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Criminal Law—Battered Child Syndrome—State v. Durfee, 322 N.W.2d 778 (Minn. 1982)

rial in terms of content only if it does so to define the locations at which material of this kind is available.[52]

The restricting of public access to constitutionally protected materials becomes a significant concern when addressing the first amendment implications of municipal ordinances regulating the locations of businesses distributing sexually oriented entertainment.[53] When municipalities exercise their police powers to protect city neighborhoods against deterioration, they must not infringe upon freedom of expression.[54] Instead, they must draw regulations narrowly enough to minimize the impact that state action has on first amendment guarantees.[55] If such action serves to severely curtail the public's access to protected sexually oriented material, it will be struck down as unconstitutional.[56] As *Alexander* indicates, the courts will continue to give priority to first amendment rights unless the government can demonstrate a legitimate and substantial interest for making a limited exception to the prohibition against content-based zoning ordinances. The impact of an ordinance on free expression must be incidental and minimal to withstand constitutional attack if it has the effect of restricting access to communication protected by the first amendment.[57]

Criminal Law—BATTERED CHILD SYNDROME—*State v. Durfee,* 322 N.W.2d 778 (Minn. 1982).

In 1982, 1.1 million cases of child abuse and neglect were reported in the United States.[1] In response to the recognized problem, every state now requires the reporting of child abuse and neglect cases when discov-

adopted by the St. Paul City Council subsequent to the *Alexander* decision prohibits adult entertainment establishments from being located within 200 feet of residential property or 1320 feet from each other in residential neighborhoods; the limit is reduced to 300 feet in the downtown area. Minneapolis Star and Tribune, Oct. 16, 1983, at 2B, cols. 5-6.

52. *Young,* 427 U.S. at 62.
53. *Schad,* 452 U.S. at 70.
54. *See supra* note 3.
55. *Schad,* 452 U.S. at 70.
56. *Alexander,* 698 F.2d at 936.
57. *Id.* at 937.

1. *Child Abuse—Laws Being Overhauled to Safeguard Youngsters,* 69 A.B.A.J. 1009 (1983) [hereinafter cited as *Child Abuse*]. Much has been written about child abuse in recent years. *See generally* M. COHN, AN APPROACH TO PREVENTING CHILD ABUSE (1981); J. COSTA & G. NELSON, CHILD ABUSE AND NEGLECT: LEGISLATION, REPORTING AND PREVENTION (1978); V. FONTANA, THE MALTREATED CHILD: THE MALTREATMENT SYNDROME IN CHILDREN—A MEDICAL, LEGAL, AND SOCIAL GUIDE (4th ed. 1979); J. GIOVANNONI & R. BECERRA, DEFINING CHILD ABUSE (1979); S. NAGI, CHILD MALTREATMENT IN THE UNITED STATES: A CHALLENGE TO SOCIAL INSTITUTIONS (1977); S. O'BRIEN, CHILD ABUSE—A CRYING SHAME (1980); D. WELLS, CHILD ABUSE: AN ANNOTATED BIBLIOGRAPHY (1980).

ered by doctors, nurses, teachers, social workers and families.[2] Efforts to control child abuse are also reflected in the development of Minnesota case law.[3] In *State v. Durfee,*[4] the Minnesota Supreme Court held, in a prosecution for assault on a small child by her custodian, medical testimony was admissible to show that the facts and surrounding circumstances constituted "battered child syndrome."[5]

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2. *Child Abuse, supra* note 1, at 1009; *see* ALA. CODE §§ 26-14-1 to -13 (1977 & Supp. 1982); ALASKA STAT. §§ 47.17.010 to .070 (1975 & Supp. 1978); ARIZ. REV. STAT. ANN. §§ 8-546.02 to .03 (Supp. 1982); ARK. STAT. ANN. §§ 42-807 to -818 (1977 & Supp. 1981); CAL. PENAL CODE §§ 11165-66 (West Supp. 1982); COLO. REV. STAT. §§ 19-10-102 to -115 (1973 & Supp. 1982); CONN. GEN. STAT. ANN. §§ 17-38a to -38c (West Supp. 1982); DEL. CODE ANN. tit. 16, §§ 901-906 (Supp. 1982); D.C. CODE ANN. §§ 6-2101 to -2119 (1981 & Supp. 1983); FLA. STAT. ANN. § 827.07(3) (West Supp. 1982); GA. CODE ANN. § 74-111 (Supp. 1982); HAWAII REV. STAT. §§ 350-1 to -5 (1976 & Supp. 1981); IDAHO CODE §§ 16-1619, 16-1620 (Supp. 1983); Abused and Neglected Child Reporting Act, ILL. ANN. STAT. ch. 23, §§ 2053, 2054 (Smith-Hurd Supp. 1982); IND. CODE ANN. §§ 31-6-11-1 to -8 (West 1979 & Supp. 1982); IOWA CODE ANN. §§ 232.67-.77 (West Supp. 1982); KAN. STAT. ANN. §§ 38-716 to -724 (1981); KY. REV. STAT. § 199.335 (1982) (repealed effective July 15, 1984); LA. REV. STAT. ANN. § 14:403 (West 1974 & Supp. 1982); ME. REV. STAT. ANN. tit. 22, §§ 4011-4015 (Supp. 1982); MD. ANN. CODE art. 27, § 35A (1982); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1983); MICH. COMP. LAWS ANN. §§ 722.621-.625 (West Supp. 1983); MINN. STAT. § 626.556 (1982); MISS. CODE ANN. § 43-23-9 (1981); MO. REV. STAT.§ 210.115 (Vernon 1983); MONT. CODE ANN. §§ 41-3-201 to -208 (1981); NEB. REV. STAT. §§ 28-1501 to -1508 (1975); NEV. REV. STAT. §§ 200.501-.507 (1981); N.H. REV. STAT. ANN. §§ 169-C:29 to -C:39 (Supp. 1981); N.J. STAT. ANN. §§ 9.6-8.8 to -8.15 (West 1976 & Supp. 1983); N.M. STAT. ANN. §§ 32-1-15 to -16 (1981); N.Y. SOC. SERV. LAW §§ 411-415 (McKinney 1983); N.C. GEN. STAT. §§ 7A-543 to -552 (1981); N.D. CENT. CODE §§ 50-25.1-01 to -14 (1982); OHIO REV. CODE ANN. § 2151.421 (Page Supp. 1982); OKLA. STAT. ANN. tit. 21, §§ 845-48 (West 1983); OR. REV. STAT. §§ 418.740-.775 (1981); PA. STAT. ANN. tit. 11, §§ 2201-22 (Purdon Supp. 1983); R.I. GEN. LAWS §§ 40-11-2 to -10 (Supp. 1982); S.C. CODE ANN. §§ 20-7-480 to -690 (Supp. 1982); S.D. CODIFIED LAWS ANN. §§ 26-10-10 to -15 (Supp. 1982); TENN. CODE ANN. §§ 37-1201 to -1212 (1977 & Supp. 1982); TEX. FAM. CODE ANN. §§ 34.01-.08 (Vernon 1975 & Supp. 1982); UTAH CODE ANN. §§ 78-3b-1 to -12 (Supp. 1981); VT. STAT. ANN. tit. 33, §§ 681-86 (Supp. 1983); VA. CODE §§ 63.1-248.1 to .5 (1980 & Supp. 1983); WASH. REV. CODE ANN. §§ 26.44.010 to .050, 26.44.060 to .080 (Supp. 1982); W. VA. CODE §§ 49-6A-1 to -8 (1980); WIS. STAT. ANN. §§ 48.981(1)-(12) (1979); WYO. STAT. §§ 14-3-201 to -202, -205 to -207 (1978 & Supp. 1983); Katz, Howe & McGrath, *Child Neglect Laws in America,* 9 FAM. L.Q. 1 (1975).

Many of these statutes have not been very effective because private physicians are reluctant to report suspected abuse. *See* Burke, *Evidentiary Problems of Proof in Child Abuse Cases: Why Family and Juvenile Courts Fail,* 13 J. FAM. L. 819, 833 n.72 (1973-1974). The fragmentation of state agencies has also reduced the effectiveness of state reporting statutes. *Id.* at 835.

3. *See, e.g.,* State v. Durfee, 322 N.W.2d 778 (Minn. 1982); Schleret v. State, 311 N.W.2d 843 (Minn. 1981); State v. Loebach, 310 N.W.2d 58 (Minn. 1981); State v. Goblirsch, 309 Minn. 401, 246 N.W.2d 12 (1976); State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973).

4. 322 N.W.2d 778 (Minn. 1982).

5. *Id.* at 784. "Battered child syndrome" is a medical term used to describe "a condition by which children are injured other than by accident." *Loss*, 295 Minn. at 277, 204 N.W.2d at 407.

Durfee is the most recent in a series of child abuse cases indicating the court's effort to protect the safety of children without sacrificing the legal rights of defendants.[6] The decision attempts to strike a balance between society's interest in the welfare of its children and the accused parent or custodian's due process rights. Although the court purports to safeguard a defendant's due process rights, the balance is ultimately struck in favor of protecting abused children. In *Durfee,* the defendant was convicted of first-degree assault on a child, Rose Tittman, by evidence that was primarily circumstantial.[7]

Rose Tittman lived with her mother, Cyndee Tittman, and her mother's boyfriend, Timothy Durfee. Durfee met Cyndee while attending an area vocational school and began living with Cyndee and Rose in mid-summer 1980. Beginning in August, Rose was left with a day-care person, Jan Polecheck, while Cyndee and the defendant attended school.[8]

On September 2, 1980, Mrs. Polecheck discovered a large soft spot on Rose's head. The following day, Cyndee noticed five or six bruises on Rose's face. When Cyndee was unable to contact her doctor, Durfee volunteered to take Rose to his family doctor the next day. On September 4th, the defendant was left alone with Rose the entire day while Cyndee attended school. When Cyndee returned from school, Durfee explained that the doctor had attributed the red marks and bruises to excessive levels of sugar in Rose's blood. In fact, Durfee had not taken Rose to the doctor.[9]

The next day Durfee related the same "blood sugar" story to Mrs. Polecheck. On that day, Mrs. Polecheck noticed several bruises on Rose's face, a reddish-purple line on her ear, two parallel red lines on her neck, and a deep burn in the palm of her hand. Defendant claimed the burn occurred when Rose touched a lamp near his aquarium. During the trial, police officers testified the lamp was not capable of causing such a burn.[10]

On September 10th, Mrs. Polecheck observed a new large purplish-red bruise on the side of Rose's head.[11] That evening, Cyndee went shopping after putting Rose to bed. While she was gone, Rose was injured and rendered unconscious. Durfee, who was watching Rose, called for emergency aid. Durfee first claimed that Rose had fallen out of the crib

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6. *See supra* note 3.

7. *See* 322 N.W.2d at 780-82. The only direct evidence presented in the case was that concerning the child's injuries. *See id.* at 784.

8. *Id.* at 780.

9. *Id.* Durfee did consult his mother who was a registered nurse. She believed that Rose might be eating too much fresh fruit. *Id.*

10. *Id.* at 780-81.

11. *Id.* When Mrs. Polecheck mentioned the bruise to Cyndee, Cyndee told Mrs. Polecheck that Durfee had given Rose a root beer float the night before, and the bruise was a result of Rose's blood sugar problem. *Id.* at 781.

but later said the crib had collapsed, pinning Rose between the crib and a wall. The emergency squad noticed "bruises, the burn, the soft spot on Rose's head, discoloration around the left eye, an open scabbed wound over the left ear and bruises in the abdomen, groin and pelvic area."[12]

When Rose arrived at the hospital, the staff notified the police. A CAT scan showed a blood clot that was compressing the brain. The clot was removed by surgery, but part of the skull had to be removed resulting in a permanent depression in the child's head. As a result of the injury, Rose was partially paralyzed on her left side and may have permanently lost the sight in one eye.[13]

On the night of the injury, police officers went to the house to take photographs of the crib.[14] Despite the officers' request that Durfee not touch anything,[15] Durfee removed a cardboard box from underneath the crib. Durfee told the police that he was getting some clothes for Rose, but never brought any clothing to the hospital. Two days later, Durfee chopped up the crib with an axe.[16] Instead of putting the pieces of the crib in a garbage can at the house, he disposed of them at the vocational school.[17]

Originally, both Durfee and Cyndee Tittman were charged with assault, but the charges against Cyndee were dropped.[18] Durfee was tried twice; his first trial resulted in a hung jury.[19] Durfee was convicted at the second trial, from which he appealed.[20]

The main issue in *Durfee* was whether the introduction of testimony concerning battered child syndrome violated defendant's due process rights.[21] Durfee contended that this form of circumstantial evidence in-

12. *Id.*

13. *Id.*

14. *Id.*

15. Respondent's Brief at 7, State v. Durfee, 322 N.W.2d 778 (Minn. 1982).

16. 322 N.W.2d at 781. Durfee alleged that he disposed of the crib because Cyndee became upset when she looked at it. *Id.*

17. *Id.* at 781-82.

18. *Id.* at 782 n.1.

19. *Id.* at 786.

20. *Id.* at 780.

21. *See id.* at 783-84. There were three other issues decided in *Durfee.* First, the *Durfee* court held that admission of testimony supporting, but not referring to, "battering parent syndrome" was admissible for purposes other than to prove "battering parent syndrome." The court cited State v. Loebach, 310 N.W.2d 58 (Minn. 1981), which held that proof of "battering parent syndrome" is not proper unless a defendant has first put his character in issue. 322 N.W.2d at 784-85; *see also infra* note 29. Second, the *Durfee* court held that photographs of Rose's injuries were properly admitted despite the fact that Durfee stipulated that Rose had sustained great bodily harm. 322 N.W.2d at 785-86. Finally, the court held that Durfee waived his right to a *Schwartz* hearing. *Id.* at 786. A *Schwartz* hearing is held when there is an allegation of juror misconduct. *See* Schwartz v. Minneapolis Suburban Bus Co., 258 Minn. 325, 104 N.W.2d 301 (1960). In *Durfee,* an alternate juror promised to vote to acquit Durfee if a witness, Durfee's ex-sister-in-law, complied with his advances. Although Durfee knew of this misconduct, he did not report it to the

vaded the province of the jury.[22] He claimed the battered child syndrome evidence, in effect, pointed the finger at him and shifted the burden of proof from the state to himself.[23] To shed light on these contentions, a review of the syndrome and its treatment by the Minnesota Supreme Court precedes discussion of the *Durfee* decision.

The phrase "battered child syndrome" was introduced into medical terminology to describe "a condition by which children are injured other than by accident."[24] The syndrome usually appears in children less than four years old and typically culminates in skeletal injuries, the most frequent of which are skull trauma and broken arms and legs.[25] The Minnesota Supreme Court described other evidence of battered child syndrome as follows:

> 'Battered child syndrome' can be evidenced by multiple injuries in various stages of healing. Before one injury heals, another injury occurs. Examples of such successive injuries include bruises, burns, and fractures. The child need not have suffered more than one of those successive injuries to permit the diagnosis. . . . The succession of harm done to the child may extend over several months or more, but it may occur in as brief a time as a few weeks.[26]

The *Durfee* court identified battered child syndrome as comprised of three elements: (1) an injury which is not caused accidentally; (2) an explanation given that does not adequately explain the injury; and (3) a pattern of injuries over a period of time as compared to a single episode.[27] The crucial factor in identifying the syndrome is any discrepency between the parent or custodian's explanation of what happened to the child and medical experts' testimony of what could not have happened,

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court or his attorney until after his conviction. 322 N.W.2d at 786. The *Durfee* court stated, "A party who learns of a misconduct of a juror during trial may not keep silent and then attempt to take advantage of it in the event of an adverse verdict." *Id.*

22. *Id.*

23. *Id.* At least one other defendant has raised this contention. *See* State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

24. *Loss*, 295 Minn. at 277-78, 204 N.W.2d at 407; *see also Durfee,* 322 N.W.2d at 783; *Schleret,* 311 N.W.2d at 844; *Goblirsch,* 309 Minn. at 407, 246 N.W.2d at 15. A commentator has stated:

> [B]y early 1965, there had come a recognition of a distinctive phenomenon called 'the battered child syndrome' which, though it begins with a pattern of injuries to the child, is really descriptive of a pattern of conduct on the part of parents or others who are to guard the welfare of the child.

McCoid, *The Battered Child and Other Assaults Upon the Family: Part One,* 50 MINN. L. REV. 1, 18 (1965). *See generally* Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix and Social Perspectives,* 50 N.C.L. REV. 293 (1975).

25. *Loss*, 295 Minn. at 278, 204 N.W.2d at 408; *see, e.g.,* People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971); People v. Henson, 33 N.Y.2d 63, 249 N.Y.S.2d 657, 304 N.E.2d 358 (1973).

26. *Schleret*, 311 N.W.2d at 844.

27. 322 N.W.2d at 782.

or must have happened, to cause the injuries.[28]

Testimony concerning the existence of battered child syndrome has been allowed in Minnesota since 1973, when the court decided *State v. Loss.*[29] Although the diagnosis of battered child syndrome is merely circumstantial evidence, it is often the only evidence existing in child abuse cases.[30] The unique circumstances justifying the use of battered child syndrome were explained by the court:

> In allowing such evidence to support a conviction, this court has recognized that those felonious assaults are in a unique category. Most cases of felonious assault tend to occur in a single episode to which there are sometimes witnesses. By contrast, cases that involve battered child syndrome occur in two or more episodes to which there are seldom any witnesses. In addition, they usually involve harm done by those who have a duty to protect the child. The harm often occurs when the child is in the exclusive control of a parent. Usually the child is too young or too intimidated to testify as to what happened and is easily manipulated on cross-examination.[31]

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28. *Schleret,* 311 N.W.2d at 845. Professor McCoid elaborates:

> The medical description [of battered child syndrome] can perhaps best be summarized as multiple injuries in various stages of healing, primarily to the long bones and soft tissues and frequently coupled with poor hygiene and malnutrition, but peculiarly identified by the marked discrepancy between the clinical or physical findings and the historical data provided by the parents.

McCoid, *supra* note 24, at 18.

29. 295 Minn. 271, 204 N.W.2d 404 (1973). The *Loss* court held establishment of the existence of a battered child, together with the reasonable inference of a battering parent, was sufficient to convict the defendant of first-degree manslaughter in view of other circumstantial evidence presented by the prosecution. *Id.* at 280, 204 N.W.2d at 409.

Since the battered child syndrome was admitted in *Loss,* there has also been discussion of the "battering parent syndrome." The Minnesota Supreme Court has allowed evidence on battering parent syndrome in differing ways, ranging from relevant but not necessary to inadmissible unless defendant places his character in issue. *See* State v. Loebach, 310 N.W.2d 58 (Minn. 1981) (inadmissible unless defendant raises character issue); State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973) (relevant but not necessary). Durfee claimed that references to his character were intended to identify him as a battering parent. The *Durfee* court allowed the testimony stating that references to Durfee's character were not intended to portray him as a battering parent. The court emphasized that the State's medical expert did not accuse any specific person; this testimony was only intended to show that Rose was the victim of abuse. *Durfee,* 322 N.W.2d at 784; *see also supra* note 21.

Other courts admit testimony concerning battered child syndrome. *See* People v. Ewing, 72 Cal. App. 3d 714, 140 Cal. Rptr. 299 (1977); People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971); Cohoon v. United States, 387 A.2d 1098 (D.C. App. 1978); People v. Sexton, 31 Ill. App. 3d 593, 334 N.E.2d 107 (1975); Commonwealth v. Boudreau, 362 Mass. 378, 285 N.E.2d 915 (1972); State v. Muniz, 150 N.J. Super. 436, 375 A.2d 1234 (1977); People v. Henson, 33 N.Y.2d 63, 249 N.Y.S.2d 657, 304 N.E.2d 358 (1973); State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Best, 89 S.D. 227, 232 N.W.2d 447 (1975).

30. *See, e.g., Durfee,* 322 N.W.2d at 783; *Schleret,* 311 N.W.2d at 844; *Loss,* 295 Minn. at 281, 204 N.W.2d at 409-10.

31. *Schleret,* 311 N.W.2d at 844. For a discussion on the lack of admissible evidence in

Recognizing these difficulties, the Minnesota Supreme Court has consistently permitted the use of battered child syndrome testimony for the limited purpose of showing that a child's injuries were not accidental.[32]

Evidence of battered child syndrome is not intended to indicate that a particular person injured the child.[33] Although battered child syndrome has an accusatory tone, "it is intended to indicate only that the child was not injured accidentally . . . ."[34] To protect a defendant's due process rights, the court continues to require that this form of circumstantial evidence establish guilt beyond a reasonable doubt.[35] Requiring the prosecution to offer proof beyond a reasonable doubt is a heavy burden in child abuse cases, "[b]ut this is the traditional burden which our system of criminal justice deems essential."[36]

As noted above, Durfee contended that testimony concerning battered child syndrome violated his due process rights by shifting the burden of proof from the state to himself.[37] The state contended that the only burden on the defendant was to refute the factual evidence presented in the case.[38] The *Durfee* court agreed with the state and held the admission of testimony concerning the syndrome did not violate Durfee's due process rights.[39]

Each of the three elements of battered child syndrome were present in *Durfee.*[40] The first element is an injury not caused by accident.[41] The prosecution presented three expert witnesses,[42] each of whom testified

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child abuse cases, see Comment, *Evidentiary Problems in Child Abuse Prosecutions,* 63 GEO. L.J. 257 (1974).

32. *Loss,* 295 Minn. at 277-78, 204 N.W.2d at 407; *see also Durfee,* 322 N.W.2d at 783; *Schleret,* 311 N.W.2d at 844; *Goblirsch,* 309 Minn. at 407, 246 N.W.2d at 15.

33. *Durfee,* 322 N.W.2d at 783; *Goblirsch,* 309 Minn. at 407, 246 N.W.2d at 15; *see also* People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971); People v. Henson, 33 N.Y.2d 63, 249 N.Y.S.2d 657, 304 N.E.2d 358 (1973).

34. 322 N.W.2d at 783.

35. *Schleret,* 311 N.W.2d at 847 (Wahl, J., dissenting). The *Loss* court stated:

> The applicable rule to determine the sufficiency of circumstantial evidence was set forth originally in *State v. DeZeler,* 230 Minn. 39, 52, 41 N.W.2d 313, 322 (1950), which held that circumstantial evidence will support a conviction only where the facts described by it—
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> '* * * form a complete chain which, in light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt * * *.'
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> In other words, circumstantial evidence 'must do more than create a suspicion of guilt. It must point unerringly to the accused's guilt.'

Loss, 295 Minn. at 281, 204 N.W.2d at 409 (citations omitted).

36. Mullaney v. Wilbur, 421 U.S. 684, 701 (1975).

37. *See supra* notes 21-23 and accompanying text.

38. Respondent's Brief at 15-16.

39. 322 N.W.2d at 784.

40. *Id.* at 782.

41. *Id.*

42. *Id.* The three medical experts for the State were Dr. Robert Donley, the neurosurgeon who performed Rose's skull operation, Dr. Scott Burns, Rose's family physician,

that Rose's head injury could not have been accidental.[43] The second element is a story given by the defendant that does not explain the injury.[44] Durfee's explanation of the events leading to the injury was inconsistent. In fact, the explanation of the accident that he gave at trial was completely different from that which he told several witnesses the night Rose was injured.[45] Additionally, several witnesses, including the attending physicians, testified that neither of Durfee's explanations would account for the severity of the injury.[46] The third element of battered child syndrome is a pattern of injury.[47] The facts indicated a pattern of injury stemming over a period of at least eight days.[48] Rose's body was covered with bruises, scabs, and a burn in various stages of healing the night she was taken to the hospital.[49] Based on these facts, the court held the three elements of battered child syndrome existed in *Durfee.*[50]

The defendant was the sole custodian of the child at the time of the head injury and several of the other injuries.[51] In combination with the severity, type, and number of Rose's injuries, a jury could conclude the circumstantial evidence was strong enough to find Durfee guilty beyond a reasonable doubt.[52]

The use of battered child syndrome in criminal cases has been criticized as a violation of due process. Criticism has centered around the similarities between battered child syndrome and res ipsa loquitur principles.[53] Battered child syndrome permits an inference that a child was not injured accidentally.[54] Similarly, res ipsa loquitur permits an infer-

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and Dr. Robert ten Bensel, pediatrician and Professor of Public Health and Pediatrics at the University of Minnesota. *Id.*

43. *Id.*

44. *Id.*

45. *See id.* at 781.

46. *Id.* at 782.

47. *Id.*

48. *Id.* at 780-81.

49. *Id.* at 781.

50. *Id.* at 782.

51. *Id.* at 780-81.

52. *Id.* at 780-82; *see also* State v. Williams, 324 N.W.2d 154 (Minn. 1982) (state must establish each element of crime including intent beyond reasonable doubt); State v. Martin, 293 N.W.2d 54 (Minn. 1980) (direct and circumstantial evidence did not prove guilt beyond reasonable doubt); State v. Tibbetts, 281 N.W.2d 499 (Minn. 1979) (state must prove facts beyond reasonable doubt or defendant denied due process); *supra* note 35 and accompanying text.

53. *See* Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome,* 50 CHI. KENT L. REV. 45, 69-70 (1974); Burke, *supra* note 2, at 848-49; Note, *Evidence—Child Abuse—Expert Medical Testimony Concerning "Battered Child Syndrome" Held Admissible,* 42 FORDHAM L. REV. 935, 939 (1974); Comment, *supra* note 31, at 262-63; Casenote, *Family Law—Parental Rights—Principles of Res Ipsa Loquitor Apply to Proof of Child Abuse and Neglect,* 9 TEX. TECH L. REV. 335 (1977-1978).

54. *See supra* notes 32-34 and accompanying text.

ence that an event would not have occured but for someone's negligence.[55] Although an inference of negligence may be permissible in civil cases where the case is decided by a preponderance of the evidence, critics contend that this type of inference is inappropriate in criminal trials.[56]

Some commentators believe the use of battered child syndrome allows an inference of guilt without proof beyond a reasonable doubt.[57] If so, courts may be violating defendants' due process rights by placing an affirmative burden on defendants to prove that a child was injured accidentally.[58] As Justice Wahl has noted, Minnesota case law should "not require an inference that, when a child dies of unknown causes not inconsistent with accidental causes, the parent responsible for his care is criminally responsible for his death."[59] The *Durfee* court comes close to abandoning the reasonable doubt standard and shifting the burden of proof in child abuse cases by placing an affirmative burden on defendants to prove accidental injury in cases where the state's evidence is entirely circumstantial.[60]

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55. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39 (4th ed. 1971).

56. One commentator has stated:

> Often the only admissible evidence in child abuse cases is the testimony of an examining doctor who has found multiple injuries that seem too numerous or severe to be accidental, and the testimony of the parent who claims that the injuries were purely accidental. In those civil child abuse proceedings where the evidence is scarce, circumstantial, or solely within the domain of the defendant, and where the injury is the sort that would not have occurred if ordinary care had been used, several jurisdictions have applied the doctrine of res ipsa loquitor to avoid a directed verdict. Such use allows an inference of guilt without proof of guilt beyond a reasonable doubt. Although this inference may be permissible in a civil proceeding where the burden of proof is only the preponderance of the evidence, it could be considered a deprivation of due process in a criminal trial.

Comment, *supra* note 31, at 262.

57. *Id.*

58. Battered child syndrome is used to show that a child was injured nonaccidentally—that someone intentionally assaulted the child. *Durfee,* 322 N.W.2d at 783. Although intent is a fact solely within a defendant's knowledge, this does not justify shifting the burden of proof in criminal cases. Mullaney v. Wilbur, 421 U.S. 684, 702 (1975).

In *Mullaney,* the defendant was accused of murder when he killed a man who had made sexual advances to him in a hotel room. Under Maine law, it was the defendant's responsibility to prove that he had been unbearably provoked, and thus have the charge reduced to manslaughter. Wilbur was unable to prove this to the jury's satisfaction and was convicted of murder. He appealed to the Maine Supreme Judicial Court, claiming that his right to due process was violated because the burden of proof had shifted to him to provide affirmative evidence of provocation. The Maine court rejected his appeal. *See* State v. Wilbur, 278 A.2d 139 (Me. 1971). Wilbur eventually prevailed when the United State Supreme Court held that the due process clause required Maine to prove absence of provocation beyond a reasonable doubt. 421 U.S. at 704.

59. 311 N.W.2d at 848 (Wahl, J., dissenting).

60. Testimony concerning battered child syndrome could conceivably create an irrefutable presumption in the minds of the jurors. Nevertheless, a discussion of the stringent standards the State must meet when attempting to convict a defendant with circumstantial evidence is noticeably absent from the *Durfee* court's analysis. The court comes closer

The use of battered child syndrome in criminal cases places a heavy burden on the courts to protect abused children while safeguarding defendants' due process rights. Although evidence of battered child syndrome may be the prosecutor's only incriminating evidence, courts should temper the use of battered child syndrome testimony because this powerful form of circumstantial evidence may prejudice the jury.[61] Once a defendant is convicted, the jury's decision will seldom be overturned because the facts will be reviewed in a light most favorable to a finding of guilt.[62]

Notwithstanding these criticisms, in the final analysis, Durfee's due process argument was properly rejected by the court. The testimony of the state was consistent with the principles set out in prior cases.[63] The jury was instructed that the defendant was presumed innocent until proven guilty beyond a reasonable doubt.[64] "The burden of going forward with the evidence was not shifted. The state met its burden of going forward with the evidence and also its burden of proof with the aid of testimony of an accepted medical diagnosis of 'battered child syndrome.' "[65]

State v. Durfee reflects society's increased awareness of the necessity of protecting the health and welfare of children. The Minnesota Supreme Court's sanctioning of battered child syndrome testimony solves many of the evidentiary problems inherent in child abuse cases.[66] *Durfee* avoids

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to the "inference that, when a child dies of [or is injured by] unknown causes not inconsistent with accidental causes, the parent responsible for his care is criminally responsible. . . ." *Id.* This conclusion is buttressed by the court's sanction of expert testimony which concluded that Durfee's denial of the crime was consistent with his guilt. *See* Appellant's Brief at 24-25, State v. Durfee, 322 N.W.2d 778 (Minn. 1982); *cf. supra* note 35.

61. *See supra* note 56 and accompanying text. A battered child syndrome diagnosis backed by the weight of medical experts might be viewed as prejudicing the jury against a particular defendant who attempts to explain the cause of a child's accident. Before evidence of battered child syndrome was admitted, on the other hand, juries were often unable to believe that a parent could beat a child. *See* Note, *supra* note 53, at 939.

62. *Loss,* 295 Minn. at 281, 204 N.W.2d at 409; *see also Goblirsch,* 309 Minn. at 405, 246 N.W.2d at 14; State v. Ellingson, 283 Minn. 208, 167 N.W.2d 55 (1969); State v. Daml, 282 Minn. 521, 162 N.W.2d 240 (1968).

63. *See supra* note 35.

64. Respondent's Brief at 16.

65. 322 N.W.2d at 784. "The only burden placed upon the Defendant was self-imposed because of his prior lies about the cause of Rose Tittman's injuries and his inconsistent statements. The Defendant himself created a credibility gap with the jury. That was the only burden he had to overcome." Respondent's Brief at 16.

66. Solutions to the evidentiary problems created by criminal prosecutions may not, unfortunately, have any effect on the condition of Minnesota's abused children. Although convictions for child abuse will now be easier to obtain, the value to society of criminal prosecutions for child abuse has been questioned. Several commentators have suggested that criminal courts are the least desirable forum for protecting children's safety. For example, Professor Burke states:

> For a variety of reasons, the criminal courts are not favored as judicial forums for decisions of this kind. First, resort to the criminal courts to adjudicate cases of

the hazard of allowing battered child syndrome testimony to prejudice the jury against a particular defendant. The court continues to require a complete chain of evidence showing that a defendant had exclusive control over the abused child during several episodes of abuse including the final injury. Thus, the court has controlled the use of a powerful form of circumstantial evidence—expert testimony identifying "battered child syndrome."[67]

Torts—MINNESOTA'S "NEW TORT": INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS—*Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983).

> The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability.[1]

These words have been prophetic, particularly in the area of the law allowing recovery for emotional distress.[2] The movement toward recognition of the independent tort of intentional infliction of emotional distress[3] has been slow but relentless.[4] In light of this trend, the Minnesota Supreme Court finally joined the majority of jurisdictions recognizing the "new tort" of intentional infliction of emotional distress.[5]

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child abuse is not encouraged because of the higher level of proof demanded under the rules of criminal law and procedure than in either the juvenile or family courts. Second, the prosecutor must also cope with the requisite level of intent demanded as an element of the alleged crime.

Burke, *supra* note 2, at 3 (legal system must protect child without unnecessary disruption of family); Comment, *supra* note 31, at 258 (other forums desirable because criminal prosecution exacerbates existing family problems).

67. For further reading and an excellent bibliography on the battered child syndrome, see 2 AM. JUR. P.O.F.2D 87-90 (Supp. 1982).

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1. Note, *Torts—Intentional Infliction of Mental Suffering—A New Tort,* 22 MINN. L. REV. 1030, 1031 (1938) (quoting 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 470 (9th ed. 1912)); *see also* Handford, *Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort,* 8 ANGLO-AM. L. REV. 1 (1979) ("[T]he tort of Intentional Infliction of Mental Distress now flourishes in the United States.").

2. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12 (4th ed. 1971) (background case progression indicating movement toward expansion of intentional infliction of emotional distress).

3. Hereinafter referred to as the "new tort."

4. Numerous jurisdictions have adopted the *Restatement* formulation of the tort. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1977); *see also* Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct,* 82 COLUM. L. REV. 42, 43 n.9 (1982). *See generally* W. PROSSER, *supra* note 2, at 49-50 ("[T]he law is clearly in a process of growth, the ultimate limits of which cannot as yet be determined.").

5. Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428 (Minn. 1983).