

ABSTRACT OF FAMILY COURT AND CHILD ABUSE BY STEPHEN PAGE

The Family Court deals with sexual abuse allegations on a daily basis. Stephen explores the cascading test employed by the Family Court in dealing with sexual abuse allegations, including dealing with a number of case examples.

Stephen Page

Stephen Page is a dedicated family law specialist. Stephen:

- Is one of only approximately 100 Queensland Law Society approved accredited family law specialists in the whole of Queensland.
- Was admitted as a solicitor to the Supreme Court of Queensland in 1987.
- Was also admitted as a solicitor to the High Court of Australia in 1989.
- Has practised solely in family law since shortly after his admission.
- Has handled most types of family law cases including:
 - property settlement;
 - residence;
 - contact;
 - child support;
 - child abduction;
 - Hague convention;
 - care and protection;
 - adoption;
 - sexual abuse; and
 - domestic violence.
- Has extensive experience in the Family Court, especially in cases involving sexual abuse and domestic violence whether they relate to children or property matters.
- Has a strong belief in the use of mediation when appropriate and as part of that:
 - has been on Legal Aid Queensland conference chairperson panel since 1991;
 - has been a Queensland Law Society approved mediator since 1996;
 - complies with the Family Law regulations as to a family law mediator;
 - has been a member for some years of Relationships Australia (Qld) including the chairperson of its Mount Gravatt Committee since 1996 and currently an executive committee member for Relationships Australia (Qld).

- does not believe that mediation is appropriate to deal with issues of domestic violence or sexual abuse and is very wary about recommending clients to attend mediation when there are domestic violence and sexual abuse issues.
- Is committed to tackling the issue of domestic violence in our community. As part of this:
 - Stephen's sub-specialty within family law is that of domestic violence cases including related issues to do with children, property settlement, spousal maintenance and child support;
 - has regularly appeared on applications for protection orders;
 - can empathise with survivors of domestic violence;
 - has delivered various papers to community groups about domestic violence and family law issues including "GP's and Domestic Violence" and attending the National Domestic Violence conference "Beyond the Barriers, Improving Legal Responses to Domestic Violence", delivering paper at "Beyond the Barriers" (1999) "Benefits/Difficulties in Obtaining a Protection Order"; delivering paper at "Seeking Solutions": Australia's Inaugural Domestic Violence Sexual Assault Conference (2001) "Family Court and Child Abuse:; delivering paper at "Men's Issue Community Forum" (2001) "Issues of Domestic Violence and Family Law".
 - is an occasional lecturer at Griffith University on domestic violence issues;
 - has been a co-founder of a domestic violence service;
 - has been a management committee member and chairperson of a refuge;
 - is a committee member of a court assistance program for women survivors of domestic violence;
 - is a member of a Domestic Violence Resource Centre.
 - is on the referrals list of Womens' Legal Service.
- Stephen is strongly committed to access for justice for all and equality for all before the law. As part of this, Stephen is currently a member of the GLWA.

- has undertaken domestic violence training for LGBT Police Liaison Officer Trainees and training Gay and Lesbian Welfare Association Counsellors about domestic violence issues.

Stephen has a unique insight into domestic violence arising from his legal practice including:

- Has acted against the president of an outlaw bikie gang involving issues of severe domestic violence.
- Has obtained witnesses to give unique evidence in Queensland about research on domestic violence issues.
- Has been an aggrieved person named on a protection order, been the target of intimidation and harassment by the respondent spouse and been cross examined by the respondent spouse in that domestic violence case for four hours in what became Queensland's longest domestic violence trial (seven days).
- Stephen has an attitude that domestic violence and sexual abuse are fundamentally wrong and that those who have survived the violence and abuse should have the full protection of the law and other safety systems of our society to ensure that it does not happen again.
- Stephen has acted for men and women in straight relationships who have survived domestic violence from their partners and has also acted for lesbians, gay men, bisexual and transgendered people ;who have survived domestic violence.
- Has assisted Queensland Association Gay and Lesbian Rights in drafting legislation to ensure that property law reforms and domestic violence law reforms covered LGBT people.

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THE FAMILY COURT AND CHILD ABUSE

by STEPHEN PAGE

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In terms of a legal response, child abuse, especially sexual child abuse, can be a very difficult matter for the Family Court of Australia or the Federal Magistrates Service to determine. A reference to Family Court in the title is also to the Federal Magistrates Service. In this paper I will be focussing on child sexual abuse.

WHY?

Child sexual abuse has a number of taboos.

1. SECRECY

Most, if not all, people know that it is immoral, improper and against the law to sexually abuse a child. It is, except in some subcultures within our society, considered to be a shameful act and for the perpetrator, if discovered, the removal of the object of his or her pleasure, the child, there is always the consequences of discovery. It is therefore a secret.

How often have we seen perpetrators threaten their victims with punishment or retaliation if discovered and emphasise to the victim the secrecy of the encounter?

Because it is a **secret** act and is therefore often capable of being denied, it is therefore easier for the perpetrator to deny the existence of any such child abuse.

2. CHILDREN AS PART OF FAMILIES

Child abuse allegations in the Family Court, as one would expect, typically involve members of family, whether extended or nuclear. From my experience, it is very rare indeed for allegations to be made in the Family Court of non-familial child abuse.

3. CHILDREN

Children by their nature are younger, more impressionable about the world, more naive, less cognitively developed than adults, loving of the adults in their lives and therefore as a general rule more vulnerable to being sexually abused than adults.

In terms of issue of proof of the allegations, often the most difficult cases to deal with involve the youngest children (i.e. preschool and younger), simply because they are considered to be more impressionable, less cognitively developed and less accurate therefore in their recollection of events.

Because the alleged perpetrator in these cases is a member of the family, then the chances of a child making full disclosure of being sexually abused one would expect to be considerably lower, than if the child had been sexually abused by a stranger.

4. CORRELATION OF DOMESTIC VIOLENCE AND SEXUAL ABUSE

No doubt there will be experts at this conference presenting papers about the high correlation between these two issues. What I have seen regularly is that when allegations of sexual abuse are made then commonly (though not always) they are made in the circumstances of allegations of domestic violence also being made; in circumstances where it is alleged in effect that there are multiple abuses occurring. Because of these circumstances of multiple abuses and domestic violence at times this can cause even greater difficulty in determining the truth or otherwise of the sexual abuse.

Typically the alleged perpetrator will deny the allegations of sexual abuse and domestic violence and the other abuses. Sometimes the alleged perpetrator will admit but in a minimal form that domestic violence has occurred and usually deny abuse allegations relating to the children.

5. PHYSICAL/OTHER PROOF

All too often, as one only has to attend a District Court on a daily or almost daily basis, it would appear that the most common form of child sexual abuse is what is called in Queensland “indecent dealing” i.e. touching, groping, feeling, without penetrative acts.

So far as penetrative acts on children of the anus and vagina are concerned, (from what I have seen of experts giving evidence) ordinarily these are easily able to be corroborated medically.

The difficulty comes when penetrative acts of the anus and vagina are not alleged. Justice Fogarty (albeit in a despatching judgment) in N and S and the Separate Representative (1996) FLC 92-655 gave a long but useful discussion about sexual abuse matters. At page 82,709 and 82,710 His Honour states:

“Sexual abuse of a young child by a parent or care-giver or other person associated with that household is so alien to the concepts and actions of most people in the community that there is an understandable resistance to accepting that it may or does occur. Regrettably, the actuality is otherwise.

(His Honour then goes on to cite statistics and comparative overseas cases....)

Courts must be aware that the occurrence of sexual abuse is not confined to certain socio-economic groups, and that its perpetrators are not easily

identifiable. Experience shows that there is nothing incongruous about a sexual abuser being otherwise widely respected and admired by his or her peers or community... It is difficult to overstate the importance of protecting children from sexual abuse, and from the consequences which often flow from sexual abuse. Sexual abuse involves the most severe exploitation of children, the most serious invasion of their rights to personal integrity and freedom, and a most serious denial of their rights to personal growth and development. Its effects, both in the short and long-term, can be devastating...where a child has been sexually abused by a parent, that fact will have an enormous impact on any decision that must be made by a Court regarding the welfare of that child, and involving the parents. However, in reality, there are only a limited number of cases in which a Court will be able to say with certainty that the allegations of sexual abuse are true. Most fall within...the “grey area in which a confident conclusion cannot be reached either way”. Often there will be limited evidence of the sort which those in the legal profession are accustomed to recognising as prohibitive of the occurrence of an event. The secrecy which usually surrounds sexual abuse, the nature of the offences which it involves, and the nature of the relationship between the perpetrator and the child, all militate against the furnishing of the type of evidence with which lawyers like to work. Of course, the lack of that type of evidence may say less about whether an alleged event did or did not occur than it says about the inappropriateness of the legal concepts used to test the allegations, especially in the context of a case which centres on the welfare of the child.”

In [1993] NZFLR SvS 657 at p.659 Justice Thomas of the New Zealand High Court (referred to in N and S and the Separate Representative stated:

“Allegations in custody and access cases where a child has been sexually abused are not uncommon. They pose an acute problem for the Courts simply because of the difficulty of determining whether the sexual abuse has taken place. This is particularly so in the case of pre-school children. Such children are not likely to be able to provide a coherent account of what, if anything, has happened. In the result, the allegations frequently are neither conclusively proved nor disproved.

In the state of uncertainty which results, it would be easy for the Courts to find that the allegations of sexual abuse have not been established to the requisite standard of proof and dismiss them from contention. But to make that finding and no more may result in the child being exposed to an unacceptable risk of being sexually abused while in custody or during access visits. Having regard to the fact that the child’s welfare is the first and paramount consideration to be taken into account by the Courts that risk clearly cannot be accepted. The ordinary evidential rules governing the proof of matters in issue in civil cases can be seen at once to be appropriate.

The Courts dilemma was graphically described by Hardie Boys J in Gooch v Gooch (High Court, Christchurch M156/82, 22 April 1983). The Learned Judge said (at p28):

“It would of course be a terrible thing for the children if I were to entirely reject their allegations and order their lives on the basis that there was no substance in them and yet in fact for them to be true.”

At page 660 Justice Thomas continued:

“The immaturity of the child is not the only problem in cases such as this. Difficulties also arise because the allegations were made in the context of a custody or access dispute. Generally speaking and it is the case here, the mother who suspects the child is being sexually abused voices her concern and reports the perceived disclosures that have been made to her by the child to the authorities and the Family Court. Her account is at once seen as ‘allegations’ or an ‘accusation’ of sexual abuse and her motives are viewed with suspicion. It is suspected that she is seeking to discredit the father and so advance her claim to custody or to restrict the father’s access. Her credibility is put squarely in issue. Although the mother may do no more than report the unusual behaviour she has witnessed in her child and the perceived disclosures which the child made to her, the somewhat dated aphorism that such allegations are easily made and difficult to refute may still prevail.

The matter is somewhat more complex. The reality is that child sexual abuse is often as difficult to prove as it is difficult to refute. Studies have explored the reasons why allegations of sexual abuse tend to surface in the context of custody or access disputes...at the same time it must be borne in mind that false allegations or total fabrications of child sexual abuse are regarded by many experienced child psychologists and psychiatrists as being somewhat rare...This does not mean, of course, that allegations of sexual abuse are to be approached on the basis that they are true or likely to be true. Indeed, it is recognised that a relatively small but significant percentage are likely to be false. The point merely serves to demonstrate the difficulty of reaching a firm conclusion as to whether sexual abuse has or has not occurred and the necessity to proceed with great care and caution before either finding that such allegations have been established or finding that they are without foundation. The Court’s concern must be to adopt an approach which will be just and which will place the welfare of the child ahead of all other considerations.”

As Justice Fogarty went on to say in N and S and the Separate Representative (1996) at p.82,711:

“(C)ourts must be aware that not all allegations of sexual abuse are true. False allegations may be made either by parents acting in good faith, as a result of a misperception of information about their child, or by parents deliberately

fabricating allegations in order to gain an advantage in proceedings. Ambiguous events often have an innocent explanation.

Those latter factors give rise to concerns about the ‘rights’ of the parent and the suggestion that allegations of sexual abuse only have to be made for those rights to be lost or unfairly compromised. The Courts have to be vigilant about this, but in the ultimate the only issue is the welfare and protection of the child.

The overall problem is accentuated by the circumstance that, in general, lawyers and judges do not have a specialised understanding of the intricacies of child psychology and development. In addition these cases must ultimately be conducted within a legal framework with resort to familiar legal terms, concepts and attitudes. That the fact that the concept of justice thus involved is inexplicably linked with those legal concepts and attitudes represents a problem in cases of this type which is difficult to articulate or compensate for.

On the other side of the equation the great benefits that can be enjoyed by children through contact with both parents, a healthy parent-child relationship can bring to a child a unique richness and warmth of experience which is vitally important to the child’s future development. The forced severing of ties between a child and a non-abusive, loving parent can have profound effects.

This is where the dilemma arises. Does one take the step of terminating or limiting that relationship where one does not know whether the alleged events took place? And how does one sufficiently account for the fact that because of the nature of the offence any real degree of certainty may be impossible to achieve, and that in any event, the ultimate determinant is the welfare of the child?”

6. CORROBORATING EVIDENCE

It is always useful to have corroborating evidence if allegations are being made of child sexual abuse. This evidence can take many forms but can include:

- (i) Interviews for the child or alleged perpetrator by officers of the statutory authority (in Queensland, the Department of Families) or Police.
- (ii) Statements made by the child or others such as parents, relatives, friends, school or doctors.
- (iii) Observations of indicia or possible sexual abuse by others, such as parents, relatives, friends, schools or doctors.

There are always cautions with corroborating evidence other than clear medical evidence. This is because:

- (i) The allegations may be false.
- (ii) Statements of the child taken by the statutory authority and/or police may be unsatisfactory.

- (iii) The child's statements may be ambiguous and the process involved in questioning the child may be flawed.

CASE EXAMPLE

I acted for the father. He was having contact with his daughter when she alleged to him that she had been sexually assaulted by her half brother. The father believed the child's complaint and immediately notified the Department of the complaint and commenced court proceedings for residence. When the mother was served with the father's court material, she immediately complained to the Department that the father had sexually abused the daughter. Approximately one week later a departmental and a police officer interviewed the child at home, the interview being taperecorded but in which questions were fully put. The Department formed the view that the father had sexually interfered with the child. No investigation occurred as to the father's original complaint! The father then received supervised contact although the mother inexplicably sometimes agreed to the father having unsupervised contact and sometimes volunteered that. At the trial, it became apparent that the child had never been sexually interfered with by the father and that the departmental and police interview was in turn fundamentally flawed. Halfway through the trial, the mother agreed to an order that the child reside with the father.

7. CRITICISM OF INDICIA

Whilst indicia like bedwetting, could be indicia of some sexual or other abuse, it is not considered to be proof but merely indicia when one's mind has to remain open to the possibility that what one is observing is not indicia of sexual abuse at all but something that could be completely innocent.

8. POLICE MAY DECIDE NOT TO CHARGE THE ALLEGED PERPETRATOR

If the alleged perpetrator has been charged and is then convicted of the offences it is very easy to prove that there has been child sexual abuse.

If police decide not to charge or proceedings are discontinued or dismissed:

- The alleged perpetrator will present this as a victory for innocence.
- The other party and the court will be left to deal with the possible lack of evidence.

9. FALSE ALLEGATIONS

Various studies have demonstrated that, despite the beliefs of many lawyers, judges and some social services, the propensity of mothers to lie about child abuse in Family Court proceedings for the purpose of denying contact or to obtain residence is no greater than that which occurs in the broader community and is therefore at a low rate. Thea Brown et

al “Child Abuse in the Family Court” (1998) 91 Trends and Issues in Crime and Criminal Justice 1; Marie Hume “Study of Child Sexual Abuse Allegations Within the Family Court of Australia 1995”; Marie Hume “Child Sexual Abuse Allegations In the Family Court 1997”.

Nevertheless false allegations by the father, mother or child do occur and, in the grey area of the law, can be difficult to dispose of

CASE EXAMPLE

The parties separated after their daughter, 10, alleged that the father had sexually assaulted her. The mother was at first shocked and disbelieving that it had occurred, but nevertheless followed through with various protective behaviours, including notifying police and having them interview the child. After Family Court proceedings commenced, a psychologist was called upon to prepare a Family Report. During the course of this he interviewed the girl and formed a very strong view that the child had been sexually interfered with, and that it appeared that the perpetrator was the father. The mother’s reaction was that of shock to discover something which she believed could not be true, appeared to be in fact true and was told to her by an expert i.e. that her husband had sexually assaulted their daughter. The father’s reaction was shock as he always maintained his innocence. Through his solicitors the father sought to obtain his own psychiatric evidence, being a critique of the Family Report. The father’s expert suggested that the process was flawed and that it was incomprehensible that the psychologist had not viewed the videotaped police interview of the girl as it led to grave concerns in the view of that psychiatrist as to whether or not the girl was telling the truth. The psychologist, however, “dug in”, rejecting this approach and formed an even stronger correlation between the father and child for sexual abuse. Many months later, shortly before the matter was listed for hearing, the psychologist on the father's solicitors and experts continued urgings, eventually viewed the videotaped police interview of the girl. When he did so, he formed the view that the allegations might not be true after all and he recommended that the girl be psychiatrically examined as she may have a psychiatric disorder. When the girl then attended an independent child psychiatrist, the diagnosis was that she did indeed have a psychiatric disorder which featured a propensity to tell lies and seek attention. The matter was then settled on the basis that the child had usual contact with her father. Subsequently:

- Because of the child’s ongoing behavioural problems, the parties agreed that the girl should live with her father.
- Both parties looked at suing the psychologist whose recommendation in effect cut off all contact, but luckily for the psychologist a time limit applied and both parties were out of time.

10. THE TEST

The test that the Family Court employs is as follows:

A Section 68F(2).

Section 68F(2) sets out a shopping list of matters as to how a Court determines what is in a child's best interests. Section 68F(2) provides inter alia: *The Court must consider:*

- (g) *The need to protect the child from physical or psychological harm caused, or that may be caused, by:*
 - (i) *Being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or*
 - (ii) *Being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.*
- (i) *Any family violence involving the child or member of the child's family.*

B. Positive Finding of Sexual Abuse.

As Justices Fogarty and May stated in re: C & J (1996) FLC 92-697 at p.83,334

“(In) the cases of this type which go through to trial, the evidence is always conflicting and likely to be less than exact or overwhelming. The nature of sexual abuse is that it is committed in secret. Children are at times regarded as inexact or unreliable witnesses, admissions by an abuser are rare, and often there is an absence of corroborative evidence. Almost by definition, cases which come through to trial and appeal represent the most acute end of that graduating scale. In cases where investigation or other evidence indicate that the allegations are without foundation or they indicate the likelihood that they have validity are likely to fall out of the system at a much earlier point. For those cases which proceed through to trial, the evidence in support of the allegations is often constituted by evidence of the parent by the personal statements made by the child, statements made to subsequent investigating personnel and the opinion of experts.

“So far as the alleged abuser is concerned, it is rare that he or she is able to produce positive evidence negating the allegations. He or she can usually do little more than deny the assertion and make himself or herself available for the inevitable investigation in cross-examination. There is no objective way of identifying a sexual abuser; they come in all shapes and sizes and from all strata of society.

These problems are not unique to Australia. They have been grappled with in most courts of most comparable western countries.”

In M and M (1988) FLC 91-979 at p.77,080-77,081 in a joint judgment Chief Justice Mason, Justices Brennan, Dawson, Toohey & Gaudron of the High Court held:

“In considering an allegation of sexual abuse, the Court should not make a positive finding that the allegation is true unless the Court is so satisfied

according to the civil standard of proof, with due regard to the factors mentioned in Briginshaw -v- Briginshaw (1938) 60 CLR 336 at p.362. There Dixon J said:

“The seriousness of an allegation made, the inherent likelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony or indirect inferences.”

This does not mean that the Court should not invest the allegations even if they be the possible subject of criminal proceedings. In A and A (1998) Fam CA25; FLC 92-800 the Full Court of the Family Court consider the circumstances in which when the children were in contact with their father, the wife was violently assaulted in the home and would be an attempt to murder her. The considered that the husband was the assailant and that there was a risk to the safety of the children if the husband was to continue to have contact. The husband denied any involvement in the assault. The police had extensively investigated the matter but no person was charged with the crime. There was no dispute about the wife’s injuries. They were as follows:

- (i) Left hand side of the head from approximately 3 inches above her left temple across her forehead through the right eye socket extending to below the temple on the right hand side was grossly opened exposing part of the wife’s brain. The frontal skull was fractured with disruption to her front sinus.
- (ii) Her right cheek bone was smashed, also damaging her sinus.
- (iii) A gash running completely across the top of her head approximately an inch behind her hairline above the left eye to above her right eye.
- (iv) A gash of approximately 1 inch on the left hand side of her head forward of her ear.
- (v) Both her eyes were badly beaten and swollen. Both eyes were closed. A haematoma developed protruding from under her right eyelid so that when the swelling subsided the eyeball was distended from the socket outwards towards the wife’s cheekbone.
- (vi) Her face was blackened and swollen down both cheeks and extending under the chin.
- (vii) Approximately two days after the attack, bruising developed at the base of her throat extending both sides of her throat almost to her ears.
- (viii) There was severe bruising to her right shoulder and right upper arm.
- (ix) The second and third fingers on her right hand were broken.
- (x) Bleeding from the vagina. (It was suggested, but objected to, that she had been assaulted in the vaginal area of her body with a blunt instrument..

The wife was of the view that the husband was the perpetrator because, she asserted:

- (i) He admitted that he called at the home that morning to return the lawnmower which he had borrowed from the wife, the previous day. The time of the return of the lawnmower was within the time frame police witnesses asserted that the assault had taken place.
- (ii) He conceded that he had left the children at his residence for a period in excess of half an hour on the occasion that he returned the lawnmower. He could not recollect the route he had taken to and from his home to the former matrimonial home. He conceded he had not left the children alone on any other occasion for more than a few minutes.
- (iii) The husband gave the wife a cheque for child support on the previous day. Following the assault the wife's handbag was taken by the mother and retained until after the wife had been released from hospital. The cheque reappeared approximately two months later in a bowl on the kitchen bench of the former matrimonial home. Although the husband had denied that he had returned the cheque the wife believed that he took it from her handbag at the time of the assault and surreptitiously returned it sometime afterwards.
- (iv) There was no evidence that any doors or windows of the home had been forced or that the property had been damaged or trashed in any way. The window to the child's bedroom was found to be open and the husband conceded that he was aware that the window could not be locked. No evidence was found of any damage having been caused to the property or that its contents had been trashed.
- (v) Following a close inspection of the property following the assault, some items were found to be missing:
 - (a) The wife's diary.
 - (b) The boy's birth certificates
 - (c) 12 photographs of the children.The wife contended that the only person who might have had any interest in those items was the husband. The wife had \$400 in cash in her possession. Neither this nor any other valuables was stolen. The telephone wires had been cut at the junction box. It is asserted that the wires could only have been cut by a person with knowledge of the precise location of the junction box and it was the wife's belief that the husband was that person.
- (vi) The independent psychiatrist gave evidence that the horrendous nature of the injuries inflicted upon the wife suggested to him that the perpetrator was a person filled with a malevolent form of hatred, whose desire was to humiliate and debase his victim and the injuries which the wife suffered were, firstly, an attack upon her body and hence her life, and secondly, the sexual assault was an attack upon her soul.
- (vii) Although the parties were estranged at the time of the assault having separated five months before, nevertheless the husband at no time made any enquiry in relation to the wife's physical condition, or her prognosis. His only concern appears to have been an effort to ascertain whether the wife had been able to report precisely what had occurred at the moment of the assault.
- (viii) The husband inspected the wife's medical records from the hospital at Court though he was not entitled to do so. He also made notes from those records which had more to do with the wife's psychological and/or psychiatric condition and

whether she had been able to recall past events, rather than any prognosis of her medical condition.

- (ix) He admitted he had made a telephone call to another hospital to enquire whether a person who had suffered severe injuries in say, a motor vehicle accident, would have the ability to recall it at some subsequent time, what had occurred.
- (x) Police had found blood on the husband's jogging shoes which had been subjected to forensic tests which were not yet complete. When asked what shoes he was wearing on the day of the assault the husband replied equivocally "probably my masseur shoes".
- (xi) The husband conceded that he had called at the hospital in order to see the Doctor. This was to ascertain whether the injuries his wife had suffered were likely to affect her ability to recall what had occurred. On the occasion in question, the husband gained admission to the brain injury unit at the hospital when he passed through the security door with another family.
- (xii) Although the wife was unable to recall what happened to her on the day of the assault or any statements made in relation to it subsequently, she made the following statements:
 - (a) Miss H arrived at the wife's home in the morning of the assault. Having seen the condition the wife was in, Miss H said to her: "Why did he do it?, what has he done? why did he hit you?" to which the wife replied: "Who?" Miss H then indicated the husband to which the wife replied "No". Miss H said "If he didn't, who did?" to which the wife replied: "He didn't, I fell."
 - (b) Within two days of the incident the wife had told three other witnesses that her husband was the person who had assaulted her.
- (xiii) On the day of the assault one of the children said to another witness "Mummy has sore fingers". This information could only have been gleaned from the husband and would have been communicated by him to the child before his arrest at a time when the husband himself had little knowledge of the wife's injuries and what had caused them.
- (xiv) The husband was aware that the wife's boyfriend was due to arrive from the United States early in the morning of the day of the assault.
- (xv) The investigating police officers have told the wife that the husband is the main and only suspect.
- (xvi) There is evidence that the husband had singled one of the children out during contact and pressured him to make sure that he "tells the truth".

The husband denied the assault and evidence towards such denial included:

- (a) That he had not made any application for residence order since separation until after the assault.
- (b) He was having regular and frequent contact with the children. He had no prior convictions. Finger prints found in the junction box were not his.
- (c) Telephone wires to the house had been cut but the wife had, to his knowledge, a mobile phone.
- (d) The property was remote from its surroundings.

- (e) He was “quite shocked” on being informed of the assault.
- (f) He agreed to an inspection of his home without a warrant and voluntarily provided a blood sample.
- (g) He agreed to be interviewed by the police and no admissions were made by him.
- (h) He was not charged with any offence arising out of the events.
- (i) There was no evidence in the analysis of the blood on the husband’s shoes.

Police declined to answer a number of questions on the grounds it may prejudice their ongoing investigation of this crime.

The Trial Judge said that the hearing had been conducted “by the parties as a criminal trial,being invited to find the husband guilty or innocent of the crime in question.

His Honour went on to say:

“It is not for the Family Court to usurp the role of the criminal authorities and investigate criminal activity, even although such activity may have a direct bearing upon the issues which the Court is called upon to decide and the result which is actually achieved. The danger of adopting such a course may be that if a person were to be found upon the civil standard to be engaged in some criminal activity, the result for him or her may be for example, a complete suspension of contact, or, in the event that such person is found not to be engaged in a criminal activity referred to, then the Order which the Court makes might be as sought by the person alleged to have undertaken the particular criminal activity. Such a course, in my view, is completely unrealistic, and that it ignores completely the provisions of Section 68F of the Family Law Act in general, and the best interests of the children, in particular”

Thankfully, the Full Court criticised that approach and stated at paragraph 3.10:

*“Neither the High Court nor this Court has stated that the Family Court **must not** investigate or form a conclusion about the question whether the respondent committed the acts in question in a case of this type.*

Paragraph 3.22, the Full Court said:

“Whilst it is correct to say that the Family Court is not a Criminal Court, and its primary task is not to determine guilt or innocence, that is entirely different from an approach which declines to examine that issue at all. The whole emphasis of the decision of the High Court in M and M is its identification of the essential issue in cases of this sort as being whether the evidence establishes “a non-acceptable risk”.

UNACCEPTABLE RISK

In M and M, in p. 77-080 the High Court stated:

“The resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the Court’s determination of what is in the best interests of the child. The Family Court’s consideration of the paramount issue which it is enjoined to decide cannot be diverted by the supposed need to arrive at a definitive conclusion on the allegation of sexual abuse. The Family Court’s wide range in discretion decide what is in the child’s best interest cannot be qualified by requiring the Court to try the case as if it were no more than a contest between the parents to be decided solely by reference to the acceptance or rejection of the allegation of sexual abuse on the balance of probabilities.”

At p.77-081 the High Court went on to say:

“No doubt there will be some cases in which the Court is able to come to a positive finding that the allegation is well founded. In all but the most extraordinary cases, that finding will have a decisive impact on the Order to be made respecting custody and access. There will be cases also in which the Court has no hesitation in rejecting the allegation as groundless. Again, in the nature of things there will be very many cases, such as the present case at which the Court cannot confidently make a finding that sexual abuse has taken place and there are strong practical family reasons why the Court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so.

*In resolving the wider issue the Court must determine whether on the evidence there is a risk of sexual abuse occurring if custody or access be granted and assessing the magnitude of that risk. After all, in deciding what is in the best interests of a child, the Family Court is frequently called upon to assess and evaluate the likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child’s welfare. The existence and magnitude of the risk of sexual abuse, as with other risks that are harm to the welfare of a child, is a fundamental matter to be taken into account in deciding issues of custody and access. In access cases, the magnitude of the risk may be less if the Order in contemplation is supervised access. Even in such a case, however, there may be a risk of disturbance to a child who is compulsorily brought into contact with a parent who has sexually abused her or whom the child believes to have sexually abused her....to achieve a proper balance, the test is best expressed by say that a Court will not grant custody or access to a parent if that custody or access would expose the child to **an unacceptable risk** of sexual abuse.”*

In SBS Thomas J warned of the possible consequences of elevating the “test” beyond the function it is designed to serve. At p.664 he said:

“If the Court works to a prescriptive test there must always be a danger that, in the circumstances of a particular case, the interests of the child will not be served by the strict application of that test. Any test which is articulated, therefore, must necessarily be subordinate to the interests of the welfare of the child.”

And at p.670:

“This phrase should not be permitted to take on a life - and meaning - of its own.”
As commented on by the Full Court in M and M and then by Justice Fogarty in N and S and the Separate Representative at p.82,712:

“The term “unacceptable risk” itself may be read as conveying the notion that a genuine risk is capable as being viewed as “acceptable”. That could not be so...

As Justice Fogarty went on to say at p.82,713:

“The High Court’s decision must be read as taking a cautious approach to the issue, in light of the paramountcy of the welfare of the child and the gravity of the possible effects of sexual abuse. Largely it means that if there is an ascertainable risk of harm, the Court must so mold its Orders so as to avoid exposure of the child to that harm. It would be unthinkable to take a risk with the child’s welfare or to “experiment” in such cases.

ASKING THE UNACCEPTABLE RISK QUESTION

Justice Fogarty stated at p.82,713 - 82, 714 in N and S and the Separate Representative:

“One of the difficulties which arises in the application of these principles is in seeking to preserve an independent content to the notion of “unacceptable risk”. Though the purpose behind the notion is to assist a Court in determining what is in the child’s best interests, the importance of asking the question separately lies in its specific guidance to Courts faced with the difficulties which cases of sexual abuse raise. There is the danger that it will be treated just as an expression which must be ritually used in judgments which involve questions of sexual abuse, that give no substantive meaning or weight. It is easy to say that there is or is not an unacceptable risk of sexual abuse, and so to be seen to be applying the correct legal test. Those words seem sometimes to be used without an appropriate degree of consideration... the essential importance of the unacceptable risk question as I see it is in its direction to judges to give real and substantial consideration of the facts of the case, and to decide whether or not, or why or not, those facts could be said to raise an unacceptable risk of harm to the child. Thus, the value of the expression is not in a magical provision of an appropriate standard, but in its direction to judges to consider deeply where the facts of the particular case fall, and to explain adequately their findings in this regard.

In asking whether the facts of the case do establish an unacceptable risk the Court will often be required to ask such question as: What is the nature of the events alleged to have taken place? Who has made the allegations? To whom have the allegations been made? What level of detail do they involve? Over what period of time have the allegations been made? Over what period of time are the events alleged to have occurred? What are the effects exhibited by the child? What is the basis of the allegations? Are the allegations reasonably based? Are the allegations genuinely believed by the person making it? What expert evidence has been provided? Are there satisfactory explanations of the allegations apart from sexual abuse? What are the likely future effects of the child?

This is not a catalogue of the correct questions, but a reminder that it is questions such as these which are required to be considered in deciding whether an unacceptable risk may be shown. The weight to be attached to the various answers to the relevant questions will inevitably vary from case to case. But it is essential that questions like these be asked.

In answering the unacceptable risk question the Court must undertake a qualitative analysis...(T)he essential weight must be attached to the magnitude of the harm to which the risk relates. The notion of “unacceptable risk” must be assessed in light of the grave consequences of sexual abuse to a child’s development as well as the effects of future contact with the party” eg A and A not surprisingly the Full Court formed the view that there would be unacceptable risk to the children if unsupervised contact was to occur.

PARENT’S BELIEF

If the Trial Judge has made a positive finding that there has been no sexual abuse of the child or found that there has been no unacceptable risk of sexual abuse of the child, then the judge needs to turn to the separate question of the residential parent’s belief as to whether or not the child has been sexually abused. This test was first formulated by the Full Court in Russell and Close (25th June 1993 unreported) and referred to more recently in cases such as Re Andrew (1996) FLC 92-692 and A and A. It was stated in A and A at paragraph 3.28

“If the wife has such a belief, it is not a necessary component that the belief should be reasonably and objectively based. What is required at this level of the enquiry is that it was genuinely held. The reason for that, as explained in Russell and Close and in cases which have followed that since, is that if the wife genuinely holds a belief that may so impinge upon her capacity as the primary carer of the children to look after them that the question arises whether in the interests of the children, contact should continue and/or whether it should be supervised to allay those apprehensions.”

At paragraph 3.29:

“The first enquiry is whether there is subjectively an unacceptable risk. If there is the Court must take steps proportionate to the degree of risk. If there is not, the Court may then need to consider whether the residence parent has a genuinely held belief that such a risk exists and whether that will have a significant impact on that party’s capacity as the residence parent and so impinge on the best interests of the children. The Court then needs to take steps proportionate to that circumstance.

At paragraph 3.47:

“His Honour concluded that the wife ‘possesses a strong personality and will be able to cope with the Orders which I propose.’

We think His Honour attributed to the wife a degree of stoicism which is unjustified. She has made a remarkable recovery physically and emotionally. This is emphasised by her preparedness to return to the home where she was assaulted, generally to get on with her life, and her ability to restrain herself from making negative comments about the husband to the children. Nevertheless, as her evidence indicates, she has grave concerns and fears for her own safety and that of the children. Whilst she is to be admired for the way she has faced these problems, we think that His Honour placed too much emphasis upon that. She has steeled herself to return to the home and get on with her life and has coped this far with supervised contact. This, however, is quite different from her capacity to cope if contact is unsupervised and is for extensive periods such as His Honour ordered. It could not confidently be predicted that she could continue to cope. We think that this may impose upon her an altogether intolerable strain which may have a drastic, long term impact on the children, a risk which should not be taken”

CASE EXAMPLE

The mother had been assaulted by the father including sexual assault. The mother had formed the view that the children may well have been sexually interfered with by the father. The mother obtained a referral to a Counsellor. The Counsellor informed the mother that the children had been sexually interfered with. The mother believed what the Counsellor had told her as it also accorded with her suspicions. The Trial Judge made a positive finding that there had been no sexual abuse but nevertheless ordered that contact be supervised because of the mother’s belief and the related concern that if contact were to be unsupervised, false allegations of sexual abuse might be made against the father.

BEST INTERESTS OF THE CHILD

As the High Court stated in M and M the test is seen through the prism of what is in the best interests of the child both in a general sense under Section 65E of the Family Law Act and the shopping list contained under Section 68F(2). This step needs to be considered carefully and should not be brushed over.

CASE EXAMPLE

The father had in the mother's case terrorised her and her son from a former relationship, including having the son hold out his penis on a barrel to be hit by the father's hammer. (It was never hit.) The parties had a three year old daughter and the mother raised serious concerns (assault and neglect) regarding her care by the father. The father denied the allegations. The mother also made extensive allegations about domestic violence. A report was obtained from the Contact Centre where the father was exercising supervised contact. It showed that in effect whatever the truth of the other matters (and on those the Trial Judge found in favour of the mother), the father had not in any case bonded with his daughter at the Contact Centre, merely attending like a disinterested observer. In that case even if the father had been successful in every other element one would have to question whether in the ultimate result he would have obtained contact in light of that behaviour.

SUPERVISED OR NO CONTACT?

Often parents who bring forward these allegations are loathe to suggest that there be no contact. There are a variety of possible reasons for this, but they include that of being seen to make false allegations and the associated threat of removal of the child from that parent's care. e.g. in Re David (1997) FLC 92-776 the mother made allegations that the father had sexually interfered with the child. The mother was not believed by the Trial Judge. The child was placed in the father's care with mother to have the most limited contact. During the course of the appeal the mother admitted that the allegations that she had made were false. Not surprisingly the Full Court ordered that the child remain in the father's care.

In A and A at the trial the mother sought an Order that the father have no contact with the child. The Trial Judge ordered contact at weekends and school holidays to be supervised for nine months and thereafter unsupervised but with the qualifier that the independent psychiatrist could talk to the children about the assault. The mother's belief that the father was responsible for the assault and the father's denial of the assault. Obviously one effect of such attendances might be the children did not want to see their father anymore.

On appeal the mother, although she opposed contact, sought as great reluctance a second option that the father have supervised contact. The husband's position was that the Orders of the Trial Judge should continue. The children's representative supported the husband's position. The children's representative stated that the events of the assault were a "one off incident", that the circumstances were unknown, that the assault was not against the children, and that there was no history of abuse of the children by the husband and no evidence suggesting a "propensity" for abuse towards them. She submitted there was no unacceptable risk to the children and emphasised the benefits which, she submitted, would flow to the children by continuing to have contact, unsupervised after an initial period. Whilst the children's representative stated it was a "one off incident" it was apparent that there had been previous assaults by allegations made by the wife of

violence perpetrated upon her by the husband previously. Both the Trial Judge and the children's representative did not concentrate on those but in the circumstances, not surprisingly, tended to focus solely on the last assault which the children's representative incorrectly described as "one off".

The Full Court ordered that the father has supervised contact at a Contact Centre each Saturday between 9.00am to 5.00pm or such other person agreed to by the mother.

At paragraph 4.5:

"We emphasise, however, that the supervision needs to be by a person or persons who will endeavour to ensure that the risk which we have identified is eliminated."

The Full Court adopted the Trial Judge's Orders relating to the psychiatrist attending on the children.

One can only wonder that if the mother had stated at the appeal that she was completely opposed to supervised contact, whether it would have been ordered.

WHO SHOULD SUPERVISE?

Ordering or an agreement to supervise is not enough. Thought should be given about practical issues:

- Availability, such as a Contact Centre
- Cost
- Location
- Safety
- Consistency.

In B and B (1993) FLC 92-357 the Full Court stated on page 79,780:

"In our opinion, a Trial Judge who has made a finding that an unacceptable risk of sexual abuse exists, or that sexual abuse did occur should look to the level of trauma, in the widest sense, that has been occasioned to the child or children or may be occasioned in the future, to determine whether supervised access is appropriate. If there was an unacceptable risk of the child or children being exposed to physical, emotional or psychological harm by reason of contact with the abusing parent, then an order for supervised access is not appropriate because of the Court's obligation to protect children from such harm."

In circumstances where abuse has occurred or when there is an unacceptable risk of such abuse, access should be suspended until such time as the access parent can show that there is no longer an unacceptable risk in access recommencing. In some cases this will involve an acknowledgement by the access parent that abuse has occurred together with evidence of appropriate treatment. In most

*cases, other family members must have the opportunity to resolve the effects of the trauma to the children and the children have the opportunity to recover from the effects of any such abuse. Without that “time out” and counselling/treatment, the children’s feelings of distress and fear may well be re-stimulated by contact with the access parent, despite the alleged assurance of safety provided by a supervisor. Supervised access may then be capable of being ordered for the time limited purpose of re-establishing a relationship between the access parent and the children. Supervised access is **not appropriate as a long measure [emphasis added]***

Suspension of access for a period of time may be important for the custodial parent as well as for the children. It is not unreasonable for the Court to take into account in assessing whether an unacceptable risk exists, the need of a custodial parent to be assured of the children’s protection. As primary caregiver, anxiety about the children’s exposure to potential harm is likely to impact adversely on that parent’s ability to care for the children.”

In B and B p.79,780-79,781 the Full Court stated:

“Both social science literature and experience demonstrate that it is generally inappropriate to have friends or relatives of the access parent as supervisors of access where any risk of harm to the children exists...Family and friends are not neutral but were usually, as in the case here, have an opinion as to whether any harm as occurred or whether any risk exists. They may therefore believe that close monitoring of the children is unnecessary. In a practical sense they cannot always be present and may fail to respond protectively to complaints of abuse or distress by the children. Supervisors must be available to the children for safety and support and be prepared to intervene on the children’s behalf if an issue of protection arises during the visit. It is in our opinion, unrealistic to expect a supervisor to undertake those responsibilities on a regular weekly or fortnightly basis for an indefinite period.

For the above reasons, it is in most cases undesirable for friends or family of the access parent to supervise children during access periods in circumstances where abuse has been found to have occurred or where there is an unacceptable risk of abuse occurring.”

STEPHEN PAGE