CHILD SEXUAL ABUSE AND THE COURTS: THE MESSAGE FROM CUSTODY AND ACCESS CASES. AN OLD LIGHT ON A NEW PROBLEM?

by Frank Bates*

Two recent decisions of the English Court of Appeal - *Re R (A Minor) (Child Abuse: Access)*[1] and *S v S (Child Abuse: Access)*[2] - raise the issue of if, and when, access should be awarded to parents who are found to have sexually abused their children. It is the purpose of this article to examine these cases and others for their broader implications for Australia and elsewhere. At the outset, it must be said that the discussion which follows extends far beyond the limited question of whether custody or access should be granted in such cases. The issues which are generated by these cases, and those which touch upon them, are fundamental to the litigation process as a whole and give rise to central matters concerned with the law of evidence. As regards Australia, it seems clear that the apparent presumption in favour of access appeared to have been well established even prior to the *Family Law Act* 1975: thus, in the case of *Melean v Melean*[3] access was granted to a father, who had been convicted of sodomy and sexual offences against young girls, in respect of his six year old daughter. However, it must be said that the offences had not been committed on the child in question and the order was made subject to stringent conditions.[4] Quite apart from these obvious distinctions, it may now be that other developments[5] and general awareness[6] have overtaken the *Melean* decision.

In *Re R* the child had been born as the result of a casual relationship between her mother, a single woman, and a much older man who had been married for twenty years and continued to live with his wife and children. The child saw the father regularly and frequently remained in his home overnight. The child showed signs of disturbance and the

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1 [1988] 1 FLR 206.

2 [1988] 1 FLR 213.

3 [1964] NSWR 633. For comment on this, and other pre-*Family Law Act* cases, see F Bates, 'The Problem of Access' (1974) 48 *ALJ* 339.

4 Access was granted once a month on the condition that the child should be accompanied by one of the father's parents.

5 See, for an introductory comment, R S and C H Kempe, *Child Abuse* (1978) at 60 *ff.*

6 For a general survey of case law and literature, see S Maidment, *Child Custody and Divorce* (1984) at 321 *ff.*

mother began to suspect that the father had been sexually abusing her.[7] The child was then medically examined and, in consequence, the police arrested the father, although, ultimately, no further proceedings were taken against him. Thereafter, the mother denied the father access and sought legal custody. The father, who strongly and repeatedly denied the allegations, also claimed custody but later, on advice, only sought access. The trial judge accepted the mother's version of events as against the father's and found, on the balance of probabilities, that there had been sexual interference by the father, but, nonetheless, granted him supervised access four times annually on the basis, *inter alia*, that it was important for the child to maintain contact with her father. The mother successfully appealed.

The arguments on both sides were predictable: on behalf of the mother it was argued that the child had never been part of any family unit involving the father[8], that there was no effective alternative explanation for the child's medical condition other than sexual abuse and, finally, in Stephen Brown LJ's own words[9],

> ... the access ordered by the judge could only be artificial - always supervised and only on four occasions a year.

On behalf of the father, it was argued that the blood tie continued to be of importance since, as Stephen Brown LJ described[10] the submission,

> Little children when they grow up in cases where they are in what is sometimes described as a broken home tend to show interest in the identity of their parents. They naturally enquire who their father is.

Stephen Brown LJ did not regard that as a matter which could be weighted in any real sense against the risks that the child would run if contact with the father were to be continued. The judge, having examined various welfare reports, concluded that the evidence showed that the mother was, '... caring and competent ...' and that the child was, '... happy and intelligent ...'. Further, the child did not seem to have suffered any lasting damage from her experiences.[11] All in all, Stephen Brown LJ considered that the case represented a serious situation which had been brought about by the father and was,

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[7] It might properly be asked what the father's wife's role was in the proceedings, but, at the relevant time, she was, unknown to the mother, visiting relatives in the West Indies.

[8] It appeared from the judgment of Stephen Brown LJ, [1988] 1 FLR 206 at 210, that the father had had children by yet another woman who was living as part of his conjugal family group.

[9] [1988] 1 FLR 206 at 210.

[10] *Ibid.*

[11] Although Stephen Brown LJ, *ibid*, accepted a suggestion made on behalf of the mother that it was difficult to be sure that some psychological damage had not occurred.

> ... of a nature that should lead the court to take the view that the extreme step of withdrawing all access should be taken.

More particularly, Stephen Brown LJ emphasised[12] that *Re R* was not a case which fell within the ambit of the principles enunciated by the House of Lords in the leading case of *G v G (Minors: Custody Appeal)*[13]. There, Lord Fraser, with whom the remainder of the court agreed, had stated[14] that appeals in custody cases, or in other cases concerning the welfare of children, were not subject to special rules. Even if the appellate court would have preferred a different conclusion, it must leave the decision at first instance undisturbed unless it could say that the decision was wrong.[15] Lord Fraser said,

> The reason for the limited role of the Court of Appeal in custody cases is not that such appeals are subject to any special rules, but that there are often two or more possible decisions, any one of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong.

In *Re R* Stephen Brown LJ took the view[16] that the judge had plainly erred in the exercise of his discretion. It may be that any distinction between *Re R* and *G v G* is more apparent than real, as Lord Fraser had specifically noted[17] that there were some cases where the Court of Appeal could conclude that a trial judge had reached the wrong conclusion and, in such cases, it was the duty of the appellate body to substitute its own decision. After referring to various formulae which had been attempted in various courts, Lord Fraser commented that all of them had been used,

> ... in order to emphasise the point that the appellate Court should only interfere when they consider that the judge at first instance has not merely preferred an imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.

Given the inherently serious nature of the father's conduct in *R*, the Court of Appeal's decision could fit easily into the framework described by Lord Fraser.

Balcombe LJ, agreeing with Stephen Brown LJ, noted[18], as might have been expected, that the trial judge had had the opportunity of observing

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[12] *Ibid.*

[13] [1985] FLR 894.

[14] *Ibid* at 898.

[15] See *Clarke-Hunt v Newcombe* (1983) 13 Fam.Law 20 at 20 *per* Cumming-Bruce LJ.

[16] [1988] 1 FLR 206 at 210.

[17] [1985] FLR 894 at 899.

[18] [1988] 1 FLR 206 at 210.

the parties in the process of their giving evidence and was thus entitled to prefer the account presented by the mother to that of the father. In addition, Balcombe LJ pointed out that there could be no misunderstanding that the child had made the allegation of sexual abuse. Given those circumstances, Balcombe LJ continued by saying that,

> ... while one can understand any judge dealing with sensitive human relationships of this kind being reluctant to say in so many words that that was his finding it seems to me incontrovertible on the evidence as found by the judge that on the civil version of proof he was accepting that this father had sexually abused this little girl; and indeed that can be the only rational explanation for his requiring that access be supervised in the way that he ordered it to be.

The judge further commented that, in his view, any arguments based on notions of 'blood-tie' and continuing contact were insignificant when compared with the matter of sexual abuse. These comments are important when taken together with Balcombe LJ's subsequent comments on the nature of the access which the trial judge had ordered.[19]

> When one considers the effect that this continued access in all the circumstances could have on the mother and how that could rub off on the child, the answer can only be, it seems to me, that no positive benefit will enure to the child as a result of such limited and artificial access. One can never envisage that access will ever improve so long as the father does not accept what he did, and equally there must come the time when the child will begin to wonder why the access was so artificial, and inevitably the answers would be given, which could well do very severe psychological damage to the child.

In the event, in ordering that the father should not have access to the child, the court made an additional order that, in the words of Stephen Brown LJ[20],

> ... the father should not assault, molest or otherwise interfere with the mother or the minor; he must understand that that means that he must keep away from the minor and not seek her out or even cross the road to see her.

On the general issue of access, *R* is an interesting decision in that it seems to run counter to the prevalent approach in both case law and writings to the effect that access is, in Maidment's words, '... a right or need of the child ...'.[21] There was, of course, no question that the child

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[19] *Ibid* at 211.

[20] *Ibid*.

[21] Supra n 6 at 256.

actively desired to maintain contact with her father and *R* differed from much of the preceding case law in that the parents had never had a formalised or continuing relationship. It may be that cases involving sexual abuse of children might be regarded as a discrete category where access ought, save in the most exceptional circumstance, to be refused and that certainly seemed to be implicit in the judgment of Balcombe LJ. Indeed, Balcombe LJ's emphasis on the direct effect of access on the mother seems to raise a rather new dimension, perhaps redolent of Goldstein, Freud and Solnit's rejection[22] of access *per se*. From an Australian point of view, it should be remembered that the Goldstein, Freud and Solnit formulation had been rejected by Fogerty J[23] as representing an abrogation of the responsibilities of the court.[24]

In *S v S*, the issue was slightly different, involving, *inter alia*, considerations applicable to the *Melean* decision, noted earlier.[25] In *S* the parties had divorced and there were three children of the family, although the eldest girl, aged seven, was the natural child of the mother, but not of the father. The other children, also girls, were aged five and four and were the children of both parties. The father applied for access to the three children following the divorce and, in considering the application, the Recorder found that the eldest girl had been sexually abused over a lengthy period of time by the applicant. However, no such finding was made in respect of the other children. Accordingly, the Recorder refused access to the eldest child, but allowed supervised access to the younger children on an experimental basis. As in *R* the mother appealed successfully to the Court of Appeal.

Fox LJ, with whom Both J agreed, was of the view[26] that the order was wrong in principle and could not be sustained. Because of the fact that the general family circumstances were different in *S* from those in *R*, Fox LJ approached the problem from an appropriately different direction.

> Although [the eldest girl] is in fact a stepchild of the father, all these children have been brought up as a single family, and it is clear that that situation must continue. They are all children of the mother; she has the custody of them, and it is plain that they must continue as hitherto to be a single family and under her sole daily control ...

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[22] J. Goldstein, A. Freud, A.J. Solnit, *Beyond the Best Interests of the Child* (1973) at 116 *ff*.

[23] *In the Marriage of Sampson* (1977) FLC 90-253.

[24] It may also be that the influence of *Beyond the Best Interests of the Child* has, even its own country of origin, been, at best, peripheral, see, R E Crouch, 'Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child' (1979) 13 *Fam L Q* 49.

[25] *Supra* text at n 3.

[26] [1988] 1 FLR 213 at 216.

This comment proved the basis of Fox LJ's later remarks: he, first, queried[27] as to whether the fact that access was permitted in respect of two of the children, but not in respect of the other, could be satisfactorily be explained to them. Second, in consequence, Fox LJ was doubtful as to whether, were the order to be given effect, the children could satisfactorily be brought up as a single family unit. He justified that view on the basis that it was,

> ... very likely to create many tensions and there will be a lack of balance in this family, which may well be exacerbated by the circumstances of the access, since such access must necessarily be constantly supervised which will make it unrelaxed and artificial. In all probability it would have to take place on neutral ground such as a welfare office or the like, which does not encourage an easy exchange or family relationships. There is no possibility of the access taking place in the mother's house. She has flatly refused to allow the father to enter the house, and having regard to the findings of the judge, that is not an attitude which the court would criticise.

Hence, the order made at first instance would not be in the interest of the children and the family group, and was not a practical way of dealing with the matter.

S, thus, reinforces the earlier decision in *R* relating to access in cases involving sexual abuse. Although the refusal of access in such cases may run counter to more generally prevailing notions[28], the rejection of supervision in such cases may have much to commend it. Quite apart from the telling point made in *S* by Fox LJ regarding the wholly artificial nature of the conduct of such access orders, other considerations may be raised which are just as important and still more general in their applicability. Hence, the Australian writer Goodman[29] has been especially critical of courts seeking to impose conditions on custody and access orders on the grounds that they are likely to exacerbate conflict between the parties and increase the risk of further litigation. These factors are just as relevant to cases such as *R* and *S* - disputes could arise as to the nature and extent of the supervision, the identity of the supervisory body or person and almost anything else. The Court of Appeal is to be commended on grasping this matter in an effective and appropriate manner.

One other matter arises initially out of *Re R* and *S v S*: in both cases, the parent who had apparently been guilty of the abuse (and no further action had seemingly been taken in either case) had vehemently and

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[27] *Ibid* at 217.

[28] *Supra* text at n 21 *ff*.

[29] E Goodman, 'Homosexuality of a Parent: A New Issue in Custody Disputes' (1979) 5 *Monash ULR* 305.

persistently denied any impropriety. It will be remembered that in *R*, Balcombe LJ had noted[30] that the father had refused to accept what he did. Although such denials are to be expected, the matter of evidence and proof are still crucial to ultimate findings, both at first instance and on appeal, on matters of access. In *R*, evidence of the allegations of abuse was represented by acts of unusual behaviour on the part of the child and a medical examination which provided no alternative explanation of the child's physical condition. In *S*, the evidence was rather more ephemeral in that its initial source was a conversation which the eldest child had had with her grandmother at about the time of the child's fifth birthday in which she had made specific allegations concerning herself and one of the younger children. Evidence had also been given by a social worker who had held conversations with the eldest child regarding the issue. In addition, it appeared that the child was deeply emotionally disturbed.

Some of the evidentiary difficulties, arising in a case directly involving access, are illustrated in graphic form by the decision of Hollis J of the Family Division of the High Court in *C v C (Child Abuse: Evidence)*.[31] There, the husband had applied, in divorce proceedings, for access to his two children and a third child who was a child of the family. There had been difficulties over previous arrangements for access because the mother believed that the father had sexually abused one of the children (a daughter of his, who was five years old at the time of the hearing). The child in question had been physically examined, but no evidence of sexual interference had been found. When the father heard that the mother had alleged that he had sexually abused his daughter, he saw his own doctor and reported the matter to the police.

Further developments occurred when the child's stepmother discovered the child to have a mild vaginal discharge which was diagnosed as a minor infection frequently connected with juvenile sexual activity. This was a generally common condition and confirmed in the child's case by her own mother. Again, so far as the doctor could see, there was no evidence of sexual abuse. The mother then saw a health visitor, who referred the child to a sexual abuse clinic, where the child attended a 'diagnostic interview' at the clinic, where she was spoken to by a consultant psychiatrist and a psychiatric social worker. The interview lasted two hours and took place in the presence of the mother, one of the other children and the health visitor. At the start of the interview, while the daughter was playing with toys, the consultant psychiatrist and the psychiatric social worker discussed the allegations of sexual abuse with the mother and the health visitor. It appeared to the interviewers that the girl and the other child were listening closely to the discussions of the adults. At the subsequent hearing, the psychiatrist made a formal report to the court stating that the girl was able to show that the father had attempted to penetrate her vaginally and had had oral sexual intercourse with her.

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[30] *Supra* text at n 19.

[31] [1987] 1 FLR 331.

An earlier letter from the consultant psychiatrist to the health visitor had referred to full penetration having taken place. Although a video recording had been made of the diagnostic interview, it was somehow erased before it could be presented to the court. Further, a transcript of the interview was not taken and the consultant psychiatrist's notes had been lost. If all that were not bad enough, prior to its erasure, the video had been seen by another consultant psychiatrist who had made a number of criticisms of the interview technique and who reported to the court that, in his opinion, the interview was not psychiatric evidence by the child which indicated that she had been sexually assaulted by the father. There was additional medical evidence put to the court that the diagnosed vaginal infection was not evidence of sexual misconduct.

Not altogether surprisingly, Hollis J made trenchant criticisms of the entire procedure and allowed access by the father on terms to be agreed between the parties and the Official Solicitor. After discussing the facts which had been outlined above, Hollis J turned his attention[32] to the diagnostic interview, to which he attached no evidential weight.

> The inferences drawn by the interviewers were probably and almost certainly wrong. From the father's own conduct when he first knew what was said against him, going to see his own doctor and indeed the police and indeed from [the child's] attitude to him, it is most unlikely in my view that anything in the slightest way improper took place between them. It of course remains a possibility, because one simply cannot disprove with entire certainty such an allegation once it is made.

On the particular issue of the weight to be attached to such interviews, Hollis J referred to two earlier decisions of the Family Division which had considered the procedure. In both *Re E (A Minor (Child Abuse: Evidence)*[33] and *Re N (Minors) (Child Abuse: Evidence)*[34], considerable disquiet had been expressed by Ewbank J and Swinton-Thomas J, respectively, regarding the procedure. In *Re E*, Ewbank J had noted[35] that there had been no legal argument regarding the evidential standing of the video recording of the interview as it had been admitted by consent. The judge expressed doubts as to its evidential standing and even more doubt as to its evidential value.

> Of course, I remind myself that it is not intended to have evidential value; it is for clinical purposes and not ... with a view to evidence.

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[32] *Ibid* at 328.

[33] [1987] 1 FLR 269.

[34] [1987] 1 FLR 280.

[35] [1987] 1 FLR 269 at 278.

On the conduct of the interview itself, Ewbank J had earlier commented[36] that he had a clear impression that,

> ... the form of interview has built into it preconceptions, particularly the preconception that sexual abuse is likely to have taken place. Maybe that is necessary. It is not, of course, a very satisfactory preconception when the matter comes to court.[37]

A similar view was taken by Swinton-Thomas J in *Re N*[38], who considered that it was inevitable that a court would be slow to act upon conclusions which were based, to a large extent, on answers given by a small child in response to direct and leading questions which,

> ... certainly strongly suggest that they require particular answers from the child. As is seen in the recording on the video, the questions involve direct, leading and suggestive questions. That is to say, questions which suggest to the child the answers.

As regards the techniques used at the child abuse clinic, the judge noted that they were deliberately rigorous with a view to persuading reluctant children to tell interviewers about the abuse which they were thought to have suffered. The team at the clinic, he mentioned, carried out two functions; first, the treatment of sexually abused children and, where possible, their families. Second, the team exercised a diagnostic function, but, in that area, the technique used in the clinic was, to a degree, at an experimental stage. Nonetheless, Swinton-Thomas J emphasised that none of his remarks were to be taken as criticisms of either the social worker involved in *Re N* or the staff of the clinic. Later in his judgment, however, Swinton-Thomas J commented[39] that the procedures involved considerable pressure being brought to bear upon the child. It was claimed, on behalf of the clinic, that such a course was necessary in order to match the trauma which the child had suffered as a consequence of the abuse.

> The object is to get children to talk about what has happened, and that is, of course, very laudable. However, there must, in my view, using that technique, be a very real risk that the child will say that something has occurred which has not ... and as at the moment I must have some reservations as to whether the technique of interviewing children does necessarily elicit the truth.

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[36] *Ibid* at 276.

[37] In addition, there was other expert evidence which had expressed, to a greater or lesser degree, dissatisfaction with the conduct of the interview.

[38] [1987] 1 FLR 280 at 283.

[39] *Ibid* at 286.

In *C v C*, Hollis J adopted[40] all of the comments referred to except that he considered that Swinton-Thomas J had been too generous in his approach towards the utility and advisability of the procedures used by the child abuse clinic, particularly insofar as the techniques were supposed to assist the children. Given that general observation, Hollis J's comments, on the facts of *C*, were predictable and, given the wholly unsatisfactory quality of the evidence presented to the court, worthy of very serious consideration by courts and by appropriate welfare organisations, not only in England but in Australia and elsewhere. On the facts of *C v C*, Hollis J was strongly of the view that the interview had done assessable damage, in that it had confirmed in the mother's mind that the father had been guilty of the acts alleged against his daughter. Indeed, the judge regarded the process as having damaged the relationship between the child and her mother.[41] Ultimately, the judge stated that he was,

> ... by no means satisfied that such diagnostic interviews are in the best interests of any child, except possibly where the sexual abuse has already been proved. It may then be a relief ... to get it off his or her chest and then steps can be taken to help the child and treat the child for the damage that has been done.

Hollis J continued by saying that, in cases such as the present, where it had not been proved whether sexual abuse had taken place, he was not persuaded that the interviews were in the child's best interests. However, he stated, if they were to be persisted in,

> ... there should certainly be no preliminary discussion of the allegations in front of the child concerned. The complaining parent, or other complainant should ... be present during the interview for obvious reasons. The use of hypothetical, and indeed leading questions should not if possible be used. Although I accept that it may be necessary from time to time.[42]

These cases, and others which touch upon them, are of very considerable global significance. Quite apart from the judicial criticism of the techniques used by the child abuse clinic, two academic commentators,

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[40] [1987] 1 FLR 321 at 330.

[41] Hollis J, *ibid*, also referred to an expert witness who had expressed the view he would not want any child of his to be subjected to that kind of interview. Hollis J added, 'I should think not'.

[42] Hollis J, *ibid*, was also critical of the use of sexually explicit dolls and was particularly disturbed to hear from an expert witness that their use was common throughout England and that they were sometimes used by people who were wholly unqualified to use them. See also *Re W (Minors) (Child Abuse Evidence)* [1987] 1 FLR 297 at 301 *per* Waite J for comment on the way in which dolls had been used.

Douglas and Willmore, adopt[43] the approach of Hollis J in *C v C* when they write that,

> These clinical interviews should only be arranged after careful thought, from a lawyer's point of view. Once such an interview has taken place any further discussions with the child are suspect, as it then becomes difficult to tell whether the child is recalling what actually happened, what happened in the interview, or some compromise of memory between the two ...'

These commentators regard the technique as limited in its effectiveness and are of the view that it will never be useful in establishing allegations dependent on specific instances of abuse. Douglas and Willmore note that the interview is not designed to be conducted with the rigour of a police interview, in that dates and locations are not regarded as relevant to clinical requirements and, indeed, might detract from the overall aim of the interview. Further, as Douglas and Willmore properly point out, young children are likely to be unreliable on such specific issues. In fact, it may be that Douglas and Willmore do not go far enough; the facts in *C v C* suggest that in one, at least crucial case the procedures were not carried out with even minimal care. Erasure of video tapes[44], failure to take a useful transcript and loss of notes are, to put it mildly, inexcusable. In Australia, where the issue of child sexual abuse has not been the subject of curial scrutiny to the same extent as in England, the importance of workers keeping contemporaneous notes in a general context was emphasised by Wood SJ in the case of *In the Marriage of Hogue and Haines*.[45] In the event, Douglas and Willmore adopt a sensible and practical approach, saying that, until the techniques which were discussed in the cases were more widely accepted, lawyers involved at an early stage on behalf of a child should consider a more conventional interview prior to the diagnostic session. It should also be added, especially in view of the facts in *C v C* that the utility and desirability of subjecting a five year old child to an interview of two hours duration is, at the very least, questionable. In Australia, the misuse of clinical procedures had been noted by Street CJ of the Supreme Court of New South Wales in the important case of *Epperson v Dampney*.[46] Whilst the present writer is in no way unsympathetic towards the use of modern psychological and medical techniques in the investigation of child sexual

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[43] G Douglas and C Willmore, 'Diagnostic Interviews as Evidence in Cases of Child Abuse' (1987) 17 *Family Law* 151 at 154.

[44] Douglas and Willmore, *ibid*. emphasise the importance of a recording being placed before the court, who can then evaluate the particular interview. 'It will' they write, 'never replace other evidence, but should be seen as one piece of evidence to be considered alongside other evidence.'

[45] (1980) FLC 90-809 at 75,100. For general comment on the attitude of the courts towards evidence by social workers in Australia, see F Bates, 'The Social Worker as Expert Witness in Australian Family Law' (1982) 56 *ALJ* 330.

[46] (1976) 10 ALR 227 at 230.

abuse, he must reiterate the view expressed in an earlier article[47] that traditional means and practices of evidence law are far from irrelevant in this new and, inevitably, contentious area. Finally, after a detailed analysis of the diagnostic techniques under scrutiny in the cases, a medical commentator, Vizard, has urged[48] caution in making a diagnosis of sexual abuse in very young children and also the need for specific training both for lawyers and psychiatrists.

As might be expected, England has produced most of the case law - indeed, it would have been surprising had it been otherwise, given the various *causes celebres* which have occurred in that jurisdiction. These seem now to be never ending, though numerous instances of, often fatal, child abuse and an apparently documented tendency of courts to award access to fathers of ex-nuptial children where there has been little or no contact between father and children.[49] This, it seems to me, is not merely a quaint, but a potentially catastrophic paradox.

The issue has arisen in Australia in relation to a custody determination in *In the Marriage of B*[50], which involved an appeal to the Full Court of the Family Court of Australia by a mother against an award of custody of the daughter of the marriage to the father, although with joint guardianship to both parties.[51] The relevant facts were that the parties had married in January 1980, the child being born in December 1980. In 1983, the parties separated, when the wife went to live with Mr H, a married man, whom she subsequently married towards the end of 1985. There were two daughter's of Mr H's first marriage, who were in the custody of his former wife. Before the wife left the matrimonial home, the parties had agreed that they would share the custody of the daughter, the intention being that she would stay with her father but that her mother would have very liberal overnight access. This arrangement continued until early 1985, when Mrs H made an allegation to the Department of Youth and Community Services of the State of New South Wales that Mr H had sexually abused his older daughter. When this was discovered by the husband, he immediately applied to the Family Court to limit the wife's access and, in February 1985, some overnight access was resumed by consent.

The husband, rather earlier, had begun proceedings for custody and guardianship of his daughter and, at the hearing of those proceedings, an officer of the Department of Youth and Community Services had produced the departmental files on Mr H's two children in court. There

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47 F Bates, 'Some Recent Evidentiary Developments in Australian Family Law' (1987) 61 *ALJ* 271 at 280.

48 E Vizard, 'Interviewing Young Sexually Abused Children - Assessment Techniques' (1987) 17 *Family Law* 28 at 33.

49 See P Toynbee, 'The Ties that Bind' *The Guardian* April 28th 1988.

50 (1987) FLC 91-855.

51 See *Family Law Act* 1975 s 63E.

was considerable argument as to the admissibility of the files[52], the husband seeking to tender the files through the officer and the wife strongly objecting to such tender. At first instance, Purdy J permitted the tender of the entire files, but later conceded that he had been error, in that he ought to have required counsel for the husband to tender each individual document on which he sought to rely. The judge then went on to quote extensively from the file relating to the elder daughter and concluded that, on the balance of probabilities, Mr H had not sexually abused his daughter. However, at the same time, he refused to conclude that unlimited contact between Mr H and the parties' daughter was totally without risk and ordered accordingly.

The wife's appeal was based on four major grounds: first, that the trial judge had brought about a substantial miscarriage of the conduct of the proceedings by admitting the entire files of the state department and, then, in effect, reversing himself. Second, that the trial judge had brought about a miscarriage of the proceedings by regarding particular parts of the files as admissible and, in consequence, relying on them. Third, that the judge had erred in holding that selected parts of the files were admissible. fourth, and most important for the purposes of this article, the wife argued that Purdy J had fallen into error by concluding that, although it appeared that Mr H was innocent in respect of the allegations of sexual abuse, it was not without risk to the parties' daughter for unlimited contact to be maintained between her and Mr H. In the event, the Full Court remitted the case for rehearing.

On the issue of the admissibility of the files, the Full Court[53] took the view[54] that the relevant legislation[55] made it inappropriate for the files to be admitted as a whole. As the court properly pointed out,

> They consisted of statements made by different people, for different purposes and on different occasions. Each document, and possibly each statement would need to be considered to see if it was a statement of a fact of which evidence was admissible.

Quite apart from the fragmented nature of the legislation, this statement is clearly correct as a description of the contents of the files in question; such files, given the nature of social work practice and of the proceedings themselves, are most unlikely to be systematic statements of the specific issue involved in *B* alone.[56]

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[52] See Commonwealth *Evidence Act* 1905 s 7B.

[53] Evatt CJ, Ellis and Murray JJ.

[54] (1987) FLC 91-855 at 74, 460.

[55] *Supra* n 52.

[56] The court (1987) FLC 91-855 at 74, 460 went on to say that had the trial judge gone no further than reversing his findings and made no reference to the contents of the files thereafter, no substantial miscarriage of justice would have occurred; see *In the Marriage of Bowron* (1982) FLC 91-270 at 77,513 *per* Baker J. Such, however, was not the case in *B*.

The second response by the court to the wife's arguments was, of course, connected with the first. The problem, as the court noted[57], was that the trial judge had not given counsel (in particular, counsel for the wife) the opportunity to address him on the admissibility, or otherwise, of the various statements. The Full Court stated,

> Each party has a right to be heard before a ruling is made affecting that party's rights. If [the judge] had given that opportunity, particular issues relating to the admissibility of the files or parts of them might have been raised. Moreover either counsel might have sought the opportunity of cross-examining any of the persons making the allegedly admissible statements comprised in the files of those persons from whose statements the statements in the files were derived.

Again, this is a basic issue, to which consideration had earlier been given by Australian Courts[58] in relation to family law matters. Cross-examination is a central method of testing the reliability of evidence and litigants who are deprived of the opportunity to test evidence in such a way may feel legitimately aggrieved.

Still more central to the major thrust is the reason why the trial judge elected to act as he did. The Full Court regarded[59] the judge as having acted in that way in order to deal with the allegations of sexual abuse made against Mr H in respect of a child who was not, in fact, the subject of any dispute before the court. That course of action was, their Honours considered, inappropriate. In particular, it was not appropriate,

> ... to make a finding, whether on the balance of probabilities or otherwise, as to the guilt or innocence of Mr H of the offences alleged ... without the testing of all the admissible relevant evidence from the files or without hearing from all of the caregivers of [the child] ...

The court continued by saying that acting in any other way might be unsafe and unsatisfactory for the parties and could prolong and confuse the proceedings, the primary goal of which was the protection and welfare of the child. The court took the emphatic view that,

> If the Court has before it evidence which gives rise to a reasonable belief that there is a risk to the child, then, whether or not an allegation can be proved, it must act to protect the child.

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[57] *Ibid* at 74,460.

[58] See *In the Marriage of Harris* (1977) FLC 90-276 at 76,473 *per* Fogarty J; *In the Marriage of M* (1978) FLC 90-429 at 77,182 *per* Marshall J *cf In the Marriage of McKee* (1977) FLC 90-258 at 76,383 *per* Wood J.

[59] (1987) FLC 91-855 at 76,462.

The Full Court appreciated the dilemma in which the trial judge found himself: the point, of course, being that, if a caregiver who is not a party is to be assessed by the court, and allegations against that party are of a serious nature (such as child sexual abuse), then the requirement of the welfare of the child makes it desirable that the allegations be investigated so as to establish the degree of risk. It followed that the party associated with a caregiver in such circumstances was likely to feel at a great disadvantage if the allegation is not resolved by judicial determination as allegations of child sexual abuse are easily made, but less easy to prove or disprove. Nonetheless, the court emphasised that it was the primary duty of courts to protect children from risk, rather than make findings of guilt or otherwise. Finally, the court suggested[60], albeit specifically *obiter*, that one way of resolving the problem was by the appointment of a separate representative under s 65 of the *Family Law Act*, who could monitor negotiations for consent orders, as had happened earlier in the proceedings in *B*. Such a course would enable the court to have some assurance that its order, even though a consent order, was consonant with the welfare of the child.

Although this last suggestion is eminently sensible, *B* is not, as the Full Court itself admitted, without disquieting features. Although one must accept that the protection of the child is to be the major aim of the legislation and judicial scrutiny[61], some assessment must also be made of the truth of the allegation. By using the concept of *risk*, the Full Court seem to have independently adopted an approach similar to the English Court of Appeal.[62] In other words, an allegation of child sexual abuse is enough to put the child at risk and for the court to fashion orders accordingly. The dangers will be readily apparent: false, or at least, irreponsible allegations are not unknown in Australian family law[63] and the risk of disadvantage to a party or to a child is clearly present. Thus, a party who may not be an especially satisfactory parent may attempt to redress the balance by making an allegation of child sexual abuse against the other party or, more likely, the other party's partner. Arndt, in a newspaper article[64], has noted that, in the United States, such allegations are powerful weapons against divorced fathers and, in consequence, courts, in attempting to protect the child, appear to assume the father's

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[60] *Ibid* at 76,463.

[61] The Full Court noted, *ibid* at 76,463, that investigation was not confined to the Family Court. 'These investigations' they said, 'sometimes take place in criminal or child protection proceedings but if the police or child protection authorities take no steps to bring the matter to other courts, one or other party may choose the Family Court as a venue to determine the truth of the allegation.'

[62] *Supra* text at nn 21, 28.

[63] See *In the Marriage of E (No 2)* (1979) FLC 90-645. For comment, see F Bates, 'Custody Disputes Between Parents and Non-Parents: Recent Developments in Australia and Canada' (1981) 11 *Manitoba LJ* 303.

[64] B. Arndt, 'Being a Father is not Child's Play' *Sydney Sun Herald* January 24th 1988.

guilt.[65] Similar considerations are applicable to step-parents. Thus, although the way in which the trial judge acted in *B* was not appropriate, it is fair to conclude that the exoneration of Mr H was of some relevance to his capacity as caregiver.

In reaching the conclusion that the court was unequivocally not required to make findings exculpating individuals, the Full Court referred to their previous decision in *In the Marriage of M.*[66] This case involved an appeal by a husband against an order granting him daytime supervised access to his five year old daughter. The parties had married in 1978 and separated in 1985, the wife having been married previously. The three children from that previous marriage lived with the parties. There was one child of the marriage, with whom the present proceedings were concerned. The wife's objection to overnight access was based on an affidavit of her daughter, who was aged 17 at the time of the hearing, in which she alleged incidents of sexual molestation during a period between 1982 and 1985. At first instance, the husband was permitted to cross-examine the daughter, but the husband instructed counsel not to do so, although he denied all of the allegations which were contained in the affidavit. The trial judge, Rourke J, found that the sleeping arrangements provided for the child of the marriage during access raised a reasonable suspicion of impropriety and that the husband had, '... a proven propensity for sexually molesting young girls'. The husband unsuccessfully sought to introduce fresh evidence[67] and claimed, likewise unsuccessfully, that the family report was not given to him and had been misused by the court. On the major issue, the Full Court dismissed the husband's appeal, Evatt CJ stating[68] that,

> ... it was not necessary for his Honour to make a positive finding of fact in relation to the allegations in order to determine the issues before him... The Court was entitled in my opinion, to conclude that there was an element of risk in allowing unrestricted access to the husband, even if it had taken the view that it could not conclude that there had been any actual impropriety in relation to the child ...

Nygh J pointed, as the Full Court had done in *B*[69], to the dilemma[70] faced by the trial judge. On the one hand, the trial judge, Rourke J was faced with sworn evidence by the husband, which counsel for the wife, in

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[65] For a specific instance, see L Spiegel, *A Question of Innocence* (1987).

[66] (1987) FLC 91-830.

[67] The Full Court of the Family Court of Australia, Evatt CJ, Nygh and Kay JJ, held that the power to receive fresh evidence under s 93(2) of the *Family Law Act* would only be exercised where the evidence was not reasonably available at the hearing. The husband had been given the opportunity to cross-examine the wife's daughter at the time of the hearing but had not done so. See generally *Mulholland v Mitchell* [1971] AC 66.

[68] (1987) FLC 91-830 at 76,240.

[69] *Supra* text at n 60.

[70] (1987) FLC 91-830 at 76,241.

the proceedings before the Full Court, conceded did not disclose any inherent basis for disbelief. In addition, Nygh J seemed to regard the husband's unwillingness to submit his step-daughter to cross-examination as operating in his favour. Nygh J agreed with Evatt CJ that it was unnecessary, at least at the present stage, to come to any findings of fact.

> 'Indeed, I would find it most difficult to understand how many positive findings one way or the other could have been made ...

One matter of especial interest, given the thrust of this article, was the reliance by both Evatt CJ and Nygh J on the decision of Anderson J of the Supreme Court of Victoria in *A v A*[71], a case which was decided[72] before the Family Law Act came into force. Specifically, Evatt CJ adopted[73] the *dictum* of Anderson J[74] that,

> In this present matter, however, the issue is not whether or not the father has been guilty of a serious criminal offence. What has to be determined is what is the appropriate order to make in the interests of the child. It is not necessary, before this court makes an order adverse to the father, that it shall have been proved beyond reasonable doubt that he was guilty of the misconduct alleged.

Similarly, Nygh J adopted[75] a later view expressed by Anderson J[76] that,

> I stress again that the making of the orders which I shall shortly make is not to be taken as a definite finding of fact by me as to the allegations against the father, and if there are at some future time further proceedings directed at modifying the orders I shall have made, it should not be argued that I found adversely to the father so far as the allegations were concerned. But just as it would be a terrible thing to make a positive finding of guilt when the evidence was insufficient for that purpose, so it would be equally terrible to create a situation of risk for a child when the evidence justified the suspicions reasonable engendered in this case.

Nygh J regarded those comments as being of direct application to the case at hand, but then went on to refer to a further comment[77] of Anderson J in *A v A* that,

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71 [1976] VR 298.
72 14th - 17th October 1975.
73 (1987) FLC 91-830 at 76,240.
74 [1976] VR 298 at 299.
75 (1987) FLC 91-830 at 76,242.
76 [1976] VR 298 at 300.
77 *Ibid* at 301.

> In the present case, with adequate safeguards, occasions may arise when the irksome presence of third parties may be waived, and indeed, when the child is some years older, the restrictions now to be imposed might be well modified or removed completely. They will always be irksome to the father, and are not imposed and should not be used, or thought to be designed, to punish or humiliate the father.

These references to the decision in *A v A* are of interest because, first, there seemed to be some disagreement between Evatt CJ and Nygh J as to which *dictum* should be emphasised. Further, some concern must be expressed regarding the relationship between the two cases. In *A v A*, Anderson J was at pains to point out that he did not reject the evidence of the child's family even though it was wholly circumstantial. Yet, in his Honour's own words[78],

> Some of the matters on which the witnesses based their suspicions were equivocal, when considered *in vacuo*, and some, indeed, in any event. There were also, as I have said, exaggerations; but I do not think that four people, though related to each other and hostile to the father, have conspired to concoct the evidence they gave. It may well be that their fears and suspicions were unjustified, but I share their disquiet, having heard them and seen them cross-examined. I am satisfied that what they have said is substantially true, though in some cases, as I have said, I think there have been exaggerations and there has been, likewise, in respect of some of the incidents, undue anxiety expressed.

Put another way, the evidence was open to, at least, some question.

The pattern of the Australian cases is, thus far, similar to the pattern of those in England, in that the courts will restrict access, or prohibit it altogether, if the allegations of child sexual abuse appear to put the child at any perceptible degree of risk. The reasons for this course are clear - as can be seen from the English cases - since the courts seem to be unhappy with the methods hitherto used to establish such allegations. It may be that Australian courts are less sceptical of the kind of evidence which has been criticised by the courts in England, although it would be wrong to attempt to draw too many global conclusions at this stage. The decision of Legoe J of the Supreme court of South Australia in *Pierce v Minister of Community Welfare*[79] is not, unlike the previous cases, directly concerned with litigation between parents, but it casts light on the problem generally. In *Pierce*, the South Australian Minister of Community Welfare had made an application to the Children's Court that a child, L, was in need of care having suffered mental or physical injury by

[78] *Ibid* at 299.

[79] (1988) 27 A Crim R 119.

maltreatment by a guardian.[80] A previous application had been made in respect of another child, N, who was L's brother. These proceedings were an appeal against the making of a declaration in respect of L. The evidence was that L and N were both children of Mr and Mrs P, who were separated. Although Mrs P had legal custody of the children, L actually lived with Mr P, whilst N lived with the wife and her *de facto* husband. During May and June 1987, L was twice admitted to hospital and, in July, Mrs P resumed care of L, who was diagnosed as having been sexually abused. L and N were then placed in foster care. It was conceded that, whatever the situation in respect of L, Mr P could not have abused N. There was evidence as to L's physical condition, evidence from a psychiatrist who had examined L and evidence that she had identified Mr P as her abuser. The magistrate made orders in respect of both L and N, finding that L had been sexually abused by Mr P and that N had been abused physically, and possibly sexually, by someone other than Mr P. Mr P appealed.

Legoe J heard that the Minister had established on the balance of probabilities, as was required by the Act[81] that the statutory requirements[82] had been made out. In particular, the judge noted[83] that,

> The material put before the court included reports of examinations and interviews with the child (and sometimes a parent or foster parent or relative being present at the time), and other passages of evidence which contain some statements which could be classified as 'hearsay' if the normal rules of evidence applied. It is basic forensic common sense that a court hearing an application should be able to inform itself about the physical and mental well-being of the child by using all the techniques and procedures which present day medical science can make available without the further restrictions of technical rules of evidence.

This is the proper approach, being both consonant with the legislation and practice in the area generally; but it must be borne in mind that the proceedings were different from those before the Family Court in that it was necessary, in the *Pierce* case, for the court to make a finding on the basis of a statutorily specified standard of proof. The evidence seems, at the same time, to have been very much stronger than in *B* and rather stronger than in *M*.

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80 See *Children's Protection and Young Offenders Act* 1979 s 12(1)(a).

81 *Ibid* s 17(2). Although the legislation also provides that the court is not bound by the rules of evidence, '... but may inform itself upon any matter relating to the proceedings in such manner as the court thinks fit'. *Ibid* s 17(1).

82 *Supra* n 80.

83 (1988) 27 A Crim R 119 at 133.

More specifically, Legoe J referred[84] to evidence given by a psychiatrist who has used anatomically correct dolls in her examination of the child. The judge considered that the medical practitioner had carried out her examination, '... in a conventional and appropriate manner'. Legoe J continued by saying that,

> By using dolls to illustrate the 'experiences' (if any) the doctor was engaged in an exercise which clearly has some probative value if it is conducted by a medical practitioner who has experience in that type of exercise. I cannot close my eyes to the fact that in many criminal trials such material is admitted as circumstantial. Once admitted the tribunal of fact (the jury in a criminal trial) can use that circumstantial material to the extent that it considers proved by those circumstances. Just as the police trainer of a tracking dog (usually an Alsatian) can give evidence recounting the reactions of a dog at a scene of a crime, and further explain from his training and experience what the dog's movements and reactions indicate ... so too can the experienced doctor, doing examinations and making reports on those examinations in a child sexual abuse centre, recount and explain the reactions of a child to the dolls (usually male and female).

This statement runs directly contrary to many of the observations made in the English courts in the cases discussed earlier.[85] Legoe J's acceptance of the procedure is effectively uncritical, even though he refers to 'experienced' medical practitioners. Lack of experience in the use of these devices is one of the specific criticisms made of English practice.[86] According to Arndt[87], in the United States, similar considerations are applicable in that evidence is frequently based on reports by so-called 'validators', who are individuals who claim expertise in the area of child sexual abuse, but whose qualifications, in too many cases, are distinctly dubious. All of this suggests that considerable care should be taken to ensure that such interviews with children are properly conducted by appropriately experienced and qualified individuals. Disasters such as those in *C*[88] must be avoided both for the protection of adults and children and to ensure that any value which such procedures could have will not be undermined.

The recent Canadian cases have concerned more traditional areas of evidence law but have tended, once again, to rehearse aspects of the English and Australian cases, particularly as they relate to the uncertainty which surrounds evidence law generally and child sexual abuse. Thus, in

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84 *Ibid* at 134.

85 *Supra* text at n 31 *ff*.

86 *Supra* n 42.

87 *Supra* n 60.

88 *Supra* text at n 31.

C R K v G F K and Minister of Social Services[89], the mother of the child, in custody proceedings, applied for an order denying the father access. The order was granted on the interim basis primarily because of an affidavit by the mother suggesting that there may have been sexual abuse of the child. A social worker with the Department of Social Services agreed with the mother and told her not to grant access. When the interim order was made, a further order was made that the social worker give information to the father. The Minister of Social Services was subsequently added as a party at his own request without, in the words of Gerwing JA[90], 'any directions to clarify the terms of, or reason for, his intervention'. The judge continued by making the opposite comment that,

> It is difficult of course to follow the usual time-tested procedures in a courtroom where the position and interest of one of the parties is unclear, and where no provision is made for pleading or its equivalent or for the manner of providing or eliciting information.

The trial judge had indicated his dissatisfaction with the information which the Department of Social Services was providing, and ordered that all of the relevant files be provided. Counsel for the Minister then argued that the Minister's consent was not required when the Department was a party. The file was ultimately produced and shown to the expert witnesses. The Minister appealed unsuccessfully to the Saskatchewan Court of Appeal against the order for production. The Court of Appeal[91] accepted a privilege had been created but it had been waived by counsel when he had said that ministerial consent was not necessary and by producing the files themselves. As Gerwing JA later stated[92],

> In the circumstances, it would be artificial to pretend that all counsel and the court are not fully aware of the contents of these files. The position of the minister's counsel implies, if not expressly gives, the permission of the minister to the disclosure; the disclosure has had its effect; and it is now too late for the minister to claim a privilege which, in the circumstances, is if not wholly at least virtually academic.

In the general context of this article, *C R K* is of interest because it points to, as was the case in the Australian decision in *B*[93], the uncertainty which is demonstrated by the legal process towards administrative files containing information regarding child sexual abuse. It is, of course, impossible to tell from the report as to how far the future claim was based on the contents of the files and how much on administrative territoriality. Nevertheless, *B* and *C R K* do demonstrate a disquieting uncertainty

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89 (1987) 5 RFL (3d) 433.

90 *Ibid* at 435.

91 Tallis, Cameron and Gerwing JJ A.

92 (1987) 5 RFL (3d) at 439.

93 *Supra* text at n 53.

which, when taken together with other evidentiary difficulties, needs to be resolved.

The role of the Minister of Social Services for Saskatchewan was also, though rather less controversially, in issue in *Minister of Social Services of Saskatchewan v A J and C J*[94], which was also a decision of the Saskatchewan Court of Appeal. *A J* has features in common with the English case of *Re R*[95], particularly as regards the attitude of the parents. The facts of *A J* were that, in January 1986, a trial judge had found that the children had been sexually abused by their parents, declared them to be in need of protection and committed them to the care of the Minister of Social Services for a temporary period ending in June 1986. The children were placed in the care of their paternal aunt and adjusted to their new home and environment quickly and well. The parents, however, refused to admit that the children had been sexually abused and, in consequence, it was impossible for counselling services, made available by the Minister, to help alleviate conditions in the parents' home. The parents also paid regular supervised visits to their children. At a further hearing in October 1986, the judge found that the children were in need of further protection, but ordered that the children be returned to their parents under the supervision of the Minister for a period of one year. The Minister successfully appealed.

After a detailed analysis of the evidence, Sherstobitoff JA, with whom Vancise JA concurred, noted[96] that the relevant legislation[97] provided that a judge might impose conditions when an order is made that children remain with, or be returned to, their parents under departmental supervision. On the other hand, the legislation did not specify what was required of the parents of the children or, indeed, of the Department of Social Services when the children were placed in the care of the Minister. Although the legislation[98] provided that a committal made the Minister the legal guardian of the child, it did not confer any power on the Minister to require the parents to do anything! That unsatisfactory state of affairs notwithstanding, Sherstobitoff JA continued by saying that certain matters were self-evident:

> Where, as here, children have been placed into the temporary custody of the minister, and the parents wish to have the children returned to them, they must make efforts to improve or remove the conditions or circumstances in the home which have resulted in the children being taken from the parents. Furthermore, there is a responsibility on the minister, as the legal guardian of the children, to ensure, before consent to return of the children to the parents,

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[94] (1987) 10 RFL (3d) 69.

[95] *Supra* text at n 19.

[96] (1987) 10 RFL (3d) 69 at 76.

[97] *Family Services Act* 1978 s 29.

[98] *Ibid* s 43.

> that conditions have changed to a degree that the children are no longer in need of protection ... In order to achieve this end, the department should give directions to the parents in order to assist them in achieving conditions which would permit return of their children, and to let the parents know what is expected of them.

The judge then went on to detail the unfortunate relationship which had developed between the parents and the various government instrumentalities. The Minister had directed the parents (in fact, it was the only direction given to the parents at all) to attend counselling at a particular clinic; however, the clinic refused to see the parents because they maintained that, in the absence of an admission of sexual abuse, counselling would be valueless. Sherstobitoff JA was critical of that general approach when he said[99] that,

> The parents have maintained their position throughout and their sense of grievance and persecution is almost palpable. The situation was characterized at the hearing of the appeal as an omnipotent, all pervasive government saying to the helpless parents, 'admit the guilt that you continue to deny or you will never have your children back'. This plays upon the inherent aversion that any person trained in law has to any form of governmental pressure upon a person to incriminate himself.

Nevertheless, that general position was modified by the fact that there had been two separate findings of child sexual abuse committed by the parents. In those circumstances it was reasonable for the Minister to insist upon counselling, whatever conditions might be attached by the counselling authority.

Sherstobitoff JA went on to comment, that, given the finding that sexual abuse had occurred,

> ... continued denial of it by the parents, whether because they see nothing wrong with their conduct or whether because they think denial will permit them to escape the consequences, leads to the irresistible conclusion that the sexual abuse or related serious problems will probably recur if the children are returned to their parents. It must be remembered that the problem goes beyond actual sexual abuse. There are the problems which gave rise to the abuse. There are the problems consequent upon the abuse. There are also the problems flowing from the fact that the children informed the authorities of the abuse ...

Hence, given that the parents and children would have ultimately to deal with the problem and that departmental supervision would not necessarily

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[99] (1987) 10 RFL (3d) 69 at 77.

protect the children from abuse, it was contrary to the evidence and to common-sense for the children to be returned to their parents.[100]

Wakeling JA took up[101] the point made by Sherstobitoff JA regarding the relationship between the parents and the counselling authority.[102] This judge began by accepting the principle that the interests of the children were paramount, but was less willing to accept the view that those interests could only be assured by,

> ... a parental confession of weakness and psychiatric treatment for the confessed weaknesses. It seems to me that, if this posture is insisted upon, the parents could easily confess just because it is insisted upon, get on with whatever the confession requires by way of treatment, and end up being no different in their approach to sexuality than they were before it all happened. This makes me question what assurance of adequate protection for the children is provided by the insistence upon a confession of guilt.

Wakeling JA was uncertain[103] as to the most appropriate solution but was reluctant to have assistance predicated on confession, so that any further hearing ought fully to canvass precisely how essential it was for the courts to endorse such a policy. The courts, the judge continued,

> ... somehow avoid this approach with criminal offenders by assuming punishment is a positive force to change the attitude of the person convicted, but in this case the prospect that punishment may be an effective deterrent seems to have been inadequately canvassed.[104]

A J is an interesting and important case which illustrates the tensions which exist between those trained in the law and those trained in other disciplines which deal with child sexual abuse and related matters. In too many areas, legal and social work practice are in conflict at a basal level.

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[100] Sherstobitoff JA also *ibid* at 78, considered that the trial judge had erred in taking the motives of the parents in account. 'The motivation was irrelevant, '... because the effect on the children, in the circumstances of this case, is clearly the same in either case. The result of returning the children to the care of their parents would also be the same. The fundamental concern must be the health and emotional welfare of the children rather than the motivation behind the conduct of the parents'.

[101] *Ibid* at 70.

[102] *Supra* text at n 99.

[103] (1987) 10 RFL (3d) 69 at 71.

[104] Wakeling JA disagreed, *ibid* at 70, with Sherstobitoff JA that the parent's motives were irrelevant and wondered whether it was, '... not possible these parents have only been, as the trial judge said, guilty of mindless vulgarity and not ingrained sexual deviance. Could it not be that they now see that punishment has been visited upon them for failure to follow accepted social norms and, having been so punished by the loss of their children, are very unlikely to repeat these or similar actions in the future?'

To take up the situation in *A J* the law properly treats confessions and admissions with care[105], whilst the counselling authority regarded such admissions as a prerequisite to effective treatment. This situation is, of course, nothing new in the general area: McClean, for instance, has noted[106] the different attitudes of the lawyer and social worker towards the maintenance of registers of children 'at risk' of child abuse.[107]

> The lawyer recognises a crucial distinction between facts that can be proved and allegations that cannot; he may even give too much weight to it, but the experience of the law teaches that is the right direction in which to err.

Although the various cases from the various jurisdictions which have been discussed in this article tend to demonstrate a flexible approach to the formal rules of evidence, that may not inevitably be the position. In *Children's Aid Society of Hamilton - Wentworth v D M and C M*[108], the children in question were found, in July 1983, to be in need of care and protection as a result of the parent's substandard level of care. No allegations of sexual abuse were made at that point. In October 1983, the children were ordered to be returned to the parents under a supervision order, but, in March 1984, the children were apprehended because of suspicion of child abuse. At a status review hearing, the trial judge considered the allegations of sexual abuse and asked questions of the witnesses testifying on that issue. In granting a temporary wardship order in favour of the Children's Aid Society, rather than Crown wardship, the trial judge stated that he was not satisfied that either parent was directly involved in sexual activity with the children. The society again sought Crown wardship and attempted to introduce evidence of sexual abuse during the time period which had been investigated in the previous hearing. The parents objected to the introduction of that evidence on the basis of *res judicata* or issue estoppel. Steinberg UFCJ of the Ontario Unified Family Court sustained the parent's objection and ruled the evidence inadmissible.

Steinberg UFCJ, having decided that[109] the children were subject to the evidentiary rules of *res judicata* and issue estoppel, turned his attention to the argument that estoppels did not bind the court where it had an

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[105] For general Commentory, see D M Byrne and J D Heydon *Cross on Evidence* (3rd Aust Ed 1986) at 825 *ff*.

[106] J D McClean, 'The Battered Baby and the Limits of the Law' (1978) 5 *Monash U L R* 1 at 11.

[107] *Ibid* at 12.

[108] (1987) 10 R F L (3d) 57.

[109] *Ibid* at 75. His Honour justified that finding by referring to s 39(6) of the Ontario *Child and Family Services Act* 1984 which provides that, 'A child who is an applicant [for status review] receives notice of a proceeding under this part or has legal representation in a proceeding is entitled to participate in the proceeding and to appeal ... as if he or she were a party'.

obligation to enquire into the facts of a case. After an analysis of the authorities[110], his Honour concluded that, in cases such as the present, the *res judicata* and issue estoppel rules were, 'perhaps broader than in more traditional adversarial cases'. However, the judge took the view[111] that any judicial discretion to modify the operation of those rules should be exercised in accordance with three general principles: first, whether there had been a full and frank disclosure in the previous litigation. Second, the hardship which the respondents might have to face in relitigating the issue and, third, the general nature of any fresh evidence which was sought to be introduced. On the facts of *D M*, Steinberg UFCJ commented that the trial judge had conducted a full and proper inquiry into the allegations of sexual abuse and was of the opinion that it would be unfair to require the respondents to relitigate an issue which had arisen over three years earlier and where there was no significant fresh evidence. Although the judge might have been correct, the decision tends to beg the question as to when the doctrines ought not to be applied and certain of the earlier proceedings in the case give rise to some disquiet. Even though the society's initial application for status review was not well drafted[112], the society had sufficient evidence to name names and connect them with particular events and one expert witness had suggested[113] that the children's sexual behaviour seemed to contain, '... elements to it that suggested education ...' One should not, given all of this, ignore Hubbard's comment[114], made about *res judicata* and issue estoppel as long ago as 1972, that,

> ... the implications of existing jurisprudence respecting circumstances yet to come before the courts, are such as to merit careful consideration with a view to their possible elimination in the resolution of family conflicts.

The law, as disclosed by these cases from three jurisdictions is vague and unsatisfactory. It may be that the state of affairs is inevitable given the relatively recent awareness of the phenomenon of child sexual abuse and in view of the general public abhorrence with which it is justifiably

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110 See *Thompson v Thompson* [1957] P.19; *Childrens' Aid Society of Ottawa v G M* (1978) 87 DLR (3d) 572; *Upper v Upper* [1933] 1 DLR 244 and, particularly, *Gordon v Gordon* (1981) 23 RFL (2d) 266. There, Morden JA of the Ontario Court of Appeal had said, at 271, that, 'A custody case, where the best interest of the child is the only issue, is not the same as ordinary litigation and requires, in our view, that the person conducting the hearing take a more active role than he ordinarily would take in the conduct of a trial. Generally, he should do what he reasonably can to see to it that his decision will be based upon the most relevant and helpful information available. It is not necessary for us to go into details.'

111 (1987) 10 RFL (3d) 57 at 68.

112 *Ibid* at 59.

113 *Ibid* at 60.

114 H A Hubbard, '*Res Judicata* in Matrimonial Causes' in *Studies in Canadian Family Law* (1972 Ed Mendes da Costa) 694 at 755.

regarded. One immediate and obvious reaction is, that the law of evidence as it has presently developed[115], is inadequate to deal with the issue of child sexual abuse, especially because of the age and inexperience of the victims, who will most often be the only witnesses. In litigation between parents, the courts seem to have resolved the question by using the criterion of risk, as represented by an allegation (of greater or lesser credibility) of sexual abuse, to determine matters of custody and access against the party against whom the allegation is made. The reasons for adopting that course are apparent from the decisions themselves - namely, that the function of that area of legal activity is to protect children, rather than attribute blame - but, as the passage from McClean quoted earlier[116] emphasises, that is not a situation with which lawyers ought to feel happy.

At the same time, new methods of proving matters are continually coming before the courts, not only in this field[117], and the courts, and lawyers who appear before them, must come to terms with them. In relation to the methods which have been discussed in this paper, the preponderance of judicial opinion has taken the view that care ought to be exercised in accepting some of their conclusions and practices too readily, and support may be found in the writings of one medical commentator.[118] It is suggested that this is the appropriate response, despite a contrary approach to be found in Australian case law.[119] Throughout the English cases, the novelty of the techniques was emphasised as well as the fact that they are not usually used with litigation in mind. Furthermore, general evidentiary considerations are not without relevance; although, in family law proceedings, the strict rules of evidence are treated flexibly, experience in other related areas has shown that they are far from being irrelevant[120] and that they frequently operate to protect individuals in their personal and familial relationships. It would be unhappily paradoxical if the making of mendacious and unsubstantiable allegations were, because of evidentiary and procedural difficulties, to place the party making them in a more advantageous position than an innocent party against whom they are made.[121] The generally unfortunate position is further demonstrated by the Canadian cases where it can be seen that government departments are unhappy when dealing both with child sexual abuse itself and with its legal aftermath. This is especially unsatisfactory as it will normally be such instrumentalities who will have the immediate responsibility for both diagnostic and therapeutic functions in these cases. One final substantive point should also be made: it will be apparent that

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115 For a comment on the development of the law of evidence and the reasons for it, see P Murphy, *A Practical Approach to Evidence* (1980) at 4 *ff.*

116 *Supra* text at n 107.

117 See, for example, R A Brown, *Documentary Evidence in Australia* (1988).

118 *Supra* n 48.

119 *Supra* n 84.

120 See F Bates, 'Aspects of Evidence in Australian Social Security Proceedings' [1987] *Civil Justice Q* 108.

121 See, for example, J Renvoize, *Children in Danger* (Rev Ed 1975) at 91.

no mention has been made in any of the cases of the notion of corroboration. It may be that the courts have not considered it because it will normally not have been available and it will certainly not be easy to find it in any of the usual forms. At the same time, if assessment of the truth of allegations is to be made, corroboration may be of some, though probably limited, assistance. Although the Australian Law Reform Commission has recommended the abolition of existing corroboration requirements, the present writer, albeit in a different context, has argued that, in at least some circumstances, corroboration can provide a necessary safeguard.

It is, thus, clear that much remains to be done, but, for once at least, the primary responsibility is not the lawyer's. New forms of clinical procedures, developed perhaps from those which have been discussed, must be devised which are acceptable both in clinical terms and to the law and which properly protect the interest of both the children and people associated with them. Co-operation between disciplines is, therefore, of the essence and, although it may have been hard to achieve in the past[124]

> ... there are professional barriers to overcome, and disciplines have their own languages and styles of debate which need much translation; but the rewards are considerable.

It is, therefore, from the point of view of a legal writer, disturbing that a recent Australian book on child sexual abuse concludes[125] by saying that,

> Parents, teachers, health and welfare workers can all work together to help children protect themselves from child sexual abuse ... child sexual abuse is a problem which can be solved.

Why, one is forced to ask, does the lawyer not figure?

To conclude on a more general note: it would be struthious indeed were we not to recognise that the whole area is shot through with contradictions and inconsistencies. Thus, although the inquiry into the, now notorious, Cleveland child sexual abuse crisis conducted by Butler-Sloss LJ found that Australian paediatrician Dr Marietta Higgs and her colleague Dr Geoffrey Wyatt had been guilty of 'overzealousness'[126], it was also clear that some children had, indeed, been abused. Appalling

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[122] Australian Law Reform Commission, *Evidence* (Report No. 26, 1985), Vol 1 at 560.

[123] F Bates, 'Recent Cases on Corroboration' (1987) 11 *Criminal LJ* 357 at 378.

[124] *Supra* n 106 at 15.

[125] F Briggs, *Child Sexual Abuse: Confronting the Problem* (1986) at 91.

[126] For a useful commentary on the matter, see Y Preston, 'The Child-Care Workers Who Went Much Too Far' *Sydney Morning Herald*, July 8th 1988. See B M Mitchells, 'Moving on From Cleveland' (1988) 28 *Sol J* 1015.

instances, including a three-year-old girl suffering from gonorrhoea[127] were discovered. At the same time, it is equally clear that the method of diagnosis generally used by Dr Higgs and Dr Wyatt was, of itself, inadequate. This test, the Reflex Anal Dilation test, had, until then, been largely used in the examination of male homosexuals. Considerable doubt had been expressed as to the utility of the process in the area of child sexual abuse by Dr Alistair Irvine, a local police surgeon, and the report of the Butler-Sloss inquiry stated that the test could not, on its own, be relied upon as an indicator of sexual abuse. Thus, it does seem that much needs to be done in the clinical area at large.

But, equally, there are conceptual issues to be faced. No less an international figure than Dr Germaine Greer has involved herself in the controversy and refers[128] to,

> ... gangs of zealots with hideous dolls ... creating mass hysteria in our primary schools.

Greer's hyperbole notwithstanding, she makes one point, at least, which is worthy of very serious consideration.

> If the Cleveland report means that children will be afraid of what might happen if they were to climb into daddy's bed, or if daddy bathed them ... then the quality of life endured by British children will deteriorate even further.

To this point can be added the present writer's concern that men may be discouraged from seeking employment in the welfare area because of the possibility of unfounded allegations of sexual misconduct being made against them.[129]

There is one still more important issue raised by the instances discussed throughout this article: recent history has seen some landmark decisions concerned with the nature of the parent and child relationship - *Gillick v West Norfolk and Wisbech Area Health Authority*[130] is one immediate example. As a result of the Cleveland incident, Britain has seen the rise of parents' rights groups, one such being the Cleveland based

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[127] An additional instance, quoted *ibid*, concerns a 14 year old girl, a suspected victim of child abuse, who was allowed to return to her family. Her father raped and murdered her, murdered her mother and then hanged himself. That incident did not take place in Cleveland but in Leeds.

[128] Quoted in the *Sydney Sun Herald* July 10th 1988.

[129] In this context, reference, perhaps, should be made to a columnist in the London *Daily Express*, quoted *supra* n 126, who has described child sexual abuse as, '... a battlefield over which militant feminists who believe all men to be evil, fight their Waterloos'.

[130] [1985] 3 All ER 402. For commend, see J M Eekelaar, 'The Emergence of Children's Rights' (1986) 6 *Oxford J Legal S* 161.

action group *Parents Against Injustice* (PAIN).[131] The history of the parent-child relationship has generally been the history of the weakening of parental authority[132] and the recognition of the rights of children. It would be sadly ironic were a crisis such as Cleveland to undermine that central development. Despite deficiencies in clinical practice, it is clearly the duty of the law to protect children from vicious and, indeed, eccentric parental behaviour[133] and a vociferous parents' rights movement could well call even that moderate statement into question. One way of attempting to ensure that such movements do not gain too much ground is to clarify the evidentiary processes leading up to findings that a child has been sexually abused. Put another way, assumptions of the truth of allegations and insufficiently critical use of scarcely proven medical techniques do neither children, parents nor the legal process any good whatsoever.

[131] In the Cleveland case, quoted *supra* n 126, a father who had sexually abused his six-year-old mentally retarded son had managed to join that particular group, had spoken at its meetings and had his case taken up by a local member of parliament. His children are now, thankfully, wards of court and he is prohibited from seeing them.

[132] See *J C Hall, 'The Waning of Parental Rights'* (1972) 31B *CLJ* 248; F Bates, 'Re-defining the Parent/Child Relationship: A Blueprint' (1977) 12 *UWALR* 518.

[133] For an example of the latter, see *Re D J M S (A Minor)* [1977] 3 All ER 582.