? Even if you had, do you think you could have gotten him to come testify?

Kim Hart is a must-have member of any team defending a child abuse case. In one case, Leonard Martinez was brought into the case by another lawyer just days before trial. It was a continuous sexual abuse of a child case. A 13-year-old child was accusing her mother’s former boyfriend of having raped her once a week for 16 or more weeks. It would allegedly happen when her mom left early in the morning to go to a flea mark in San Antonio. And the sister of the complainant, who is a year younger than the complainant, was allegedly an eyewitness to at least one of the rapes.

Leonard contacted Kim Hart, and even though the trial judge refused to give any resources, Kim helped with brainstorming, resources, and strategy. The case was a nightmare from Hell. The trial judge refused to give counsel any additional time to prepare. In a motion for continuance, counsel cited the ?Performance Standards for the Representation of Non-Capital Cases.? The judge was not even aware of such standards. As a result of some of the judge’s rulings, a motion to recuse was filed, and after a hearing, counsel was given just two additional weeks to prepare. Counsel had a total of three weeks to deal with a case no less complicated than a death penalty case, a case more emotionally charged than a death case, one that carried the potential of life without parole?the slow death penalty.

With the help of Kim Hart’s advice, Leonard’s team was able to have their client acquitted of all charges from continuous sexual abuse of a child all the way down to indecency by exposure. Without her help and advice, there is little doubt in the defense team’s mind that their client would have, in all probability, been convicted.

It is the opinion of the authors that you should never take one of these cases without hiring Kim Hart or having her appointed. There may be other trial consultants out there who are as competent in this field, but the authors have never heard of any, much less met one. Until they do, they are going to stick with what has been proven time and time again, throughout this country, by other lawyers who have used her services.

Unfortunately, there are too many lawyers who believe child abuse cases can be handled like any other criminal case. Those who believe that are woefully unprepared to take on such a case. They don’t know what they don’t know.

The issues involved in child death, child injury, and child sex abuse cases are often difficult to identify and very difficult to analyze once identified. Kim can help you not only identify the issues, but also review the records and analyze the issues, bringing in the experts needed to assist the team in effectively representing
the accused.

And if you didn’t know about Kim before this article, you now know part of what you didn’t know. For your benefit, the benefit of your clients and the benefit of Texas jurisprudence, please don’t ever handle one of these cases without Kim’s active participation and involvement. You may not be perfect, but you will at least be prepared. And you will no longer be in the position of not knowing what you don’t know.

Notes

1. Some of the “science” is not even worthy of being referred to as junk science. But you need to know which is which.

2. This is the case of Patricia Stallings in Missouri. She was sentenced to prison for life but subsequently exonerated on a writ when it was conclusively established that the laboratory results were misread and the recessive genetic defect that she and her husband both had was conclusively identified, thereby showing the cause of the propionic acid (not ethylene glycol) poisoning. Among the other problems with the case were that one laboratory claimed to find ethylene glycol even though its retention time (the period it takes for a compound to traverse a GC column) was not identical to a standard sample of ethylene glycol. Another laboratory did not even bother to run a standard. One laboratory did not calculate that the child would have had to consume 300 liters of ethylene glycol to account for the results of the chemical analysis. Genetic testing showed that the dead son had MMA, and the compound identified as ethylene glycol was shown to be propionic acid instead.

3. There are at least two: a SANE nurse or a pediatrician with experience in sexual assaults and a psychologist familiar with implantation of memories or corruption of memories.

4. There are at least two: an ME and a biomechanician.

5. You need to obtain the records relating to the birth of the child and any medical records of the child, especially those showing any vaccinations administered to the child.

6. The birth records will show the child’s health at the time of birth and whether there was any birth trauma that could account for the rib fractures, among other conditions. Vaccinations have been shown to cause severe adverse reactions in young children, including subdural hematomas and even death.

7. A physician is not competent to calculate the forces that the body suffers in any particular situation. That job belongs to a biomechanician. And courtesy of biomechanics, we know that it is impossible to shake a child and generate anywhere near those forces.

8. The pathologist is David Posey, M.D. He presented at the 2008 National Child Abuse Defense and Resource Center’s biennial seminar in Las Vegas. From May 1985 to August 1990, while he was Staff Pathologist and Forensic Pathologist at Tripler Army Medical Center, he was locum tenens at City and County of Honolulu Medical Examiner’s Office.

9. There are some physicians who are extremely competent in diagnosing hematomas and explaining their non-criminal causes, but they want to express opinions about the forces involved. If you know that up front, you can use them as experts, so long as they understand that they will not, under any circumstances, opine on the forces involved.

10. Ms. Hart has helped attorneys defend these type of cases in all 50 states, Puerto Rico, Guam, American Samoa, Canada, Australia, and Great Britain.

11. Ayub Ommaya, M.D. Dr. Ommaya’s research with rhesus monkeys provided the experimental data
needed to model traumatic brain injury, which was used to come up with the unfounded theory of "shaken baby."

12. This raises the question, were you?

13. The authors know other attorneys in other states who are of the same opinion when it comes to defending this type of case. Those lawyers will also not defend one of these cases without Ms. Hart's assistance.

14. In several cases on which he has been appointed, Leonard Martinez has been able to have the trial judge authorize fees for Ms. Hart to be retained to assist in the defense. While it may be difficult, getting Ms. Hart appointed can be accomplished.

15. See Endnote 10, above.

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