



Articles

Child abuse allegations in family law cases: A review of the law*

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*This article examines **M v M** and the more important later decisions relating to parenting cases in which there are allegations of child abuse, discussing John Fogarty's criticisms of certain Full Court decisions and his call for a 'return to basics'. It suggests that some comments by the Full Court need to be treated with caution, and argues that the law requires courts to make a balanced assessment of the relevant considerations, not only when deciding what parenting orders to make, but also when deciding what positive or negative findings to make about allegations of child abuse.*

1 Introduction

Sadly, it is an everyday occurrence for the family law courts to hear cases in which there are allegations of sexual and other forms of abuse against children. The modern law on the topic starts with the High Court's decision in *M v M*,¹ a decision now over 20 years old which has been applied and interpreted in numerous later cases. In an important article in 2006,² John Fogarty argued that some of the Full Court decisions contained misleading or faulty analysis, and he urged 'a return to basics'.

This article reviews *M v M* and the more important decisions³ in the later case law (including Fogarty's critique), and seeks to clarify the current legal principles. It will be argued that the substance of Fogarty's critique of some Full Court statements is correct, and it follows that those statements should be treated with caution.

This topic seems particularly important because the principles laid down by the High Court can apply to areas other than child sexual abuse. Sexual abuse cases are distinctive, of course: sexual abuse can be very damaging to the child, and the allegation is particularly shocking; and because it usually happens in private, the evidence is typically circumstantial and often ambiguous. Despite these special features, the general principles expressed in

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1 *M v M* (1988) 166 CLR 69; 12 Fam LR 612; FLC 91-979; 82 ALR 577.

2 J Fogarty AM, 'Unacceptable risk — A return to basics' (2006) 20 *AJFL* 249.

3 For a valuable and more detailed review of the case law, see R Harris, 'Failing the vulnerable: shortcomings in the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) and the "Unacceptable Risk" Test', LLM Minor Thesis, Melbourne University Law School, 2009.

M v M can be applied to other areas.⁴ Further, the principles are applicable not only to the work of the family law courts but also to the work of children's courts.⁵

This article does not engage in a detailed discussion of the impact of the amendments of 2006.⁶ There are reasons for thinking that those amendments may not have made a great deal of difference to the principles applied by the courts in child abuse cases.⁷ First, there seems no indication in the reasoning in the case law that they have caused a significant change: the cases continue to treat *M v M* as setting out the applicable approach, while, of course, applying the criteria as formulated in the 2006 amendments. Second, a recent study of a sample of decisions found 'no discernible difference' in the way the application of the 'unacceptable risk' test was applied in decisions before and after the amendments.⁸ Third, the amendments of 2006 do not include any provisions specifically relating to child abuse cases, but give great emphasis to the two considerations that often compete, namely, the child's need for protection and the benefit the child might have from parental involvement.⁹ Both of these, of course, were also taken into account in the pre-2006 law; and giving added emphasis to *both* of them would not seem likely to tip the scales one way or the other. Further research may, however, shed more light on the nature and extent of any impact the amendments might have made on child abuse cases.

Finally, as this article went to press the Attorney-General released draft legislation,¹⁰ and the Australian Law Reform Commission and the New South Wales Law Reform Commission released a major report,¹¹ related to family violence and child abuse. While it has not been possible to examine the question in detail, it seems likely that the principles in *M v M* will remain

4 The expression has been incorporated into the Family Law Act 1975, which requires the court to ensure that an order 'does not expose a person to an unacceptable risk of family violence': s 60CG, noted by Fogarty, above n 2, at 257. It has been applied to psychological abuse: *Orwell & Watson* [2008] FamCAFC 62; BC200850122 per Dessau J. It has been used in proceedings under the *parens patriae* jurisdiction of the NSW Supreme Court, in the context of deciding whether there should be intervention into an intact family to protect the children: *Re Frieda and Geoffrey* (2009) 40 Fam LR 608; [2009] NSWSC 133; BC200901594 at [71]ff; *Re Jayden* [2007] NSWCA 35; BC200701138 at [79]. It has even popped up in relation to bail (an unacceptable risk that the prisoner would commit a serious sexual offence): *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; 210 ALR 50; [2004] HCA 46; BC200406384, cited by Fogarty, above n 2, at 249.

5 R Chisholm, 'The law on unacceptable risk — a comparison of the family law and care jurisdictions', forthcoming in the NSW Children's Court's online publication 'Children's Law News'.

6 Family Law Amendment (Shared Parental Responsibility) Act 2006.

7 It is a different question, of course, how the amendments have affected people's understanding of the law. This important question is not the subject of this article. It is considered in a number of reports currently available from the website of the Attorney-General's Department, including The Australian Institute of Family Studies', *Evaluation of the 2006 family law reforms* (December 2009) and Richard Chisholm, *Family Courts Violence Review* (November 2009).

8 Harris, above n 3, at 65–6.

9 See especially Family Law Act ss 60B and 60CC(2).

10 Family Law Amendment (Family Violence) Bill 2010 (released 11 November 2010).

11 *Family Violence — A National Legal Response*, ALRC Report 114, released 11 November 2010.

important even if there are legislative changes of the kind foreshadowed in those developments.

2 *M v M*: An overview

The facts and the decision¹²

In *M v M*¹³ the mother suspected that the father had sexually abused the parties' 4 year old daughter, because of things the child told her. She took the child for examination, but it was inconclusive, and the child then made no disclosures. The child did later make disclosures to a police officer, albeit after leading questioning by the mother and the officer. She also implicated the father in sexual abuse in later interviews with a child psychologist, who believed that the child had been abused, although not necessarily by the father. The mother, it seems, genuinely believed that the allegations were true. The father denied them.

The trial Judge said he was unable to determine whether or not the father had abused the child, but thought there was a possibility that the child had been abused by the father, and terminated access by the father. His Honour ruled out supervised access as not having any benefit for the child, but that aspect was not the subject of the appeal.

The majority of the Full Court dismissed the father's appeal, although Nicholson CJ, dissenting, held that access should not be refused because of a mere possibility that access would expose the child to a risk of sexual abuse — there must be 'a real or substantial risk of such abuse occurring as a matter of practical reality'.

The High Court dismissed the father's appeal in a single unanimous judgment. Although the trial Judge had used the term 'lingering doubts', the High Court agreed with the majority of the Full Court that on a correct reading of his judgment, he had found that 'as a matter of practical reality', access would have entailed a risk that the child might be sexually abused and her welfare endangered. In those circumstances, the High Court, like the majority of the Full Court, upheld the trial judgment.

The High Court thought that the difference of opinion in the Full Court might have reflected different views about what the judge had decided. In dissent, Nicholson CJ had formulated a test that included the words 'as a matter of practical reality', and on the High Court's interpretation of the trial judgment, it would have passed the Nicholson test. This is important, because it emphasises the point, to which I will return, that the High Court did not say that *any* possible risk is enough.

12 Valuable discussions of *M v M* and its implications include The Hon Chief Justice Alastair Nicholson, 'Child sexual abuse — problems in family law' (1989) 4 *Australian Family Lawyer* 1; Family Law Council, *Child Sexual Abuse*, AGPS, Canberra, 1988); and three articles by P Parkinson: 'Unacceptable Risks and the Investigation of Child Sexual Abuse' (1990) 4 *AJFL* 254; 'Child Sexual Abuse Allegations in the Family Court' (1990) 4 *AJFL* 60), and 'Family Law and Parent-Child Contact: assessing the risk of sexual abuse' (1999) 23 *MULR* 345.

13 *M v M* (1988) 166 CLR 69; 12 Fam LR 612; FLC 91-979; 82 ALR 577.

The father's submission and why it was rejected

To understand the decision, it is important to identify the argument that was addressed to the High Court. The appellant father argued in the High Court that in such cases the court must first determine, on the balance of probabilities, whether the parent has abused the child. If the complainant fails on that issue, that is the end of the matter because the rejection of the complaint necessarily entails a negative answer to the second issue, which is whether there is a risk of sexual abuse occurring if the access order is made.

It is quite clear, in my view, that the father's submission was untenable. Evidence that a person has previously abused the child would indeed strongly suggest that the child would be at risk if placed in the care of the person. But it is not *necessary* for a finding of risk. There could well be evidence of a risk of child sexual abuse other than evidence that the accused person had previously abused the child. The person could have abused other children, the house could be full of child pornography, the person could have been grooming the child, even boasting about his intentions to abuse the child, and so on. This sort of evidence could easily lead to a finding that the child would be at risk of abuse in the care of the person. And it would make no difference, of course, if it had *also* been alleged that the person had actually abused the child in question, but the court was unable to make that finding: the other evidence could still lead to a finding that the child was at risk of abuse.

Less obviously, although a finding that the person had previously abused the child would strongly suggest a future risk, there could be evidence that would lead the court not to make the finding of risk. Suppose, for example, that there was good evidence that the previous abuse had occurred when the person was mentally ill, and the illness was now cured or controlled by medication. More obviously, the question is always whether the proposed orders would expose the child to risk, and the court might well be persuaded that a particular order, such as an order for supervised contact, would not involve a risk of sexual abuse.

Thus, the father's submission could not possibly succeed. A finding that the person had previously abused the child is not a *necessary* condition for a finding that orders placing the child with that person would expose the child to risk of abuse. Nor is it a *sufficient* condition for such a finding of risk, because there could be circumstances that lead the court to conclude that even though the person had previously abused the child, the proposed orders would not expose the child to risk.

It's not surprising, then, that the High Court rejected the submission, essentially for these reasons. Here is what it said:

The fact that the proceedings involve an allegation that the child has been sexually abused by the parent who seeks custody or access does not alter the paramount and ultimate issue which the court has to determine, though the court's findings on the disputed allegation of sexual abuse will naturally have an important, perhaps a decisive, impact on the resolution of that issue . . . the resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the court's determination of what is in the best interests of the child.

As this passage shows, there are two separate questions about which findings might be made: (1) whether the person seeking to have contact with the child

previously abused the child and (2) whether the proposed contact orders expose the child to such a risk of abuse that they should not be made. We will take them in turn. In relation to the first, the court discussed when such a finding could be made, and when it might be appropriate to make such a finding. In relation to the second, the court laid down the ‘unacceptable risk’ principle.

Findings that a person has sexually abused the child: when can they be made?

As to the determination of sexual abuse allegations, there were no surprises: those allegations were to be determined ‘according to the civil standard of proof, with due regard to the factors mentioned in *Briginshaw*’.¹⁴ This basically remains the position, although as we will see it is now necessary to bring the test up to date by reference to later cases and to the Evidence Act 1995.

Findings that a person has sexually abused the child: when *should* they be made?

The court made two comments on this question. First, it acknowledged that the evidence will often fall short of what is required to make such a finding:

No doubt there will be some cases in which the court is able to come to a positive finding that the allegation is well-founded . . . there will be very many cases, such as the present case, in which the court cannot confidently make a finding that sexual abuse has taken place.

The court also commented on whether, in circumstances where the evidence *would* justify a finding that a person has abused the child, the court should, in fact, make that finding:

And there are strong practical family reasons why the court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so.

Making parenting orders: the unacceptable risk test

The High Court then went on to say something about the assessment of risk of sexual abuse, and laid down the famous test of ‘unacceptable risk’, which relates to the making of what are now called parenting orders. The key passage starts:

In resolving the wider issue the court must determine whether on the evidence there is a risk of sexual abuse occurring if custody or access be granted and assessing the magnitude of that risk. After all, in deciding what is in the best interests of a child, the Family Court is frequently called upon to assess and evaluate the likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child’s welfare. The existence and magnitude of the risk

¹⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; [1938] ALR 334; (1938) 12 ALJR 100; BC3800027.

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

The court then referred to various earlier attempts to formulate a helpful test, such as 'risk of serious harm', or 'an appreciable risk', but said those formulas were 'striving for a greater degree of definition than the subject is capable of yielding'. The court concluded:

In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.

The principles stated

It is not difficult to identify the principles emerging from *M v M*. In a valuable article published shortly after the decision,¹⁵ the former Chief Justice of the Family Court, Alistair Nicholson, expressed them accurately and succinctly:

- (a) It is [not] necessary to make a positive finding of child abuse and the court should avoid doing so except in the most obvious cases.¹⁶
- (b) If such a finding is made, the standard of proof to be applied is that provided in *Briginshaw v Briginshaw* (1938) 60 CLR 336.
- (c) In resolving the issue as to what form of order is in the best interests of the child, the court must determine whether on the evidence there is a risk of abuse occurring if custody or access be granted and assessing the magnitude of that risk.
- (d) If the risk is assessed to be unacceptable, then custody or access should not be granted.

3 The *Re W* decisions

The present review of the later case law starts with three decisions which were particularly criticised by John Fogarty, and which I will for convenience call 'the *Re W* decisions'.¹⁷

K v B (1994)

In *K v B*,¹⁸ the majority (Ellis and Baker JJ) dismissed an appeal from a judgment in which the trial Judge, applying *Briginshaw*, had found that unsupervised contact would expose the child to an unacceptable risk of sexual abuse, and that supervised contact would not be in the child's interests (mainly

¹⁵ Nicholson, above n 12, at 3.

¹⁶ Nicholson actually wrote '[i]t is no longer necessary . . .'. I have modified the phrasing only to simplify the matter by removing the implication that under the previous law it had been necessary to make such a finding. I don't think that is so, but the point is not worth pursuing here.

¹⁷ The decisions are *K v B* (1994) 17 Fam LR 722; (1994) FLC 92-478; *WK v SR* (1997) 22 Fam LR 592; (1997) FLC 92-787, and *Re W (Sex Abuse: Standard of Proof)* (2004) 32 Fam LR 249; FLC 93-192; [2004] FamCA 768.

¹⁸ *K v B* (1994) 17 Fam LR 722; (1994) FLC 92-478.

because there was no suitable supervisor). Both the trial judgment and the majority judgments are, in my view, orthodox and unremarkable. Kay J's dissent, however, requires comment because it has played a part in later developments.

After introductory comments, Kay J's dissenting judgment contains an extended discussion of the importance of access, with numerous citations, including judicial quotations, an article of the Convention on the Rights of the Child, and a pamphlet entitled 'Parents are Forever'. His conclusions are firm:

In my view the denial of an opportunity of a relationship between the child and his father is a conclusion which the court should only reach with the utmost reluctance . . .¹⁹

In my view where there exists a meaningful relationship with parent and child it will only be in exceptional circumstances that the courts should actively prohibit the continuance of that relationship in some form or another.²⁰

At one point in this wide-ranging discussion, Kay J returned to the trial judgment, making the following comment:

Faced with a possibility of inappropriate sexual conduct towards the child of a sexual nature and faced with the custodial parent's firm belief that such conduct took place, in my view it was not unreasonable for his Honour to have concluded that unsupervised access was inappropriate in the circumstances.

The word 'inappropriate' is an insufficient account of the trial Judge's findings. The trial Judge did not merely say that it was inappropriate, but based his conclusion on an unacceptable risk of sexual abuse:

Looking at the evidence as a whole, I have reluctantly come to the conclusion that there is an unacceptable risk of sexual abuse in giving the husband unsupervised access, and that it would not be in the best interests of the child to make an order to that effect.²¹

Kay J upheld the appeal essentially because he held that the trial Judge could not properly have concluded that that *supervised* access would not be of any benefit to the child.²² He did not say that the trial Judge was not entitled to find that there was an unacceptable risk of sexual abuse in giving the husband unsupervised access. Yet although it was therefore not relevant to the appeal, Kay J went on to speak at length of the dangers of wrongly believing that a child has been abused:²³

. . . Can the welfare of a child be advanced by denying it a relationship with its non custodial parent on the basis that at its highest, the trial Judge is left with the possibility that some sort of sexual misbehaviour might have occurred between the father and his 2½ year old child, particularly in circumstances where the child is closely bonded to the father and enjoys an excellent relationship with him?

19 Ibid, at Fam LR 743.

20 Ibid, at Fam LR 746.

21 The trial Judge went on to say that the mother's unshakeable belief that the father had abused the child was another factor that led him to the view that he should not make an order for unsupervised access.

22 *K v B* (1994) 17 Fam LR 722 at 743; (1994) FLC 92-478.

23 Ibid, at Fam LR 749.

In my view the legal system is brought into disrepute if the mere existence of a possible threat to a child is sufficient to disrupt the relationship between parent and child . . .

We do not require that before a person is entrusted with the care of a child, that person positively prove that they will take all possible steps to minimise any risk to the child whatsoever . . .

Why is it in access cases where there is an allegation of sexual abuse, the failure to negate the allegation is often seen as an appropriate basis for denying the child a relationship with its parent?

These comments, with respect, are misleading. It was not the law that the ‘possibility’ of ‘some sort of sexual misbehaviour’, or ‘there mere existence of a possible threat’, or the failure to negate an abuse allegation, were appropriate grounds on which to deny the child a relationship with a parent. As we have seen, the High Court’s test, which had been properly applied by the trial Judge (as Kay J in effect conceded) is that orders should not be made that would expose the child to an unacceptable risk of abuse. Nor did Kay J offer any evidence that *in practice* in Australia the failure to negate the allegation was ‘often seen as an appropriate basis for denying the child a relationship with its parent’. The comments were also unnecessary, because the only real difference between Kay J and the majority was on a fairly narrow point, namely, whether there had been evidence to support the trial Judge’s conclusion that *supervised* access was not in the child’s best interests (the main problem being the lack of anyone the trial Judge thought was a suitable supervisor).

Although as Fogarty points out these views were not referred to in the next two Full Court decisions (which followed *M v M* in an orthodox way),²⁴ some of Kay J’s extended discussion about the benefits of access and the dangers of false conclusions about sexual abuse was adopted in the later decision *Re W*, as we shall see.

Reliance on a 1992 article by Horner et al

A further notable aspect of the judgement is its reliance on a published article,²⁵ from which Kay J quoted.²⁶ There are, with respect, a number of problems with his Honour’s use of this article. First, there is no indication that the parties’ representatives were given an opportunity to make submissions on it. Second, there is no reference to the standing of the authors, or the level of

24 Unreported, Ellis, Baker and Finn JJ, 14 July 1995; *D v M* (unreported, Baker, Lindenmayer and Smithers JJ, 10 October 1996).

25 T M Horner, M J Guyer and N M Kalter, ‘Prediction, Prevention and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made: III. Studies of Expert Opinion Formation’ (1992) XXVI(2) *Family Law Quarterly* 141. This quoted article is the third of a set of three, by authors qualified in psychology. The first is T M Horner and M J Guyer, ‘Prediction, Prevention and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made: I Predictable Rates of Diagnostic Error in Relation to Various Clinical Decisionmaking Strategies’ (1991-1992) 25 *Fam LQ* 217. The second is T M Horner and M J Guyer, ‘Prediction, Prevention and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made: II Prevalence Rates of Child Sexual Abuse and the Precision of “Tests” Constructed to Diagnose It’ (1991-1992) 25 *Fam LQ* 381.

26 *K v B* (1994) 17 Fam LR 722 at 748–9; (1994) FLC 92-478.

acceptance of their views among other scholars in the field. John Fogarty wrote: 'In the wide spectrum of opinions about expert evidence this article occupies an extreme position. But it is hardly the last word. You could fill a library with articles on this topic arriving at differing conclusions.'²⁷

Third, and most importantly, the article is not primarily about judicial decision-making at all. It is mainly about the reliability or otherwise of *clinical* decisions. As Brown J has pointed out in the course of a valuable and detailed critique (regrettably unreported but reproduced in the Appendix to this article):

[The authors'] main point is that the court should be cautious when considering expert evidence; as its sub-title makes clear, the article is about the formation of expert opinion, not determination of allegations by a court.

Brown J also pointed out that there are two significant omissions from the passages quoted by Kay J. The first omission is of the introductory sentence, which is as follows:

Clinicians seem inherently averse to both the scientific standard of accepting the null hypothesis (and, correlatively, the legal standard of presuming innocence in the absence of incriminating proof) when adduced data are insufficient to make its rejection defensible.²⁸

The second omission²⁹ is as follows (the words omitted by Kay J are in italics):

Unfortunately, the magnetising force of the simple allegation of a heinous event such as child sexual abuse, which legitimately invokes consideration of the possibility of that event, draws the clinician — and perhaps even judges and jurors as well, *although the safeguards against this happening seem to us stronger in the civil arena than in the clinical arena* — away from what ought always to be the starting point of his or her evaluation enquiries, which is that the event did not (or very highly probably did not) occur.³⁰

The omission of these words is particularly unfortunate. Like the missing introductory sentence, the omitted words underline that the authors' main concern — and their qualifications — relate to clinical judgment. Indeed, the omitted words indicate that the authors appear to have more confidence in the judicial process in civil law cases ('the civil arena') than in the 'clinical arena'. These omissions, and the way the article is used in Kay J's judgment, might give readers the false impression that the article contained research indicating that courts are likely to make false findings that children have been abused. Unfortunately, as we will see, a later Full Court appeared to rely uncritically on Kay J's summary of the article (*Re W*, below).

²⁷ Fogarty, above n 2, at 272.

²⁸ Horner et al, above n 25, at 170.

²⁹ Kay J's quotation from the article, quite properly, did indicate (by '. . .') that some words had been omitted; the criticism here is that they should not have been omitted.

³⁰ Horner et al, above n 25, at 170.

WK v SR (1997)

In the second case, *WK v SR*,³¹ the Full Court allowed an appeal from a trial judgment that found that the father had sexually abused the two children. A successful ground of appeal was that the trial judge had drawn impermissible inferences from the evidence of a step-daughter of the father, to the effect that the father had behaved improperly towards her. If the Full Court had merely said that this evidence was not a proper basis for the finding, having regard to the *Briginshaw* guideline, the decision would be unremarkable. But the Full Court's reasoning, in the single unanimous judgment, went further than this.

First, the judgment embarked on a fairly detailed review of 'similar fact' evidence, although the court itself seemed to accept that that body of law applied only to criminal proceedings.³² Fogarty criticises this aspect of the judgment, and I agree that the discussion is a little confusing about the relevance of the 'similar fact' principle in civil proceedings. Perhaps the Full Court intended only to use the 'similar fact' cases to illustrate the low probative value of the evidence of the witness in the particular case.

Second, the Full Court said this:

It is clear therefore, that a finding that abuse has occurred can only be reached by a strict application of the onus of proof as set out in *Briginshaw* . . . [The Full Court then quoted s 140 and continued]

In children's matters under Pt VII of the Family Law Act, where the issue is a child's contact or residence with a significant person in his or her life, the grave consequences of a finding of sexual abuse cannot be overstated. Accordingly, before trial judges find themselves impelled to make a positive finding of sexual abuse, as opposed to a finding of unacceptable risk, the standard of proof they are required to apply must be towards the strictest end of the civil spectrum as set out in *Briginshaw* and s 140 of the Evidence Act 1995 (Cth). Inexact proofs, indefinite testimony, or indirect inferences are insufficient to ground a finding of abuse.³³

The language ('the grave consequences of a finding of sexual abuse cannot be overstated'; 'the strictest end of the civil spectrum') raises the question whether the court intended to create some special standard of proof applicable to findings that a person had abused a child. Commenting on this case, Fogarty writes:

The fact is that in these cases sometimes the court has to weigh up the respective risks of two possible errors: a false finding that there has been sexual abuse, and a false finding that there has not been sexual abuse. Each, of course, is likely to have serious adverse consequences. However the nature and degree of those consequences will vary enormously from one case to another. It is a mistake for the Full Court to state the problem in a way that suggests that the adverse consequences of one wrong conclusion — a false finding that there has been sexual abuse (when the child has actually not been abused) — are necessarily more damaging than those of the other wrong conclusion — a false finding that there has not been sexual abuse (when in fact the child was abused).

This important point is also relevant to the next case, *Re W*.

31 *WK v SR* (1997) 22 Fam LR 592; (1997) FLC 92-787 at [47] per Baker, Kay and Morgan JJ.

32 *Ibid*, at [54]–[56].

33 *Ibid*, at [46]–[47] per Baker, Kay and Morgan JJ.

Re W (Sex Abuse: Standard of Proof) (2004)

*Re W (Sex Abuse: Standard of Proof)*³⁴ is the third and final decision in the series. In this case the Full Court again allowed an appeal from a decision that involved a finding that the father had abused the child.³⁵ In its single judgment, the Full Court quoted from *WK v SR*, referring to ‘the very high standard by which a court needs to be satisfied on the balance of probabilities that something has actually occurred’, and implicitly criticised the trial Judge for not paying attention to it.³⁶

The Full Court then expanded on the ‘disastrous’ consequences of a false finding of abuse, and the termination of a child’s relationship with a parent:

In setting out those authorities it does not appear that his Honour paid any attention to the views of the Full Court in *WK v SR* where the court emphasised the very high standard by which a court needs to be satisfied on the balance of probabilities that something has actually occurred. Unless such a rigorous approach is taken, where the often-inevitable result of a positive finding is a cessation of the relationship between parent and child, there is a major risk of inflicting upon the parent and child the disastrous effects of a positive finding that is reached in error.

The termination of a worthwhile relationship between the parent and child ought in most cases be the course of last resort. The court should not shy away from reaching such a result in an appropriate case but at all times judges should be conscious that the adversarial or inquisitorial systems often reach results that are artificial. The truth does not always come out. A false negative finding accompanied by appropriate safeguards as to the future relationship between parent and child, such as adequate supervision to guard against possible abuse, may be far less disastrous for the child than an erroneous positive finding that leads to a cessation of the parent-child relationship. The court needs to be remain conscious of this imperfection at all times.³⁷

The Full Court then quoted substantial passages from Kay J’s dissenting judgment in *K v B*, including passages from the Horner article, and continued:

The lessons to be learned have not changed. The risk that the court will find heinous behaviour when none has occurred needs to be born in mind at all times. The harm and injustice that flows to both parent and child from an erroneous positive is almost too horrible to contemplate.³⁸

Fogarty criticises these passages. He asks whether the Full Court is implying in the first sentence that there has been no relevant research since 1991, the date of the article. He notes that the passage exhibits overwhelming concern about an incorrect finding of abuse, and comments:

The gravity of such consequences has always been acknowledged. But to start with an entrenched view that the consequences ‘cannot be overstated’ or are ‘too horrible to contemplate’ warps the process explained by the High Court.

It is indeed hard to reconcile this language with a careful balancing of the consequences of false positive and false negative findings about child abuse;

34 *Re W (Sex Abuse: Standard of Proof) (2004)* 32 Fam LR 249; FLC 93-192 per Kay, Holden and O’Ryan JJ.

35 The decision is criticised at some length by Fogarty, above n 2, at 280–7.

36 (2004) 32 Fam LR 249; (2004) FLC 93-192 at [18].

37 *Ibid.*, at [18]–[19].

38 *Ibid.*, at [21].

and I agree with Fogarty that such a balancing is what the High Court's decision requires. With hindsight, it can be seen as regrettable that the Full Court did not give more careful consideration to the accuracy of Kay J's summary of the Horner article and the appropriateness of relying on that article: had it done so, it would surely have become aware of the problems later identified by Brown J, and briefly summarised above.

The *Re W* decisions criticised

As we have seen, the *Re W* line of cases urges a very strict approach to findings of sexual abuse and focuses on the terrible consequences of a false positive finding. Fogarty's criticism was, in substance, that although this is important, it should not be given such importance that the court fails to review and weigh up all the relevant factors, including the consequences of making a false negative finding, or of making no finding: 'to start with an entrenched view that the consequences "cannot be overstated" or are "too horrible to contemplate" warps the process explained by the High Court'.

The Fogarty critique of what he calls 'hyperbole' in these passages raises the question whether the *Re W* cases involve an impermissible departure from the High Court ruling, by formulating some test even higher or stricter than *Briginshaw*. My own view is that the rulings are intended as applications of the *Briginshaw* test to the specific context of determinations that a child has been sexually abused. They focus especially on the gravity of the consequences, especially on the negative impact for the child of a loss of a relationship with a parent (the father, in the cases). Although most of the discussion relates to the potential harm to the child, it is reasonable to assume that the Full Court was also very conscious of the terrible distress that such a finding would cause to the person accused of abuse where the person was, in fact, innocent of the abuse. Because the High Court did not need to engage in a detailed discussion of these matters, I am not sure that the *Re W* cases are necessarily inconsistent with *M v M*. The Full Court is entitled to give trial judges guidance on such matters.

Nevertheless, I think there is substance in the criticism that the *Re W* statements are unbalanced and overstated, and that they might discourage trial judges from making a careful and considered decision about whether to make a finding. Trial judges might be tempted to think that if the consequences of a false finding 'cannot be overstated' or are 'almost too horrible to contemplate', the Full Court is in effect telling them never to make such a finding.

It would be mistaken and worrying if trial judges did understand the Full Court decisions in that way. A finding that a parent has not abused a child, or a refusal to make a finding, will also have a lot of consequences: for the person, for the child, and for other people involved. Think of the impact of a negative finding, or even the refusal to make a finding, on a child who has had the courage to disclose sexual abuse. How would it feel to be such a child, being required to have contact (supervised or otherwise) with the abusive parent? What lessons will the child learn from such an outcome? How would it affect the child's relationship with an appropriately protective parent? If a parent has indeed abused a child, the lack of a finding to that effect might

suggest that the parent can get away with similar conduct in the future.³⁹ Similarly, there would be impacts on other family members, for example a parent or relative who had rightly believed the child and had sought to protect the child, if the court declined to make a finding of abuse where the child had in fact been abused. As Hardie Boys J once said:

It would of course be a terrible thing for the children if I were to entirely reject their allegations, and order their lives on the basis that there was no substance in them, and yet in fact for them to be true.⁴⁰

Fortunately, it has been widely recognised that these cases require a careful balancing of considerations, not just a preoccupation to avoid false positive findings. Brown J once remarked, in relation to the *Re W* line of decisions:

With respect to the Full Court, one might as well say that the harm and injustice that flows to a child from an erroneous negative finding is almost too horrible to contemplate, that harm including repeated sexual abuse of the child. Nevertheless, I am bound by the exposition of principle in the judgment.⁴¹

To similar effect, here is the NZ Court of Appeal:

The matter is somewhat more complex. The reality is that child sexual abuse is often as difficult to prove as it is difficult to refute . . . At the same time it must be borne in mind that false accusations or total fabrications of child sex abuse are regarded by many experienced child psychologists and psychiatrists as being somewhat rare . . . This does not mean, of course, that allegations of sexual abuse are to be approached on the basis that they are true or likely to be true. Indeed, it is recognised that a relatively small but significant percentage are likely to be false. The point merely serves to demonstrate the difficulty of reaching a firm conclusion as to whether sexual abuse has or has not occurred and the necessity to proceed with great care and caution before either finding that such allegations have been established or finding that they are without foundation . . .⁴²

Similarly Professor Ian Freckelton has written:

The most pressing difficulty in the aftermath of these decisions is whether the bar has now been set at too high a level for findings of sexual abuse by the Family Court or at least that a child in particular circumstances will be placed at unacceptable risk by way of either residence or contact. The reality is that evidence about whether a child has been sexually abused is frequently the product of inferences and clinical assessments that are not fully complete and which are amenable to different interpretations. While it is undeniable that false positive findings by the court wreak dreadful suffering for family units, it is important too that the need to minimise false positive findings not come at the cost of an unacceptable number of false negative findings; these too have the most serious consequences.⁴³

39 See the discussion by Fogarty, above n 2, of *Napier v Hepburn* (2006) 36 Fam LR 395 in 'An unusual case' (2007) 19(4) *Australian Family Lawyer*.

40 *Gooch v Gooch* (High Court, Christchurch M 156/82, 22 April 1983, at 28), cited by Fogarty J in *N and S* (1995) 19 Fam LR 859; (1995) FLC 82,713.

41 *McCoy v Wessex* (2007) 38 Fam LR 513; [2007] FamCA 489 at [33] per Brown J.

42 *S v S* [1993] NZFLR 657, Thomas J, quoted by Fogarty J in *N and S* (I have omitted some references to the social science literature because they are now somewhat dated).

43 'Evidence in the Family Court: The New Regime' (2005) 12 *Psychiatry, Psychology and the Law* 234, quoted by Fogarty, above n 2, at 267.

In short, both false positive and false negative findings are likely to have profound consequences for the child and for other family members, and it is wrong to focus only on the harmful consequences of false positive findings (as the three *Re W* cases tend to do), and ignore the harmful consequences of false negative findings. The nature of that balancing process will be considered later.

Other significant Full Court decisions

Before returning to the issues raised by the *Re W* decisions and John Fogarty's critique, it is appropriate to review some other Full Court decisions, of which the most important, for present purposes, are *Potter v Potter* and *Johnson and Page*.

Potter v Potter (2007)

*Potter v Potter*⁴⁴ was an unusual case. The parties conceded that the child had been sexually abused by *someone*, and the trial judge narrowed down the possible abusers to the father and the maternal grandfather. Her Honour went on to conclude that unsupervised contact with the father would expose the child to an unacceptable risk. The Full Court upheld the finding that the child was abused (that finding being based on the concessions), but found that the trial Judge's conclusion about unacceptable risk was against the weight of evidence and could not be upheld. It ordered a rehearing. This was a case in which there were no specific allegations or evidence about what constituted the sexual abuse (much of the relevant evidence was about the child exhibiting sexualised behaviour). The Full Court pointed out that the trial Judge did not make any finding to the effect that the father was the more likely of the two to have been the abuser. The Full Court referred to the now-familiar quotations in *Re W* and *WK v SR* in connection with the proof of sexual abuse, and briefly stated the test as follows:

A finding that abuse has occurred can only be reached by a strict application of the onus of proof as set out in *Briginshaw* and s 140 of the Evidence Act 1995 (Cth).

It is interesting that the Full Court treated the authorities as applicable to the determination of whether the child had been abused *by someone*. This seems odd, since the 'disastrous' effects mentioned in those cases referred to findings that the child had been abused by a particular person (the father, in each case). If there is some kind of sliding scale, depending on the awfulness of the consequences, as *Re W* and *WK v SR* seem to suggest, I would have thought a finding that the child had been abused by someone would be at a different point on the scale than a finding that a child had been abused *by the child's father*.

⁴⁴ *Potter v Potter* (2007) 37 Fam LR 208; (2007) FLC 93-326; [2007] FamCA 350 per Bryant CJ, Coleman and May JJ.

Johnson and Page (2007)

In *Johnson and Page*,⁴⁵ the trial Judge had made orders for the father to have unsupervised time with the child, having found that such orders would not expose the child to an unacceptable risk of child abuse. The mother appealed, seeking that the father should spend no time with the child. The Full Court dismissed the appeal (except in relation to an order restraining the mother's partner from certain activities with the child).

The trial Judge had explicitly found that there was *some* risk that unsupervised time with the father might expose the child to abuse, but it was not an unacceptable risk. Since the judgment was upheld, this case is clear authority that there is a difference between some risk and an unacceptable risk.

The most interesting point in the appeal for present purposes is that the appellant mother argued, in substance, that the trial Judge had been misled by *Re W* (which the mother argued was wrongly decided) into applying the *Briginshaw* test to the question whether there was an unacceptable risk. The Full Court did not agree that the trial Judge had made this error, and confirmed that the question of unacceptable risk is to be determined according to the ordinary civil standard of the balance of probabilities. It pointed out that *Re W* was a decision about determinations of past sexual abuse, not about determinations of whether certain orders would expose the child to an unacceptable risk.⁴⁶ The Full Court made the following firm and lucid distinction between the two matters:

The onus of proof is not in doubt. It is the civil standard in accordance with s 140 of the Evidence Act. The evidence necessary to satisfy a finding of actual sexual abuse, as distinct from unacceptable risk, is accommodated by s 140(2)(c).

The Full Court said it 'generally agreed' with a seven point summary of principles stated by John Fogarty. To avoid repetition, I will quote these principles later.⁴⁷

Finally, it is interesting that the Full Court included an extensive quotation from Fogarty J's dissenting judgment in *N and S*, some of which is quoted elsewhere in this article. It is possible that *Johnson and Page* indicates a departure from the extreme language in decisions such as *Re W*, and points towards a more balanced and thorough consideration of the difficult decisions that these cases require. If this was the Full Court's intention, however, it is a pity it was not made explicit.

Other decisions

For completeness, I mention some decisions that need not be discussed in detail. In *N and S*,⁴⁸ the Full Court dismissed an appeal from a judgment that provided access, the majority holding that the trial Judge had dismissed any unacceptable risk. It is not fruitful for present purposes to discuss this

⁴⁵ *Johnson and Page* (2007) FLC 93-344; [2007] Fam CA 1235 per May, Boland and Stevenson JJ.

⁴⁶ *Ibid*, at [76].

⁴⁷ The Full Court refrained from making any comment about Fogarty's critique of the *Re W* cases.

⁴⁸ *In the Marriage of N and S* (1995) 19 Fam LR 859; (1995) FLC 82,713.

complexities of this case, as much depends on an interpretation of the trial judgment.⁴⁹ In *Fitzpatrick v Fitzpatrick* (2005)⁵⁰ both the trial Judge and the Full Court took an orthodox approach to the principles, and I leave readers to form their own views on whether, as John Fogarty suggests, the Full Court in effect substituted its own views for those of the trial Judge.

*Vasser-Taylor*⁵¹ is an unremarkable orthodox decision, consistent with *Briginshaw*, the Full Court upholding an appeal for lack of adequate reasons. Two points deserve mention, however. First, the Full Court said that the following submission ‘cogently encapsulated’ the Federal Magistrate’s task:

When allegations of abuse arise in interim proceedings, the court must weigh the competing risks of abuse, including the risk of interrupting or severing a relationship between a child and a parent. In order to weigh the competing risks, the court should analyse what the risk is. To simply state that there is a risk of psychological abuse is not providing an analysis of the risk to the child, nor does it assist in determining what, if any, safeguards could be put in place to ameliorate the risk.⁵²

Second, the majority appeared to approve the proposition advanced by the Full Court in *Re W (Sex abuse: standard of proof)* that ‘the termination of a worthwhile relationship between a parent and child ought, in most cases, be the course of last resort’,⁵³ and went on to remark:

The Act assumes that the continuation of such a relationship is worthwhile if other factors do not act to countervail that position.

Since that time, the Act has been amended, and it is now clear that the focus is not on the relationship itself but on the *benefit to the child* of the relationship.⁵⁴

In ordinary situations, of course it is right to say that children benefit from a continuing relationship with both parents, but many of the cases that come before the family courts for final adjudication are far from ordinary, and the court needs to determine each on its particular facts. It is worth keeping in mind the penetrating analysis by Fogarty J in *N and S*:

The court must make a decision based on the facts of the particular case before it, including the nature of the relationship between the particular child and parent concerned. While it is of great importance to take into account the benefit to a child of a healthy, loving, supportive relationship with a parent, where such a relationship does not exist on the facts of the particular case, it can be of no assistance to a judge, or the child, to idealise that the situation were different, on the basis that the majority of parent-child relationships are of that character.

To speak of a court terminating the parent-child relationship only in ‘exceptional circumstances’ says nothing more than that, in the majority of cases, parents genuinely love, respect and care for their children, and seek to act in their best

49 See Fogarty, above n 2, at 274–6, and the remarks by Parkinson quoted by Fogarty, *ibid*, at 275.

50 (2005) 33 Fam LR 272; (2005) FLC 93-227; [2005] FamCA 394.

51 *Vasser v Taylor-Black* (2007) 37 Fam LR 256; (2007) FLC 93-329; [2007] FamCA 547.

52 *Ibid*, at [5].

53 *Re W (Sex Abuse: Standard of Proof)* (2004) 32 Fam LR 249 ; (2004) FLC 93-192 ; [2004] FamCA 768.

54 Section 60CC(2) states the first ‘primary consideration’ as ‘the benefit to the child of having a meaningful relationship with both of the child’s parents’, and s 60B(1)(a) uses rather similar language.

interests. It thus may be true that as a matter of sociological inquiry it would be an 'exceptional' case in which that were not the situation. But as a matter of legal principle, in making decisions concerning the welfare of a particular child, it cannot ultimately matter to that child's welfare how parents in general relate to their children. All that matters to that child's welfare, in this context, is how that particular child's parent relates to him or her. To speak of 'exceptional circumstances' is to run the risk of confusing legal principle with sociological expectations, and losing sight of the individual case in favour of broad, non-specific ideals.⁵⁵

4 Conclusions: Findings that a person has sexually abused the child

Having reviewed these cases, we can seek to identify the current law relating to the key issues in cases involving allegations of child abuse. We start with the application of what has become known as the *Briginshaw* test in relation to findings of abuse.

When can the court make findings of abuse: the *Briginshaw* test updated

As we saw, *M v M* held that the determination of sexual abuse allegations is to be 'according to the civil standard of proof, with due regard to the factors mentioned in *Briginshaw*'. The court referred to determinations that the person who was seeking custody or access had abused the child, but the same approach would presumably apply to the determination of such allegations against other people, for example a step-parent or other family member.

The *Briginshaw* test has been somewhat reformulated, notably by the High Court in *Neat Holdings* (1992):

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J commented in *Briginshaw v Briginshaw*:

'The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved . . .'

⁵⁵ *In the Marriage of N and S* (1995) 19 Fam LR 859 at 852.

There are, however, circumstances in which generalisations about the need for clear and cogent evidence to prove matters of the gravity of fraud or crime are, even when understood as not directed to the standard of proof, likely to be unhelpful and even misleading.⁵⁶

The facts of *Neat Holdings* illustrate the point made in the last sentence. The case involved allegations by each party that the other had deliberately falsified financial figures. The High Court said that ‘the most that can be said in such a case is that the trial judge should be conscious of the gravity of the allegations made on both sides when reaching his or her conclusion’.⁵⁷

Second, s 140 of the Evidence Act 1995 now provides:

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
 - (a) the nature of the cause of action or defence; and
 - (b) the nature of the subjectmatter of the proceeding; and
 - (c) the gravity of the matters alleged.

This provision, I think, is entirely consistent with *Briginshaw* and *Neat Holdings*. Firstly, it emphasises that there is only one standard of proof, the balance of probabilities, although there are things to be taken into account in applying it. That is consistent with the language of *M v M*⁵⁸ and *Briginshaw*, and is the point made strongly in *Neat Holdings*, quoted above.

When should the court make findings of abuse? Understanding the options and balancing the consequences

To start with the obvious, there are often three possibilities that the court should consider: a finding that the person has abused the child, a finding that the person has not abused the child, and no finding either way.

There are, perhaps, two steps involved in considering whether to make a finding that a person has sexually abused a child, although there is considerable overlap between the two.

Step one: applying s 140 of the Evidence Act

The first step is to consider whether the evidence would justify a finding on the balance of probabilities that the person has abused the child, having regard to s 140. The section refers to ‘the gravity of the matters alleged’, echoing one

⁵⁶ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449; 67 ALJR 170; BC9202685 per Mason CJ, Brennan, Deane and Gaudron JJ. See also *Qantas Airways Ltd v Gama* (2008) 167 FCR 537; 247 ALR 273; [2008] FCAFC 69; BC200803114 at [139] per Branson J (with whom French and Jacobson JJ agreed) (‘references to, for example, “the *Briginshaw* standard” or “the onerous *Briginshaw* test” . . . have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s 140 of the Evidence Act provides.’) Cited by Brown J in *Hemiro & Sinla* [2009] FamCA 181 at [43].

⁵⁷ *Neat Holdings* (1992) 110 ALR 449; 67 ALJR 170; BC9202685 at [3].

⁵⁸ See above quote: ‘according to the civil standard of proof, with due regard to the factors mentioned in *Briginshaw*’.

of the matters referred to by Dixon J in the famous statement in *Briginshaw*. As to this, for the reasons advanced above, the court needs to consider not only the grave consequences of a positive finding of abuse, but also the consequences of a finding that there has been no abuse, and the consequences of making no finding one way or the other. What those various consequences will be, and how grave they will be, must of course be determined on the facts of each case.

The section does not explicitly refer to another aspect mentioned by Dixon J, namely, the ‘inherent unlikelihood of an occurrence of a given description’ but, as Odgers points out, this element was effectively endorsed in *Qantas Airways*.⁵⁹ No doubt sexual abuse is uncommon in families generally, and in that sense we might say that it is inherently unlikely. But in most cases where child sexual assault is alleged, there are statements or behaviour by the child suggestive of sexual abuse, and, usually, a parent who genuinely believes that the child has been or might be abused. These are difficult areas for judges. The behaviour of children and adults in child abuse situations may be counter-intuitive. For example, one might think that a child who has been sexually abused would shrink from contact with the abuser.⁶⁰ However I believe that child abuse experts consider that — surprising as it may seem — children who have been sexually abused can sometimes be strongly attached to their abusers. It may be comforting, but hardly useful in a particular case, to have regard to the uncommonness of sexual abuse in families generally. The court has to determine its likelihood in the circumstances of the case, typically a most difficult task. There is a formidable scientific literature on the incidence of sexual abuse and the likelihood that allegations, by children and others, might be true or not;⁶¹ but assessing and applying the insights from this literature is also a difficult task. It is easy for non-specialists to be too easily impressed by plausible publications readily available on the Internet, especially when the reader is not in a position to assess the methodological soundness of the research, and may have insufficient knowledge of the area as a whole to know whether the article is expressing a mainstream or minority view.

Step two: considering whether to make a finding when it is possible to do so

As we have seen, it seems clear that the High Court also contemplated a second step, in which the court must decide whether to make or refrain from making a finding of abuse (‘there are strong practical family reasons why the

⁵⁹ S Odgers, *Uniform Evidence Law*, 9th ed, Thomson Reuters, 2010, at [1.4.120], citing *Qantas Airways Ltd v Gama* (2008) 167 FCR 537; 247 ALR 273; [2008] FCAFC 69; BC200803114 (FC) at [138] per Branson J.

⁶⁰ This seems to have been the assumption made by the Full Court in *Re W*, when it said that the strength of the children’s wishes to be with the father should have been a ‘a further indicator that there were serious questions as to whether the father had ever behaved inappropriately towards them: see (2004) 32 Fam LR 249; (2004) FLC 93-192; [2004] FamCA 768 at [41].

⁶¹ Parkinson’s 1999 article refers to some of the literature, although of course the article is now rather dated.

court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so’).

This particular question did not arise in *M v M*, because the trial judge considered that the evidence did not permit such a finding, and so it is not surprising that the High Court did not expand on this sentence. What circumstances did the High Court have in mind when it referred to a court being ‘impelled’ to make such a finding? Did it refer to cases when the evidence was very clear, or to cases where the evidence was very clear and there was some other reason for making the finding? The reference to ‘strong practical family reasons’ for refraining from making the finding seems to refer to matters other than the degree of certainty. We can only guess what the High Court thought such reasons might be. Suppose, however, the abuse had been committed by a respected family member while suffering from mental illness which has since been cured or controlled; or that some other family member had known about the abuse but had not disclosed it. Perhaps in such circumstances making the finding could have repercussion that might be damaging to the children.

The High Court had previously said that the resolution of an allegation of child abuse is ‘subservient and ancillary to the court’s determination of what is in the best interests of the child’. It seems to follow that the court should have regard to the child’s best interest in deciding (in cases where the evidence permits such a finding) whether or not to make that finding.⁶²

If the evidence supports a finding that the person has sexually abused the child, a court should presumably consider whether it is *necessary* to make that finding in order to justify the parenting orders. If it is necessary to justify the parenting orders, then it is hard to see how the court could properly avoid making the finding.⁶³ This situation, however, is probably rare, because the court will usually be able to justify the parenting orders by making a finding about unacceptable risk.

In practice, whether to make the finding of abuse is likely to be problematical where (i) the evidence justifies the finding, but (ii) the court could, if it chose, justify the proposed parenting orders without making the finding (using other factual findings to show that contact with the person would expose the child to an unacceptable risk of abuse). In these cases, in my view, the court needs to consider carefully whether or not to make the finding. In favour of not making the finding is the possibility that although it passes the civil standard, it may in fact be wrong, and a false finding that a person has abused the child is, indeed, a terrible thing. But there are some factors that might favour such a finding. No doubt the court would be more comfortable making such a finding if it felt that the evidence for it not only satisfies the requirements of s 140, but is exceptionally convincing. The court might also consider the consequences of making the findings for various family

62 To avoid an elaborate digression, I mention that at the time of *M v M* the paramount consideration principle had a more over-arching role in the legislation than it now does: see how s 60CA is now limited to situations when the court is considering what parenting order to make. For a detailed account, see Family Law Council, *Letter of Advice on the ‘Child Paramourcy Principle’ in the Family Law Act 1975*, 2006.

63 See also Fogarty, above n 2, at 263.

members, most obviously the impact on the child.⁶⁴ It might be important, for example, to vindicate adults who have believed the child, correctly, and have acted to protect him or her. The child might need their protection again. There could be various other consequences that might flow from the court's decision whether or not to make the finding, and in my view they should be taken carefully into account. Indeed, in some of these cases, decisions about what to say in the judgment, and what not to say, are more difficult to determine than what parenting orders to make.

Summary

This has been a somewhat complex discussion, but I can state my conclusions briefly. In sexual abuse cases the court should first consider whether it is open to make a finding that a person has abused the child, applying the civil standard of proof having regard to s 140. If it is, the court should then consider whether it should do so. It may properly refrain from making the finding when it is otherwise able to justify the proposed parenting orders, for example by making a finding that exposure of the child to the person would expose the child to unacceptable risk, or for other reasons would not be in the child's interests. In relation both to the application of the s 140 test and the choice of making or not making an available finding, the court should carefully and systematically consider the consequences of the decision for the child, the parents, and others involved. The passages in the *Re W* decisions that emphasise the dangers of making false positive findings of abuse should not be allowed to distract judges from carefully weighing up all the factors involved.

5 Exploring the 'unacceptable risk' test

Possible risk is not enough (the 'lingering doubts' problem)

In his article on *Briginshaw*, the former Chief Justice, the Hon Alastair Nicholson AO, stressed that the High Court's decision should not be taken to mean that a mere *possibility* of child abuse is sufficient of itself to constitute such an unacceptable risk. He urged, rightly in my view, that the words 'unacceptable risk' should be taken at face value. If this is done, he said, the test to be applied is 'whether, on the evidence, there is an unacceptable risk that abuse will occur if a particular access or custody order is made'.

The reason that Nicholson was worried that the High Court decision might be misunderstood is partly that the trial judge used the phrase 'lingering doubts' to describe his level of concern. Nicholson thought that this meant the trial Judge had, indeed, acted on a mere possibility, and worried that by upholding the decision the High Court might be seen as endorsing that approach. As we have seen, however, the High Court did not interpret the trial judgment in this way.

⁶⁴ Because s 60CA does not apply to decisions other than what parenting orders to make, the paramount consideration principle probably does not strictly apply, but the child's best interests would always be an important and often overwhelming consideration.

Whatever might be thought about the correct interpretation of the trial judgment in *M v M*, everyone agreed on the important point, namely, that the mere possibility of abuse is not equivalent to a finding of unacceptable risk. It follows that it is best to forget about the phrase 'lingering doubts', because taken out of context, the phrase might suggest that it is enough to say that the judge cannot exclude all possibility of abuse, which is not the law. The risk must be 'unacceptable'.

Understanding the term 'unacceptable risk'

We saw that the High Court considered earlier attempts to describe the risk were unsatisfactory. In his article, Nicholson said that the High Court, by using the phrase 'unacceptable risk', had done precisely what it had criticised, namely, to strive for a greater degree of definition than the subject permits.

It seems to me, however, that the High Court's phrase is particularly important precisely because it does *not* attempt to quantify the matters involved, or to suggest that the court should lean one way or another. As John Fogarty nicely put it:

The advantage of the phrase 'unacceptable risk' is that it is calibrated to the nature and degree of the risk, so that it can be adapted to the particular case, whereas words such as 'serious', 'real', etc may suggest a fixed standard into which the case must be placed.⁶⁵

If we reflect on what is involved, I think it can be seen that this is wise.

The High Court indicated quite succinctly but precisely what is involved: achieving 'a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access'. Alastair Nicholson helpfully indicated the nature of the exercise when he wrote that in making an assessment of whether there was an unacceptable risk, judges should 'be mindful of the dire consequences involved in permanently depriving a parent of contact with the child from the child's point of view, while at the same time balancing the devastating effect upon the child of sexual or other forms of abuse occurring.'⁶⁶ There are many other ways of stating this point, and one can find numerous examples in the cases and in the secondary literature, but I do not think it would be particularly helpful to review them.

One reason that people might be troubled by the word 'unacceptable' is that it could be seen as open-ended and vague. They might ask, 'unacceptable to whom? How is it to be determined what is acceptable and what is not?'

Such questions are, however, easily answered when one considers the legislative context. As the High Court emphasised, the fundamental principle is the paramountcy of the child's best interests. Thus, the relevant matters are to be assessed according to what the court thinks is likely to be best for the child. Considering this, the big point that the High Court makes is, perhaps, the same point that Alistair Nicholson stressed, namely, that the mere possibility of abuse cannot of itself lead to a conclusion that there should be no access. Indeed, as a matter of principle, no single factor can ever of itself

⁶⁵ Fogarty, above n 2, at 253.

⁶⁶ Nicholson, above n 12, at 3.

lead to any conclusion about what parenting order should be made.

Because of this, and because the word ‘unacceptable’ refers back to this fundamental principle, it is quite possible to state the law in a way that is entirely consistent with the High Court’s reasoning without actually using the word ‘unacceptable’.⁶⁷ The High Court might just as well have used such words as the following: ‘In determining whether to make an order for access (or any other parenting order) the court must weigh up the risk that the child might be harmed by being abused against the risk that the child might be harmed by lack of contact with the other parent.’

The balancing exercise involved

I want to say a little more about the weighing or balancing exercise involved in applying the ‘unacceptable risk’ test. First and foremost: one should not read *M v M* as suggesting that the ultimate decision about parenting orders will necessarily reflect *only* the balancing of the two factors mentioned. Other matters relating to the child’s best interests will come into play. It may well be, of course, that assessing the risk of abuse against the risk of detriment from a separation from a parent will in many cases be the overwhelmingly important matter to be determined. But of course the court will have to consider everything relevant to the child’s best interests.⁶⁸

To take a simple example, suppose that the parent against whom the allegations of sexual abuse have been made has a history of substance abuse or mental illness, and there is evidence that this has compromised the parent’s ability to attend to the children’s needs. These factors might lead the court to decide, in the light of all the circumstances, that it would not be in the child’s interest to spend time with that parent, regardless of the sexual abuse allegations. As the High Court put it:

[Even if the risk of abuse is less in the case of an order for supervised access] there may be a risk of disturbance to a child who is compulsorily brought into contact with a parent who has sexually abused her or whom the child believes to have sexually abused her. . . .

Take a case where the court considers that there is at least some risk that the order in question — assume it is unsupervised time with the child — might expose the child to sexual abuse by a father. It needs to weigh up the likely harm to the child of separation from the parent (if the time with the father is refused) and of sexual abuse (if time with the father is permitted). As John Fogarty has been at pains to point out, in this and many other contexts assessing risk involves two elements: the likelihood and the amount of harm or damage.⁶⁹ We let a toddler take the risk of falling over on the domestic carpet, though that will happen frequently: we would not dream of letting the toddler take the risk of being run over by a car in the street, though that might

67 This is partly because the term is a tautology — the court should not order custody or access where the risk of abuse is such that the court should not order custody or access: see R Chisholm, ‘Child Sexual Abuse: The High Court Rules on Onus of Proof’ (1989) 3 *AJFL* 184.

68 Parkinson’s discussion about these matters in the 1999 article is illuminating and wide-ranging.

69 Fogarty, above n 2, especially at 254ff.

be very unlikely. Therefore in these cases of risk of child abuse, in relation to each risk, we need to think about the likelihood of the harm occurring, and the extent of the harm if it did occur.

As to likelihood, it can be assumed that in most of these cases there will be a low likelihood of abuse if time with the father is permitted, and a high likelihood that if time with the father is not permitted, the child will suffer the harm of being separated from a parent. If there were a 50:50 chance that the child would be sexually abused, it would be unthinkable that a court would take such a risk, since the likely harm from being abused would be much greater than the likely harm from having a period of no contact with the parent. Similarly, if on the facts the child would have no benefit, or minimal benefit, from contact with the other parent, a very small risk of abuse would clearly outweigh that minimal benefit.

The toughest cases are those where there is a low likelihood of abuse, and the child is likely to suffer considerable harm from separation from the parent. In these cases the determination of whether time with the parent should be allowed, by applying the 'unacceptable risk' test, will be agonisingly difficult. The court will have to examine the evidence very carefully, and attempt to quantify both aspects of risk in the particular case. *How* likely is the harm? *How* severe would be the harm if it happened?

Fact-finding is the basis of risk assessment

A number of commentators have warned against treating 'unacceptable risk' as a sort of incantation, a phrase that automatically justifies an order terminating or restricting contact. Thus Fogarty J has said:

One of the difficulties which arises in the application of these principles is in seeking to preserve an independent content to the notion of 'unacceptable risk'. Though the purpose behind the notion is to assist a court in determining what is in the child's best interests, the importance of asking the question separately lies in its specific guidance to courts faced with the difficulties which cases of sexual abuse raise. There is a danger that it will be treated just as an expression which must be ritually used in judgments which involve questions of sexual abuse, but given no substantive meaning or weight. It is easy to say that there is or is not an unacceptable risk of sexual abuse, and so to be seen to be applying the correct legal test. Those words seem sometimes to be used without an appropriate degree of consideration.⁷⁰

This warning is wise. Applying the test means plunging deeply into the evidence. Making findings of fact is essential to the task of assessing what the risk is. The court cannot make statements about risk at large, without any factual basis.⁷¹ For this reason, I have some reservation about statements such as the following:

⁷⁰ *In the Marriage of N and S* (1995) 19 Fam LR 859; FLC 82,713. This passage was adopted by the Full Court in *Johnson*, discussed above.

⁷¹ As the Full Court has said, 'a finding of unacceptable risk must be based on more than conjecture': *Orwell & Watson* [2008] FamCAFC 62; BC200850122 at [74].

It is not necessary in the assessment of risk to take into account only components which are proved. The court is entitled to take into account factors which are not proved but which nevertheless raise issues of concern (John Fogarty).⁷²

Neither the existence of the risk in the future nor the alleged sexual misconduct in the past or other risk indicators have to be established as probabilities. It is enough that either or both are merely possible.⁷³ Thus, probable offending in the past can sustain a possible risk in the future or, alternatively possible past behaviour may support a probable future risk finding. In either case the risk can be legitimately characterised as an unacceptable one and justify the revocation of contact (Carmody J).⁷⁴

I find these passages a little difficult (perhaps I have misunderstood them). It seems to me that the factors that raise concern must be proved on the evidence. A judge could surely not make a finding of unacceptable risk based on suspicion that has no basis. Take the nice analogy discussed by Fogarty: if, in war-time, there are six unconfirmed air-raid warnings, it is sensible to take precautions such as going into a bomb shelter, even though none of the warnings is confirmed (maybe the siren is malfunctioning). My point, however, is that on this analogy there would have to be proof *that the air-raid sirens went off*. Similarly, in child sexual abuse cases, the finding of unacceptable risk would necessarily be based on a whole set of factual findings about the child and much else; those findings would have to be based on evidence, or agreed facts.

6 Conclusions — Back to basics

Where does all this leave us? I think the best place to start with a summary of the present law in *Johnson*, in which the Full Court specifically endorsed⁷⁵ the following seven-point summary by John Fogarty:

- 1 The decisive issue is and always remains the best interests of that child. All other issues are subservient.
- 2 The nature of the risk is best expressed by the term ‘unacceptable risk’. It is an evaluation of the nature and degree of the risk and whether, with or without safeguards, it is acceptable.
- 3 Where past abuse of a child is alleged it is usually neither necessary nor desirable to reach a definitive conclusion on that issue. Where, however, that is done the *Briginshaw* civil standard of proof applies.
- 4 The circumstance, if it be so, that the allegation of past abuse is not proved in accordance with *Briginshaw*, does not impede reliance upon those circumstances in determining whether there is an unacceptable risk.
- 5 The concentration in these cases should normally be upon the question whether there is an unacceptable risk to the child.
- 6 The onus of proof in reaching that conclusion is the ordinary civil standard.

⁷² Fogarty, above n 2, at 275, discussing *N and S and Separate Representative* (1995) 129 FLR 243; 19 Fam LR 837; (1996) FLC 92-655.

⁷³ With respect, in my view, for the reasons advanced earlier in this article, this statement is not consistent with *M v M*, since it treats a *possible* risk as equivalent to an *unacceptable* risk.

⁷⁴ J Carmody, ‘Removing Obstacles to Justice in Family Court Sex Abuse Cases’, March 2005, 4th World Congress on Family & Child Rights; quoted by Fogarty, above n 2, at 274–6.

⁷⁵ *Johnson* (2007) FLC 93-344; [2007] FamCA 1235 at [68].

7 But the components which go to make up that conclusion need not each be established on the balance of probabilities. The court may reach a conclusion of unacceptable risk from the accumulation of factors, none or some only of which, are proved to that standard.

The Full Court added, in relation to the last paragraph:

We assume point seven of that summary is directed to the requisite standard of proof. We think a Judge may be cautious in coming to a finding of unacceptable risk if none, rather than some only, of the accumulation of factors considered, satisfy the standard of proof (but see *Malec v J C Hutton Proprietary Limited* (1990) 169 CLR 638).

The point here, I think, is that unacceptable risk is a prediction of the future, based on findings of fact. The confidence one will have in the prediction will be, in part, a reflection of the confidence one has in the factual findings that base the prediction. The decision cited, *Malec*, contains a short but interesting discussion of the approach to making predictions (in that case, relating to the future impact of injury in a damages action) as distinct making findings about past facts.

In relation to para 4, as the Full Court pointed out in *Johnson*, the position relating to the burden of proof for findings that a person has abused a child has been modified, the early reference to *Briginshaw* now being a reference to s 140 of the Evidence Act 1995.

The principles as stated in *Johnson* provide a more balanced and more authoritative guide than the language in the *Re W* cases to the effect that the consequences of a false positive finding ‘cannot be overstated’, and I suggest that such statements cannot now be taken as representing the law. We don’t yet have a substantial Full Court discussion of the way the court might weigh up various considerations in deciding whether to make a finding of abuse in circumstances where that is open on the evidence. However I have suggested that in considering this, the court would be entitled to look at all aspects, especially those relevant to the child’s best interests — and in this respect a continuing involvement of the other parent, while of course very important, would not be the only factor to be considered. Although the amendments of 2006 gave renewed emphasis to the benefits to children of a relationship with both parents, there is no reason to think that the need to protect children is any less than it ever was, as Brown J has pointed out.⁷⁶

Ultimately the court must try to work out what is in the best interests of the particular child, and in cases where there are allegations of child abuse, the challenging tasks include not only what parenting orders to make but whether to make positive or negative findings about the abuse allegations. The decision in *Johnson* may be seen as answering John Fogarty’s call for a ‘return to basics’. It does not make these decisions any easier — they are inevitably full of difficulty and anguish — but it does help guide practitioners and trial judges to what the High Court surely intended, namely, a careful and balanced assessment of all the options, and all the relevant factors, when preparing judgments and making orders about the best interests of children.

⁷⁶ *McCoy v Wessex* (2007) 38 Fam LR 513; [2007] FamCa 489. Interestingly, the protection of children from violence and abuse would be given ‘greater weight’ under the Family Law Amendment (Family Violence) Bill 2010, released for consultation in November 2010: see Item 17, adding new (2A) to s 60CC.

Appendix

Extract from *Hemiro v Sinla* [2009] FAMCA 181 (Brown J, 17 March 2009)⁷⁷

At [20], her Honour quoted at length from her previous decision *Hartford v Ansilda* [2009] FamCA 23; BC200950161 at [23]–[25], as follows:

The Full Court [in *Re W (Sex abuse: standard of proof)*] then referred with approval to the dissenting judgment of Kay J in *K v B* (1994) FLC 92-478 where his Honour said, at 80,972:

In cases of alleged sexual abuse, there is a significant risk that the ultimate effect of orders to be made by the court, and of the proper operation of the legal system, will be overlooked in the court's anxiety to ensure that the risks of sexual interference are minimised. Where the evidence of sexual abuse consists of ambiguous statements of a pre-kindergarten aged child coupled with perceived but possibly otherwise explicable behavioural changes, it is almost impossible for the party denying any impropriety to prove that party's position.

In an article entitled 'Prediction, Prevention and Clinical Expertise in Child Custody Cases In Which Allegations of Child Sexual Abuse Have Been Made', appearing in Volume XXVI No 2 Summer 1992 Family Law Quarterly (Publication American Bar Association Section of Family Law), at p 170, it was observed:

Unfortunately the magnetising force of the simple allegation of a heinous event such as child sexual abuse, which legitimately invokes consideration of the possibility of that event, draw the clinician — and perhaps even judges and jurors as well, . . . away from what ought always to be the starting point of her or his evaluation enquiries, which is that the event did not (or very highly probably did not) occur. Because the null hypothesis (and, correlatively the absence of an event) cannot be proved, in their testimonies concerning possibilities of alleged events, clinicians strongly resist exonerating the targets of their evaluation. Because it is always possible that a given individual — even one randomly drawn from the general or a specific population — has sexually molested a child, an inconvertible proof that the individual has not molested a child is impossible. (emphasis in original)

The article concerns itself with research carried out at the University of Michigan. Case notes concerning the possible sexual abuse of a three year old child were provided to 8 senior clinical psychologists, 23 graduate students undergoing clinical training in psychology and 50 members of staff of child guidance clinics including social workers, clinical psychologists and psychiatrists all specialising in child development in areas of child mental health. They were asked individually and then in groups to evaluate the probabilities that sexual abuse had occurred and then to recommend what if any ongoing child/father contact should take place.

The range of opinion on whether there had been abuse was so wide that the authors concluded as follows:

⁷⁷ Paras [23]–[44]. The quoted part of the *Hemiro* judgment, contained in [20], is in fact an extended extract from Brown J's previous decision *Hartford and Ansilda* [2009] FamCA 23. See to the same effect *Davidson v Davidson* [2010] FAMCA 5; BC201050002 per Brown J.

The most striking feature of these studies' findings is the extremely large range across experienced and non-experienced clinicians of estimates concerning the likelihood that M was sexually abused by her father. When given all of the relevant facts of the case, child experts and trainees varied greatly in their individual judgment. . . These findings lend strong support for the view that individual experts can provide courts little if any assurance that they are able to provide even crudely reasonable (ie objective) estimates of likelihood that child sexual abuse has occurred or will occur, when they are confronted with the same set of ambiguities faced by the courts in these cases.

In *Re W*, the Full Court concluded its analysis of the relevant legal principles by remarking, at 79,218:

The lessons to be learned have not changed. The risk that the Court will find heinous behaviour where none has occurred needs be borne in mind at all times. The harm and injustice that flows to both parent and child from an erroneous positive is almost too horrible to contemplate. . . .

As I have observed before, and with respect to the Full Court, one might as well say that the harm and injustice that flows to both parent and child from an erroneous negative finding is almost too horrible to contemplate, that harm including repeated sexual abuse of a child. Nevertheless, I am bound by the exposition of principle in the judgment . . .

(Her Honour then discussed *W v W (Abuse allegations; unacceptable risk)* (2005) 34 Fam LR 129; (2005) FLC 93-235; [2005] FamCA 892. The judgment in *Hemiro v Sinla* then resumes at [21]–[44]:

W v W (Abuse allegations: unacceptable risk) (2005) FLC 93-235 was delivered after *Re W (Sex abuse: standard of proof)* (2004) FLC 93-192 and made no reference to the null hypothesis advanced in the article quoted by Kay J in his dissenting judgment in *K v B* (1994) FLC 92-478, which was endorsed by the Full Court in *Re W (Sex abuse: standard of proof)*. Nor was there any reference to the article in *Potter & Potter* (2007) FLC 93-326 in which the Full Court endorsed the approach described in *Re W (Sex abuse: standard of proof)* or in the earlier decision in *Napier & Hepburn* (2006) FLC 93-303 in which the Full Court considered the approach to determining whether the evidence establishes an unacceptable risk of abuse. It is timely to say something further about that article.

Neither Kay J in *K v B* nor the Full Court in *Re W (Sex abuse: standard of proof)* named the authors of the article in question, nor was its sub-title stated. . .

In the introduction to Part I the authors make clear their interest in the decision making processes that are generated under the mantle of expertise in cases of alleged child sexual abuse. The introduction to Part II sets out its focus as the problems inherent in attempting to reach firm conclusions about allegations of sexual contact between young children and adults. Part III deals with the field and scope of clinical expertise in these cases. The same case study was used in the research referred to in all three parts.

The authors frankly state their concerns about the accuracy of expert evidence and uncritical reliance on it and draw conclusions based on the research to which Kay J referred. Not all their assertions are attributable to their research; for example, in Part I they assert, at 251, that '(t)he contemporary preoccupation with child sexual abuse surely has many parallels with the preoccupations of other times, such as witchcraft and other heresies.' While a footnote is provided (*Child Abuse from Salem to Jordan: Therapists as Culprits*, 9 AUGUSTUS 7(1986)) the authors go on to wonder how many people over the course of history have been 'mortally persecuted

for the alleged practice of witchcraft, but had indeed not practiced it' and maintain and flesh out the analogy in their concluding paragraph. Part II continues where Part I left off, commencing with an aphorism attributed to Nietzsche: Convictions are the greater enemies of truth than lies.

Part III of the series, which is the article referred to by Kay J, continues the critique of the involvement of clinical experts in child sex abuse investigations. As Kay J observed, detailed case notes concerning the possible sexual abuse of a 3 year old child were provided to eight senior clinical psychologists, twenty-three graduate students undergoing clinical training in psychology and fifty members of staff of child guidance clinics, including social workers, clinical psychologists and psychiatrists. In one phase of the study participants were able to question the evaluating clinician who presented the case study. No participant met with the child who was the subject of the allegation or with any parent or family member of the child. They were neither treating experts nor forensic experts; the method involved the presentation of extensive clinical case material by the evaluating clinician in that case.

Participants were advised that until the allegation was made the child's parents maintained a good relationship and the child enjoyed a positive relationship with each parent. When she was about 16 to 17 months old, the child began (on her mother's account) to exhibit behaviours resembling ones referred to in certain media accounts as being associated with sexual abuse. They included nightmares, an interest in and references to sexuality, occasional resistance to having her nappy changed, an emergent negativism, protests against separation from her mother and, once when having her nappy changed, the child saying 'daddy hurt 'gina', which the mother construed to mean the father had molested the child. The mother's concerns moved to a strong suspicion when she discovered a hair in the child's nappy which, she said, was the colour of the father's hair, and she asserted, a pubic hair. She did not save the hair.

An examining paediatrician discovered no physical evidence of sexual contact and in the course of police investigations the father underwent two polygraphic examinations, which concluded that he was being truthful when he denied any sexual misconduct towards his daughter. The father acknowledged that his daughter had become avoidant of nappy changes and that he sometimes had to be firm with her during them. He corroborated the mother's observations of increased negativism and oppositionality. He could not explain the hair in the nappy.

Neither police nor protective services investigations substantiated the mother's suspicions and allegations. Following her receipt of their negative findings, the mother contacted a clinic specialising in the diagnosis and treatment of child sexual abuse; a therapist there stated that the child was being treated for (this is a direct quotation from the article) 'trauma [sic] of possible [sic] sexual abuse'. The evaluation team at the clinic never contacted the father but recommended a course of treatment to deal with the child's behavioural problems, which were deemed symptomatic of 'some kind of abuse'.

The clinician who presented the case study to the participants in the research exercise had been requested by a court to complete another clinical evaluation of the allegation of abuse.

The findings of the authors in Part III could be summarised in this way.

- Expert evidence is highly imprecise and unreliable. Even if some of the experts were 'correct' in their opinions, the broad spectrum of opinions makes it very difficult to discern which of those are to be trusted.
- Estimates of the likelihood of abuse did not necessarily match the recommendations made when asked about the contact the child should have with the allegedly abusing father. In the authors' words, the implication of

this is that ‘...an allegation taken alone ... has a powerful determining effect far beyond any failure to substantiate it’ (p 165 (emphasis in original)).

- Where an expert is confronted with ambiguous and conflicting evidence, he or she is rarely better placed than a court to assess the evidence.

The section of the article quoted by Kay J in *K v B* at 80,972 commences one sentence into a paragraph. The first sentence of the quoted paragraph, which is omitted, states:

Clinicians seem inherently averse to both the scientific standard of accepting the null hypothesis (and, correlatively, the legal standard of presuming innocence in the absence of incriminating proof) when adduced data are insufficient to make its rejection defensible. (170)

The authors’ reference to the presumption of innocence is curious. Insofar as the authors refer to the admission of expert evidence, it is to evidence adduced in civil proceedings, not criminal proceedings. This is expressly acknowledged in their comparison, at 170, of the ‘clinical arena’ with the ‘civil arena’ and in the Introduction in Part I of the series. In Australia, ‘the legal standard of presuming innocence in the absence of incriminating proof’ has no role in civil proceedings and no role in the criminal standard of proof, which requires rather that the accused’s guilt must be established beyond reasonable doubt, to achieve which the elements (ingredients or ultimate facts) of the crime must be established by the evidence beyond reasonable doubt; see Evidence Act 1995 (Cth) s 141; *R v Dickson* [1983] 1 VR 227 at 235, *Thompson v R* (1989) 169 CLR 1 at 12. The presumption of innocence is a vital part of the criminal law but to say an accused person is entitled to the presumption of innocence is to say no more than that a person suspected of or charged with a crime shall be assumed innocent unless and until his or her guilt is proved, either by a plea of guilty or by a jury finding.

All three authors of the article hold positions at the University of Michigan in the State of Michigan. The article quoted says nothing of the legal standard of proof (or, indeed, burden of proof) in that State however in Part I, at 250–1, the authors note that civil law generally accepts preponderance of evidence as the standard of proof that a party must meet to prevail in the judicial decision making forum while criminal culpability requires that the State meet the more stringent standard of proffering evidence of guilt beyond a reasonable doubt. A footnote, numbered 43, notes:

Certain questions brought before the courts require that the prevailing party meet a higher standard of proof than the usual civil standard. The determination of paternity, the termination of parental rights, and the civil commitment of the mentally ill, for example, all require the moving party to meet a clear and convincing standard of proof.

The authors may be working within a system in which the standard of proof in civil litigation is more variable than it is under Australian law and the court could not rule out constitutional ramifications in the United States.

While this court cannot know why the first sentence of the paragraph was omitted from the quotation in *K v B*, it can say that its inclusion would have caused a legally qualified Australian reader to question the apparent analogy drawn between the null hypothesis and the presumption of innocence, its relevance to the arguments the authors sought to advance and the authors’ non-expert assumptions about the law.

The authors refer to the null hypothesis as ‘the scientific standard’ at 170, but say nothing more of it. The expression was coined by Sir Ronald Fisher, an English geneticist and statistician, in 1935; (see Fisher, RA (1966) *The Design of Experiments*, 8th edition, Hafner: Edinburgh). In statistics a null hypothesis is a concept which arises in the context of statistical hypothesis testing to describe in a

formal way some aspect of the statistical behaviour of a set of data which is treated as valid unless the actual behaviour of the data contradicts this assumption. Although a null hypothesis always occurs in conjunction with an alternative hypothesis it would be misleading to consider the alternative hypothesis as the negation of the null hypothesis. Importantly, the absence of evidence against the null hypothesis does not establish its 'truth'; if the null hypothesis is not rejected there is no reason to change decisions or procedures predicated on its truth but it allows for the possibility of obtaining further data and then re-examining the same hypothesis. In the article the authors appear to use it to mean an hypothesis that sexual abuse has not occurred.

Tellingly, a clause is omitted in the midst of the paragraph quoted by Kay J. The first sentence of the quoted paragraph is reproduced below with the omitted words in bold:

Unfortunately, the magnetising force of the simple allegation of a heinous event such as child sexual abuse, which legitimately invokes consideration of the possibility of that event, draws the clinician — and perhaps even judges and jurors as well, *although the safeguards against this happening seem to us stronger in the civil arena than in the clinical arena* — away from what ought always to be the starting point of his or her evaluation enquiries, which is that the event did not (or very highly probably did not) occur. (170)

The omitted words, which qualify 'perhaps even judges and jurors', are consistent with the authors' statements (at 162–3) that despite their view of the imperfection of expert evidence, 'the findings do not mean, of course, that specialists in child mental health cannot be useful in the fact finding process, as they may offer modes and venues of communication that genuinely assist courts in fully weighing evidence'. The authors describe the central problem faced by courts which use experts in cases of alleged child sexual abuse as being:

. . . one of determining which of the diverse expert opinions one might solicit is veridical and which expert(s) among the many who present themselves as such in any given case can be expected and relied upon to exercise genuine expertise rather than simple ordinary judgment. (163)

The paragraph following that quoted by Kay J is the concluding paragraph of the article, and is in these terms:

Certainly, one important implication of our observations and findings is that for each and every individual clinician an immense burden exists to demonstrate convincingly to the courts to which they testify, and to society in general (neither statements to the effect that one has seen "hundreds of cases" nor presentations of thick resumes or curricula vitae being inherently convincing), the grounds on which s/he can be confidently expected to reason or predict beyond the capacity of the ordinary judge or juror when s/he is faced with the same information. A further implication, of course, is that courts need to examine their experts beyond the customary scope (which is too often perfunctory) of *voir dire*, which in our opinion admits far more clinicians to the realm of privileged testimony than is justified by any reasoned appraisals that have been made of them as a class of specialists. (170)

The authors of the article place much faith in the deductive capabilities of courts (as opposed to 'clinical experts') in drawing conclusions from conflicting and ambiguous evidence. The authors do acknowledge the 'pragmatic utility' in the admission of expert evidence, however unsatisfactory (166). Their main point is that the court should be cautious when considering expert evidence; as its sub-title makes

clear, the article is about the formation of expert opinion, not determination of allegations by a court. At 169, the authors make this clear when expressing this caution:

Courts need to recognize, therefore, that the thought processes of most clinicians, whose modes and manners of discourse may in their aplomb and tones of unflinching conviction, appear to be authoritative, are by dint of training and practice historically rooted in the traditionally divergent, intuitive, and speculative thought processes of the clinical case conference, and not in the traditionally systematic, fact-weighting thought processes of legal discourse. *Caveat curia!*

The authors refer to the problematic relationship between a low assessment of abuse and a 'conservative' recommendation for contact. An example given involved a risk assessment by participants falling between 0.001 and 0.25 (mean probability: 0.11) where despite this low likelihood of abuse, several experts expressed the opinion that contact between the father and child should be supervised as a caution. That approach was criticised and attributed by the authors to 'individual differences in tolerance for risk, as well as non-expert based views of parental rights'.

As the article was not concerned with the court process, it did not take into account the potential for such a poor correlation between a clinician's assessment of risk and his or her recommendation for contact to be tested in cross-examination and the contradiction exposed. Nor did it take into account a court's obligation to act according to law, rather than on personal views of 'parental rights'.

By quoting that part of Kay J's earlier dissenting judgment which includes an edited quotation from the article, the Full Court in *Re W (Sex abuse: standard of proof)* cannot have meant to endorse an approach which would have the court take as its starting point a premise that the sexual abuse did not, or 'very highly probably did not' occur, as that would be inconsistent with s 140 of the Evidence Act 1995 (Cth) and inconsistent with decades of jurisprudence about the standard of proof in civil cases, before and after the proclamation of the Evidence Act 1995. A revisiting of the article, and of the series of which it forms part, leads one to wonder whether it was considered in its entirety by Kay J in *K v B*. As the Full Court itself made no reference to the article, save by quoting that part of *K v B* which refers to it, there is no reason to infer that it considered the whole of the article, or the series.

On occasions, submissions made in this court suggest that some readers extrapolate from the first paragraph of the article quoted by Kay J that the starting point of a judge's evaluation should be the null hypothesis. The article does not support such a reading; nor does s 140 of the Evidence Act 1995 (Cth) or any of the other authorities to which I have referred.