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Précis Paper

The Unacceptable Risk Test for Sexual Abuse

Introduction

In this edition of BenchTV, Professor Patrick Parkinson and Dinah Loumis, Registrar of the Family Court of Australia, address the unacceptable risk test for sexual abuse in the context of a wide-ranging discussion.

Key areas of presenters' discussion

1. Difficulties faced by Courts and legal practitioners in considering child abuse
2. Ensuring that practitioners and the Court ask the right questions so that a trial judge can assess future risks to a child
3. The need for a substratum of facts when the Court is making an assessment of future harm
4. The risk of a category error in confusing an assessment of risk and outcomes
5. The four stage process of assessing risk
6. Outcomes in cases containing child sexual abuse allegations

Difficulties faced by Courts and legal practitioners in considering child abuse

It is noted that child sexual abuse usually happens in secret. It is explained that one of the problems facing the Family Law system is that many children about whom there are child abuse concerns are under 7. The problem lies in the fact that an older child may give an articulate account, but it is difficult to work out what has happened with young children. It is further explained that the chances of having corroborative evidence of any kind in a child sexual abuse case are minimal, It is noted that children under 7 tend to be really accurate about what they say but that what they say is very little, and said to a trusted caregiver, and not repeated to police or child protection authorities. The difficulty is also noted of the situation where evidence of a child is transmitted through a parent in the context of a family law dispute. In this situation there can be a suspicion that the allegation is being put as a tactical weapon. There can also be misunderstandings in the context of separated parents. For children under 7, it is noted that there is also the possibility of misinterpretation of touching of children for purposes of such things as bathing, dressing and hygiene care

Ensuring that practitioners and the Court ask the right questions so that a trial judge can assess future risks to a child

It is explained that it's critically important to have a detailed chronology of how the allegation of child sexual assault arose. The awful dilemma for the Courts is that there may be nothing more than the recounting of the conversation as Mum best remembers it in a situation where there had been no clear disclosure to anybody else. A responsible practitioner should explore an issue, asking the question: Could this have a benign explanation?

The need for a substratum of facts when the Court is making an assessment of future harm

Courts have to make their decisions on the basis of proven facts. You can sometimes have micro-facts around child sexual abuse, for example the child said to Mum that Daddy did X. There may be micro-facts which can be proven or disproven on the balance of probabilities in the normal way, none of which will satisfy the Court according to the Briginshaw standard that the child had been

sexually abused. Any assessment of risk must be a cumulative exercise of looking at all the things that have been established, and saying: where does that take us into the future.

The risk of a category error in confusing an assessment of risk and outcomes

The High Court in Malec v JC Hutton explained that when you are looking at the assessment of future possibilities, you do it on the basis of findings of fact and those are on the balance of probabilities. A risk is either there, or not there. A risk is categorised according to the seriousness of the risk. The Court is trying to determine whether there is an unacceptable risk, which is a judgment call. It is an assessment of whether the possibilities going into the future of harm to the child are sufficiently grave to be unacceptable to the judge. The decision on unacceptable risk needs to be factored into the broader picture of: what are the benefits to this child of an unsupervised or unrestricted relationship with his parent? The Court's protocol for dealing with child sexual abuse cases is the Magellan protocol The protocol is trying to make sure the Court is appraised of what is possibly available to it and puts into place an independent children's lawyer immediately to start gathering information for the Court. In every Family Court there is a Magellan judge who carefully case manages the matters in a list, and the matters are given priority.

The four stage process of assessing risk

It is explained that there is a distinction between the question whether the child has been abused at all, and the question whether the child has been abused by the alleged perpetrator. The first question to be asked is whether the child has been abused at all. In situations where it seems, on the balance of probabilities, that the child has been abused by somebody, the question becomes: who? If we can't say on the balance of probabilities using the Briginshaw test that this man has abused this child then what are the micro-facts that give rise to a concern? One must look not only at the alleged abuse itself, but also what other indicators are there that this man may be a risk to the child, for example grooming It's not uncommon for victims of child sexual abuse to talk about the fact that they were

isolated from other supports. There are programs for sex offenders against children and some are very much helped by those programs It is not the case that all sexual offending against children is by paedophiles There is also the important question whether, if the secret is out, if there was a secret, he will offend in the future. Child sexual abuse can only take place in secrecy. Another large part of the assessment is going to be: what is the child's response to being asked to see the offending parent, even if the likelihood of abuse is low, given there had been a finding or acknowledgment of sexual abuse in the past.

David Finkelhor, who is a top expert on child sexual abuse, talks about one of the traumogenic dynamics of sexual abuse being traumatic sexualisation. The fact that a child wants to see dad does not mean it is necessarily in the child's best interest because there may be traumatic sexualisation. To assess the situation in terms of the child's best interests is critical Any best interests decision must look at the totality of the parent child relationship and the options The ultimate question is: should this child see the parent against whom the allegations have been made?

Outcomes in cases containing child sexual abuse allegations

It is explained that One option is a no face-to-face contact option. The next option is supervised contact. The Court is not keen on indefinite supervision orders. Even where there is a finding of no unacceptable risk it needs to be a careful recommencement with family therapeutic approach. The fact that the Court concludes that the risk is not unacceptable does not mean there is no risk at all. The finding of no unacceptable risk is probably an agonising decision for a judge but that finding doesn't mean it didn't happen. There are cases where the judge fairly confidently concludes it didn't happen. These are terribly difficult cases. A judge may decide to remove the child from the parent making the allegation and place them with the parent against whom the allegation was made. There is a need for caution in these cases. There are more cases occurring where the child is being removed from the parent who makes the allegation. The message it sends: that if you make an allegation of sexual abuse and the Court doesn't believe you, you may lose your children, is terrifying for a mother. The therapeutic approach can be of great assistance both during and after proceedings Often it's the return case

that results in the Court making the decision to remove a child from the parent making the allegation.

Bibiography

Child Sexual Abuse: Assessing the Risk:

https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0016/20149/Child-Sexual-Abuse-Assessing-the-Risk-Professor-Parkinson.pdf

N v S and the Separate Representative (1996) FLC ¶92-655

M v M [1988] HCA 68

Johnson & Page [2007] FamCA 1235

Malec v JC Hutton Pty Ltd [1990] HCA 20

s140 Evidence Act 1995 (Cth)

JIRT: Joint Investigative and Response Team

Presenters' Biographies:

Professor Patrick Parkinson came to Australia in 1986 to teach at the University of Sydney after gaining his masters and teaching at the University of Illinois. Patrick is an expert in family law who was appointed as a member of the Order of Australia for his service to the law. He is a former President of the International Society of Family Law and a frequent speaker at national and international events, having published several legal textbooks and numerous journal articles. He was also the Chairperson of the Family Law Council, chaired the Ministerial taskforce on Child Support, a member of the NSW Child Protection Council, Chairperson of the review of NSW Child Protection Laws and Editor of the Australian Journal of Family Law.

Dinah Loumis was admitted to practice in 1990. She has worked in Family Law and Care and Protection since that time. Dinah is an accredited specialist in Family Law and is an experience Independent Children's Lawyer. Dinah has worked at NSW Legal Aid and was the Solicitor in Charge of the Parramatta and Bankstown Office and was the solicitor in charge of the establishment of the Early Intervention Unit. She has worked as a Registrar of the Family Court. She also has worked as a casual academic at the University of Technology Sydney teaching ethics and evidence. She has trained experienced lawyers in the role of the Independent Children's Lawyer. Dina was a member of the NSW Law Society Professional Conduct Committee.