

CHAPTER ONE

COURT UNDER SIEGE

In the absence of strong political movements for human rights, the active process of bearing witness inevitably gives way to the active process of forgetting. Repression, dissociation, and denial are phenomena of social as well as individual consciousness.

(Judith Herman, 1992:9)

1.1 Introduction

In 1975 a new era for family law decision-making was marked in Australia with the introduction of the Family Law Act (FLA). The Act depended on the principles, the ‘no fault’ divorce and the ‘best interests of the child’, as its foundations for judicial decision-making. At the time this legislation was being enacted there was increasing recognition that child physical abuse was a social problem (Kempe, Silverman & Steele, 1962), although it was not until the next decade that the extent of child sexual abuse would also be acknowledged as a common problem for many children (Russell, 1983).

This thesis comes some 30 years after this legislation and began after the Reform Act (1995) (Reform Act), the first major reform since the legislation’s inception. It has been completed on the eve of further family law reform. In this period there has been an

escalation in social and political interest about family law matters. This contestation of legal issues is part of a defining and redefining process of the world of meaning: ‘in the realm of meaning, law is particularly important because it provides a site where meanings can be defined, tested and challenged’ (Smart, 2003:22). In contemporary family law, this contestation has included agitation about fathers’ rights after separation, their access to children and the payment of child support (Shared Parenting Council of Australia Inc., 2003)¹. Smart (2000) argues that the idealised biological family that continues after divorce has emerged as the preferred unit for the care of children post separation. In this model both parents remain engaged and involved in the financial provision and the day-to-day care of the children (Sevenhuijsen, 1986a).

Family law decisions about child sexual abuse allegations are made in territory that is continuously besieged by social and political debate, criticism and disputation. At present that territory is characterised by a concern about fathers having adequate contact and care of their children. The period in which the research has been undertaken has included a Joint Senate Inquiry into whether:

the Family Law Act 1975 be amended to create a clear presumption, that can be rebutted, in favour of equal shared parental responsibility as the first tier in post separation decision-making.

(Joint Senate Inquiry, 2003:19)

^{1 1} The Shared Parenting Council of Australia Inc., is a coalition of 28 fathers’, church and community groups.

Legislative reform in train following this inquiry is designed to establish a ‘presumption of equal shared parental responsibility’ (s61AD) where, at its most prescriptive, children live for equal amounts of time with each parent (Australian Government, 2005b). The Federal Government has created an environment in which mothers are discouraged from bringing allegations of abuse unless there is objective proof, and there is punishment for parents who do not comply with the new legislation (Ruddock, 2005c).

This notion that both parents should be central to the day-to-day decision-making about the child is a more recent trend in family law (for example, Smyth & Parkinson, 2003). This creates conflict when there is an expectation that contact must continue even when there are allegations of child abuse or domestic violence (Harne, 2003).

A second significant development in family law since the 1975 legislation, has been the acknowledgement that the Family Court is now a part of the child protection system in Australia (Brown, Frederico, Hewitt & Sheehan, 1998; Nicholson, 1999). An increase in the number of child abuse and domestic violence allegations has resulted in a de facto child protection system, parallel to the State systems, in a court that was originally established to determine a limited range of issues related to divorce, property and custody disputes (Family Law Council, 2000).

Decision-making and assessment in family law is situated in difficult territory characterised by a complexity of issues and competing interests. It is these allegations

and the Court's reaction to them that are the subject of this thesis. Allegations of child sexual abuse or incest raise particular challenges to the idealised constellation of the family after separation that has become intrinsic to contemporary family law legislation.

1.2 This thesis

This thesis is concerned with the processes which currently inform judicial decision-making in these cases and how the 'best interests of the child' is interpreted in defended hearings in the Family Court. It is also concerned with the assessment processes and concepts that inform the professional evidence tendered to the court during these hearings.

Allegations of child sexual abuse and incest have been the subject of long-term debate and exploration in the legal and psychiatric communities and so there is also a legal and psychiatric legacy that is engaged when these allegations are raised in family law proceedings. The dominant view found within these professions is that of a deeply held sceptical belief that women and children who make allegations of sexual violence are likely to be liars who are hysterical, mentally ill or vindictive (Freud, 1896; Hale, 1736; Scutt, 1997). This view has been woven into the contemporary forensic assessment models used by experts in family law disputes (for example, Gardner, 1987, 1994; Lucire, 2000; Turkat, 2002).

There has, however, been ongoing refinement of theories and research in the areas of child protection, child development and adult sex offending. This has resulted in a better understanding of many aspects of victims' experience of the perpetration of child sexual abuse, its relationship to domestic violence and other forms of child abuse and neglect, disclosure, investigation, recovery and the long-term effects of child sexual abuse (e.g., Fleming, Sibthorpe & Bammer, 1999; Kellogg & Menard, 2003). This raises the question of whether these advances are incorporated into the evidence provided to the Family Court and/or reflected in orders made by the court about children.

This thesis explores decision-making about children by examining how allegations and denials, and evidence from key players such as mothers, fathers, children and grandparents, is treated. It also examines what assessment concepts and ideas are used in reports tendered to the court by legal, psychiatric, psychological and social science professionals and which of these are used by judges in their final decisions.

1.3 My interest in this area

During the 1990s, I was working for Barnardos, a non-government child welfare agency, providing counselling and support for children who had been sexually abused and their non-offending family members. This service was funded by the Department of Community Services and Barnardos Australia, and was part of the Child and Adolescent

Sexual Assault Counsellors (CASAC²) network. In 1997, at a State CASAC conference, colleagues and I identified a number of cases where children had disclosed sexual abuse and had begun counselling and the family was subsequently involved in Family Court proceedings. A number of these cases resulted in court-ordered reports being prepared. These reports did not confirm the allegations, and concluded that the children were lying, or that the mother had created the allegations. In a number of cases this resulted in young children being returned for contact to their fathers, the alleged perpetrators. These experiences underlined the different approaches being taken in the two jurisdictions: what was abuse in one jurisdiction was considered to be a lie in the other.

From this it was evident that real problems existed in the assessment of and responses to children who made incest allegations. These problems resulted in immediate and ongoing safety issues for children. Despite the introduction of new programs³ by the court to manage child abuse cases quickly, and to involve State child protection departments, these problems still appear to be current. For example, the NSW Interagency Guidelines for child protection Intervention of 2000 mention the Family Court briefly, but while the Family Court's functions are described, the court is not integrated into the flow charts for

² Child and Adolescent Sexual Abuse Counsellors or C.A.S.A.C. services are community based counselling services funded by the Department of Community Services in NSW. Annual State Conferences allowed discussions and comparison of casework experiences.

³ The Magellan Program is a judge-managed approach to cases where there are allegations of children abuse. It has been, or is being introduced into all States and territories, except Western Australia where the Columbus project has been implemented. The Columbus project ensures that cases are dealt with promptly and investigations are ordered by child protection departments, if necessary.

interagency co-operation or decision-making (Commission for Children and Young People, 2000).

One of the gaps in the interagency network is in specialist services for preschool aged children: they are at particular risk of not gaining an adequate service response. The ability of the preschool child to make a verbal disclosure to a child protection officer is the linchpin of their eligibility for referral to a Joint Investigative Response Team (JIRT)⁴, assessment in a hospital-based child protection unit, or counselling in Department of Health services (Commission for Children and Young People, 2000).

Moreover, if these children are not living with the alleged perpetrator, they are not seen as a high priority and the allegations may never be investigated. In addition to these difficulties, there appear to be different assessment criteria operating in the child protection jurisdiction as opposed to the family law jurisdiction. As a result, children who are assessed as being 'at risk' of sexual abuse by their fathers in the child protection sector have been sent on contact with their fathers as a result of family law involvement. This is illustrative of a splintered and non-integrated child protection sector (Family Law Council, 2000).

The disclosure of incestuous sexual abuse usually creates a crisis in the family when the family is still intact, raising issues of whether the other family members and (usually) the mother will believe the child and act to protect the child, and whether she will leave her partner or husband in order to achieve safety for the child. When parents have already

⁴ Joint Investigation Response Teams (JIRT) comprised Police and child protection officers in NSW.

separated and one of the parents is the perpetrator, statistically this is most likely to be a father or step-father (Russell, 1983). The question that immediately arises is one about the future contact that the alleged perpetrator will have with the child. This creates an immediate crisis about family law issues of contact. If the child does not see the alleged perpetrator in the immediate aftermath of the disclosure, the question remains: when should they see them and under what circumstances? The court has to wrestle with the question of what type of contact is suitable for this type of offender. These are the issues that are raised in Family Court hearings when such allegations are raised.

This research was undertaken with the aim of achieving a particular outcome: making the processes that guide decision-making in family law more transparent to those who do not work within it. It is anticipated that a better understanding of the Family Court and family law will enable practitioners who work outside the court and in other areas to assist children and families who have been involved in family law disputes.

It is anticipated that the examination of judgments will provide insight into the complex area of judicial decision-making in these cases and into how evidence about children is regarded and dealt with. The specific goals of the research are to add to a knowledge and practice base that can be used in the assessment of children in family law disputes and to identify deficits in processes that impinge on the assessment and management of, and decision-making in, child sexual abuse cases in the Family Court.

1.4 Feminism and Child sexual assault

This research joins a critical, feminist commentary in reviewing the way in which decisions about children are made when there are child sexual abuse allegations. While feminism represents a broad range of theories and traditions, there is also common ground among feminist authors concerned with child sexual abuse and incest. This includes a socio-cultural explanation for incest in which gendered power imbalances are key: father-perpetrators are held responsible for the abuse rather than mothers or child victims (Laing, 1996).

This research tradition is located within radical feminist research and inquiry and is concerned with the way in which disclosures of child sexual abuse are responded to, in the context of a patriarchal society where there is systemic resistance to hearing victims of sexual abuse (Herman 1992). Scutt refers to the basis of a patriarchal social order being the notion of male ownership of women and children. The investigation of a child sexual abuse allegation against a father implicitly challenges this order:

Cultural and social institutions adhere to a hierarchical structure placing men, and particularly fathers and husbands, at the top. Giving proper recognition to the enormity of the sexual abuse of children and wives threatens not only male concepts of justice, but the organisation of society itself. All legal institutions- police, courts, the legal profession-are so strongly imbued with the notion of ownership, combined with 'male right', that requiring the legal system to respond

to children's and women's needs, rather than to maintain male privilege, is no easy task.

(Scutt, 1991:118)

The vast majority of sexual abuse allegations raised in the Family Court are incest allegations where the perpetrator is an adult who lives within the family. The nature of these allegations creates a very specific dilemma in a patriarchal society and threatens a social order based on the male-headed nuclear family (Herman, 1992; Masson, 1984; Scutt 1991; Smart 1989). Unlike the threat of the stranger from outside the family, incest threatens the very fabric of the society (Smart, 1989).

Recently, there has been interest and research pursuing domestic violence allegations in Family Court matters (Kaye, Stubbs & Tolmie, 2003). While there has also been some attention given to the incidence of child sexual abuse (Hume, 1996), as yet there has been no Australian research that examines how the decisions about these cases are dealt with in these hearings. This research fills that void.

1.5 Questions pursued in the research

The key question that this research attempts to answer is, 'How are child sexual abuse allegations dealt with in the Family Court?'

In order to explore this question the following sub-questions are posed:

1. How do judges make decisions when there are disputes in expert evidence?

2. What concepts and frameworks are relied on in the professional assessment of parents, children and allegations of child sexual abuse?
3. How does the legal process respond to those who allege child sexual abuse?
4. How is evidence relating to children treated in Family Court decision-making?

The methodology chosen was a thematic analysis of 21 first instance judgments. These judgments were selected using a purposeful selection process designed to highlight the issues involved in decision-making where there is expert disagreement. The judgments were made after the enactment of the Reform Act, and each contained disagreement about the child sexual abuse allegation by at least two professionals.

The cases therefore included evidence reported from different professionals on whether child sexual abuse had occurred, or whether there were risks to children as a result of the allegations.

1.6 Incidence

How significant is the problem of child sexual abuse and incest? This question has been the subject of much research and debate. Establishing the accurate prevalence of child sexual abuse has always been hampered by underreporting, as retrospective studies show that only a small percentage of adults who were sexually abused as children reported the abuse at the time (Berliner, 1988). In addition, the sex offenders themselves are also likely to under report the frequency of their abusive acts. When self identified sex offenders are assured of indemnity from prosecution, the level of self reporting increases

dramatically to reveal patterns of ongoing and changing forms of sexual abuse over a lifetime (Abel, Becker, Cunningham-Ranther, Mittleman & Rouleau et al., 1987).

Estimations of the prevalence of child sexual abuse are often derived from research utilising retrospective self report methodology. For example, Finkelhor's North American study of college students found that between 19 percent of girls and 9 percent of boys by the age of 16 had childhood sexual experiences (1979). Australian researchers Goldman and Goldman (1988) replicated this study in an Australian tertiary institution with similar findings. Of 991 completed surveys,⁵ 28 percent of the girls reported 188 incidents of child sexual abuse, thus resulting in the conclusion that between one in three and one in four girl students reported a sexual interaction that ranged from an invitation to do something sexual, to exhibitionism or fondling, through to actual or attempted sexual intercourse (Goldman & Goldman, 1988). In addition, Goldman and Goldman (1988) found that approximately one in ten or 11 of all the boy respondents also reported incidents of child sexual abuse. More than 90 percent of the abusers were male, and 76 percent were known to the child, whilst 24 percent were strangers.

1.7 Percentage of father offenders

This survey was more recently repeated in a Queensland University study (Goldman & Padayachi, 1997) and while the results were within the range of other similar studies, they were higher than the previous study. The authors consider that this may be due to

⁵ This study was a result of 991 questionnaires being completed by first year students at post-secondary educational institutions in Victoria. Thirty nine percent of this group were males, 61 percent were females.

differences in screening and having a greater number of screening questions than the previous study. The prevalence using the broad definition of sexual abuse (including exhibitionism to penetration) by the age of 17 years, was 19 percent for males and 45 percent for females. Incestuous abuse was reported in 9 percent of males and 19 percent of females.

Badgely (1984) found that 22 percent of girls and 9 percent of boys in a national Canadian random study had been sexually abused by the age of 18. Russell, in research employing a representative sample conducted in the San Francisco area, found even higher rates of 38 percent of women by the age of 18 years reported an experience of sexual abuse (1986).

1.8 The impact of incest

Most child sexual abuse allegations in the Family Court relate to incest; the intra familial form of child sexual abuse and the type of child sexual abuse that has found to be associated with the most severe forms of trauma for the victims (Browne and Finkelhor, 1996; Beitchman, Zucker, Hood, DaCosta, Akman & Cassavita, 1992; Fleming, Mullen, Sibthorpe & Bammer, 1999; Russell, 1986). Incest offenders pose a great risk to children because they have greater access to them and power over them. Laing (1996:7) proposed the view about intact families in which incest occurred:

... the offender is in a unique position to identify the child's vulnerabilities, to use this knowledge to create the most effective conditions of entrapment of the child, and to shape the perceptions of the mother and other family members about his victims.

In families where the parents are separated, as in Family Court populations, there is even more unfettered opportunity for an incest perpetrator to have access to their victim as the presence of a second parent is removed as a protective factor when a child either resides with the perpetrator or has contact with them.

Prior to Russell's landmark research into sexual abuse in the mid-1980s, incest had been predominantly reported as being promulgated by fathers. In Herman's analysis of five studies that relied on clinical studies since 1955, for example, father-child incest was by far the most prevalent form of incest, ranging from 69 to 95 percent of cases (1981). However, Russell's 1986 study, which was based on a probability sample of 930 women and is the most reliable research in the area of incest available, found that fathers and uncles were reported to be perpetrators at about the same rate. Twenty-five percent of perpetrators were uncles, while fathers, including step-fathers, biological, adoptive and foster fathers, were the perpetrators in 24 percent of cases. First male cousins accounted for 16 percent, brothers represented 13 percent, and grandfathers 6 percent of the perpetrators. However, there were differences in the experience of father-daughter incest that relate to why incest by fathers results in higher levels of trauma: abuse by fathers was

more severe. Fathers sexually abused their daughters more often than other abusers (38 percent abusing them 11 times or more compared with 12 percent of other abusers), and they were also more likely to force vaginal intercourse on their daughters. In short they caused the most severe effects when measured in terms of the type of abuse, the use of force, frequency and the effects reported by the victims.

There is some preliminary research that indicates that reported incidents of child sexual abuse have been on the decline over the past ten years in both the USA and Australia (Dunne, Purdie, Cook, Boyle & Najman, 2003; Finkelhor & Jones, 2001; Jones & Finkelhor, 2003). Whether these findings represent changes to the actual experience of children or simply of reporting patterns and of gate-keeping practices by over-loaded statutory departments is presently unknown. Never-the-less, the rates of current reporting still indicate that a large number of children are suffering the trauma of child sexual abuse.

1.9 Key terms

Most child sexual abuse allegations in the Family Court relate to incest, the intra-familial form of child sexual abuse. There are various definitions of incest that reflect differing degrees of biological and social relatedness between the child and perpetrator and in the sexual acts included. For example, Russell's study used a broad definition of incest that refers to the adult/child relationship as 'Any kind of exploitative sexual contact or attempted contact that occurred between relatives, no matter how distant the relationship, before the victim turned eighteen years old' (Russell, 1984:41). 'Incest' has traditionally

been used in a narrow band of sexual behaviour and between persons based on consanguinity.

The definition for child sexual abuse used in the FLA, s60D(1), is sexual abuse that is a sexual assault under State or Territory law in which the act constituting the assault occurs or

a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

s60D(1)b.

The term ‘child sexual abuse’ is used in this research, rather than ‘child sexual assault’, because it is the term used in the FLA and it does not confine the type of activity to that which meets the legal criteria of being an ‘assault’. It is also a broader term that encompasses the sorts of concerns that are likely to be raised in Family Court allegations.

The complexities that are involved in assessing allegations of child sexual abuse are compounded by the lack of clarity in the use of key terms in the area (Browne & Lynch, 1995; Finkelhor, 1994). There has been inconsistent use of definitions for key terms in both research and practice.

The definition of what constitutes ‘abuse’ has changed over time, and while early studies used broad definitions such as ‘Sexual experiences involving other people while growing up’ (Sedney & Brooks, 1984), more precise definitions have been used by later researchers. Finkelhor, for example, defined categories that comprised a range of behaviours such as ‘fondling, intercourse and exhibitionism’ (1979). Sorrenti-Little, Bagley and Robertson (1984) further narrowed the definition to specify only fondling or intercourse with the child’s unclothed genitalia (Salter, 1988). In addition, an age differential between the assailant and the victim of five years or more (Briere & Runtz, 1985, cited in Salter, 1988) or three years (Sorrenti-Little et al., 1984) has also been required by some researchers.

This research is primarily about child sexual abuse allegations. However, there is a relationship between all forms of child abuse and domestic violence. While there is no one definition of domestic violence that is not contested (Laing, 2000), in this research the definition adopted is from Partnerships Against Domestic Violence Statement of Principles, agreed on by the Australian Heads of Government at the 1997 National Domestic Violence Summit:

Domestic violence is an abuse of power perpetrated mainly (but not only) by men against women both in relationship and after separation. It occurs when one partner attempts physically or psychologically to dominate and control the other. Domestic violence takes a number of forms. The most commonly acknowledged

forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation.

(Australian Heads of Government, 1997, National Domestic Violence Summit, cited in Laing, 2000).

This definition contrasts to that used in the Family Court. The FLA captures domestic violence and child abuse under one broad category of ‘family violence’ that includes all types of violence within families. This definition is utilised in the Family Court’s Family Violence Strategy (Family Court of Australia, 2004c) and in the FLA as follows:

Conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family to fear for, or to be apprehensive about, his or her personal well-being or safety.

(s60D, 5(b))

1.10 How to read this thesis

Chapter Two is the first of three chapters to examine the literature that relates to child sexual abuse allegations in family law disputes. The available research literature on allegations of child abuse in the Family Court is reviewed, including the limited research specifically on child sexual abuse allegations. It is noted that most of the research undertaken to date on the impact of the first major reforms to the FLA, has dealt with

domestic violence allegations, with no studies in the last ten years into the Court's response to allegations of child sexual abuse.

The chapter also outlines the challenges that arise from the Family Court's growing role as part of the child protection system, a role that was not anticipated at the time of the Court's establishment. These challenges include the legal precedents that guide findings in relation to child sexual abuse allegations and associated risk to children; the problems arising from the failure to integrate the Family Court's child protection role with the work of statutory State child protection agencies; the complexity of responding to allegations that may involve both domestic violence and various forms of child abuse; and the family law system's emphasis on understanding children's welfare primarily through the literature on the impact on children of separation and divorce, including the concept of "high-conflict" parents, rather than through the child protection research literature. This is found to shape a sceptical view about the veracity of allegations of child sexual abuse made in the context of Family Court proceedings.

Chapter Three begins with an examination of the polarised conceptualisation of child sexual abuse and of the two paradigms that dominate the literature. These are the 'sceptical' and 'child protection' paradigms. The sceptical paradigm typically understands child sexual abuse as rare, and allegations as being the product of a mother, child or professional erroneously making an allegation. This is contrasted with the 'child protection' paradigm that conceptualises child sexual abuse as a common occurrence and

one that children, and in particular girls, are at risk of after their parents separate or divorce (Wilson, 2001).

The nature of child sexual abuse, the secrecy and manipulation involved, and the young age of many victims, creates high levels of difficulty for professionals assessing these allegations. While false allegations of child sexual abuse are rare, there is a fixation in the literature on false allegations. The use of the simplistic true/false dichotomy within the sceptical paradigm to categorise these cases is explored.

The chapter also outlines the major historical influences that have had an enduring impact on establishing a deep scepticism about allegations of sexual abuse. This legal legacy of scepticism has been given added legitimacy by psychoanalysis and psychiatry, as found in the 'family dysfunction literature'. This literature focuses on the mother and child, with the father escaping scrutiny despite his role as alleged perpetrator.

Despite the strong theme of scepticism in the literature there have been voices of dissent throughout history that have attempted to raise the social issue of incest and child sexual abuse. The chapter concludes with the 'rediscovery' of child sexual abuse in the 1970s and 1980s as an example of this dissent.

Chapter Four examines the effects of the backlash that followed the 'rediscovery' of child sexual abuse, including the effects of the 'false memory debate'. The chapter focuses on the particular version of the backlash experienced in the family law context by

psychiatrists who became expert forensic assessors in these cases. These psychiatrists developed a family law model of the alleging mother who made allegations as a result of mental illness or vindictiveness in order to prevent contact with the father (Gardner, 1987, 1994; Green, 1991, 1986; Kaplan & Kaplan, 1981; Blush & Ross, 1987). This model, typified by Gardner's Parental Alienation Syndrome (PAS), was biased against making positive finding of abuse. This conceptualisation has elicited a strong critical response from child protection, feminist and systems theorists, who point to its theoretical and practice limitations. The psychiatric conceptualisation, and scepticism, about child sexual abuse allegations in family law disputes is challenged by recent research into family court populations that finds the majority of allegations of child sexual abuse raised in the Family Court are based on valid concerns. Indeed, fathers (rather than mothers) have been found to be the group of persons who make the highest number of false complaints about child abuse (Trocme & Bala, 2005).

The chapter finishes by exploring some of the issues for professionals in the assessment of these cases, including bias in assessments and attempts to establish reliable assessment models. The partial integration of issues related to child abuse into the clinical literature addressing family law is noted (Lee & Olesen, 2001), as is the value laden nature of such assessment processes. Finally, the chapter raises a number of questions relating to the integration into the body of knowledge used in family law, of research knowledge about child victims of sexual abuse and sexual abuse perpetration.

Chapter Five justifies the methods used in the qualitative thematic analysis of the 21 Family Court judgments used in this research. The chapter outlines the theoretical orientation of the research, it describes the influences on the methodology and details the aims, research questions, sample selection, ethical considerations, and data analysis. This chapter ends with a case summary of each of the cases included in this research.

Chapter Six provides a demographic profile of family members, professionals and judges involved in the cases as reported in the judgments. It also summarises the explanations provided about the allegations, the judicial outcomes of the cases and the major themes found in the judgments that are spelt out in Chapters Seven to Nine.

Chapter Seven examines the way in which judges manage conflicting evidence and how evidence from different sources is compared and evaluated. It also assesses the weight that is given to evidence in the judicial outcome. The evidence is sourced from professionals from different workplaces and with different training. The impact of these differences is examined.

Chapter Eight examines the way in which mothers and their allegations are conceptualised and analysed within the judgments by professionals and judges. The impact of the separation and divorce paradigm on considerations about mothers is also examined.

Chapter Nine examines the way in which fathers are assessed by professionals and judges. The theoretical frameworks used to conceptualise their behaviour, and the allegations about them, is critiqued.

Chapter Ten explores the descriptions and analysis used to understand what the subject children in these judgments experienced. The theoretical frameworks used to understand children, and the degree to which children's evidence was considered, is examined. The chapter also considers the assessment of risk made by judges in relation to the allegations made about and by children.

Chapter Eleven outlines the conclusions and the implications of the research for practice in the Family Court and child protection fields.

CHAPTER TWO

THE FAMILY COURT/CHILD PROTECTION NEXUS

2.1 Introduction

Despite the Family Court being established to deal primarily with property and divorce under the ‘no fault’ legislation of the FLA, it has increasingly dealt with domestic violence and child protection issues. Based on this trend, clearly identified in their research in the Family Court of Australia, Brown, Frederico, Hewitt and Sheehan (1998) argue that the Family Court has become a de-facto part of the child protection system. This chapter considers the challenges this raises for the Family Court in the management of cases where child abuse is alleged and in negotiating a role in the child protection system.

Key among these challenges is the reliance of the Family Court on a body of literature that emphasises the negative consequences and psychological effects of divorce on children. In particular, the effects of parental conflict and the loss of a relationship with the non-resident parent have been emphasised in this literature (Neale & Smart, 1998). This chapter explores the ways in which this perspective shapes the Court’s response to child abuse allegations.

This research commenced at the time of the implementation of the first significant change to the FLA since its inception, the Reform Act. At the time of its implementation, there was concern about the ways in which the tension between two of the key principles in the legislation would play out: the right of the child to have contact with both parents and the right of the child to protection from family violence (Rhoades, Graycar & Harrison, 2000). The chapter concludes with a discussion of the impacts of this legislative amendment, which create the context for this research.

2.2 The Family Law Act 1975

The FLA was proclaimed in a period that was socially progressive. It marked a significant departure from previous laws governing the dissolution of marriage. There was no longer any requirement for one party to be found responsible for the breakdown of the marriage, and it was envisaged that divorce and the decisions that surrounded it, such as property settlement and the arrangements for the children, would be sorted out with the assistance of counselling and mediation services provided at the Court:

The creation of the Family Court of Australia was an initiative aimed at improving the manner in which separation and marriage dissolution were managed. Informing the vision were humanitarian values – the Court was to be a helping court, the need for improved access to justice was identified. The Court's processes were to be less formal, services were to be provided to remote areas and child-care was to be provided for parents using the Court's services.

(Family Court of Australia, 2002, np).

From the outset the Family Court was not conceptualised as a Court that would deal with domestic violence between ex-spouses or with child abuse. Hence, when such allegations were made they were not seen as the province of the Court. The former Chief Justice, Alastair Nicholson, commented on this on his retirement, saying that the ‘no fault’ culture of the Court had resulted, in the 1980s, in the Court being unwilling to consider domestic violence: ‘Judges would tend to say, “we don’t want you to come here and talk about who is at fault for this or that” and so violence tended to get pushed out.’ (Family Court, 2004a:3).

It is somewhat paradoxical that this Court, which was established on the highest humanitarian ideals, has itself been the source of considerable violence that has been aimed directly at the judges, other staff and their family members. This terrorism has taken lives. However, the problem has been framed as the responsibility of the Court, rather than of the people who have committed terrorist acts (Taylor, 1992). Elizabeth Evatt, former Chief Justice of the Family Court, commented in an interview about this:

They said, ‘the Court has been bombed, what’s wrong with the Court?’

Not, ‘the Court’s been bombed – what an outrage – what are we going to do to stop this type of thing happening in our community...’ The agenda started to be: what are you going to do to change things.

(Taylor, 1992:1)

In addition there has been a similar tendency to attribute the cause of familicide, where fathers have murdered their children and ex-partners, to Family Court involvement, or to categorise such murders as ‘family law’ cases, even when these families have had no involvement with the family law system (Johnson, 2005). This attribution of responsibility to the court for violent acts perpetrated by troubled individuals appears to be the result of a process similar to that of ‘blaming the victim’ noted in the child sexual abuse literature (Herman, 1981; Salter, 1988). In the case of familicide or infanticide, the blame is shifted away from the perpetrator and onto the Family Court. The Court, as the site of decision-making about parental responsibility after separation, is framed as the cause of what has been seen by conservatives to be a crumbling of social order in which men were once defined as the legitimate patriarchs (Sevenhuijsen, 1986a). The second irony for the Court, which was established to humanely hear divorces, is that it has become a venue in which the range of violence that occurs within families is raised.

2.3 Australian research on child abuse in the Family Court

Research by interdisciplinary research teams that included social work and law led by Thea Brown of Monash University in Melbourne, (Brown, Frederico, Hewitt and Martyn (1995), Sheehan Brown, Frederico, Hewitt and Sheehan (1998), Brown, Sheehan, Frederico, Hewitt (2000, 2001)), have established that child abuse has now become a core element of the Family Court’s work. However, the burgeoning of this work has occurred without formal recognition by the court or by the child protection sector.

Brown et al. (2000) reviewed 200 cases over two States in which there was a contact or residence dispute and child abuse allegations. They found that the proportion of the total cases entering the Family Court that involved allegations of child abuse cases was small, which challenges the notion that child sexual abuse cases were flooding in to the Family Court (Crisp, 1988). However, as cases moved through the system many were resolved and, by the time of the pre-trial conference, 50 percent of the cases included child abuse allegations. Of the matters that went to trial, 30 percent involved child abuse allegations. Many of the cases were found to have multiple allegations of different types of child abuse and/or domestic violence. Twelve percent of the cases included child sexual abuse allegations, and in 25 percent of these cases there was a combination of sexual abuse and other forms of child abuse.

These findings highlight the complexity of child sexual abuse allegations in family law disputes. These allegations are often associated with other forms of family violence, and involve interaction between the Family Court and the State child protection jurisdiction. The multiple types of abuse contribute to the challenges involved in assessing such allegations and highlight the intensive level of resources required (Brown et al., 1998a, 1989b).

Brown, et al., (2001) found that the majority of cases (66.7 percent) had not been investigated by the State child protection authority. Even when notifications from the court were made to the State body, half of these were not followed up, investigation times were variable, substantiation rates were low and the information that was fed back to the

Family Court as a result of these investigations was ‘very cryptic’ (Brown et al., 2001: 855). Moreover, Brown et al. (2001) found that child abuse cases were being referred by the statutory child protection departments to the Family Court, although court counsellors are explicitly prohibited from investigating such allegations.

These findings, together with the conclusions of a major government report (Family Law Council, 2002) highlight the fact that, although the Family Court is now an intrinsic part of the child protection system, neither the court nor the State and Territory statutory child protection agencies has developed a consistent policy response to this change of role.

2.3.1 Australian research on child sexual abuse allegation in the Family Court

To date, there has been little Australian research about the Family Court’s management of child sexual abuse allegations. Further, the small body of existing research was conducted prior to the Reform Act, and does not focus on judicial decision-making in contested cases. This research aims to fill that void.

Based on unpublished internal research in the Family Court,⁶ Parkinson (1999) reports that seven percent of the 294 cases heard in the Court in 1990 contained an allegation of

⁶ Bordow, formerly of the Research and Evaluation Unit, Family Court of Australia, undertook internal research that included the examination of the number of child sexual abuse cases in the Court’s workload, however, this research was never released. Parkinson’s figures are sourced to private correspondence with Bordow. Other aspects of Bordow’s research were however published in 1994 (see bibliography).

sexual abuse committed by the child's father, and in another three percent there was an allegation of child sexual abuse committed by another member of the child's family

The research by Brown and her team (1995) laid the basis for the implementation of an interagency approach – 'Project Magellan' – to the management of serious allegations of child abuse in the state of Victoria (Brown et al., 2001). This project evaluated 100 cases that were managed within the program. The largest change in this population in comparison to the first study was that there was a threefold increase in child sexual abuse allegations, with 32 percent of the cases involving child sexual abuse allegations as opposed to 12 percent in the previous study. There were also additional cases where child sexual abuse cases occurred with other types of abuse, although these were similar to the previous study and comprised an additional 25 percent of cases. The rise in child sexual abuse allegations may be explained by the selection criteria applied: these were cases that were referred because they met the criteria of being serious abuse cases. Under Project Magellan, the Family Court ordered the investigation of the alleged abuse by the State statutory child protection departments. The resultant finding of this was that 50 percent of cases were substantiated. The project was evaluated as being successful on a number of indices, including bringing about early resolution to the cases and lasting agreements. While the findings of Project Magellan have noted improved responses to child abuse, the project has subsequently been piloted only in two limited locations in NSW.

Hume (1996) studied 50 cases that contained sexual abuse allegations in the Adelaide Registry in 1990-1992. These allegations were raised either in affidavit material, during conciliation in the Court, or in the preparation of family reports. Hume followed these

cases through the court system until their finalisation. She found that the rates of child sexual abuse allegations made in the court were about the same as the rate of referrals made to the State child protection department in South Australia at the same time. She also found that the percentage of these cases that were substantiated was higher than for the South Australian child protection population. Of the 50 cases in this study, 42 percent were substantiated compared to confirmation rates of 37.3 percent of notifications made to the State's statutory child protection department, Family and Community Services, during 1993/94. Most significant, however, was that the rate of substantiation was highest when there were specific allegations of child sexual abuse that involved the father: confirmation rates were high at 70.4 percent (n=19) of these cases. This figure is substantially higher than the rate of confirmation of sexual abuse (37.3 percent) in figures from Family and Community Services. The rates of inconclusive findings in this study were 16 percent (n=8) and are comparable to Family and Community Services figures of 18.6 percent. No abuse was assessed to have occurred in eight percent (n=4) of cases in this study. This figure is substantially lower than the figure of 20.4 percent of investigations in the data from Family and Community Services and suggests that child sexual abuse allegations made in divorce and custody/access hearings are less likely to result in a finding of 'no abuse'.

On examination of the judicial outcome, Hume (1996) found that 80 percent of the cases did not go to trial, and a large percentage of parents did not complete a court process, relying instead on informal agreements to establish contact arrangements. Of the 18 percent (n=9) of the cases that did proceed to a fully defended hearing, seven were

confirmed by the investigative body. However, in three of these cases the sexual abuse allegation was not litigated and the parties relied on other evidence to pursue their case. In only two cases were there doubts expressed in court judgments about the motivation of the person making the allegation. (In one case this was the mother against the father, with medical evidence indicating abuse had occurred, but the alleged abuser was unable to be identified, and in the other case it was a father making the allegation against the mother's partner).

These findings counter the widely held belief that child sexual abuse allegations are made at a much higher rate in the Family Court than statutory child protection jurisdiction. This is further discussed in Chapter Four.

Like Brown et al. (1998), Hume (1996) also found that a large proportion of these cases of child sexual assault— 68 percent — also contained domestic violence allegations. Further, 34 percent had not been investigated in the child protection jurisdiction. In addition, the alleged and alleged comprised a range of family members: 64 percent of the alleged perpetrators were fathers, and 14 percent were the mother's new partner, with other alleged abusers including mostly other family members. Sixty-two percent of alleged abusers were mothers and 16 percent were fathers. Mothers made allegations of sexual abuse against fathers in slightly less than half of the cases (n=24; 48 percent), which challenges the notion that mothers always make allegations against fathers. In addition, fathers made allegations against mother's partners in 75 percent (n=6) of the cases where fathers were the source of the allegation.

This study's findings create a picture of child sexual abuse allegations occurring in the Family Court at about the same rate as in the child protection jurisdiction. These matters are complex and associated with other forms of abuse, and most frequently contain allegations that were supported both by the State child protection substantiation process (when this was available) and by judicial finding (when the cases went to trial). In addition, of the very small number that proceeded to trial, the majority were found to contain enough evidence to result in a substantiation of the abuse.

Humphreys (1992) undertook a small qualitative research project that examined the treatment of child sexual abuse cases that were involved in both the State statutory Department of Community Services (DoCS) in NSW and the Family Court. She tracked the total number of child abuse cases confirmed in a six month period (155). Of these, 12 had Family Court involvement involving changes of residence or contact. Humphreys found that Family Court orders did not provide appropriate levels of protection. Orders were made for children to have contact with fathers in half of the cases where there may have been a risk of sexual abuse.

This small body of Australian research suggests that the assessment of child sexual abuse cases in Family Court proceedings is complex, with child sexual abuse often occurring in conjunction with other forms of child abuse and with domestic violence. Moreover, these allegations also occur in an area that is characterised by a policy and practice confusion

and overlap between the State child protection sector and the federal Family Court (Family Law Council, 2000; 2002).

2.4 Challenges in assessing allegations of child sexual abuse in the Family Court

2.4.1 Legal precedent

There are two main precedents that relate to child sexual abuse which guide the parameters of a judge's findings in the Family Court. In *M & M* (1988), the High Court handed down a ruling that it was not the role of the Family Court to reach a finding about whether child sexual abuse had occurred or not. Reaching a finding such as this was seen to be the proper role of the criminal courts, where there is a higher burden of proof and there are processes that offer protections and procedural rights for the accused. The High Court found that it is only when evidence meets the strictest end of the civil standard of proof as interpreted in *Bringshaw v Bringshaw*⁷ that such findings should be made in the Family Court⁸ (Parkinson, 1998). Instead, the role of the trial judge was defined as being responsible for determining the risks of child sexual abuse:

⁷Justice Dixon said that the seriousness of an allegations made, the inherent gravity of the consequences flowing from particular findings are considerations which must affect the answer to the questionIn such matters, 'reasonable satisfaction should not be produced by in exact proofs, indefinite testimony, or indirect inferences.' (1938) 60 CLR 336 ('Bringshaw'): 362.

⁸ Within the Family Court the level of proof that is required to establish allegations, is that of 'On the balance of probabilities'. However, Parkinson argues that this level of proof operates as a sliding scale, with less evidence being required to make a positive finding about allegations that are considered to be less serious. Due to the serious implications of a positive child sexual abuse finding, the highest level of evidence within the 'on balance of probabilities' range towards, to the 'beyond reasonable doubt' threshold, is required.

The existence and magnitude of the risk of sexual abuse, as with other risks of harm to the welfare of the child, is a fundamental matter to be taken into account in deciding issues of custody and access.

(M & M (F.C.88/063:24))

A second precedent that is also significant in this area is the High Court finding of B. & B. This ruling has been a significant finding relating to the definition of ‘unacceptable level of risk’ that would result in a judicial outcome of no contact. It established the Court’s obligation to protect children from the harm of child sexual abuse and only that in extraordinary cases should contact continue once the risk of child sexual abuse had been established (Scutt, 1991). However, the nature of child sexual abuse presents obstacles in bringing supporting evidence of risk to the Court. Child sexual abuse is frequently the result of a carefully built relationship with a child in which there are incremental increases in physical intimacy, leading to sexual contact (Conte, Sorensen, Fogarty & Della Rosa, 1991; Jenkins, 1997). It may therefore be difficult for a child to identify specific abusive acts. Moreover, this “grooming” process (Christiansen & Blake, 1990) undertaken by an adult may add up to a picture of concern for a child but may not contain individual acts that reach a threshold of what a court considers to be abuse.

Judicial findings concerning risk, as opposed to the finding of whether sexual abuse has occurred or not, is therefore the judge’s usual role in these matters. There have been

criticisms about the way that the Court manages matters in which there are allegations of violence and child abuse from both a father's advocate position and from a child protection position. For example, it is argued that allegations of domestic violence and child abuse are made too easily in the Family Court without a determination being made about whether the allegation is fact or not. Moreover, the test of 'unacceptable risk' established by the High Court is seen by pro-father commentators as fundamentally flawed because it is based on a risk estimated from these unfound allegations, rather than from an incident that has been found to have occurred (Hirst, 2005). In contrast to this position, child protection advocates have argued that, despite the precedent established by M & M, Family Court decisions do not always include an assessment of this risk and, as a result, children may be put at risk (Jenkins, 2003; McInnes, 2003). These legal precedents form part of the backdrop against which the judicial decisions, the subject of this thesis, are made.

2.4.2 The Family Court/child protection interface

There are problems that arise from the Family Court not being integrated into the child protection sector. The interagency mechanisms that have been found to be essential for the identification and management of risk to children are not well developed (Hallett, 1995; Commission for Children and Young People, 2000). This raises the question of how the Court undertakes the serious and complex task of making decisions about these cases when child protection investigations are not undertaken.

Despite acknowledgment of the Court's role in child protection in Project Magellan (Brown et al., 1998), the Court is still not integrated into the wider child protection system at many levels and there are systemic impediments which prevent a unified or consistent approach to the problem of child abuse. The Family Law Council (2000, 2002), for example, identified duplication and confusion between State and Territory statutory child protection departments and the Federal Family Court. Of major concern is that both domestic violence and child abuse can be caught in both the State and Federal jurisdictions simultaneously and this may result in a systemic failure to protect children from serious abuse (Family Law Council, 2000, 2002).

A combination of gate-keeping practices designed to exclude cases, resource shortfalls in State child protection departments (Family Law Council, 2002) and sceptical beliefs about the veracity of such allegations may be influential in this problem. Further to this, legal practitioners in North America have suggested that, when there are family law proceedings on foot, investigating professionals prefer to leave child sexual abuse allegations for the Family Court to deal with. Haralambie's observations appear to be true for Australia:

There are workers who investigate cases much less thoroughly when there is a custody case in progress, either because they believe that the allegations are inherently less reliable or because they feel that the child will be protected in another forum.

(Haralambie, 1992:166)

There may be legitimate reasons why State child protection departments do not investigate every case referred to them. The cases may not be relevant to the child protection agency, the child may not be presently in need of protection, there may be insufficient information to complete a risk assessment, or the concern may not be serious enough to warrant investigation (Family Law Council, 2002). Brown et al. (1998a) and Hume (1996) both confirmed that many of these cases are simply not raised within the child protection sphere.

The implications of this are significant: the Family Court may be the only agency involved with the child sexual abuse allegation. However, the Court does not have the capacity to investigate allegations of child abuse. In addition, the two systems operate within two different theoretical paradigms, which result in inconsistency in assessments between child protection and family law jurisdictions (Family Law Council, 2000, 2002). In the Family Court, orders are usually made for a forensic clinical assessment to be undertaken, by child and family psychiatrists, otherwise family reports are undertaken by social workers and psychologists employed as Family Court counsellors. The role of the assessor is defined under the Rules of the FLA.⁹ This assessment takes place at some time after the Court application and may be after a significant delay. The assessment will also have a psychiatric tenor. In the child protection arena the assessment of safety and risk to the child is of immediate import and in such assessments it is usually the resident mother's ability to act protectively that is a paramount and deciding factor in the outcome

⁹ The role of these specialist assessors was defined under s. 30A of the Family Court rules prior to the change of the rules in 2004. They are now defined under Family Law Rules 2004, Chapter 15.44. Orders made for a Family Court counsellor to undertake a Family Report are found under s62G of the Family Law Act, 1975.

of the child protection intervention (Baird, 1999; Humphreys, 1992, 1999). This focus shifts in the Family Court arena to a psychiatric assessment of the mother's motives for bringing the allegation, her mental health and her capacity to promote a relationship between the child and father. When a mother stops making the child available for contact to the father, in order to ensure their safety, this may be construed as 'interfering with contact' (Turkat, 2002) in the family law jurisdiction while the same action might be seen as proof of protective capacity in the child protection jurisdiction.

In such a complex situation with many systems involved, it is understandable that parents may try unsuccessfully to secure protective intervention by contacting a number of professionals and jurisdictions (Myer, 1989). However, these attempts may be interpreted as the parent attempting to create evidence (Neustein & Goetting, 1999).

It is a peculiarity of the Australian Federal and State child protection legislation that if these notifications were made about children in intact families they would be dealt with by the State child protection legislation and any litigation would be funded by the State. However, in separated families this is less likely to be the case (Family Law Council, 2002). In cases that are refused Legal Aid funding, there is a net result of transferring the costs of running a child protection matter to the parent. This is a narrowing of State government interventions and a privatisation of child protection activities (McInnes, 2003). As a result, parents either fund their own cases, or attempt to represent themselves. The success of an application in the Court is thereby dependent on the 'resources and

resourcefulness of the private individuals appearing before it for the evidence upon which it will make critical decisions' (Family Law Council, 2002:23).

These arrangements underscore the role of the Family Court in the assessment of child protection issues that occurs either by default, when child protection agencies fail to investigate, or when a parent chooses the Family Court as their first jurisdiction in which to raise their concerns.

Thus, the Family Court has become an important decision maker in a proportion of child protection matters, despite this not being within the original vision for the Court. The change in the Court's role also highlights the existence of two parallel systems operating in determining outcomes for the children who are the subject of child sexual abuse allegations.

2.4.3 The co-occurrence of child abuse and domestic violence and the Family

Court's response

There has been substantial research directed at the Court's management of domestic violence. This research is relevant to understanding how child sexual abuse is approached in the Court because child sexual abuse often occurs concurrently with domestic violence. In addition, the severity of possible consequences for children of exposure to domestic violence results in such allegations posing a threat to contact between children and the alleged perpetrators and provides an example of how the Court deals with this challenge

to paternal contact (Abrahams, 1994; Hester & Radford, 1996; McGee, 2000; Stark & Flichtcraft, 1988).

There are strong links between domestic violence and child abuse. The clearest are between child physical abuse and domestic violence. However, sexual abuse is also present for a proportion of these children (e.g., Abrahams, 1994; Hester & Radford, 1996; McGee, 2000) and elevated rates of child sexual abuse have been found in the context of domestic violence (Ayoub, Grace, Paradise & Newberger, 1991; Farmer & Owen, 1995; Goddard & Hiller, 1993; Stark & Flichtcraft, 1988; Stanley & Goddard, 1993, 2002, 2004).

Risks of domestic violence are heightened in the context of separation; 66 percent of separating couples were reported to have experienced violence and 33 percent of these cases were described as serious (Australian Institute of Studies, cited in Brown et al., 2001). Domestic violence has serious implications for children, who are often witnesses or become involved in various ways. For example, some children sustain physical injuries and/or live in an atmosphere of fear of further domestic violence occurring (Christian, Scribano, Seidl & Pinto-Martin 1997; Harne, 2003, Hester & Radford, 1996). Moreover, the psychological effects for children who have been exposed to domestic violence can be serious and long lasting, and include the development of post-traumatic stress syndrome (Edelson, 1999). These effects are 'dose related': the more frequent and extreme the experience of domestic violence, the more significant the impact (Jaffe, Lemon & Poisson, 2003). In addition, Morris (2003) has proposed that one of the processes

undertaken by fathers as part of a domestic violence dynamic is to alienate the child from their mother. This creates vulnerability for the child, in being separated from a mother who is a potential source of support and protection, and so creates conditions where incest might occur. This process is, however, unlikely to be identified if domestic violence is not assessed.

The culture of the Court and family law has proved resistant to providing a consistent response to allegations of domestic violence and other forms of family violence, despite attempts to implement internal domestic violence policies and practices across the Court's different interventions, such as the Family Violence Strategy (Family Court of Australia, 2004-05). An example of this culture is the Court's emphasis on facilitating mediated parental agreement. This influences how allegations of child abuse and family violence are dealt with. For example, mothers who alleged domestic violence have reported that they were put under pressure to come to consent orders (Kaye, Stubbs & Tolmie, 2003). Kaspiew (2005) found that such pressure comes from a number of sources, including the lack of financial ability to fight the application for contact, and pressure from lawyers to adopt standard consent orders. Mediation services within the Family Court were also identified in Kaspiew's research as a source of pressure. In addition, the influence of the 'no fault' culture in family law lends itself to an expectation that parents who are acting reasonably will reach Consent orders. Failing to come to such an agreement in the Family Court results in the alleging mother coming under scrutiny during the assessment and trial process, and the onus is likely to be on her to prove that her concerns are warranted (Family Law Council, 2002).

The implications of multiple forms of abuse being perpetrated by the same person is that the perpetrator uses a broad repertoire of abusive behaviour, involving a number of family members, with child sexual abuse being only one component of the spectrum of abusive and violence behaviour. This highlights the need for assessors to be alert to the possibility that one form of violence may be part of a more extensive pattern of violence affecting other family members. However, such patterns have not been recognised, according to feminist authors and researchers who argue that the link between domestic violence and child abuse has been ignored in the Family Court. Moreover, they argue that the mother's experience has been treated separately to the child's, at the expense of a safety assessment that involves an estimation of risk to the child (Humphreys, 1999). Further, Humphreys (1999) claims that if mothers reveal that they have been victims of domestic violence their allegation of child sexual abuse by their ex-partner is treated with increased scepticism. Ironically, domestic violence in this situation is seen as the reason why mothers make the allegation rather than as a confirmation of the father's propensity for a spectrum of abusive behaviour:

...the allegation is construed as an attempt by women to overcome for themselves problems with 'hand over' and contact arrangements with violent men.

(Humphreys, 1999:40)

The clustering of abuse has important implications for assessors: presenting domestic violence may mask the incidence of child abuse, including child sexual abuse, and the domestic violence may prevent mothers from protecting their children from their father

sexually abusing them (Bolen, 2002; Herman, 1981). However, in this contested context of family law disputation, and where there is no consistent integration of services, the allegations are likely to be denied and the links between domestic violence and child abuse are not consistently used in the assessment of risk of children.

2.4.4 Emphasis on separation and divorce as a cause of childhood trauma

When child sexual abuse allegations arise in family law, they are considered within the dominant body of knowledge informing the area: the separation and divorce literature. Over the past 40 years there has been substantial clinical and research activity dedicated to understanding the effects of separation and divorce on children. The first wave of research has been described as being preoccupied with the identification of the negative effects of separation and divorce (Wallerstein & Kelly, 1980; Kelly & Emery, 2003). Children and adolescents from divorced families were compared to those from intact families in order to identify the relative disadvantages that children of ‘broken homes’ experienced in comparison to their peers from intact families (e.g., Neale & Smart, 1998; Popenoe, Elshain & Blankenhorn, 1996, cited in Kelly & Emery, 2003; Wallerstein & Kelly, 1980; Whitehead, 1998).

Children of divorced and separated parents were seen as undergoing a number of adjustments following separation (Hetherington, 1979; Wallerstein & Kelly, 1980). Risk factors impacting on these children included parents not adequately informing their children about family changes, children not having enough access to the parent who has left (Dunn, Davies, O’Connor & Sturgess, 2001; Wallerstein & Kelly, 1980), and, losing

contact with their non-residential parent two to three years after separation (Braver & O'Connell, 1998).

The psychological risks for children have been found to be the highest when their parents are engaged in ongoing conflict and expose their children to their anger, including verbal and physical aggression towards the other parent (Johnston, 1994). These children and adolescents are more likely to be depressed and anxious compared to when they are involved in parental conflict (Buchanan, Maccoby & Dornbusch, 1991). Current Australian research has confirmed that exposure to parental conflict can result in significant mental health issues for children (McIntosh & Long, 2005).

A second theme developing more recently in the separation and divorce literature has been that of normalising the experience of children in separated families and focusing on protective factors that mitigate the possible negative effects of divorce. For example, Kelly and Emery (2003) reviewed relevant research about factors that promote resilience in children. They found that a highly functioning parent is the best predictor of the children's adjustment:

When custodial parents provide warmth, and emotional support, adequate monitoring, discipline authoritatively, and maintain age-appropriate expectations, children and adolescents have more positive adjustment, when compared to children whose divorced custodial parents are inattentive, less supportive, and use coercive discipline.

(Kelly & Emery, 2003:356)

Despite this second theme in the literature, Smart, Neale and Wade (2001) describe a ‘narrative of harm’, or ‘harmism’, that has developed into an ideology, or a tendency to see only harm as the effect of separation and divorce, despite the evidence being more complex than this. Smart et al. (2001) argue that: “‘harmism’ insists that the greatest harm to children is their parents’ divorce and that it pushes out or minimises considerations of poverty, domestic violence, poor housing, inadequate financial provision and the possibility that an ongoing marriage might be worse for children than a divorce.’ (Smart et al, 2001:37-38) This narrative of harm has been inextricably bound with the lobbying for policy arrangements such as the adoption of a shared residence as the preferred arrangement after separation (Smart & Sevenhuijsen, 1989).

‘Shared residency’ consists of both parents having a substantial involvement in the child’s life. In its most prescriptive form, shared residence means that children spend exactly the same amount of time with each parent. This theme in the literature began in the 1970s, when the case was argued that both parents should have a high level of involvement in the child’s life (e.g., Cohen, 1978; Ricci, 1980; Roman & Haddad, 1978). Shared residence has been linked to the child support debate in international literature and government policies and in attempts to rein in government spending on welfare (Crowley, 2003). Smart and Sevenhuijsen (1989) posit that a less altruistic motive for supporting the shared residence position is that it is a pragmatic treasury-led drive to ensure that non-residential parents (usually fathers) will remain committed to seeing, and hence paying for, their children.

The debate has included a focus on perceived gender inequalities by fathers who have claimed that decisions made by the Family Court are biased against them and result in the loss of father-child relationships (SPCA, 2003). The pro-shared residency literature cites the loss or diminution of parental relationships as a major risk factor for children post separation (Kelly & Lamb, 2000; Smart et al., 2001; Smyth & Parkinson, 2003). Frequent and meaningful contact with the non-residential parent is prescribed in this literature to assist children's post-separation adjustment; the non-residential parent is seen as ideally undertaking a range of parenting tasks with the children and thereby negating some of the risk of separation (Amato & Gilbreth, 1999).

The language of equity has been employed in describing ideal post-separation arrangements between parents. It is argued that the promotion of the importance of biological relationships of the children with both parents is driven less by objective facts about what children need and more by a social policy, welfare principle (Neale & Smart; 1998). In addition to providing a 'script for equality', equally shared residence also serves a further ideological function by underpinning the notion of the 'eternal biological family' post separation (Sevenhuijsen, 1986a:336).

In the current social and political milieu, the support for 'equally shared parenting' has now been written into proposed legislation (Australian Government, 2005). In this debate, allegations of domestic violence and child sexual abuse are seen as likely to be made in order to frustrate fathers' rights to have access to their children (Peatling, 2005).

2.4.5 The currency of the concept of ‘high-conflict’ parents in the Family Court

There are a number of endemic debates in the separation and divorce literature, many of which are contentious and unresolved. One debate that has a direct relationship on the consideration of child sexual abuse allegations is that of ‘high-conflict’ parents and the belief that parental conflict, rather than actual abuse, is behind allegations. ‘High-conflict’ parents are defined as those who continue to dispute well after the initial separation (Buchanan, et al., 1991). While the majority of separated parents come to their own agreements about contact and residence without approaching the Family Court, between 8 and 20 percent of parents are still involved in high levels of conflict and litigation two to three years after separation (Hetherington, 1999; King & Heard, 1999; Maccoby & Mnookin, 1992). These parents have been described as ‘the relatively small group of chronically contentious and litigating men and women, still intent on vengeance and/or controlling their ex-spouses and their parenting’ (Kelly & Emery, 2003:357).

The ‘high-conflict’ frame is significant in considering how child sexual abuse allegations are considered. The difference between a protective mother and an abusive father and ‘high-conflict’ parents can be lost if the parents are viewed as fulfilling the high-conflict criteria. While it is commonly assumed that both parents in these cases are involved in prolonging such unnecessary litigation, and that they are equally propelled by anger and revenge, this may not be the case (Kelly & Emery, 2003). Thus parents who are involved in ongoing litigation are often both categorised as ‘high-conflict’ parents. This implies equality in their contribution to the longevity of the conflict when in fact the conflict may

be a result of violence, abuse or inappropriate parenting by one parent and the other parent attempting to act protectively.

2.5 Research on the impact of the Reform Act (1995)

The Reform Act introduced legislation aiming to ensure the child's right to regular contact with both parents, as well as safety from family violence (FLA s60D). The two issues of family violence and a continuing relationship with the non-residential parent sit side by side in this amendment. Those critical of the impact of the Reform Act argue that it has resulted in a magnification of existing tension between the child's right to have a relationship with both parents and their need for protection from family violence and child abuse (e.g. Rhoades, Graycar & Harrison, 2000; Kaye, Stubbs & Tolmie, 2003).

Following the introduction of the Reform Act, a number of studies have found that interim orders for contact are sometimes made without an examination of allegations of domestic violence and that the number of orders for 'no contact' have sharply declined (see Dewar & Parker, 1999; Rendell, Rathus & Lynch, 2000; Rhoades et al., 2000). Laing (2003) argues that this is a result of a pro-contact culture operating in the Family Court.

Evaluations of the Court's management of domestic violence have shown considerable variation in responses by the Family Court to domestic violence allegations. For example, court mediators have been found to minimise, or ignore, claims of domestic violence, and

not acknowledge the links between this form of violence and risks of child abuse in Family Reports (Kaye et al., 2003).

Kaspiew (2005) examined 40 Family Court files that contained children's matters about s60B (the objects of the provision), 'shared parental responsibility' (s61C), and the 'best interests' principle and how they were applied in matters that went to trial between 1999 and 2000. She found that in Family Reports the risks that were identified for children in being exposed to domestic violence were weighed up against the risks attached to difficulties in developing a sense of identity if children did not know their father. It was considered that there was less risk in being exposed to domestic violence and attending contact. In addition, it was only in cases when the violence was severe and there was evidentiary support that the violence disqualified fathers from contact (Kaspiew, 2005). Hart (2004), from the same standpoint, argues that children who are exposed to domestic violence in the Family Court are undifferentiated and not seen as being at risk by the presence of domestic violence and are consequently subject to joint parenting decisions when this may not be in their best interests. The emerging picture is that of a Family Court culture that is imbued with institutional resistance to accepting the full range of abusive behaviours that fall within the spectrum of domestic violence, or as indicating the possibility of other forms of abuse involving children.

The decade following the implementation of the Reform Act has seen a proliferation of studies, cited above, that explore the Court's response to allegations of domestic violence,

and to the harm that exposure to such violence can cause to children. Some authors have argued strongly about the risks of the Court's approach to its ability to protect children from the risks of sexual abuse (e.g. McInnes, 2003; Jenkins, 2003). For example, McInnes argues that the way in which the Act is interpreted results in a presumptive paradigm in regard to child sexual abuse allegations, that they 'are the product of vengeful and vindictive mothers' (2003:2) and that the Court makes orders that are not protective of mothers or of children where there are allegations of domestic violence and child abuse. However, no research has specifically examined the effects of this legislation, or of the pro-contact culture, on the Court's response to allegations of child sexual abuse. The specific effects of this paradigm on the treatment of children who may be at risk of child sexual abuse is therefore unknown: this research explores this area.

2.6 Summary: the Family Court as part of the child protection system

This chapter has described the growing recognition that the Family Court has become a system that is parallel to the State child protection system. However, the Court's core knowledge about the welfare of children is derived, not from the child protection research literature, but from the 'parental conflict' paradigm (Dalton, 1999). Smart (2003) argues that, in the current legal and social milieu, it is presumed that the guiding principle of 'the best interests of the child' is synonymous with continued contact with the non-residential father. In this paradigm, allegations of family violence are subordinate to the preservation of the relationship of the child and non-residential parent. The onus to prove that the risks alleged do exist sits with the alleging parent (usually the mother). However, providing

such proof is difficult, given the need for resources to pursue litigation and the difficulty in obtaining evidence of child sexual abuse.

Allegations of child sexual abuse strike at the heart of the idealised post-separation family structure of both parents providing day-to-day care of the children. They challenge the assumption that contact with non-residential parents is good for children (Rodgers & Ryan, 1998). In the current social and political context the Family Court itself is caught under political fire and struggles with the competing demands of keeping children safe and managing claims by fathers for involvement in the child's life. As will be seen in the following chapter, the position taken in the separation and divorce literature is identical to the psychiatric/legal response to allegations of child sexual abuse in family law disputes – that of scepticism about their veracity.

The following chapter will explore the contributions made to conceptualising the nature of sexual abuse from different professional fields and review the research that establishes the prevalence of child sexual abuse and incest. The chapter will also examine the dominance of the sceptical paradigm of child sexual abuse and attempts that have been made to challenge it as the dominant construction of child sexual abuse.

CHAPTER THREE

THE ROOTS OF SCEPTICISM:

THE CONTEXT OF DECISION-MAKING

Based on a Calvinist tradition, favored by many systems and family therapists, and well-orchestrated by politicians, the nuclear family was reconstructed as the cornerstone of society, a well-guarded institution in which no one was entitled to intrude. In the midst of the triumph of the nuclear family as the ideal environment for children, acknowledgment of sexual victimization of children could not be allowed.

(Lamers-Winkelman, 1994:146)

3.1 Introduction

This chapter explores the view about child sexual abuse allegations which takes a sceptical stance in relation to their veracity. This stance involves a preoccupation with false allegations, a position that does not take into account the complexity and uncertainty involved in assessing allegations of child sexual abuse. The chapter traces the historical context in which the dominant sceptical paradigm about child sexual abuse has developed, highlighting the social, legal and psychiatric influences on this paradigm. Attempts by practitioners, researchers and others to present an alternative to the sceptical construction of child sexual abuse and incest are also reviewed. Finally, this chapter examines the

‘rediscovery’ of child sexual abuse that occurred in the context of second wave feminism in the early 1980s (Breckenridge, 1999).

3.2 The two positions

There are two distinct positions taken in the literature that inform the theory, research and practice in relation to child sexual abuse. These two positions, described in their most simple form, are of scepticism about the veracity of allegations of child sexual abuse and a belief that many false allegations are made, versus an acceptance of these allegations and a belief that child sexual abuse and incest are widespread social problems (Faller, 2005). These two positions at their most extreme are diametrically opposed and create a dichotomy replicated by parents bringing applications to the Family Court. Dalton (1999) describes the ‘collision of paradigms’ of these two belief systems. The disparity between the two positions has impacted on the day-to-day practice of Family Court decision-making (McInnes, 2003; Myers, 1990; Neustein & Goetting, 1999) and child protection practice (Humphreys, 1999; Jenkins, 2003). These two positions are played out in a number of the areas to be discussed in this and the following chapter.

3.3 The nature and context of child sexual abuse: The high level of difficulty in assessing child sexual abuse allegations

Child sexual abuse allegations are characterised by high levels of complexity and a paucity of evidence. This is due both to the nature of the abusive acts and the demands of

the legal system in reaching final determinations. This lends itself to practitioners falling back on the dominant value position that imbues the field. This is why it is important to understand the two paradigms.

Child sexual abuse is usually committed in secret, leaving no corroborative evidence such as medical evidence, or evidence that would lead to the identification of the abuser (Heger, Ticson, Velasquez & Bernier, 2002; Yuille, Tymofievich & Marxsen, 1995). In addition, children may not be able to verbalise what their experience has been, because they have not yet developed adequate verbal skills (Hewitt, 1999), or because they feel guilty and responsible for the abuse (Sgroi, 1982). Moreover, when such allegations are raised in family law disputes, they may be considered to be malicious (Parkinson, 1998), or alternatively, it may be proposed that the allegations have arisen from misconceptions in the context of emotional stress created by the separation or divorce (Green, 1991; Sink, 1988).

The level of difficulty in Family Court cases frequently relates to the age of the children, who are, in the main, of preschool age. The oral evidence that these children provide will reflect their developmental stage and may not be a coherent sequential account or be a sufficiently detailed account to sustain a criminal prosecution of an offender (Lamb, Sternberg & Esplin, 1994). Challenges in understanding the experiences of children are directly related to their capacity to verbalise their experience, which in turn are directly related to the substantiation rates, rather than probable abuse (Hewitt, 1999; Lowenstein,

1991). The more verbal a child the more able they are to be understood by a system that depends on verbal disclosure. This creates a barrier for young children, who do not typically disclose in ways that meet legal standards for establishing a complaint (Parkinson, 1998).

There are many other reasons why an allegation by a child may be unsubstantiated (Myers, 1990). For example, they may only tell their mothers about sexual abuse and not a 'neutral' professional. It follows then that a lack of substantiation for allegations in this subgroup of children is qualitatively different to a finding of a 'false allegation'. The complexity of this area of assessment is marked by the child's high levels of dependence and vulnerability, in the context of incomplete data about the child and/or the allegation (Hewitt & Friedrich, 1995).

3.4 The fixation on false allegations

Despite consistent research findings that false allegations are rare, especially from children (Everson & Boat, 1989; Goodman & Hegleman, 1985; Undeutsch, 1982), there has been considerable effort expended to understand the nature of such allegations. This is not surprising given the dominance of the view that child sexual abuse allegations are frequently false. Research about false allegations of child sexual abuse that involve family law dispute are of two different types. These are, firstly, research that is undertaken within the child abuse population where there has been a child protection investigation, and, research in family law populations concerning cases where there are allegations made in the context of family law litigation. There has also been one small

research project that tracked cases that were in both jurisdictions (Humphreys, 1992). The first research type, involving child protection intervention, will be discussed in this chapter, while the research based on populations involved in family law litigation will be discussed in Chapter Four.

The most recent research on false allegations from the first category is the first national study on the rate of intentionally false allegations across the spectrum of types of child abuse and neglect that was investigated by child welfare services in Canada. The representative sample of 7,672 child maltreatment investigations was tracked in 1998 (Trocme & Bala, 2005). The study classified cases into four categories: ‘substantiated’, ‘suspected’, ‘unsubstantiated but made in good faith’ and ‘intentionally false’ (Trocme & Bala, 2005:133). They found that, while one-third of the maltreatment investigations were unsubstantiated, only 4 percent were considered to be intentionally false. Within the sub-sample of separated and divorced cases, the rate of intentionally false cases was higher, at 12 percent. However, this research revealed that, contrary to the stereotypes that prevail about false reports of child abuse in separated families, the most frequent false allegation, at 43 percent, was an allegation of neglect, made by the non-custodial parent (usually the father). The group that was next most likely to make false allegations incorporated relatives, neighbours or acquaintances, at 19 percent. Custodial parents (usually the mother) rated low, at 14 percent, and children were the least likely, at 2 percent. While the substantiation rates were highest amongst police reports (60 percent of their allegations were substantiated), custodial parents were the second-highest group

having allegations substantiated (54 percent of their allegations were substantiated) and children were the third-highest group (47 percent of their allegations were substantiated).

Another large-scale project was conducted by Jones and McGraw (1987), who reviewed all the child protection cases over one year from a North American social services department that included family law disputes. Jones and McGraw found that, of the false reports that were made, adults made the majority and many of these were involved in custody hearings. However, false reports only comprised five percent of the reports. Fifty-three percent of the cases were validated and 47 percent unfounded (with either inadequate information or genuine concerns but where there was a finding of no abuse).

Oates, Jones, Densen, Sirotnak, Gary & Krugman (2000), in a study based on referrals of child sexual abuse allegations to the Denver department of Social Services over a 12-month period, also found that erroneous concerns of sexual abuse that are derived from children are uncommon, and comprised only 2.5 percent of 551 cases reviewed. This small group comprised three allegations made in collusion with a parent, three cases where an innocent event was misinterpreted as sexual abuse, and eight cases (1.5 percent) of false allegations of sexual abuse (Oates et al., 2000). The highest rate of intentionally false reports (8.5 percent in the UK) was found by Anthony and Watkeys (1991, cited in Trocme & Bala, 2005),

False allegations are sourced to two main groups: adult family members and the professionals who intervene. Ceci, Crossman, Scullin, Gilstrap and Huffman (2003)

summarised the situations in which children might make a false claim of child sexual abuse. These situations were: exposure to repeated erroneous suggestions (Leichtman & Ceci, 1995), repeated interviewing, being asked to visualise fictitious events (Ceci, Huffman, Smith & Loftus, 1994), being asked about events that occurred a long time ago with no 'refresher', and being suggestively asked to use anatomically correct dolls (Bruck, Ceci, Francoeur & Renick, 1995). While these circumstances may give rise to false allegations from children, these are rare events (Goodman & Hegelson, 1985). In fact, children are more likely to make false denials than false claims of child sexual abuse (Bussey, 1995).

The magnitude of difficulty that children face in disclosing sexual abuse was described by Summit (1983:181), who identified the process of sexual victimisation that secures a child's compliance with the abuser. This involves the child taking on responsibility for keeping the secret that may be instilled by threats: 'Don't tell your mother because she will hate you, she will hate me, she will kill you', and so on. Moreover, Summit posited that 'the average child never tells' and, if they do attempt to, most adults will respond with 'an adult conspiracy of silence and disbelief'. Further, Summit proposed that the condition of helplessness is established by the power differential between the child and the adult; in a context of entrapment, accommodation is the child's only option. If the child does disclose, Summit proposed, it would be delayed, conflicted, unconvincing and may be followed by a recantation of the allegation by the child as a response to family reactions.

The frequency of recantations, even when there is strong evidence to support children's claims, challenges professionals to understand the experience of the child within their family and the counter-forces that may be at work to inhibit such disclosures and make children attempt to withdraw them once they are made. If these contextual issues are not understood, then allegations may be erroneously assessed as false, especially in a legal setting where the timing of allegations and recantations may be used as evidence that an allegation lacks veracity. The manner in which children are likely to disclose, combined with a lack of supporting evidence, creates a barrier in the legal context to these allegations being believed. The significance of these two factors are illustrated in the precedent of M & M where the lack of medical evidence and the child's delay in making her allegation made it less believable to the judge:

*My reasons for [not being satisfied on the balance of probability that the husband had sexually abused the child] are the fact that **neither Doctors Moody nor Connor was able to find any evidence that the child had been sexually abused, the conflicting evidence of the wife as to when she first suspected abuse, the initial refusal of the child to say that the husband had abused her, to a limited extent the interrogation techniques employed by the wife and Constable Anderson, and the husband's denial ... (Emphasis added)***

(Justice Gun, cited in Scutt, 1991:120)

A lack of understanding of the experience of the victimised child or of the complex process of disclosure (Staller & Nelson-Gardell, 2005) appears to be influential in this

precedent. This is likely to result in children's evidence not being well understood or being dismissed as not meeting legal standards. While there has been a high level of interest in understanding false allegations, there is a comparative gap in understanding the nuances of the child victim's evidence and presentation in the legal setting. For example, very few of child sexual abuse cases presenting for medical examinations, even in severe cases of abuse, have supporting medical evidence (Heger, Ticson, Velasquez, Bernier, 2002). The challenge of creating legal systems that are responsive and open to children's voices and their experiences is one that is currently the subject of attention and research as methods to engage children are being utilised in research in the family law sphere (Smart et al., 2001; Smart, 2002).

3.5 The inadequacy of the 'true/false' dichotomy

The complexity and difficulty that is involved in assessing these cases is reflected in the recording and classification of findings. There has been substantial confusion about the terminology employed by different authors. Categories comprising binary opposites were used during the 1980s, including, for example, 'true' or 'false' (Gardner, 1992b, 1994), 'fabricated' and 'genuine' (Gardner, 1987) and 'bona fide' and 'fabricated' (Gardner, 1989b). This overly simplistic categorisation of findings has not differentiated the range of findings in these cases and treats 'false' and 'unfounded' reports as a homogenous group. However, a finding that an allegation is 'unfounded' does not necessarily mean that the abuse did not occur (Jones & McGraw, 1987). The fact that young children are not able to give verbal accounts of their experiences may result in a lack of evidence to support allegations or suspicions of abuse. As a result, these allegations may be classified

as 'false' when they are in fact 'unsubstantiated', that is, there was not enough evidence to determine whether abuse had occurred or not (Myers, 1990). In comparison, 'false' allegations are those which have been determined not to have occurred. This confusion has resulted in a minimisation of the risks to children (Yuille et al., 1995).

A more sophisticated approach to understanding the outcome of these investigations is found in a spectrum of findings that captures the range of uncertainty and complexity that is found in these cases. McGraw and Smith (1992), in researching the types of assessment outcomes in these cases, developed a model with six categories. 'Reliable' or 'substantiated' reports are those that, 'after a systematic process of validation, were considered to be likely accounts of sexual abuse'. 'Recantations' were 'cases that were felt to be likely accounts of child sexual abuse by the child but had been subsequently retracted under duress'. 'Insufficient information' reports were those where there was 'insufficient data to assess if abuse had occurred'. 'Fictitious reports' were 'reports by adults about children that were considered not to have occurred'. Lastly, 'fictitious reports by children' were 'those in which the child provided the account of child sexual abuse that was considered falsely made' (McGraw & Smith, 1992:53).

Trocme and Bala (2005) used four categories for their research: 'substantiated', 'suspected', 'unsubstantiated but made in good faith' and 'intentionally false'. Oates et al. (2000) also recommended the use of four categories to reflect the findings of child sexual abuse in order to encourage an 'open mind' in the investigation process. These were 'substantiated', 'not sexual abuse', 'inconclusive' and 'erroneous accounts by children'.

These distinctions introduce the ability to make a range of findings, including the motivation of the alleged, a concept that is particularly significant in the legal domain.

The simplistic approach to allegations that is captured in the ‘true/false’ dichotomy is therefore inadequate to the task of understanding the possible range of situations that can result in an allegation. In fact, findings may need to reflect a lack of definitiveness about whether the abuse has occurred or not. In turn, this may present the need for exercising discretion in making decisions about a child’s access to the alleged perpetrator, when it is unclear if there are risks relating to sexual abuse. It is in this context of uncertainty that many child sexual abuse allegations are raised in the Family Court.

3.6 The historical context

Contemporary professional responses to allegations of child sexual abuse have their theoretical and attitudinal foundations within law, medicine, psychology and social work. An exploration of the historical roots of the body of knowledge that informs these professions reveals that, despite the dominance of a sceptical approach to allegations, there has been ongoing dissent from this dominant paradigm.

3.6.1 The legal contributions to the legitimating the ‘patriarchal family’

The current contestation about child sexual abuse allegations in family law is an example of family law being the site of contest about the form that the post-separation family should ideally take. Family law has been identified as influential in the shaping the family, either by the structural preservation of norms (Smart, 2003) or by eroding them

(Morgan, 1999; Muehlenberg, 2003). The development of family law provides a record of the changing norms and values in relation to the ideal family form. This has direct implications for how allegations that challenge these norms will be responded to.

In the eighteenth century the ‘principle of unity’ between husband and wife was enshrined in British common law. This principle ensured that children born within wedlock were placed in their fathers’ custody upon divorce or separation. It reflected a social order where male supremacy was affirmed and a wife’s possessions became her husband’s upon marriage. She could not own anything in her own right, and children of a marriage belonged to the father (Holcombe in Graycar & Morgan, 1990).

Australia inherited British law and, as a consequence, Australian women could not seek legal custody of their children until the late nineteenth century. They were rarely given the legal custody of children as a result of divorce; ‘The father was endorsed as the source of authority and the guarantor of order and integration in the family and in society in general, and the mother the guardian of morality’ (Sarantokas, 1996:47).

This paternal preference under the British *Matrimonial Clauses Act 1857* gave way to a reversal of maternal preference by the twentieth century, and for a brief moment women were the clearly preferred parent. Indeed, under the influence of the practice of maternal preference, fathers came to be viewed as unable to care for children and mothers, came to be viewed as ‘natural’ nurturers (Rhode, 1989). In the early 1900s through to the late 1970s, the ‘tender years’ doctrine provided a rationale to support the maternal preference

that became influential and dictated that young children, especially girls, should be placed with their mothers. The doctrine was based on biological determinism: It was believed that a strong attachment between mother and infant was ‘biologically determined by deep genetic forces’ (Eppersen v Damney 1976, 10 ALR 227 New York: at 241, per Glass JA in Graycar & Morgan 1992:243). This view was reinforced by the primacy placed on the mother-child dyad in the field of child development and child mental health (Bowlby, 1958; Winnicott, 1958).

During the 1950s and 1960s, however, the introduction of the principle of the ‘best interests of the child’ brought subtle changes, although the principle usually resulted in the ‘tender years’ principle being applied. However, by the 1970s, with the influence of feminism questioning traditional gender roles, the automatic maternal preference was no longer legally sanctioned (Graycar, 1994; Stamps, Kunen & Rock-Faucheux, 1997). In Australia, the principle was finally discarded by the High Court in 1979 in the case of *Gronow v Gronow* (1979) 144 CLR 513. After 1979, fathers wishing to apply for residence or to have a major role in parenting were able to claim precedent and legislative support.

These shifts in the 1970s and onwards were contemporaneous with changes to an economic and social milieu in which mothers were entering the workplace and at the same time feminism was questioning the assumption that only women could do housework and provide child care (Stamps et al., 1997). With the concomitant increase in divorce rates, fathers increasingly applied for custody and access, in a social climate that

was more likely to see this as a legitimate departure from traditional gender roles than before. In Australia the gender-neutral *Australian Family Law Act 1975*, supported such changes, and comparable legislative changes were also enacted in other Western democracies, such as the *California Family Law Act 1969*, the first State in the USA to enact no-fault divorce and similar legislation in England and Wales (Bagshaw, 1992).

These social changes resulted in debate about whether the family was in decline or simply adapting to changing social and economic circumstances (Dornbush & Strober, 1988). Some argued, for example, that the family had been stripped of its functions (Humphries, 1999). Some authors decried changes to the family and what they saw as the loss of the gender-specific roles, such as the mother as primary caregiver and moral guardian of social norms. In addition, feminist values and the ease of obtaining a divorce were blamed for undermining the nuclear family and fuelled arguments for a return to the finding of 'fault' in divorce and for children to be awarded to the wronged parent (Rowthorn, 1999).

Over the last two-hundred years the pendulum has swung from a preference for fathers to a preference to mothers, and has attempted to find a neutral position in relation to parents' responsibilities for children. However, feminist authors argue that these changes have resulted in a position of preservation of the father-child relationship at all costs and that fathers are now seen as of vital importance to their children regardless of what kind of relationship they may have previously had with them (Neale & Smart, 1998; Smart, 2000b; Sevenhuijsen, 1986a). The re-emergence of the role of the father as central in a

family and as arbiter of family life post-separation has an impact on the ability of children and others to raise allegations about paternal incest.

3.6.2 Legal scepticism towards allegations of sexual abuse

Women's claims of sexual abuse have been met with entrenched scepticism in the law and its decision-making processes. This stance has been extended to allegations of child sexual abuse (Scutt, 1991; 1997). This scepticism was first codified in English law by Hale, who in 1736 included in his foundational treatise 'Pleas to the Crown' a statement that rape is 'a charge easily made and hard to be defended against, tho be he never so innocent' (Hale, 1736:635). While Hale proposed that young children should be able to give unsworn evidence in sexual abuse cases, he also established the principle that their evidence alone should not be used to establish a conviction. This publication has laid the groundwork for centuries of scepticism about women's allegations of sexual abuse. It also demonstrated the legal reticence to accept children's evidence over that of an adult. Hale's warning to the jury is a creed used in rape trials involving women that is discernable in contemporary legal attitudes and precedent; such warnings have proved to be resistant to legislative reform and have continued in Australia. The Department of Women's (1996) comprehensive review of all sexual abuse cases heard in the NSW District Court over one year found that in only 14 percent of cases was a warning by the judge not given. These warnings were found to take the form of an old-style corroboration warning such as, 'dangerous to convict on the complainant's evidence alone', or a modern version of the warning such as 'scrutinise her evidence with great care' or 'assess her evidence in the light of human experience' (Department of Women,

1996:8). The report recommended that legislative reform be enacted to prevent such warnings being given.

While these warnings were originally made in the criminal jurisdiction, their scepticism about allegations has been extended into other jurisdictions, including family law. Jenkins (2003), for example, reports the same strong sentiment of scepticism about allegations of child sexual abuse being promulgated within the Family Court of Western Australia as recently as 1993. Senior judicial officers were reported to publicly assert that ‘...the Family Court of Western Australia was being over run by malicious allegations of sexual abuse by mothers against fathers’ (Jenkins, 2003:3).

Hale’s warning is also an enduring concept that has been restated by judges in child sexual abuse cases in the Family Court, including the two cases that have established precedents in the area. Hale’s continued influence is evident in the judgment of the trial judge, Justice Dixson, in the first instance finding of *Bringshaw v Bringshaw*, and it is repeated by the High Court judgment of *M & M* in 1988:

Justice Dixson’s remarks have a direct application to an allegation that a parent has sexually abused a child, an allegation which is often easy to make, but difficult to refute.

(Cited in Scutt, 1991:124)

In the 1940s a second influential lawyer updated Hale's original warning by adding a scientific facet to it. John Henry Wigmore, an influential North American lawyer, grafted the Freudian concept of the Oedipus complex onto Hale's warning (Myers, 1990).

Wigmore applied Freud's theory about childhood fantasises of sexual experience with their fathers, to women who claimed to have been raped: '**fantasies of being raped** are exceedingly common in women, indeed one may almost say **that they are probably universal**' (Wigmore, 1940) (emphasis added).

This attribution of the unconscious desire to be raped bolstered the belief that, while claims of sexual abuse might be common, in reality such abuse was rare, since women really wanted to be raped and as a result commonly made false allegations that were an expression of that fantasy. Of this Wigmore wrote:

On the surface the narration is straightforward and convincing. The real victim, however, too often is the innocent man ... No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a physician.

(J Wigmore, Chadbourne rev. 1970; 737-37. Emphasis in the original)

This legal discussion on the propensity of women to make false allegations about sexual abuse illustrates the potency of this ancient scepticism and its capacity to adapt to new social circumstances. Wigmore reaffirmed what had been the official position for a

number of centuries and by doing so reflected the social mores of the day. His position illustrates the use of medical/psychiatric theory to add validity to the sceptical position found within the law. This ‘marriage’ of medicine and law is further developed in the body of knowledge of psychiatric forensic assessments. The paradigm used by Hale and Wigmore has its contemporary expression in the assessments undertaken by psychiatrists, psychologists, legal and other professionals who employ the same ideas in relation to child sexual abuse allegations in family law. They work from a presupposition that false allegations in Family Court disputes are a frequent strategy to alienate the child from the father and to manipulate judicial outcomes (Gardner, 1994). This melding of medicine and law has served to define women as unreliable because of their fantasies and men as innocent victims of a false report. This assessment paradigm will be further explored in Chapter Four.

3.6.3 Examples of the legal responses to incest

In a further exploration of how legal processes respond to allegations of incest, rulings in the English Court of Appeal provide an example of how father-daughter sexual interaction is conceptualised and dealt with. Mitra (1987) examined 18 out of the 21 incest cases that were successful in the English Court of Appeal over a ten-year period. In these cases she found that a number of factors were seen as legitimate ‘mitigating circumstances’ in the appeals. These were: ‘domestic stress’ (Mitra, 1987:145), the potential for family reunification and the conceptualisation that daughters had ‘seduced’ their fathers. The presence of violence in 15 cases did not disqualify fathers’ appeals. In 12 cases, despite violence perpetrated within the incest relationship, mothers and

daughters were seen as partly responsible for the occurrence of the incest, and consequently the responsibility for the incest was spread across the family.

Scutt (1990) also noted some of the same judicial attitudes in Australian courts. For example, in a criminal trial, the mother's absence from the home due to her employment was seen as a contributing factor to the father's rape of their nine-year-old-daughter.

Additional examples from the UK and from Victorian courts demonstrate the systematic application of the principle that sexual abuse of family members is approached as a less serious crime than the sexual abuse of a stranger (Fox & Freiberg, 1985). For example, a sentencing judge in 1982 in Chester Crown Court (UK) commented: 'If this girl had not been your daughter this would have been a very serious matter because she at the time was fifteen and you were forty-six' (Chester Crown Court, 1982, cited in Mitra, 1987:143-144).

These examples provide evidence that the attitude expressed by judicial officers in the course of their decision-making trivialised incest and shifted the blame away from the perpetrator father. In addition, there was no awareness demonstrated of the risks to children once fathers returned home or an acknowledgement of the effects of the incest despite some of these cases having characteristics that would suggest that the victims would experience long-lasting debilitating harm (Corwin, 1988). In sum, the legal response to incest over a range of judicial decision-making demonstrates a minimisation of the consequence of the incest to the child victim and a reticence to hold the father responsible for it.

3.6.4 Psychoanalytic contributions

Developments in the area of medicine and psychiatry also had a direct impact on the conceptualisation of incest. Investigation into the origins of ‘hysteria’, a loosely defined mental illness (now known as trauma), took place in the late 1800s. In this period of scientific excitement there was a race to discover the cause of hysteria (Herman, 1992). The most enduring outcome of this period of ground-breaking research was the supremacy of Freud’s (1896) theory of the ‘Oedipus complex’, which proposed that children normally go through a developmental phase characterised by sexual fantasies about their opposite sex parent. His theory provided an explanation for why many of his adult patients complained of early traumatic sexual experiences at the hands of adults.

The Oedipus complex was Freud’s second attempt to theorise the cause of trauma. The first theory he proposed, in ‘The Aetiology of Hysteria’ (1896) was based on the idea that trauma in his adult patients was a result of early childhood sexual experiences. This theory was not accepted by his peers. Herman (1992) proposed that the first theory was based on his patients’ reports, and it was rejected because of its radical implications that child sexual abuse was widespread throughout middle-class Viennese society; ‘This idea was simply unacceptable. It was beyond credibility’ (Herman, 1992:14).

The Oedipus theory, in comparison to ‘The Aetiology of Hysteria’, linked hysteria not with Freud’s patients’ premature sexual experiences, but with their apparent unconscious sexual drives and unfulfilled sexual fantasies. Freud thus codified the powerful and

pervasive idea that children will, in the course of their normal development, have sexual fantasies about their opposite sex parent. Hence, the Oedipus complex explained his patients' claims without challenging conventional beliefs about the family and assisted in preserving the contemporary social order, reflecting in the 'principle of unity' the paternal preference and the role of the father as the custodial parent.

This position created what appeared to be scientific support that would be used to reinforce the scepticism about claims of sexual abuse already established within the legal world and legal precedent. The family was to be preserved, at least nominally, as the safe haven from the outside world by attributing allegations of childhood sexual experiences to fantasies (Lasch, 1977).

3.6.5 Psychiatric theories of causation and treatment: The mentally disturbed daughter

The impact of Freud's theory not only bolstered legal scepticism: it has had a profound impact on the psychiatric treatment of families where there was an allegation of incest. Early studies about incest in the 1950s were imbued Freud's formulation of the Oedipus complex. This tenet of psychoanalytic theory effectively ensured there could only be a sceptical interpretation of incest claims. This scepticism took a number of forms that included blaming the mother or daughter/victim when there was a positive finding of incest. This is exemplified by an early clinical article from this period involving a sample of 11 girls who were referred for treatment to a North American clinic. In a conceptual framework that reflected a combination of the Freudian ideas of the 'seductive daughter'

and the ‘colluding mother’, incest was summed up as occurring in families where psychopathology was ‘particularly conducive to the acting out of the Oedipal wish’. These incest victims and their mothers were seen as complicit in the incest. It was hypothesised that the girls had reacted to their mother’s unconscious desire to place them in the spousal role as the father’s sex partner (Kaufman, Peck & Tagiuri, 1954:277).

A commentary on this article¹⁰ was published in the same edition by a fellow psychiatrist, Pavenstedt (1954), who was working in a North American teaching hospital. She referred to the standard position of ‘trained disbelief’, about claims of incest by adolescents:

Most of us have trained ourselves to scepticism toward the claims of young girls who maintain that they have been seduced by their fathers, since we recognize the strength and reality value such fantasies can assume particularly in adolescence.

(Pavenstedt, 1954:278)

These extracts provide an insight into the prevailing clinical construct of allegations of incest: firstly, they were met with scepticism; secondly, when they were accepted, intervention and treatment was aimed at the family that consisted of the mother and daughter, and often did not include the perpetrator. Thus, psychiatry had formulated incest as being a problem within the realm of unconscious mother-daughter interactions.

¹⁰ Pavenstedt, M.D. from the Boston University School of Medicine; Children’s Psychiatric Clinic.

This frame pathologised the mother-daughter relationship while the father was invisible as either a causal agent in the crime or as a participant in the therapy.

3.6.6 The family therapy contribution: the dysfunctional family

The fascination with the role of the victim daughter and colluding mother in incest families continued unabated in the family therapy movement. The fledgling movement, which was an application of a ‘talking’ therapy that involved all family members, began in the 1950s. The movement took a particular interest in treating incest. The conceptualisation of incest in the psychiatric literature was influential in the development of a family systems view of incest that was utilised in family therapy.

The professional journals at this time published case studies detailing therapeutic strategies, and Eist and Mandel (1968), for example, recorded the therapy undertaken with Mary Carlson. Mary was a young woman who had had three hospital admissions for ‘hysterical reactions’ after violent arguments with her step-father during which she had claimed that he had raped her. She was treated with ‘EST’¹¹ and sent home after her first two admissions. It was not until her third admission that her family was engaged in family therapy and Mary’s step-father was confronted with her claims. He agreed that he had repeatedly forced her to have sex with him. Importantly, in this conceptualisation of incest, Mary’s story was outlined only as the incidental background in an article that was dedicated to the theme of the ‘collusion’ by the mother in the incest.

¹¹ EST is not defined in the article, it is assumed to be Electric Shock Treatment.

This article exemplified the double standard that is a theme in the clinical literature: while Mary's claims were seen as 'hysterical reactions' and discounted by those who treated her in the psychiatric unit, her mother was criticised for the same ambivalence towards her daughter's allegations. Despite the step-father admitting to a number of rapes, he escaped the intense, critical examination to which the mother was subjected. During the course of the family therapy, the mother and other family members were described as being partly responsible for the incest because they took part in the interactions in which the incest had developed and was sustained.

Another theme of this literature, the attribution of positive outcomes to incest, further minimised the harms caused by it and obfuscated paternal responsibility (Lustig, Dresser, Spellman, & Murray, 1966; Gutheil & Avery, 1977). Indeed, the idea of incest as a symptom of other family problems is also found in more contemporary family therapy literature as late as the 1980s (Penn, 1982). Penn provided a case example of a family therapy consultation by Boscolo, one of the three founding psychiatrists in the influential Milan school of family therapy. He agreed to keep the secret of father-daughter incest when the mother shared this privately with him. Penn's commentary reads: 'The consultant does not wish to know the content of the secret, only the value it holds for the family. Secrets are not treated as real information by the Milan Associates. They are treated as information about coalitions.' Further, in line with the theoretical stance of Milan Therapy at that time, the incest was treated as synonymous with intimacy and the family was provided with the abstract response by the therapist of being prescribed a

parallel secret and then left the family to find 'its own solution' to its problems, including the incest (Penn, 1982:275).

This disarming dismissal of the significance of the incest and lack of protective response by the therapist exemplifies the denial of the harm done by incest to children. Incest was been treated as inconsequential to the 'real issue'. The real issue has been variously defined as 'family coalitions', 'intimacy' or the 'unconscious maternal contributions' to the incest. The lack of the analysis of power within family therapy has been challenged by feminist writers as condoning male hegemony within the family and as shifting responsibility to the mother for family ills (James & McKinnon, 1990).

The belief that mothers are to blame for father-child incest, because of their collusive and manipulative behaviour, took root quickly in a culture where blame shifting to mothers was acceptable (Caplan, 1989). Wattenberg (1985) demonstrated that the idea of the 'collusive' mother was based on a few selected clinical cases from doctors who quoted each other. The result of this was that therapists believed mothers and children were either solely responsible for the incest or equally responsible along with other family members (Gutheil & Avery, 1977; Justice & Justice, 1979).

Descriptions of the incest father were not always provided. When they were, they were frequently incomplete. These fathers were generally viewed as emotionally deprived, with poor self-esteem and possible alcohol dependence (Cormier, Kennedy & Sangowicz, 1962; Eist & Mandel, 1968; Lustig et al., 1996; Sgroi, 1982), and as having

uncontrollable sexual desires (Lustig et al., 1996; Salter, 1988). In one early clinical article in a case example, the father was described as a:

...maladroit adolescent attempting to win a young girl in his first love affair....He is like an older brother who forces his sister to misbehave, threatens to tell the mother, at the same times blackmails her by saying that if she complains about him, or the mother finds out, she too will be punished for wrongdoing.

(Cormier et al., 1962:206)

This description does not attribute adult responsibility to the father, nor does it recognise the effect of the differential in power and authority in the father-daughter incest relationship. Moreover, it removes any responsibility for the father engineering the incest or inflicting damage on his daughter. The discernable trend in this literature is to decriminalise the act of incest, to make the father almost invisible and to attribute responsibility to all other family members.

It is not surprising that, in the same way, the presence of domestic violence and the physical abuse of children was also ignored or minimised in cases of incest in this literature. In 13 out of the 20 incest cases reviewed by Tormes (1968), for example, domestic violence and child abuse were present but not acknowledged as significant factors. Acts of violence included burning children with hot irons, chasing mothers with guns and attempting to strangle them. The remaining seven fathers controlled their family effectively by strict control over money, social interactions and daily activities. Despite

evidence of abuse, Tormes still concluded that it was the mother's role and hers alone to protect the children from incest. There was no expectation expressed about the father's responsibility in limiting his behaviour or of even removing himself so as to protect the children from his behaviour. These conclusions are at odds with the evidence presented and suggest that a subtext is continually at play in the conclusions that are drawn, that it is unacceptable to hold fathers responsible for abuse within families.

Evidence of paternal coercion was not integrated into an understanding of the entrapment of children, or the dynamics of incest. Therapists undertaking family therapy likewise excused violence by fathers against family members and thus expected the frightened family members to do so as well (Eist & Mandel, 1968). Laing (1996) concludes that the position inherent in treatment and other incest literature from the 1950s -1970s was imbued with an ideological commitment to 'family preservation', that is, the preservation of the father's position despite the concomitant risks to children and mothers. The implications of this position are that the most powerful and abusive member of the family is not held accountable for incest or the other forms and violence or coercion used against members of their family. This literature laid the theoretical foundation for the psychiatrists who were to later grapple with the issue of child sexual allegations in custody disputes.

3.7 Dissent

While a sceptical position about the claims of widespread child sexual abuse dominated thinking about the area, there have been pockets of dissent from this view. Smart (2000c),

for example, identified four areas of debate during the last century, where there was powerful dissent and a challenge to the silence and denial about child sexual abuse. Feminists during the nineteenth century in Australia and other countries had attempted to establish an 'age of consent' that established a legal age for sexual intercourse in order to protect girls from sexual abuse. By the late nineteenth century, children under the age of 13 were 'protected' from unlawful carnal knowledge; consent was no longer a defence (Scutt, 1991).

Similarly, Smart (2000c) argues that there is evidence that there have been ongoing attempts in certain quarters to acknowledge the problem of child sexual abuse, although these attempts have not gained legitimacy in the face of the dominance of scepticism about the problem. There were, for example, doctors who challenged the orthodox explanation for childhood venereal disease. While medical journals such as *The Lancet* reported that gonorrhoea was spread by towels and dirty toilets, in 1909 Dr Flora Pollack of the Johns Hopkins Hospital in New York City argued against this orthodox explanation:

The possibilities of towel, bathtub or toilet infections of gonorrhoea are extremely rare, but they offer a very useful shield for a guilty individual, and they also impede justice, and make it extremely difficult to protect children from these assaults.

(cited in Smart, 2000c:5)

Another voice of dissent that challenged the dominant view of incest was the sociological work of Weinberg (1955), who undertook research that involved 203 families where allegations of incest had resulted in a conviction. Weinberg, like the psychiatry and social work professions of the time (Wurtele & Miller-Perrin, 1992), believed incest to be extremely rare (Weinberg, 1955). Despite this, he provided a view of life within an incest family that was characterised by ongoing manipulation and terror as violence was routinely used by perpetrators to subdue and victimise both children and mothers. As a backdrop to the incest, domestic violence created a context of fear and control and the experience of entrapment.

Weinberg's reports dissented from the contemporaneous dominant view of incest, which included the Freudian preoccupation with unconscious desires, maternal collusion or mythologising the nuclear family form. His examination of the abuse of power within families was a foretaste of later feminist analysis that would centralise the role of the perpetrator and understand incest as a part of a wider pattern of violence and manipulation of the mother and other family members (Stark & Fritchcraft, 1988).

These voices of dissent were not, however, able to effectively challenge the dominant view, which dismissed mounting findings that indicated high levels of childhood sexual abuse were prevalent. Salter (1988), for example, cites seven social science studies that were published from 1929 to 1965 supporting prevalence estimates that between 24 and 37 percent of children experienced child sexual abuse (Gagnon 1965; Hamilton, 1929;

Kinsey, Pomeroy, Martin & Gebhard, 1953; Landis, 1940, 1956; Terman, 1938, 1951).

Kinsey et al, (1953), for example, widely published his results of a large survey on sexual practices in the USA. Despite publicising sensitive findings about homosexuality, masturbation and women being able to have multiple orgasms, he failed to publicise that 24 percent of participants reported experiences of childhood sexual abuse and denied the devastating effects on the victims (Herman, 1992).

The fact that the dominant view about incest remained effectively unchallenged by this evidence is a testimony of how strongly the dominant view was held. Despite the mounting evidence that child sexual abuse was a common experience for many children, this would not be accepted until there was a political and social ground swell necessary to successfully overturn it.

3.8 The ‘rediscovery’ of child sexual abuse

It was not until the late 1970s, about a hundred years after Freud’s research into trauma, that the public became aware that child sexual abuse was an unaddressed social problem. The modern ‘rediscovery’ of child abuse had begun unfolding in the previous decade when the ‘battered baby’ was diagnosed by radiologists in the 1960s (Kempe, Silverman & Steele, 1962). This decade witnessed an increasing awareness of physical abuse experienced by many children and the widespread nature of the problem that was found across socio-economic groups. While there is evidence that medical practitioners had for hundreds of years been documenting cases of child abuse, it was only publicly recognised

after the publication by Kempe et al. (1962), when the article sparked widespread media attention about child abuse as a social problem. It was then that the problem was also recognised in Australia (Birrell & Birrell, 1966; Goddard, 1996).

Child sexual abuse took longer to be recognised and was more controversial than child physical abuse from the beginning (Goddard, 1996). It was not until the late 1970s and 1980s that the full extent of child sexual abuse was being recognised. Finkelhor (1984) argues that the recognition of child sexual abuse occurred because it was ‘championed’ by two groups: the child protection movement and the women’s movement. Goddard (1996) suggests that child sexual abuse was not taken up by physicians in the same way that physical abuse had been taken up because sexual abuse was largely viewed as a problem dealt with by psychiatrists, and psychiatrists were generally sceptical about child sexual abuse. Moreover, child sexual abuse often left no physical trauma, thus limiting the role of the physician in this form of child abuse (Heger et al., 2002).

A number of key pieces of research began to present findings that child sexual abuse was in fact widespread (e.g., Finkelhor, 1979; Russell, 1983, 1984) and while such findings had been available previously (e.g., Kinsey et al, 1953) these findings now found their way into the public domain. The popular press took up the issue, with newspapers and magazines undertaking surveys to ascertain the level of child sexual abuse within the general population (Crewdson, 1988).

During the 1980s domestic violence and rape and child abuse were taken out of the private domain and placed on the political agenda. Research into violence against women and children followed, as did the funding for services (Herman, 1992). For example, in NSW, the Child Sexual Assault Task Force, funded by the State Government, brought down a plan in 1985 for the training of professionals across the child protection sector. This plan included provision for the funding of direct services for women and children (L'Orange, 1985).

In this political and social milieu, feminism had helped to create the social and political space for women to share their secrets of domestic violence and child sexual abuse, which they had previously felt too shameful to tell (Breckenbridge, 1999). The emerging refuge movement and consciousness-raising groups also made it possible for women to be able to escape from domestic violence and talk together about their experiences, their own childhood trauma of incest and their children's experiences (Herman, 1992). This resulted in a withdrawal of confidence that had hitherto been placed in conventional sources of 'expert' knowledge that had silenced women, and an embracing of women's versions of their experiences (Herman, 1992).

3.9 Conclusion

Child sexual abuse, previously the focus of research in Europe in the late 1800s, again became the subject of social commentary and research in the 1970s and 1980s. Until then the influential professions of psychiatry and the law had each mirrored and bolstered the sceptical conceptualisation that allegations of sexual abuse were likely to be spurious

(Freud, 1896; Hale 1736; Wigmore, 1940). This scepticism remained in the modern lexicon and leached into the clinical treatment of incest victims and their families, even when child sexual abuse and incest were acknowledged as problems in families. The recognition of the damaging nature of child sexual abuse challenged deeply held beliefs within society that denied the extent of the problem (e.g.; Kinsey et al., 1953). The ‘rediscovery’ during the 1980s of the prevalence of child sexual abuse and its negative impact on victims posed serious challenges to this dominant world view.

The reason why the incestuous father escaped a critical commentary is the linchpin to understanding why the dominant paradigm was accepted and promulgated for so long. The psychiatric/legal paradigm protected the belief that the nuclear family, headed by a father, was the rightful child-rearing unit (Smart, 2000b).

Thus, the large increase in reports of child sexual abuse cases being referred to pediatric medical services, child protection services and the courts was a result of the progressive social and political milieu in which feminism had become an influential force. This movement privileged the voices of women and children. It was largely non-experts such as refuge workers and others who, in working outside the psychiatric/legal paradigm, challenged this paradigm’s hegemony over the area (Breckenridge, 1999). Such a change was not welcomed by all. While the widespread nature of child sexual abuse was initially met with shock and empathy towards victims, this was not to last.

The scene was set for the Family Court to become increasingly involved in matters of child sexual abuse, thus resurrecting a number of ideological conflicts about women's allegations of sexual abuse. A backlash against the reporting of child sexual abuse was the next significant development in the literature. The family law literature has had a particular expression of the backlash, as child sexual abuse allegations are considered within residence and contact disputes. This is explored in the following chapter.

CHAPTER FOUR

CHILD ABUSE IN THE FAMILY COURT: THE FAMILY LAW BACKLASH

... in the context of divorce, unlike any other context, protectiveness is construed as paranoia, and reporting abuse is treated as vindictiveness

(Humphreys, 1999:39)

4.1 Introduction: The defence of the sceptical paradigm

The nascent child sexual abuse movement of the 1980s was soon to face strenuous and sustained attack. For a moment in history, feminism had created the conditions under which child sexual abuse could be named (Breckenridge, 1999). This chapter traces the reaction to the sharp increase in the rates of child sexual abuse notifications during the 1980s by professionals who worked within the child protection sector. It also traces the development of the dominant psychiatric/legal paradigm that was the family law's own version of a reaction to the perception of rising numbers of child sexual abuse cases referred to the Family Court. This paradigm conceptualised such allegations as a product of parental dispute or as a product of the mother's psychopathology.

The chapter critiques the dominant paradigm and explores the evidence that challenges it. This critique includes a review of the research that draws out the complexity of the task

of assessing child sexual abuse allegations, and discusses practice issues for professionals who undertake assessments. The chapter concludes by examining the partial integration of knowledge about child sexual abuse into family law assessments.

4.2 The ‘great divide’ and the ‘backlash’

During the 1980s there was a dramatic change in the clinical literature, as the general scepticism about sexual abuse was replaced by an explosion of articles that were sympathetic to victims of rape and sexual abuse. Myers (1997:132) called this ‘the great divide’. Child sexual abuse was investigated and researched with a vigour that had not been applied to this area since Freud’s ‘discovery’ of the cause of ‘hysteria’ in the late nineteenth century (Herman, 1992).

There was a change in child protection work as a sudden flood of child sexual abuse cases caught many workplaces and professionals unprepared (Ney, 1995:xvii). The high level of complexity involved in assessments was related to the nature of the crime. Unlike physical abuse, there was often no physical evidence (Heger et al., 2002), there were no witnesses and in most cases the abuse allegations resulted in the evidence of a child being pitted against the denials of an adult who was often a family member (Herman, 1992). As professionals struggled under the load of increasing referral rates there was also a growing critical commentary on the child protection movement (e.g., Gardner, 1992a; Wakefield & Underwager, 1988).

The reaction to the recognition of the extent of child sexual abuse was swift and forceful. Those who worked with identified victims became the target of strenuous and sustained attack: the ‘false memory’ debate became the centre of controversy and succeeded in undermining the credibility of the allegations and the methods employed by counsellors working with women who made allegations of childhood trauma (e.g., Lucire, 2000; Underwager & Wakefield, 1990). Counsellors were threatened with legal action and were accused of creating false memories of child sexual abuse (Cossins, 1999).

Accused perpetrators and their defenders coined the term ‘false memory syndrome’ to discredit cases where women discussed childhood abuse. This gained wide currency despite an extensive history and empirical evidence base that supports the position that traumatic memories are subject to amnesia (Herman, 1992; Kristiansen, Gareau, Mittleholt, DeCourville & Hovdestad, 1999; Whitfield & Stack, 1997). Cossins (1999:128) found that these claims, that allegations made by women were implanted memories, were based on cultural stereotypes of women – ‘the mentally unstable female’ and the ‘angry and vindictive female’.

The impact of the debate about ‘false memory’ undermined child protection practices during a period of professional turbulence as child protection, law enforcement and health professionals were challenged to adapt their practices and policies to the rising demand for services to deal with child sexual abuse (Breckenridge, 1999; Ney, 1995).

The reaction against the child sexual abuse movement became known as ‘the backlash’ and was in essence a reaction against the social upheaval that the rediscovery of child sexual abuse threatened: ‘Put simply, backlash supporters believe there has been an epidemic of sexual abuse accusations rather than an epidemic of actual sexual abuse’ (Tomison, 1995:3).

A series of controversial and high-profile cases across Western democracies marked the beginning of the reaction against the child sexual abuse movement. A perception of a lack of reliability was promoted in a series of complicated and publicly reported cases. The investigations were portrayed as badly managed, based on faulty methodology and causing harm to those involved. In the North American McMartin preschool case, for example, Crewsdon (1988) reported that, while many jurors thought some abuse had occurred, they were not sure whether children were giving evidence that was from their experience, or if it were suggested by investigators and therapists who were involved in the case.

In Australia, the ‘Mr Bubbles’ case was highly publicised and included allegations of multiple sexual abuses perpetrated on a number of preschool children in a childcare facility. Investigations were said to have been ‘contaminated’ by the children talking to each other about what had occurred (Hills & Hole, 1990). The Cleveland inquiry in Britain resulted in large numbers of children being misdiagnosed as having been sexually abused, as a result of an over-reliance on a single source of evidence, the results of medical examinations (Campbell, 1988). These and similar cases have been described as

contributing to a backlash against child protection interventions. They raised public anxiety that parents and carers were potential victims of false allegations (Gardner, 1987).

The backlash culminated in a powerful force undermining confidence in the efficacy of professional interventions to protect children. State child protection interventions were repeatedly criticised for ‘contaminating’ evidence and for arriving at false positives by finding abuse had occurred when it had not. ‘Overzealous’ parents and investigators were said to lead malleable children to make false allegations (Benedek & Schetky, 1987a and 1987b; Wakefield & Underwager, 1988) and child protection interventions were criticised as undermining parents’ civil liberties. There were claims that harm was being caused by innocent parents being wrongly accused (Besharov, 1993). In the USA ‘Victims of Child Abuse Laws’ (VOCAL) was established by men and women who claimed to be victims of child sexual abuse prosecution, and in Australia there was similar scepticism about these allegations, with information circulated to assist those who were making a defence against such charges (O’Gorman, 1991).

Child protection interventions and the methods used for investigation became targets of critical examination (Gardner, 1992b, 1997; Underwager & Wakefield, 1990). Other areas drawn into the debate about the veracity of child sexual abuse allegations have been: children’s capacity to make verbal descriptions of their experiences (Sorensen & Snow, 1991); their suggestibility (Saywitz, Goodman, Nicholas & Moan, 1991); the dynamic nature of memory recall (Loftus, 1997); and assessor skills and bias (Quinn,

1989). These criticisms resulted in a general loss of confidence in the findings made by State authorities and the child protection system in general.

Others took the opposite position, that underreporting was still the main problem, that children had difficulty disclosing their abuse and that, if they did, adults often failed to act protectively (Summit, 1983). Moreover, there was a long tradition of silencing allegations of incest (Herman, 1992; Masson, 1984). Despite rates of child sexual abuse notifications climbing each year, it was argued that they had not approached the estimated figure based on extrapolations from retrospective studies of adults reporting that they had suffered abuse as children (Finkelhor, 1993).

4.3 The family law backlash

The backlash became a powerful counter-movement because it was able to draw on deeply held and highly influential beliefs that children and women could not be believed when making such allegations (Herman, 1992; Scutt, 1986). The backlash was also evident in the family law area. A significant point of difference between the child protection and family law jurisdictions was in the conceptualisation of the motive attributed to the mother. In the child protection field the mother was stereotyped as complicit, colluding and failing to protect the child, whereas in the family law context she was seen as manipulative and vindictive for bringing the allegations (Humphreys, 1999; Turkat, 1997). Moreover, mothers and professionals who believed the allegations that were made by children were also targeted for criticism and discredited (Humphreys, 1999:44).

The resistance to a protective stance vis-à-vis children in the family law arena drew on arguments previously used in rape trials during the 1970s; the psychiatric and legal community extended the same arguments to child sexual abuse allegations (Scutt, 1991). Instead of women being accused of making false claims about their own sexual abuse in rape trials, mothers were said to be lying about child sexual abuse and involving their children in these false allegations (Scutt, 1991). The application of the rape debate onto the family law area relied on a psychiatric diagnostic frame that proposed that particular dynamics between mothers and children could result in the development of false allegations (e.g., Blush & Ross, 1987; Green, 1986; Kaplan & Kaplan, 1981).

It was therefore in cases where incest was alleged in family law litigation that a particular form of backlash was enabled by the reassertion of psychiatry as the preferred knowledge base. This was fortified by a clutch of beliefs that undermined the credibility of allegations, including a denial of the harm incurred by incest by a range of professions (e.g., Kinsey et al. 1953; Mitra, 1987; Penn, 1982) and the view that children's evidence could not be trusted (Hale, 1736) against the context of the 'no fault' culture of family law and the Family Court's role in promoting an ongoing relationship between the parents and child (Family Court of Australia, 2004a; Kaspiew, 2005).

This sceptical psychiatric response mirrored a broader social agenda. This position was made most overt in Gardner's Parental Alienation Syndrome (PAS) (1987, 1989a, 2002b), in which, until recently, the alienation was nearly always attributed to women.

Turkat's (1997) theorising also demonstrates a gender bias in his 'Malicious Mother Syndrome'. This overtly gendered response, found within the family law backlash, is situated within a broader movement that is committed to men's rights and defines one of the central issues as the control over children: 'children have re-entered the public domain on the political and legal' (Cain & Smart, 1989; xii). Accordingly, family law litigation is one of the sites where the issue of control is decided; the political agenda of the New Right has claimed family law as its venue for restoring the paterfamilias to his place within the nuclear family (Ehrenreich, 1983).

While feminism had championed mothers as the experts of their own experience and as being able to identify danger to their children and to protect them (Herman, 1992; Walby, 1985), the psychiatric/legal model was seen by feminists as silencing women and children about their experiences of sexual abuse (Scott, McCarthy & Gilmore, 1981; Smart, 1989). It is this model that is dominant in the conceptualisation of child sexual abuse allegations in the Family Court.

4.4 The use of forensic psychiatry in the family law

During the 1980s a number of North American psychiatrists published articles based on their clinical work with cases in which there were child sexual abuse allegations. These articles were all based on small clinical and unrepresentative samples and they predominantly presented false allegations as being often made by mothers in custody disputes (Benedek & Schetky, 1985, 1987a, 1987b; Blush & Ross, 1987; Bresee et al.,

1986; Coleman, 1986; Gardner, 1987, 1989a, 1989b, 1992a, 1992b, 1994; Green, 1986; Green & Schetky, 1988; Jones & Seig, 1988; Kaplan & Kaplan, 1981; Schuman, 1986).

Kaplan and Kaplan (1981) provided one of the first clinical studies of ‘false allegations’. It concerned a single case involving two siblings, a boy of 11 and his sister of five years, who had both made allegations of sexual abuse against their father and paternal grandfather. The article described how the boy was subjected to a joint interview by the disbelieving therapists and the denying father and grandfather. During the interview the boy partially recanted. On the basis of this, the Kaplans assessed both children’s allegations as untrue and made a finding of ‘folie au deux’, that is, the allegation was the result of a shared delusion between the mother and child. Faller, Corwin and Olafson (1993) have argued that this diagnosis was made despite the absence of the necessary preconditions: the children did not have delusional thinking, and the allegation did not originate with the parents but with the children. The Kaplans’ methods and conclusions demonstrate the absence of a suitable conceptual framework with which to consider allegations of incest. For example, they did not consider the imbalance of power in the father-son relationship being replicated in confrontation between the therapist, father, and grandfather and child. In addition, the fact that these children did not conform to the definition of the ‘folie au deux’ demonstrates a lack of rigour in the assessment, the diagnosis and ease with which such a label was applied. This is a reflection of the dominance of the view that fathers could not be held responsible, found in the dysfunctional family literature, and so an explanation was devised in which the child was blamed.

Despite the flaws in the conceptualisation of this assessment, the Kaplans' article and others of its ilk laid down the basis for what was to become a developing field of forensic psychiatric assessment in cases where there were incest allegations in family litigation. Others followed the Kaplans and drew conclusions from small and highly selective clinical samples. These were applied to the general population of allegations of sexual abuse in divorce, focusing on the alleging parent and their psychopathology (e.g., Benedek & Schetky, 1985, 1987a, 1987b; Green, 1986; Schuman, 1986). Brant and Sink claimed that a 'brainwashing' dynamic was present in 75 percent of their clinical population where there was a custody dispute. Blush and Ross (1987), in a similar vein, proposed what they called 'Sexual Assault In Divorce' (SAID) syndrome. They described four elements to the 'syndrome': the allegations almost always surfacing in the midst of a custody dispute; a history of family dysfunction and an unresolved divorce; the female (usually the accusing parent) manifesting hysterical symptoms; and the child (the alleged victim) finding themselves in a position of control.

Blush and Ross developed three typologies for mothers who made false allegations. This mother was described as either:

- (a) presenting herself as fearful, a victim in the marriage, powerless and perceives her male partner as a source of threat, economic punitiveness and retribution; or*
- (b) a "justified vindicator". "A hostile, emotionally expansive, vindictive and domineering woman"; or*
- (c) manifesting a psychotic personality.*

(Blush & Ross, 1987:6)

Blush and Ross focused solely on allegations within Family Court proceedings, and, despite their description of the mother presenting herself as fearful (consistent with being a victim of domestic violence), this possibility is not explored in the SAID. Benedek and Scketky (1985), also psychiatrists in private practice, presented 14 cases of their sample of 18 that involved ‘visitation’ disputes. The authors assessed ten of these as false, with all but one of the ‘false’ allegations made by mothers. The mothers were described as suffering from psychiatric problems or as wishing to vindictively exclude their ex-partners from their lives. Benedek and Schetky (1985) also reported that a majority of their clinical population, about 55 percent, contained false allegation.

Schuman’s (1986:449)¹² article presented a singular focus on custody cases in a sample of seven cases from his private practice where there were both sexual and physical abuse allegations. He proposed that ‘over-anxious’ parents ‘over-interpreted’ ambiguous statements by children and then fed back their anxieties to the child in a positive feedback loop. Arthur Green (1986), psychiatrist and academic,¹³ expanded Schuman’s proposition in an article about the assessment of true and false allegations of child sexual abuse. He described false allegations from children as rare, but when they did occur he postulated that they were the result of four possible processes that focused on the mother, or interactions between the child and mother. The first was when a ‘vindictive mother’

¹² At the time of publication Schuman was the director of psychiatry, at Norfolk County Probate and Family Court, and Assistant clinical Professor of Psychiatry Tufts Medical School, Boston MA, USA.

¹³ At the time of publication, Green was the Medical Director of the Family Center and Therapeutic Nursery of the Presbyterian Hospital of the City of New York and Associate Professor of clinical Psychiatry, Columbia University College of Physician and Surgeons.

brainwashed the child. The second was when the child was influenced by a delusional mother ‘who projects her own unconscious sexual fantasies onto the spouse’ (Green, 1986:451). He proposed that this mother began this process soon after separation, misperceiving the relationship between the child and spouse, interrogating her children, withholding love or approval if the child denied abuse. Thirdly, Green suggested that the child’s allegations were a result of the mothers’ sexual fantasies, rather than reality, and, fourthly, that a child would make false allegations to retaliate against a parent. Green reviewed a selection of 11 cases from his caseload and postulated that four out of these 11 were false. Moreover, Green’s focus on the alleging mother was extended to the assessment of the veracity of her allegations: he proposed that mothers making true allegations would be depressed, whereas mothers making false allegations would be paranoid, or suffer from hysterical psychopathology.

When Green’s 1986 paper was published in the influential *Journal of the American Academy of Child Psychiatry*, it elicited a critical response from a number of authors, including a rebuttal article by leading researchers and clinicians, Corwin, Berliner, Goodman and White (1987) who pointed to problems with Green’s analysis of two of the cases and drew attention to the difference between unsubstantiated cases and false allegations. They argued that Green was overly simplistic in his analysis:

Our major concern is that Green’s article is most likely to be misused in judicial settings to the detriment of a large number of children who are caught in custody battles and who have also been sexually abused.

(Corwin et al. 1987:92)

In a later article, Green (1991) proposed an additional category that may result in a false allegation: mistaken perception. The same theme was also described by Sink (1988). In this scenario the mother typically asks the child leading questions after they have visited their father, until they eventually elicit an allegation of sexual abuse from the child. Green detailed a mother who was over-protective towards the child, and the father's involvement in bathing and toileting was misconstrued as abuse. He suggested that these allegations were more likely to be the result of a mistakenly false allegation, rather than as a purposeful, vindictive allegation.

Sink's (1988) theory was based on interactions between the child and mother and described a similar process to that proposed by the Kaplans (1981), 'folie au deux', although the delusion is replaced with a 'shared belief':

The interplay between the child's and the custodial parent's fears may result in increasing symptoms in the child and/or interpretation of the non custodial deceit but is instead an example of overreaction and misperception in which both custodial parent and the child develop a shared belief that the abuse has occurred and/or could occur during contact with the other parent.

(Sink, 1988:147)

Gardner, possibly the most prolific psychiatrist in this area, authored many books and articles on the subject of the assessment of families in custody disputes until his death in

2003. He is best known for his theory of Parental Alienation Syndrome (PAS). This theory became the symbolic flagship of the ideological battle about child sexual abuse allegations in family law disputes. Gardner wrote prolifically about the assessment of false allegations of child sexual abuse, arguing that they were easily and frequently made in custody cases (e.g., 1984, 1987, 1989a, 1989b, 1992a, 1992b, 1994, 1999, 2001a, 2001b, 2002).

Gardner's theory was that PAS had become a common phenomenon as a result of changes in family law from the 1970s to the early 1980s (Gardner, 1987). He estimated that in 85 – 90 percent of cases he termed as parental alienation, the mothers were the parents favoured by the children, although he later revised this estimation to being spread equally between mothers and fathers (Gardner, 2001a). Allegations of child sexual abuse were, according to Gardner, a particular variant of the PAS: 'A new weapon was now being added to the parent's armamentarium in the custodial warfare. What more effective way could there be to get quick action by the courts than to allege that a parent was sexually molesting a child?' (1987:100-101).

Gardner's 1987 publication 'The Parental Alienation Syndrome and the Differentiation Between Fabrication and Genuine Child Sexual Abuse', for example, is one of a number that portray his view of allegations falling into one of two categories. Gardner reassured the reader of the ease with which the assessment could be made as in most cases, he said, the conclusion would 'jump out off the page' (1987:171). This assurance is arguably naïve in a context where the Family Court most often deals with cases where the evidence

is not compelling enough to meet a criminal court's level of proof, but where there are often genuine concerns about young, preverbal children (Brown et al., 1998a; Hewitt, 1994; Parkinson, 1999).

The dominant theme in Gardner's (1987:177-186) guide for the assessor is the presumption that children can be readily 'programmed' by their mothers. These children are then preoccupied with 'parent-denigration that is unjustified and/or exaggerated' and idealisation of the other parent (Gardner, 1987:68). Gardner (1987, 1992b) developed the Sexual Abuse Legitimacy Scale (SAL), which later gave way to the use of unweighted criteria for assessing mothers, fathers and children where there was an allegation of child sexual abuse. This assessment scale contains a mixture of criteria based on clinical observations while others appear to have no clinical or empirical support. It may be that these criteria are derived from Gardner's personal value system. At the base of Gardner's theory is his claim that mothers use false allegations of child sexual abuse against their ex-spouses as an 'extremely powerful vengeance and exclusionary maneuver' (Gardner, 1994:1).

4.5 Critique of the sceptics' position

The sceptical position expounded in the clinical literature results in a bias that focuses on collecting evidence to confirm the hypothesis that a false allegation has been made. These authors (e.g., Benedek & Sckety, 1985; Gardner, 1987, 1994; Green, 1986, 1991; Kaplan & Kaplan, 1981; Schuman, 1986; Sink, 1988) have built on the 1950s and 1960s formulations of their professional forebears who relied on the dysfunctional family

model. These 1980s reformulations like their 1950s and 1960s counterparts, utilised impressions drawn from small clinical samples from which were developed typologies and guidelines for assessment that have been used in Family Court evaluations. The influence of this view of the emerging social problem of incest in separated families gained influence in family law despite the repeated serious criticisms of the PAS by respected child sexual abuse researchers and others (e.g., Conte Sorensen, Fogarty & Della Rosa, 1991; Corwin et al., 1987; Dallum, 1998; Faller et al., 1993; Freckelton, 2002). The body of psychiatrists who published in the 1980s, drew conclusion from their clinical practices and in doing so established the foundation for forensic assessments undertaken by court-ordered psychiatric assessors of the 1990s and 2000s. The 1980s and 1990s psychiatric assessment models were similarly focused on the mother as the main subject of assessment – on her motives and any visible pathologies that might explain a false allegation.

4.5.1 Explicit negative bias in the Parental Alienation Syndrome

The implicit bias in Gardner's (1987) SAL scale favours the parent who has been accused of abuse. Gardner prefers to err on the side of false negative findings: the error of missing child sexual abuse is thought preferable to mistakenly identifying sexual abuse where there is none. Gardner actively argues for this position:

This conservative approach is based on the setting of the cut off point for bona fide sex abuse is based on the American legal principle that "it is better for 100 guilty men to go free than to convict one innocent."

(Gardner, 1987:175)

Gardner also defended this bias by arguing that many other professionals work from the opposite presupposition, that is, that child sexual abuse has occurred if alleged, unless there is evidence to prove otherwise (1987). Gardner's scale is therefore a result of a hybrid fusion of legal and clinical principles and his own personal value position that privileges the rights of fathers to have contact. When there is uncertainty due to inadequate information, the presupposition that child sexual abuse has not occurred comes into force and a finding of 'no abuse' is made.

Another critique of the sceptics' position has been made by demonstrating a particular value system that is implicit in Gardner's work. Dallum (1998) argues that Gardner's concepts about paedophilia concur with those of the North American Man/Boy Love Association (NAMBLA) and do not fall within mainstream views. Dallum draws together a collection of Gardner's views that season his publications. For example, Gardner (1991:118) suggests that Western society is 'excessively moralistic and punitive' toward paedophiles and that 'paedophilia has been considered the norm by the vast majority of individuals in the history of the world' (Gardner, 1992b:593). Some of Gardner's comments imply that the children are responsible for seducing their fathers (1986). He theorised that paedophilia had a positive function in ensuring the survival of the species as child victims *are 'charged up'* with sexual interest and are therefore more likely to have sex in adulthood and reproduce (1992b:24-5). Furthermore, Gardner (1992b) did not favour the reporting of paedophilia to authorities lest the child be traumatised by the interventions that follow, such as the police interviews (608-12). In her analysis of

Gardner's views about paedophilia, Dallum (1998) appears to have captured a glimpse of the personal value system that underpins the PAS.

4.6 The counter-response

Gardner's assessment model has come under sustained attack from many researchers in the field of child protection (e.g., Brooks & Milchman, 1991; Conte et al., 1991; Dallum, 1998; Faller, 1998, Freckelton, 2002; Kelly & Johnston, 2001; Rosen & Etlin, 1996).

There are also a number of theoretical objections and research findings that challenge Gardner's position (Beitchman, Zucker, Hood, DaCosta & Akman, 1991; Johnston, Lee, Olesen & Walters, 2005; Thoennes & Tjaden, 1990; Wilson, 2001).

4.6.1 Theoretical objections: use of the medical model

One of the most pervasive problems that has been identified in the sceptical position is that it is built on a presupposition that child sexual abuse allegations are likely to be false in the context of a family law dispute. It was Blush and Ross (1987) and Gardner (1987), however, who took the most extreme positions in the development of the SAID and PAS, which the authors called 'syndromes', thus claiming the mantle of medical legitimacy, despite there being no supporting empirical data that would allow an evaluation of their efficacy (Conte et al., 1991). More recently, Turkat (1997, 2002) has continued this tradition in his publications about mothers being involved in 'visitation interference'. Kelly and Johnston (2001), who write from a systems theory perspective, claim that there is bias and tautology in Gardner's work as the definition of the PAS includes its

hypothesised etiological agents: an alienating parent and a receptive child and therefore cannot be disproved. Further, Kelly and Johnston argue that behavioural interactions from the family's social system that the PAS seeks to define fail to meet the definition fail to meet the definition for a diagnostic syndrome¹⁴ - thus failing when the criteria of the medical model are applied. Moreover, Brooks and Milchman (1991)¹⁵ assert that the use of a medical model and the clinical-diagnostic paradigm is unsuitable in the assessment of allegations of child sexual abuse because there is no specific mental disorder uniquely diagnostic of sexual abuse. They assert that a 'clinical research' paradigm is more suitable for describing and for theorising family interactions where child sexual abuse is one of a number of hypotheses.

Despite criticisms of the PAS, there have been attempts to have it accepted as a 'syndrome' within the Diagnostic and Statistical Manual to Mental Disorders IV (DSMIV). To date these attempts have failed, but the push to legitimise the PAS has continued (Freckelton, 2002).

4.6.2 Research on Family Court populations

Research on Family Court populations has challenged the stereotype that had developed as a result of studying small clinical populations from psychiatric practices (e.g., Benedek

¹⁴ The American Psychiatric Association (1994) requires that a diagnostic category have a 'commonly recognised, or empirically verified pathogenesis, course, familial pattern or treatment selection' otherwise it cannot be considered a diagnostic syndrome as defined by the American Psychiatric Association (1994).

¹⁵ The New Jersey's Concerned Professional for the Accurate Assessment of Child Sexual Abuse, is comprised of a number of clinicians involved in the assessment of child sexual abuse allegations in their work. Catherine M. Brooks J.D. was an Associate Professor of Law at Creighton University School of Law, Madelyn S. Milchman, PhD was a psychologist in private practice in New Jersey.

& Schetky, 1985; Green, 1986). The fixation on the small percentage of false allegations of child abuse and child sexual abuse in the child protection population was discussed in Chapter Three. This phenomenon has also been found in the family law population in cases where there are allegations of child sexual abuse.

Large-scale research projects that have explored sexual abuse allegations in family law disputes have established that the simplistic stereotype that mothers make frequent allegations against fathers is inaccurate. Thoennes & Tjaden (1990), for example, found that the proportion of contested custody cases in which there were child sexual abuse allegations was lower than two percent. This study collected information from court counsellors, Family Court, and child protective service files from over 12 jurisdictions in the USA where there were determinations available (in 129 cases). Fifty percent of these cases were found to have involved abuse, 33 percent were found to involve no abuse and in 17 percent there was an indeterminate ruling. This illustrates not only that abuse was confirmed in 50 percent of cases, but in a large minority of cases it was not possible to make a finding because of a lack of information or evidence. In addition, the study revealed that a range of family members were involved in the allegations. Mothers made allegations in 67 percent of the cases, fathers in 28 percent and third parties in 11 percent of the cases. In addition, fathers were the family members who were accused in only about half the cases (51 percent); mothers were accused in six percent of cases, mothers' new partners in ten percent, and extended family members in six percent. In summary, it was found that there were a variety of family members who were both the allegers and

the alleged. These findings dispel the belief that such allegations are made by mothers against fathers (Gardner, 1999).

Five studies using smaller sample sizes have found rates of intentionally false allegations of abuse arising in the context of custody disputes ranging from 23 percent (Bala & Schuman, 1999) to 4.7 percent (Faller & DeVoe, 1995), with three studies falling within a narrower band of nine-15 percent (Brown et al., 1998; Faller 1991; Thoennes, 1988). It should be noted that the highest rate (Bala & Schuman, 1999) was from a study that included both physical and sexual abuse and was based on judicial findings, and the rate may have been elevated because of the highly selective nature of the sample. These were cases where there was not enough evidence to go to a criminal court, but enough concern to warrant the issues being raised in the family law jurisdiction. These larger projects have found rates of deliberately false allegations for litigating parents much lower than the rates of 55-75 percent reported by psychiatrists who had extrapolated from small clinical samples (Benedek & Schetky, 1985; Brant & Sink, 1984). In fact, the rates of false and unsubstantiated allegations have been found to be comparable to rates in the general child sexual abuse population (Ehrenberg & Eltman, 1995; Hume, 1996; Thoennes & Tjaden, 1990).

More recently, there has been research focusing on particular aspects of the population of litigating parents in family law. Johnston, Lee, Olesen and Walters (2005) were interested in family law cases where there was ongoing conflict, many of which contained child abuse allegations. They selected 120 custody cases from the San Francisco Bay area.

These cases were from a four-year period from 1989 to 2002 and were selected because of their ‘high-conflict’ characteristics. Overall, the researchers examined records from family evaluations and counselling and found that 43 percent of the allegations across all forms of child abuse contained evidence that would lead them to substantiate the cases. They also found that allegations of child abuse by either parent were less likely to be substantiated than domestic violence and that, over-all, mothers’ and fathers’ allegations were substantiated at almost the same rate (51 percent and 52 percent respectively). Researchers concluded that this finding ‘implies that women in custody disputes are no more likely to allege unsubstantiated about against their child’s other parents than are men’ (Johnston et al., 2005:290).

Researchers focusing on families involved in family law litigation (Bala & Schuman, 1999; Brown et al., 2000; Hume, 1996) concur that a large percentage of the cases that proceed to trial, contain multiple forms of child abuse allegations and that the child protection/family law interface is poor. Overall this research in Family Court populations presents a complex pattern of abuse within families. Child sexual abuse allegations have been found to be only a small percentage of the total population of cases that enter the Court. However by the time of the trial they comprise a much higher proportion of the cases still remaining in the system. Of the cases that go to trial, child physical abuse, sexual abuse and domestic violence occur at high frequencies and in clusters. In a large proportion of this population there are positive findings made that either child abuse or domestic violence or both have occurred, or there is evidence to suggest that it may have occurred (Bala & Schuman, 1999; Brown et al., 2000; Hume, 1996).

4.6.3 Child sexual abuse and divorce and separation

Alongside the debates about the validity of the cases raised in family law disputes, there is a considerable body of research about the heightened statistical vulnerability of children to child sexual abuse once their families separate and/or divorce. Robin Wilson (2001), a North American law academic, reviewed 70 social science research findings to identify the effect that divorce and separation have on the risk of child sexual abuse.

There is strong evidence that divorce substantially elevates the risk of child sexual abuse for girls who were living with a father or other adult males in the household: they were more than seven times more likely to be abused than children living only with females. In addition, living with a mother and step-father, or when living alone with the father, also presents a heightened risk to girls (Bolen, 1998; Russell, 1984).

Support for the findings of heightened vulnerability comes from a number of sources. A national North American survey found that 50 percent of female children residing with the father after separation reported sexual abuse by their father or by someone else (Finkelhor, 1993). Beitchman, Zucker, Hood, Da Costa, Akman and Cassavia (1991) also concluded after a review of 42 publications that the majority of children who were abused appeared to have come from single parent or blended families. Boys do not appear to have the same susceptibility to an increased molestation rate after divorce. Wilson (2001:257) concluded that ‘the dissolution of the parental relationship does not appear to alter appreciably the risk of abuse for boys’.

While this statistical risk is present for girls after separation, there is no evidence that this risk is taken into consideration or even understood by the professionals who, because of their sceptical beliefs about allegations being made in family law litigation, are biased towards making negative findings of abuse. This statistical finding challenges Gardner's (1987) belief that practitioners should be biased in favour of negative findings of abuse and suggests the necessity of being open to the possibility that there may be risks of this nature, especially for girls in separated families. Wilson (2001:253) concluded that: 'family law deals inadequately with this disturbing phenomenon because courts in custody proceedings generally neglect to address the increased statistical probability of sexual abuse after divorce'.

4.6.4 Bias amongst professionals in family law matters

There have been assertions that 'overzealous evaluators and therapists' are biased towards making false positive findings of child sexual abuse (Gardner, 1994:2). However, there is evidence to support the assertion that in fact there is a systematic bias against positive findings. This problem appears to relate particularly to the assessment of allegations that are made in family law disputes. Humphreys (1999), for example, identified this bias amongst child protection workers when there was family law involvement. McGraw and Smith (1992:60) also found that 'custody cases' caused statutory child protection workers considerable difficulties, which they termed 'divorce-induced polarization'. This resulted in being unable to hold a neutral stance in the investigation and a reliance on a presumption that the allegations were likely to be false.

Professional groups, other than statutory child protection workers, have also been identified as having difficulties in assessing the level of risk in cases where there are child sexual abuse allegations. Everson, Boat, Bourg and Robertson (1996) found that beliefs held about the likelihood of false allegations of child sexual abuse vary across the range of professionals who deal with child abuse. Judges, police, mental health professionals and statutory child protection workers were the subject of research and the levels of their scepticism were related to two factors: the age of the child and the familiarity the professional has with child sexual abuse. There were higher rates of belief amongst professional categories where child sexual abuse was a component of their core duties, and allegations made by teenage girls were less likely to be believed (Everson et al., 1996).

These studies highlight the difficulties in maintaining a systematic approach to assessments: professionals involved in child protection, mental health, policing and judicial decision-making are prone to various contextual influences, such as a lack of familiarity with child sexual abuse, sceptical beliefs about such allegations, and extrapolation from one case to another, regardless of individual differences. In sum, and contrary to Gardner's proposition that child protection workers were particularly prone to making positive findings of child sexual abuse, child protection workers and other professionals appear to be reticent about making positive findings of sexual abuse. In response to recognition of the universal difficulty of making consistent and accurate assessment findings in cases where there are child sexual abuse allegations, there have been attempts to minimise the impact of the interview bias and to increase inter-rater

reliability and consistency. Statutory child protection departments have increasingly adopted the use of structured risk models and actuarial assessment tools of sexual abuse (Cree & Wallace, 2005; English & Pecora, 1994; Honts, 1994; Lamb et al., 1994; Starr, 1993). These developments do not appear to be recognised in the family law literature.

4.6.5 Lack of integration of sex perpetrator assessment or family violence

material

The body of knowledge pertaining to family law assessment has not readily integrated material from other fields of inquiry. While domestic violence has suffered this neglect, there has been some headway in this area, as a number of researchers and practitioners have focused on this issue (e.g., Hart, 2004; Jaffe, Lemon & Poisson, 2003; Laing, 2003; Kaspiew, 2005; Kaye, Stubbs & Tolmie, 2003). There is current interest in the child abuse, domestic violence/family law interface by family law specialists who are attempting to integrate findings about family violence into practice (e.g., Jaffe, Lemon, & Poisson, 2003; Johnston et al., 2005). This is evidence that a child abuse/domestic violence paradigm is being now increasingly being used in family law assessments.

Despite these developments in acknowledging domestic violence and child abuse, there is little evidence of an application of specific knowledge about sex offenders to family law assessments. An example of the danger this hiatus brings is evident in Gardner's (1994) work: one of his strongest 'differentiating criteria' in the assessment of child sexual abuse allegations is that innocent fathers are likely to express 'extreme indignation' at a false allegation:

People who have been falsely accused of pedophilia often suffer with a sense of impotent rage over the prospect of long jail sentences and destruction of their lives. Accordingly, their professions of innocence are convincing, and do not have an artificial quality of the feigned and unconvincing denials often seen in genuine pedophiles.

(Gardner, 1994:6)

There is no evidentiary base provided for this criterion, and the proposition that a professional can assess an alleged sex offender by interview alone is challenged by extensive research and practice that reveals skilled denial and cognitive distortions in sex offenders. This means that they are particularly practised at, and able to provide, compelling false denials (Abel et al., 1987; Salter, 1988; 1994). Moreover, even thorough specialised sex offender assessment schedules have not been able to distinguish incest offenders from non-offending populations (e.g., Abel et al., 1987; Abel & Rouleau, 1990; Murphy, 1990). Professionals assessing sexual abuse perpetrators and the risks they pose rely on assessment tools developed to aid the specialist assessment of sex perpetrators. These include gathering collateral evidence, a detailed sexual history, the use of standardised assessments, including the assessment of arousal patterns, and cognitive distortions (Limandri & Sheridan, 1995; McGovern & Peters, 1988; Murphy, 1990; Quinsey, Lalumiere, Rice & Harris, 1995; Salter, 1988, 1995). There is no evidence that this area of clinical research is applied in Gardner's assessment of fathers.

Gardner's SAL fails to integrate knowledge about sexual abuse perpetrators, child victimisation within families or what is known about the process of disclosure (Staller & Nelson-Gardell, 2005; Jenkins, 1997; Sorrenson & Snow, 1991; Summit, 1983). Similarly, the findings that support children being reliable witnesses (Goodman & Helgesson, 1985; Lamb, 1994) are not integrated into Gardner's assessment scale. The omission of information about children and their reactions to abuse creates an assessment structure that excludes information about their experiences. It is argued that the scope of assessments within family law proceedings is limited by the implicit belief that contact is in the best interests of the child (Kaye et al., 2003; Laing, 2003); this limitation is evident in Gardner's scale (1994).

4.7 The mother as the key subject of examination

In assessing child sexual abuse allegations in a family law dispute the emphasis found in the psychiatric assessment literature suggests that the alleging mother is the key subject of scrutiny and interviewing the child is not mandatory (Blush & Ross, 1987; Wakefield & Underwager, 1990; 1991). This contrasts with researchers and child protection practitioners who propose that the child interview is the most significant piece of evidence in the investigation of an allegation (e.g., Bussey, 1995; Goodman & Bottoms, 1993).

The psychiatrists of the 1980s who specialised in assessing child sexual abuse allegations, proposed two main maternal categories for the falsely alleging mother. Firstly, the mentally ill mother was seen as experiencing delusions or hysteria, or as involved in over-enmeshed and anxious relationships with their children that could result in a shared

delusion or belief that child sexual abuse had occurred (Kaplan & Kaplan, 1981; Sink, 1988). This position is still promulgated in more recent psychiatric publications, with a reliance on the argument that false allegations and lies are a feature of borderline personality disorder and therefore many allegations that such parents make are likely to be false (Lucire, 2000). The alternative, more malevolent category is a ‘vindictive’ mother who makes false allegations to prevent contact with the father (Blush & Ross 1987; Gardner, 1987; Green, 1986; Turkat, 1997).

The mother stereotype from the dysfunctional family literature of the 1950s and 1960s is slightly altered in this incarnation. Whereas she was portrayed as failing to protect her daughter in the family dysfunction literature, she is now portrayed as making false allegations. She is no longer collusive in the incest, but is mentally unstable or vindictive and vengeful (Humphreys, 1999). In this forensic framework there is an assumption that maternal mental illness or vengefulness excludes a true allegation (Humphreys, 1999). Neustein and Goetting, in reviewing cases in which there were child sexual abuse allegations, found that the mother’s personal characteristics, such as her alleged paranoia, vindictiveness or even weight gain, were the focus of the legal defence rather than the issues surrounding the subject children.

The general effect of the contributions made by the psychiatric literature of the 1980s to the area of assessment (e.g., Benedek & Schetky, 1985; Blush & Ross, 1987; Gardner, 1987, 1992b, 1994; Green, 1986, 1991; Sink, 1988) is that the assessor searches for evidence to support the hypothesis that the mother has created the allegation. In this

search, the independent, fully functioning, protective mother is invisible. Instead, if the mother conforms to Gardner's (1994) criteria she would have been damaged by years of living with a dominating sexual abuse perpetrator. Her own experience of child sexual abuse would render her partial to offering her daughter to her spouse as a sexual partner, as described in the 1950s and 1960s family dysfunction literature, or being over-sensitised to the possibility of child sexual abuse. This pathologising description of sexual abuse survivors and suspecting mothers provides no alternative profile for the mother who is protective of her child.

Further, in the application of Gardner's (1994) scale, if the mother acts independently and self-confidently and consults a professional specialist in child sexual abuse or the child protection authority before confronting her husband, or if the allegation arises after the separation, she is less believable. The mother with a mental illness, history of domestic violence or childhood incest, in this schema, is at a great disadvantage because these factors are believed to diminish her capacity to give factual evidence and her credibility is effectively undermined.

Punitive judicial reactions to mothers making allegations of child sexual abuse in the Family Court are a theme noted by a number of researchers. This involves the reversal of residence (previously 'custody') after an assessment that the mother has made a false allegation. In these circumstances, reversals of residence are made despite parenting deficits in fathers, and in circumstances in which the only apparent parental deficit in the mother is the fact that she has made an allegation. Jenkins (2003) documented one case in

Western Australia in which there were undisputed verbal allegations of a three-year-old boy who said that his father had pinched his stomach and penis. The boy became upset at the contact changeover and told the contact supervisor (a neutral professional), that he was scared of his father because his father had hurt him. There was also a history of inadequate care, domestic violence and physical abuse of an older step-son by the father. The mother was assessed by the court-ordered assessor as being honest in her reports to the Court about her son's allegations. Despite all this evidence the judge made orders based on a finding that the mother was 'alienating' the child from the father. Residence was reversed and the mother was to have supervised contact for a period of time (E & R, 2001, unreported decision of the Family Court of Western Australia). This finding concurs with the North American precedent of *Ellis v Ellis* (747 s.w.2d 711) which established the reversal of residence to the non-residential father from the resident mother after a similar finding that the mother had deliberately made false allegations.

Neustein and Goetting (1999) also found evidence of a lack of proper consideration of maternal allegations of child sexual abuse in custody disputes in the USA. In their review of 300 complaints from professionals and parents about judicial decisions. They found that in 20 percent of these cases the child's custody was changed to the allegedly abusing parent. In 70 percent of cases, orders were made for children to be in joint custody and in the remaining 10 percent of cases the child was placed primarily in the custody of the alleging parent (1999). A common problem identified in these complaints was that mothers had been considered to be obsessive or to have some form of mental illness resulting in what were assumed to be false allegations. One mother was charged with

‘emotional neglect’ for making allegations of child sexual abuse (Neustein & Goetting, 1999:116). The researchers concluded that it was only where mothers could counter the negative views about them, by employing experienced legal teams who undertook an educative role with the judge, that the allegations were taken seriously and the courts protected the children from further abuse. This North American research suggests that there is a systematic bias against maternal allegations of child sexual abuse in family law litigation in the USA (Rosen & Etlin, 1996). This thesis examines the same of judicial decision-making in Australian family law cases.

4.8 The context of the allegations

The assessment of child sexual abuse allegations in the Family Court is complicated by a number of factors. Firstly, a large percentage of subject children are preschool age and may be preverbal (Bala & Schuman, 1999; Hewitt & Friedrich, 1995; Parkinson, 1998). In addition, there are contextual factors that muddy an assessment: many of the indicators for child sexual abuse are also general indicators of distress caused by other factors such as family separation or other forms of abuse such as exposure to domestic violence.

Parkinson (1998:2) comments on the difficulties that a very young child presents to assessors: they do not have the ‘linguistic skills, knowledge and capacity for accurate expression to articulate precisely what had happened to them in the way most adults can’. Moreover, verbal disclosures from young children may be indirect or piecemeal, with children giving fragments of information about their experience (de Young, 1986; Hewitt,

1999; Ney, 1995). A significant problem is that if they do tell anyone about their experience it is likely to be their main caregiver, usually their mother, who will be considered biased by the Family Court (Humphreys, 1999; Jenkins, 2003).

The specific behaviour of abused children depends on the developmental stage of the child, their relationship with the alleged perpetrator, the actual abusive experience and, to some extent, their understanding of it (Faller, 1990; Hewitt & Friedrich, 1995; van de Kolk, McFarlane & Weisaeth, 1996). The nature of the child's experience will be influenced by such things as the presence of coercion or force, the frequency, invasiveness and range of sexual activity they were involved in, the level of responsibility they feel and what they have been told about the abuse (Cavanagh Johnston & Friend, 1995). If they act out sexually, then the quality and pattern of their behaviour must be assessed (Cavanagh Johnston & Friend, 1995). In addition, it has been estimated that 21 percent of children who have been sexually victimised are asymptomatic, so may have no behaviours that indicate distress or trauma (Conte & Berliner, 1988). These factors create an environment in which there is a high level of difficulty and consequently great care and consideration is required in approaching such assessments. In addition, the assessor is required to keep an 'open mind' about what the child may have experienced (Faller, 1991; Nurcombe, 1986).

Despite conflict in the literature about the ability of young children to recall events (e.g., Bruck et al., 1995; Ceci & Bruck, 1993), they have been found to have reliable memories in their recall of core events and after about six years are no more suggestible than adults

(Ceci, Leichtman, Putnick & Nightingale, 1995; Goodman & Hegelson, 1985).

Moreover, children who have been sexually abused have been found to be likely to encode the central actions, ‘even if they do not have a great deal of knowledge about sexual behaviour and may not understand what has happened to them’ (Gordon et al., 1995:103).

The type of evidence favoured within the legal process is the evidence that has been recorded as a result of ‘free recall’, that is, when a child makes verbal allegations without prompting. Free recall is considered the most reliable form of evidence in the legal domain (King & Yuille, 1987; Loftus, 1997). In the Ontario Court of Appeal case of R. v. Khan (1986), Justice Robins admitted a then three-and-a-half-year-old child’s spontaneous disclosure of sexual abuse into a court of law, claiming that:

... young children ... are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They ... are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act.

(Cited at p.19 of R. v. Khan, in Ney, 1995:30)

The difficulty with relying on free recall as the preferred form of evidence is that young children will rarely be able to make such verbal pronouncements to people who are considered ‘neutral’. Moreover, young children are best able to access encoded memory by the provision of ‘scaffolding’ questions to orient them to the subject area (Hewitt, 1999). Interviewers are encouraged to allow children, whenever possible, to tell their

story in their own manner, at their own pace and, when leading questions are necessary, in a child-centred approach (Faller, 1990; Hewitt, 1999). The assistance of developmentally appropriate support for children to access memory may however lead to judicial scepticism about the evidence and to a finding of the evidence being ‘contaminated’.

There has been recent international and local interest in developing ways to listen to children and to use what they say to inform decision-making (McIntosh & Long, 2005; Maloney, 2005; Neale & Smart 1998, Smart, 2003). However, Neale and Smart (1998) point to the difficulty in listening to children in a legal context in which there is a presumption that children must have shared residence or frequent contact with both parents. They argue that this difficulty is a result of the construction of children within the law as dependent and needing relationships with their parents. The notion of the ‘right of the child to have contact with their parent’ is the basis of family law legislation, and the converse right of a child to ‘not have contact’ is discouraged. Further, they argue that this construction of what children need, regardless of circumstances, ‘has acquired such potency that it has obliterated other more compelling constructions of their interests’ (Neale & Smart, 1998:13).

The stricture of the legal system and reliance on verbal communication skills ability and the political context through which the legislation is interpreted is the context through which children’s evidence is screened. Children are not developmentally equipped to use free recall to give a cogent narrative or to be able to ascertain that they should find a

protective, neutral adult to confide in. The child's allegations may be discredited even before they are assessed, because the person they have told (often the mother) is construed as having an interest in believing or alleging child sexual abuse has occurred when it has not. This is a result of a lack of congruence between young children's developmental characteristics and the requirements of a legal system designed for adults (Hewitt, 1999; Parkinson, 1998).

4.8.1 Attempts to re-establish credibility and expert status

The skills and methods required to interview children and accurately ascertain their experience has been the subject of extensive interest. This has been part of an effort, predominantly by child protection, social work and psychology professionals, to counter the negative impact the backlash has had on the perception of their professional competence. One area that has been the subject of such endeavour has been on the need to limit 'contamination', when a child's evidence is influenced by the way in which questions are asked or by their beliefs about what they think they should say (Nurcombe, 1986; Robin, 1991; White, Santilli & Quinn, 1988). There are a number of practice strategies suggested in order to manage the effects of the investigator and their own beliefs and views. Ney (1995), for example, cautions assessors to be aware of their own beliefs in an effort to be as neutral as possible. Nurcombe (1986) sets about managing bias by testing a number of hypotheses during the assessment:

The child is truthful, credible, and accurate.

The child is truthful but has misperceived an ambiguous or innocent situation, or has misidentified an alleged perpetrator.

The child does not have the mental capacity because of age or disability to give a reliable account of the alleged event.

The child has been inappropriately influenced by a third party or parties to make a false allegation.

The child is intentionally fabricating an account as an act of anger or revenge or for some type of secondary gain.

(Nurcombe, 1986:97)

As a response to the criticisms raised about investigation errors and the complexity of interviewing children in a legal setting, there have been attempts to develop assessment systems to guide professional assessment and decision-making (e.g., Lamb et al., 1994, 1997; White et al., 1988; Nurcombe, 1986; Ney, 1995; McGraw & Smith, 1992; Hewitt, 1999). These approaches vary widely in how they are constructed. Some are the result of ongoing evaluation and research and focused on the forensic assessment (e.g., Lamb et al., 1994; Lamb et al., 1997), while others are the result of the application of theoretical knowledge in relation to child development and what is considered to be best practice at this time (e.g., Cavanagh Jonhston & Friend, 1995; Hewitt, 1999).

Professionals who focus on the assessment of the child list three main components that should be a part of an investigation: a meticulous investigation and analysis of the data, an application of knowledge about normative sexual development and normal bodily

curiosity; and child development and the development of memory (Hewitt, 1999; Mrazek, 1981; Sgroi, 1982; White et. al., 1988). Current knowledge about children's vulnerability to suggestion has also been recommended (Goodman, 1984; King & Yuille, 1987; Hewitt, 1999). The way in which children are assessed in child sexual abuse allegations is one of the areas that will be examined in this research.

4.8.2 Partial integration

There has been a partial recognition of the presence of violence and abuse in litigating families in family law assessment models. The integration of this material into assessments is however in its infancy and appears to be unevenly implemented (Hart, 2004; Kaspiw; 2005; Kaye et al., 2003). In the family law assessment literature there has also been an increase of interest in the examination of the sceptical premise that pervaded the thinking of many psychiatrists of the 1980s, and the PAS. There are now alternative explanations for children refusing to attend contact or for allegations of child abuse in this literature. Systems theorists have, for example, proposed a more sophisticated assessment schema for children who are resisting contact with the non-residential father (Johnston et al., 2005; Lee & Olesen, 2001). They suggest that in assessing these cases a number of variables may be influential, such as parents having been abused themselves, the quality of the parent-child relationship, the child's characteristics and the child's exposure to domestic violence.

Domestic violence and child abuse are now issues that are being integrated into the family assessment literature (Johnston et al., 2005; Johnston & Roseby, 1997; Lee &

Olesen, 2001). However, critics argue that this literature is limited and in some cases results in a mis-measurement and under-estimation of domestic violence (Bancroft & Silverman, 2002; Dalton, 1999; Jaffe et al., 2003).

While there is research and practice-based material that links the analysis of domestic violence to child protection considerations (Hart, 2004; Johnston et al., 2005; Kaspiew, 2005), there is a paucity of assessment information about the presentation and assessment of child sexual abuse in family law evaluations. Some reference texts, such as the American Psychological Association's *Family Evaluation in Custody Litigation: Reducing Risks of Ethical Infractions and Malpractice* (Benjamin & Gollan, 2003), suggest that in cases where there is an allegation of child abuse the family evaluator should simply include findings from the child protection assessment. This model is similar to the practice guidelines for Family Court evaluators (Family Court, 2004). As a result, the evaluator does not pursue the assessment of the abuse allegations. This practice can be problematic, because many cases in the Family Court are not investigated prior to the Court assessment. Brown et al. (1998) found that 70 percent had not been previously investigated by State child protection departments before the families were involved in family law litigation. Hume (1996) had similar findings: 34 percent of her sample (Family Court cases containing a child sexual abuse allegation), had not been investigated. Moreover, the guidelines for the preparation of Family Reports in the Family Court (2004b) refer to the indicators of child sexual abuse and to the need for assessing these cases thoroughly, although specifying that the role of the reporter is not defined as an investigative one. These guidelines do not address the situation of

allegations that have not been investigated by the child protection system. This suggests that there will be subject children in Family Court trials about whom allegations or suspicions of abuse have not been investigated.

4.8.3 Acknowledging and managing the value-laden nature of assessments

Assessment practices, like the law itself, are the product of social and historical processes that lead to a particular construction of meaning (Humphreys, 1999; Smart, 2003). The social nature of research and the development of theories and assessment constructs reflect particular social realities and knowledge, and in doing so place in doubt the possibility that bias can ever be eliminated. In short, while improvements in assessment methods may make an assessment more credible in court, true neutrality is never possible in the collection and evaluation of evidence (Brooks & Milchman, 1991). It can therefore be argued that the assessor and their personal world view, the socio/political context and the workplace ethos may all be influential in the interpretation of assessment data, and in this case, whether child sexual abuse has taken place in the context of family law litigation. Once one accepts this premise, the central issue is redirected from attempting to design neutral assessment tools to identifying which world view is being promoted by the assessor or the theorist's position and taking account of it.

The focus on ensuring that assessments and investigation of allegations involving children comply with legal standards creates a danger that the voice of the child may be filtered out. The test of such assessment methods may be the ability of these methods to

capture the child's voice, identify the interests of children and to project these successfully into judicial decision-making (Maloney, 2005; Smart et al., 2001).

4.9 Conclusions

Second-wave feminism created the conditions under which child sexual abuse, including abuses by father-perpetrators, was named as an important social problem (Herman, 1992). However, the clarity of that moment was quickly obscured by a resurgence of the dominant belief that child sexual abuse allegations were likely to be false (Cossins, 1999). The backlash was aimed not so much at the children who made these allegations but at the advocates who spoke on their behalf, reported their disclosures or collected their stories in investigations and interviews (Cossins, 1999). These advocates were often the mothers or child protection, counselling and other professionals involved in responding to child victims.

The scepticism about these allegations has proved to be both pervasive and resilient (Neustein & Goetting, 1999; Scott, McCarthy, Gilmore, 1981). The presence of incest creates grave problems that are not easily resolved if the child is to be assured of safety and the relationship with the father is to continue. The theories and proposals provided by the psychiatric community have offered a way out of this conundrum by directing a critical focus onto the mother. Emphasis is placed on her weaknesses and on hypotheses as to why she might be creating a false allegation.

Thus, the particular expression of the backlash in family law has its foundations in the pathology (real or imagined) of the alleging mother, a superficial assessment of the alleged abuser (if any), and only a peripheral focus on the child. This sits comfortably with a family law culture that is infused with the ethos that the ‘best interests of the child’ is synonymous with equal contact with both parents (Smart, 2003), and where ‘protectiveness [on the part of the alleging mother] is construed as paranoia, and reporting abuse is treated as vindictiveness’ (Humphreys, 1999:39). Incest allegations in the Family Court, despite the statistical risk present for girls after separation (Russell, 1983; Wilson, 2001), are interpreted as an attack on the parental rights of the alleged perpetrator to have a relationship with his children and as a threat to the idealised post-divorce family. The family law backlash has flourished in a cultural and political context in which the dominant ethos has seen the father reinstated as central to the post-separation family.

This literature review has raised important questions about the processes involved in the response of the Family Court to allegations of child sexual abuse. Chapter Two explored the changes in the core work of the Court that now includes child abuse allegations. This raises the question of how competently the Court deals with these cases given that it was not established to hear them. Chapter Two also examined the Court’s inconsistent responses to allegations of domestic violence, and the lack of integration of the knowledge about the effects of domestic violence on children into the decision-making culture of the Court (Kaye et al., 2003; Kaspiew, 2005). This raises the question of

whether the harm caused by child sexual abuse and incest is also an area that has not been consistently integrated into the Court's assessment processes and decision-making.

Chapter Three examined the enduring sceptical paradigm in relation to child sexual abuse and incest allegations in family law disputes. This position includes a minimisation of the harm of incest and removes the responsibility from the offender and redirects it onto the mother and child. The implications of this may be that these dynamics and concepts are influential in family law assessments and decisions. The chapter also noted that there have been voices of dissent throughout history that have challenged scepticism about child sexual abuse allegations. It may be that there is evidence of such dissent in Family Court assessments and decisions.

Chapter Four has focused on the family law backlash, and the development of a psychiatric assessment model that is biased towards negative findings in relation to child sexual abuse. The chapter has also examined the criticisms made of professional groups such as child protection officers and advocates for children. It has explored the conflict between professional groups in relation to findings of child sexual abuse. This raises the question of how judges respond when confronted with conflict between professionals in relation to assessments of child sexual abuse. How are conflicts such as these resolved, and, is one paradigm favoured over another? In addition, those who made allegations of child sexual abuse or who have advocated for child victims have come under strenuous attack as part of the backlash (Humphreys, 1999). This research will explore whether this is a dynamic in family law cases.

Lastly, children are the subject of family law decision-making and of a vast array of child protection and child development assessment schedules have been developed. Children have been blamed for making false allegations of incest in the literature and for being responsible for incest (Salter, 1988). This raises the issue of whether recent child abuse assessment approaches have been incorporated into the assessment of allegations in contested Family Court matters.

CHAPTER 5

METHODOLOGY

5.1 Introduction

This chapter locates the research within a radical feminist theoretical structure and justifies the methodological approach adopted to explore the research questions. The aim of the research and the research questions are identified. It is argued that qualitative analysis of documentary evidence, namely the 21 Family Court judgments, is the most appropriate source of information in order to explore the research questions. The steps undertaken to choose a relevant sample of judgments and the process of analysing the data is described. This section also includes a discussion of the ethical considerations and the limitations of the research. Information about the judgements that are included in the research is provided, including demographic information about the cases, information about the parents, children, and other involved family members, judges and professionals. The chapter concludes with a profile of the cases used in the research.

5.2 Aim and research questions

The overall aim of the research is to explore the processes which inform judicial decision-making in cases which involve allegations of child sexual abuse, paying particular attention to how the ‘best interests of the child’ is interpreted by the judges. The issues raised in the literature review in Chapters Two to Four concern the impact of beliefs about child sexual abuse in both professional assessments and judicial findings in

these matters. This research explores the ways in which these issues are played out and their possible influence on processes of decision-making in the Family Court where there are contested allegations of child sexual abuse.

Based on the literature review the key question that this research attempts to answer is:

'How are child sexual abuse allegations dealt with in the Family Court?' In order to explore this question the following sub-questions are posed:

1. How do judges make decisions when there are disputes in expert evidence?
2. What concepts and frameworks are relied on in the professional assessment of parents, children and allegations of child sexual abuse?
3. How does the legal process respond to those who allege child sexual abuse?
4. How is evidence relating to children treated in the Family Court decision-making?

5.3 The theoretical orientation of the research

While there are many differing positions within feminism (Dominelli, 2002; West, 1999), this research is situated within the radical feminist tradition in which patriarchy is seen as the central system of social organisation based on unequal gendered power relationships:

Patriarchy refers to a view of the right to power dominance by men over women at every level of society from government to the family. It is integrally woven into the structures of modern Western societies (and most others as well) and all its institutions.

(Waldegrave, 2003: 34)

Early radical feminists understood the family as being ‘patriarchy’s chief institution’, and the family structure as providing ‘effective control and conformity where political and other authorities are insufficient’ (Bird, 2002:1). Indeed, the common law doctrine of unity pertaining to marriage that: ‘in the law husband and wife are one person, and the husband is that person’ (Halcombe, cited in Graycar and Morgan, 1992:114) reflects a social structure in which control and power were prescribed as being vested in the role of the husband/father:

Traditionally, patriarchy granted the father nearly total ownership over wives and children, including the powers of physical abuse and often even those of murder and sale. Classically, as head of the family the father is both begetter and owner in a system in which kinship is property.

(Millet, 1970:33)

The oppression of women under patriarchy is understood as being promulgated within the privacy of the home and (Ward, 1984) and through public institutions such as the law.

This research explores the ways in which the law responds to allegations of sexual abuse of children within the family.

Radical feminism conceptualises individual acts of oppression and violence or the threat of violence within families as part of a broader continuum of patriarchal control (Millet; 1970; Kelly, 1988). These methods of control include systemic and structural violence against women (Kelly, 1988; Thorpe & Irwin, 1996). Within the family the impact of the oppression of women extends to the children and especially daughters, resulting in the

widespread abuse of women and daughters in the form of incest (Ward, 1984). Kelly sums this up with the equation: 'Cumulative power (for fathers) and powerlessness (for daughters) are as evident in the structure of the family as in the complex structuring of social relations' (Kelly, 1987:22). Thus, the family is a microcosm of the wider society and as such is 'protected by the ideology of privacy, and with a historical tradition of male ownership of women and children, is a domain in which men can exploit their greater power, with the greatest power differential existing between the adult male and his daughter' (Laing, 1996:26).

The nuclear family form, where two biological parents live with their children, has been increasingly challenged since the liberalisation of divorce laws in the 1970s and the rise in rates of divorce and separation (Smart, 2000b). The 'doctrine of unity', or the 'marriage regime', was an expression of male sovereignty over the family, in which the roles of father/mother were breadwinner/child bearer and carer, and the father was the legal guardian of his wife and children. Changes to this structure have been seen as resulting in a loss of male supremacy, or rights (Smart, 2003:23). For example, Smart contends that the 'marriage regime' of the late nineteenth century had enabled a 'consolidation of power in the private sphere' that remains part of a cultural expectation. The Father's movement that has arisen in the UK since the 1980s, and other similar groups in Western democracies can be seen as a reaction against these changes and 'because of a perceived loss of men's power in the private sphere/family' (Smart, 2003:23).

The threat to the father-headed nuclear family that is brought by the high rates of divorce provides the context for the second threat to this family form: exposure of the secret of father-child incest - largely through the actions of second wave feminists - naming it as criminal behaviour and as a gross abrogation of the responsibilities of parenting.

Together, the coincidence of these two elements can be seen as being a serious threat to the patriarchal family form. However, despite this double blow, the father-headed patriarchal family has proved to be remarkably resilient and has now adapted to the threat posed by high rates of separation and divorce. The emergent new ideal family form post separation centralises the significance of biological relationships and is promulgated in family law (Perlesz, 2004). This ideal claims superiority over a mother-headed/single parent family and diminishes the role of the social or psychological father. Thus, when parents separate, the reification of the 'eternal biological family' (Sevenhuijsen, 1986a:336) represents the responses by father's groups and forces of patriarchy in clawing back influence and control over the family (Hirst, 2005, Ruddock, 2005a). This is a return to a privileging of male ownership of children by the biological father-the 'legal fortification of fatherhood, as an institution which guarantees men rights based on their biological capacity to inseminate women, regardless of their social ties between them' (Sevenhuijsen, 1986a:336).

Feminism encouraged women to speak out about their experiences of private oppression, such as domestic violence and child abuse, as part of a strategy in breaking the secrecy that surrounds such abuse and to force social and political change (Herman, 1981; Kelly, 1988; Laing, 1996; Waldby, 1985; Ward, 1984). This research furthers this feminist

project of challenging the private – public divide. Its subject is how allegations of child sexual abuse within the family are dealt with in the post separation family. This research is particularly concerned with exploring the responses to women and children who make such proclamations in the arena of family law.

5.4 The orientation of the research and the research approach

The orientation of this research project is qualitative, chosen because of the exploratory nature of the research which focuses on understanding the processes involved in judicial decision-making in the Family Court where there are contested allegations of child sexual assault. A strength of qualitative research is the capacity to investigate processes, meanings and understanding in the world of lived experience, individual belief, action and culture (Ritchie & Lewis, 2003; D’Cruz & Jones, 2004). This research reflects a constructivist approach (Crotty, 1998) as it is interested in the processes that result in the social construction of meaning, which is important in this study. This is evidenced by the fact that the researcher is interested in the processes of judicial decision-making, in particular how the judges view the key players, namely the expert witnesses, the mothers, the fathers, the grandmothers and the children when child sexual abuse allegations are brought to the Family Court.

A major source by which these processes can be examined are the judgments, the official documents of the Family Court judges’ deliberations. This documentary evidence captures the every day practices of the Family Court, including assessors who rely on

theoretical constructs and value positions to assess children and families. They incorporate the assessment findings arrived at by child protection and other professionals and the multiplicity of beliefs held about mothers and children who alleged sexual abuse, how these beliefs are applied in Family Court cases and melded with those of the judiciary who hear these cases. In addition, the judgments and expert evidence are understood as the product of a particular context that includes historical forces, social and political processes. Thus, this research positions the judgments as products of historical and social processes (such as the construction of gender and familial violence), and interactions (May, 1997).

For these reasons judgments have been chosen as the source of data in this research because they are the official record of the trial. In the legal world the written word is relied on as the primary means of recording argument, and findings. In addition, the judicial reasoning is also provided in the majority of judgments thus providing insight into the comparative evaluation of conflicting expert evidence and a record of the evidence that has been given weight in the judicial reasoning. The judicial findings in relation to the child sexual abuse allegations and the contact and residence arrangements lay the foundation for future relationships between the child and their parents. These documents are therefore of key significance and importance, as they capture the way in which the allegation is dealt with and include implications for the child's future. As official records of the trial, the judgments are the authoritative record of the judge's activities and, as such, may be used in any appeal process.

As official documents about each case, the judgments are written for a particular purpose and audience, which provides a high degree of assurance as completed documents that contain an accurate depiction of the judge's view of what event have occurred, what factors are significant in the matter and the final outcome. While the cases that are the subject of each judgment may have a life beyond the judgment, through appeals or subsequent trials, they are a complete document at that particular time. The audience for which the judgments are written include the litigating parents or grandparents who are the parties in each matter, the solicitors who drive the litigation and the High Court, if the matter goes to appeal.

Such a comprehensive picture of the day-to-day practices in the Family Court would not be captured using interviews, focus groups or observation as these data sources could only contribute an understanding to part of the decision-making process from the perspective of the different stakeholders such as judges, professionals, parents and children. Hence the rationale for choosing documentary evidence as the source of data for examining the research questions. In addition, a qualitative orientation in this research using documentary evidence, allows for the interrogation of the judgments, without suffering the effects of demand characteristics and other interview effects that are problems in interview-based data collection (Gomm, 2004). The problems that arise with interviewing participants; such as experimenter effects, observer expectancy effects and participants altering their answers to fit the context in which they are being questioned are also avoided. The qualitative orientation is also suitable because it locates the data

within a social and political context and family law is a product of social legal and political processes.

5.5 The sample selection and the data collection

The judgments were drawn from the Family Court of Australia's electronic database that contained all judgments submitted by Family Court judges. This included unpublished judgments not available in the public domain.

A non-probability, purposive sample of 21 judgments was selected from the data base from between 1996 to 2001. The judgments varied in length and ranged from between 2,500 words, to 51,000 words. There were only two judgments that were less than 5, 500 words and the remaining 19 judgments ranged from between 12,000 and 51,000 words. This totalled half a million words and approximately 1,000 pages of judgments scripts.

The judgments contained varying amounts of detail, some allowing a reconstruction of the trial in the mind's eye, describing such details as the reactions of witnesses cross-examined and toilet breaks being requested by the parents under cross examination.

Others were skeletal and less descriptive or detailed. The roles of the legal counsel and the child's representative were not defined for the reader. The researcher relied on her own knowledge of the court process and roles played by various personnel to understand and interpret the narrative where this was not illuminated (Denzin & Lincon, 2003).

The judgments were selected if they contained discussion about allegations of child sexual abuse or sexual behaviour by a parent towards a child. A second selection criterion was added to this after a pilot coding of 24 judgments. In order to increase the concentration of relevant discussion about the assessment of child sexual abuse allegations, an additional criterion was included that judgments had to contain disagreement between at least two professionals about the allegations. This sampling ensured that cases used were ‘information rich’ (Patton, 1990:169) in relation to the discussion about assessments, and decision-making about child sexual abuse allegations. Judgments in the initial group of 24 that did not include this criterion were discarded.

The criteria developed for the sample were as follows:

- The search facility in the data base must identify ‘child sexual abuse’ or ‘child sexual assault’ at least on ten occasions
- The date of the judgments must be between June 1996 (post introduction of the Reform Act), and 2001
- At least two professional witnesses must be in disagreement about some aspect of the child sexual abuse allegation or associated risks to the child.

The criterion of ten references to the key search phrases ‘child sexual assault’ or ‘child sexual abuse’ was applied to all judgments on the Family Court data base. The remaining criteria were applied upon reading the judgments by the researcher. There were attempts

made to ensure that there was a selection of cases from across the period of eligibility and from a cross section of judges. This ensured that any issues that were specific to particular periods of time or judicial personnel did not dominate the findings.

The sample selection was completed when searches of the coded data revealed a pattern of a heavy clustering of coding in particular categories. These searches indicated that there was adequate repetition of the themes and uses of concepts for fruitful analysis.

Judgments that were not included in the sample that contained child sexual abuse allegations were those that had only one expert, or where the experts did not disagree, where there was no expert report, or if they were interim hearings or where the date of the judgment was not recorded.

A survey of the number of references to 'child sexual abuse' or 'child sexual assault' during the years 1992 through to 2000, was undertaken to establish the number of judgments in which there was a concentration of material about child sexual abuse allegations. The records for 2001 were incomplete at the time of downloading the judgments. The number of judgments fitting this criterion rose from six in 1992, in a trend that steadily increased over the following seven years to peak at 63 in 1999. The number of cases declined in 2000 to 57. Of these, one judgement was selected from the year 1995, two from 1996, five from 1997, four from 1998, 1999 and 2000, and one from the year 2001. This totalled 21 judgments.

Total number of judgments conforming to the first selection criteria of ten hits for the key words, and those selected as conforming to criteria of ‘disagreement between experts’.

Year of judgment	Number of judgments with ten references to child sexual assault/abuse*	Number of judgments with disagreement between experts
1992	6	Not in sample
1993	14	Not in sample
1994	14	Not in sample
1995	21	1
1996	39	2
1997	52	5
1998	50	4
1999	63	4
2000	57	4
2001	7 (year not complete)	1
Total	323	21

**The total number of judgments. If the same application was entered twice, because of an interim hearing and final hearing both were counted separately.*

5.6 Ethical considerations

Permission to undertake this research was granted by the University of Sydney Human Ethics Committee in February 1998 and from the Family Court Research Committee in 1998. This approval was conditional on appropriate measures being put in place to ensure the confidentiality of all the parties who were noted within the judgments. In accordance with this all identifying information about individuals has been changed, including their names, places of origin, place names and unusual characteristics of a case that may have made it identifiable. The researcher also changed the names of each of the cases (see 'The cases' 5.9) while the analysis was being completed, in order to eliminate the possibility of accidental disclosure of personal or identifying information. The names of professionals involved in the cases were also removed and replaced with a generic, descriptive title, such as; 'psychiatric court-ordered assessor', 'court counsellor', 'treating psychiatrist' or 'counselling social worker', in order to disguise the identity of the professional but to retain the meaning of the text. In addition, State government officers employed in statutory child protection investigative roles, such as 'district officers' in NSW, were given the generic title of 'child protection officer', in order to disguise the State in which they were operating.

The research data was stored in a secured filing cabinet and floppy discs of the original judgments destroyed. The family names in each case were replaced by names randomly chosen from an art history text and each case was also given a number. The key to this code has been kept separately to the research material, in a locked filing cabinet at the

researcher's work place. The researcher also agreed to destroy all copies of the judgments at the completion of the research.

5.7 Analysis of the data

Thematic analysis was used as the method of data analysis (Richie & Lewis, 2003). This allowed for a detailed examination of the judgments; the concepts that were applied to the actors in the judgments and to their actions, and the evaluative comparisons of the evidence. This detail allowed for the identification of themes, and for a comparative analysis of how these themes are treated within the judgments.

The coding of each concept was defined (see Appendix I) and reviewed half way through the coding process. Some categories were regrouped and others refined in response to this review process (Charmaz, 2003). Thus reflexivity, ensured that the design was robust, and provided assurances that the methods used, such as the selection of a purposive sample and progressive focusing of the coded material, focused on the assessment material about those who were involved in the child sexual abuse allegations.

The identification of categories in the judgments was begun by reading the sample of 21 judgments with the researcher taking note of the issues that were being raised. The qualitative software program, 'NUD*IST Vivo ', was used to code the concepts identified in each text, whilst using summary statistics for comparisons.

Some concepts were collected in free codes, that were interesting, but where it was unclear how these categories might relate to the research question.

The use of thematic categories of assessment concepts, opinions and findings enabled a comparison between the different professionals and family members. Thus, it was possible to compare the findings by judges about the different professional groups and the assessment ideas used about the different family members. The absence of particular material was treated as evidence of a lack of consideration about that subject in the judgment. The lack of material about issues such as perpetrator characteristics or of the allegations, for example, was evidence in itself of a particular way of approaching the issue and the value placed on it.

In the preliminary analysis of the data in the first ten judgments a number of themes emerged where there was a significant amount of description given to these issues in the judgments that were relevant to how the allegations of child sexual abuse allegations were considered. These areas were; family characteristics, characteristics of children and parents (see Appendix II, Table 1) and explanations for the allegations (see Appendix II, Table 2). These themes were further refined and others identified; the judge's processes and their assessment of the oral evidence, expert witnesses and their views about child sexual abuse, positive and negative attributes about parents (see Appendix II, Table 3 and

4), grandparents and children and the evaluation of the allegations including its veracity, explanations provided for it and the assessment of risk (see Appendix II, Table 5).

5.7.1 The categories, themes and coding

Categories were developed in this research when there was a repeating subject, discourse, or point of view, being flagged by the use of key words or the descriptions of a concept. The definitions of each category used key words and concepts and these guided the coding. The coding of the judgments was based on an allocation according to three major categories. Firstly, *who* made the statement or proposed the idea that was being coded. Secondly, *what* the subject was that was being discussed and thirdly, any *characteristic* attributed to a family member or professional. The judges and the experts made comments, while the experts and the family members were most often the people to whom characteristics were attributed. Using the NUD*IST Vivo software, reports were then run on characteristics attributed to family members by professionals and judges: the frequency of coding in the categories revealed patterns of clustering that enabled the researcher to identify the commonly used concepts, who used them and about whom. After an analysis of this data, the researcher was able to draw out broader themes from across the clusters in the categories. In addition, in order to ensure that the data was not taken out of context and that the meaning and use of the concepts was understood, judgments that were examples of particular uses of a concept, for example, vindictive mothers, or abusive fathers, were re read and analysed in their entirety to validate the analysis. It was this method that formed the basis of the thematic text analysis.

The process of ‘progressing focusing’ a method used in grounded research (Gomm, 2004: 235), allowed the researcher to narrow the focus of the coding to ensure that particular issues involved in the assessment of child sexual abuse allegations were collected. This resulted in some categories being discarded and others being refined in order to focus more closely on the themes that were being generated.

The researcher used this process to develop theories as the data threw up themes. Memo writing to develop theories from the data (that is the practice of jotting down ideas about the judgments) was used during the coding in order to generate and record ideas and themes that developed during the coding.

Patterns that emerged from the categories were used to generate the over-arching themes in the research. This responsiveness to the material being thrown up from the judgments resulted in a focus on the interaction between judicial decision-making, expert witness testimony and evidence.

5.8 Limitation of the methodology and research findings

This project is based on an in depth thematic analysis of 21 judgments and the processes that are influential in clinical assessment and judicial decision-making. As the data is drawn from a purposive sample there are no claims made that the findings are representative of all child sexual abuse cases in the Family Court of Australia.

One of the limits of the methodology used in this research is that of thematic analysis, unlike interview methodology, this has no capacity for the researcher to clarify incomplete information with the author of the document: The documents are a finite source of information (Gomm, 2004). In one judgment this limitation was apparent as there were no reasons given for the judicial decision. However, the analysis was based on patterns emerging from the categories and so the lack of detail in this one case, did not influence the identification of themes.

The strength of the research is that there has been an in-depth analysis of the judgments that has captured the richness of the data and the complexity of the interdependent issues in judicial decision-making in these cases.

5.9 Conclusion

This chapter has outlined the way in which the research was undertaken: the aims, methods, theoretical orientation of the research and orientation of the research and the method of analysis used in these cases. The following chapter provides information about the judgements and summarises the findings and the dominant themes found in them.

CHAPTER SIX

THE JUDGMENTS

6.1 Introduction

This chapter provides details about each judgement and a demographic profile of the families and professionals involved in the judgements. This is followed by a summary of the dominant themes identified in the judgments.

6.2 The cases

6.2.1. van Gough

The father, 36 years, and mother, 39 years old, had previously reached an agreement that the father have alternate weekend contact. The father's application was that he have overnight contact; the mother's response was that he should have three hours supervised contact per week. The mother alleged that father had fondled their four-and-a-half-year old daughter, Lizzie. She also alleged that the father's brother had sexually abused Lizzie.

Professionals involved in the case:

- Court-ordered assessor (psychiatrist)
- Court-ordered court counsellor
- Relationship counsellor
- Mother's counselling psychologist

- Mother's treating psychiatrist
- Statutory child protection officer.

Key issues in the trial: Both parents' mental health status and the question of either the contamination or creation of evidence. The mother's treating psychiatrist and the child protection officers believed the alleged abuse had occurred. The child protection officers believed that the risk of harm that was 'likely and significant'. The court-ordered psychiatrist and court counsellor provided alternative explanations for the allegation.

Findings: The judge found that the mother suffered from an anxiety/adjustment disorder and that there had been contamination of the child's allegation during the investigation by the child protection officers. The mother was found to have misunderstood Lizzie's statements because of her disorder resulting in her immediately assuming abuse had occurred after Lizzie had made an 'innocent' statement.

Outcome: The hearing lasted seven days, and each party was legally represented.

Lizzie was to continue residing with her mother and have regular contact with her father.

6.2.2. Kandinski

The father, 38 years, applied for contact and represented himself in court, through an interpreter. He sought to have overnight weekend contact with the only child of the marriage, a boy, Alexi, who was five-and-a-half years old. An investigation by the welfare authorities had confirmed sexual abuse by the father. A referral was made to the police but no charges were laid. The mother, 45 years, alleged that the father had fondled and anally raped Alexi. Her response was that contact with the father cease.

Professionals involved:

- Mother's treating psychiatrist
- Child Protection Department
- Child sexual abuse counsellor (a social worker employed by the Department of Health)
- Court-ordered assessor (psychiatrist)
- The Education Department
- General medical practitioner.

Key issues in the judgment: The mother's motives for making this allegation; her mental and emotional state that may have influenced her allegations. The child's characteristics that impacted the investigation: his limited acquisition of English and a development delay. The suitability of the methods used in the investigation.

Disagreement: The General Practitioner had identified that Alexi had an inflamed penis and he had notified the child protection Department. This action and the following investigation and its outcomes led the mother to believe that Alexi had been sexually abused. The child protection Department, the treating psychiatrist and the child sexual abuse counsellor took the position that the child had been sexually abused. In contrast the psychiatrist undertaking the court-ordered assessment believed that the child had not been abused. The court counsellor took a more neutral position in regard to the allegations. The Education Department and the psychiatrist (who undertook the court-ordered assessment), assessed Alexi as being developmentally delayed. The child protection officer's assessment was that the child had no developmental problems.

Findings: The judge found that there had been contamination of evidence as a result of the child protection intervention. The mother was found to have an anxiety and adjustment disorder that was exacerbated by the effects of the child sexual assault counsellor's intervention. This professional was criticised for accepting the child protection positive finding and not undertaking her own assessment of Alexi and his allegations.

Outcome: The hearing lasted four days. Alexi was to have contact with the father; his mother was to continue psychiatric treatment.

6.2.3. De Maria

The mother, 40 years, alleged that the father, 37 years, vaginally and anally penetrated their daughter Mary, who was five-and-a-half years old. The mother applied for residence and for there to be no contact with the father. The father responded with an application for residence and failing that, for regular overnight contact.

Professionals involved:

- Child protection officer
- Child protection unit social worker
- Court-ordered assessor (psychiatrist)
- Child's legal representative.

Key issues: The possible contamination of the child's evidence and the dependent relationship the mother had with Mary and associated risks of this. In addition, the inability of either parent to focus on Mary's needs was considered.

Disagreement: The child protection unit social worker assessed Mary as probably being sexually abused (the child had made repeated verbal allegations to her). The court-ordered psychiatrist believed abuse was unlikely because of the details of the description of abuse given by the child and the presentation of the mother. The child protection officer and child protection unit social worker validated the allegation. The assessing psychiatrist thought the referral to the social worker confirmed/created a belief in the child that abuse had occurred when it had not.

Findings: The mother's anxiety and chaos produced the allegation. There was a finding that there had been no systematic coaching by the mother of Mary to make the allegation. There was a finding of an unacceptable risk of sexual abuse if Mary was in the unsupervised care of the father. The capability of each parent was questioned by the judge. English was a second language for both parents which added to the likelihood of misinterpretation.

Outcome: The hearing lasted for 11 days. The father's application for residence was denied and future contact was to be supervised. Ongoing counselling was ordered by the judge after the trial. The child was to live with the mother but the child's representative was to stay involved and bring the matter back to court for review in six to nine months time.

6.2.4. Roberts

The mother, 32 years, alleged that the father, 35 years, had sexually abused two of the eldest boys by exposure to pornography. She also alleged that he had fondled Ross's genitals and committed sodomy on him. There were four children in the family who were

all the subject of the Court application (Ross eight years, Harry seven years, Jack four-and-a-half years and Sam ten months). Police laid charges in relation to the alleged abuse of Ross; the matter went to committal hearing and it was found there was a case to answer. However, the Crown withdrew before the criminal hearing.

Professionals involved:

- Court-ordered assessor (psychiatrist)
- Court-ordered clinical psychologist checked if child could give evidence.
- Court-ordered assessor (court counsellor)
- Child protection officer
- Validating psychologist
- Detective.

Key issues: Coaching of the children, the creation and veracity of the allegations.

Disagreement: The assessing psychiatrist and court-appointed clinical psychologist found that the children had been put under pressure to repeat stories and lie about abuse that had not occurred. This contrasted with the counselling psychologist who believed that the abuse had occurred.

Findings: The mother was found to have been either complicit or reckless in the development and/or maintenance of allegations. After this finding was made a change of residence was considered, but as the children had been in their mother's primary care it was considered that this would cause unacceptable trauma to them. Instead, the possibility of a change of residence was left open in the event that the mother did not cooperate with contact to the father.

Outcome: The hearing lasted 12 days. Overnight unsupervised contact was to be reintroduced. The boys were left in the mother's care, with a phased-in reintroduction of contact to their father, with the possibility of a change in residence in favour of the father being left open.

6.2.5. Pollock

In this case the father, 41 years, made an application for a contravention order after the mother refused the father's contact with the two children, Sara, seven years, and a boy of five years. The mother, 36 years, alleged that the father had digitally penetrated Sara's vagina and had her wash his genitals. This was notified to the child protection Department and after investigation, it was referred to the police.

Professionals involved:

- Counsellor from non-government organisation
- Senior child protection officer
- Child protection psychologist
- Validating psychologist
- Detective
- Court-ordered assessor (psychiatrist)
- Court-ordered clinical psychologist.

Key issues: The level of risk to the children and whether the mother had a reasonable cause to contravene the existing orders. The methods used by the counsellor in taking the child's disclosures and whether there had been contamination of the evidence from the children through counselling.

Disagreement: There are a number of disagreements between experts. There was internal disagreement in the child protection department: the investigating child protection officer consulted a child protection psychologist who assessed that there was no basis upon which to confirm the allegation. However, a senior child protection officer did confirm the allegation. In addition the counsellor, (who was from a non-government organisation and who took the disclosures), believed that child sexual abuse had occurred.

Findings: The child's allegation was thought to be contaminated through the counselling process. The wife did not establish that she had a reasonable excuse to deny contact.

Outcome: The duration of the hearing was three days. Contact was to resume immediately.

6.2.6. Martens

The father, 45 years, applied for joint residence of the only child of the marriage, Skye, five. The mother, 44 years, alleged that Skye had reported that her father had put his fingers inside her vagina. Skye's behaviour was reported to have recently included increased masturbation. The child protection officers were involved in investigating the allegations. The mother was ambivalent about believing the child, domestic violence (financial and psychological violence) was also raised in the trial.

Professionals involved:

- Child protection officer
- Court-ordered assessor (court counsellor)
- Court-ordered assessor (psychiatrist).

Key issues: The main issues were whether the sexual abuse could have taken place or not, and the mother's belief about whether abuse had occurred. There was also a focus on what the child had alleged to the mother. By the time of the last report the differences between the experts' opinion about the likely occurrence of the sexual abuse was minimal.

Disagreement: There were three reports written by both the assessing psychiatrist, and the court counsellor over a three-year period. The psychiatrist felt on a 'hunch' that the alleged child sexual abuse had not taken place and that the child would not be at risk while the matter was being investigated. The court counsellor recommended that the child continue supervised contact with her father and reside with mother.

Findings: The father admitted to allowing Skye to hold his penis while in the spa bath; he was found to have enjoyed this and to have not have deterred her from doing this. The judge said that they could not make a finding of sexual abuse, but did not find that the mother had deliberately made the allegation up. The father was found to have had 'inappropriate in boundaries' with his daughter when he had bathed with her.

Outcome: The hearing went for three days. There was to be day-time only contact to father for the next two years.

6.2.7. Johns

The mother, 36, travelled to Australia from Europe to apply for residence of her two children, a girl, 11 years and a boy, nine years, who have been living with their maternal grandmother for a year after their mother's divorce in Europe. The maternal grandmother

responded with a cross application for residence. Interpreters were used for both mother and maternal grandmother.

Professionals involved:

- Court-ordered assessor (psychiatrist)
- Court-ordered assessor (court counsellor)
- Psychologist (in Europe).

Key issues: The wishes of the children, (which were to live with their grandmother), the children's fears and beliefs, the mother's inability to protect the children, and veracity of the allegations of child sexual abuse by the mother's ex husband.

Disagreement: The court-ordered assessing psychiatrist believed that the assessment of child sexual abuse (made in Europe), were not based on a professional method or conclusive evidence. The psychologist's findings are a positive finding of child sexual abuse. The father was convicted in Europe and he was serving a sentence. The children were also sexually assaulted in Australia by their grandmother's partner; there was an apprehended Violence Order taken out against him.

Findings: The children's allegations of child sexual abuse were given weight and their wishes concerning who they wanted to live with guided the judicial decision. However, the grandmother was thought to be hyper vigilant and creating fear in the children about returning to Europe with their mother. Her influence on the children was seen as resulting in parental alienation from the mother.

Outcome: The hearing that lasted five days. The children were to reside with their grandmother.

6.2.8. Clark

The father, 35 years, applied for overnight contact with his two children, a girl of five-and-a-half years and a boy of three years. The mother, 28 years, alleged that her son had said that his father had rubbed faeces in his and his sister's hair and that his father had put his finger up his (the boy's) bottom.

Professionals involved:

- Court-ordered assessor (psychiatrist)
- Court-ordered assessor (court counsellor).

Key issues: The positive assessment of the father in the witness box and whether he should have overnight access and if so, when it should commence.

Disagreement: The court counsellor believed the allegations could be true, however, the psychiatrist was emphatic they were not and in the light of such 'false allegations' recommended the removal of the children from the mother. Despite the application by the father only being for overnight access with the children, the psychiatrist recommended that the children be removed from the mother and placed with the father because she had made an allegation of sexual abuse.

Findings: The child sexual abuse allegations were not seen as presenting a risk to the children. No reasons given for this finding apart from the allegations being 'bizarre' and the judicial assessment of the parents: the father was thought to present as being more plausible than the mother.

Outcome: This hearing was of five days duration. Residence was to stay with the mother and overnight access was to commence with the father.

6.2.9. Hobbs

There were four children in the family and all were subject of the application. At the time of the application, Jason, aged 11 years, and Peter, aged 13 years, were living with the father and Jennie, aged seven years, and Alison, aged 15 years, were living with the mother. The mother, 34 years, had applied for residence of Jennie and for there to be no contact to the father. The father, 44 years, applied for residence of the two boys and for contact with Jennie and Alison.

Jennie alleged that her father had sexually abused her by fondling her genitals. She had given a police statement to this effect and as a result her father was charged. Criminal action proceeded to a committal hearing. The mother relocated to another area with the three youngest children, without informing the father or arranging contact with the father or between the children.

Professionals involved:

- Child protection psychologist
- Child protection officer
- Department of Public Prosecutions
- Court-ordered assessor (clinical psychologist).

Key issues: The main issue was that of contamination and whether or not the mother and the eldest daughter had coached Jennie to make an allegation of fondling by her father.

The creation of evidence and the testing of the youngest child's evidence were considered in the hearing. Parental alienation syndrome was raised.

Disagreement: The child protection officer and Police confirmed the allegations however the clinical psychologist, who undertook the court-ordered assessment, believed that abuse had not occurred.

Findings: The mother and Alison were found to have coached Jennie. No risk of child sexual abuse was thought to be present.

Outcome: The hearing took three days. The mother's application was refused and orders were made that the three youngest children were to reside with the father. The eldest daughter, who was thought to be alienated from the father, and expressed a strong wish not to live with him, was to remain with the mother and to attend therapy. The child protection psychologist who took the initial disclosure of child sexual abuse, and later provided counselling, was forbidden from seeing Jennie again due to her involvement in supporting the allegation.

6.2.10. McCubbin

The father applied to have contact with his three boys (five years, seven years and nine years) and for the boys to continue to live with their mother. The mother opposed contact and submitted that the children would be at risk of sexual abuse if contact occurred. The maternal grandmother allegedly witnessed the father asking the middle boy, David, to masturbate him. In addition, the father was alleged to have emotionally abused the children. There were also allegations of domestic violence by the father against the mother.

Professionals involved:

- Court-ordered assessor (psychiatrist)

- Allied mental health team for the community mental health services.

Key issues: The lack of veracity of the father's evidence and the risk that the father would pose to the children as a result of his drug and alcohol abuse and mental illness. In comparison, the grandmother's evidence was assessed as having a high level of veracity. She alleged that she overheard the father asking David to masturbating him.

Disagreement: The medical evidence that was on the father's community health psychiatric file confirmed the mother's and maternal grandmother's evidence of domestic violence, the use of pornography and the mixing of illicit drugs, alcohol and prescribed medication. The assessing psychiatrist believed that the alleged sexual abuse was unlikely to have occurred.

Findings: The father's use of drugs and alcohol plus the likelihood of child sexual abuse occurring were found to be risks if the children were to have contact with the father.

Outcome: The duration of the trial was three days. The father's application was denied and he was ordered not to apply to the Court again unless he had supporting evidence that he was drug free.

6.2.11. Grace

There were four parties who were applicants or respondents in this matter: the mother, 28 years; the father, 26 years; the paternal grandfather and grandmother. The maternal grandmother was also an 'intervenor' in the matter and sought residence in the event that her daughter was not awarded residence. The mother applied for residence of Joshua, seven years, and for there to be no contact to the father. She accused the father, and his parents and sister of sexually abusing Joshua.

The paternal grandparents also applied for residence and the father supported their application. Prior to the hearing, Joshua had been living in a shared care arrangement, primarily with the mother during the weekdays and the father during the weekends.

Professionals involved:

- Investigating child protection officer, who became child's therapist
- Child counsellor
- Court-ordered assessor (court counsellor)
- Court-ordered assessor (psychiatrist)
- Father's assessing psychiatrist.

Key issues: The parents' own experience of being incest victims and coming from families where child sexual abuse was experienced and perpetrated by a number of family members. The parents' level of competence and reliability was considered in the light of their psychiatric disorders: the father was diagnosed with Bipolar Disorder and the mother with Factitious Disorders and/or a severe Borderline Personality Disorder. The mother had also attempted suicide on a number of occasions. The allegations of domestic violence made about the father by the mother were also considered.

The allegations of sexual abuse were made by Joshua about both maternal and paternal family members when he had been placed in foster care after State child protection intervention. He was returned to his mother after she re-partnered and had frequent contact was to the father. The mother claimed that Joshua's behaviour became regressed after Joshua had contact with his father. The mother applied to stop contact, but it was her

mental health, her allegations of child sexual abuse by the father and his parents, and her emotional abuse of Joshua that were the primary considerations.

Disagreement: The child protection psychologist validated the mother's concerns about paternal child sexual abuse after interviewing the child and making three reports over a three-year period. This psychologist subsequently became the child's and mother's therapist. In contrast to the psychologist, the court ordered assessing psychiatrist believed that the mother was displaying Munchausen's syndrome by proxy, and concluded that the child should be removed from her. The court counsellor's explanation was that the mother projected her anxieties onto the child.

Findings: The judge adopted the court counsellor's explanation of maternal projection. In addition, intervention by the child protection Department was thought to have contaminated evidence and made it difficult to determine if Joshua had been abused. The judge made a positive finding that the maternal grandfather had violently, sexually abused the maternal aunt over a ten-year period, and that the mother and her maternal grandmother had tried to conceal that history. The mother was found to have a serious mental illness that posed serious risks to the child.

Outcome: The duration of the hearing was seven days. The paternal grandparents were granted residence of the child, and the father, who lived with the paternal grandparents, was to have supervised contact. The mother and the maternal grandmother were to have no physical contact with the child. The possibility of contact to the mother could be reviewed after she had had treatment.

6.2.12. Franks

The father, 45 years, applied for residence after the mother, 38 years, had left the country with their three year old son without his permission. The application was made under the Hague Convention and the mother subsequently returned with the child to Australia. The mother alleged that the father had sexually abused their son by fondling his genitals. The mother also alleged domestic violence by the father. The father conceded that he had perpetrated some violence against the mother.

Professionals involved:

- The mother's treating psychiatrist
- The court-ordered assessor (clinical psychologist)
- The court-ordered assessor (court counsellor)

Key issues: The psychiatric health of the parents, the property settlement, and the allegation that the father had perpetrated long-term emotional abuse on the mother.

Disagreement: The court counsellor had concluded that one parent had a personality disorder, but they did not know which one. The mother's treating psychiatrist believed that she was psychologically well and the allegations she had repeated to him regarding child sexual abuse were genuine. The court-ordered assessor, a clinical psychologist, took an opposing position and found that the mother had a personality disorder and that the allegations were not genuine.

Findings: The judge found that the mother was likely to have a personality disorder and that the child would be psychologically harmed if he lived with her. It was concluded that the allegation of sexual abuse did not present an unacceptable risk to the child.

Outcome: This was a 14 day trial. The child was to live with the father and the mother was to have ample contact of about three days a week. The details of the contact are left for the parties to work out and present to the judge.

6.2.13. Burchfield

There were five applicants and respondents in this matter: the mother; maternal grandmother; the father of two of the children; and the State child protection Department. Both the mother and maternal grandmother applied for residence of the four children; Tanya, 12 years, two other girls of seven years and four years, and one boy, Tom, who was five years. The children had been in the maternal grandmother's care for some time after an extended holiday when she had sought orders to have them reside with her.

Professionals involved:

- Child protection officer
- Child protection psychologist
- Court-ordered assessor (court counsellor), who prepared four reports.
- Dr O, the medical officer
- Detective.

Key issues: The risks involved for the children who were exposed to ongoing severe domestic violence and the mother's inability to protect the children. In addition, there were allegations of child sexual abuse. The mother acknowledged that she worked as a prostitute and evidence was given in relation to the father's indigenous identity and of the negative impact of his mother being part of the 'stolen generation'. The medical examination of Tom revealed an anal tear. Tom told his grandmother and investigators

that his father had put his finger in Tom's bottom. The allegations were confirmed by the State child protection Department.

Findings: The judge found that the child sexual abuse was unlikely and accepted an alternative medical explanation that the anal tear was the result of a 'hard stool' being passed, arguing that a number of child protection investigations had contaminated the allegation of child sexual abuse. The ongoing domestic violence between the parents was found to present unacceptable risks to the children.

Outcome: The duration of the trial was five days. Orders were made that the children were to reside with the maternal grandmother. The mother and the respective fathers were to have regular contact with their children.

6.2.14. Miro

The father, 66 years, applied for unsupervised contact to the two children who lived with their mother, 36 years. The children, Phillip, seven years, and Charlotte, five years, had resided with their mother after the first Family Court trial five years before the second application. Cross allegations were made of child sexual abuse following separation where the father accused the maternal grandfather of sodomising Phillip. The mother reported Phillip's alleged allegations of sexual interference by the father and his adult daughter.

Professionals involved:

- Court-ordered assessor (psychiatrist)
- Child protection officer
- Child protection department

- Father's assessing psychiatrist.

Key issues: The father's ongoing harassment of the mother and children; the father's limited ability to focus on the needs of the children.

Disagreement: The psychiatrist who undertook the court-ordered assessment concluded that contact with the father was deleterious to the children's well being and would have long lasting effects as he disregarded their basic needs. This contrasted to the findings of the private psychiatrist who completed an evaluation of the father and argued that the father should have unsupervised overnight and holiday contact.

Findings: The father was found to be harassing the mother and emotionally abusing the children. There was no finding about the sexual abuse allegations that had been the focus of the previous trial. Other child abuse allegations were of physical abuse and domestic violence.

Outcome: This hearing lasted for four days. The father's application was not granted, instead his contact was diminished in frequency to once every three weeks (rather than once a week) and it was to be supervised.

6.2.15. Bellows

The father, 46 years, applied for contact with the three children- two boys (who were six and nine years), and a girl, who was six years. At the time of the application the children resided with their mother, 41 years. She responded with an application for residence and indefinite supervised contact. Two of the children had allegedly told their mother that their father had fondled their genitals. The mother has also witnessed the father allowing his daughter to do up his fly. The child protection Department investigated but failed to not confirm the allegations.

Professionals Involved:

- Court-ordered assessor (court counsellor)
- Child protection officer
- Consulting psychologist to Court
- Consulting psychologist to father

Key issues: The father's tendency for sexual deviancy, specifically voyeurism, which had attracted police attention; his use of pornography; his sexualised behaviour in front of the children; the identity of the supervisor for the contact and duration of the supervision.

Disagreement: The child protection officer did not validate the allegations made by the children. This contrasted with the expert witnesses: the court counsellor and consulting psychologist both found that there were risks of sexual abuse.

Findings: The father was found to have a sexual deviancy. He sought psychological assistance during the period of the trial (which included an adjournment) concerning his sexual deviancy. His treating psychologist gave evidence at the trial. The father made a partial admission that he had been involved in voyeurism.

Outcome: Orders were made for the children were to reside with the mother and to have supervised contact with their father for two years. The father's request that his de facto supervise contact was not granted and another person would supervise.

6.2.16. Ceracchi

The father, 32 years, applied for shared residence with the mother, 33 years, although he modified this application during the trial to regular contact. There were two children, Vanessa, eight years, and Tina, six years. The girls were living with the mother and having weekend contact with the father at the time of the trial. The paternal grandparents were also respondents, seeking orders for contact. Vanessa alleged that her father had fondled her while she was sleeping in his bed. The mother alleged chronic domestic violence. Evidence was given that Apprehended Violence orders had been granted to both parents against the other.

Professionals involved:

- Child protection officer
- Court-ordered assessor (psychiatrist)
- Child protection unit social worker
- Private counsellor (former court counsellor), employed as mother's counsellor.

The issues: Domestic violence, the level of violence between parents, and the father's inability to control his anger, the abusive quality of the interaction between the grandparents and the children and the lack of veracity of the grandparents' evidence. The assessing psychiatrist assessed Vanessa as lying about being sexually abused by the father. Alienation from the father was considered to have occurred, although not intentionally. Safety for the children and their mother was also considered.

Disagreement: The child protection unit social worker believed Vanessa's allegations and thought that Vanessa had been sexual abused by her father; the assessing psychiatrist believed that Vanessa was lying.

Findings: As a result of being cross examined, the paternal grandparents were both found to have previously committed perjury in a trial in the criminal court. The father was found to be violent and unable to control his behaviour. Contact was seen as a high risk of continuing to involve the girls in high levels of conflict and emotional abuse. It was found that it was possible that the father had had ‘intimate activity’ with his daughters.

Outcome: The hearing lasted 20 days. The children were to live with mother and to have no contact with the father or grandparents.

6.2.17. Proctor

The parents both sought residence. The father and mother both represented themselves. When the proceedings began there was one four-year-old child, Toby, and the mother was also pregnant. Toby and the unborn children were subjects of the trial. The mother had first gained residence in the local court and sought a recovery order when the father failed to return Toby. Interim contact orders were made for Toby to live with his father and have three days from 9 am to 5 pm, each week with the mother. A few days before the trial the mother alleged that the father had fondled Toby’s penis on a daily basis and that the father had also forced Toby to fondle his father’s genitals (until ejaculation). As a result, new reports were completed to examine the implications of these allegations.

Professionals involved:

- Mother’s treating psychiatrist
- Court-ordered assessor (psychiatrist)
- Court-ordered assessor for interim hearing (court counsellor)
- Court-ordered assessor for final hearing (court counsellor)

- Child protection department
- Police.

Issues included: The mother's mental health; the possible link between the mother's mental health and the domestic violence; alleged child physical abuse. The matter was investigated by the State child protection Department and a statement was taken by the police.

Disagreement: The mother's treating psychiatrist assessed the mother as suffering from the effects of being a long term victim of domestic violence; these included recurrent panic attacks. This contrasted with the court-ordered psychiatrist who diagnosed the mother as having a severe personality disorder.

Findings: There were no findings of risk relating to the child sexual abuse allegations.

Outcome: The hearing lasted for nine days and resulted in final orders that specified that Toby would reside with father, with fortnightly contact to his mother from Friday to Sunday and every second Monday.

6.2.18. Whitely

The father applied for supervised contact with the two boys Harry, four years, and John, six years. There were also child sexual abuse allegations about an older step daughter, about whom the judge made a positive finding of sexual abuse by the father. The mother alleged the eldest boy also said that his father, on a number of occasions, had put his 'hands down his pants', played with his 'wee' and put two fingers in his bottom.

Professionals involved:

- Court-ordered assessor (psychiatrist)

- Court-ordered assessor (court counsellor).

Key issues: The father's chronic drug and alcohol problem mixed with his medication for his schizophrenia. The eldest boy's allegations that his father had pulled his pants down when he was asleep and the veracity of the allegations.

Disagreement: Two reports were made by the assessing psychiatrist including an allegation of child sexual abuse by one child. The court counsellor also presented a report that included reports that the boys wanted to see their father. These reports were written 12 months apart and reported differing wishes on behalf of the two boys.

Findings: The judge found the older step daughter had been sexually abused by the father. However, it was found that John made a false allegation after getting into trouble on contact and that there was no risk to the boys. It was alleged that he made his allegation to avoid getting into trouble. There was no finding of unacceptable risk relating to the allegations.

Outcome: This was a three day trial. Orders were made for the father to have supervised contact, and after a period the matter was to be returned to Court with a second expert report.

6.2.19. Fine

The father, 44 years old, applied for residence after the mother, also 44 years old, had refused contact due to her concerns of child sexual abuse. There were two girls, who were four years and six years of age.

Professionals involved:

- Paediatrician

- Paediatrician - Head of Department
- Child protection officer.

Issues: The mother's ability to foster a relationship between the father and the children, the medical condition that the eldest child suffered from and if this indicated sexual abuse.

Disagreement: Internal disagreement between two paediatricians within the same hospital. The first confirmed the medical condition of the child as being indicative of child sexual abuse. However, the Head of Department's opinion was that the medical condition was not indicative of child sexual abuse.

Findings: No child sexual abuse was found to have occurred. In addition, it was found that there had been a misinterpretation of the medical assessment that had been a part of the investigation.

Outcome: The children were to remain in the care of their mother, and have regular contact with their father.

6.2.20. Duchamp

The mother had applied for residence of two daughters, Hetti, 13 years, and Samantha, ten years. Despite consent orders being made three years before that the girls live with their mother, they had been living at their father's house. The father wanted his daughters to reside with him and for them to have holiday contact with their mother, her step children and her second husband. The 19-year-old daughter, Debbie, who was living independently by the time of the second hearing, made allegations that her father had

raped her when she was about ten years old. The children had their own legal representation.

Professionals involved:

- Court-ordered assessor (clinical psychologist)
- Father's assessing psychiatrist.

Key issues: Samantha's and Hetti's feelings of being responsible for their father's emotional well being. The degree to which Hetti's expressed wishes to live with her father, were the result of his manipulation.

Disagreement: Professional disagreement between the court-ordered assessor and the psychiatrist (who was engaged by the father to provide an independent assessment of him). The court-ordered assessor diagnosed the father as having a borderline personality disorder. She also assessed Debbie's allegation as being credible and probably true. The father's psychiatrist challenged her assessment of borderline personality and the neutrality of the findings, claiming that the assessor had become Debbie's advocate.

Findings: The judge gave Debbie's evidence weight and found that her allegations may have been true. The judge also found that the psychiatrist's evidence was compromised because they had not been given a full family history, (which included three generations of incest in the father's family). Despite the court-ordered assessor being found to have become an advocate for Debbie, her recommendations were still used by the judge in forming the final orders. The judge found that the professional disagreement over the diagnosis of borderline personality disorder was not relevant to the outcome: the parents' ability to care for the children was the central issue. The father was found to be emotionally abusive and manipulative of the girls.

Outcome: The length of the hearing was nine days, and each party was represented.

There was a risk of sexual abuse to the younger daughters if they were to live with the father. Orders were made for the children were to live with the mother and that no contact with the father. Contact would only be considered once the issue of what happened to Debbie was resolved, by either further specialist assessment or criminal prosecution, at which time the father could make a fresh application to the Family Court.

6.2.21. Hay

The mother applied for residence and to relocate interstate with the two children, Chantelle, aged five, and a three-year-old daughter. The father also wanted the children to reside with him. The mother had concerns about the father's interactions with the children that included him licking them, sleeping naked with them, and telling them inappropriate stories. One child was observed to have sexualised behaviour by mother. The mother was alleged by the father to have physically abused the children. The father was alleged to have perpetrated domestic violence.

Professionals involved:

- Child protection officer
- Child protection psychologist
- Court-ordered assessor (court counsellor), who completed two reports.
- Mother's assessing psychiatrist.

Key issues: The mother and grandmother's apparent display of 'intense hatred' toward the father while giving evidence in Court. The child protection psychologist was

concerned that Chantelle dissociated during the assessment and thought the behaviour was due to more than the effects of a parental dispute, but could not go so far as to make a positive finding of abuse.

Disagreement: The court counsellor believed that Chantelle was suffering from a lack of stability in her contact regime rather than risks in relation to the child sexual abuse. In comparison the child protection psychologist assessed Chantelle to have serious psychological problems that could not be explained by family conflict alone and recommended further assessment.

Findings: No risks of child sexual abuse; the mother's anger was found to be influential in the creation of a false allegation against her father; the children's greatest need was for stability in the contact/residence regime.

Outcome: The duration of the trial was three days. The children were to reside with mother and to have weekly contact with the father for one year, after which the contact would become fortnightly. There was to be no ongoing assessment of the child.

6.3 The profile: children parents and grandparents of this research

This section is about the people who appear in the judgments: the family members and the professionals who gave evidence or who had been otherwise involved in dealing with the allegations of child sexual abuse. It presents a summary of the children, the allegations, the accused, the allegers and the judges. The length of the trials, the types of professional evidence cited in the judgements and explanations for the allegations that the professional groups proposed is also provided. Finally, there is a summary of the judicial findings about the allegations.

6.3.1 The children and parents involved in the judgements

There were 16 girls and 18 boys in the sample whose age range was between three and 13 years. Both girls and boys had an average age of six years. Six children were only children of their parents and another two were the only children of the marriage and had older step siblings.

In 14 cases there were sibling groups where there was more than one child who was the subject of allegations.

Mothers were parties in the proceedings in every case, and fathers in 19 cases. In addition there were two applicant maternal grandmothers, and one set of applicant paternal grandparents.

6.3.2 Who were children living with at the time of trial?

In 17 cases, the subject children were living primarily with their mothers at the time of the hearing. In two cases children were with a grandmother (7 & 13), in another with their father (20) and in the fourth case the children were living in a shared residence arrangement with both parents (17).

6.3.3 The allegations

The allegations that were made ranged in level of intrusiveness. They included; vaginal/penile rape, penile/anus penetration of sons by their father, to digital/vaginal penetration, fondling and inappropriate touching on the outside of clothes, exposure to

pornography and paternal masturbation. Some concerns that were raised were supported by external evidence, such as police records or medical findings. However, in most cases there were no witnesses to the alleged incidents, the children allegedly told their mothers that sexual contact had occurred and the mothers then reported these concerns to the court. In a few cases concerns were less specific and were promoted by the presence of indicators of risk of child sexual abuse such as vaginal infections or behavioural indicators such as sexual behaviour in children including masturbation.

6.3.4 Who were the accused?

Those who were accused of the child sexual abuse or of posing risks relating to sexual behaviour also comprised a similar mix of family members: mothers, fathers, an uncle, maternal grandfathers and in one case, both paternal grandparents. In every case a biological father was alleged to have sexually assaulted their children. In one case the father was alleged to have assaulted both biological and step children. In three cases, more than one adult was accused of child sexual abuse in cross allegations. There were a number of allegations made during the period of litigation leading up to the hearing that were not the subject of detailed evidence or judicial consideration. It is only the allegations about which there is evidence provided during the trial that are the subject of this research.

In one case both the father and paternal uncle were accused of sexual abuse by the mother (1). In another allegations were made by the child against the father and paternal grandparents and paternal aunt while he was in foster care (11). In the third case, the

mother alleged that the father and his older daughter from a previous relationship sexually abused their son, and the father made cross allegations that the maternal grandmother had sexually abused the children (14). In one case there were allegations against the father and maternal step-grandfather. The maternal step-grandfather was convicted in relation to the sexual abuse and was serving a goal sentence at the time of the trial (7).

Table 6.1 Alleged perpetrators in the trial

Alleged perpetrator	Number
Biological father	21
Paternal uncle	1
Maternal grandfather	1
Mother	2
Paternal grandfather	1
Paternal grandmother	1
Paternal aunt	1
Total number of alleged perpetrators	28

6.3.5 Who made the allegations?

The majority of cases had only two parties involved in the litigation; the mother and father. One case had five applicants and respondents including the State child protection department.

A range of family members made allegations of child sexual abuse: mothers, fathers, grandparents, aunts and an adult daughter. There were 18 mothers who made allegations of sexual abuse in the 21 judgments. In addition, one adult daughter, four maternal

grandmothers, and in one matter the mother, father, and the paternal grandparents made cross allegations in the remaining cases.

Table 6.2 Identity and number of persons making allegations

Adult alleged of child sexual abuse	Number
Mother	18
Adult daughter	1
Maternal grandmother	4
Paternal grand parents	1
Father	1
Total number of allegeders	25

6.3.6 Who were the judges?

There were 15 different judges involved in this sample, with three judges completing multiple judgments. There were 13 judgments written by nine male judges and eight judgments written by six different female judges.

The trials were held over five States and one Territory of Australia, and eight different cities. In New South Wales, there were six cases heard in Sydney, three in Parramatta and two in Newcastle. In Victoria, there were three cases heard in Melbourne. In Queensland, there were three cases heard in Brisbane and one in Townsville. In South Australia, there was one case heard in Adelaide and in the Northern Territory, two cases heard in Darwin.

6.3.7 The duration of trials

There were a total of 144 days spent in trials for the 21 cases. The average duration of a trial was six days, the mode being five days and a range in length of trial being between three to 20 days.

6.3.8 Professional evidence

There were at least two social sciences or mental health professionals giving evidence in each judgment. The professionals were divided into three groups. The first being the ‘court-ordered assessors’, who comprised court counsellors who completed reports under an order section s.62G, and ‘court-ordered assessors’ who were child and family psychiatrists and clinical psychologists, who completed specialist reports under order s.30A of the FLA, now known under the most recent rules as Rule 15 Experts.

The second group were ‘external assessors’ included child protection and police professionals. The third group included ‘external treating professionals’ who were therapists and or counsellors who provided services to members of the family before and during the Family Court trial.

Of the court-ordered assessors, there were 20 private specialist practitioners (17 of whom were child and family psychiatrists and three of whom were clinical psychologists). Court counsellors who completed family reports in 11 cases were either social workers or psychologists. In addition, there was one psychologist ordered to provide supervision during contact who gave an oral report to the court in relation to the supervision.

Of the ‘external assessors’, there were ten statutory child protection officers employed by the State child protection departments (referred to as child protection officers). Other professionals who were engaged in forensic assessments, a policing or child protection response included one detective, two child protection psychologists and five physicians (or medical doctors).

The ‘external treating professionals’ who provided therapy or treatment to family members and who were not part of the child protection response, included six treating psychiatrists, six child therapists and three counsellors/therapists who provided services to adult family members.

There were three professionals who had multiple appearances each giving evidence in two cases, two completing court-ordered reports and the third completing a court-ordered report as well as being a privately engaged psychiatrist in another case by a father.

Table 6.3 Type of expert evidence cited in judgments.

<i>TYPE OF EXPERT</i>	<i>TOTAL</i>
<i>COURT-ORDERED ASSESSORS</i>	
Court-ordered psychologist to supervise access	1
Expert psychiatrist	17
Expert clinical psychologist	3
Court counsellor	11

<i>Total number of court-ordered assessors</i>	32
EXTERNAL EXPERTS	
Child protection officer (including 4 cases with no detail of finding)	11
Detective	1
Assessing/treating psychologists	4
Doctor assessing medical condition	5
Privately employed assessing psychiatrist	2
<i>Total number of external experts</i>	23
EXTERNAL TREATING PROFESSIONALS	
Treating psychiatrist	6
Treating therapist	2
Non-statutory counsellor/relationship counsellor	2
Child therapists - social workers in 3 judgements-(2/3/16) & clinical psychologists in 3 judgments-(4/7/9)	6
<i>Total number of external treating professionals</i>	16
TOTAL OF ALL PROFESSIONALS	71

6.3.9 The child protection professionals' findings

Of the 11 matters in which the child protection officers undertook investigations, and where the findings of these investigations were made known, all but one made positive findings of risk in relation to child sexual abuse. In the remaining case, a positive finding of psychological abuse was made. In another four cases where statutory child protection departments had been involved, the results of their intervention were not discussed or cited. In the remaining six cases there appeared to be no involvement by the relevant statutory child protection department.

6.3.10 Court-ordered assessors findings

Court counsellors provided reports in 11 judgments (1, 4, 6, 7, 8, 11, 12, 15, 16, 18 & 21). Of these cases, two made findings that there may be risks of child sexual abuse, another two that the risks were unknown, three concluded that there was probably no risk, and four were did not make an assessment of the risk of child sexual abuse.

Findings made by court-ordered assessors, psychiatrists and clinical psychologists, were predominantly of negative findings of risk that related to child sexual abuse. Only in one case was there a positive finding, and this was made by a clinical psychologist (20).

6.3.11 Explanations about the child sexual abuse allegations

In the majority of cases allegations were considered to be the result of ‘contamination’ and/or projections by anxious, suspicious mothers (1, 2, 4, 5, 8, 11, 17, 19 & 20). Mental illness was also seen as influential in the development of false allegations by mothers in four cases (1, 2, 11 & 17). (See Appendix II, Table 6 for a breakdown of categories concerning mental health issues relating to mothers).

There were only two cases in which mothers were considered to have deliberately created false allegations (4 & 9). In a third case, while it was not explicitly stated, it was inferred that a mother may have made false allegations, in order to provide a reason for leaving Australia with her son, without the father’s permission (12).

In two judgments there were findings of false allegations with no explanations given for how these had developed (8 & 18).

There were seven cases in which there were positive findings of risk (3, 6, 7, 10, 15, 16 & 20) related to the allegations of child sexual abuse.

Other allegations that were the subject of these cases involved forms of coercive behaviour that included the psychological abuse of children and exposure to domestic violence. There were ten cases in which there were positive findings relating to domestic violence by fathers against mothers.

Allegations against mothers included the creation of false allegations and the lack of protection of children from child sexual abuse (7) and domestic violence (13). Both mothers and fathers were criticised for exposing their children to the effects of parental conflict (11, 16, 20 & 21).

6.3.12 Judicial findings and outcomes

In the majority of cases mothers retained residence of their children, and in one case the children were returned to the mother after they had been living with their father (20).

There were seven cases in which mothers lost residence: three of these were to grandparents (7, 11 & 13) and four were to fathers (4, 9, 12 & 17). In one of these cases a father was granted a shared care arrangement, where there was a father/mother split of four and three days. Where residence was reversed, this was due to either severe mental

illness in the mother that was estimated to have adverse effects on children, or where mothers were found unable protect children from the risks of possible sexual abuse or domestic violence (7, 11 & 13) or where mothers were found to have deliberately created false allegations (4 & 9).

In two of the cases where there was a reversal of residence, mothers were portrayed as actively alienating the children from their father. They had no mental health disorders and were represented in the judgments as lying in court and to the police, coaching children to believe that sexual abuse had occurred when it had not, and causing emotional and psychological abuse of the children (4 & 9). In one of these cases residence of the three youngest children was reversed to the father, while the eldest girl was to remain with the mother. In the other case the mother remained the main carer of the children and residence was to be reversed to the father if the reintroduction of contact to the father did not proceed.

Fathers applied for residence in seven cases (3, 9,12,17,19, 20 & 21), shared care in two cases (6 &16), contact in five cases (1, 2, 4, 10 &15). Increases in existing arrangements were sought, from no contact to supervised contact in one case (18), from day time supervised contact to overnight unsupervised in one case (14) and overnight in one case (8). Contravention orders were sought against the mother in one case (5). In two cases mothers applied for residence of their children who were living with their maternal grandmothers (7 & 13). In the remaining case one mother applied for residence of the children (11).

Contact was reinstated after a breach in existing orders or having contact orders made in five cases (1, 2, 5, 8 & 19). In one of these, contact was extended to overnight (8).

In a number of cases orders were made for contact to fathers to be either supervised or diminished. Such orders were made only in the presence of additional findings of risk that related to domestic violence. In four cases supervised contact was ordered (3, 6, 15 & 18), and in one, contact to the father was to be reviewed after an unspecified period (3). Contact to one father was diminished from once a week to once every three weeks (14). In three cases orders for 'no contact' to the fathers were made (10, 16 & 20).

6.3.13 Summary

In these 21 contested cases the type of allegations of child sexual abuse ranged in intrusiveness, and most of them involved young children. While allegations were made about a range of family members, it was only allegations made about fathers that were presented in detail and examined in the judgments. Evidence was presented to court by child protection assessors, and court-ordered assessors. The most frequent type of evidence presented to court was from court-ordered psychiatrists.

There were positive judicial findings of risk in relation to the allegations in one third of the cases and two cases in which mothers were thought to have deliberately created false allegations.

Limitations of contact to fathers or orders of no contact were made where there were additional risks that related to domestic violence.

6.4 Dominant themes in the research findings

There were four broad themes identified in the judgments: the judicial management of the conflicting evidence, the primary focus within the judgments on the mother and conversely, the lack of assessment of the father. Lastly, there was a marginalisation of evidence from and about children.

6.4.1 The Judicial lens: the family separation and divorce paradigm

Judges were active in shaping the narrative about the allegations of child sexual abuse and the father's responses to these allegations. The lens through which they understood the allegations was one of 'parental dispute': the allegations were seen as a product of the parental dispute rather than the result of child abuse. This theme of minimising the allegations of child sexual abuse was woven throughout the majority of judgments.

This frame was reinforced by the most influential professionals appearing in the Court, the private child and family psychiatrists and clinical psychologists, who were court-ordered assessors engaged to undertake assessments and provide a report (the s.30A, or rule 15 experts). These assessors also favoured the frame of 'parental dispute' in their assessment and focused on the mental health of the alleged and on the mother-child dynamics. Court counsellors (social workers and psychologists employed by the court) also provided assessments, although these reflected a blend of child protection concerns about the possible risks for the child and, to a lesser extent, the use of the parental conflict

frame. This professional group was less definite about their findings and were more likely to express findings in terms of ‘possibilities’ rather than ‘probabilities’ or ‘certainties’.

In the majority of cases judges excluded material that challenged the sceptical, parental dispute model. Such challenges were mounted by mothers (who made the allegations) and by professionals such as child protection officers and child therapists who raise children’s safety needs. The positive findings of child sexual abuse that were given credence were from three assessor/therapists (two social workers and one psychologist) who worked within a medical model.

6.4.2 The assessment of the alleger

Mothers and maternal grandmothers who were applying for residence and who alleged child sexual abuse became the focus of the assessments and evaluation. They were primarily assessed in relation to their motives, mental health and emotionality: that is, through a psychiatric lens. Gendered assessment criteria were applied to mothers and grandmothers as their motives for bringing the allegations, and their mental health and behaviour were examined. They were subject to assessment in areas of parental characteristics that fathers were not subject to, such as ‘protectiveness’.

There were a small number of cases where mothers were assessed as deliberately creating false allegations in order to stop contact. In the majority of cases however, it was proposed that mother-child interaction resulted in the belief that sexual abuse had occurred being transferred to the child through a series of interactions with the child.

Mental health problems were also seen as instrumental in mothers developing a misguided belief that the child was at risk of child sexual abuse.

6.4.3 The assessment of the alleged perpetrator/father

The dominant theme relating to the assessment of fathers was a lack of scrutiny of them and their evidence. This was found to be particularly the case, in relation to their abusive and sexual behaviours with their children.

While there was little examination of the potential for sex offending, there was more attention given to fathers who were involved in long-term harassment, manipulation and coercion of mothers and children. This group of fathers were assessed via a different conceptual model: instead of allegations of the domestic violence and manipulation being seen as a result of a parental dispute, it was seen as causal to the dispute and as inflicting emotional and psychological abuse to children and impairing the mother's ability to parent. This approach to assessments was not used in the assessment of child sexual abuse allegations.

6.4.4 The marginalisation of evidence from and about children

The dominant theme that relates to children's evidence was that of marginalisation. Evidence from children and about children on the whole, was excluded because it was deemed to be contaminated by parents or child protection officers. Some evidence provided by children to their mothers or child protection officers was ignored. Children

were predominantly seen as victims of a parental dispute, rather than as having their own opinions or experiences that could be elicited for the Court.

The influence of the parental conflict model was seen in a lack of thorough assessment, or weight given to indicators of child sexual abuse such as children's allegations or sexualised behaviours.

6.5 Conclusion

These themes identified in the judgments will be fleshed out in the following chapters. Chapter Seven will deal with the judicial process, Chapters Eight, Nine and Ten will successively focus on the assessment and judicial decision-making in relation to the mothers, fathers and children involved in the judgments. Chapter Eleven will draw conclusions from the findings.

CHAPTER SEVEN

MANAGING UNCERTAINTY

JUDICIAL DECISION-MAKING

In cases of alleged sexual abuse, the task of the Court is an onerous one. The Court is called upon to contemplate very grave orders. On the one hand, the Court may be asked to deny a child contact with a parent or to deny a parent the opportunity to have a child reside with him or her or have contact with him or her. On the other hand, the Court is required to contemplate the prospect that an order for residence or ongoing contact may be an order placing a child at risk of abuse of a most serious nature which of itself would have a far reaching impact upon the welfare of the child.

(Trial judge, Grace Judgment)

7.1 Introduction

Family Court judgments are a record of how each judge sorts and evaluates the evidence presented to them during the trial. It also records their deliberations. The judgments traverse the terrain of the conflicting evidence to arrive at final orders that define contact and residence arrangements for the subject children in the context of allegations of child sexual abuse.

Throughout this journey judges apply principles and concepts set out in the legislation and precedents. These concepts include the guiding principle of ‘the best interests of the child’, and the High Court’s ruling that discourages positive findings about child sexual abuse (Parkinson, 1998). In addition, there are also the tensions within the Reform Act between the rights to contact and protection from family violence (Kaye et al.; 2003). The legal milieu also includes a tradition of reticence in believing children’s allegations when they challenge an adult’s denial (Bala, 1989; Hale, 1736). Despite the disparate accounts of events that are presented during the trial, the judge in most cases, constructs a single narrative of what events have occurred, or that they think are likely to have occurred.

This chapter details the processes that judges use in their deliberations and in doing so addresses the research question: How do judges make decisions when there are disputes in expert evidence?

Judicial decision-making is immersed in a process of sifting through contradictory and comparative assessments. In this process judges also generate their own theories to explain the evidence before them. These judicial activities are the dominant themes explored in this chapter.

This chapter is divided into two areas; the first is dedicated to an examination of the processes used by judges in weighing up and comparing contradictory evidence. The second area focuses on how professionals providing Court-ordered assessments are

comparatively evaluated by the judge, what evidence is excluded and what evidence is influential. This is followed by a discussion of the findings and the conclusions.

7.2 The judge as the active narrator: deconstructing and excluding evidence

There was a common theme found in all the judgments: the attempt by each judge to create a whole unified narrative from fractured pieces of conflicting evidence. In this process the judges were active in shaping the evidence into a cogent narrative, despite the obvious discrepancies in the evidence.

When judges considered the disagreement between professional witnesses, evidence was disqualified because the dispute was defined as being outside the judge's scope of inquiry, or evidence was found to be 'contaminated'. In this way, judges were able to eliminate multiple descriptions of a single event and conflicting explanations for the allegations (see Appendix II, Table 2). In the van Gough judgment for example, the judge reduced conflicting accounts from the evidence into one single narrative in which events logically led to the development of a false allegation. This is explored in detail in Chapter Eight.

While in many cases 'contamination' was provided as the reason for why evidence was excluded, judges did not always justify why they discarded allegations. In the Clark judgment, for example, the father had applied for overnight contact with his five-year-old daughter and three-year-old son. The mother opposed overnight contact and had reported that her son had told her that the father had rubbed faeces in his hair and poked his finger

up his bottom. The judge discarded part of the allegation although no reasoning was provided as to why this was so.

In this matter, the judge did not give any weight to the mother's allegations or that the court counsellor had kept an 'open mind' about whether they were true. By discarding this evidence, the judge paved the way for the court outcome of overnight contact to the father. In this matter the judge did not justify this decision, but moved directly to a judicial outcome. The evidence that was most influential in this hearing was that of the court-ordered assessing psychiatrist, who implicitly referred to Gardner's (1987) PAS by recommending a reversal of residence to the father after concluding that there was no risk of child sexual abuse. This recommendation was made despite the father's application only being for overnight contact and in the absence of any negative evidence about the mother's parenting ability.

The discarding of evidence from child protection professionals who had made positive assessments about the risks of child sexual abuse proved to be a reliable pattern throughout the judgments. Evidence sourced from child protection officers was the most vulnerable to being discarded from the final reconstructed judicial narrative and findings.

7.2.1 Filling in the blanks: judges as theory builders of benevolent explanations

Where there was conflicting evidence or where specific information was unknown the judges made their own interpretation or proposed their own hypothesis of what had occurred. While in the majority of cases there was thought to be no risks relating to the

allegations, in seven judgments the judges believed there was at least a possibility, or a higher likelihood, that there had been some form of sexual interaction between the father and the children.

The judicial reconstruction of sexual interactions between fathers and their children was marked by attempts to provide explanations for sexual activity with children that was not conceptualised as abuse. This resulted in contorted descriptions of sexual behaviour. Judges attempted to walk a tightrope of logic, explaining how intimate sexual activity between the father and children could exist without it constituting child sexual abuse. This reflects the precedent of M & M, where the High Court found that in most cases, it was not the role of the Family Court to make findings about child sexual abuse allegations (Parkinson, 1998; Scutt, 1991). This theme of downplaying the evidence that supported the presence of risks to children being evident in the Cerrachi case (16) where the judge attempted to reconcile two opposing narratives. This resulted in the sexual activity that the children had alleged was not named sexual abuse.

In the Cerrachi judgment, the judge refrained from naming the father as intentionally abusive, but wove an implausible explanation of the sexual contact around various pieces of evidence from the legal counsel, the father and from the child Vanessa:

It is possible that the husband may have engaged in some intimate activity that the girls disliked and have come to be seen as abuse (although he was resolutely opposed to any such possibility and there is no evidence or argument to make

such a finding possible). If so, he may be genuinely unaware of the activity concerned. It may be, as the counsel suggested, that the allegations arose from some kind of mistake or mischief on the part of Vanessa. If so, it is easy to see how the husband would feel unjustly accused and, given the history of the relationship and his personal qualities, how he might blame his wife.

(Cerrachi judgment, number 16)

There is a powerful force at work in this excerpt: the drive to create a coherent story where the evidence is irreconcilable. In order to achieve this awkward single narrative and explanation for the allegations, the daughter's allegation had become invisible. The judge placates the husband 'the husband may feel unjustly accused' and does not visit the possibility that the husband's actions of 'blaming his wife' are consistent with the denials and cognitive distortions often present in child sexual abuse and incest offenders (Salter, 1988). This case is explored in detail in Chapter Nine.

In other judgments the same struggle to find benevolent explanations for the child/father sexual interactions is evident. In the De Maria judgment, the judge provided an explanation of the father 'accidentally' touching his daughter in a sexual way. In the Martens case (6) it was thought that the father had sexually offended through a 'looseness of boundaries'. This approach gave the father the benefit of the doubt, massaging the evidence so that even when there were positive findings of sexual interactions with children, these were framed in a benevolent way, as the result of innocent actions.

In these cases the child's allegations were not explicitly presented as a separate voice. Rather, they were submerged in the alleging parent's evidence and in the process, were lost in the adversarial contest between the parents and/or grandparents. This resulted in a perception that the allegation had less veracity because it came via an adult who was considered to be partial. If positive findings of risk were made, they were only made in relation to part of the alleged abuse and they minimised the possible negative effects on the child.

These judgments demonstrate a palpable desire to develop benevolent narratives that describe false allegations as being the result of honest mistakes and misconceptions, or of fathers who have unintentionally touched their children in a sexual way. When judges attempted to retain both the allegations and paternal claims of innocence in their narratives, the resulting narrative attempted to weave together the two irreconcilable, parallel accounts of sexual behaviour. The resulting narrative strains under the irreconcilable accounts and the weight of the seriousness of an allegation of child sexual abuse and the need to create the idealised post-separation family of two loving, although perhaps flawed parents. This is a demonstration of the tension in the Reform Act that was identified in domestic violence cases (Kaye et al, 2003) as the judges work hard to achieve safety for the child and continued contact.

7.3 The evaluation of competing professional evidence

While there were distinct individual differences between the judges in how they approached the comparative evaluation of professional evidence, there were a number of

common themes within the judgments. The most notable was a high level of credibility that was placed on the assessments undertaken as a result of a court order and these were the most common form of evidence in the judgments. These were undertaken either by private practitioners (child and family psychiatrists or clinical psychologists) or by court counsellors. In general, more weight was placed on these reports than on the reports undertaken by other professionals.

Judges evaluated conflicting evidence presented by professionals and commented on the independence, comparative worth, comprehensiveness and bias in relation to the allegations of child sexual abuse. The evidence of the court-ordered assessors was generally preferred over that of other professionals engaged by individual members of the family to provide therapeutic interventions or alternative individual assessments. Other professionals were seen as being unable to present the same level of assurance about objectivity or thoroughness as the court-ordered assessors who saw all members of the family.

7.3.1 Court-ordered assessments by private practitioners

In 18 cases, there were court-ordered assessments undertaken by specialists in private practice, 17 of whom were child and family psychiatrists. Two were undertaken by one clinical psychologist. They provided explanations about the child sexual abuse allegations that were relied on by the judges in 18 cases. Their evidence was preferred over other conflicting professional evidence such as child protection officers' assessments and treating psychiatrists' reports. Further, there were only two cases where the evidence of

court-ordered psychiatric assessors were criticised for methodological errors but despite this, their assessments remained the preferred evidence in relation to the allegations. The only cases where the views of the court-ordered assessors were not favoured over outside professionals, was when they were pitted against the evidence of social workers and psychologists who worked as child therapists in medical settings. These child therapists worked under the mantle of a medical institution and had also established their objectivity in relation to the method that they employed and their professional independence in undertaking their assessment. The particular characteristics of these comparative assessments will be examined in detail below.

7.3.2 Evidence of sceptical presumptions in court-ordered psychiatric assessments

Decisions made by psychiatrists who undertook court-ordered assessments were found to rely on a number of assumptions that resulted in decision-making ‘shortcuts’ in their analysis of evidence (Starr, 1993). In one of these cases the child therapist’s assessment was preferred over the court-ordered psychiatric assessment because of these errors. This was the De Maria case and five-year-old Mary had alleged that her father had fondled her on the outside of her clothes, and that this had upset her. The court-ordered psychiatric assessor told the judge that the role of the social worker, who was the child therapist and employed within a teaching hospital’s child protection unit, would be predisposed to making a positive finding of child sexual abuse. This opinion was not based on any specific knowledge of the social worker or her assessment in this case:

*The psychiatrist made some comments on the counselling social worker's report. He said that in contrast to his own role, which was investigative, **he saw her role as a counselling one and it was likely that she would confirm what had been reported to her by the department.** He thought that she was not looking at the whole situation from the point of view of investigation. [emphasis added].*

(De Maria Judgment, number 3)

Thus, the psychiatrist used this untested assumption in their evaluation of the social worker's objectivity and in doing so, went on to place no value on her opinion that abuse had occurred. The judge found to the contrary: that the social worker had maintained professional independence and had undertaken her own assessment.

In this judgment, the psychiatrist suggested that the child was making the allegation in order to please the mother. However, the judge supported the social worker's criticism of this suggestion. The psychiatrist's confidence in this explanation was so firm that they did not feel the need to offer supporting evidence and it was not tested against the alternative hypothesis, that the allegations were the result of the child's experience of abuse. This appears to be an example of a decision-making error based on overconfidence (Starr,1993). The evidence was that the mother had been very upset and angry each time the child had disclosed further information about her father touching her. The judge thus concluded: 'I do not find it easy to see how the child's wish to please or please the mother can account very satisfactorily for all her actions relating to this topic' (De Maria Judgment).

Professional assessments of evidence in this case were carried out by both the court-ordered psychiatrist and the social worker from the child protection unit, while the judge evaluated and compared the evidence from both of these professionals. There were three steps in the judicial evaluation of competing evidence and judicial decision-making. Firstly, the judge began with testing the social worker's evidence for bias that may have been present as a result of their contact with the child protection officer in the process of receiving their assessment. The judge found that the social worker had formed an independent assessment and view of what had occurred: their evidence was retained. Secondly, the judge found the social worker's findings were supported by the evidence and therefore, viewed as credible. The judicial outcome was that the father was found to have sexually touched his daughter and therefore presented a future risk to her: contact was to be supervised.

In this case decision-making errors occurred when the psychiatrist relied on two generalisations and did not seek information that would test them out, by either contradicting or confirming them. The first generalisation was that the child had made an allegation to please their parent, the second being that the social worker would accept the statutory child protection department's finding of abuse without undertaking an independent assessment. The psychiatrist therefore demonstrated the impact of a 'sceptical position' Gardner (1987) by assuming that the child's initial wish not to see her father was the result of contamination by the mother and other professionals. However,

the judge did not concur with this assumption and relied on the social worker's evidence that was based on evidentiary support.

In the Duchamp case the court-ordered assessor was a clinical psychologist who was found to have made a methodological error, by becoming an 'advocate' for the daughter, rather than remaining an 'objective clinician'. A privately hired psychiatrist criticised the psychologist for a loss of objectivity; the judge agreed with this criticism:

The psychologist did not maintain an open mind when she was interpreting his behaviour' 'she gave the impression of being an advocate for Debbie, rather than as an objective clinician....

(Duchamp judgment, number 20)

The posture that was interpreted as being an 'advocate' may have developed as a consequence of the unusual circumstances in which Debbie, the older sister of the subject children, disclosed rape by her father some ten years previously. The psychologist confirmed Debbie's allegation of rape that had occurred some ten years previously. This allegation had resulted in a crisis created by the Family Court hearing about her younger sisters. The assessing psychologist also concluded that Debbie's father suffered from a personality disorder. The assessor/client encounter that resulted in a first time disclosure about an event that had occurred ten years previously precipitated a crisis, as this young woman had not told her family about the abuse. It therefore closely approximated the interaction that might also occur between a child protection officer and client in the child

protection context when allegations from children are heard close to the time of the first disclosure or discovery, before there has been a process of shaping the allegation into a more sanitised narrative that then forms a part of the evidence.

In this sample the criticism of taking a supportive posture vis-à-vis the allegation was also made of child protection officers and is similar to the position of ‘advocate’ taken by the psychologist. However, despite the judge agreeing that the psychologist had ‘lost their neutrality’ by allowing her dislike for the father to influence her assessment of him, there was, enough supporting evidence of the allegations for them to make a positive finding of risk in relation to the allegation.

In the second case where a court-ordered assessing psychiatrist was found to have erred in method, the psychiatrist had interviewed the parents with the children in the same room. It was argued that the child had been exposed to the parents’ views and that this in itself was a methodological flaw. While the judge accepted that criticism, the judge still preferred the evidence of this psychiatrist, because of the comprehensiveness of their assessment: they had conducted interviews with all family members.

Overall, I consider the psychiatrist’s evidence to be an important contribution to the assessment to be made by this Court and deserving of weighty consideration.

(Miro judgment, number 14)

When key information was excluded from assessment data, the resulting reports were weakened as the report writer was not able to evaluate the family situation, but only have an opinion about their client. Judges took on a position of aligning themselves to the court-ordered assessors who had seen all key family members who were involved in the dispute.

7.3.3 Court-ordered family reports: court counsellors

The other court-ordered assessors were court counsellors of which there were 11 in this sample. Court counsellors did not assess the sexual abuse allegations, and comments they made about the allegations involved a degree of uncertainty, such as they thought abuse to be ‘unlikely’, or that they had ‘remained open’ to the possibility that abuse had occurred. These comments often reflected an openness to a possible risk with a recommendation of further assessment.

This is in keeping with their role as defined by the court guidelines that excludes an investigation of child abuse allegations, which is the province of the court-ordered specialists in private practice and child protection officer. While there is some room for individual discretion, the scope of their assessments is generally limited to the child and family and the family relationships.

Other assessment outcomes by court counsellors included a request for further specialist assessment of mental health issues in the parents and reports on the children’s wishes rather than the allegations of child sexual abuse. Lastly, one court counsellor stated that

despite not assessing the child sexual abuse allegations she assessed the relationship between the children and father and recommended that contact recommence immediately.

Judges made positive comments about the usefulness of these reports. In the Bellows case for example, the judge noted; ‘I have been greatly assisted in these proceedings by a welfare report prepared by a counsellor of the registry of the Court’.

7.3.4 External evidence from child protection officers

Child protection officers from statutory departments were the second largest group of professionals who submitted evidence to court. They were involved in 16 cases.

Most of this evidence was discredited because of perceived errors in investigation methods. The focus of judicial analysis of this material was on the opportunity for contamination and the development of an erroneous allegation.

7.3.5 The focus on the child protection method of investigation and analysis

In the Pollock judgment, the child protection department relied on evidence provided by a community-based counsellor to whom the child had disclosed. However, this material was assessed as ‘contaminated’ because the seven-year-old child, Sara, was interviewed with the mother present. The counsellor had agreed to a joint interview after the child refused to separate from her mother. It was on the basis of these interviews that the statutory child protection department confirmed the allegations of sexual abuse by the father. The judge assessed this confirmation as flawed because of the counsellor’s interviewing method:

It is of serious concern that not only did the counsellor see the wife and the children together at times, take details of the wife's concerns in the presence of the children and then question the children about them at times in the presence of the wife.

(Pollock judgment, number 5)

The judge found that appropriate consideration had not been given to the potential for contamination, and further, that the child protection department had deliberately not revealed this contamination to the Family Court in the interim hearing, thus influencing the interim decision to stop contact.

In the Fine case a paediatrician found that the symptoms of vaginitis flared up after contact visits and were consistent with molestation, although that opinion was contradicted by a more senior paediatrician. The mother responded to the first medical opinion by refusing to allow contact. She was supported by the child protection department in doing so. The judge found the initial medical diagnosis to be flawed, and that the child protection officers had prematurely formed a view that abuse had occurred and had then actively searched for evidence to confirm that view:

Moreover, I am troubled about the professionalism brought to bear by the child protection officers of the department who gave evidence in this case. They

obviously formed the view that the most likely cause of the child's condition was sexual abuse, and consequences flowed from that as set out above.

(Fine judgment, number 19)

This case demonstrates the antithesis of the neutral position that assessors are required to demonstrate (Chisholm, 2003). The judge robustly criticised the child protection officers and decided that they had manipulated and misled the Family Court interim hearing by deliberately providing an incomplete history of interviews with the child:

Yet in the affidavits filed in February, which had the effect of contact being suspended, no reference was made to the previous interview they had conducted in January and it was misleading for this not to have been placed before the court at that time. This was not done because it was considered irrelevant in that it did not support their view. Moreover, the view expressed to the court in that affidavit was taken without a full consideration of indicators and contra-indications of sexual abuse, which any investigating officer could be expected to weigh and consider.

(Fine judgment, number 19)

In this excerpt, the judge made a series of critical comments indicating that the standard expected in a child protection assessment had not been met. The criticism made of the evidence included a lack of balance in the assessment that would be demonstrated by an examination of both indicators and contra-indicators of abuse.

The crux of the criticisms about the child protection officer's assessment was that it did not reflect a neutral investigation that would consist of looking for both indicators and contra indicators of abuse. In the three cases where doctors made diagnoses that were consistent with child sexual abuse, a judge or a more senior paediatrician decided that these assessments were incorrect. These doctors were not criticised for the errors that they had apparently made. This silence sits in stark contrast to the strident criticisms made about child protection officers and for the impact that they made on the lives of the family members by providing fuel for what were found to be false allegations.

Critical judicial evaluation was routinely applied to the child protection evidence. However, it was not equally applied to court-ordered assessors. Court-ordered assessors' evidence was less often critically evaluated and with less vigour. This suggests that there is a higher threshold for veracity applied to child protection evidence, as it is tested more often and more stringently than court-ordered assessor's evidence. This resulted in the child protection evidence being excluded on all occasions on which there was a positive finding of risks of child sexual abuse. This is consistent with my finding that judges had a negative opinion about the child protection departments and adopted a universally sceptical position in relation to evidence presented by them.

7.3.6 Police intervention: a memorable case

Detailed evidence about police intervention was recorded in only one matter, the Roberts case, in which a videoed taped record of the interview was the primary evidence in the

case. This is a memorable case because the video recorded repeated questioning of Ross, the eight-year-old interviewee. The interview was used by the judge as evidence of contamination of the child's evidence.

The context of the interview was that a mother and child went to a Police Station to report the boy's allegation. They were accompanied by a refuge worker who took control of the interview and repeatedly asked Ross if he had been hurt. The judge gained intimate information about the interview and the child's responses, as they could see the child's body language and hear the verbatim questions, intonations and replies to the interview questions:

The refuge worker then asked Ross if somebody had hurt him and Ross clearly shook "no". Shortly after, Ross was asked the same question again, and he again indicated "no" with a shake of his head. After some further attempts to encourage Ross to respond, the refuge worker again asked if somebody had hurt him, and again he indicated with a clear shake of his head in the negative. The refuge worker then suggested to Ross that he remembered at her house in the bedroom that Matthew had said somebody had hurt Ross, and she asked Ross if that was true...

(Roberts judgment, number 4)

The video demonstrated methods that could contaminate a child's evidence in the interviewing process: repeated, leading questions have been noted as problematic, and a

preoccupation in the literature (Wakefield & Underwager, 1988). However, the discussions about the problems involved in leading questions by the judges did not explore the possible scenarios that may have led to pressure being placed on a child to make an allegation by the police or an appreciation of the difficulties for children in making an acceptable allegation within the court system. There are few opportunities for children to make allegations in a way that is acceptable to a court: they would have to not only disclose their abuse but also choose a confidant who was considered neutral. The descriptions of the repeated questioning captured on tape may well be an artefact of the difficulty that mothers have in protecting their children in a legal system that emphasises a formal, single interview as the source of evidence about the child's experience.

Thus the frequent cry of contamination by judges, is in part related to the issues surrounding the difficulty that children have in producing allegations at the 'right' time (when the video camera is rolling or the investigator is present), to the 'right' person (a neutral professional) and in a cogent enough form and detail.

The final judicial narrative in this case, was one of a grave injustice to the father and child because of interviewer contamination that led to charges being laid and a prima facie hearing before the Department of Public Prosecution (DPP) dropped the charges. The danger of understanding this case only as a list of errors in method is to analyse it only in relation to the presence of contamination and suggestion. The legal context is one that prescribes the form in which evidence should be collected and this presents problems for children who are not fortunate enough to happen upon a professional who can

undertake a non-leading interview. This case example is also a demonstration of the difficulty that is presented in providing a space for children to be heard in the legal system, where there is conflict between parents. It must also be remembered that the mere presence of contamination or methodological error, does not mean that abuse has not occurred. However, in these cases that appeared to be the presumption and where there was contamination, there was a finding of 'no risk' and children were not offered protection. This treatment of contamination in investigations reflects the use of a sceptical presumption about the sexual abuse and a parental conflict paradigm that emphasises the rights of the parent to have contact, rather than the assessment of risks to a child (Gardner, 1994; Wakefield & Underwager, 1991)

The danger is that the errors of method in the interview in this case may be encoded in the judge's memory as typical of a child sexual abuse interview because of the extreme and therefore memorable nature of the material. This may inadvertently be used as a template in the future evaluation of child sexual abuse cases. If this were so, findings would be skewed against an impartial assessment of any claims children might make. Starr comments on memorable cases such as this and the need to rely on objective measures as much as possible; 'If we do not, knowledge of relatively rare but highly available case outcomes may lead to bias in the judgment of risk in less striking cases' (1993:204) .

7.3.7 Privately engaged professionals

Privately engaged professionals were either hired by one of the parties to counter the findings of an ‘in-house’ report, or they were professionals who were involved in some form of treatment or therapy for the children or their parents. One of the main themes in relation to these professionals was the difficulty they had in establishing that their evidence was neutral and unbiased. They were not able to effectively challenge court-ordered report findings, although they were able to raise particular issues on behalf of their clients.

Evidence from privately engaged therapists and assessors, no matter what their professional category, be they psychiatrists or social workers, were treated as necessarily being biased in favour of their clients. In addition, when the privately engaged professional was providing counselling, therapy or treatment, they were not considered to have the skills to make an assessment. For example, in the following case a psychiatrist was treating the mother and consequently provided a report for the hearing. The psychiatrist’s assessment was not accepted on the basis that it was not their brief to conduct an assessment:

The comments I would make about that report are as follows: first, it was not part of the treating psychiatrist's original brief, ...to conduct any form of assessment. His involvement with the mother was therapeutic.

(Franks judgment, number 12)

This clear delineation between the assessor and therapist was a theme repeated in other judgments and is supported by Chisholm's discussion on expert evidence provided to the Court (2003). There was an explicit assumption made in the judgments that the methodology used by the therapists would be based on uncritical acceptance of what the client told the therapist which defined the therapeutic encounter as fundamentally different to that of a forensic assessment.

7.3.8 The potency of an objective therapists' evidence

The evidence of the three child therapists who worked in medical settings, remained in the evidence pool and was adopted by the judge as their understanding of what had occurred to the child. These three professionals were distinguished by a number of characteristics. Firstly, they undertook their own assessment, and established that they had maintained an objective stance vis-à-vis the allegations, or 'an open mind'. All three were employed in work roles where the assessment of child sexual abuse and the provision of therapy with children were core responsibilities. Two of these professionals were social workers based in two different child protection units situated in teaching hospitals. The third was a psychologist from a European Country, who worked within a multidisciplinary medical team. All three therefore worked in medical settings.

These three child therapists who successfully presented children's material to the court represented a minority of the sample and have a specific agency profile. The judicial preference for these professionals who worked in a medical model and a scepticism about child protection professionals, creates a two-tiered child protection/assessment system.

Children's experiences are more likely to be assessed and accepted in court if they are successfully referred to a child protection unit in a hospital. This disadvantages children who are interviewed by child protection officers or counsellors who work in other professional settings or theoretical models. While the three child therapists successfully found the narrow opening through which their evidence could pass, this success illustrates of the difficulty that exists in getting evidence into the Court about children and from children.

A significant finding is that in these three cases judges preferred evidence from these child therapists over that of the court-ordered assessing psychiatrists. When child therapists from a medical context were pitted against the court-ordered assessing psychiatrists, the delineation of assessor versus therapist that was underlined as an important demarcation in professional role, faded in its importance and was not applied as a reason to diminish the reliability of the assessment. The evidence presented by the child therapists will be examined in more detail in Chapter Ten.

7.4 Discussion

7.4.1 The preference for the medical model

The first process undertaken by judges was an evaluation of the evidence that was not a result of a court-ordered assessment, for the methodology problems or for the presence of contamination. The majority of this evidence was assessed as unsound or affected by contamination or was derived from therapists who were assessed as biased towards their

clients and was thus devalued in comparison to the court-ordered assessments. The high level of scrutiny applied to all evidence from child protection officers was not applied to court-ordered assessments.

The judicial scrutiny and subsequent disqualification of evidence from child protection officers resulted in a loss of evidence from children and about children. The other source of rich information about children was from the small number of child therapists, but as there were only a small number of these involved in the sample, this limited the acceptable sources of information about children. The retained evidence was predominantly informed by a psychiatric model and the separation and divorce literature, thus skewing the body of evidence that was primarily available to judges towards a more sceptical stance about the allegations and a limited focus of assessment on the parental dispute. The scepticism about evidence from the child protection officers is consistent with the sceptical position taken in the 'backlash' literature and results in a refocusing of the case on information that is collected within a separation and divorce paradigm.

A more even-handed response to evidence that may be contaminated, would be to assess the degree of contamination before a decision was made about whether to discard the evidence. This approach was undertaken in the two cases where the court-ordered assessors were found to have potentially contaminated children's evidence, or to have been biased. In these cases the judge evaluated the level of compromise to their assessments and retained the parts that were not affected.

There was a consistent discrepancy between the findings of the State child protection departments and that of the court-ordered assessing psychiatrists. The material that these two professional groups reviewed was differentiated by the timing of their involvement and the theoretical frame in which the two professional groups operate: child protection interviews in all cases occurred some time before the Family Court assessment. In contrast to this, material presented to the court-ordered psychiatric assessor would have usually been relayed to child protection professionals, solicitors, family and friends and scripted in affidavit material before being retold in the family report interviews.

The dismissal of statutory child protection officers' assessments may be related to structural differences; these investigations are undertaken in another jurisdiction where there may be different standards related to evidence and methodology (Family Law Council, 2002). In some judgments criticisms about contamination within child protection interventions may have been warranted. However, there was no evidence that there was an understanding of the child protection environment and the specific demands it placed on child protection officers. The dismissal of their assessments resulted in a significant impact on the Family Court's ability to assess the allegations. Court ordered assessors undertook assessments long after the allegation was originally made. It is reasonable to conclude that these delays diminished the ability to make reliable findings.

Psychiatrists were the most influential professional group providing evidence in the sample. Of the 18 cases in which court-ordered psychiatric and clinical psychology assessors gave evidence, their recommendations were influential in the judicial findings

in all but four cases. Court-ordered assessors provided assessments of the family, critiques of other professional interventions, and they developed theoretical explanations about the allegations. Theirs was a position that was remote from the immediate crisis of a disclosure of child sexual abuse.

When court-ordered assessing psychiatrists considered child sexual abuse allegations they did so from within a sceptical family dispute model: unless there were admissions or obvious pathologies within the father that indicated that sexual abuse was probable, they concluded that there was no risk related to the allegation. The clinical psychologist who undertook assessments in two cases made a positive finding in one case and a negative finding in another, so no inferences can be drawn about the paradigm that she was using. While there was limited reference to specialist knowledge about child victims in these assessments, there was no specialist information about the assessment of sexual perpetration.

There was specific invocation of Gardner's PAS (1987) in three cases by psychiatrists, when they made recommendations to reverse residence because the mother had alleged possible child sexual abuse by the father. In one judgment this recommendation was solely because the mother had made the allegations, not because of any deficit in her parenting. Thus, the mother's punishment for making what was apparently a false allegation against the father was a higher priority than the consideration about the child's relationship with each parent or their capacity to care for them. This appeared to be a

prioritisation of punishment of a mother who is seen to be vindictive, over an analysis of the needs of the child. The reversal of residence parallels experiences reported by mothers seeking protection in the Courts in the USA (Neustein & Goetting, 1999).

The dismissal of child protection evidence and the use of court-ordered psychiatrists and clinical Psychology assessors to investigate allegations, results in the Court relying on a narrow professional base from which evidence is drawn. As a result, the judges saw these allegations primarily through a psychiatric lens, typified by a critical analysis of the alleging parent.

7.4.2 The loss of children's voices

Allegations from children were treated by court-ordered assessing psychiatrists in some of these cases as derivative of the adults who made the allegations. The court-ordered psychiatrist in the De Maria case for example, relied on an assumption that Mary made a false allegation in order to please her mother, an assumption that is congruent with the sceptics' position (Gardner, 1987). In fact, there was a paucity of assessment of children and their allegations reflected in these judgments. There was no analysis of the individual characteristics of the child, or of the family and parental dynamics that might shed light on their experience of their family and if any abuse had occurred as (e.g., de Young, 1986; Kelly & Johnston, 2001; Johnston, Walters & Olesen, 2004; Lee & Olesen, 2001; Sgrio, 1982). The court-ordered psychiatric reports appear to suffer from the effect of the presupposition that child sexual abuse was unlikely and from a narrow parental focus. Their narrow conceptual frame led psychiatrists to collect only evidence that would confirm their views and the inevitable conclusion: that the mother had created a false

allegation and consequently, there were no risks for the children. This bias was not addressed in the judgments.

7.5 Conclusion

This chapter has reviewed the methods of comparative evaluation used by judges in considering conflicting evidence, thus exploring the research question: How do judges make decisions when there are disputes in expert evidence?

In dealing with the contrasting evidence that is before them, judges attempted where possible, to simplify the narrative of events and to manage the competing evidence by disqualifying evidence provided by child protection officers that contained positive risk assessments from the evidence pool. In judgments where there were positive findings of risk in relation to child sexual abuse, these risks were minimised. This is consistent not only with a reluctance to make positive findings of child sexual abuse, but also a reticence to properly assess the risks that children face (Parkinson, 1998). These findings support the conclusions that judges are influenced by a pervasive sceptical belief about child sexual abuse allegations, in particular those that are presented via child protection authorities.

This scepticism is promoted by the nature of the court-ordered evidence that judges primarily relied on. It is unclear what specific expertise the psychiatrists and clinical psychologists who undertook the court-ordered assessments offered the Court in relation to the allegations. Their evidence was primarily on the assessment of parents. There was

almost no evidence that was an application of specialist knowledge about the effects of child sexual abuse or about incest perpetration in the assessments by these professionals.

The contribution made by the psychiatric profession was to reinforce the notion, championed by the judges, that the assessment of child sexual abuse allegations in Family Court disputes should be focused in the parental conflict and maternal mental health problems. The preferential treatment given to the court-ordered assessments undertaken by these psychiatrists and psychologists, suggests a shared theoretical or value base position that continues the legal/psychiatric hegemony within the court: judges were oriented toward finding a way for the child to have a relationship with both parents, and these professionals leaned toward the presupposition that child sexual abuse was unlikely.

In short, in this research the psychiatric profession drew on the separation and divorce paradigm that interprets parental conflict as being the reason why there are allegations made in family law disputes (e.g., Benedek & Schetky, 1987a & 1987b; Gardner, 1994). In these conditions, unless there is an abundance of evidence from multiple sources that confirms the allegations, the chances of a positive finding of risk of child sexual abuse appear to be negligible.

The striking contrast between the trial judges' findings and the child protection officers' findings about the risk of child sexual abuse, suggests the two jurisdictions are operating with different operational thresholds for risk

In the majority of judgments mothers were the parent who brought the allegation to the court. The way in which mothers were assessed and conceptualised is explored in the following chapter.

CHAPTER EIGHT

MOTHERS UNDER THE LENS, AND CHILDREN OUT OF SIGHT-

WHO AND WHAT IS THE FOCUS OF ASSESSMENT?

8.1 Introduction – an unequal legacy

This chapter focuses on the gendered nature of assessment and decision-making in relation to mothers and grandmothers who raised concerns about child sexual abuse in Family Court hearings. Nineteen mothers and two maternal grandmothers brought concerns about child sexual abuse in this sample of judgments. There was a high level of scrutiny of their evidence with an examination of their motives, mental health and emotional stability as their allegations were predominantly interpreted within a parental conflict model.

This chapter will examine the following questions in relation to mothers:

What concepts and frameworks are relied on in the professional assessment of parents, children and allegations of child sexual abuse? and

How does the legal process respond to those who allege child sexual abuse?

In exploring these questions, this chapter also identifies the typologies of mothers that were found in the judgments; these are compared to the assessment methods identified in the literature.

8.2 ‘Gendered decision-making’: Mothers and their motives

The mother’s possible motive in bringing allegations of child sexual abuse is an *a priori* consideration before the allegations are assessed. The mother’s perceived motive sets the scene for the interpretation of evidence about the child. Characteristics that shed light on the possible maternal motivation for making the allegation were the subject of scrutiny and entailed: levels of vindictiveness, the collection or creation of evidence, the mother’s mental health and emotional adjustment. The mother’s protectiveness was also used to confirm the genuineness of her concerns and to determine whether she had acted consistently with a belief that child sexual abuse had occurred.

The presence of a mental illness or a high level of emotion in a mother was linked to the explanation that the mother had a genuine but misguided concern about the child. The most common explanation of how allegations arose were those that included an ‘over anxious’ or a ‘hyper vigilant’ mother, who, in the context of distrust and suspicion, interpreted innocent behaviours as indicative of child sexual abuse. This mother did not deliberately attempt to develop false allegations. These mothers were also found to have exposed their children to their angry feelings about the father. The exposure of children to their mother’s emotionality and parental conflict was understood as being a causal link to how children became involved in the development of a false allegation. This is evidence

of a link to the explanation of false allegations that were developed in the 1980s psychiatry literature (e.g., Blush & Ross, 1987; Green, 1986; Kaplan and Kaplan, 1981). This was evidence of the psychiatric/legal paradigm colouring the way in which mothers were assessed.

A ‘malevolent mother’ was identified in the judgments. This mother failed the ‘motive test’. She was found to have deliberately attempted to stop contact by deliberately concocting allegations. Three mothers fell into this category, and two of these mothers were seen as being vindictive. These two mothers will be the subject of detailed examination below.

Mothers were expected to balance the two imperatives: being protective but not disrupting the children’s contact with the father. They were strongly criticised when they were seen as not achieving that balance and were instead thought to be ‘hyper vigilant’ or ‘obsessed’ with the possibility of child sexual abuse occurring. They were also criticised in some cases for being ‘passive’ and ‘unprotective’, usually in the face of domestic violence.

It appeared that mothers and fathers were assessed differently in relation to the presence of parental empathy. It was only when a mother was assessed as not being empathic to her children that her level of empathy was noted. In contrast, when fathers demonstrated empathy it was noted and taken as evidence of good parenting and as contraindicating child sexual abuse.

8.3 'Bad mothers': Maternal vindictiveness

In six judgments mothers were found to be vindictive to varying degrees, and in half of these cases, there were mental health or emotional issues such as paranoia, depression and anxiety that interacted with behaviour that was considered to be vindictive (see Appendix II, Tables 3 & 4). In three cases mothers were described as taking purposeful and conscious actions in a direct attempt to thwart the father's contact in the absence of any mental health problems.

One example of a case where the mother was considered to be vindictive was in the Grace judgment. Both the parents in this case shared the care of their son, Joshua who was seven years old. The mother had applied for residence of Joshua and for there to be no contact to the father. Both parents had extensive histories of invasive childhood incest. This mother was assessed in relation to her motives for making the sexual abuse allegation and the possibility that she had created false allegations:

Serious allegations have been made about Ms Grace's behaviour with Joshua. An exploration of Ms Grace's relationship with Joshua requires discussion on four main issues. The first is her alleged desire to 'pay back' Mr Grace for limiting her to supervised contact after the first Court case.

(Grace judgment, number 11)

There was evidence that alleging mothers and grandmothers were routinely assessed for the presence of vindictiveness. The notation of the absence of this characteristic occurred

in two cases, on one occasion to a mother and on another to a grandmother. These women were both assessed as having emotional and mental health issues, however, vindictiveness was ruled out as the motive for them bringing the allegations. In three other cases vindictiveness was seen as a motivation for other behaviours, although it was not linked to the reason for bringing an allegation of child sexual abuse.

One of these women was the maternal grandmother in the Burchfield case. She had made allegations that her son-in-law had sexually abused his five year old son Tom (her grandson). Tom had been taken to the doctor and was found to have an anal tear. He had told the doctor that this father had ‘stuck his finger up his bum’ in a public toilet before a contact changeover.

The judge considered the possibility that this grandmother’s motivation for making the allegation was that she was angry with her son-in-law because he had battered her daughter (Tom’s mother) over a number of years, resulting in a head injury and multiple hospitalisations. The judge considered a range of scenarios that might explain the allegations. These included various types of interactions between the grandmother and Tom. The judge was offered two possible explanations for the anal tear: that it was the result of sexual abuse, or the passing of a hard stool. Relying on the ‘hard’ stool’ explanation, the judge concluded that the sexual abuse had not occurred, but also, that the grandmother had not deliberately influenced the child to make a false allegation:

This is an issue of the gravest kind and one which has to be approached with careful thought. But I am satisfied on the probabilities, having regard to the evidence, that it [the sexual abuse], did not in fact occur.

*If it did not happen, the question then to be asked is why did Tom say it. Did he not say it at all initially, but his later statement came about because he was coached by his grandmother to implicate his father in wrongdoing when his injury came to her attention? Did he make some innocent remark linking his father with his injury which his grandmother then deliberately misrepresented and succeeded in having him adopt?.....Did he in fact say it thinking it would please his grandmother to explain his soreness by blaming his father for it and cast his father in the worst possible light? These raise other questions about the maternal grandmother. **Is she so blinded by her loathing of the father that she would manufacture such a statement and succeed in coaching the child to repeat it or, alternatively, have the child adopt and repeat the accusation arising from a more innocent representation?** Either course could achieve her purpose of saving the children from harm as she perceives it..... I hold the view that she genuinely loves the children and is genuinely concerned for their safety and well-being and she would not abuse them in such a way...*

... there is nothing to suggest that this has been a deliberate campaign by her; more likely than not it has been unintentional or inadvertent or even careless.

[emphasis added]

(Burchfield judgment, number 13)

The judge's deliberations provide insight to the concepts that were influential in their considerations: despite the fact that there was no evidence to suggest that the grandmother had set out to coach Tom, this was nevertheless considered and then ruled out.

In another case the father's defence lawyer suggested that the mother was trying to stop contact by making false allegations about the father (her second husband and the father of the subject children). This mother was alleged to have already excluded the first husband from having any contact with the child of that marriage. The father asserted that she was repeating this pattern with her two younger two boys who were the subject children in the current court matter:

It seems to be suggested as part of the husband's case that what the wife is doing, in trying to exclude the husband from the life of these children, is similar to that which she did in respect of the step daughter's father. There is no evidence before me in this regard that I am able to base any finding on.

(Whitely judgment, number 18)

This description is similar to exclusionary tactics described as being used by mothers in the sceptical literature (Gardner, 1987, 1989b, 1994) and were raised in the hearings by the parties' legal representatives. Judges mused about the possibility that mothers were bringing allegations in an attempt to exclude fathers in a number of cases, but a positive finding was made in relation to this in only three cases.

The theme of the vindictive mother was seen in references to mothers having a desire to punish their ex-partners. The mother in the Proctor judgment is described for example, as denying her children a relationship with their father while she is punishing him:

The mother's behaviour is another indication of her inability to separate her needs from those of the children. Specifically her need to punish the father takes precedence over a child's need to have an ongoing relationship with both parents...

(Proctor case, number 17)

The so called 'vindictive mother' type was identified in some judgments by her activity in the relation of evidence. Mothers, fathers and grandparents were all identified as being involved in this activity: six mothers, one maternal grandfather (acting in support of his daughter) and three fathers were referred to as 'creating' and 'gathering evidence'.

Evidence gathering consisted of taking children to counsellors and doctors, which was seen as an attempt to collect evidence that would confirm allegations of child sexual abuse. The grandfather and mother in the Proctor case also recorded interviews with children, by videoing contact changeovers, and the mother was found to have falsified her diary entries that she then used as evidence in court:

... One of my concerns about this matter and the obsessive evidence gathering that seems to have consumed the mother and her father for now almost two years,

is that I have a real concern as to whether it will ever stop i.e. before the mother has somehow managed to exclude the children's father from their lives.

(Proctor judgment, number 17)

In all these judgments, the conclusion reached by the judges was that parents who collected evidence were doing so in order to prevent contact with the father and thus were attempting to manipulate the court system. The alternative possible explanation, that mothers might be attempting to obtain the prerequisite standard of proof that child sexual abuse had occurred in order to gain protection for the child, was not considered. This is despite the secretive nature of the crime that creates difficulties in establishing to legal standards, that a risk to children exists. This problem and the tendency to only see the collection of evidence in a negative light, has also been noted in the literature (Myers, 1990). This suggests that mothers are viewed in a stereotypical way in assessment, with an automatic reliance on the frame of the 'vindictive mother type' who is attempting to stop contact between the child and father. This stereotype appears to have been unaffected by the findings that mothers have been found to have high levels of commitment to facilitating contact despite danger to themselves in situations where domestic violence is an issue (Hester & Radford, 1996).

8.3.1 Archetypal vindictive/sane mother

While in most cases the judge explored the allegations in a manner that was dispassionate and non-blaming, as in the judgments discussed above, there were exceptions to this. Two mothers were described as perpetrating emotional and psychological harm to their

children through manipulating false allegations of child sexual abuse. These mothers were seen as fitting the Gardner profile of the alienating mother (1992a, 1994).

These mothers were described as carrying out extreme actions that included long-term manipulation of their children and deliberately creating false allegations about their fathers in order to stop contact. These findings resulted in a change of residence in one case (Hobbs, case number 9), and a phased reintroduction of the children to their father, with the possibility of a future change of residence, in the other case (Roberts, case number 4).

In these two judgments there is detail provided about the vindictiveness of the mothers and a number of common characteristics in these descriptions: their motives, the adverse effects of their behaviour on the children and the father's comparative parenting strengths. The judgments also contain references to chronic and unrelenting emotionally abusive actions by the mothers that are directed towards the children.

These mothers are seen as deliberately and repeatedly hurting their children and the father by the use of manipulation, threats and actions. Mental illness or related disorders were ruled out and as a result their allegations could not be attributed to any mental or emotional disturbance.

The mother in the Hobbs judgment for example, was thought to have manufactured a false allegation of child sexual abuse by manipulating the 15-year-old daughter Alison,

who then coached her younger sister, Jennie, aged seven years, to believe that her father had fondled her genitalia while she was in bed with him. Of a total of 12 references from all the judgments about vindictive mothers in the sample, eight were attributed to this mother. This mother's application to the court was for Jennie to live with her and for the two boys, who were 11 and 13 years old, to live with their father.

The court-ordered psychiatrist who assessed the case interpreted the mother's actions in a critical way, describing her as abandoning her eldest son and deliberately manipulating her teenage daughter Alison to coach Jennie to give a false statement to police. This had resulted in both the girls giving statements to the police and in the father being charged. The judge commented that this had resulted in an abuse of the criminal justice system. This mother is described as embodying the archetype of the vindictive ex-wife and manipulating mother who is capable of sacrificing her children in order to achieve her desires (Gardner, 1987; Turkat, 1997). The judge described in detail how the mother's evidence was contradictory and inconsistent with other evidence. In addition, the judge's personal experience of the mother during the trial appears to have negatively influenced their assessment of her:

The mother's evidence in cross-examination about what she contemplated at the time of her proposed relocation was not credible. It appears that she did not give any serious consideration to the implications for the children, was driven by her hostility to the father, and over-looked the children's interests.

(Hobbs case, number 9)

In all, the profile that was developed of this mother fits the typology of the alienating mother (Blush and Ross 1987; Gardner 1987; Turkat 1997) and in accordance with Gardner's PAS the court-ordered psychiatrist assessor recommended a reversal of residence.

The judge quoted the psychiatrist's report to support their conclusion that the mother's motive for bringing the allegation was that of hostility towards the father.

In this judgment the father was described in direct contrast to the mother, thus creating a polarity in the two parents: an evil mother and a saintly father. Most parents do not fit these extremes, but the judge in this case appeals to a primitive duality of decision-making and provides an example of the 'divorce induced polarisation' that has been noted as a powerful dynamic in the literature (McGraw & Smith, 1992). The judge's compassionate retelling of the father's version of events and detail given to the emotion expressed by him emphasised the judge's identification with the father and a dislike for the mother. The assessor's report reflects the same polarisation and was also sympathetic to the father. The report was used to highlight the father's strengths:

In his evidence the father presented as sincere, composed, balanced, caring and committed to the four children. The court-ordered psychiatric assessor's report stated:Perhaps the most striking feature of Gary's presentation was the heavy focus on how the children had been affected by the marital conflict. He continually mentioned them, seemed insightful about their difficulties and showed

considerable empathy towards them, including the eldest child, who has accused him of child sexual abuse. While at times he expressed some anger towards his ex-wife, this appeared to be of appropriate proportions and he did not display the disrespect for her that she vented on him.

(Hobbs case, number 9)

This description of the father implies that the empathy he demonstrated towards his children was a contra indication to child sexual abuse perpetration. The allegation by the mother is used to highlight her deficiencies and as a consequence she is seen as the less desirable parent:

In her cross-examination the court-ordered psychiatric assessor testified that the father, 'Would win hands down on his parenting abilities'.

(Hobbs judgment, number 9)

Gary was seen as a victim-father who was empathic, nurturing and who had been unfairly victimised and maligned by his vindictive ex-wife. This negative focus on the mother resulted in there being no concurrent examination of the father's deficits or the characteristics and needs of the children. The focus of the judgment has thus become lop sided, focused on the mother's deficits. While it was assumed that the mother's motives were to deny the father contact with the children, the fact that a child protection officer and police had considered the allegations to be robust, was not discussed. Neither is the question examined of what action would be appropriate for the mother to take if she

genuinely believed that the father did pose a threat to the children's welfare. The judicial outcome in this case was for Jennie was to reside with her father and brothers, while Alison, who was considered too alienated from her father to be successfully reunited with the rest of her siblings, was to reside with her mother.

In this case the degree to which the mother's motive was underscored by the judge. Her apparent motive of vindictiveness was central to how the evidence was assessed and presented. This mother had fallen a long way short of the ideal of post-separation motherhood and was assessed as unable to promote the father's relationship with the children (Sevenhuijsen, 1986a). She was found to have deliberately manufactured allegations and allowed her children to become part of the plan to exclude the father. This raises the question: are men criticised as harshly when their motives are assessed in a negative light? This is addressed in more detail in the following chapter.

8.3.2 The demand for maternal protectiveness-a mother's burden

Mothers were also evaluated critically in relation to their ability to protect their children from violence and parental conflict and to provide child focused, nurturing care. In five cases after her allegations were found to have no substance, a mother's capability to cooperate with promoting contact was then assessed. In comparison to this, fathers however, were not assessed for protectiveness and their actions that were deemed to be nurturing were given greater emphasis than when the same characteristics were present in mothers.

There was no assessment of mothers being ‘protective’ of their children in the judgments, although there were eight mothers who were cited as being ‘unprotective’. For example, in the Duchamp case the 20-year-old daughter made allegations that her father had sexually abused her about ten years before. The mother had not known that this had occurred and her actions at the time of her daughter’s alleged rape were the subject of scrutiny during the trial. She was described in five different incidents as not protecting her daughter and being ‘passive’. She was criticised for not seeking medical help when her daughter was injured and bleeding vaginally at ten years of age, which was later disclosed as being a result of the father’s rape:

Despite the fact that, on her evidence, the mother was aware that Debbie was bleeding from her genital area, she did not take her to the doctor. A concerned mother would obviously have sought medical attention for a ten year old girl who had injured her genital area to the extent where it was bleeding. ...

(Duchamp judgment, number 20)

This mother was also criticised for not using the legal system to protect her younger daughters when they ran away to their father’s home the year before. She is seen as inadequate and defined as ‘passive’:

... she made an application for the return of Samantha, which the Chamber Magistrate declined to proceed with. On the other hand, she gave evidence to the effect that she knew enough about court proceedings by that stage to know that allegations without evidence were unlikely to succeed, and, until Debbie was

ready at least to speak to a Counsellor, she had no evidence which would justify an application for the return of Hetti and Samantha against their wishes.

(Duchamp judgment, number 20)

The criticisms made about this mother did not take into account the likely effect of the father's manipulative personality in diminishing her capacity to protect her children. She was criticised for being 'passive' despite her unsuccessful attempts to access help through the legal system. Other research findings about mothers' experiences of attempting to protect their children in the legal system have similarly identified that there are many impediments to mothers who are not believed (Humphreys, 1999; Jenkins, 2003; McInnes, 2003). The judge's view of this mother was reminiscent of the descriptions cited in the literature on incest mothers who were seen as contributing to the abuse by their own passivity in the family and dependence (Herman, 1981; Laing, 1996; Salter, 1988).

This was one of only two cases where mothers did not make the allegation of child sexual abuse about their children. While the majority of the other mothers were criticised for bringing allegations, the two mothers were both effectively criticised for not making an allegation, or for not being aware of the abuse or preventing it. It is also of interest that 'protectiveness' was not a characteristic explored about any father in this sample, which suggests that while it is linked to the assessment of mothers: it is not expected to be present in fathers.

Once judges had determined that child sexual abuse had not occurred, their attention turned to whether mothers, who had made these allegations, were capable of promoting paternal contact. In the Kandinsky (2), Fine (19) and Hay (21) judgments, the issue of the mothers' enduring negative feelings towards the fathers were assessed as inhibiting their parental co-operation and as a threat to future contact:

It is important for the wife not to interpret statements of the children as disclosures of abuse or their statements as illustrating a lack of desire to visit their father. Further, it is important to their future for her to create an emotional climate where the children do not feel compelled to make statements which lead her to jump to the conclusion that they have been abused or maltreated in some way while with their father.

(Fine judgment, number 19)

In these cases the mothers' negative feelings about the fathers was not, however, considered so detrimental that a reversal of residence was ordered, although that option was considered by each of the judges in these cases. These mothers are expected to be able to make an 'about turn' and promote contact once the judge told them that the sexual abuse had not occurred. This would be a difficult task to achieve if the mother was unconvinced by the judge's reasons or if her concerns were entrenched. It is an example of the impossible situation that mothers find themselves in when attempting to protect their children in the Family Court.

The most frequent criticism made of both mothers and fathers was that they were involved in conflict in front of their children. Mothers were also criticised for this more frequently than were fathers despite the descriptions of the conflict being of an interactional nature between both parents. In the Pollock case, ongoing conflict was noted by the trial judge, who quoted the findings that there was no sexual abuse from the interim hearing, although the trial judge believed the father should stop bathing with the children:

One of the issues before his Honour Justice X was the wife's alleged fear that the children may have been sexually abused by the husband. After the children reported to the wife that they bathed with the husband and washed his genitals she reported this to the statutory child protection department who arranged for interviews and investigations. The allegations were found to be inconclusive and no further action was taken. His Honour heard evidence on this issue and said:

*"I am satisfied that there is no evidence of abuse of the children in that regard and that the children are **not exposed to any unacceptable risk of abuse**. However the bathing routine is inappropriate and must cease. The husband appears to acknowledge that."*

What is also clear from his Honour's findings in the judgment is that there remained a high level of conflict and difficulties in communication between the husband and wife.

(Pollock judgment, number 5)

This excerpt illustrates how concerns about child sexual abuse are understood primarily as a result of the context of parental separation and an associated lack of communication between the conflicted parents. However, it appears that the parental conflict explanation is the only one that was pursued: there was no exploration of how the children perceived the routine of bathing with their father.

In sum, mothers were assessed against criteria that were not applied to fathers, some of which appear impossible to comply with. For example, there is a paradoxical expectation that the mother will fulfil the role of protector against the children's father (if he poses a risk) but also facilitate contact. This places mothers in a double bind: if they do protect their child they will stop contact and this will appear to be interfering with contact as described by Turkat (1997) in his 'Malicious mother syndrome'. When mothers do appear to have acted vindictively, as in the Hobbs judgment, the dynamics of focusing on the mother's deficits dominates the assessment and inevitably there is an exclusion of a thorough assessment of the father or/and the children. Moreover, 'parental conflict' is used as an explanation for allegations in the absence of understanding the child's experience of the sexual behaviour or practices that have been raised as issues of concern. While children are the reason why parents are in court, they are not the subject of the judgments. Their experiences, perhaps the most significant factor in determining if a practice has been abusive or not, may not even be considered.

8.3.3 Mentally ill mothers and grandmothers: maternal mental illness and ‘state of mind’

The mental health of mothers and accusing grandmothers was one of the filters through which allegations were understood and interpreted. Ten mothers and one grandmother (or about half of the mothers) were assessed for issues concerning mental health or heightened levels of emotion, which were linked to explanations for how false allegations had arisen. If there was a finding of mental illness or heightened emotions that impaired logical thought, the allegations were explained as being the result of the distortion of reality through delusions and high levels of anxiety coupled with suspicion and parental conflict. Moreover, mothers’ emotions were described in judgments as ‘spilling over’ into their interactions with the children.

Mothers were described as the perpetrator of psychological abuse or as exposing children to emotional outbursts in 11 cases. In the van Gough case the mother was assessed as suffering from an ‘adjustment disorder’ and there was evidence that she had verbally abused her husband after the end of the relationship. She was found to have exposed their child to conflict and her labile emotional state:

Three tapes of phone calls made by her to the father's answering machine were played during the hearing. They amount to a profound emotional demonstration of the mother's attitude to the father and exhibit a deep, abiding hatred and resentment towards him

(van Gough judgment, number 1)

Mothers in the sample had diagnoses of major depression, personality disorders, factitious disorders (resulting in behaviours of Munchausen's syndrome by proxy), possible paranoia, anxiety and adjustment disorders. Two mothers were assessed as having untreatable personality disorders that had a severe negative effect on the child. As a result, the residence was reversed to the father in both of these cases.

'Hyper vigilant' and 'hypersensitive' were terms used to describe five mothers and one maternal grandmother who made allegations, thus suggesting an explanation for why they may have held a genuine but misguided belief that their children were being harmed. Hypervigilance was a pathologised state described as being highly sensitive to the possibility of child sexual abuse occurring:

There is ample evidence to show that the mother has become hypersensitive in guarding the child's interests... I find that her severe separation anxiety to be the explanation for her being upset, and that she told the mother something that she thought would satisfy the mother, otherwise being unable to articulate her anxiety.

(van Gough case, number 1)

In this case the mother alleged that her husband and her brother-in-law had sexually abused her daughter, Lizzie, who was four years old. Lizzie was questioned by her mother and then interviewed by child protection officers. Her disclosure was along the

lines of being touched by her father. Her mother gave a history of experiencing anxiety and being depressed after the separation. After hearing the evidence, the judge summed up their findings about what they believed had occurred:

I do not believe that the mother invented Lizzie's statement, but I find that the mother's heightened tension and anxiety state caused her to misinterpret Lizzie's statements. Instead of treating that statement as innocent, her heightened anxiety state caused her instant suspicion, and it is to be recalled that she was expecting something dreadful to happen to Lizzie. She immediately assumed Lizzie had been touched. When Lizzie responded to the mother's direct and leading questions, she said it was the father. The mother treated that statement not as innocent, but as revealing and damning.

(van Gough judgment, number 1)

In addition to the mother's heightened anxiety, the judge found that the child protection officer's assessment had contributed to the development of a mistaken belief that abuse had occurred, by the use of leading questions in their investigation. As a result, the positive finding of risk by the child protection officers did not remain in the pool of evidence. The judge's narrative reconstructs the evidence into a chain of events that are based on the mother's anxiety, namely:

- a. the mother thinks something dreadful will happen to her daughter,
- b. the mother becomes suspicious of what the daughter says after contact with the father,

- c. the mother interrogates the child using direct and leading questions, and as a consequence,
- d. the child says ‘it was the father’,
- e. the statutory child protection officer also used leading questions when they confirmed abuse, and as a consequence
- f. a false allegation is made in the Family Court.

This reconstruction of events has the effect of stripping multiple, conflicting evidence down to a single sequence of events in which a false allegation developed. Where conflict in the evidence could not be reconciled, it was ‘pruned’ and discarded from the final narrative. This resulted in a distilled narrative that had clarity and certainty. In this case it is the allegation of abuse and the positive findings from child protection officers that were discarded.

Lastly, in this case, the mother’s suspicion was seen as consistent with her diagnosed post-separation ‘adjustment disorder’ and these factors were thought to be the genesis of the allegation:

She had not in any way accepted that the relationship was finished and was seeking to have it continue, but at the same time she was suspicious of the father to the extent that she thought he was involved in the burglary of her house. In the middle of her anxiety and adjustment disorder she had become concerned about the brother’s mental health after the paedophilia conversation.

(van Gough judgment, number 1)

Here, the mother's state of mind was seen as the fertile ground in which an allegation of child sexual abuse by the father and paternal uncle grew. The reference to the mother's 'adjustment disorder' was a direct reference to the context of separation and divorce and the mother's willingness to be suspicious about the father. The reliance on the context to interpret mothers' allegations was evident in a number of other judgments. In the Fine case, for example, the judge agreed with the court-ordered psychiatrist that the mother's feelings about the father had led her to believe that sexual abuse had occurred:

I agree with the psychiatrist's opinion as to the likely explanation for the statements made by the child i.e. her attitude towards and feelings about the husband led her to jump to conclusions.

(Fine judgment, number 19)

The dominance of this paradigm influenced how the evidence was interpreted, and while the child protection investigation resulted in a confirmation of the allegation, the Family Court finding was that there were no unacceptable risks of child sexual abuse and contact was to resume.

In the Johns case, the children were living with their maternal grandmother and had alleged sexual abuse by their father who lived overseas. Their mother had sent them to be cared for by this grandmother on a temporary basis. However, while they were in

Australia the grandmother's partner had also sexually abused them. He was charged and jailed as a result.

This grandmother was criticised for being hyper vigilant, although it could be argued that she had good reason to be anxious and vigilant about sexual abuse as the children had now been abused by two different perpetrators. Moreover, Finkelhor (1980) found that the strongest factor in predicting child sexual abuse was a previous history of sexual abuse. However, her response was pathologised.

In the Grace judgment, there was ample evidence that both the parents had a significant mental health problems, and that the mother in particular had a personality disorder. The psychiatrist who was the court-ordered assessor had proposed that she had used the mechanism of the 'projection' of her own experiences of child sexual abuse onto the child and that she may be gaining attention from making the allegations:

The second point concerns her 'projection of her own sexually abusive experience' on to Joshua. Thirdly, the amount of attention and rewards she is gaining from her endeavours to make him well again should be considered.....

(Grace judgment, number 11)

In this case, there was ample evidence presented through medical records that the mother did have a long-term history of a serious mental health problem and the consideration of 'projection' and gaining attention may well have been appropriate. However, the use of

this concept of mothers ‘projecting’ and thus creating false allegations was used in a number of cases as a hypothesis with no supporting history or evidence. It is a concept that has gained wide acceptance and has consequently been applied in a number of judgments as a ‘decision-making shortcut’ in cases where there is no evidentiary support for it. This may be because, in a case like this one, the hypothesis has proved to be useful in a memorable case (Starr, 1993).

The centrality of the mother’s emotional and mental health in assessing these cases was underlined by a reliance on the use of the concepts of ‘projection’ or a ‘feed back loop’ that were seen as causing false allegations by children, or/and an erroneous beliefs by the mother. The mother’s expression of anxiety about contact in front of a child or exposure to negative feelings about the father was used as the basis for the court-ordered assessing psychiatrists to propose that an interactional process between the child and mother had resulted in a false allegation. The exact mechanism for how this occurred was not explained in the assessor’s evidence or in the judgment. The incomplete theoretical explanation that there was a ‘feed back loop’ from the child to the mother was offered in one case as the explanation for how this had occurred.

In the following excerpt it is the interaction of mother’s anxieties and the child’s response that is thought to result in children telling their mother that their father had done something sexual to them:

His second statement is made in the situation where I am satisfied that he was aware that the statement by him of bad things done by his father would find approval with his mother.

(Whitely judgment, number 18)

Thus, the most common explanation for allegations throughout the judgments was that the child made the allegation to the mother, grandmother or a professional in order to please or appease their primary carer (Appendix II, Table 2). This explanation was raised by court-ordered assessing psychiatrists in seven cases and was also used by judges in a total of ten cases. This suggests that this explanation is part of a psychiatric/legal assessment schema used within the court and shared by psychiatrists and judges. This explanation is reminiscent of the typologies developed by the psychiatrists of the 1980s and 1990s (Blush & Ross, 1987; Green, 1986; Kaplan & Kaplan, 1981; Sink, 1988). In this literature an emotionally overwhelming and needy mother, with diffuse emotional boundaries, projects her needs on her child and the child responds accordingly.

However, this explanation relies on the receptiveness of the child to take on the mother's anxieties, and for the child to respond to such anxieties by offering an allegation of abuse. Not all children who are exposed to anxious mothers will be receptive to such anxiety, nor would they always respond with sexual abuse allegations about their fathers. The particular characteristics that result in a child responding in this way were not identified in the judgments, although there has been discussion in the literature about the conditions required for this dynamic to develop (e.g., Lee & Olesen, 2001). Kelly and Johnson

(2001) in their revision of parental alienation note that children react differently to the circumstances of separation and parental conflict, the differences being related to such things as the quality of the relationship with the parent prior to separation, whether they have witnessed domestic violence or been the subject of child abuse by that parent, or whether they have an affinity with the parent. While much of this literature is recent, there has been earlier literature that has emphasised the need to focus on the characteristics of the child in order to understand their allegations (e.g., de Young, 1986). Such characteristics are about the child, and would form the basis of an assessment of possible alienation and of allegations of abuse. However, this focus on the characteristics of the children is not discussed in these judgments. Instead, the focus remained steadfastly on the mother and her pathologies.

This explanation of ‘projection’ was used as formulaic response by court-ordered assessing psychiatrists in situations where there was opportunity for interaction to occur between the mother and child. In the absence of any evidence to the contrary, the explanation that children made allegations of sexual abuse to please their mothers, found a comfortable resonance with the sceptical stance about allegations in family law disputes and the separation and divorce literature. It is also consistent with the principle of the continuation of contact with the nuclear family after divorce.

Interventions by child protection professionals were also seen as reinforcing or creating erroneous beliefs in mothers about the occurrence of child sexual abuse. The explanation

that allegations were a result of contamination by professionals was found to be a plausible explanation by judges in four cases.

In two cases the court-ordered psychiatric assessor attributed the development of an erroneous belief in the mother to the intervention of child sexual abuse counsellors. It was proposed that these mothers then projected this belief onto their children:

The court-ordered assessing psychiatrist did not himself form the view that the child had been "coached". He described a process in which, in the course of various interactions between the child and the mother and between both of them and various health professionals, the child and the mother could both come to believe that the child had been abused even though this had not in fact happened.

(De Maria judgment, number 3)

This case provides an example of where there is no explanation for the precise mechanism of how the false allegation developed, or how counselling methods gave rise to a child who responded with sexualised behaviours. The process that the assessor relied on to develop an explanation was based on speculation of what they assumed had taken place between the mother and child and the other professionals. The explanation that the child had made the allegation to please the mother had no evidentiary basis, indeed there was no indication that evidence was sought. The alternative hypothetical explanation that the child had been the subject of sexual activity was not considered. This absence confirmed the use of the presumption that, in cases where there was no strong

corroborating evidence, the possibility of child sexual abuse was not the subject of the assessors' or judges' consideration.

In summary, there were two types of scenarios used to explain false allegations. The first was when mother-child interaction resulted in 'programming' or 'coaching'. The second was in relation to mental health characteristics of the mother that included diagnosed mental illnesses and/or emotional states such as hypervigilance, suspicion and anxiety. Both these explanations were the result of an assessment focus on the mother. In the context of separation and the parental conflict these states were seen as the necessary preconditions for 'projection' to occur and hence for false allegations to be made. This explanation relied on an untested theory that did not take into account or seek out information about the individual characteristics of the child.

8.4 Exceptions – Glimpses of a domestic violence paradigm

There were nine cases in which domestic violence was alleged to be a characteristic of the parental relationship. In three cases the effects of current domestic violence were considered in terms of the effect on the mother's ability to function as a parent. The domestic violence was analysed as a significant factor in these cases.

In five judgments, the mother was described as a victim of abuse and fathers as instigating the violence. In these cases the impact of long-term domestic violence against the mothers was described in a detailed history that was taken during the assessment.

These judgments were noteworthy in their analysis of power issues between the parents that resulted in the conceptualisation of the perpetrator/father abusing the victim/mother.

This provides a conceptual framework that is consistent with a domestic violence framework, in particular because the effect of the violence is considered as a factor that impacts on the mother's ability to function. This contrasts with the sceptical framework that focuses on perceived maternal weaknesses. In this assessment paradigm the mother's capacity is related to the effects of the ongoing harassment by her ex-partner and accordingly, the presence of the domestic violence was examined as a risk factor for children.

8.4.1 Judicial insight into the dynamics of manipulation

In four cases there was an appreciation of the impact of the dynamics of the abuse of power within families. This was demonstrated by an analysis of the subtle uses of manipulation as a part of the repertoire of abusive behaviour by a father or/and ex-partner. Four fathers were described as manipulating their children and ex-partners in this way and the impact of this on the children and the mother was the subject of judicial consideration.

In the Franks judgment, for example, the judge considered the possibility that the father may be creating a false description of the mother so she would appear to be suffering from a personality disorder. In doing so the judge quoted the psychiatrist who had undertaken the court-ordered assessment:

The court-ordered assessor concludes significantly:

“What needs to be determined is whether the father’s account of her dramatic, irrational and angry outbursts to very minor provocation is in fact reflective of what occurred, or whether in fact this is part of a cunning, well-planned exercise and a sophisticated trap into which the wife is being led. It is within the realm of possibility that what the father, who himself is a mental health professional, has laid out before me a picture of personality disorder in order to lead me to such a conclusion. Inescapably, however, it is also very possible that in fact his description of events, behaviour and reactions by the wife all clearly depict quite severe personality dysfunction”.

(Franks judgment, number 12)

In other cases, women were found to have experienced abuse at the hands of their ex-spouses during the period of the litigation. The assessment of this violence was an influential factor in the judicial outcomes of ‘no contact’ between the father and children. These patterns of chronic and severe violence by the fathers was conceptualised within the domestic violence paradigm. This marks a conceptual move away from the separation and divorce to the domestic violence paradigm.

What was different about these four cases that caused this conceptual shift? These judgments were characterised by the safety of the children and mother being the

overriding consideration that marked the shift to the use of the domestic violence paradigm (Jaffe et al., 2003).

The answer is found in the characteristics of the abuse. Firstly, in three of these cases there had been long-term domestic violence against the mothers that had a demonstrable negative impact on the children. In all four cases there was substantial evidence that the children were negatively impacted by paternal abuse of them, and of their mothers. In all four of the cases there were long-term patterns of abuse. In two of the cases judges found that there was also a risk of child sexual abuse and the probability of continuing domestic violence. In the remaining two cases the likelihood on going harassment was estimated to be high. In addition, the fathers in these cases presented poorly during oral evidence and demonstrated to the judge their own behavioural traits of lack of anger management, or/and deceitfulness.

In short, these four judgments were ones in which there was high levels of evidence supporting that there had been long-term problems from the domestic violence and as a result there had been serious effects on the children. While judicial reasoning in the judgments demonstrated an awareness of the dynamics and effects of domestic violence on mothers and children, it also demonstrated that the domestic violence paradigm was only applied to selected cases, where there is strong supporting evidence.

The comparison between the level of understanding of domestic violence demonstrated in these judgments where the domestic violence paradigm was applied, and the

understanding applied to child sexual abuse and incest allegations revealed a comparatively lower level of understanding about child sexual abuse and incest dynamics. There were no parallel processes of a specialist assessment paradigm used to assess and test out child sexual abuse and incest allegations.

8.5 Discussion: The mother categories

There were three categories used to describe mothers in these judgments. They are the ‘anxious and projecting mother’, the ‘vindictive mother’ and the ‘aptly concerned mother’. These categories are outlined below.

8.5.1 The ‘anxious, projecting mother’: the use of maternal psychological and psychiatric characteristics to explain a false allegations

The majority of mothers were assessed according to their mental health and emotional state: over two thirds of the mothers were described as being volatile or hyper vigilant and as ‘projecting’ their anger or anxiety onto their children.

The reliance on these maternal characteristics in the assessment, reflect an assessment paradigm that is based on the parental conflict frame. That is, the mother’s concerns are a result of her response to the current context of parental separation and conflict. The mothers’ anxiety and mistrust of the father, and/or mental illness were portrayed as playing a causal role in the development of her erroneous belief about child sexual abuse. The emphasis placed on the mother’s mental health status has also been noted as problematic in North American research (Neustein, Burton & Quick, 1993) where

maternal allegations of child sexual abuse were commonly met with an explanation that the mother was paranoid.

Contrary to the emphasis that mothers created false allegations as a result of their emotionality or mental illness, there was evidence that maternal anxiety about child sexual abuse was based on sound reasons in over half of these cases. There were six mothers whose concerns included a lack of physical boundaries that were confirmed in observation by court-ordered assessors, or found to be likely by the judge. Since poor physical boundaries between a parent and child may be a forerunner of child sexual abuse or/and grooming of the child, it is not surprising that these behaviours elicited heightened concern in mothers. However, mother's reactions to these boundary issues were primarily interpreted as evidence of anxiety, hypervigilance or vindictiveness.

When the effect of maternal mental illness or personality disorder on children was assessed as serious, residence was changed. In one case it was changed from the mother to a shared care arrangement that favoured the father, of four days to the father and three to the mother each week. In the other case, residence was changed to the paternal grandparents after the mother was diagnosed with Factitious Disorders, resulting in Munchausen's syndrome and Munchausen's syndrome by proxy. However, because of the focus was on the mother's mental health, the paternal grandparents, with whom the child was to reside, were not the subject of any detailed assessment. There was no evidence that they had been assessed in any depth for their suitability to take the long-term care of the child.

One significant issue that relates to these cases is that maternal mental illness does not rule out the possibility that child sexual abuse had occurred (Humphreys, 1999), or that the conditions were being established through grooming, as a precursor to sexual abuse. Indeed these children may be more vulnerable to the approaches of sexual perpetrators, as their mothers may be less able to elicit protection for them. Increased risk of incest has been found to be a correlate of maternal mental illness by Herman (1981). Thus, it follows that consideration and testing of the evidence that might support concerns of abuse should be as rigorous as those in other cases where there are no maternal health issues. However, maternal mental illness was used as an explanation for false allegations, thus halting further exploration of possible risks to the child.

Court-ordered assessors, particularly psychiatrists, drew on explanations that were identical to the psychiatrists who were writing in the 1980s and 1990s about child sexual abuse allegations in family law disputes. For example, the SAID formulation by Ross and Blush (1990) proposed that alleging parents were histrionic, or had borderline personality disorders. The actual mechanism proposed for the development of a false allegation was usually not explicitly outlined, instead general psychological theories were assumed to have been used, such as ‘projection’ and the use of ‘positive reinforcement’, ‘feed back loops’ and ‘suggestion’.

This maternal mental health focus and the dismissal of child protection evidence did not allow an informed judicial assessment of the risks to the child of child sexual abuse.

Instead, it focused the assessment on the risks to the child from the maternal mental illness (Humphries, 1992).

8.5.2 The vindictive mother

The assumption that mothers were motivated to make false allegations through vindictiveness was present in a number of judgments. However, there were two mothers in this sample who were found to be motivated by vindictiveness in the absence of any mediating mental health problems. These mothers were seen to fall far short of the classic ideal of motherhood of selflessness, nurturing and protective of her children (Summers, 1975) or the mother conjured up by the psychiatry movement of the 1950s and 1960s, who developed close and nurturing attachments with her children (Winnicott, 1958; Bowlby, 1958). They were described as deliberately manipulating their children so as to create false allegations of child sexual abuse, thus conforming to the definition of the self absorbed, vengeful parent described in Gardner's typology of an alienating mother (e.g., 1987, 1989b, 1994). The actions of these mothers were described in detail, while the fathers and their children fell into the background and were described as victims of maternal manipulation and emotional abuse. The predominant focus on the mother had the effect of disallowing an in-depth analysis of the father or the children.

8.5.3 The aptly concerned mother

An allegation of child sexual abuse did not on its own elicit a response in the assessment process of assessing the alleged abuse in detail, as was seen in the four cases where the domestic violence model was employed. Therefore there was no systematic evaluation of

existing power imbalances, or dynamics of incest or of risk. A shift in focus was achieved in the four cases that contained histories of domestic violence that were collected by child therapists and one clinical psychologist who was a court-ordered assessor. These professionals presented the risks that related to the children to the judge, and as a result, the evidence about and from children including their feelings and wishes, was given weight. The domestic violence model centralised the assessment of evidence about abuse and associated trauma of both children and their mothers. The focus was moved from the mother's pathology or parental conflict onto the child and the need to plan for safety. The behaviour of alleging mothers was framed within the context of a domestic violence (rather than parental conflict), and of abuse and manipulation. This model, while promising a more complete understanding of child abuse allegations, was used only in a minority of cases and predominantly in relation to domestic violence rather than the child sexual abuse allegations.

8. 6 Conclusion

This chapter has explored the way in which these mothers and maternal grandparents have been assessed and how their allegations have been conceptualised by court-ordered assessments and judicial decisions. This exploration has provided answers to the research questions in relation to mothers:

What concepts and frameworks are relied on in the professional assessment of parents, children and allegations of child sexual abuse? and,
How does the legal process respond to those who allege child sexual abuse?

8.6.1 Concepts and frameworks

Mothers or grandmothers who brought allegations of child sexual abuse to the court became the primary focus of the assessment. In turn these assessments reflected the body of knowledge used by the assessors: the psychiatric/legal paradigm. This resulted in the use of diagnostic categories, psychological theories and the descriptions of possible dynamics between the mother's mental or emotional states and the child making a false allegation.

At a higher level of analysis, the concepts used to assess mothers were derived almost exclusively from psychiatric formulations of the separation and divorce literature. The allegations were given weight only if there was other supporting evidence. There was no standard assessment of characteristics of child sexual abuse or incest within families in order to rule out the dynamics of incest. The focus on maternal factors diverted the assessment away from the child, their characteristics and that of their allegations. The predominant focus of the proceedings was therefore on the mother and included the risks she presented to disrupting contact between the father and child.

Assessors therefore relied on the context of the Family Court dispute to interpret child sexual abuse allegations rather than an abuse paradigm. An allegation of child sexual abuse did not on its own elicit a response in the assessment process of using a family violence paradigm that would ensure the evaluation of any existing power imbalances, or dynamics of incest and risk.

In short, it was only in a minority of cases where concerns about inappropriate physical contact or sexual abuse were assessed within an abuse paradigm. The alternative assessment model that reflected this paradigm allowed the full extent of domestic violence and its impact on both the mother and children to be explored. This model represents a shift in the paradigm informing the assessment model, from maternal pathology to the impact of trauma and violence on children and their mothers. In this framework, allegations are conceptualised differently: parental conflict may be renamed domestic violence and ‘inappropriate touching’ may be also be renamed as child sexual abuse. In addition, the behaviour of alleging mothers was framed within the context of domestic violence, abuse and manipulation. This paradigm was used only in a minority of cases and when it was used, it was predominantly applied to domestic violence rather than the child sexual abuse allegations.

Finally, by making allegations of child sexual abuse these women attracted intense scrutiny of themselves, their mental health, their emotionality and their motives. Maternal exposure of the child to her anxiety and emotions in relation to the parental conflict were pathologised and made the subject on intense scrutiny and speculation about how these factors would contribute to the development of a false allegation.

The maternal characteristics that were assessed and tested were those that would confirm Gardner’s typology of the PAS (1987, 1989b, 1994). As in this typology, the search for evidence that would support a view of a mother who was genuinely attempting to protect

her children from a real risk was glimpsed only in a few judgments. Instead, the search for maternal motives for bringing false allegations was central to the court-ordered assessments. The following chapter will examine the way in which fathers were assessed in the judgments and the implications for the assessment of risk.

CHAPTER NINE

THE ASSESSMENT OF FATHERS IN FAMILY COURT

HEARINGS: SEXUAL ABUSE PERPETRATORS

OUT OF SIGHT

9.1 Introduction

This chapter examines the assessment of fathers who were alleged to pose a risk of child sexual abuse to their children. This includes an exploration of the second research question: What concepts and frameworks are relied on in the professional assessment of parents, children and allegations of child sexual abuse?

This chapter analyses how fathers are described and assessed when; there are positive findings in relation to a risk of child sexual abuse, when there are positive findings in relation to other risks, and when fathers are thought to be wrongly accused of child sexual abuse.

9.2 Adult-child sexual interaction

In just over one third of the sample (8 cases), there were positive findings of a risk to subject children emanating from their father's sexual behaviours. The judicial discussion about the allegations was characterised by a minimisation of the possible extent of the

abuse and of the harm that may be caused by it. In all of the cases except one, positive findings were only made in relation to a portion of the alleged sexual activity. There was a persistent reluctance to link other paternal behaviours such as manipulation and domestic violence, to the alleged sexual abuse.

9.3 Lack of sex perpetrator assessment

There were seven fathers who were found to pose a risk to their subject children¹⁶ that related to child sexual abuse, and an eighth father who was found to have sexually abused a non-subject child but posed no risk to his younger subject children. In general there was a deficit of specialist knowledge about sexual abuse perpetration in court-ordered assessments. There was only one case in which specialist knowledge about sexual abuse and incest perpetration was provided and this was not provided by a court-ordered assessor, but by the father's therapist, who was treating him for his sexual deviancy of voyeurism.

This general lack of specialist evidence was evident even where allegations were either uncontested or partly conceded as was the case in three judgments. In the remaining four judgments there were positive findings of risks related to contested allegations of child sexual abuse by fathers. Despite the finding that these seven fathers had involved the subject children in a range of sexual activities, there was a limited assessment of the resulting risk: findings of previous sexual behaviour with children were not treated as indicators of future risk. Moreover, the fathers' behaviours were not evaluated in the light

¹⁶ 'Subject' children are the children about whom the Court application is made.

of research findings that the 'grooming' process described by sex offenders may consist of an incremental increase in the sexual nature of the adult-child relationship, before more invasive sexual abuse begins (Conte, Wolfe & Smith, 1989).

In one case, while the father was found to have sexually abused his step-daughter there was no link made by the assessor or the judge between this finding and the possibility that the father may therefore pose a risk to other children. The abuse with his step-daughter was treated as a discrete issue and consequently, the judge determined that the father's two preschool aged boys were not at risk of sexual abuse despite findings that sexual abuse offenders target a wide range of victims (Abel et al., 1987).

An example of the lack of examination of risks to children is found in the Bellows case in which the father had a police record of numerous complaints of voyeurism from members of the public. The judge also found that he had involved his three young children in dressing him, exposing them to pornography and that he had probably masturbated in his daughter's bedroom. The children had also told their mother that their father had involved them in 'hands-on' sexual activities. These allegations from the children, were not however, taken into consideration or used in an estimation of risk. No explanation was provided in the judgment or court-ordered assessments as to why the children's allegations were not believed. Moreover, there was no evidence offered to the judge about the possibility that the father's behaviour was part of a more extensive pattern of sexual deviancy, a void commented on by the judge:

None of the expert evidence suggests that Mr Bellow's voyeuristic tendencies may lead to any behaviour which might physically harm the children and in that regard I particularly refer to sexual abuse.

(Bellows judgment, number 15)

The consequences of this were that there was a lack of analysis of the possible link between the father's voyeurism and other sexual behaviours, future risks to the children. Patterns of sexual deviance have been found to develop over a lifetime and are not limited to one form of victim or pattern of arousal (Abel & Rouleau, 1990). Consequently, this father could arguably present long-term risks to his children. Unfortunately, the children's statements were not used to alert the judge to the possibility that the father may have a wider range of sexual behaviour that had involved them.

In this case the judge ordered supervised contact, which would provide some protection for the children. However, because there was an absence of expert evidence about the father's propensity to offend against his children, there may have been an underestimation of the risk posed by the father. Indeed, research about sex offenders has found a strong tendency for offenders to deny their activities and to underreport their offences (Abel et al., 1987).

In short, the assessment of fathers who were found to pose risks of child sexual abuse did not include specialised or detailed assessments on the nature of the sexual abuse perpetration would allow a thorough assessment of the risks relating to the child sexual

abuse allegations. The court-ordered assessing psychiatrists did not provide judges with evidence about the propensity of the fathers to sexually abuse. Moreover, there was no evidence that these assessors took a history that might provide evidence about their propensity for sexual perpetration. Such an assessment appeared to be outside the scope of the psychiatrists' and clinical psychologists' assessments that were primarily focused on parenting capacity. This may be the result of individual assessors censoring their scope of inquiry; perhaps these professionals had surmised that the court does not see its role as identifying sexual offenders. Alternatively, their skills and knowledge base did not extend to sexual abuse perpetration.

9.4 Fathers where there was a 'no risk' finding

When fathers were articulate and appeared to be considerate and caring to their children the combination of these factors were used as a contra indicator that child sexual abuse had occurred. Twelve fathers were found to not pose an unacceptable risk of child sexual abuse. Two of these were described as 'good parents' who had been falsely accused of child sexual abuse. They were recorded as demonstrating 'child focused', 'empathic' or 'nurturing' behaviours both by the assessors and the judges, who were impressed by the fathers' empathy and child focus in the witness box.

The identification of paternal-child empathy was a persuasive factor in ruling out child sexual abuse perpetration. There was a suggestion that it was also seen as an exceptional characteristic in a father. The comparison of the assessment of mothers and fathers in these judgments provided evidence of the use of different expectations being applied to

each parent. Fathers who were observed as being empathic towards their children were assessed as being good fathers. However, the presence of empathy in mothers was not noted (as if this characteristic was seen as normative in mothers). Conversely, it was the absence of empathy in mothers that was noted, and the absence of empathy in fathers was not noteworthy enough to be reported (as if this were normative). It appears from this that fathers were not expected to be empathic towards their children and when they were they were seen as exceptional fathers, whereas mothers were expected to be empathic and were considered to be bad mothers if they were not empathic.

One example of this is found in the Hobbs judgment where the judge recounts the court-ordered assessor's description of the father:

Gary presented as a 45 year old man who related warmly and appropriately and seemed emotionally mature. He appeared to be of at least normal intelligence. He showed an appropriate range of affect and became tearful at times, especially when talking of the loss of his relationship with his older child. The father's narrative was very organised, in part aided by a chronology he had prepared. Perhaps the most striking feature of the father's presentation was the heavy focus on how the children had been affected by the marital conflict. He continually mentioned them, seemed insightful about their difficulties and showed considerable empathy towards them, including Alison, who has accused him of sexual assault. While at times he expressed some anger towards his ex-wife, this

appeared to be of appropriate proportions and he did not display the disrespect for her that she vented on him.

(Hobbs judgment, number 9)

As captured in this excerpt, these fathers were often framed as the victims. Victims of mothers who deliberately concocted false allegations of child sexual abuse, mothers who were unreasonably fearful and anxious about the father's activities, and victims of medical experts, therapists and child protection officers whose activities created and or sustained false allegations. The problem with this typology of the victim father was that once the father was seen in this way, this tended to focus attention on the paternal interactions and disallowed any analysis of risk to the children.

The lack of specialist expertise applied to the assessment of the alleged perpetrator fathers resulted in a naivety in the interpretation of the clinical observations that involved father-child interactions. If the fathers interacted responsively to children, then this was used by experts as evidence to support a recommendation for contact. This meant that clinical observations and the behaviour of fathers in the witness box were taken at face value: children who enjoyed interactions with the father were assessed as children who had not been abused. For example, in the Whitely case, the assessing psychiatrist had observed the father being 'inappropriate in his sensitivity to boundary issues':

The court-ordered psychiatric assessor does say that the husband's physical interaction with the boys was slightly inappropriate and demonstrated at least a lack of sensitivity to boundary issues. She goes on to say that he made several

requests for hugs or kisses from the boys and did not seem to respond appropriately to Jay's very clear signals that this was not welcome..... However, there is nothing in that evidence that I take to indicate any indication of sexual impropriety or misbehaviour on the part of the husband.

(Whitely judgment, number 18)

However, approximately one year later the court counsellor undertook a second report and found nothing to concern her in the father/child interactions:

My observation of the children while undertaking this family report would indicate that the boys have had a very strong and close relationship with the father. The boys demonstrated a strong wish to have contact with their father, and really enjoyed the chance to see and be close to their father during their observation. They demonstrated no reticence or fear toward their father, which may have been expected if Jay had been molested by his father. He was reluctant to engage with his mother during her observation, and remained upset for some time that he could not return to his father.

(Whitely judgment, number 18)

In this assessment, the father had applied for supervised contact with the two boys, who were six and four years old. It was the presence of enjoyable interaction between the father and children that sealed the court counsellor's opinion that the boys should resume contact. Clinical assessments like this one, that relied on observations between fathers

and their children to contra indicate sexual abuse draw on a schema developed for the assessment of attachment behaviour¹⁷ (Bowlby, 1946, 1958). These assessments are germane to a parenting assessment but have not been developed for specific application to families where there are child sexual abuse allegations (Bolen, 2002; Crittenden, 1999). This theory may have been influential in the court counsellor's assessment. When the counsellor did not observe any fear between the father and the two boys as she had expected if they had been abused and instead observed the boys enjoying their time with their father, she recommended contact be immediately reinstated:

The mother's claim that the two boys did not want to see their father, seemed to reflect her wishes not theirs. In fact, it could demonstrate that the mother has no capacity to understand or accept that Harry and Bo need their father to be involved in their lives. Observations indicate that there should be no further disruption to the father's relationship with his children unless there is good reason to be concerned that the father has abused the children.

(Whitely judgment, number 18)

There are problems with such a heavy dependence on the observations of parent-child interactions in the assessment of risks of child sexual abuse. Observations should form only one part of a more comprehensive assessment of the parent-child relationship and possible risks (e.g., Benjamin & Gollan, 2003). In the Whitely case the children were not questioned about the allegations of sexual interaction between them and their father,

¹⁷ The theory of attachment is based on the parent being used as a 'safe base' by the child from where they explore the world, returning when needed for reassurance.

despite the father being found to have behaved in a sexual way towards his step-daughter. Moreover the court counsellor's observations were undertaken one year after an initial court-ordered psychiatrist's report had noted that there was some evidence of a lack of boundaries in the father's interaction with the boys. It appears that in this case an assessment is unlikely to be able to definitively rule in or out the risk of child sexual abuse, because of the lack of investigation of the situation.

The use of observations in relation to assessing allegations of incest is dangerous unless integrated into other assessment criteria (e.g., Milner, Murphy, Valle & Tolliver, 1998). A comprehensive assessment of child sexual abuse allegations is more likely to be accurate if there is a collection and analysis of information about the child, father and mother and family context from a range of sources. Such an assessment may for example, include information about the details about the veracity of the allegations and a detailed history about the child including developmental and behavioural indicators of trauma and sexualisation (Cavanagh Johnston & Friend 1995; Herman, 1992). A thorough assessment of the fraternal propensity for incest may take place in the criminal justice or child protection jurisdictions or in a therapeutic setting (Seto & Barbaree, 1999; Lee & Olesen, 2001; Ms Govern & Peters, 1988; Salter, 1994). By contrast, the assessment undertaken by the court counsellor was focused on the observed interactions between the parent and children in an artificial office setting.

In summary, the emphasis on clinical observation and parents being able to give oral evidence in a way that conveys empathy and responsiveness in parenting are

unsophisticated measures in the identification of the risk of child sexual abuse perpetration. The Family Court focus on parenting capacity is not sensitive to indicators of child sexual abuse. This is particularly pertinent to the identification of incest offenders, who are often impossible to distinguishable from other fathers (Conte, 1989; Crewdson, 1988). The lack of specialisation of these assessments in relation to child sexual abuse allegations contributed to professionals making generalisations in assessments with the use of superficial logical deductive reasoning that was based on a false premise; ‘the child shows no fear therefore the child has not suffered abuse’. There are however, three major characteristics that are associated with incest perpetration; cognitive distortions including high levels of denial, deviant sexual arousal patterns and sexual deviation (Milner et al., 1998). There was no assessment about these factors noted in the judgments, which suggests that the court-ordered assessors were operating upon a presumption that these fathers were not sex offenders, or that they did not see it as their job to assess these issues as they relate to parenting. This resulted in judges having to make determinations in cases where there was a void in evidence that demonstrated specialist knowledge in relation to child sexual abuse.

9.5 Minimisation: underestimating the possible risks of child sexual abuse

The allegations of child sexual abuse that were made by children, their mothers and grandmothers were not thoroughly explored in the judgments. Moreover, even when there were positive findings in relation to risks posed by fathers, it was only the proportion of

the allegation conceded by the father that was used as a basis for an assessment of risk. This was so even when there were no criticisms of ‘contamination’ of evidence.

One example of this is that in the Martens case: Skye, who was five years old, lived primarily with her mother, and her father had frequent contact. Her father had applied for joint residency. He had admitted that Skye, who was five years old, had held his penis for a prolonged period while in the spa bath with him. There was no finding made about the more extensive allegations that Skye had made to child protection officers of vaginal-fondling and digital penetration. The positive finding related only to what the father admitted and consequently this was treated as the basis to estimate the consequent risk. Skye’s more extensive allegations were not used in this estimation despite the child protection investigation not being criticised for contamination. The allegations that Skye had made were not given weight in the final outcome. Nor was the court-ordered psychiatrist’s findings, that the father had probably enjoyed the experience, linked to any discussion about the father’s propensity for future sexual interaction with his daughter.

There were four fathers who had admitted to engaging in behaviour that was the subject of interpretation in relation to whether the behaviour comprised sexual abuse or not. These behaviours included sleeping with or being in bed with children nude, general nudity in front of children, licking children and a father regularly encouraging his children to wash his genitals when he was bathing with them. Repeated sexualised touch on a girl’s back and abdomen (when he was inebriated), and tongue kissing were also

behaviours that were assessed in relation to whether they comprised of sexually abusive behaviour or not. For example:

The father's girlfriend gave evidence that she observed the father to run his hand lightly down his daughter's back and over her buttocks in a way she interpreted to be sexualised; she said that she recognised the same kind of touch that the father had given her during the course of their relationship.

(Duchamp judgment, number 20)

Some of the judgments were ambiguous in their findings about the status of these behaviours. In the Whitely case the father had been found to touch his step-daughter's back and abdomen in a sexual way on a number of occasions when he was inebriated. Despite this finding there was a finding of no risk of sexual abuse to her younger half brothers. The judge concluded that supervised contact was ordered not because the boys were at risk, but to:

... allay the fears held by Mrs Whitely and enable her in the future to deal with the issue of contact by these boys to their father without her judgment and emotions being coloured by ongoing fears that the husband will abuse the children.

(Whitely judgment, number 18)

Again, in the Pollock judgment, the judge noted inappropriate behaviours by the father but these were not described as sexual in nature or as presenting a risk. Despite this the

father was told he must stop the ‘inappropriate’ bathing practice, of allowing his children to wash his genitals:

I am satisfied that there is no evidence of abuse of the children in that regard and that the children are not exposed to any unacceptable risk of abuse. However, the bathing routine is inappropriate and must cease. The husband appears to acknowledge that.

(Pollock judgment, number 5)

These cases also exemplify the tendency to downplay the extent of the allegations and to examine them as individual events, unconnected to other behaviours that may present a more complete picture of paternal behaviours that did pose a risk of child sexual abuse. This is a recognised legal process where broader patterns of abusive behaviour are broken down into discrete events hinders the assessment of general risks that relate to child sexual abuse (Parkinson, 1998).

The cases discussed in this section are some of the 12 cases where there was a finding of no unacceptable risk to children. In these cases the issues raised by mothers included fathers sleeping nude with their children or paternal nudity in the home, bathing with children and tongue kissing. The ages of the children involved were predominantly preschool aged to early primary school, with the eldest child being a girl of eight years. Mothers saw these behaviours as concerning and as having the potential to be part of a more extensive, sexualised range of behaviours. The language used by judges suggested

circumspect findings; the behaviours were not named ‘sexual abuse’, but were described variously as ‘inappropriate practices’ or ‘behaviour of a sexual nature’. In some cases it appeared that the child abuse lexicon was deliberately avoided so that these practices were not classified as abuse. This reflects the High Court M & M finding that discourages positive finding of child sexual abuse and a position that it is not the role of the court to be investigating a father’s propensity for sex offending because it is considered to be the proper role of the criminal courts (Parkinson, 1998; Scutt, 1991).

The Burchfield case offers another example of judicial reluctance to make positive findings of child sexual abuse and was one of the three cases in which grandparents were awarded residence of their grandchildren. The three Burchfield children had been cared for by the maternal grandmother for a large portion of their lives. Their parents had been in a long-term de-facto relationship that was characterised by serious domestic violence. In this case the mother did not believe that her husband had sexually abused her son as he had alleged, and the judge agreed with her. It was the presence of multiple risk factors that influenced the judge’s decision that the children should reside with the maternal grandmother. These included multiple risk factors that together painted a picture of serious risk; paternal chronic alcoholism, severe domestic violence, exposure of the children to adult sexual activity and impaired parenting (Appendix II, Table 2).

In this matter it was despite robust indicators of child sexual abuse being present, that there was no positive finding of child sexual abuse. After returning to his grandmother following contact with his parents, Tom told his grandmother that ‘Daddy stuck his finger

up my bum’, while his grandmother was giving him a bath. An anal tear was diagnosed by a medical practitioner the next day, and it was also alleged that he was also displaying sexual behaviours. However, these indicators of child sexual abuse did not become the subject of judicial scrutiny. There was no notation that a thorough risk assessment or psychosocial assessment had been undertaken by the court-ordered assessor (Baird, 1999, Hewitt, 1999; Milner et al., 1998; Ney, 1995). In this case, the finding was that there was no unacceptable risk of child sexual abuse, despite robust and specific evidence that supported the allegation. These were namely: a verbal allegation by the child plus supporting medical evidence. In addition there was a change of behaviour that was consistent with sexual abuse. The mother, who was a joint applicant with her husband, ironically lost residence of her children anyway because of the risks associated with the father’s domestic violence and alcoholism.

The following quotation illustrates the judge’s assessment of risk in this family if the children were to stay in their parents’ care:

I consider that the children would be exposed to violence within the family should they be returned to the care of the parents and that there would be no protective mechanisms to ensure the safety of the children or to minimise the emotional impact on them from witnessing the violence. I consider that the children would be exposed to poor parenting in the home of the parents due to the father’s heavy drinking and the mother’s lack of availability and focus on the needs of the children. I consider that such adult needs are likely to take priority in this

household. It is also of great concern that the children may have been exposed to their parent's sexual activity as reported by the eldest child to the grandmother when describing the preschool sibling's sexual acting out.

(Burchfield judgment, number 13)

In this case, Tom's father's denials were given more weight than Tom's allegation. There was no analysis of the veracity of the allegation versus the high likelihood that the father would deny the abuse if he had committed it. This demonstrates a lack of understanding of the sexual offender behaviour, which is likely to include a denial of the allegations. The outcome was that the three children of the family would live with their grandmother not because of a risk of child sexual abuse, but because of the other risks related to domestic violence and alcoholism and the mother's inability to protect them from the effects of the father's violence.

These cases illustrate a reticence in making positive findings of child sexual abuse. In addition, there is also a lack of definition of what behaviour might constitute abuse. In all cases in this research sample, fathers' denials were believed over children's allegations, unless there was strong evidence for their allegations from other adults.

9.6 The association of a ‘positive risk’ of child sexual abuse and other risk factors

In the majority of cases, fathers were alleged to have been engaged in a range of coercive behaviours other than child sexual abuse. Domestic violence was alleged in half the cases. Manipulative behaviour, that comprised for example, the fathers placing psychological pressure on children to take their side in the parental dispute, was found to be used by seven fathers and there were also paternal risks identified of drug and alcohol abuse, emotional abuse, the effects of uncontrolled mental illness and uncontrolled anger. These risk factors had to be present before there was a positive finding of child sexual abuse (see Appendix II, Table 5).

Cases where there were positive findings of child sexual abuse (in the absence of any admissions by the father) were those in which there were risks such as uncontrolled anger and perjury, which pushed the assessment of risk over the threshold into the unacceptable risk finding. There are two problems with a reliance on other risk factors to make a positive finding about child sexual abuse. The first relates to the ability of the incest perpetrators to carefully manage a ‘pro social’ presentation so that they would not show any indicators of sexual deviancy (Nugent & Kroner, 1996). Therefore, if there are no other risks recorded, this father can create a strong positive impression.

Fathers who commit incest may have no anti social behaviours that are visible in a court-ordered assessment and thus ‘perpetrator blindness’ may operate. The reliance on the presence of a cluster of other risk factors (not sexual abuse risk factors) appears to have

occurred in the Clark judgment as the father presented well in the witness box. Since there were no other indicators of risk, the child sexual abuse allegations were given no consideration:

It is fair to say that court counsellor kept an open mind on whether sexual abuse had occurred. The court-ordered psychiatric assessor was certain it had not. I base my view that it never occurred, primarily on the presentation of Mr Clark in the witness box.

(Clark judgment, number 8)

There was no detail in this judgment that indicated this father was asked any questions, or investigated in relation to the child's allegations that were reported by the mother. Since child molesters (including intra familial sex offenders) have been found to engage in denial and 'impression management' to control what others think about them (Nugent & Kroner, 1996), it follows that they may be particularly practised at presenting a credible profile in the witness box.

It was only in two cases that allegations about fathers were accepted in their entirety; in the Johns case the father was not an applicant in the court, and in the McCubbin case the father lost all credibility during his cross examination. He was found to have lied in court about his drug abuse, mental illness and his sexual behaviours in front of his children.

There was also extensive evidence collected that undermined his denials including an eye witness testimony given by the maternal grandmother and the mother:

The court has had the opportunity, through this subpoenaed material where he's been frank with the doctors, to see what life has been like in that household and what the father's behaviour has been like. It is of a piece with that self-centred selfish behaviour of the husband that he would not care or not be considerate and not be protective of the children. If he felt like masturbating himself he would. I thought that the grandmother's account was an actual account of something which she had seen. And when she [the maternal grandmother] was asked for the children's reaction, I thought that her description of the abuse incident, which was given without a moment's hesitation, was the account being given by someone who had witnessed it and who remembered it well.

(McCubbin judgment, number 10)

The judge estimated that the risks presented by Mr McCubbin were too great to allow contact. These risks included his drug abuse, sexual practices, and uncontrolled mental illness and associated delusional beliefs about his children and ex wife. Under these circumstances the judge made an unambiguous finding against the father. In this case, it was the aggregation of paternal risk characteristics and the father's poor performance in the witness box that amounted to perjury and contributed to the finding of no contact.

The judgments therefore appear to be using a method of risk assessment that relies on the aggregation of risk factors. This relates to the second problem with the reliance on the presence of other risk factors before a positive finding of risk is made in relation to child

sexual abuse. While the reliance on an aggregate of risk factors is used in the general area of child protection and risk assessment for physical abuse or neglect, it does not contain specific risk factors that relate to incest. The development of risk assessment methodology that is sensitive to child sexual abuse or incest has remained elusive, although there are specific indicators of sexual abuse that can be derived from a thorough assessment of the child's history and interviews (Hewitt, 1999; Wald & Woolverton, 1990). The child being asked about the allegations is one of the more significant pieces of information in an assessment of such allegations (Goddard, 1996; Sgroi, 1982). However, since a detailed assessment of the child does not appear to be within the scope of the court-ordered assessments the judicial risk assessments are made without this crucial information.

Incest offenders are practiced at presenting well in social situations, and are indistinguishable in sex offender assessments from normal populations (Milner et al., 1989). This raises the question of whether it is possible for positive findings to be made in the Family Court when the father presents well, there is an absence of other risk factors and no specialist assessment of child sexual abuse perpetration.

9.7 The use of a domestic violence paradigm to assess other forms of coercive behaviour

The thorough examination and assessment of coercive behaviours was associated with cases where there was significant harm suffered by the children and their mothers. As

outlined in Chapter Eight, this triggered the use of a different conceptual frame by judges: the battering ex-husband appeared to be familiar and well understood in these judgments. In a number of cases the presence of chronic domestic violence appeared to be the deciding factor in stopping contact or changing residence.

Domestic violence in these cases was understood as being intimately linked to the range of the father's interactions within the family. Manipulation for example, was seen as one facet of the father's overall coercive style of behaving. The analysis of the domestic violence included an assessment of the duration of violence, its severity, effects on children and the impact of the violence on the mother's ability to care for the children. This assessment included an attempt to estimate the likelihood of a reoccurrence.

There were three different patterns of violence identified in the judgments. Chronic and ongoing domestic violence was the most serious. In some of these cases, the abuse began long before separation and continued after the separation. The second pattern of domestic violence was episodic periods of severe violence associated with alcoholism. The third pattern was of discrete incidents of violence that were associated with the period of separation. The van Gough case is an example of this third pattern of domestic violence, when the father was considered to have hurt the mother on only one occasion when they were arguing about the separation. The judge commented on their assessment of future risk associated with the father's behaviour:

He admits assaulting her on several occasions, for which actions he is now deeply ashamed, but maintains that at no time did he do anything more than push her away forcefully although he acknowledges that she may have hit her head as a result.

(van Gough judgment, number 1)

This was the only case in which domestic violence was conceptualised as being an artefact of the separation process. Most of the domestic violence detailed in the judgments involved long-term domestic violence: five mothers were clearly described as victims of long-term abuse, and the fathers as the perpetrators. The judge's view about the domestic violence in the Franks case was that:

The suspicions on my mind are that the mother has been the subject of a lengthy period of emotional and physical abuse from the father, and that the father may be using all legal means to perpetuate this abuse.

(Franks judgment, number 12)

This long-term, chronic domestic violence is illustrated by the Ceracchi judgment. In this case a pattern of chronic violence dated from the mother's first pregnancy and continued throughout the marriage and after separation. Moreover, after separation, other members of the family became co-perpetrators of verbal abuse and harassment. The father's violence and manipulation was seen by the judge as characterising his interactions with

both the mother and their children. The judge named the mother's reported experience as abuse and recorded a detailed history of it in the judgment:

The wife says that during the marriage the husband was physically violent to her on several occasions, kicking, slapping, punching and pushing her, twisting her arms, and pulling her hair. He frequently shouted at her and was aggressive, calling her, for example, a "money hungry slut". She gives examples of his violent conduct. These include punching his fist through a plate glass door while shouting at her; whipping her with a telephone cord when she was pregnant, and then locking her outside the house, then, when she locked herself in the car, throwing a brick through the front windscreen; hitting and punching her while driving with friends; pushing his fingers in her eyes.

(Cerrachi judgment, number 16)

The severity of the violence and its negative impact on the mother is underlined in this recounting of it in the judicial narrative. This violence perpetrated by Mr Cerrachi was assessed as part of a pattern of manipulation and abuse by the judge who overrode the finding of the court-ordered assessing psychiatrist. The psychiatrist found that the eldest child, eight-year-old Vanessa had lied in making allegations of child sexual abuse. Instead, the judge concluded that that father was also likely to have interacted in a sexual way with the girls:

My conclusion is that, while I am not able to make any findings of specific behaviour, it does seem likely that the children were exposed to some behaviour by the father that they strongly disliked, had to do with sex, and for which they took a strongly hostile and fearful view.

(Cerrachi judgment, number 16)

In contrast to the way in which other child sexual abuse allegations had been broken down into discrete and separate events (Parkinson, 1999), the sexual abuse allegations in relation to this father's coercive behaviours, were seen as a part of a pattern of behaviour of which the child sexual abuse allegations were one facet. This father was evaluated in a negative light because the history of marital domestic violence but also because he had difficulty controlling his anger in the witness box during cross examination. Thus, the judge had first hand experience of the father's abusive behaviour, which was described by the psychiatrist undertaking the court-ordered assessment as 'vindictive' and 'narcissistic'. In addition, the judge found that the paternal grandparents, who gave evidence in the criminal trial, had perjured themselves during the earlier criminal trial in relation to evidence about the father's opportunity to sexually abuse the girls.

Where there is a combination of high levels of domestic violence, manipulation and parental discord, as there was in the Cerrachi case, the long-term conflict and violence might mask the indicators of child sexual abuse unless there was specific credible evidence to support positive sexual abuse findings. In this case there was such evidence, from the child therapist (social worker) in the child protection unit.

Incest and domestic violence have been found to be linked (Herman & Hirshman, 1981). There have also been links found between incest and alcohol abuse, and high levels of parental discord (Julian & Mohr, 1980). The fact that child sexual abuse was identified as a risk in the Cerrachi cases appears to have hinged on two factors; the extreme nature of the father's domestic violence perpetration and the fact that there was credible evidence from the child therapist from the child protection unit who supported the child's sexual abuse allegations.

The same kind of abusive behaviour was also demonstrated by the father in the Miro judgment. The impact on his seven-year-old son was noted by the psychiatrist who undertook the court-ordered assessment:

Phillip has begun to act out in the school setting to such a point where it has been commented that this will interfere with his cognitive development. It seems likely that he is finding himself caught in the cross-fire between two bitter parents, and is unable to contain the tension engendered in this situation. He has also given a first-hand account of witnessing his father's aggression (the attack on his step sister). Descriptions of his behaviour in the school setting mirror the bully tactics employed by his father, and it is likely that continuing contact with the latter will lead to increasingly internalisation of this aggressive parental object.

(Miro judgment, number 14)

There were three cases in all in which judges found that there was reliable evidence to support the allegation that fathers were involved in ongoing abusive campaigns against their ex spouses that ultimately resulted in the children suffering emotional and psychological distress. Moreover, three children (including Phillip in the excerpt above), were described as developing psychological symptoms of dissociation and behaviour disorders that were attributed at least in part to the effects of the domestic violence.

Seven fathers were described as manipulative and unable to control their anger, four were described as emotionally abusive. These characteristics were found to be present in the two cases previously discussed (the Miro and Cerrachi judgments). The judge noted in relation to Mr Miro:

... it was said that the father cannot be seen as a person who can control his behaviour as he lacks insight into it and its effect on others.

(Miro judgment, number 14)

The court-ordered assessor commented in relation to Mr Cerrachi:

The whole time I saw him, he was rarely relaxed and mostly demonstrated only barely controlled anger. He showed marked agitation and pressure of speech. He inevitably saw himself as in the right and his wife as at fault. His tone of voice was generally accusing and critical. Despite constantly accusing his wife of

extreme selfishness, he returned repeatedly to himself, his needs and how they had not been met.

(Cerrachi judgment, number 16)

The presence of these characteristics of uncontrolled anger were consistent with a profile of some sexual abusive fathers found in the sex perpetrator literature, who demonstrate behaviours that are aimed at terrorising or controlling all the family members (Radford et al., 1997; Weinberg, 1955). Such coercive behaviour was associated with adverse Family Court outcomes for fathers such as losing residence or a reduction of contact. However the relationship between these behaviours and the possible relationship to sexually abusive behaviour was not explored. The clustering of domestic violence, emotional abuse, manipulation, and lack of behaviour control as forms of coercive behaviours within this group of fathers, reflected a coercive style of interaction that was stable across a number of different settings and relationships.

9.8 Positive findings of risks of child sexual abuse

Fathers who were identified as posing a threat of child sexual abuse to their children were those about whom there was a large amount of damning evidence. These were cases where there were partial admissions, or significant amounts of credible evidence supporting the allegations. However, in all cases, whether there was a positive finding of risk or not, there was a lack of perpetrator assessment material. Court-ordered assessors did not actively look for indicators of sexual perpetration and some fathers were not assessed in relation to the risks they might pose to the children because they appeared to

be credible in the witness box. In the cases where domestic violence and coercive behaviours were not a feature of the paternal behaviour, the separation and divorce paradigm drove the interpretation of the evidence.

9.9 Discussion-The use of different paradigms

There were two distinct assessment paradigms used in understanding the fathers: the domestic violence model was used in cases where there was evidence of long-term domestic violence. Its use resulted in a detailed and comprehensive assessment that conceptualised the father as acting consistently with their personality traits. This father was manipulative, lost his temper easily and was emotionally abusive to his ex spouse and children. In the three cases in which fathers were described in this way, their profile was consistent with that of a batterer (Jaffe et al., 2003). However, the use of this model was limited to a cachet of coercive behaviours, and did not extend to a comprehensive assessment of the allegations of child sexual abuse. The model was not extended to use in child sexual abuse cases despite the link between domestic violence and child sexual abuse being well established.

If domestic violence was not established as a significant factor in the case, then the separation and divorce paradigm was used to assess fathers and the allegations of child sexual abuse. This paradigm resulted in the court-ordered assessors not actively seeking data that might confirm domestic violence and the presence of risk in relation to child sexual abuse. Factors usually considered to be important in the prediction of future behaviour, such as previous child sexual abuse of another child, were not treated as being

indicators of risk or as a trigger that a specialist assessment was required to estimate the father's potential for sexual abuse. Even where specific sexual activity was alleged and found to have occurred, the least damning explanations that minimised the potential seriousness of the behaviour were put forward by court-ordered assessors (in one case this included a court counsellor) and judges. This led to a minimisation of the possibility that child sexual abuse was occurring, or that there would be negative effects on the children. Moreover, the professional assessments presented to the court, apart from one exception, did not include risk assessments that overtly linked deviant sexual arousal patterns, or sexual behaviours or grooming behaviours to future risks for children (Christiansen & Blake, 1990).

In the majority of cases the lack of examination of the father's propensity for child sexual abuse resulted in these allegations not being thoroughly examined. The absence of the use of a specific schema for the assessment of indicators of child sexual abuse, or family dynamics and alliances, suggests that this material is not being used in assessments (Hanson & Thornton, 1999; Maddock & Larson, 1995; McGovern & Peters, 1988; Sgroi, 1982).

The limitations of experts not viewing the assessment data through a domestic violence lens are that the dynamic of child sexual abuse may not be identified or taken into account. The 'counter-intuitive' nature of the abuse can confound those who do not know how the effects of child sexual abuse may present in children (Haralambie, 1992). For example, children may be coached to act in a positive way to spend time with an abusive

parent (Sgroi, 1987). In addition, in particular with older children, the status of the victim child may have been bolstered within the family as a result of the father's 'promotion' of them to be his sexual partner (Maddox & Larsen, 1995) and isolate the child from possible sources of support, for example, the mother. Further, the child may develop other symptoms of trauma such as dissociative states, to cope with the ongoing incest, or may be asleep, or not fully conscious during the abuse (Herman, 1992; Salter, 1994). Finally, a large minority of children do not demonstrate any indications of the abuse (Berliner, 1988). In the absence of assessment models that are sensitive to incest or perpetrator characteristics, court-ordered assessing psychiatrists and court counsellors are unlikely to identify any forms of sexually abusive behaviour unless there is already strong evidence available that supports them. The assessment undertaken is therefore more like an evaluation and analysis of material already presented to the court and admitted by the parties rather than an inquiry, exploration or investigation of allegations. The secretive nature of sexual abuse and the strong pattern of denial in sex offenders, suggests that this method of assessment is inappropriate for the task at hand and in particular when one source of potential evidence about these issues, the evidence from child protection officers, has been disqualified from the evidence pool.

9.10 Conclusions

The findings in relation to fathers reflected the use of the separation and divorce paradigm by the psychiatrists, clinical psychology and court counsellors undertaking the court-ordered assessments. There was no evidence that these assessments actively sought out data in the information gathering phase of the assessment that might support positive

findings of child sexual abuse perpetration. Accordingly, judgments were limited by the nature of the evidence that was tendered: it did not explore the terrain of sexual perpetration. Unless fathers displayed significant areas of dysfunction or a history of coercive or and violent behaviour that made the allegations of child sexual abuse appear to be plausible, or there was credible adult support for the allegations, they were not considered.

The majority of assessments about fathers focused on their parenting capacity as informed by the observations and assessment of the child-parent relationship. If they appeared to be caring and empathic fathers, it was concluded that they were not sexually abusive. In fact the assumption that a caring or empathic parent is not an abusive parent is misleading and dangerous, as it is based on the incorrect assumption that abuse cannot co-exist with aspects of the parent-child relationship that are nurturing for the child.

Investigation material about the child sexual abuse concerns that were raised by mothers were not investigated or assessed thoroughly and their concerns were minimised. In short, positive findings of risk minimised the extent of children's allegations, or, allegations from children were ignored. Even the presence of multiple and robust risk factors specific to child sexual abuse did not guarantee a positive finding of sexual abuse.

In relation to the research question; 'What concepts and frameworks are relied on in the professional assessment of parents, children and allegations of child sexual abuse?', it

was found that there was an uneven assessment of the different forms of coercive behaviours. While a range of manipulative and violent behaviours were accepted as occurring in the majority of cases when there was supporting evidence, there was a distinct reluctance to assess for the presence of risks of child sexual abuse.

This unevenness may be the result of the assessment model being in transition from a reliance on the separation and divorce paradigm that focuses on the parental conflict to one that incorporates findings about domestic violence. The assessment scheme used here does not however include a focus on child sexual abuse. While manipulative and violent behaviours came under the same critical scrutiny, judges and court-ordered assessors did not apply the same level of scrutiny to the indicators of child sexual abuse.

There was no attempt to make a differential assessment about child sexual abuse, no application of child perpetrator behaviours, patterns of pervasive denial, or cognitive distortion which may be used in assessing sex perpetrators (Nugent & Kroner, 1996; Salter, 1994). This material was not offered to the court in expert evidence.

The failure to fully integrate domestic violence, and sex offender assessment material into the divorce and separation model could result in court-ordered assessments not investigating any possible perpetrator dynamics or seeking any other data. As a result, risks relating to child sexual abuse could be dismissed or underestimated. These issues and the implications of the assessment of children in the sample will be examined in depth in the following chapter.

CHAPTER TEN

CHILDREN: THE SUBJECTS OF JUDICIAL DECISIONS

Children are entitled to tell their stories without prejudice. This means they must have the right to have their experiences and feelings understood in the language they talk.

(Lowenstein 1991:281)

10.1 Introduction

This chapter explores the judicial considerations given to evidence that is about children and from children in Family Court judgments. This relates to the fourth research question: How is evidence relating to children treated in Family Court decision-making?

The findings of this research have so far established that a dominant theme in the judgments is the exclusion of evidence from the child protection authorities and a minimisation of the estimation of potential harm to children from child sexual abuse. It has also been found that there is a high level of scrutiny of mothers, their motives and mental health. In comparison there is a lack of assessment of the child sexual abuse or of the likelihood that the father has sexually abused the children. This chapter examines how evidence from and about children is scrutinised in these judgments.

10.2 The marginalisation of evidence from and about children

While the judgments contained some detail about children and the allegations that pertained to the child sexual abuse, this was provided less frequently and in less detail than the detail that was provided about the parents.

When evidence about children was discussed in the judgments the primary focus was on the relationships between the children and their parents. The following excerpts are examples of judgment material dedicated to the discussion of issues about children. They illustrate a focus on parenting capacity rather than a focus on the child and their characteristics:

The assessor commented that although Hetti was crying, neither the mother nor her husband made any attempt to comfort her. When asked about this in cross-examination, the mother gave the rather bizarre answer that she thought that Hetti should be left alone in her distress so that the assessor was able to make a complete assessment of the situation. When the assessor asked her at the time how she felt to see Hetti crying, the mother apparently replied that it was "the system's fault and that of the father's pressure on the children". This explanation seems hardly adequate to the event.

(Duchamp judgment, number 20)

This is consistent with the evidence of the psychiatrist who said that he had a childish and immature manner and that in trying to establish rapport with Mary he adopted a child like approach and had trouble understanding how difficult it would be for her.....it is extremely likely that Mrs De Maria will expect Mary to care for her and therefore Mary will be required to, in a sense, reverse parent her mother. Without the balance of at least one other responsible parent figure this form of child rearing could be extremely destructive.

(De Maria judgment, number 3)

The husband and the children interacted with spontaneity and warmth. There were reciprocal displays of affection initiated by both father and children. The assessor concluded that she believed that neither the husband nor the wife had considered the impact of the loss of a parent from the children's lives, or on their future psychological and emotional well-being.

(Roberts judgment, number 4)

The main thrust of these excerpts is to place children in the context of their parents on whom they are dependent. It is the parents' capacity to provide care that is the linchpin and primary subject of the judicial considerations. In this frame, children are not the subject of detailed assessment in relation to their own characteristics, experiences, needs and views. This is the particular frame described as 'children as dependents' (Neale & Smart, 1998). Consistent with the focus on parental capacity, is the deficit in references to child development issues or a detailed analysis of the content of a child's allegation, or of

any behavioural indicators of sexual trauma. Such a focus would normally be present in a child sexual abuse specialist assessment (e.g., Cavanagh Johnston & Friend, 1995; Ceci & Bruck, 1993; Goodman & Helgeson, 1985; Hewitt & Friedrich, 1995; Hewitt, 1999; Ruby & Brigham, 1997; Yuille et al., 1993). Allegations of sexual abuse from children were not given weight even when there had been a partial admission by the father as there were in two cases, or when there were positive findings of other types of associated risks to children. The only case where children's allegations were upheld in the face of adult denial was in the Johns case where the father was not involved in the court dispute, and the maternal grandmother and mother were the applicant and respondents. These children, who had grown up in a European country, made allegations of sexual abuse by their father which the mother denied. There were issues raised about the children believing that their mother would not protect them if they returned home with her to Europe, as she was proposing to do. All of the allegations made by the children against the father were accepted by the judge. In addition, their fears of returning home and their wishes to stay in the care of their grandmother were central to the judicial reasoning as to why the final outcome was for them to stay in Australia:

The most important matters in favour of the grandmother are the children's wishes and close attachment to her; their fears of going to back to Europe; their lack of confidence in the mother as a person who is child centred and capable of protecting them; the progress they have made in the grandmother's care; and a number of matters giving rise to a degree of concern about the mother's ability at

this time to respond appropriately to the children's present fears and state of mind.

I have found the task of attempting to weigh up all these matters very difficult.

(Franks judgment, number 7)

In five other cases, where there was credible adult evidence to support the children's allegations, such as an adult eye witness account, admission by the father or a positive professional assessment, only the part of the child's allegation that was supported by adult testimony was accepted as posing a risk. This treatment of children's allegations created a pattern of the child's evidence not being treated as valid or as relevant as the father's denials: evidence about children and from children was not tested or probed to understand possible risk implications. There is no explanation provided in judgments for this absence. The Family Court processes usually mean that children are assessed some time after an allegation is made, resulting in a delay between the allegation being made and the family assessment interviews. While such delays decrease the accuracy of memory recall (Goodman & Hegelson, 1985), child development research has found that children's memories about traumatic experiences are robust (van de Kolk, et al., 1996). Therefore, a delay in interviewing the child is not a valid reason to refrain from asking children about allegations. Therefore, the reason for the lack of probative assessment of allegations is likely to be situated elsewhere.

In a small number of cases there was a departure from this lack of probative assessment of the allegations. These judgments did examine evidence about children's behaviour and verbatim reports from child protection officer or police investigative interviews.

However, this examination reflected a primary interest in establishing that 'contamination' had occurred. An example of this is the Pollock's judgment in which the father had brought a contravention application. The mother did not prove she had reasonable grounds on which to deny the father contact. This case primarily focused on the child's allegations that she had made to a counsellor in the presence of her mother:

The psychologist commented in the last paragraph of her report:

"Furthermore, it appears that Sara may have been covertly or overtly influenced by her mother when making her recent disclosures. For example, Sara stated during her police interview that she was prepared to discuss her alleged experiences of abuse by her father as her mother was going to give her a party and she also indicated that her mother reminded her what to say. It is worth noting, however, that a child of this age making references to behaviour of this nature warrants concern. In summary, given the concerning nature of Sara's allegations in addition to her reported reluctance to attend access visits with her father, it would appear that the arrangements regarding contact between Sara and her father should be reviewed."

(Pollock judgment, number 5)

The judge, commenting on the psychologist's assessment was concerned about the contamination of Sara's evidence:

*In this context the evidence of Sara's therapist about Sara and the wife being together during sessions is significant. **The question of whether Sara has been covertly or overtly influenced by her mother in making the disclosures is directly raised by the psychologist.** It is given even more weight by the evidence of the therapist about her failure to ensure that Sara's statements were not contaminated by her mother's concerns, and her complete failure to attempt in any way to ascertain whether Sara was reporting factual matters, rather than matters upon which she had been coached or influenced. [emphasis added]*

(Pollock judgment, number 5)

In a total of six of these cases, children's evidence was assessed as contaminated and not given weight. In a further four matters preschool aged children were exposed to a combination of multiple interviews by parents and child protection officers, that resulted in findings of contamination and resultant uncertainty about the veracity of the allegations. This dismissal of evidence about children's evidence was consistent with the overall pattern of disregarding evidence that might support a positive finding of risk.

The result of focusing on the possibilities for contamination resulted in evidence about the accused father's behaviour not being the focus of examination. In the Bellows matter, for example, despite the father admitting to a predilection to voyeurism and the judge's acceptance of the mother's allegation that the father had exposed their three children to pornography, additional allegations made by the children were not given any weight nor

taken into account in the judge's estimation of risk. These allegations included 'hands-on' sexual contact by the father. However they were not discussed in detail despite the potentially serious implications of risk for the children when they were in their father's care. These allegations were only referred to obliquely in the judgment:

None of the evidence suggests that the incident described earlier relating to disclosures by the children actually took place.

(Bellows judgment, number 15)

Why weren't the children's disclosures given any weight? There were no issues raised in relation to contamination of the children's evidence in this case. The mother, who had brought the children's allegations to the court, had been assessed by the judge as a reliable witness. The judge said that they preferred her evidence over that of the father's. In addition, the father had admitted to having a predilection for the sexual deviancy of voyeurism and there were findings made by the judge that the father had engaged in a range of sexual behaviours such as secretly videoing himself and the mother having sex and then distributing that video to friends. Despite the evidence painting a picture of the father as having a lack of control over his sexual behaviours, there was still a reticence to make a finding in favour of children's evidence when it was in conflict with their father's evidence. Consequently, the children's disclosures were not used to alert the judge to the possibility that the father's sexual behaviour involved them and that that created risks of future more invasive sexual abuse. Further, the judge did not provide a reason as to why the children's disclosures were not given weight in their own right. The lack of

consideration of more extensive abuse as alleged by the children was also evident in the Martens (6) and Burchfield (13) cases. In the Martens case, five year old Skye told investigators that her father had put his finger inside her vagina while they were in the spa bath. In the Burchfield case, five year old Tom had told his grandmother and investigators that his father had put in finger in his (Tom's) anus. (Upon examination Tom was found to have an anal tear).

10.3 Disbelief of the child

This differential treatment of the evidence from children versus evidence from adults concurs with claims in the literature that point to adults' evidence being given more credence than that of children's evidence (Bala, 1989). Overall, unless there was evidence from adult sources other than the children's mothers, children's allegations were not given the same weight as adult denials.

The children in these judgments were not assessed in relation to their particular vulnerability to contamination from parents (Johnston & Kelly, 2004) or other characteristics that would be consistent with a false allegation (Ceci & Bruck, 1993). Neither was an investigation or systematic examination of evidence from children undertaken (Cavanagh Johnston & Friend, 1995; Hewitt, 1999). In short, the dominance of the sceptical framework focused on the vulnerability of children to contamination, rather than on the salient or core events that children are likely to remember (Ceci & Bruck, 1993).

In these and other judgments, the evidence provided by children was treated as inherently less reliable in comparison to evidence given by a parent as has been noted in the literature (Bala, 1989). This included evidence about the child sexual abuse allegations even when there were no concerns raised about reliability of these allegations or the methods used in collecting evidence from children.

10.4 Inconsistent examination of allegations of sexual abuse

Judges did not systematically examine each allegation of abuse and make a finding of positive risk or 'no risk'. There were seven judgments in which the risks that were alleged were not addressed or only partly addressed in the judgments. This group included three judgments where none of the allegations were explored. In the first judgment of the three, the Clark children made their allegations of sexual abuse to their mother. The judge believed that the first part of the allegation (that the father had rubbed faeces into his son's hair) was 'bizarre'. They gave no other rationale for not testing or considering this allegation. The second part of the allegation was that the father had put his finger up his bottom; this attracted no judicial comment. The father's oral evidence in this case impressed the judge, while there were no comments made about the mother. No evidence was provided that examined the allegations in detail, or from the child's point of view. There was no exploration of the presence or absence of characteristics or indicators that would be consistent or inconsistent with the allegations. Instead, the psychiatrist who undertook the court-ordered assessment interpreted the mother's allegation as an expression of PAS (Gardner, 1987); she recommended that residence be reversed. This

frame was accepted by the judge although refraining from a change of residence, they ordered that overnight contact commence. In this case, the possibility that the allegations might be an indication of risk to the child was not considered by the judge. Hence, if the child did disclose to their mother, the fact that they had chosen her as their confidant resulted in their allegations not being taken into consideration by the judge. This has the effect of disqualifying the child's voice and dismissing their experiences of abuse.

There were also other cases where the allegations of child sexual abuse were marginalised or set aside in the favour of examining the parent's characteristics. In the Frank's matter for example, the mother left Australia without the father's permission. The father instituted a Hague convention trial to force the mother to return to Australia with the child. Her motives and her explanation for going overseas with the child, without the father's permission, dominated the hearing. The details of the allegation of child sexual abuse were not explored, even though this was the purported reason for her leaving the country.

The Miro case offers a contrast to the previous cases where the parents were the focus of the judgment. In the Miro judgment it is the effect of the father's continuing harassment on their lives that is the subject of close examination. This is one of the cases to which the domestic violence assessment model was applied (as discussed in Chapters Eight and Nine). As a result the judgment records allegations of continuing coercion and violence that had continued for the five years following the first trial. The continuing harassment

was also continued through the litigation, an issue that is commented on by the judge. Moreover, despite the collection of a detailed assessment data about the children, their development and indicators of trauma, this detail relates only to the father's harassment and not to the sexual abuse allegation. The sexual abuse allegation in this case forms a part of the context of the case and was the subject of the trial five years previously. It was not the central risk being assessed in this hearing. While this case does not make findings about the sexual abuse of the children, it does find the dynamics of abuse had continued, that they were current and were posing a threat to the children's normal development:

The children are still being exposed to a parent who has shown contempt for their basic emotional needs. They are not listened to, their wishes are not respected, and they are treated as pawns to be used against their mother in a most calculated and manipulative way. In this context, the children showed themselves to be anxious and wary, and prepared to distort the truth in order to avoid their father's anger (This is not a dynamic speculation, but an observation by the children themselves).

(Miro judgment, number 14)

In this case the judge integrates the domestic violence model into their analysis by the use of key concepts. These included an emphasis on the effects of domestic violence and the father's manipulation on both the mother and the children, and the likelihood that the father may continue these activities. This integration is also marked by the attention focused on the impairment of the mother's ability to care for the children because of the

harassment and on the impairment of the children's normal development. Phillip's behavioural problems of aggression towards other children, was interpreted as an outward manifestation of his exposure to his father's harassment. The father's psychological manipulation of the children is used as key evidence in this analysis.

In this case the father's application for residence of the children was not successful and, instead, the judge diminished his contact from supervised contact once a week to supervised contact every three weeks.

The use of the domestic violence assessment model resulted in a child focused judgment. A full integration of an assessment model that was also responsive to the allegations of child sexual abuse would be able to place the child sexual abuse allegations in the context of the other paternal behaviours of harassment. The addition of this consideration would indicate a complete integration of knowledge about the links between domestic violence and child sexual abuse (Ayoub et al., 1991; Farmer & Owen, 1995; Stark & Fritchcraft, 1988). It would also integrate child protection and family law concerns.

10.5 Children as victims of a parental dispute

The children in the Miro case were described by the assessor and judge as being 'worn out' by the Family Court litigation. In other judgments children were recorded as being weary of the parental conflict. Judges used children's statements to tell both the parents that they should stop their disputation:

...in relation to his telling the expert about his parents fighting, said in vehement response to her question as to how he felt about that, "I hate it."

That is a very important piece of evidence which both his parents should heed.

(Hay judgment, number 21)

Judges aligned themselves with the children when they criticised the parental conflict in this way. In some judgments their disapproval and anger was directed towards the parents because of the damaging impact of the parental conflict on the children. This process polarised the victim children versus the emotionally abusive parents. Judges expressed their exasperation at the parents for inflicting distress and emotional trauma on the children. The frame of parental conflict resulted in the themed formula to describe the child's circumstances: two emotionally abusive parents and a victim child. However, this is an overly simplistic explanation that frames the litigation as a fight between two parents. It does not differentiate between parents who are attempting to protect a child, or take into account the power imbalance implicit in a domestic violence scenario.

10.6 The 'parental dispute' as the causal agent of a false allegation

In five matters there were more risks alleged by children, family members or professionals than were acknowledged or accounted for in the judicial findings. In two of these fathers were found to have engaged in sexualised behaviour with their children. However, there was no risk assessment undertaken assessing the father's potential for further sexual behaviour.

The judicial reliance on the paradigm that understands child sexual abuse allegations as a product of the parental dispute, rather than of abuse, was illustrated clearly in the Hay matter. In this case both parents had applied for residence of the two girls who were five and two years old. The mother had also applied to relocate to another State, and she had made allegations that the father had a number of behaviours that were concerning to her. These included sleeping with the children naked, frequent nudity around the house, sleeping with a knife under his bed and other unspecified behaviours. In this case the judge responded to the mother's and the maternal grandmother's strong feelings of antipathy about the father that were expressed under cross examination. Their angry reactions overshadowed information about the child and the allegations:

The level of emotional dislike, suspicion, mistrust and almost hatred and other matters I have referred to lead me to the conclusion that I do not accept that the husband has behaved towards the children in an inappropriate way.

(Hay judgment, number 21)

The contextual factors of the parental conflict and intense negative feelings directed the main judicial consideration towards the mother in a search of an explanation for the allegations about Chantelle (the five-year-old child) and her dissociation and symptoms of distress. The mother and maternal grandmother's 'emotional dislike' of the father plus the court counsellor's assessment were the key factors in the judge's interpretation of the evidence.

This case is illustrative of the conceptual struggle about which framework should prevail in understanding the child's presenting problems. The judge reviewed two conflicting reports, one by the child protection psychologist and the other by the court counsellor. The child protection psychologist had assessed Chantelle and was concerned by her presentation which included characteristics of a high level of traumatisation that the psychologist believed could not be explained by the parental conflict:

I am concerned about this little girl and her reactions in my room. I do not know why she appears to dissociate when issues to do with her parents are approached. It may be maltreatment occurring, however this assessment process has not been able to determine this. And I do not believe the seriousness of the situation should be minimised by explaining all of Chantelle's behaviour as a reaction to the conflict, or as within the range of normal behaviour because in my opinion she is presenting in an unusual fashion.

(Hay judgment, number 21)

The judge compared the child protection psychologist's opinion to that of the court counsellor who had also assessed the child:

... the child protection psychologist, in cross-examination, said that Chantelle is depressed and in a very vulnerable emotional condition. She said that the child is in need of psychological assistance. The counsellor said that he does not believe that the child needs psychological assistance at this time. Further, the counsellor said

that what the child presently needs is stability and certainty. The child representative submitted that I should place more weight on the opinion of the counsellor and I accept this submission...

(Hay judgment, number 21)

The outcomes of the two assessments appear to be a direct reflection of the professional context in which the two professionals worked. The court counsellor found that the child was suffering from the effects of parental conflict, and that they simply needed a regular contact regime to ameliorate the situation. However, the child protection psychologist found that the child's presentation could not be explained by the parental conflict alone; hence child sexual abuse could not be ruled out. The child protection psychologist recommended further assessment. The judge was presented with two assessments of the child that were derived from the two competing bodies of knowledge: that of child protection, and divorce and separation. The judge, embedded in the culture of the court that has been described as pro-contact (Laing, 2003), favoured the court counsellor's opinion and a contact regime was accordingly put in place. There was to be no further assessment. Hence, the separation and divorce paradigm was used to interpret parental conflict as the cause of the child's problems and provided a platform for a benign finding in relation to the allegation of child sexual abuse:

I am not prepared to make the orders sought by the wife. In my opinion, this is a case where it is necessary that final orders be made now. There is an extremely high level of conflict between the parties and it must cease. In my opinion, if there

was any provision for orders until further order or a review of the arrangements for contact then this may only contribute to a perpetuation of the high level of conflict.

(Hay judgment, number 21)

The judge thereby dismissed the request for further assessment of the child and made final orders for contact with the father. The position that the parental conflict was the source of the child's problems appeared to be taken as a 'default position' or presumption, by judges. The degree to which the domestic violence model was influential by comparison, was however, limited. The 'child as victim of parental dispute' was the dominant frame placed on the child's experience. This is consistent with the 'narrative of harm' identified in the literature and policy decision-making relating to children after divorce and separation that emphasises harm as an inevitable consequence of parental separation (Smart et al., 2001). This frame of the child has the effect of limiting investigations into the possibility that sexual abuse has occurred and it was only effectively challenged when there were extreme examples of violence perpetrated by fathers, as in the Miro case.

10.7 Children as creators of false allegations

One prevalent and enduring construction of children who are involved in the allegations of child sexual abuse has been to blame them for the incest, for seducing the adults, or of lying about the allegations (Herman, 1981; Salter, 1988). In these judgments however, this was not a dominant construction and children were more likely to be described as

victims of the parental post-separation dispute. Indeed, the idea that children were responsible for deliberately making false allegations was raised in only three judgments: by two psychiatrists who undertook court-ordered assessments and by one legal counsel. Even in these three cases, children were also described by professionals and judges as the victims of parental dispute or manipulation. These cases are the only detailed examination of the child's verbal allegations that was found in the judgments, and in them, the dominant focus was to critique allegations for internal consistency and meaning as part of the process of discrediting the evidence that was provided by children.

For example, in the Hobbs matter, Alison aged 15 years was assessed as making claims that appeared to be inconsistent and unlikely to be true:

It is most unusual that a normal child would react to several incidents of touching outside the clothes with such severe symptoms as Alison alleges (self-mutilation, playing with knives for months, trying to jump off a cliff but being restrained).

These are the symptoms seen in highly traumatised people who have experienced prolonged, intense, severe and usually multiple abuses and who likely have severe personality problems as well. A child in Alison's situation who has had the experiences she claimed would be most likely instead to show symptoms of depression, anxiety, loss of interest in school work, etc.

There are thus two explanations for these alleged "symptoms":

- * *If these symptoms did occur, as Alison claims, one would have to assume that she has severe personality problems, which then raises issues about the parenting she has received from her primary carer:*
- * *These symptoms may have been elaborated for effect, given there has been a degree of publicity about such symptoms in the popular press.'*

(Hobbs judgment, number 9)

The explanations for Alison's symptoms that are accepted by the judge were that while she may have lied, she was predominantly seen as a 'troubled child'.

The detail found in the judgment about her allegations reflects an interest in disproving Alison's allegations. It is only here, where the evidence supports a finding of 'false allegation' that a more systematic assessment of a child's verbal allegation and her behaviours was provided by an assessor.

The Roberts' case was another case in which the children were thought to have been involved in creating allegations. However, this was again conceptualised as the result of Ross being a victim of his mother's manipulation:

Ross, 8 years, made allegations that he later said were about events that had not actually happened to him. He had reported an event that had been conjured up by a combination of talking about things that had occurred with his father and

inserting another 'borrowed' scenario of abuse into this narrative. This was seen as the result of a long and protracted course of events engineered by his mother, not by him deliberately lying.

(Roberts judgment, number 4)

These children were therefore not seen as inherently deceitful, but as victims of their parent's psychological manipulation. Judges assessed the children's evidence through the filter of parental dispute or professional contamination. This construction of children resulted in a broad brush application of the concept that parental conflict was linked to the aetiology of the allegation and is a reflection of the backlash position taken by the sceptics (Gardner, 1992; Underwager & Wakefield, 1990). This position excluded a detailed analysis of the child and their characteristics that might make them susceptible to the development of a false allegation (Johnston & Kelly 2004; Lee & Olesen, 2004). The position did not take into consideration the findings that have shown children's evidence to be reliable and that they require considerable pressure before they are influenced by suggestion by adults (Ceci & Bruck, 1993; Saywitz et al., 1991).

10.8 Risk assessment

Many Family Court judges have wrestled with the assessment of risk in child sexual abuse cases. A number of different definitions have been coined by trial judges.¹⁸ The

¹⁸ These include the 'risk of serious harm' (A v A (1976) VR 298 at 300); 'an element of risk', or 'an appreciable risk' (M&M (1987) FLC 91-830 at pages 76, 240-242), 'a real possibility' (B&B 1986) FLC 91-758 at 75,545), a 'real risk' (Leveque v Leveque (1983) 54 BCLR 164 at 167) and an 'un acceptable risk'.

High Court has attempted to define different levels of risk with greater precision; *'To achieve proper balance, the test is best expressed by saying that a court not grant custody or access to a parents is that custody or access would expose the child to an unacceptable risk of sexual abuse; M & M 1988 FLC 91-979 at page 77,081.'* Despite this attempt to clarify the definition of risk there remain differences in how judges approach this task. Some judges for example, have approached the assessment of risk as a two step process, first establishing if the abuse has occurred or not (Coleman J, in N and S and the Separate Representative [1996] 92-655, 82,704 cited in Parkinson, 1999) and then proceeding with a risk assessment. It may follow then that, if there had been no abuse, there would be no risk. (Parkinson calls this a 'binary' reasoning dependent on first establishing the facts). Other judges have proceeded with an evaluation of risk without establishing if the alleged abuse occurred, only that it may have occurred. Lord Nicholls (1996, cited in Parkinson, 1999), for example, relied on the idea that in these cases there is often a spectrum of proof that ranges from a high to a low degree of certainty that the abuse has occurred (Parkinson, 1999).

In this research, it appears that the risk that is evaluated is more likely to be the risk related to the parental dispute, rather than the risk of child sexual abuse. This reflects a reliance on the parental conflict model's presupposition that allegations in the Family Court are a bi-product of parental dispute. The judicial risk assessment did not generally extend to an appraisal of the indicators of child sexual abuse or the father's propensity for abuse.

An example of the risk assessment approach in these cases is found in the Martens case where the father had admitted to enjoying the experience of Skye (who was five years old), holding his penis for a prolonged period while they were in the spa bath. However, she had made more extensive allegations of her father putting his fingers inside her vagina. The judge's assessment of risk was not overtly discussed in the judgment, but the orders allowed for day time contact only (although it was unsupervised), for two years. Like the other cases in this sample, there was no expert evidence or reasoning available that explored the level of risk of future sexual abuse. In addition, there was no analysis of whether such orders would offer her appropriate protection from future sexual interaction with her father.

The court's work is therefore interpreted as being primarily to assess if contact should occur, and these decisions often have to be made in the face of a lack of certainty about what the risks of child sexual abuse are. The information that is collected about the subject children does not include the material required to assess risk about an allegation of the kind made by Skye. One of the most notable limitations of the court-ordered assessments provided to the judges in this sample is that they do not include an estimation of this risk of child sexual abuse. This in turn limits the judges' ability to make appropriate orders.

Moreover, there was no indication that there was a systematic methodology employed by the court-ordered assessors or judges to identify or/and analyse indicators or risk. Children in this sample were not routinely interviewed about the allegations despite the

child interview being ‘the most important factor in determining the truth of the allegation’ (Faller; 1991: 90). While the delay between the interviews and the allegations first being made has implications for the children’s ability to remember what had occurred, children of all ages have been found to have fairly reliable memories about the core events (Saywitz et al., 1991). While there is no definitive screening or assessment tool to identify positive child sexual abuse cases (Kendall-Tackett et al., 1993), the child protection literature includes the analysis of the children’s allegations and their behaviour to establish a level of risk of sexual abuse (Cavanagh Johnston & Friend 1995; Faller, 1991; Hewitt, 1999). Robust indicators of child sexual abuse that are more reliably related to positive risks and unlikely to have any other explanations, include the verbal allegations made by children (Elliot, 1989; Goodman & Bottoms, 1994). However, children’s allegations were not uniformly treated as likely indicators of abuse, even when there were no questions raised about contamination of the allegation. Child protection risk assessments typically also include assessment of: the alleged perpetrator, and various child and primary caretaker variables, family characteristics, the nature of the alleged abuse incident and environmental factors (English & Pecora, 1994).

The focus that court-ordered assessors brought to the assessments of children was an emphasis on the child-father interaction that focused only on behavioural interactions that were primarily based on proximity seeking, derived from attachment theory (Bowlby, 1988). The limitations of an assessment of children and their parents being based on observations, in cases where there are allegations of child sexual abuse, were discussed in detail in Chapter Nine.

Behavioural indicators and verbal disclosures of child sexual abuse were not assessed in the light of the child's cognitive development and the family context or family functioning to determine if the dynamics were consistent with sexual abuse (Abbott 1995; Elliot, 1997; Hewitt, 1999). Methods of investigation and assessment used in the child protection and forensic spheres include interviewing the child using open questions as much as possible, the careful use of a structured interview process that allows for free recall and some prompting where necessary (Yuille et al., 1993). In addition, the child's verbal allegation is analysed for internal consistency and meaning (Honts, 1994; Lamb, 1994). In addition, sexual themes in play, behavioural changes indicating trauma, physical evidence consistent with sexual abuse and the use of coercion or imitation of adult sexual behaviour should be explored (Cavanagh Johnston & Friend 1995; Goldman & Goldman, 1988; Ney, 1995).

This is not an exhaustive list of the areas that may need to be considered in an assessment of a child who has made allegations of child sexual abuse or about whom an allegation has been made. However, it does illustrate that the area is a complex one, and one that requires a dedicated focus on the child, as well as understanding the context in which the allegations are being made. In this research sample, expert assessments and judicial evaluation did not reflect a dedication to this task, neither was specialist knowledge apparent that would be used to make such an assessment of child sexual abuse. In short, there was no thorough assessment of the child in order to make sense of the allegation nor

was there specialist knowledge applied to the evidence about children that is derived from the literature pertaining to child victims of incest.

10.9 Attempting to understanding the child's world

The type of evidence that was available about children varied according to its clarity and completeness. This resulted in high levels of uncertainty about what the child had experienced. There were varying forms of evidence available to the court and this had the effect of creating different levels of knowledge about the child. Judges favoured evidence that had an assurance of reliability that was derived from specialist services such as child therapists who worked in child protection units or in a medical model.

Evidence from these professionals included a high level of detail and knowledge about the child, their reactions to family events and their reactions to the abuses. In the absence of this type of evidence, judges accepted the evidence provided by court-ordered assessors: psychiatrists, clinical psychologists and court counsellors.

When evidence from children was not dismissed due to findings of 'contamination', their utterances were attentively examined and where possible, the context in which children made statements was reconstructed. The judicial task of assessing the evidence and understanding it as completely as possible was one that involved tracing the origins of the child's allegations, behavioural indicators and any factors that may have affected these.

There were indications that some judges valued material that was rich in detail about the children and relied on it in determining final orders. In Pollock case for example, the judge asked for more such material but was told that this was not available:

I have some suggestion that there was an allegation at some stage by somebody that – to somebody – all of these are unknowns.

Legal Counsel: That is right. The difficulty in my case is that I simply do not have someone here who has spoken to the children.

(Pollock judgment, number 5)

The area that was most uniformly considered in detail about children was that of ‘children’s wishes’ (an item specified in orders for Family Reports), and children’s experiences of the parental conflict. Judges routinely detailed the reported opinions that children had voiced during the family assessment interviews. Children’s wishes were usually sought in relation to residence and contact issues. In the De Maria judgment for example, the judge attempted to clarify five-year-old Mary’s wishes from piecing together a number of statements that she had made about her father and what he had done to her:

The assessing psychiatrist states in his report, quoted earlier, that after Mary had described the sexual abuse he asked her whether if the father promised not do this it would change her feelings, and she said that "she would love him and would like to see him as long as he promised not to do this". It seems to me, therefore, that the evidence strongly suggests that Mary wishes any such sexual interactions

to cease and, if she is confident that they will not recur, she would like to maintain a relationship with the father. I think it is appropriate to attach at least some weight to this evidence of Mary's wishes.

(De Maria judgment, number 3)

The child's words are referred to by the judge in their reconstruction of what Mary had said during the family assessment interview. The judge concluded from this assessment by the court-ordered assessing psychiatrist and the child therapist at the child protection unit, that if Mary was safe from abuse from her father, she would want contact to occur. In this judgment the dilemma of maintaining the daughter-father relationship despite a substantial risk of child sexual abuse was the key dilemma. This is the same dilemma that is at the heart of these cases. Any level of positive risk calls into question the suitability and practicality of the child continuing a relationship with the alleged abuser. One solution to this is to order supervised contact, although this has been the subject of debate within the judiciary (Baker, 1995), as supervision may not be able to control subtle abuse during the contact. For example, sex offenders have been noted to use intimidation as a method of controlling their victims and maintaining fear after the physical aspects of the abusive relationship have stopped. Gestures or actions that have a particular currency in meaning between the child and alleged abuser, for example, may be used without a vigilant adult supervisor being aware of the dynamics that are being played out (Jenkins, 2003; Salter, 1994). Therefore, the reliance on supervised contact can be inadequate to protect a child because it does not recognise the manipulation and coercion aspect of the victim-perpetrator relationship.

10.10 Conclusions

Children who are the subjects of Family Court hearings are conceptualised first and foremost as hapless victims of their parental conflict (Smart et al, 2001). The guiding theories and ideas used by experts and judges are derived from the parental conflict model that places parents, their allegations and characteristics in the foreground of the analysis and views children as victims of parental conflict. In this model, children are found to have made allegations of child sexual abuse as a result of parental conflict in order to please one of their parents. This frame relies on a psychiatric interpretation of the allegations and the theoretical proposition that child-parent interactions in families where there is family law litigation, can result in a false allegation of child sexual abuse. This is the assumption extrapolated in the backlash literature, as an explanation for how false allegations are made (Kaplan & Kaplan, 1981; Schuman, 1986). It is a more forgiving version of the PAS in its most punitive form (Gardner, 1987, 1994) and is replete with positive connotation, of the child trying to please a parent. However, like the PAS, it moves the focus of analysis away from a detailed consideration of the children and onto the parents, thus reflecting the parental conflict frame in family assessments.

Judges took a position of alignment with children against parents when they thought that parental conflict was the cause of the litigation. Thus, the accusing mother and the accused father were yoked together as jointly engaging in conflict that distressed and harmed their children.

In exploring the question *How is evidence related to children, treated in Family Court decision-making?*, the impact of the family conflict model was identified as influential in a number of ways. This dominant model has had the effect of stifling an exploration of the allegations of child sexual abuse or the possibility that they were true. This was most obvious when children made allegations of abuse and fathers' made partial or full denials. Children's allegations were not examined in detail in order to assess their validity and veracity unless it was to establish that the child's allegation was contaminated. Children's evidence was not given the same weight as parents' evidence. This finding is consistent with findings that legal systems are reticent to favour evidence from children when it challenges an adult's version (Bala, 1989), despite a growing body of evidence that points to their memory and evidence being as robust and reliable as adult testimony (Goodman & Helgeson, 1985; Goodman & Reed, 1986; Goodman, Rudy, Bottoms & Aman, 1990).

In addition to this, children themselves did not undergo thorough assessments. The allegations they made were only examined for veracity in order to establish that they were unreliable. In some cases the only assessment that was made was one that focused on the interactions between the parents and children and interviews with the children. This assessment style is one that is specific in Family Court assessments to assess attachment, parenting ability and style (Benjamin & Gollan, 2003). It is not equivalent to a child protection risk assessment or a forensic investigation of allegations (for example, Baird, 1999). In short, the dominance of the parental conflict model narrows the assessment focus onto the child's relationship with the parents and diverts the assessor away from a focus on the child or of the allegations of sexual abuse.

This is a crucial issue when the assessments undertaken by child protection departments are routinely discredited or when there has been no child protection assessment undertaken. Because of the demarcation of roles between the Family Court and the State child protection departments, court counsellors do not ask children about allegations, and while court-ordered psychiatrist and clinical psychologists, might, ask children about the allegations, they are not assigned to every case, and the scope of their assessment may be limited by the order made for their involvement. It is therefore possible for a child who is the subject of a court application to have orders made about a contact and residence regime without ever being asked about the allegations.

In a few exceptional cases, the focus of the judgment shifted to the children, what they said and experienced. However, this shift was only successfully achieved when there was no realistic contest for residence between the mother and father, either because there was no father involved in the court proceedings, or the father's credibility had been severely undermined during the trial. In comparison, where fathers presented well, they were not denied contact even when there was a partial admission of inappropriate or sexual behaviour with their children. This illustrates one of the facets of the parental conflict model that emphasises the necessity for the child to have a relationship with the father, under almost any circumstances.

Ultimately, the implications of the limited focus on the child or assessment of allegations of sexual abuse is that risks may go undetected and judicial decisions may be made

without the benefit of a complete assessment. The limitations of the Family Court's treatment of evidence about children raises the question of how can a judicial system, with the checks and balances required to ensure parents rights are not undermined, ensure the child is central to decision-making? One part of the answer must lie in ensuring the allegations are examined in detail, and that the professionals involved in assessments are not limited by a presumption that such allegations are likely to be the product of the parental dispute.

This chapter has reviewed the findings that relate specifically to children's evidence and evidence about children. The following Chapter further examines the findings of this and the preceding chapters, draws conclusions and suggests further areas of research.

CHAPTER ELEVEN

CONCLUSION

... it is all of society, not just those immediately affected, that protects the secret of child sexual abuse. We have overlooked or outrageously trivialised this subject, not because it is peripheral to major social interests, but because it is so central that we have not yet dared conceptualize its scope. Much as the individual victim is compelled into silence, self-punishment, dissociation, and identification with the aggressor, we as a society move thoughtlessly to deny sexual abuse and to conceal vast aggregates of pain and rage.

(Summit, 1988, 41)

11.1 Introduction

This research has explored the processes that inform judicial decision-making in cases that involve allegations of child sexual abuse. It has paid particular attention to how the ‘best interests of the child’ is interpreted by the judges. This chapter considers the relationship of the findings to the current social and political context of family law. The implications of the findings and possible fields of further inquiry are also explored.

The key question in this research was; *How are child sexual abuse allegations dealt with in the Family Court?* The answer to this question lies in the finding that there was a reluctance to name child sexual abuse or to assess these allegations in Family Court

hearings. The allegations were minimised as were the possible risks associated with them. Significantly, there was a disqualification of evidence from the statutory child protection sector that has the role and expertise to investigate such allegations. Judges were handicapped in their decision-making by a lack of specific evidence in court-ordered reports about the nature of sexual abuse perpetration and the experience of childhood incest. Moreover, the judgments were found to be focused on the parents and their parenting capacity rather than on the children and the allegations of sexual abuse.

The body of knowledge that dominated the considerations about the allegations in the judgments was the forensic psychiatric/legal paradigm that was developed in the 1980s and 1990s. This paradigm has largely remained static despite ongoing refinement of models used to assess the veracity of allegations, the experience of victimisation and the modus operandi of alleged incest offenders. The growth of knowledge in these areas has been accompanied by the certainty that child sexual abuse is widespread and will affect a high number of children, and in particular girls, in divorced families (Wilson, 2001). However, there is no evidence that this knowledge has been integrated into the Family Court assessment processes.

The sceptical psychiatric/legal model was drawn on by the psychiatrists and clinical psychologist undertaking court-ordered assessments of the families. Expert evidence that might illuminate the assessment of child sexual abuse allegations, such as information about the way children disclose, the victimisation of children within families, incest dynamics and sexual abuse perpetration, was not sourced in these assessments. This

finding relates to the sub-question; *What concepts and frameworks are relied on in the professional assessment of parents, children and allegations of child sexual abuse?* These findings establish that deep scepticism (Parkinson, 1998) about allegations of incest, is implicit to the psychiatric/legal paradigm, thus limiting the Court's access to alternative 'knowledges' (Smart, 1989:10) that challenge the dominant frame of child sexual abuse allegations being the result of the mother's mental health, her emotional state or/and the parental conflict. The alienating mother described in the psychiatric/legal paradigm, who falsely alleges incest, has left an indelible mark on the psyche of court-ordered assessors and judges. Judicial criticism of the child protection evidence was also reminiscent of the criticism of the overzealous child investigator of the 'backlash' literature of the 1980s and 1990s (e.g., Gardner, 1994; Wakefield & Underwager, 1988) and resulted in child protection officers being more closely scrutinised than court-ordered assessors. They were criticised in relation to their methodological errors, the 'contamination' of children's evidence and bias. The effect of this scepticism and the uniform discrediting of child protection evidence is consistent with a defence of the idealised post separation family that returns the father, regardless of the nature of his relationship with the mother or child, to the head of the family (Sevenhuijsen, 1986a).

The only exception to the exclusion of evidence that was not sourced from court-ordered assessments was that of the child therapists who were working within medical contexts. This context appeared to provide the child therapists with a mantle of scientific legitimacy that ensured their evidence was accepted as complying with the judicial standard of 'neutrality' and professionalism. This setting also served child therapists by

distinguishing them from professionals who, by comparison, took positions of advocates for their clients. It also differentiated them from the State child protection officers.

The finding that there was an exclusion of ‘knowledges’ from child protection departments was the clearest finding in this research. It had the effect of narrowing the assessment focus onto the veracity of the mother’s allegation and observable personal characteristics of each parent. This exclusion effectively silenced the children in this research- thus contradicting the feminist project of hearing and honouring the stories of victims of abuse that occurs in the privacy of the home (Herman 1981; Ward, 1984).

This diverted the assessors away from the specific issues that related to the allegation, or a broader assessment of, for example, the changing pattern of the child’s sexual behaviours (Hewitt & Friedrich, 1995), the veracity of their verbal allegations (Honts, 1994) or any indicators of trauma (Beitchman et al., 1991; Whitfield, 1995). Court counsellors, who might provide an alternative child focused frame, were hamstrung by the limited scope of their assessments through Family Court policy (Family Court of Australia, 2004b). This finding relates to the sub-question of: *How do judges make decisions when there are disputes in expert evidence?* The limitations of the evidence provided to the court, and the influence of the sceptical psychiatric/legal paradigm, resulted in judges making decisions that were not based on evidence relating to child sexual abuse allegations unless there were other risks present. For example, severe domestic violence, or drug and alcohol abuse and mental illness had to be present before positive findings of risk of child sexual abuse were made. The judicial decisions about

contact and residence were therefore based on other factors and risks that presented in addition to the allegations of child sexual abuse.

The family members who brought the allegations to court, mothers and grandmothers, like child protection officers, also came under intense scrutiny. This finding relates to the sub-question of: *How does the legal process respond to those who allege child sexual abuse?* As in the 1980s and 1990s psychiatric/legal paradigm, alleging mothers and grandmothers in this research were seen by the court to be prone to making false allegations, either because of their own emotionality, mental illness or vindictiveness, in the same way that Blush and Ross (1987), Green (1986) and Gardner (1994), and other psychiatrists of that time, had described. Psychiatric assessors drew on these theories that were related to the creation of false allegations and mother/child dynamics. The explanation most commonly applied by court-ordered assessing psychiatrists/psychologists was that the mother's anxiety and fears were projected onto the child, and the child responded with an allegation of sexual abuse by the father to please the mother. However, how a mother's anxieties after separation lead to allegations of child sexual abuse was never adequately explained: it was a speculative hypothesis without specific evidence to confirm it.

There was evidence of a presumption that mothers may be vindictive in making allegations. Psychiatric/psychological court-ordered assessors actively searched for evidence that would support this hypothesis and other explanations for how a false

allegation had been made, rather than being open to the possibility that there may be risks to the child's safety that needed exploration.

The reticence to name or assess child sexual abuse allegations extended to the treatment of the alleged perpetrators: the fathers. If fathers presented well in the witness box and demonstrated empathy towards their children during their oral evidence and in the assessment observations, this was used as a contra-indication of incest perpetration. Fathers were not assessed in relation to sexual behaviours or sexual deviancies or other possible indicators of incest (with the exception of one father who could not deny the allegations because of the amount of evidence amassed by police about his voyeuristic behaviours). There was no demonstrated understanding of the ability of the incest perpetrator to engage in pro-social behaviour (Nugent & Kroner, 1996) or that incest perpetrators may represent well in a court environment. Unless there was substantial evidence that established that the father had anger management difficulties, manipulative behaviours or other problems that posed other types of risks to children, contact was granted and/or lengthened. These deficits in the assessments of fathers suggest that the prevailing family law culture that gives primacy to the role of father after separation is so influential that self censoring on the part of assessors occurs in order to ensure that they conform to the expectation that fathers must be involved in children's lives post separation regardless of the nature of the relationship that they have had with them (Sevenhuijsen, 1986a). Further, when mothers were found to be creating false allegations, residence was reversed or a reversal was threatened if contact was not

successfully reinstated, thus illustrating the application of the sceptical paradigm to the assessment of mothers.

This research found that children's evidence was treated unevenly in the judgments and the acceptance and use of their evidence was dependant on the credibility of the adult presenting their allegations, or the information about them. This relates to the sub-question; *How is evidence relating to children treated in the Family Court decision-making?* In the majority of cases, evidence about and from children was not central to the judicial considerations; rather it was the assessment of each parent that eclipsed detailed information about the child, their experiences and individual characteristics. In the few cases when child therapists based in specific medical settings presented themselves as neutral vis-à-vis the allegations, their evidence about their child clients was accepted in full. In general however, children's evidence was screened through a lens of children as objects of concern and victims of a 'parental dispute' rather than of possible victims of child sexual abuse or as people in their own right with individual and unique lives that required understanding (Smart et al., 2001).

11.2 The context

The findings in this research suggest that child sexual abuse and incest allegations are problematic within the prevailing social context. This context is one in which these allegations are not only unwelcome, but discouraged. This is not new. The repeated silencing of women and children who report their victimisation has been the subject of cyclical processes of denial that Herman has described as a type of social amnesia. The

recognition of incest can only be sustained by a supportive social and political milieu (Herman, 1992:51). However, the current conservative climate is one that is focused on reinstating the father as the head of the post-separation family (Smart, 1989b). Further to this, at the time that this thesis was being completed, new legislation was about to be proclaimed. This legislation prescribes the nature of the post-divorce family in an idealised model of shared parenting responsibility. This includes legislative punishment for mothers who are found to knowingly make false allegations (Family Law Amendment (Shared Parental Responsibility) Bill 2005:s117AB (Second Exposure Draft). In such an environment, allegations of incest against fathers are an anathema.

In the sphere of family law, there is a constructed orthodoxy or convention that child sexual abuse and incest allegations are likely to be false. This orthodoxy relies on and engages the psychiatric/legal paradigm (Gardner, 1994; Hale, 1736; Scutt, 1997; Turkat, 1997, 2002). This orthodoxy has had the effect of disqualifying other 'knowledges' that might inquire more thoroughly into child sexual abuse allegations (Smart, 1987a:26) and is an extension of the silencing of women and children through the family law that is in this instance, an instrument of patriarchy (Kelly, 1988).

The proposed legislation prescribes that parents should have 'equally shared' parenting decisions and shared residence; it signals a conservative shift in ideology and a deliberate attempt to engineer a particular form of post-separation family life. This post-separation family form has been championed by a number of interest groups and politicians who are committed to the ideal of both parents being involved in parenting (Shared Parenting

Council of Australia, 2003; 2005). They are also committed to defending a welfare system that places financial responsibility for child maintenance onto the biological parents, and away from the State (Crowley, 2003; Ruddock, 2005a; Smart, 1989b). The shift in policy represents a loss of influence of the refuge movement and of women's services, which have in the past been successful in putting the issues of domestic violence and child abuse on the political agenda.

The current social and political debate has resulted in the 'best interests of the child' now being seen as synonymous with equal parental decision-making and 'equally shared residence'. Notwithstanding that there are issues outside the scope of this thesis that relate to biological parentage with adoption and the assistance of medical technologies (Featherstone 2004), the view that a child must have access to both biological parents, and particularly the father (Neale & Smart, 1998; Perlesz, 2004), has become an orthodoxy. This is despite findings that relate to the multiplicity of relationships within families before and after divorce and separation and of the problems for children in post-divorce families where the father poses risks in the form of a lack of attentiveness or demonstrations of love, child abuse, domestic violence or ongoing parental conflict (Featherstone, 2004; Smart, 2004). The quality of the processes within the family and the relationships between the child and parent are invisible when this script for families is applied (Silva & Smart, 1999) and the establishment of a 'normative' presumption about the arrangements for children after separation and divorce, 'may be created that cease to recognize the child as the individual child' (Smart, 2004: 499). Indeed, the large percentage of relationships that end because of domestic violence and coercion suggest

that a joint parental decision-making and an equal parenting relationship after divorce will not be possible in many of these cases (Kaye et al. 2003).

This research has been undertaken during a period that has been marked by an increase in intensity of lobbying by the men's movement in Australia. At the commencement of this research the Reform Act (1995) had been recently proclaimed. This can be seen as the first policy shift in response to lobbying from men's groups. At the completion of the research, a proposed new amendment is about to be proclaimed. This will further extend the legislated role of the father in the post-separation family. The intervening period between the Reform Act and the proposed amendment was punctuated by a Senate Inquiry into family law that handed down its report in December, 2003 (Hull, 2003). This report heralded the new policy position: the presumption now crystallised in draft legislation (Family Law Amendment (Shared Parenting Responsibility, 2005) (Second Exposure Draft) of equally shared parental decision-making and equally sharing residence.

11.3 The two orthodoxies and the 'best interests of the child'

When child sexual abuse allegations are raised in family law disputes, the two orthodoxies dovetail to create severe impediments to a thorough assessment of the allegations. These orthodoxies – that child sexual abuse allegations are likely to be false in family law disputes and that children need their parents and in particular fathers to be involved in their care and decision-making – result in an unwillingness to engage with such allegations. These allegations are only the focus of thorough assessment when the

evidence is incontrovertible, which is highly unlikely in the case of a ‘secret’ crime like child sexual abuse. In the social and political context that interprets ‘the best interest of the child’ as having both parents involved in ‘equally shared’ parenting responsibilities, the possibility that the father poses risks to the child will not be actively pursued. Indeed in this frame, pursuing evidence about the existence of such a possibility is counterintuitive: it is almost inevitable that allegations of child sexual abuse will be understood to be an artefact of parental conflict because there is Family Court litigation present.

The effect of the two orthodoxies is to militate against any serious appraisal of a child’s view or their evidence if it departs from the orthodoxies. The orthodoxies provide little room for the consideration of how courts can hear and include the evidence about and from children. Instead, fathers’ groups have succeeded in capturing the political ground to define what children need after separation (e.g., Hull, 2003; Shared Parenting Council of Australia, 2003).

11.4 Implications

At this time Australia is braced for legislative change: instead of bringing solutions to the area of family law, the changes may further polarise those seeking safety for their children in the Family Court and those who are claiming their innocence. The stakes are now higher for mothers who raise allegations. The presumption of joint parenting decisions and the presumption of ‘equal time’ in the proposed legislation will create even greater tension in how the ‘best interests of the child’ is interpreted in the face of family

violence and child sexual abuse allegations. In a legal environment that is already antagonistic to maternal allegations of child sexual abuse, mothers will be under even greater pressure to establish that they have legitimate reasons for not agreeing to equal parenting time. Ultimately, the implications of this legislative change are that mothers will be less likely to raise such concerns, in an environment in which the role of the father has been elevated.

Consequently, suspected risks to children are likely to go undeclared by mothers and will therefore not be assessed by the courts: judicial outcomes will be made without being informed by these concerns. The impact of the new legislation will therefore require urgent research, to establish if the legislation is indeed further silencing mothers and children about child sexual abuse.

The issues raised in this research present challenges for the social work profession. As a profession, social work has been involved in the response to the identification of child sexual abuse and incest as a widespread concern in the 1980s and 1990s (Carmody, 1990). Social workers have played a key role in the establishment of services for children and families after the disclosure of child sexual abuse and incest and have traditionally played support and advocacy roles for children and their families. However, this research suggests that professionals (including social workers in child sexual assault services and in statutory child protection departments), who attempted to present evidence to the Family Court, had their evidence disqualified when they had not understood the demands of the legal environment in relation to ‘neutrality’ and professional independence. In

comparison, those professionals who were able to successfully cross-over from their arena of expertise into the Family Court arena presented evidence that was valued and used by judges. The understanding of the Family Court context assisted in making this successful transition. This is a challenge for social work educators and work places to ensure that social work practices ensure that evidence that is collected about and from children is not lost to the court through being ruled as ‘contaminated’ or biased. There is also a challenge to the social work profession to find ways to educate the court system and the judiciary about the impact of the sceptical paradigm about child sexual abuse allegations in family law disputes and the possible impact of the exclusion of evidence from and about children in the evaluation of risk.

Allegations of incest are a natural enemy to ‘equally shared parenting’, and return of the ‘paterfamilias’ that reinstates the father as a central decision maker in the child’s life after divorce (Smart, 1989:52). The findings in this research bore out that in the current social and political climate, the alleged perpetrator is protected from the piercing gaze of investigation or forensic assessment in order to preserve the ultimate imperative: the two biological parent, post-divorce family. This is emblazoned on the findings in this research as the mothers who raised concerns about their children came under intense scrutiny and the voices of their children became almost imperceptible.

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APPENDIX I

CODING AND CONCEPTUAL TREE USED TO GROUP PHRASES AND CONCEPTS

1. Coding

The coding of phrases and concepts

The coding of the data was guided in all the nodes by the researcher asking the question of each phrase coded: ‘I am interested in this data because ...’, ‘It tells me about ...’, ‘It is an example of...’, ‘This is a type of ...’

These questions assisted in clarifying where the phrase should be coded.

2. Summary of the Conceptual Tree

Categories used in coding and definitions

1. **‘Opinion of’** – the person whose opinion was being referred to – 7 subcategories
2. **Person referred to** – the subject person – 15 sub-nodes
3. **Content of the Family issues** – family dynamics or characteristics – 40 sub-nodes
4. **Court processes** – evaluation of evidence and previous court hearing – 23 sub-nodes
5. **Application/responses to court** – previous legal history – 0 sub-nodes

6. **Personal characteristics** – characteristics that are attributed to individuals e.g. manipulative/hostile/anxious – 48 sub-nodes with other sub-sub-nodes
7. **Circumstances** – welfare or child protection issues – 2 sub-nodes
8. **Stages in the proceedings** – (timing of the allegations being raised in legal proceedings) – 5 sub-nodes
9. **Evidence-** type of and/or any issues about the evidence – 7 sub-nodes plus sub-sub-nodes
10. **Outcomes** – orders, findings conclusions – 6 sub-nodes
11. **Language** – positive and inferential – 2 sub-nodes
12. **Surprises-** anything that was unexpected – 0 sub-nodes
13. **Quotes-** used as examples of issues – 0 sub-nodes
14. Free nodes

3. Summary of the revised conceptual tree: revised categories for coding and definitions

1. **‘Opinion of’** (the person whose opinion was being referred to) – 6 sub-nodes: court-appointed experts/professionals/Child protection professionals/legal professionals/judge/family. 37 sub-sub-nodes.
2. **‘Person referred to’** (the person who was the subject of the opinion) – 6 sub-nodes of: court-appointed experts/professionals/persons in disagreement/Child protection professionals/legal professionals /family. 56 sub-sub-nodes.
3. **‘Parenting*’** (parenting attributes or descriptions) – 9 sub-nodes: Negative/positive/historical/attachment/truth/belief about child sexual abuse mental illness/emotions/evaluation. 64 sub-sub-nodes.
4. **‘Court processes’** (comments made about the evaluation of evidence and previous court hearing) – 5 sub-nodes: judges process/ solicitors processes/experts/other court/circumstances/*judges process/Witness box’.

5. **‘Characteristics of children’** (personal attributes or descriptions) – wishes/ attachment/development/behaviours/emotional presentation/truth/beliefs/health status/- 41 sub-nodes.
6. **‘Veracity**’** (assessment of evidence, statement or claim) – 4 sub-nodes: credible/not credible/noted/no finding – 0 sub-sub-nodes.
7. **‘Characteristics of the allegation*’** (descriptions of allegation)- 4 sub-nodes: consistent/timing/motivation.
8. **‘Evidence’** (19 unsorted types of evidence)
9. **‘Explanation of the allegation**’** (21 unsorted nodes sub-nodes).
10. **‘Outcomes’** (allegations, orders/ reasonable belief) – 3 sub-nodes: Child sexual assault allegations/ orders/reasonable belief. *Outcome/Risk assessment.
11. **‘Stages in the proceedings’** (the stage in the legal proceedings that the allegations had arisen) – 5 sub-nodes: before separation/initial hearing/after hearing/further hearings/no separation/after separation and before hearing.
12. **‘Language’** (characteristics of the language used) – 5 sub-nodes: positive/inference/negative/omission used as inference/ambivalent finding.
13. **‘Surprises’** (anything that was unexpected) – 0 sub-nodes: child’s voice/voice of powerlessness/voice of perpetrator/system failures/systems abuse.
14. **‘Quotes’** (used as examples of issues) – 3 nodes final risk assessment/solution to alienation from parent/disagreement) – 0 sub-nodes
15. **‘Family characteristics*’** (descriptions or attributions to the family)-8 sub-nodes: evaluation/extended family influence/domestic violence/care arrangements/residence/family dynamics/parental relationship) – 16 sub-sub-nodes.
16. **‘Changes to contact/residence’** (3 sub-nodes: review of previous changes/anticipated changes/intervention post hearing).

NB: * denotes that the nodes were heavily populated with coding. ** denotes that the node is a new addition to the second conceptual tree.

4. Nodes

Free nodes

1. Agreement between any professional experts

Description: Agreement between any on family witnesses who give evidence.

2. Demographics of family members

Description: Ethnicity, need of interpreter, place of birth.

3. Details of representation

Description: Self representation or details of solicitor/barrister.

4. Disagreement

Description: Between all professionals.

5. Existing court orders/applications

Description: Local court: AVOs and Family Court matters

6. Other court/legal/Violence

Description: History of alleged violence or court/legal proceedings

7. Stage in divorce/separation/CP investigation

Description: Stage in divorce/separation the allegation arose/alterations of FC orders/
stage in CP investigation.

8. The child

Description: Developmental stage of the child, disabilities, attachment

Tree

1.1 Court-ordered experts

Description: 30A (psychiatrists), 62G (welfare officers of the court), Regulation 8 experts (psychologists and social workers).

1.2 Court-ordered experts/Characteristics of alleged abuser

Description: Personal attributions of honesty, truthfulness, dishonesty, abusiveness, character traits, protectiveness, parenting ability, attachment to child, credibility of a witness, mental illness.

These characteristics are attributed to the alleged abuser by the witness.

1.3 Court-ordered experts/Victim

Description: Personal attributions of honesty, truthfulness, dishonesty, abusiveness, character traits, protectiveness, parenting ability, attachment to child, credibility of a witness, mental illness.

These characteristics are attributed to the alleged victim by the witness.

1.4 Court-ordered experts/Views about other's evidence

Description: Views about others treatment, actions, evidence or deductions.

1.5 Court-ordered experts/Non-alleging parent

Description: Parent who is not the alleged perpetrator and who has not made the allegation, e.g. where someone else makes the allegation to the court.

1.6. CP, Police, Health, Child Sexual Assault counsellor.

Description: Statutory investigators, child protection professionals, police, DoCS, Department of Health, Child Sexual Assault counsellors, or referrals made to agency via child protection statutory agency.

1.7 CP, Police, Health, Child Sexual Assault counsellor/Alleger and allegation

Description: Personal characteristics attributed to the alleged, and the evidence they have given.

1.8 CP, Police, Health, Child Sexual Assault counsellor/ Characteristics of the alleged perpetrator.

Description: Personal characteristics of the alleged perpetrator and their behaviour.

1.9 CP, Police, Health, Child Sexual Assault counsellor/ Victim

Description: Attributions made by the witness about the victim and their allegations, behaviours (related to abuse), indicators of abuse.

2.1 CP, Police, Health, Child Sexual Assault counsellor/Views about other's evidence.

Description: Views about treatment, actions evidence and deductions.

2.2 CP, Police, Health, Child Sexual Assault counsellor/Conclusion are Child Sexual Assault.

Description: Is it likely to have happened or not?

2.3 Professionals

Description: Professionals who give evidence but are not part of the interagency child protection system. Who are they, how often do they see the child or family member, scope of their involvement.

2.4 Professionals/Alleger and allegation.

Description: Personal characteristics attributed to the alleged, and the evidence they have given.

2.5 Professionals/ Characteristics of the alleged perpetrator

Description: Personal characteristics of the alleged perpetrator and their behaviour.

2.6 Professionals/ Characteristics of the victim and their allegations.

Description: Attributions made by the witness about the victim and their allegations, behaviours (related to abuse), indicators of abuse.

2.7 Professionals/ Views about other's evidence.

Description: Views about treatment, actions evidence and deductions

2.8 Professionals /Conclusions about Child Sexual Abuse.

Description: Is it likely to have happened or not?

2.9 Judge

Description: judges attributions in regards reliability and truthfulness or otherwise.

2.10 Judge/Victims

Description: Attributions about the victims and this evidence. Credibility, degree of harm visited on them by sexual abuse and personality traits.

3.1 Judge/Characteristics of the alleged

Judge/characteristics of the alleged

Judge/findings

Description: What conclusion the judge comes to.

3.2 Judge/Findings/How a false allegation grew.

Judge/Findings S68F 2 considerations

Description: Wishes of the child

Further proceedings

Child relationship with parents/Effect of separation

Desirability and effect of any change in arrangements.

Attitude to the child and responsibility and duties of parenthood by each parent, and the capacity of each part and other persons to provide adequately for the need of the child.

The need to protect the child from abuse or ill treatment etc

Any other circumstances.

3.4 Judge/Criticisms about all professional evidence

Description: What the judge thinks about the evidence given by all the categories of witnesses: Professional, court-appointed professional, child protection.

3.5 Judge/Focus of the case.

Description: Core focus of the case.

3.6 Judge/Final orders.

3.7 Judge/Non-alleging parent.

Description: e.g. mother, when adolescent daughter makes allegation.

3.8 The abuse

Description: Characteristics of the abuse that is given in evidence as fact. Scope, frequency, how it occurred etc.

4.1 The abuse/evidence

Description: Medical, verbal disclosure, indicators, of abuse.

4.2 The abuse/Evidence/How evidence and how the report was created.

4.3 The abuse/Problems with evidence

Description: e.g. evidence that the judge considers cannot be weighed up to support or not to support the case.

APPENDIX II

TABLES

Table 1: Parental/child characteristics identified in expert assessments of the family and noted by the judge in judge (#13). Multiple risks identified, although none related to a finding of ‘unacceptable risks’ of sexual abuse.

Parental characteristics	Child characteristics	Strengths/lack of strengths
Father’s chronic alcoholism.	Older child witnesses parents having sex.	Limited protection for children from mother; she leaves them with her mother when the violence is severe.
Mother’s unavailability to children.	Preschool aged child alleges father has digitally penetrated him and acts out sexually.	Maternal grandmother is protective and helps over a number of years as violence continues.
Mother’s allegiance to father takes precedence over protection of the children.	Medical examination reveals anal tear consistent with abuse or passing a hard stool.	
Chronic domestic violence by father.	Children witness domestic violence.	Mother is ‘unavailable ‘to children because of violence.
Needs of parents overwhelming in household.		

Table 2: Explanations for child sexual abuse allegations in judgments by professional category.

Explanation for allegation	Opinion of/Judge	Opinion of hired professionals	Opinion of/CP, Police, Health	Opinion of/court-ordered experts
Parental explanation: to please mother or grandmother	10	1	1	7
Unclear	3	1	0	1
Professional related explanations (contamination/mis diagnosis)	4	0	0	2
Child related explanation	4	2	2	0
Total	21	4	3	10

Table 3: Comparisons- Characteristics where mothers scored higher frequencies than fathers.

Negative parenting characteristics	Mothers # of judgments/# of codings	Fathers # of judgments /# of codings
Conflict between parents effects child	14/27	10/19
Lack of child's interests	3/12	2/2
Not protective of children	7/14	0
Evidence gathering	6/15	1
Not nurturing	7/15 mgm2/2	0
Not protective	8/14	0
Not child focused/ empathic	5/12	5/9
Vindictive	7/9	6/7
Hyper vigilant	5/8	0
Passive or weak	2/3	1/1
Protective of accused adult	1/3	1/1

Table 4: Categories where fathers were coded more frequently than mothers in negative parenting characteristics

Negative parenting characteristics	Father documents/codings	Mother documents/codings
Sexualised, aberrant sexual behaviour	4/22	0
Physical violence	7/14	3/7
Manipulative	7/12	3/2
Sexually abusive	4/5	1
Behaviour control		0

Table 5: Cases where there was a positive finding of risk in relation to the allegation of sexual contact by a father with a child.

Allegations of sexual behaviour/ contact by a father where there some level of risk was found	Judgement #
Bathing with children with sexual touching. Father admits children wash his genitals.	6
Masturbating in front of children	10
Father has established pattern of voyeurism. He involved the children in dressing him and exposed them to pornography.	15
Step father alleged to have sexually assaulted two children in Eastern European Country. Step-grandfather convicted of child sexual assault in Australia.	7
Father alleged to have raped daughter ten years before	20
Father alleged to have fondled two girls while sleeping with him.	16
Father alleged to have fondled child's genitals- risk not known and case to be reviewed after supervised contact.	3
Total number of cases	7

Table 6: Maternal health/emotional state of mind

Category	Judgment #	Total
Anxiety/adjustment disorder	1,3,7,	3
Personality disorder	3,12,14,17	4
Factitious disorders of Munchausen's syndrome and Munchausen syndrome by proxy.	11	1
'Post-traumatic stress disorder with a superimposed major depressive episode'.	2	1
Intense hatred of father	21	1
Total number of mothers		10

