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**Young, L. (1998) Child sexual abuse allegations in the Family Court of Western Australia: An old light on an old problem. *Sister in Law*, 3 . pp. 98-121.**

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## CHILD SEXUAL ABUSE ALLEGATIONS IN THE FAMILY COURT OF WESTERN AUSTRALIA: AN OLD LIGHT ON AN OLD PROBLEM

By LISA YOUNG\*

### Introduction

Ten years ago, in the case of *M and M*,<sup>1</sup> the High Court of Australia handed down what is still the definitive judgment in the area of child sexual abuse allegations in family court proceedings. The Court's approach in that case gave much cause for hope that the protection of children would be the major focus of parenting disputes where such allegations had been made. The High Court held, *inter alia*, that:

1. it was not the family court's role to determine whether or not child sexual abuse had actually occurred (as would be the case in a criminal trial);<sup>2</sup> however,
2. a court was not to grant custody or contact to a parent if that custody or contact would expose the child to an *unacceptable risk* of sexual abuse.<sup>3</sup>

The Full Family Court of Australia later added that if there is a positive finding of abuse, only in the most extraordinary cases would contact with the perpetrator of the abuse not be seen as exposing the child to an unacceptable risk of abuse. It was also held that if there is a finding of an unacceptable risk of abuse occurring, supervised contact may still provide an unacceptable risk of disturbance, whether physical, emotional or psychological, to a child who is compulsorily brought into contact with a parent who has sexually abused him or her or, who the child believes to have sexually abused him or her, and the court has the obligation to protect children from such harm.<sup>4</sup>

Despite *M and M*, which suggests that the focus of such cases is on the protection of children from this particular harm, for some time now the main concern about these cases seems to have been the use of child sexual abuse ("CSA") allegations as "weapons" in parenting disputes.<sup>5</sup> The media<sup>6</sup> and academic literature<sup>7</sup>

\* Lisa Young B Juris, LLB(UWA), LLM(Cantab), Lecturer in the School of Law, Murdoch University.

<sup>1</sup> (1988) 166 C.L.R. 69.

<sup>2</sup> *Ibid.* at 76-77.

<sup>3</sup> *Ibid.* at 77-78 (author's emphasis).

<sup>4</sup> *B and B* (1993) FLC 921-357, 79, 778.

<sup>5</sup> For example see Frank Bates, "Child Sexual Abuse and the Courts – The Message From Custody and Access Cases. An Old Light on a New Problem?", (1988) 9 *University of Tasmania Law Review* 87 at 101; Kenneth Byrne, "Allegations of Child Sexual Abuse in Family Law Matters: Use and Misuse of Expert Evidence", in *Family Law Amendment Act 1991 and The Expert Witness in Family Law* (Leo Cussen Institute, 1991); Graham Davies,

seem to have convinced us that child sexual abuse allegations in custody cases are common, and that many are malicious, that is, known to be false. Some parents will say anything to “win”. Or so we are told. We are also told that these malicious allegations are easy to make but difficult to disprove. In other words, they are, by and large, a successful weapon.<sup>8</sup> The Cleveland and Jordan cases,<sup>9</sup> while more in the public law area, are hauled out as proof of the rule of hysteria surrounding CSA allegations. A warning to be sceptical.

Family court judges are no less influenced by the tellers of this tale than the average person on the Bondi tram or Clapham omnibus it seems.<sup>10</sup> In a paper delivered in 1993 to a conference held by the Advisory and Coordinating Committee on Child Abuse (ACCA), Justice Barblett of the Family Court of Western Australia (“the FCWA”) said:

The problem in the family court is what to do about a parent who may not have abused a child but cannot prove he has not. To prove a negative is very difficult. How can a father be seen to get justice if a

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“Children in the Witness Box” Bridging the Credibility Gap” (1993) 15(3) *Sydney Law Review* 283 at 285; Ralph Glezer, “False Allegations of Child Sexual Abuse” [1988] *Law Institute Journal* 164 at 164; Margaret Harrison, “Major New Report on Child Sexual Abuse in Australia” (1989) 23 *Family Matters: AIFS Newsletter* 18 at 20; Richard Chisolm, “Custody and Access after the Reference of Powers: Troublesome Issues” in *Family Law: The Framework for the Future*, Paper No. 1, UNSW, 12; David Hechler, *The Battle and the Backlash: The Child Sexual Abuse War* (Lexington: Lexington Books, 1988) at 3; Paul Wilson, “False complaints by Children of Sexual Abuse” (April 1986) *Legal Service Bulletin* 80 at 81.

<sup>6</sup> On this phenomenon in the United States see Meredith Sherman Fahn, “Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter” (1991) 25(2), *Family Law Quarterly* 193 at 199 & 201 and John Myers, “Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection”, (1989-90) 28(1) *Journal of Family Law* 1 at 20-25. On the English experience see John Spencer and Rhona Flin, *The Evidence of Children: The Law and Psychology* (2<sup>nd</sup> ed) (London: Blackstone Press Limited, 1993) 265. In Australia, see, for example, Bettina Arndt, “Being a Father is not Child’s Play”, *Sydney Herald Sun*, 24 January 1988. One featured letter to the *West Australian* titled “Rights of Fathers are Trampled On” (11 November 1995) begins: “In sexual abuse cases the Family Court is bound by a 1988 ruling...that a lingering doubt that sexual abuse may have occurred warrants a cessation of access”. This letter, sent by a litigant, is of course grossly inaccurate but it also talks of “the enormous amount of post-matrimonial false child sexual abuse allegation”. Also see the comments by Dr. Byrne in the article referred to in note 38 below.

<sup>7</sup> *Supra*, note 5.

<sup>8</sup> See for example Glezer’s assertion that it is “likely” that a proven allegation will result in suspended contact “thereby effectively ending their relationship”: Ralph Glezer, “False Allegations of Child Sexual Abuse” [1988] *Law Institute Journal* 164 at 165. See also Frank Bates, “Child Sexual Abuse and the Courts – The Message From Custody and Access Cases. An Old Light on a New Problem?”, (1988) 9 *University of Tasmania Law Review* 87 at 104.

<sup>9</sup> For a detailed discussion see David Hechler, *The Battle and the Backlash: The Child Sexual Abuse War* (Lexington: Lexington Books, 1988) 111-129.

<sup>10</sup> As early as 1985 the Family Court was voicing its concerns. In its 1985 Submission to the Child Sexual Abuse Task Force the Court spoke of the “high frequency” of such allegations, saying that “more often they are made to persuade the Court to make a particular access or custody decision” and that a significant number had no evidentiary or substantive basis.

court says it cannot find that abuse has occurred or that he is the abuser and yet he is denied access to his child?<sup>11</sup>

As Justice Barblett goes on to say, the answer, of course, is that it is not the family court's role to dispense justice between accuser and accused. Its role is to make the order that best promotes the interests of that child.<sup>12</sup> It is nonetheless significant that protection of the accused is identified as *the problem* in the court's mind.<sup>13</sup> More recently, a front page article in the leading national Australian paper began "[s]enior Family Court judges have called for sweeping changes to the investigation of claims of child sexual abuse made by divorcing and separating parents to spare children trauma and to stem an emerging problem - malicious allegations".<sup>14</sup> Justice Nicholson, Chief Judge of the Family Court of Australia, was then quoted as saying that he had "heard it said many times that women take advantage of the situation between themselves and their ex-husbands to make unfounded allegations of abuse".<sup>15</sup> Sources were then cited to "establish" that "false accusations were an easy way for a husband or wife to get revenge on their ex-partner".<sup>16</sup> An analysis of Western Australian cases reveals that exactly these sorts of judicial concerns dictate much of what happens in the FCWA in proceedings where CSA allegations are made.

This paper, which focuses on Western Australia, attempts to achieve three objectives. Firstly, it (hopefully) debunks the myth that "false" allegations of child sexual abuse are rife, and more particularly on the rise, in family court parenting disputes. It then examines unreported Western Australian cases to establish whether it is difficult to have contact by a father to his child suspended on the basis of a CSA allegation, also with a view to exposing the belief that this is easily achieved as more myth than fact. Finally, the paper considers the significance of the current focus of the debate being on the fear of false allegations and suggests that this focus plays an important role in distracting us from the *real* problem: the *process* that creates and promotes these myths. It is argued that this picture of rampant false allegations is not only a myth but that the existence of this myth serves to maintain a status quo that protects sexual abusers at the expense of children.

### Some Thoughts On Confidentiality

Given the high profile this issue has received both locally and internationally, and the level of emotional controversy surrounding it, one would have thought the Family Courts in Australia would welcome some hard facts to support their arguments

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<sup>11</sup> Judge Alan Barblett, "Child Abuse Allegations in Family Court". Paper presented to the Advisory and Co-ordinating Committee on Child Abuse Conference. *Children at Risk: The Politics of Practice*, Perth, Western Australia, March 18 – 19.

<sup>12</sup> *Family Law Act 1975* (Cth) ("FLA"), s65E.

<sup>13</sup> The identification of the protection of the accused as of central concern is seen equally clearly in the decisions of the FCWA, discussed below.

<sup>14</sup> *The Australian*, 14 September 1994.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* Professor Levy, Professor of Law at University of Minnesota, is the "child-abuse expert" relied upon. The other major source cited, Dr. Byrne, has written extensively on the so-called problem of false accusations: see *supra*, note 5.

for reform.<sup>17</sup> In 1995 I was successful in obtaining a research grant to track how CSA allegations were handled in the Family Court of Western Australia (“the FCWA”), and to look at case outcomes. The only way to achieve a comprehensive picture would have been to review Court files. Relying on reported and unreported judgments of fully defended trials might provide some insights but the results may be misleading. Cases that proceed to a fully defended trial tend to be atypical, if for no other reason than that somewhere between 90-95% of cases are settled before trial.<sup>18</sup> Most matters are disposed of by interim court order or out-of-court agreement, and one needs to consider those cases to assess the true impact of a CSA allegation. The FCWA is an open court, but unless one is able to spend all one’s time haunting the court’s corridors, the most efficient way of proceeding would be to read Court files.

The location of such files has been made much easier than might first appear by changes to court procedure, notably the introduction of Form 66. Since June 1991, where a party to proceedings alleges child abuse, a Form 66 MUST be filed with the Court.<sup>19</sup> These forms cite, briefly at least, the nature of the alleged abuse. It is therefore possible to track down with relative ease those cases that involve a “formal” allegation of abuse. A further development that makes the perusal of such files worthwhile is the recording of interim judgments. Whilst in the past these decisions were mainly oral, it is now Court practice to record all interim judgments, making the job of analysing the factors that influence the decision-making process, and determining how the matters are disposed of, significantly easier. Rule 6 of the Family Law Rules provides, moreover, that the Court or a Registrar may grant permission to inspect Court records. All researchers are prohibited, of course, under s121 of the *Family Law Act* (1975) (Cth) (“the FLA”), from publishing details that identify any of the parties or anyone related to them, and any witness in the proceedings.

Notwithstanding s121, the FCWA has adopted a policy that may have the unintended consequence of deterring researchers in this, and other, areas. Before any decision was made as to whether this project might proceed (permission of the FCWA’s Research Committee being necessary), it was spelled out very clearly that any research undertaken was to be subject to the absolute right of veto of the Court. The then Chief Judge of the FCWA advised that this was the line taken by both this Court and the Family Court of Australia in relation to all research.<sup>20</sup> Such a right of veto not only has the potential to curb academic freedom in an area that should be transparent and accountable, but would also be likely to infringe the conditions under which research moneys are often granted.

Further, having considered the application before it, the Research Committee of the FCWA said that while a proper interest in searching the records had been demonstrated (as required under Rule 6), another important consideration was the need to protect the privacy of the parties involved. This was considered to be a very

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<sup>17</sup> See *supra*, note 14 where Family Court judges were reported as advocating a new procedure for dealing with these cases.

<sup>18</sup> Sophy Bordow, “Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome” (1994) *Australian Journal of Family Law* 252 at 254.

<sup>19</sup> FLA, s67Z(2).

<sup>20</sup> Author’s interview.

sensitive area with files containing both highly personal information and psychiatric assessments. It was concluded that leave ought not be granted “unless all those involved in the proceedings gave their permission”.<sup>21</sup> Consequently, I was not able to access anything other than the unreported judgments.

No one can deny the sensitive nature of this area. However, in terms of access to Court files, were one to undertake *any* project involving the perusal of family Court files, one would inevitably come across mountains of highly personal information, even in, say, property cases. Would it have made any difference, for example, if the research application had concerned tracing the outcome of parenting disputes generally (which would have included those where CSA was alleged)? Access to files in “less sensitive” areas will still reveal confidential information. It is the nature of family courts that they deal with highly personal information, much of which is published in law reports and available on the internet. Furthermore, the purpose of s121 is to protect the various parties from identification. Why should the parties involved in CSA cases be offered the right to withhold access to their cases when others are not? Litigants whose matters proceed to trial do not have any equivalent right to privacy. And what of the FCWA’S express reservation of the right to veto? Surely, when combined with s121, that would provide total protection against the invasion of anyone’s privacy.

It is not the purpose of this paper to review the issue of judicial accountability, although serious questions of this nature present themselves. The point, rather, is to explain why the research in this paper is necessarily limited in scope and to highlight the need for greater access to Court records. The main source of material for this paper from the FCWA has been unreported judgments. It is not possible to ensure that, even in reviewing those, one catches all relevant final decisions. In the past, these cases have been stored in alphabetical order in folders in the FCWA. The Court has advised that it cannot guarantee that all judgments are in the files. Also, catchwords have only been used in more recent years. Thus, whilst one is likely to find most unreported decisions in any given year, it is not a foolproof system. More recently, the Court has been developing an electronic database but this is not generally available yet. I was, however, kindly permitted access to this new system to find cases over the last two years.

### **Child Sexual Abuse Allegations: The Numbers**

Even ignoring such thorny issues as the definition of CSA, the actual occurrence rate of CSA in the general population is one of those things that will never be known. However, a review of 19 studies of the prevalence of CSA found an average rate across the studies of 22.7% for girls and 10.2% for boys.<sup>22</sup> The perpetrators of the abuse in these studies range from complete strangers to parents, but, even if these averages are grossly exaggerated, they nonetheless indicate that a

<sup>21</sup> Letter from the then Chair of the Research Committee of the Family Court of Western Australia to the author, dated 22 March 1995.

<sup>22</sup> W Peters, Gail Wyatt and David Finkelhor, *Prevalence: A Sourcebook on Child Sexual Abuse* (1986) cited in John Myers, “Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection” (1989-90) 28(1) *Journal of Family Law* 1 at 4.

significant proportion of the children coming before the family courts are likely to be the victims of some form of sexual abuse. In other words, one should not be surprised to find a proportion of cases involving such allegations. The question is, however, are there a disproportionate number of allegations being made in the FCWA, and is that number increasing?

If one were to glance through the reported Australian decisions one would get the impression that in the 24 years since the inception of the FLA there has been an increase in the total number of CSA allegations being made in parenting disputes each year, and anecdotally this is certainly something one hears from practitioners in the field. This coincides with a general increase in reporting rates of this crime. Of course, an increase in the number of allegations, which is to be expected with the growing social awareness of the problem, does not necessarily mean that there has been an increase in "false" allegations. Before turning to this latter point, however, let us first consider the actual number of CSA allegations made in parenting disputes in the FCWA in recent years.

When a Form 66 is filed, the relevant child welfare authority, the Department of Family and Children's Services ("FCS"), is notified of the allegation. Court personnel (and, in this context, this usually means Family Court counsellors) must also notify FCS where they have reasonable grounds for suspecting child abuse.<sup>23</sup> The FCWA's figures in relation to the notification of abuse to FCS for the (financial) years ended 30 June 1992 and 1993 are as follows:<sup>24</sup>

	From Court	From Counselling	Total	Physical Abuse	Sexual Abuse	Emotional Abuse	Neglect	Not Known
91/92	65	59	124	48	79	15	8	0
92/93	44	65	109	35	64	10	10	4

Unfortunately, these figures do not tell us the proportion of allegations relating to CSA arising from allegations by one of the parties to the proceedings (as opposed to a Court counsellor, for example). The FCWA has advised that in the 1993 calendar year it recorded 32 allegations of child abuse made by one of the parties, 23 of which related to abuse of a sexual nature.<sup>25</sup> Over the same period there were 1829 applications filed where guardianship and custody were in dispute and 1050 applications where access was in dispute.<sup>26</sup> Whilst more recent figures are not available, there is some evidence that the figures have not increased dramatically.<sup>27</sup> On these figures, the rate of allegations seems to be somewhere in the range of 1-2% of all cases involving parenting disputes.

<sup>23</sup> FLA, s67ZA(2).

<sup>24</sup> This chart is taken from Margaret Pitcher, *A Literature Review by the Advisory and Coordinating Committee on Child Abuse Allegations in Family Court Proceedings*, April 1994.

<sup>25</sup> Figures provided by the Family Court of Western Australia to the author.

<sup>26</sup> These figures were provided by the FCWA to the author. There are two matters which need to be borne in mind when looking at these figures. The first is that it is not clear the extent to which the figures for custody and access applications overlap, and the numbers of children involved. The second is that de facto partners, whilst being able to have their parenting disputes dealt with in the FCWA, are not required to file a Form 66.

<sup>27</sup> See the text accompanying notes 41-46 below.

This figure is consistent with the findings of other research in this area. Cashmore et al concluded that “[t]here is as yet little Australian data on these questions, but what is available does not support the notion that child sexual assault allegations are common in the resolution of custody and access disputes: a study by the Family Court Counselling Service found that in a 3-month period only 1.6% of all new cases registered with the Court Counselling Service involved allegations of child sexual assaults”.<sup>28</sup> A comprehensive study carried out in 1990 in the U.S. by Thoennes and Tjaden<sup>29</sup> suggested that there was little support for the assumption that an epidemic number of mothers were falsely accusing fathers of sexual abuse during parenting disputes. Rather, their study suggested these cases were relatively rare, with an incidence of less than 2% of all parenting cases. More recently, McIntosh et al concluded that the findings from their 1993 U.S. study “did not support the contention that sexual abuse allegations are commonplace in child custody disputes...” with sexual abuse allegations being made in only 2% of custody and access cases.<sup>30</sup>

It may be that, to those in the system, the number of allegations in parenting disputes seems high because a disproportionate number go to trial. When you have an issue as important as the continuation of contact at stake it is not unlikely that a higher proportion of these cases will proceed to a defended hearing. As we have seen, however, overall, the actual rate of CSA allegations does not support the idea that they are “commonly” made in parenting disputes, and certainly there is no epidemic.

Whilst the Court may not be inundated with CSA allegations, it does appear that the reporting rate is somewhat higher in the Family Court than in the general community.<sup>31</sup> A common assumption is that this higher rate is accounted for by more false allegations.<sup>32</sup> What is often ignored by many commentators in this area, however, is that there are a number of possible explanations for this increased reporting rate, other than a higher proportion of “false” allegations. Fahn, amongst others,<sup>33</sup> discusses a number of possible reasons why allegations may come out more readily after a parental separation, including the most obvious, that it may reflect an

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<sup>28</sup> Judy Cashmore, Richard Chisolm, Brent Waters, “Sexual Abuse Allegations and Child Placement: A Reply to Ken Byrne” (1992) 7(3) *Australian Family Lawyer* 32 at 32.

<sup>29</sup> Nancy Thoennes and Patricia Tjaden, “The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes” (1990) 14 *Child Abuse & Neglect*, 151.

<sup>30</sup> Julia McIntosh, and Ronald Prinz, “The Incidence of Alleged Sexual Abuse in 603 Family Court Cases” (1993) 17(1) *Law And Human Behavior* 95 at 95. These figures, and the general conclusion that numbers of allegations are small, are confirmed by John Myers, “Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection” (1989-90) 28(1) *Journal of Family Law* 1 at 21. Myers goes on to say there is no “convincing evidence that a substantial portion of the allegations are fabricated”.

<sup>31</sup> Nancy Thoennes, and Patricia Tjaden, “The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes” (1990) 14 *Child Abuse & Neglect* 151 at 160.

<sup>32</sup> See those articles referred to in *supra*, note 5.

<sup>33</sup> See the discussion of this research in Nancy Thoennes, and Patricia Tjaden, “The Extent, Nature, and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes” (1990) 14 *Child Abuse & Neglect* 151 at 160; Family Law Council, *Discussion Paper on Child Sexual Abuse*, June 1988, 5; John Myers, “Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection” (1989-90) 28(1) *Journal of Family Law* 1 at 24-5.



increased willingness to disclose real fears.<sup>34</sup> MacFarlane also lists four possible reasons why a child may more readily make a disclosure after separation: no longer intimidated; threat of family break-up gone; self-protection; and closer parent-child bond.<sup>35</sup>

Moreover, whilst there is considerable literature concerning the rate of false allegations in parenting disputes, there is nothing amongst it that supports the notion that this rate is increasing. It has also been reported in the past by Family Court Counsellors that there has been no perceptible increase in the proportion of false allegations.<sup>36</sup>

At the end of the day, there does not appear to be any hard evidence to support the contention that false allegations of sexual abuse are rife in Family Court parenting proceedings, nor that false allegations have been increasing in recent times. Whilst the overall number of allegations has no doubt increased, the number of allegations is still relatively small. The reporting rate does appear higher than in the general population but there is no evidence to support that this reflects a higher than average rate of false allegations. On the contrary, there are a number of possible explanations for this difference. The significance of the potential number of false allegations is dealt with in the next section.

### Suspension Of Contact: The Numbers

The High Court in *M and M*, after emphasising that a court's primary objective in these cases is to determine what is in the child's best interests rather than determining the guilt or innocence of the accused father, went on to say that it "must determine whether on the evidence there is a risk of sexual abuse occurring if custody or access be granted and assess the magnitude of that risk...[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".<sup>37</sup> What amounts to an unacceptable risk is, of course, a question of fact for the judge to be tested on a balance of probabilities.

This would seem to auger well for mothers distressed about their child going on contact visits where sexual abuse is suspected. Byrne, for example, a prolific writer on this topic, tells us that "there is no other weapon more powerful than an allegation of child sexual abuse. It usually provides an immediate halt to the other parent's contact with the child...".<sup>38</sup> Even the judiciary subscribe to the old adage that it is a charge easily laid but nearly impossible to defend.<sup>39</sup> The fact is, however, that it

<sup>34</sup> Meredith Sherman Fahn, "Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991) 25(2), *Family Law Quarterly* 193 at 203-4.

<sup>35</sup> Cited in Richard Chisolm, "Custody and Access after the Reference of Powers: Troublesome Issues" in *Family Law: The Framework for the Future*, Paper No. 1, UNSW, 12-13.

<sup>36</sup> Anne Macvean, Bill Skoufis and Manuela Galvao, "Child Sexual Abuse" [1988] *Law Institute Journal* 927 at 927.

<sup>37</sup> *M v M* (1988) 166 C.L.R. 69, 77-78.

<sup>38</sup> Kenneth Byrne, "Allegations of Child Sexual Abuse in Family Law Matters: Use and Misuse of Expert Evidence", in *Family Law Amendment Act 1991 and The Expert Witness in Family Law* (Leo Cussen Institute) 1991 2 at 12.

<sup>39</sup> See for example *M and M* (1988) 166 CLR 69 at 77 where the High Court unfortunately resorted to this phrase: *D and D* (Family Court of Western Australia, Barblett, J, PT

remains extremely difficult to convince the FCWA to suspend contact in these cases. Whilst the reported cases do evidence a sprinkling of suspended contact orders over the years,<sup>40</sup> and might even lead one to believe that it is not difficult to obtain such an order, this is not what one finds in the decisions of the FCWA. For example, in 1993 there appear to have been 3 trials where a father was accused of having sexually abused his child, and contact was therefore sought to be limited.<sup>41</sup> In none of these cases was contact suspended. There were at least 2 other cases involving CSA issues<sup>42</sup> and, of those, one involved an allegation against the mother.<sup>43</sup> The other saw contact suspended to a father who was in jail for having indecently assaulted a number of other minors, though there was no allegation in respect of his own young child.<sup>44</sup> Hence, there were no trials where a non-custodial father, against whom allegations had been made, was denied contact with that child. Similarly, in the period 1 January 1997 to 15 October 1998 (nearly 22 months) there were 6 matters where the trial considered an allegation of abuse against a father.<sup>45</sup> Again, in only one case was contact suspended.<sup>46</sup> These figures show little change since Kiel concluded in 1987 that judges: took a sceptical view of such allegations; commonly granted contact in the face of strong evidence of abuse; and rarely deny contact outright.<sup>47</sup>

As I have indicated above, we do not know what happens to matters that never get to trial. We should not be quick to assume, however, that the picture is vastly different. It must first be borne in mind that negotiations between the parties and any decisions made at an interim stage are made in the shadow of the law: that is, taking account of how difficult it is to obtain an order for suspension of contact. Thus, where the evidence of abuse is not strong (as is *usually* the case even where the allegation is

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3482/1984) at 13; *U and U* (Family Court of Western Australia, Tolcon J, 3 May 1993) (in this case the phrase was repeated twice in the space of half a page).

<sup>40</sup> See for example *B and B [Access]* (1986) FLC 91-758. Here, the father had admitted behaving in an indecent manner in relation to another child of the wife's, and had contact to his own children suspended after they made disclosures concerning him. In *B and B* (1988) FLC 91-978 the High Court refused to overturn a decision to suspend contact. *M and M* (1988) 166 CLR 69, *S and P* (1990) FLC 92-159 and *K and B* (1994) FLC 92-478 are further examples.

<sup>41</sup> *N and N* (Family Court of Western Australia, McCall CJ, 17 June 1993); *V and V* (Family Court of Western Australia, Tolcon J, 24 September 1993); and *U and U* (Family Court of Western Australia, Tolcon J, 3 May 1993).

<sup>42</sup> *M:M and M* (Family Court of Western Australia, Holden J, 10 September 1993); and *B and P* (Family Court of Western Australia, Holden J, 3 June 1993).

<sup>43</sup> *M:M and M* (Family Court of Western Australia, Holden J, 10 September 1993).

<sup>44</sup> *B and P* (Family Court of Western Australia, Holden J, 3 June 1993).

<sup>45</sup> *A and A* (Family Court of Western Australia, Tolcon J., 17 November, 1997); *S and S* (Family Court of Western Australia, Holden CJ, 11 July 1997); *L and T* (Family Court of Western Australia, Martin J, 21 February 1997); *S and H* (Family Court of Western Australia, Tolcon J, 3 April 1998); *K and K* (Family Court of Western Australia, Anderson J, 10 February 1998); *K v M* (Family Court of Western Australia, Martin J, 5 August 1997).

<sup>46</sup> *K v M* (Family Court of Western Australia, Martin J, 5 August 1997).

<sup>47</sup> Helen Kiel, "Child Sexual Abuse and the Family Court" (1987) 22(3) *Australian Journal of Social Issues* 3 at 3. Further, a 1982 study of all Australian family court registries found only 19 cases in that year where contact was suspended because of "violence, mental ill health, alcohol abuse, likelihood of abduction and sexual abuse": Lawrie Moloney, Audrey Marshall, and Peter Waters, "Suspension of Access Attitudes which have Influenced the Courts" (1986-87) 1 *Australian Journal of Family Law* 50. This again suggests that there were very few cases in Australia in that year where a child sexual abuse allegation resulted in a suspension of contact.

true, and would almost invariably be the case where it is false) counsel would be advising their clients that, *even if* an interim order were made suspending contact, the order would most likely be discharged at trial. It must be considered unlikely that in the face of this advice a father would accept in perpetuity an interim suspended contact order. As to whether interim orders do routinely suspend contact, it must also be remembered that the judicial determiner is equally aware of both the unlikelihood of a final suspended contact order and the impact on the outcome of a final hearing of suspending contact on an interim basis. Interestingly, of the 6 cases that went to trial on this issue during the 1997-8 period referred to above, there appeared to be no interim orders preceding the trials suspending contact. The same is true of the 3 cases that went to trial in 1993. Recent reported decisions show a similar trend. None of 7 recent reported decisions show an interim order of suspended contact.<sup>48</sup>

Further, in 1995 I interviewed 6 mothers who had been involved in parenting disputes in the FCWA where there had been an allegation of CSA. Three of those matters had been finalised at the time of the interview, and all three resulted in the mother discontinuing the action (that is, not proceeding to trial) and conceding contact, either due to a lack of funds or a fear of losing custody at trial. That is, none of them were resolved by the making of an interim order of suspended contact.

In many cases the reason that cases contact is not suspended at trial is that there is a finding either that no abuse occurred, or that the Court cannot be sure if the alleged abuse occurred. As was pointed out at the start of this section, the Court is required to determine whether there is an *unacceptable risk* of abuse occurring if contact is permitted. Whilst the Court is not encouraged to determine whether or not the alleged abuse took place, this is in fact what family courts spend much of their time doing. The standard of proof applied is the normal civil standard of a balance of probabilities. Given the perceived grave nature of the allegation (presumably for the alleged perpetrator), the standard applied in fact is much higher than this would otherwise connote, that is, that it is more likely than not that the abuse took place. In *G v M*, the Full Family Court of Australia said that “[s]exual abuse allegations are serious allegations indeed” and a finding of sexual abuse can only be made having regard to the seriousness of the allegation being made and the gravity of the consequences flowing from a particular finding.<sup>49</sup> One judge of the FCWA drew from an unreported decision of the Supreme Court of Western Australia<sup>50</sup> where it was said that in these cases “the application of a standard of proof upon the balance of probabilities will often require evidence of relatively high persuasive force, leading to the court being satisfied to a relatively high degree of the facts upon which the court’s declaration is to be founded”.<sup>51</sup> Further, in a recent reported decision it was held that “[i]n children’s matters under Part VII of the *Family Law Act*, where the issue is a child’s contact or residence with a significant person in his or her life, the grave

<sup>48</sup> *Re David* (1997) FLC 92-697; *G v M* (1995) FLC 92-641; *K v B* (1994) FLC 92-478; *R v B* (1996) 92-787; *N v S and The Separate Representative* (1996) 92-655; *M v H* (1996) 92-695; and *Re C and J* (1996) 92-697 (in this case it appears there was a short suspension of contact but it was quickly replaced with supervised contact by consent).

<sup>49</sup> (1995) FLC 92-641, 82,474.

<sup>50</sup> *Semple, Director-General, Department for Community Services v. Heijer and Ors* (unreported, Supreme Court of Western Australia).

<sup>51</sup> *K and K* (Family Court of Western Australia, Holden J, 26 November 1996), 8.

consequences of a finding of sexual abuse cannot be overstated. Accordingly, before trial Judges find themselves impelled to make a positive finding of sexual abuse, as opposed to a finding of unacceptable risk, the standard of proof they are required to apply must be towards the strictest end of the civil spectrum as set out in *Briginshaw*.<sup>52</sup> Given the notorious difficulty in proving such allegations (physical evidence is rare, there are usually no witnesses and the evidence of children is treated with some suspicion), it is hardly surprising that in most cases the Court finds there is no abuse, and thus no unacceptable risk of abuse. This is not to suggest that the family courts are misinterpreting the standard of proof required in these cases, but rather to point out that this standard really represents a sliding scale, which in these cases is edging closer to the criminal standard of beyond a reasonable doubt. This, of course, impacts on the number of suspended contact orders made.

Hence, it would seem that in reality there is no flood of CSA allegations reaching the family Court, at least in Western Australia. Rather, it is more of a slow trickle. Of those matters that actually make it to trial, the likelihood of a suspended contact order is remote. This should come as no surprise, given the difficulty of proving CSA allegations. The whole issue of how many allegations are *in fact* false has deliberately been omitted from this discussion as being essentially unimportant given the above data. *Even if* the rate of false allegations were as high as some have suggested, say 70%,<sup>53</sup> that would mean that in 1993, for example, there were hypothetically a maximum of 16 parents (not all of whom would have been fathers) in Western Australia in danger of being denied contact. In fact, the rate of false allegations is, on all the evidence, considerably less than 70%, probably somewhere between 2-20%.<sup>54</sup> At the upper end of that more realistic scale, then, the group of parents at risk shrinks to roughly 5. In the first place, it would appear that the chances of any of these parents being denied contact at trial (especially if they were biological parents) were extremely remote. Moreover, their actual numbers, given the low rate of allegations, are relatively small compared to the number of children who we know are being abused and who the Family Court never hears about. In that same year, on a very conservative estimate, there would have been 189 children passing through the court who experienced sexual abuse at some time during their childhood, with 43

<sup>52</sup> *WK v SR* (1997) FLC 92-787, 84,694.

<sup>53</sup> Hollida Wakefield and Ralph Underwager, *Accusations of Child Sexual Abuse*, (Illinois: Charles C. Thomas, 1988) report that of 83 cases studied, 71% were found by the court not to have involved abuse. It is easy to be sceptical, however, of such figures, not least because a failure to prove abuse in court proceedings does not necessarily equate with a false allegation. Moreover, many studies have found rates of false allegations under 10% across the range of child sexual abuse referrals, some as low as 2% (see for example Mark Everson and Barbara Boat, "False Allegations of Sexual Abuse by Children and Adolescents" (1989) 28 *Journal of the American Academy of Child and Adolescent Psychiatry* 230; David Jones and J McGraw, Melbourne, "Reliable and Fictitious Accounts of Sexual Abuse of Children" [1987] *Journal of Interpersonal Violence* 2:27-45; Kathleen Faller, *Child Sexual Abuse: An Interdisciplinary Manual for Diagnosis, Case Management and Treatment* (New York: Columbia University Press, 1988). Myers concludes from the relevant research that a rate of as high as 20% may be accurate, with a rate of 5-10% in cases not involving a parenting dispute: John Myers, "The Child Sexual Abuse Literature: A Call for Greater Objectivity" (1989) 88 *Michigan Law Review* 1709 at 1726.

<sup>54</sup> *Ibid.*

children from that group being sexually abused by their father or adoptive father.<sup>55</sup> The obligation of the Court in these cases is to promote the welfare of the child<sup>56</sup> - the Court has made it clear that parents' rights as such do not factor into its decision-making process.<sup>57</sup> One would have thought that such an obligation would incline the Court to err in favour of the protection of the children, rather than the very few parents who may be falsely accused. Whilst no one would deny the gravity of a false sexual abuse allegation, it seems ironic that the plight of a very few men (none of whom are likely to be denied contact) should monopolise the judiciary's concern, when we know that there are many more children facing a much graver problem.

### The Significance Of Gender

It is difficult to ignore the fact that those being accused are predominantly fathers, and that those doing the accusing are usually mothers. To talk of parents in this context, as if gender did not matter, belies what has become the predominant feature of this debate (and no, it is not the interests of children!). As the Chief Judge of the Family Court of Australia himself pointed out, it is the use *by women* of these allegations in their battles against men in the family courts that seems to be of central concern. One only has to read the literature being churned out on this subject, or lurk on a family law discussion list on the internet, to see the gendered nature of this debate. Fathers' rights groups line up against radical feminists and it seems the children are the ones caught in the crossfire. Of course, feminism has played an important part in the understanding of intrafamilial abuse. But now we are told that the tables are turned, women have taken over the family courts. Heaven help the poor man who gets caught up in a Family Court dispute, the worst excesses of which include the tarnishing of his pristine reputation with an unfounded allegation of abuse.

Some might say, therefore, that to look to feminist theory is unhelpful as it means taking sides and thus adopting a position from which neutrality is impossible. It is exactly this reaction, however, that is concerning. The hijacking of the debate about children's welfare says a lot about the way society, or sectors of it, operate to maintain the status quo. Drawing the boundaries of this debate along the lines of gender ensures that nothing is done about the problem itself. This backlash against the perceived gains of women in the family courts has proved a powerful tool in slowing

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<sup>55</sup> It is very difficult to provide an exact figure. The number of applications referred to above for that year - 1829 re custody and guardianship and 1050 re access (see the text accompanying note 26 above) - does not tell us how many children were involved. But being conservative and estimating that each application involved only one child, and using only the custody applications (assuming that there was considerable overlap between those figures) then we have 1829 children to consider. If we then take a figure of 10% of those being sexually abused (this is a very conservative estimate from the text accompanying note 22 above), we have 183 children at risk. How many of those are at risk of abuse from a father? The Advisory and Coordinating Committee on Child Abuse reported in its Summary Statistic Report for the financial year 91/92 that 23.5% of its substantiated sexual abuse reports involved natural or adoptive fathers. Using that figure, we now have a very conservative estimate of 43 of the children passing through the FCWA that year who at some point in their childhood are likely to be at risk of abuse from their fathers. In reality, the real figure would be considerably higher.

<sup>56</sup> FLA, s 65E.

<sup>57</sup> See *Brown and Pedersen* (1992) FLC92-271.

down the process of change, including in relation to the question of the protection of children from abuse. Let us look in more detail, then, at how this argument proceeds.

Feminist legal scholars will no doubt be well acquainted with the writings of Catharine MacKinnon, whose ideas on dominance provide a good starting point.<sup>58</sup> In her discussion of sex discrimination, MacKinnon exhorts us to move away from the problematic notions of “sameness” and “difference”, one or other of which is usually argued as the basis for extending women’s rights in a particular area. So, for example, sameness: “We are the same as men therefore we deserve...” equal pay, let’s say. Or difference: “We are different from men therefore we need...” maternity leave, for example. As a means to a particular end they may suffice, but ultimately they require the measurement of women against a standard. Both are phrased in terms of a comparison, and the comparison is with men. The reason that men are *the* term of reference is that historically they have had, and have controlled the distribution of, the rights to which women aspire. Women have had to prove they were as good as men to enter universities, the professions, juries and so on. This meant women had to prove they were the same as men – “as good as” means essentially “the same as” in this context - the standard for good being the way men are.

This then has been the process for dealing with sex discrimination issues. The problem with that process, as MacKinnon points out, is that in having to argue against this standard, women are doomed to fail - because women can never prove that they *are* men and therefore never meet the standard fully. The process of measuring women in this way, against a standard, is not a neutral process, it is skewed and plays its part in ensuring women do not achieve true equality. MacKinnon suggests that there is a reason for the process working this way, and that reason is protection of the status quo. By that she means the status quo of power - the hierarchy of power with white affluent men at the top and women, children, minorities and the like somewhere below. It is therefore an unequal status quo with some having more power than others. Those that sit at the top of the hierarchy have, of course, a vested interest in retaining the status quo - they derive their power from this position and they exercise this power to keep it. In other words, they exercise their power to maintain the status quo. It is this maintenance of an unequal status quo through the exercise of patriarchal power that concerns MacKinnon, and which she feels cannot be addressed by current debates such as formal equality versus affirmative action (ie sameness v. difference).

Susan Faludi in her bestseller *Backlash*<sup>59</sup> has documented in great detail what she refers to as the feminist backlash: that is, the dissemination and reinforcement of myths which serve to erode the gains, however small, of the women’s movement. Put in MacKinnon’s terms, Faludi is talking about another process which serves to maintain the unequal status quo. The propagation of myths about the negative effects of feminism serves to create a backlash against feminism which in turn ensures feminism’s gains are kept to a minimum, the net effect of which is to ensure that the status quo remains.

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<sup>58</sup> Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) Ch. 9.

<sup>59</sup> Susan Faludi, *Backlash: the Undeclared War Against American Women* (Crown: New York, 1991).

How, then, does this relate to CSA allegations in the family Court? The institution of law plays a powerful role in ensuring that the unequal status quo MacKinnon speaks of is not altered. The sexual abuse of both women and children by men is now recognised to be part of our social landscape. That is, the status quo *includes* the physical and sexual subordination by men of their inferiors (in terms of power) - which includes women and children. The failure to significantly penalise (let alone reduce) this phenomenon has also been part of the landscape. One's memory does not need to be long to recall the sorts of laws we have had which have, for instance, made prosecution of rape difficult, condoned the rape by a husband of his wife, discounted the evidence of children, trivialised domestic violence and so on. If this unequal status quo is to be changed as MacKinnon hopes, then a first step is to recognise how it operates and then to move towards reversing it. Both of these steps have always, however, been resisted, and resisted vigorously, because to ultimately resolve these problems would involve changing the current power dynamics of our society.

One would think that CSA would be a comparatively easy place for the women's movement to start (much easier, say, than in the workplace) as publicly most members of society, male and female, would acknowledge the social undesirability of sexual abuse (*at least* in respect of children, if not women). And for a few years it looked like there was some hope, as public awareness of CSA grew and more government money was thrown at the problem. What has followed, somewhat later here than in the United States, however, is less than surprising and deeply disturbing.

The current hysteria over false allegations represents exactly the type of backlash to which Faludi refers. While the focus should, if we are really concerned about stopping CSA, be on *why* it continues to occur and remain undetected, in fact the focus now is on how we ensure that a small number of men the subject of false allegations might be detected and protected. In the family courts at least, this backlash is very clearly directed against the perceived power which women have gained in parenting disputes. As the parent most likely to "win" residence, the myth would have us believe that mothers can, and frequently do, exploit their position of strength by making damaging false allegations against fathers, allegations which the courts readily act on. The judiciary responds to the backlash by reflecting precisely the same concerns in its decision-making process (that is, by being extremely cautious to act on such an allegation), to such an extent that it is very difficult to protect a child through Family Court proceedings - and so the abuse goes on. In other words, the Family Court assists in the process of distracting the focus from the real problem, the result of which is to ensure that the status quo remains.<sup>60</sup> MacKinnon might implore us to look more critically at this process in trying to understand why we fail to protect our children, just as she asks us to go beyond the sameness/difference debate in sex discrimination. In exposing these processes, we work to upset the status quo and thus move away from discrimination and child abuse.

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<sup>60</sup> See Fahn's discussion of judicial bias in Part VI of Meredith Sherman Fahn, "Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991) 25(2), *Family Law Quarterly* 193 at 199 & 201.

One final note on the significance of gender to this debate. As women are usually the bearers of these allegations in Court, it is hardly historically surprising that they are met with scepticism. Scholars such as Wigmore have long warned judges to be sceptical of women's evidence where sex offences are concerned. This extended to demanding that their social history and mental make-up be examined by experts! And so, nearly a century later, we find that the practice continues, with women's evidence being discounted and their state of mental health being questioned.<sup>61</sup>

### Maintaining The Status Quo

The process by which the Court actually achieves this shift in focus has some clearly identifiable characteristics. Not surprisingly, entrenched scepticism is the backdrop for much of what is being said and done. This final section of this paper seeks only to highlight some of the contours of these judgments to show how this concern to protect alleged male perpetrators is given effect, in turn reducing the likelihood of any finding of a risk of abuse.

In the first instance, there is an apparent ignorance, or failure to take notice of the quite considerable research on this topic. For example, some judges seem too eager to be persuaded that 'minor' abuse has little impact on its victim.<sup>62</sup> One judge found that it was likely that abuse had occurred but thought the abuse had to be put in its context, saying that it was 'seductive' rather than 'aggressive'. The implication seemed to be that this was less harmful to the child.<sup>63</sup> Whilst it is true that the nature and duration of any abuse is relevant to the impact of the abuse on the child, these are of course only two factors to be considered, with research referring to various other important factors.<sup>64</sup> It is also not uncommon to see judicial reliance on expert reports of a loving relationship between the child and the accused. Such evidence may be relevant to the order that is made at the end of the day, but is it an indicator of no abuse? As Quinn reminds us, it is quite common for there to be a significant amount of positive interaction between the two, and so such evidence may or may not be a validation of sexual abuse.<sup>65</sup>

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<sup>61</sup> Examples of cases where women's mental state of health are questioned include *M and M* (Family Court of Western Australia, Martin AJ, 29 March 1996) and *B and B* (Family Court of Western Australia, Anderson J, 1 December 1997). In the former, the Court accepted the court appointed expert, a psychiatrist's, conclusion that the wife was deluded, despite another psychiatrist's opinion that she was perfectly normal. Myers points out that the "extraordinary, sometimes disabling, stress" under which some mothers may find themselves, may account for unusual parental behaviour: John Myers, "Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection" (1989-90), *Journal of Family Law* 1 at 38-9.

<sup>62</sup> See for example *B and B* (Family Court of Western Australia, Barblett J, 1992) 17; *A and A* (Family Court of Western Australia, Martin AJ, 20 October 1995), 33.

<sup>63</sup> *S and S* (Family Court of Western Australia, Holden CJ, 11 July 1997), 8.

<sup>64</sup> See John Myers, "Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection" (1989-90) 28(1) *Journal of Family Law* 1 at 5-6.

<sup>65</sup> Kathleen Quinn, "The Credibility of Children's Allegations of Sexual Abuse" (1988) 6(2) *Behavioral Sciences and the Law* 181 at 192-3.



Some judges also seem ready to accept that children are easily coached and that retractions may provide some evidence of this.<sup>66</sup> This raises the whole question of the Court's preparedness to accept the evidence of children. Manley outlines some of the research in this area that confirms that children are not as easily led, and prone to fantasy, as many would have us believe, but also points to the need to consider their statements in context, that is, of a child of their age.<sup>67</sup> Spencer and Flin conclude, after a detailed examination of the research, that "the reliability of children's evidence depends crucially on how they are questioned...if this has been done properly, the supposed unreliability of their memories does not justify a legal rule requiring courts to approach their evidence with extra caution".<sup>68</sup> Spencer and Flin also review the literature on suggestibility, concluding that whilst children are suggestible, so are adults, and that children are quite resistant to suggestion on the issue of abuse.<sup>69</sup> On the question of retractions Manley says "[t]he retraction of allegations is well documented by researchers as being a common event attributed to the dynamics evident in cases of abuse such as secrecy and denial".<sup>70</sup> See also the discussion of Roland Summit's research, which has described retractions and delayed, conflicting and unconvincing disclosures as characteristic of child sexual abuse by a family member.<sup>71</sup>

Recidivism rates is another area where some judges seem to have a blind spot.<sup>72</sup> Mitnick says that "[c]linical experience has shown that without treatment specific to this specific type of sexual dysfunction recidivism is high – either repeated abuse of the identified victim or abuse of the victim's siblings".<sup>73</sup> As in many areas to do with CSA, there is conflicting research on this point.<sup>74</sup> However, little attention is paid to the research that does exist. The courts also seem overly impressed by an alleged perpetrator's vigorous denial of the allegation, as if this is in fact some proof of their innocence. In one case,<sup>75</sup> the judge referred to "the steadfast denials of the husband and his behaviour over the last 3 years which, while in some respects, is properly

<sup>66</sup> See for example *U and U* (Family Court of Western Australia, Tolcon J, 3 May 1993) at 13-14.

<sup>67</sup> Rachel Manley, "Assessing Allegations of Child Sexual Abuse", Paper presented to the Advisory and Co-ordinating Committee on Child Abuse Conference, *Children at Risk: The Politics of Practice* (Perth, Western Australia, March 18 – 19) 7-8.

<sup>68</sup> John Spencer and Rhona Flin, *The Evidence of Children: The Law and Psychology*, 2<sup>nd</sup> ed., (London: Blackstone Press Limited, 1993) 251.

<sup>69</sup> *Ibid.* at 252-7. See also the research referred to at note 99 below.

<sup>70</sup> Rachel Manley, "Assessing Allegations of Child Sexual Abuse", Paper presented to the Advisory and Co-ordinating Committee on Child Abuse Conference, *Children at Risk: The Politics of Practice*, Perth, Western Australia, March 18 – 19 at 5.

<sup>71</sup> John Spencer and Rhona Flin, *The Evidence of Children: The Law and Psychology*, 2<sup>nd</sup> ed., (London: Blackstone Press Limited, 1993) 195.

<sup>72</sup> Whilst judges do not readily say that they think further abuse is unlikely it sometimes seems a natural inference from their findings. Take for example *A and A* (Family Court of Western Australia, Martin AJ, 20 October 1995) where, despite it being found that it was likely that abuse occurred, it was held that contact should continue. The abuse was seen as 'mild' and it was thought that should abuse occur in the future the child could tell her mother! As against this was the significant short, medium and long term detriment of depriving the child of contact with its father (at 33).

<sup>73</sup> Mindy Mitnick, "Family Sexual abuse and Custody Evaluations" (1983) 21/2 *Conciliation Courts Review* 89 at 93.

<sup>74</sup> See David Hechler, *The Battle and the Backlash: The Child Sexual Abuse War* (Lexington: Lexington Books, 1988) 142-8.

<sup>75</sup> *K v M* (Family Court of Western Australia, Martin J, 5 August 1997).

subject to criticism, is consistent with a wrongly accused father trying to understand and disprove the allegations".<sup>76</sup> Denial of such abuse by perpetrators is, of course common. Moreover, one wonders what a judge expects of the protagonists in these cases. The likelihood of the truth being discovered is so slim there is hardly any incentive for perpetrators to tell the truth, and everything is to be gained by their lying.

If judges come to these inquiries sceptical of the allegation, it is to be expected that they will be especially vigilant of any expert evidence they perceive to be overly receptive to the idea of abuse. In the past it has not been uncommon in these cases for there to be a whole host of professionals called on to give evidence, some of which falls in to the category of expert evidence, some of which does not.<sup>77</sup> These witnesses can include anyone from Court counsellors to social welfare workers, medical practitioners, psychologists, psychiatrists, police officers and so on. Often, these professionals come to conflicting conclusions as to the likelihood of abuse and its effect, if any, on the child, leaving the Court to effectively choose between them. Lawyers and judges are part of a profession that places a very high premium on objectivity and impartiality. These tenets run through every facet of the law and it is rarely questioned by the courts. In choosing between conflicting evidence, judges are quick to discount the opinions of experts they believe to be biased or partial. Interestingly, when one reads FCWA judgments from the recent past where CSA allegations are involved, judges seemed more prone to noticing the flaws of experts who were overly receptive to allegations of CSA, rather than the reverse.

Take for example the unreported decision of the Family Court of Western Australia in *U and U*.<sup>78</sup> There were three witnesses in this case who ventured some opinion on the likelihood of abuse: a court appointed psychiatrist, the clinical coordinator of the CSA Unit at the local children's hospital (a medical practitioner) and a social worker from the Department of Community Development. The judge, who ultimately prefers the evidence of the psychiatrist, goes to great lengths to show why he believes the social worker's evidence is inferior. On closer examination his criticisms seem somewhat unrelated to the performance by the social worker of her task.

For example, the physical evidence reported by the medical practitioner was not wholly consistent with the social worker's findings.<sup>79</sup> Whilst this is no doubt part of the general evidence to be taken into account in reaching a decision on the risk of abuse, it surely should not be held against the examiner who makes a *psychological* assessment concerning the child's statements. In light of the rarity of there being conclusive physical evidence even where abuse is confirmed, it would seem somewhat of a red herring. Also, the social worker was criticised for not knowing of the mother's previous consent to an access order. The relevance of this to her report is again dubious. Rather, its inclusion possibly reflects the Judge's opinions as to why

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<sup>76</sup> *Ibid.* at 32.

<sup>77</sup> Order 30A of the Family Law Rules defines an expert to be "a person who has such knowledge or experience of, or in connection with, a question arising in proceedings that his or her opinion on the question would be admissible as evidence, but does not include a family and child counsellor or a welfare officer".

<sup>78</sup> (Family Court of Western Australia, Tolcon J. 3 May 1993).

<sup>79</sup> *Ibid.* at 8.

the mother behaved as she did. The social worker's conclusions related only to the veracity of the child's statements. Conversely, the Judge fails to acknowledge that there may have been many legitimate reasons for permitting access to go ahead. Finally, the Judge makes the somewhat damning finding that the social worker had spoken to other professionals before interviewing the child, and she was "influenced by the people to whom she spoke".<sup>80</sup> The judge concludes:

I have previously made mention of welfare officers making *adverse* conclusions on limited information. I do not believe that it is their function to make or reach conclusions but simply to report their observations. In the present case Mrs C. reached a conclusion without being fully acquainted with all of the facts.<sup>81</sup>

This same judge commenced his concluding remarks by saying (twice) that "[i]t is very easy to make allegations of sexual abuse. It is difficult to disprove the allegation once made".<sup>82</sup>

In *B and B*,<sup>83</sup> significant (perhaps determinative) weight was placed upon an expert – a psychiatrist - who had not interviewed the child. This expert, however, showed some reluctance to accept the truth of the child's disclosures, including in his report comments such as:

It is noted that marriage break-ups are often stressful events, and children's behavioural patterns and emotional responses are upset

It is important to emphasise the fact that many common minor medical conditions can cause [the physical indications found here]

It is very common that masturbation develops in young children without the child having experienced any sexual abuse

Much of what the mother cited as evidence [of the abuse] was the reaction of a distressed 2 ½ year old being caught up in an unfortunate marriage breakup<sup>84</sup>

This kind of approach does not seem to come under attack in the Court in the same way that it would if the conclusions were being drawn in favour of a finding of abuse.

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<sup>80</sup> *Ibid.* at 9.

<sup>81</sup> *Ibid.* at 16-17.

<sup>82</sup> *Ibid.*

<sup>83</sup> (Family Court of Western Australia, Barblett J, 1992)

<sup>84</sup> *Ibid.* at 15-16. For an example of this type of judicial myopia in a reported case see *In the Marriage of D and Y* (1995) FLC 92-581: "we conclude by saying that the history of this matter exemplifies the fact there are dangers in a too ready acceptance of the complaints of some children. Courts and expert witnesses alike must consider that an allegation may be false and explore this possibility in a way which appreciates that finding an allegation to be false is not the same as finding a child to have lied".

In another case,<sup>85</sup> the court appointed expert concluded that a child's allegations did not appear to have been coached. The judge's scepticism of this evidence was clear from his own interpretation of the allegations, which was that they hardly seemed (to him) sufficiently detailed to indicate whether coaching had taken place.<sup>86</sup> By comparison, the judge was "impressed" with the view expressed by a different psychiatric expert, who told the court that "[r]esearch has shown us that while mothers can provide adequately for the care of their daughters during childhood and adolescence, absence of a loving father-figure during these periods is likely to lead to adverse consequences for these girls..."<sup>87</sup>

What difference does it make which experts the courts prefer? Let us return to the point made above about the courts' search for "impartiality". We now know that the legal system has been guilty of discrimination when in fact it believed itself to be applying its rules objectively and fairly. Part of the problem has been, and continues to be, that judges find it difficult to accept that they bring to their decision-making their own personal biases. The refrain by judges that rape is a charge "easily laid but difficult to defend" is now unacceptable in criminal proceedings precisely because it reflects a bias in favour of the accused in light of the true situation, which is that such allegations are very difficult to make and are in fact extremely easy to defend. Such bias does not disappear overnight, however, and this comment persists today in CSA cases in family courts.<sup>88</sup> Unconscious of their own partiality, however, judges continue their search for evidence from unbiased sources. Like law, the medical profession also places a premium on scientific objectivity and impartiality.<sup>89</sup> They too belong to the powerful male coterie that sits at the top of our hierarchy of power. It would be little wonder if judges preferred the evidence of experts coming from professions not dissimilar to their own.<sup>90</sup> It would seem, however, that the search for impartiality has gone further than this. Where an expert starts from a position of healthy scepticism (about abuse having occurred) this is interpreted by the court as being, rather, objectivity. The question is simply not asked whether in fact the expert is *less likely* to believe sexual abuse occurs than is warranted given the statistics. Instead, all one hears about is suspect experts who might too readily believe such an allegation.<sup>91</sup>

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<sup>85</sup> *K and A* (Family Court of Western Australia, Anderson, J, 16 June 1995).

<sup>86</sup> *Ibid.* at 38.

<sup>87</sup> *Ibid.* at 57.

<sup>88</sup> *Supra.* note 38.

<sup>89</sup> See for example Kenneth Byrne, "Allegations of Child Sexual Abuse in Family Law Matters: Use and Misuse of Expert Evidence", in *Family Law Amendment Act 1991 and The Expert Witness in Family Law*, Leo Cussen Institute, 1991 at 2.3.

<sup>90</sup> It has been pointed out that "[o]ften it is not a psychiatrist, but some other mental health expert, who is in the best position to establish the probability of a child having been sexually abused and of a child telling the truth...Because of the manner in which sexual assault centres are staffed, there would be many more experts in the area of child sexual abuse who have social work, psychology or paediatric backgrounds than there would be psychiatrists.": Anne Macvean, Bill Skoufis and Manuela Galvao, "Child Sexual Abuse" [1988] *Law Institute Journal* 927 at 928.

<sup>91</sup> See for example Barblett J.'s comments: Judge Alan Barblett, "Child Abuse Allegations in Family Court", Paper presented to the Advisory and Co-ordinating Committee on Child Abuse Conference, *Children at Risk: The Politics of Practice*, Perth, Western Australia, March 18 – 19 at 99.

In fact, the clinicians involved in these cases are just as likely to be influenced by their own biases as are the judges. The common mythology is that courtrooms are filled with one-eyed experts who believe every story of abuse they hear.<sup>92</sup> "Confirmation biases can affect clinical interpretation...[B]eliefs about such problems as child sexual abuse are likely to affect the symptoms and behaviors that clinicians find of note".<sup>93</sup> Interestingly, some researchers have noted amongst workers in this area a predisposition *against* believing children's claims of sexual abuse.<sup>94</sup> Everson and Boat, who conduct workshops on child sexual abuse, have found that "[t]here is consistently a significant number of professionals from various disciplines who express expectations of false allegations of 25% or higher among children and up to 80% among adolescents. There is no known scientifically valid evidence to support such expectations".<sup>95</sup> These conclusions are supported by the findings of Conte et al<sup>96</sup> who found that of 212 various professionals surveyed, 90% agreed that being the subject of a custody dispute could distort a child's report, despite there being no data to support this perception.<sup>97</sup>

This is not intended to attack in any way the various professions of the experts involved. The point is rather that the court has, in the past, preferred certain experts over others. It assumes that these preferred experts are somehow able to be more objective than the other experts before the court (and that they are therefore more likely to have detected the truth) - just as the court believes *it* is in fact able to proceed objectively. One must remember that the personal biases of *all* the actors involved will most probably affect their judgment. But the pretence by the Court that certain actors are immune from this, justifies the exclusion of those witnesses who come to the case with a different starting position from that of the judge. Obviously, the significance of all this in the context of CSA is that if impartiality equals scepticism, it will be difficult to convince a court that there is a real risk of sexual abuse occurring. The sceptical expert will likely conclude that while abuse *may* have occurred, there are many other possible explanations and contact should not be terminated on that basis. This evidence is then likely to be highly persuasive.

Finally, on the use of expert evidence, it is important to note that this situation seems to have changed over the last few years, for somewhat external reasons. The reduction in the numbers of experts in these cases is evident and it would appear that

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<sup>92</sup> See Walsh's stinging attack on supposedly ideologically committed "professionals": Greg Walsh, "Re-establishing balance in the criminal justice system" (July 1991) *Law Society Journal* 70 at 72, 76 & 78.

<sup>93</sup> David Corwin, Lucy Berliner, Gail Goodman, Jean Goodwin, and Sue White, "Child Sexual Abuse and Custody Disputes: No Easy Answers" [1987] *Journal of Interpersonal Violence* 91 at 93.

<sup>94</sup> Mark Everson and Barbara Boat, "False Allegations of Sexual Abuse by Children and Adolescents" [1989] 28 *Journal of the American Academy of Child and Adolescent Psychiatry* 230 at 235.

<sup>95</sup> *Ibid.*

<sup>96</sup> J Conte, E Sorenson, L Fogarty and Rosa, "Evaluating Children's Reports of Sexual Abuse: A Survey of Professionals" (1991) 61 *American Journal of Orthopsychiatry*, 428.

<sup>97</sup> In the US there has been some debate as to whether expert evidence on the question whether a particular child has been sexually abused should be admissible, see John Myers, "Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection" (1989-90) 28(1) *Journal of Family Law* 1 at 17.

the FCWA is generally being presented with less, and perhaps by the Court's standards, more qualified, evidence on the whole. Court experts are invariably appointed and second opinions largely come from the ranks of clinical psychologists and psychiatrists. On the whole there seems to have been more consensus amongst the experts in recent cases and this reduces the options for the decision maker.

### Conclusion

The tides *have* turned and as the villains of the piece it is increasingly difficult for mothers to speak out about abuse where a family court dispute is involved. There is a very real danger she will lose, or be threatened with losing, custody of her child.<sup>98</sup> As one author reminds us, literature from the United States says it is typical for the mother in such a case to have an hysterical personality.<sup>99</sup>

Where does this leave mothers? A child goes to their mother with what appears to be a disclosure of sexual abuse against their father. In granting to a parent responsibility for a child's care, welfare and development, the court is asking that parent to make decisions that will protect the child from abuse. However, when the allegation is raised in legal proceedings (especially a family court), it is immediately suspected to be a fabrication. As Myers says of the U.S. situation:

[C]onsider the "catch-22" faced by women who raise the possibility of sexual abuse. A mother is idealized as her child's natural protector-possessing "woman's intuition" about the welfare of her offspring. When allegations of sexual abuse arise for the first time at divorce, some may wonder how a mother could possibly fail to notice that her

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<sup>98</sup> The unreported decision of *A and A* (Family Court of Western Australia, Tolcon J, 17 November, 1997) tells the story of a mother who eventually had custody taken away from her after allegations of sexual abuse were not proved. Whether or not that decision was correct on its facts, it is instructive to note that the court held against the mother the fact that she had made a false allegation, despite there being disclosures and severe behavioural problems being exhibited by the child in question. A failure to prove abuse does not mean that a parent necessarily concocted the allegation, but this seems assumed here. After some years in the father's care, the final chapter in this saga saw the mother's application for contact denied, as the children had come to have an obsessive hatred towards her. In *K and A* (Family Court of Western Australia, Anderson, J, 16 June 1995) the judge concluded by warning the mother that she was at risk of the "ultimate sanction of a court in access disputes...to change the custody of the child." (at 59). Other cases where the father was awarded custody after a disclosure of abuse are: *M and M* (Family Court of Western Australia, Martin AJ, 29 March 1996); *W and T* (Family Court of Western Australia, Tolcon J, 22 March 1996); *A and A* (Family Court of Western Australia, Martin AJ, 20 October 1995); and *Sampson and Sampson* (1977) FLC 90-253. See also Fahn's discussion of this in US cases: Meredith Sherman Fahn, "Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991) 25(2) *Family Law Quarterly* 193 at 195.

<sup>99</sup> Kenneth Byrne, "Allegations of Child Sexual Abuse in Family Law Matters: Use and Misuse of Expert Evidence", in *Family Law Amendment Act 1991 and The Expert Witness in Family Law*, Leo Cussen Institute, 1991, 2.33 citing G Blush, and K Ross, "Sexual Allegations in Divorce: The SAID Syndrome". Byrne goes on to warn that Australian practitioners have been slow to take notice of this literature. As the Blush and Ross paper was unpublished, related to research presumably done on divorce cases in the U.S. and was not to this author's knowledge supported by similar research of Australian cases, it is perhaps a good thing to be wary of placing too much significance on a so called "typical pattern" for these cases.

child was being sexually abused. Thus, even if the allegation is established, there may be reservations about the woman's maternal competence. And if the allegations is not established, the woman is stigmatized as a false accuser. There seems to be no safe way to raise the possibility of sexual abuse.<sup>100</sup>

Surely we must demand of these mothers that they bring forward such concerns – would they be a suitable custodian if they did not? The Full Court has alluded to this dilemma, even if in practice it remains a problem. In *N v S and the Separate Representative*<sup>101</sup> the Court said:

Not infrequently the Family Court is faced with circumstances where a custodial parent is either unwilling or unable to cooperate with access orders. These types of cases take on an unusual sensitivity in circumstances where sexual abuse allegations have been made. The custodial parent may well hold *bona fide* beliefs that the child is at risk on going to access. Whilst the Court may not have made findings consistent with those beliefs, the beliefs are nonetheless strongly held. It goes without saying that it is always in the child's best interests that adults charged with the care and responsibility of looking after the child should be vigilant to matters which will detrimentally affect the child's welfare. If a Court says to a parent you should cease your vigilance in respect to a certain type of conduct under threat that "you may well lose custody of the child", then the parent may find themselves in an impossible position.

In that case the wife's fears of abuse were seen, on the evidence, as being reasonable. Where, however, by the court's standards, they are seen as being unreasonable, then a less sympathetic approach is likely. In *Sampson and Sampson*<sup>102</sup> Fogarty J. made it clear that such "wilful or irrational behaviour may indicate such a defect of personality or character as to indicate that that person may not be a suitable custodian for the child...[justifying] the court in altering the custodial position."<sup>103</sup>

It is convenient to believe that there are hordes of women willing to use such an allegation to their advantage, simply because it is easier than trying to find a way through such dilemmas. Believing this myth permits the Court to ignore its statutory mandate – which is unequivocal: to promote the child's best interests. By keeping the focus on false allegations, the Court instead helps to maintain the status quo and thus ensure that children remain largely unprotected from intra-familial child abuse.

To suggest that the solution hinges in part on judicial education about child sexual abuse and the veracity of children, is perhaps not novel. But we must not underestimate the role counsel can play in miseducating, or perhaps just misdirecting, the judiciary. It is not for a judge to rely on materials not available for the scrutiny of

<sup>100</sup> John Myers, "Allegations of Child Sexual Abuse in Custody and Visitation Litigation" (1989-90) 28(1) *Journal of Family Law* 1 at 27.

<sup>101</sup> (1996) FLC 92-655, 82,732.

<sup>102</sup> (1977) FLC 90-253.

<sup>103</sup> *Ibid.* at 76 and 358.

counsel, and so the judiciary may at times rely somewhat too heavily on the materials that happen to be presented to them in any given trial. I vividly recall being told by a leading barrister working in this area that I must read “the” article on this topic – the one to which *he* was currently directing judges. That article<sup>104</sup> has as its objective the classification of the ways in which false statements occur in allegations of abuse. In the absence of other materials on the veracity of children as witnesses this might present a rather bleak picture of their truthfulness. In particular, discussion of confabulation, or suggestibility,<sup>105</sup> needs to be considered alongside equally compelling research that suggests the testimony of children is as reliable as that of adults, perhaps more so.<sup>106</sup>

The Family Law Council’s 1988 Report on Child Sexual Abuse underscored:

“the need for Family Court judges to be aware of at least the broad findings of research in this area. Evidence is not normally led on the question of what commonly occurs, and in many aspects of experience the judge’s common sense may be as good a guide as any. However, since child sexual abuse has been surrounded by a great deal of secrecy, judges, like other people, might well make quite erroneous assumptions about the probability of such matters as abuse occurring, and the circumstances in which children are likely to deny that abuse has occurred when in fact it has, or claim that it has occurred when it has not”.<sup>107</sup>

It would seem that these words are as apposite today as they were ten years ago. Concern about wrongful allegations is legitimate, but not to the exclusion of listening to children who are in need of protection. Whether or not in a given case a father has molested his child, there can be little doubt the child concerned has a serious problem, and on most figures it is more likely than not that the mother is simply trying to protect that child. That is where the FCWA *must* keep its focus, and not just because the FLA tells it to. Suspending contact may or may not be the solution,<sup>108</sup> but rejecting the child’s story, demonising the mother and denigrating the professionals working in the field certainly isn’t.

It has not been the intention of this paper to make recommendations for the improvement of what is patently a concerning situation, though there are many available for consideration.<sup>109</sup> However, to draw us back to what lies at the heart of

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<sup>104</sup> William Bernet, “False Statements and the Differential Diagnosis of Abuse Allegations” (1993) 32(5) *Journal of the American Academy of Child and Adolescent Psychiatry* 903.

<sup>105</sup> *Ibid.* at 906.

<sup>106</sup> Graham Davies, “Children in the Witness Box: Bridging the Credibility Gap” (1993) 15 *Sydney Law Review* 283 at 285. See also Marion Dixon, “The Credibility of Children as Witnesses: Memory, Suggestibility, Fact and Fantasy” (May 1993) *Brief* 34.

<sup>107</sup> Family Law Council. *Discussion Paper on Child Sexual Abuse*, 1988 at 10.

<sup>108</sup> It is not being argued in this paper that the Court *should* suspend contact in such cases, but rather that it doesn’t.

<sup>109</sup> See John Myers, “Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection”. (1989-90) 28(1) *Journal*



this issue – the protection of children from sexual abuse – the question of video taping children’s evidence deserves a fleeting mention. It is very easy to discount the voice of a child when it is presented through the reports of others, some of whom may in the next breath attempt to ‘contextualise’, and so de-emphasise, the story being told. In *M v H*<sup>110</sup> the trial Judge said:

The video tape made a profound impression upon me because of the nature of the disclosures made by A and the way in which those disclosures were made. I was considerably assisted in my determinations in this matter by having the opportunity of looking at, as opposed to reading what occurred in the course of this interview...I found the evidence given by A in this way to be particularly compelling. Without the benefit of any comment from any of the professional witnesses, I was impressed with the particularity of A’s comments about the sexual activity referred to and what I regarded as the inherent unlikelihood of her being able to describe what happened to her unless she had personally experienced the matter. It was chilling and discomfoting to hear what were really significant adult terms and concepts being used by one so young.

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*of Family Law 1* at 28-41; David Hechler, *The Battle and the Backlash: The Child Sexual Abuse War* (Lexington: Lexington Books, 1988) at 241-260.  
<sup>110</sup> (1996) FLC 92-695, 83, 302.