Allegations of Child Sexual Abuse: Should 'Unacceptable Risk' be the Only Criterion for Refusal of Contact?

An Evaluation of *Re H & Ors (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 All ER 1

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INTRODUCTION

The Family Court in Australia has from time to time been faced with assessing allegations of child sexual abuse in what were custody and access matters. There are many difficult considerations for the court when confronted with such matters, now known as residence or contact matters. Evidential problems may exist when dealing with the (usually

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uncorroborated) evidence of children, often obtained by leading questioning. Further, the criteria the court should use in determining whether future contact should be denied also pose some real problems. Most importantly, the question of what 'standard of proof' the court should rely on in making decisions to refuse or allow future contact[1] with the child must also be considered.

As set out in the 1988 decision *M v M*,[2] the present position in the Australian Family Court when confronted with allegations of past child sexual abuse is to determine whether an *unacceptable risk* to the child exists if contact with the accused parent continues. A finding of *unacceptable risk* does not require a finding on the relevant proven facts as to whether allegations of past abuse are true or not.

On the other hand, the House of Lords in its recent decision in *Re H & Ors*, in considering whether a 'care order' should be made, determined that where an application is based on allegations of past abuse,[3] a finding as to the truth of the abuse allegations must initially be made.[4] The court can then assess the likelihood (risk) of the child suffering harm or abuse in the future and make a decision to either refuse or allow the accused parent future contact with the child.

The High Court's 'unacceptable risk' criterion as established in *M v M* has received some criticism since its inception. The decision of the House of Lords in *Re H & Ors* sheds further light on the perceived inadequacies of the present High Court criterion of 'unacceptable risk'.

RE H & ORS: THE FACTS

The House of Lords in *Re H & Ors (Minors) (Sexual Abuse: Standard of Proof)* considered an appeal by the Nottinghamshire County Council which had applied for care orders in respect of three young sisters, pursuant to s. 31(2) of the *Children Act 1989*[5] (hereafter 'the Act'). Section 31(2) provides:[6]

> The court may only make a care order or supervision order if it is satisfied,

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1 The *Family Law Reform Act 1996*, which commenced operation on 11 June 1996, introduces a new Part VII to the *Family Law Act 1975* as amended. 'Guardianship', 'custody' and 'access' are replaced with concepts of 'parental responsibility'. Since 11 June 1996, Parenting Orders may make provisions regarding arrangements for children. (A 'Residence Order' deals with whom the child is to live with; a 'Contact Order' deals with whom the child is to have contact with; and a 'Specific Issues Order' will deal with any other aspect of parental responsibility, other than child maintenance — for example, who will have responsibility for the day-to-day welfare, care and development of the child. See Div. 5 of the amended Act.)

2 [1988] 12 Fam LR 606.

3 To the subject or another child.

4 *Re H & Ors (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 All ER 1.

5 The equivalent in Queensland would be the *Children's Services Act 1965* as amended.

6 The relevant parts of this section are in italic.

(a) that the child is *suffering,*
or is likely to suffer significant harm; and
(b) that the harm, or likelihood of harm, is attributable to,
i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him;
or
ii) the child's being beyond parental control. (Emphasis added)

The mother had four daughters. The two eldest girls were children of her marriage to Mr H in 1979. The eldest daughter, D1, was born in June 1978 and D2 in August 1981. The mother and Mr H then separated and in 1984 she commenced a *de facto* relationship with Mr R. Two children were born of this relationship, D3, born in March 1985, and D4, born in April 1992.

The eldest daughter, D1,[7] made a statement to the police in September 1993 (when she was 15) to the effect that she had been sexually abused by Mr R since the age of seven or eight. D1 was then placed with foster parents, and Mr R was charged with rape.

The subject of these proceedings centres around the local authority's applications, in February 1994, for care orders in respect of the three younger daughters. Interim care orders were made initially.

In October 1994, Mr R was tried on an indictment containing four counts of rape of D1. The jury acquitted Mr R on all counts. The local authority, however, proceeded with the applications for care orders in respect of the three younger daughters. In order to determine whether the care orders should be made, the court had to consider the following words of s. 31(2) of the Act:

> The court may only make a care order or supervision order if it is *satisfied, a) that the child concerned is suffering, or is likely to suffer significant harm.* ... (Emphasis added)

The main evidence which the local authority relied upon in their application was the alleged sexual abuse of D1 by Mr R. It was not suggested that the three youngest daughters had suffered, or were suffering, any harm; therefore, the question was whether the judge was satisfied that they were likely to suffer significant harm in the future.

At first instance, the applications were heard in the Nottingham County Court.[8] The applications were dismissed, despite Davidson J's comments to the effect that he considered the evidence of the mother and Mr R as less than impressive in dispelling suspicions of abuse. Davidson J concluded that he could not be sure 'to the requisite high standard of proof'[9]

[7] Also referred to as 'C' in the judgment of Lord Lloyd of Berwick.
[8] Davidson J presiding.
[9] These are the words of contention.

that D1's allegations were true. He did, however, note that if it were relevant, he would be prepared to hold that there was a *real possibility* that D1's statement and evidence were true.

The local authority appealed, and the majority in the Court of Appeal dismissed the appeal. The present case concerns the local authority's further appeal to the House of Lords.

THE MAJORITY JUDGMENT: GOFF, MUSTILL AND NICHOLLS LJJ

'Likely'

In his judgment, with which the other majority judges agreed,[10] Lord Nicholls considered the meaning of the word 'likely' in the s. 31(2) phrase: 'likely to suffer significant harm'. Lord Nicholls referred to two possible meanings of 'likely'; namely, that in everyday usage it could have either a limited meaning of 'more likely than not', or a wide meaning of 'a real possibility'.

Lord Nicholls concluded that the context of s. 31(2) leaned towards the wider interpretation; namely, 'likely' meant 'a real possibility — a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case'.[11]

His Lordship[12] considered the prerequisites which need to exist before a court has power to make a care order; namely, the court must be satisfied that the child is already suffering significant harm, or that looking ahead he or she is *likely to in the future*. He considered that these prerequisites mark the boundary line drawn by Parliament between the differing interests of the parents on the one hand (in caring for their own child which is *prima facie* in the interest of the child); and the circumstances where the interests of the child may dictate a need for his or her care to be entrusted to others.

He considered that the court must be satisfied that the child is *already suffering significant harm*, or the court must be satisfied that, looking ahead, although the child may not yet be suffering such harm, he or she is *likely* to do so in the future. If 'likely' meant 'more likely than not', it would have the effect of leaving outside the scope of care orders, cases where the court is satisfied that there is a real possibility of harm in the future but that possibility falls short of being more likely than not — that is, a care order would not be available even in a case where the risk of harm is *as* likely as not.

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[10] Followed by Lord Goff of Chieveley and Lord Mustill.
[11] *Re H & Ors* [1996] 1 All ER 1, 15–16.
[12] *Id.* 15.

Burden of Proof

Lord Nicholls considered that the legal burden rested on the applicant for the care orders, to establish the criteria in s. 31(2).

Standard of Proof

Lord Nicholls, without detailed discussion, considered that the standard of proof required in non-criminal proceedings is 'on the balance of probability' and that family law related matters should be included in this.[13] Lord Nicholls recognised that the law looks for probability not certainty ('which is often unobtainable'), and that 'probability' is an 'unsatisfactory vague criterion because there are degrees of probability'.[14] Lord Nicholls determined that 'the balance of probability' standard meant a court is to be satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was *more likely than not.*

Thus, the 'balance of probability' standard (a lower standard than that used in criminal matters where proof beyond reasonable doubt is necessary) was the standard used in this case.

Suspicion and Threshold Conditions

As set out above, the relevant words of s. 31(2) provide:

> The court may only make a care order or supervision order if it is *satisfied, a) that the child concerned is suffering, or is likely to suffer significant harm.* ... (Emphasis added)

The local authority's application for the care order was based upon the second limb of s. 31(2); namely, that the children were *likely to suffer significant harm.* The only fact in support of the allegations that the three younger daughters were likely to suffer future harm was the allegation that over many years the eldest daughter had been sexually abused by Mr R.

Lord Nicholls referred to the finding of the Court of Appeal, that whilst Mr R did not establish that abuse *did not* occur, the local authority (upon whom the burden of proof rested) did not establish that abuse *did* occur. Lord Nicholls referred to the earlier judge's suspicions that the allegations of the eldest daughter may be true. Notwithstanding, Lord Nicholls states the question arising from those conclusions as:

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[13] *Id.* 16.
[14] *Id.* 17.

> ... when a local authority asserts but fails to prove past misconduct, can the Judges' suspicions or lingering doubts on that issue form the basis for concluding that the second limb of s. 31(2) has been established?[15]

His answer to this was a resounding 'no'.

THE COURT'S CONCLUSION

The starting point for the majority in determining the care application was to examine the undisputed evidence and to attach to it such weight as was considered appropriate.[16] Lord Nicholls recognised that the area of controversy here was the rejection of disputed allegations (as not proved on the balance of probabilities) which left scope for the possibility that the unproven allegations may have been true. Lord Nicholls considered that whilst unproven allegations of abuse may raise doubts and suspicion in a judge's mind, these unresolved doubts *could not* form the basis of a conclusion that a child is 'likely to suffer significant harm'. The rationale for this is put forward as: '[A] decision by a court on the likelihood of a future happening must be founded on a basis of *present facts* and the inferences fairly to be drawn from them.'[17]

Lord Nicholls' reasons can be summarised as follows:

(a) At trial, a court normally has to resolve disputed issues of relevant fact before it can reach its conclusion on the issue it has to decide. This exercise applies where the issue is whether the event will occur in the future or whether an event did or did not occur in the past.

Lord Nicholls used the following illustrations to support his reasoning (that a finding of likelihood of future harm must be founded on proven facts):

> [T]o decide if a car was being driven negligently, the court has to decide what happened immediately before the accident — i.e., how the car was driven and why. The court's findings on these facts form the basis for its conclusion as to whether the car was driven negligently or not. ... If the issue before the court is with respect to the possibility of something happening in the future, such as whether the name under which foods are being sold is likely to deceive future buyers; to decide, the court must consider the relevant facts about how, why and to whom the goods *are presently* being sold, and then reach a conclusion on the issue of whether the sale will deceive in the future.[18]

The court must have before it facts upon which its conclusion can

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[15] *Id.* 18.
[16] *Id.* 19.
[17] *Id.* 20.
[18] *Ibid.*

properly be based — facts from which the court can properly conclude that there is a real possibility that the child will suffer harm in the future. An alleged but unproven fact is not a fact for this purpose.

Lord Nicholls refers to the wording in the Act which supports his reasoning that facts are necessary. Under Part V of the Act, the court, as an interim measure, may make a child assessment order if it is satisfied that the applicant has *reasonable grounds to suspect* that a child is suffering or is likely to suffer harm. When the stage is reached of making a care order, though, the words in s. 31(2) of the Act provide that the court must be *satisfied* the child is suffering or is likely to suffer harm. This illustrates that more than suspicion is required.

(b) Evidence, rather, facts which fail to establish that maltreatment or abuse has occurred could hardly be used to support a finding that maltreatment or abuse may occur in the future.[19]

(c) If suspicion were enough, this would effectively reverse the burden of proof. It would mean that, once evidence of misconduct has been given, the 'accused' must disprove it. Otherwise, it is open to the court to hold that although misconduct has not been proved, it has not been disproved and, therefore, there is a real possibility that misconduct did occur. Lord Nicholls claims that judicial suspicion is no more than a judicial state of uncertainty about whether or not an event occurred.[20]

It seems that, if there are insufficient facts to establish current abuse, it will be impossible to persuade a court of it occurring in the future. Lord Nicholls, however, stressed that it *is* open to a court to conclude that there is a real possibility that a child will suffer harm in the future *although past harm has not been established*. It is possible that in some cases the evidence will establish 'a combination of profoundly worrying features affecting the care of the child within the family'.[21] Lord Nicholls outlined that the range of relevant facts was infinite, and gave some examples of the types of facts relevant in establishing that a real possibility of future harm exists where no allegations of past abuse have been made:[22]

- the alleged perpetrator has a history of abuse;
- the history of members of the family;
- the state of relationships within a family;
- proposed changes within the membership of a family;
- parental attitudes;
- omissions which might not reasonably have been expected;
- actual physical assaults;
- threats;

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[19] *Id.* 21.
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*

- abnormal behaviour by a child;
- unsatisfactory responses to complaints or allegations; and
- other facts which may seem minor or trivial if considered in isolation, when taken together may suffice to satisfy the court of the likelihood of future harm.

Accordingly, in cases where facts of the type mentioned above exist, it would be open to a court to find that, although not satisfied that the child is yet suffering significant harm, *on the basis of such facts as are proved,* there is a likelihood that the child will suffer harm in the future.[23]

In applying this reasoning to the limited facts at hand, Lord Nicholls concluded that the three younger daughters would not be at risk unless the eldest daughter had been abused by Mr R in the past (as this was *not* a case where Mr R had a history of abuse). If the eldest was not abused, there was no reason, *in the absence of any other relevant facts,* for thinking the other daughters may be abused in the future. Lord Nicholls determined that to decide that the others were at risk, because of a possibility that D1 was abused, would be to base the decision, not on *fact,* but on a *suspicion* that D1 may have been abused.[24] Accordingly, the care order was not granted and the appeal was dismissed.

Lord Nicholls noted in his conclusion the difficulties facing judges when there is conflicting testimony on serious allegations. He referred to an inclination on the part of judges to 'play safe' in the interests of a child, and how 'sometimes judges wish to safeguard a child whom they fear may be at risk without at the same time having to fasten a label of very serious misconduct onto one of the parents'.[25]

Lord Nicholls goes on to explain that these were the difficulties that Parliament in fact addressed in the *Childrens Act 1989.* As he reads the Act, Parliament decided that the threshold for a care order (for denying contact to an accused parent) should be that the child is suffering significant harm or there is a real possibility that he or she will do so. He considers that in the latter regard, where determining if a real possibility of harm exists, the threshold is low; hence, it is here that the protection for children exists. He further considers that proof of the relevant facts is needed for this threshold to be met, and that it is here that the protection for parents exist. He states:

> [P]arents are not to be at risk of having their child taken from them and removed into the care of the local authority on the basis only of suspicions, whether of the judge or of the local authority or anyone else. A conclusion that the child is suffering or is likely to suffer harm must be based on facts, not just suspicion.[26]

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[23] *Ibid.*
[24] *Id.* 22.
[25] *Ibid.*
[26] *Ibid.*

THE MINORITY JUDGMENT

Lord Browne-Wilkinson

Lord Browne-Wilkinson agreed with the majority in so far that 'likely' amounted to 'a real possibility' and that the burden of proving any relevant facts is on the applicant, and that the standard of proof is 'on the balance of probabilities'.

Lord Browne-Wilkinson, however, differed when considering how the above should be applied when a judge is determining whether he or she is *satisfied* that the child is likely to suffer significant harm in the future, although he agreed that a judge can only act on evidence and facts which have been proved.

He considered that the facts relevant to an assessment of risk (i.e. whether a child was likely to suffer abuse in the future) were different from the facts relevant to a decision that a child had suffered harm. He states:

> To be satisfied of the existence of a risk does not require proof of the occurrence of past historical events but proof of facts which are relevant to the making of a prognosis.[27]

And further:

> [I]f legal proof of *actual* abuse is a prerequisite to a finding that a child is at risk of abuse, the court will be powerless to intervene to protect children in relation to whom there are the gravest suspicions of actual abuse but the necessary evidence to prove such abuse is lacking.[28]

Lord Browne-Wilkinson supports his reasoning with an illustration of sightings of approaching aircraft which may be enemy bombers:

> [W]hat if in 1940, there were unconfirmed sightings of aircraft which 'could be' enemy bombers. On the balance of probabilities (more likely than not) one could not conclude that any one of those sightings *was* an enemy bomber. The task however of those responsible for giving warnings was *not* to decide if it was an enemy bomber approaching, but to decide if there was a *risk* of an air raid. *The facts relevant* to an assessment of risk here were reports of unconfirmed sightings, *not* the truth of such sightings.[29]

In the case at hand, Lord Browne-Wilkinson identifies the major issue as being whether D1 had been sexually abused. His Lordship then refers

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[27] *Id.* 3.
[28] *Id.* 4.
[29] *Id.* 3–4.

to a number of other facts pointed out by the County Court judge;[30] namely: D1 had been consistent in her story; her statement was full and detailed; there were opportunities for abuse by Mr R; Mr R had been lying in denying that he had been alone with D1 or the other children; D2 had made statements that she had witnessed inappropriate behaviour between Mr R and D1; the mother (contrary to her evidence) also suspected that something had been going on between Mr R and D1 and had sought to dissuade D2 from saying anything to the social workers.[31]

Lord Browne-Wilkinson notes his concern of establishing the law in an unworkable form to the detriment of children and notes that child sexual abuse is notoriously difficult to prove.

Lord Lloyd

Lord Lloyd[32] agreed with Lord Nicholls in that 'likely' in s. 31(2)(a) meant that there is a serious risk or real possibility that the child will suffer significant harm. However, in determining the appropriate standard of proof, he considered three possibilities; namely:

(i) a higher standard than the ordinary civil standard though falling short of the criminal standard;
(ii) the balance of probabilities, but so interpreted that the more serious the allegation the more convincing the evidence needs to be to tip the balance in respect of it;
(iii) the simple balance of probabilities.

His Lordship adopted (iii), the simple balance of probabilities, as the appropriate standard of proof. He considered that, if anything, the threshold should be lower, not higher in these types of actions. He states:

> It would be a bizarre result if the more serious the anticipated injury, whether physical or sexual, the more difficult it became for the local authority to satisfy the initial burden of proof ... and ... ultimately ... secure protection for the child.[33]

Lord Lloyd considered that with respect to a claim that a child is likely to suffer significant harm in the future, the question should be simplified. All that needs to be asked is whether, on all the evidence, the court considers that there is a *real possibility* of the child suffering harm in the future.[34] Even if the evidence falls short of proof of the facts in issue (i.e.

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[30] Davidson J.
[31] *Id.* 5.
[32] *Id.* 13. Note that Lord Browne-Wilkinson agreed with the reasoning of Lord Lloyd.
[33] *Id.* 8.
[34] *Id.* 12.

here it was not proved that D1 had suffered sexual abuse), the court must go on to evaluate the evidence on that issue together with all the other evidence in the case, and ask itself the critical question as to future risk.

Lord Lloyd considered that the word 'satisfied' is used in a neutral sense, which does not require likelihood of significant harm to be proved on the balance of probabilities before a care order can be made. He states: '["satisfied"] ... means no more than conclude or determine or decide.'[35] Lord Lloyd referred to previous cases involving wardship and access to illustrate the point that evidence which is insufficient to establish the truth of an allegation to a required standard of proof, remains evidence in the case.[36]

He did consider (as did Lord Nicholls) that the finding of future risk must be based on evidence (not on a mere hunch[37]), notwithstanding that such evidence may be insufficient to support a finding of past fact.[38] Lord Lloyd considered that, on this basis, it would have been open to him to find, on D1's evidence, that there was a *real possibility* of one or more of D1's sisters suffering significant harm. He states: '[T]he likelihood of future harm does not depend on proof that the disputed allegations are true. It depends on the evidence.'[39]

It is clear that Lord Lloyd does not consider it necessary to make a finding on the balance of probabilities as to whether sexual abuse has occurred. This is in fact similar to the current situation in Australia, as established by the High Court in *M v M*.[40]

THE AUSTRALIAN POSITION

The issues in *Re H & Ors* are similar to those faced by Family Court judges in Australia when determining parenting orders where allegations of sexual abuse have been made against one of the parties.

The leading Australian case in this area, *M v M*,[41] was an appeal from the Full Court of the Family Court to the High Court. The Family Court had suspended access (as it was then known) by the father to the only child of the relationship, a four-year-old girl, following allegations that

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35 *Id.* 13.

36 *Id.* 10. Lord Lloyd refers to the judgment of Butler-Sloss LJ and Stuart-Smith LJ in *H v H and C (Kent CC Intervening) (Child Abuse: Evidence); K v K (Haringey London BC Intervening) (Child Abuse: Evidence)* [1989] All ER 740, 750 and 765 respectively; [1990] Fam 86, 101 and 121 respectively; and Butler-Sloss LJ and Neill LJ in *Re W (Minors) (Wardship: Evidence)* [1990] 1 FLR 203, 215 and 218 respectively.

37 *Id.* 11.

38 Lord Lloyd pointed out that the County Court judge, whilst not persuaded by D1's evidence as to her sexual abuse, did not discount her evidence as worthless. He in fact stated that 'if it were relevant, I would be prepared to hold that there is a *real possibility* that her statement and her evidence are true. ...'

39 *Id.* 11.

40 [1988] 12 Fam LR 606.

41 *Ibid.*

the father had sexually abused his daughter. The Full Court of the Family Court dismissed the father's appeal.[42] The father then appealed to the High Court.

The High Court unanimously dismissed the appeal and upheld the Full Court's decision to refuse access to the father. The court said that the ultimate and paramount issue to be decided in custody or access proceedings is whether the making of the order sought is in the best interests of the child's welfare.[43] The court went further and stated that the resolution of allegations of sexual abuse against a parent is subservient to the court's determination of what is in the child's best interests.

The High Court made it clear that in cases such as this, where the court cannot confidently make a finding that sexual abuse has taken place, the Family Court is not required to make a decision to accept or reject allegations of sexual abuse 'on the balance of probabilities'.[44] This is obviously quite contrary to the majority decision of the House of Lords in *Re H & Ors.*

The High Court went on to say that the court has to determine whether on the evidence there is a *risk* of sexual abuse occurring if custody or access is granted, and the magnitude of that risk. If it is an *unacceptable risk*, custody or access should be denied — a similar position to that taken by Lord Lloyd[45] in *Re H & Ors.*

In answering the question — 'how do you measure an *unacceptable risk*?' — it seems that *any* risk, albeit a risk based on mere suspicion or doubt that abuse has occurred, is sufficient to deny future parental contact.

The High Court referred to previous cases which had attempted to define the *magnitude of the risk* which would justify a court denying a parent access to a child.[46] The degree of risk has been described as a 'risk of serious harm' (*A v A* [1976] VR 298, 300), 'an element of risk' or 'an appreciable risk' (*In the Marriage of M* (1987) 11 Fam LR 765, 770 and 771 respectively), a 'real possibility' (*B v B (Access)* [1986] FLC 91-785, 75,545), a 'real risk' (*Leveque v Leveque* (1983) 54 BCLR 164, 167) and an 'unacceptable risk' (*Re G (a Minor)* [1987] 1 WLR 1461, 1469).

These cases illustrate that courts have been striving for a degree of definition as to what equates to an *unacceptable risk*. The High Court points out that in deriving these tests, the courts have endeavoured to protect the child's paramount interests 'to achieve a balance between the risk of detriment to the child from sexual abuse and the benefits to the child of parental access'.[47]

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[42] Nicholson CJ dissenting.
[43] *Id.* 610.
[44] The court recognised that there will be some cases where, on the evidence, allegations of child abuse can be clearly rejected and others where the court can come to a positive finding.
[45] One of the dissenting judges in the House of Lords decision, *Re H & Ors.*
[46] *Id.* 611.
[47] *Ibid.*

In *M v M* the trial judge, Gun J, was not satisfied that the father had *not* sexually abused the child (on application of the civil standard of proof, the balance of probabilities). His Honour then concluded that he was unable to exclude the possibility that the father *had* abused the child. Gun J finally concluded that there existed an *unacceptable risk* that the child would be exposed to sexual abuse if the father were awarded custody or access, and thus denied access.

The question in the Australian Family Court seems to be a simple one; namely: is the child exposed to an *unacceptable risk* of abuse? In answering this question, it is *not* necessary to make a finding of fact that sexual abuse has occurred, thus *allowing suspicions and doubts* to form the basis of a decision. The rationale put forward for this test is that the welfare of the child should be of paramount consideration.

The trial judge, Gun J, stated:[48]

> [I]f I am not satisfied on the balance of probabilities that the [father] has sexually abused the child but I am not sure that he did *not* ... *in other words if I have lingering doubts*, it is my view that I should discharge the order for access on the ground that *no risk or possible risk* should be taken which would endanger the welfare of the child.[49]

The father's argument in the High Court was that in cases of custody or access involving allegations of sexual abuse, two questions must be asked. First, has the parent sexually abused the child; and second, is there a risk, if custody or access is granted, of sexual abuse occurring? This is akin to the test used by Lord Nicholls in the House of Lords in *Re H & Ors*.

The High Court considered the 'flaw' in this argument as identifying the allegations of sexual abuse as the preliminary issue for determination. It is submitted that this should in fact be the starting point. In cases where allegations have been made and some evidence exists as to past sexual abuse, the court should make a decision based on the relevant facts as proved, on the balance of probabilities, as to whether abuse has taken place. In these cases the court should effectivey 'level the playing field' in order to see clearly and objectively, without the influence of 'lingering doubts' or mere suspicion. The court should make a finding as to whether past abuse occurred, in order to make a proper assessment of *unacceptable risk*.

The above reasoning should not exclude the possibility of a decision denying access or contact where there is *no* evidence of past abuse in respect of the child in question. The types of facts referred to by Lord Nicholls in his judgment in *Re H & Ors* could go to establishing an

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[48] *Id.* 609.

[49] The trial judge, the majority of the Full Court of the Family Court and the High Court in *M v M* are thus seemingly aligned with the *minority* judgment of Lord Lloyd in *Re H & Ors*.

unacceptable risk of sexual abuse[50] where allegations of past abuse are not the basis for refusing contact.

However, the High Court considered that s. 64(1)(a) of the *Family Law Act* enjoined the court to regard the welfare of the child in custody, guardianship, welfare or access matters, as the paramount consideration.[51] This is equivalent to the current position as set out in s. 65E of the *Family Law Reform Act 1996*, which enjoins the court, in determining whether to make a particular parenting order in relation to a child, to regard the best interests of the child as the paramount consideration.

Certainly this is the correct approach; however, in regarding the best interests of the child[52] as the paramount consideration, the court should as a preliminary procedure make a finding on the relevant facts. It must be recognised that the competing interests here are both the interests of the child[53] (namely, the child's right not to be abused), and the child's right to parental contact. Surely, a finding as to the truth of the allegations should be the basis upon which the court can then ensure that the balance between detriment to the child from future abuse and the right of the child to contact with the accused parent is maintained.

Concerns Regarding the Australian Position

Nicholson CJ identifies problems with the position of the High Court in this area. In his dissenting judgment in the Full Court of the Family Court in *M v M*, Nicholson CJ expressed concern at the *unacceptable risk* criterion for deciding these cases, and the 'lingering doubts' of the trial judge[54] that were considered to be of sufficient strength to deny access.

Nicholson CJ, in a paper delivered to the Australian Crime Prevention Council in July 1989,[55] further states:

> [T]he High Court left unanswered, the question of what is an unacceptable risk. It may be argued that if a judge has lingering doubts about whether abuse had occurred in the past, then this does constitute an unacceptable risk. On the other hand, as I pointed out to the Full Court there will be few cases indeed where a judge does not have lingering doubts when such an allegation has been made. Such an approach to the question would, in my opinion, have a devastating effect upon many possibly innocent parents and would not, I believe, be generally in the best interests of the child affected.

Some further comments follow.

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[50] See *supra* p. 122.

[51] This is, of course, a reference to the *Family Law Act* prior to the Part VII June 1996 amendments.

[52] Previously, 'welfare'.

[53] Not the interests of the child *vis à vis* the interests of an accused parent.

[54] Gun J.

[55] A. Nicholson, 'Domestic Violence and Child Sexual Abuse', (1989) 10 *Australian Crime Prevention Council Journal* 15.

N v R

In *N v R*[56] the husband applied for supervised access. The wife cross-applied for a dismissal of the husband's application on the basis that access had finally been determined by Purdy J in his judgment on 2 June 1989. In this case, the court[57] allowed the husband's application to proceed, as sufficient change in circumstances had been established. The court, in reaching this conclusion, referred to comments made by Purdy J which highlight the *unsatisfactory* situation that has arisen for both judges and alleged perpetrators of child sexual abuse. His comments are as follows:

> [I]f this were an ordinary civil case to be decided on the balance of probability I would find that no sexual abuse had occurred. I find the husband's denials totally believable. ...[58]
>
> The problem for the husband is that I am bound with the cases of *B v B* [(1988) 12 Fam LR 612] and *M v M* [(1988) 12 Fam LR 606] which have fairly recently codified the standard of proof in matters of this nature. ... [T]hese cases require me to decide whether there is an unacceptable risk involved in unsupervised contact between the child and her father. ...[59]
>
> The decision confronts judges at first instance with a very difficult task. The problem is not merely that a decision based on unacceptable risk may do grave injustice to the accused parent. *Looked at in terms of the Act the problem is that it may result in the deprivation of the child of access which is in fact to that child's benefit.* ... The fact is however that were I to find in favour of the husband I would be left with an *unhappy feeling*, which would last a considerable time, that the expert evidence *may* well be correct. ... I am thus led to a finding ... [of] ... unacceptable risk.[60] (Emphasis added)

K v B

K v B[61] was an application by the husband from an order made by Gun J on 17 February 1994 suspending access by him to the child of the marriage, a five-year-old boy. Allegations of child sexual abuse were the basis for denial of access. Gun J was unable to make any positive finding on the balance of probabilities as to whether abuse had occurred and reluctantly found that unsupervised access would expose the child to an unacceptable risk of harm.

On appeal, it was held[62] that the trial judge applied the correct test in concluding that as a matter of practical reality there was an unacceptable

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[56] [1991] 15 Fam LR 39.
[57] Gee J.
[58] At p. 25 of his judgment of 2 June 1989.
[59] *Ibid.*
[60] *Id.* 26.
[61] (1994) FLC 92-478.
[62] Per Ellis and Baker JJ.

risk that the child would be sexually abused in the unsupervised care of the husband.

The dissenting judgment of Kay J recognised unsupervised access as inappropriate where there is a possibility of sexual abuse. However, Kay J examined supervised access as a possible solution and a viable 'compromise' in the light of the benefits to the child of access and of the detrimental effects on the child of refusing access.[63] Kay J pointed out that in cases of alleged sexual abuse there is significant risk that the ultimate effect of orders will be overlooked in the court's anxiety to ensure that the risks of sexual interference are minimised. His Honour quotes at length from various studies which highlight the ease with which allegations of sexual abuse can be made and the difficulties which exist in refuting such allegations; and how judges can be drawn away from what should always be the starting point in such cases; namely, establishing whether the abuse occurred or not.

Kay J questions whether the welfare of the child can be advanced by denying access on the basis that some type of sexual misconduct *may* have occurred. Kay J states:

> [T]he 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.[64]

Further, Kay J asks:

> 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?[65]

Kay J recognises sexual abuse, along with violence and psychological or emotional abuse, as insidious and behaviour outside the acceptable standards of society. Kay J[66] considers that society should be doing its best to ensure against such behaviour, but points out that at all times, the minimisation of the risk of sexual abuse has to be weighed up against the importance of the continuance of the relationship between the parent and the child.[67]

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[63] Clearly, in some circumstances, supervised access will be fraught with unacceptable risk to the child — i.e. where further emotional or psychological harm may be done to the child.

[64] *Id.* 80-972.

[65] *Id.* 80-973.

[66] In the case at hand, Kay J did not consider this had been done, and that at the very least, this was a case where supervised access should be allowed to take place.

[67] It is submitted that this reasoning stands even though some may argue that broader considerations must be considered here; namely, if a child or parent believes that abuse has taken place, this will have a detrimental effect on contact with the 'accused' parent. The reasoning to follow is that the best interests of the child would be served in these cases by refusing further contact (see *M v M*, *supra* n. 40 at 611).

Parkinson

Parkinson[68] has criticised the High Court's reluctance to make a balance of probabilities finding as to whether abuse has actually occurred.[69] He considers that if allegations of sexual abuse cannot be affirmatively disproved, this should not be sufficient reason to deny access, unless it is clear that there is at the present time some disturbance to the child.[70]

Regarding the High Court's *unacceptable risk* criterion, Parkinson observes that the High Court adopted this test 'without particular explanation'. Parkinson noted the difference between assessing risk on the basis of known facts and assessing risk where the facts are uncertain. He concedes that the *unacceptable risk* test is clear (or appropriate[71]) where abuse has already been proved and the court then has to determine, *in light of such facts as proven*, whether an unacceptable risk exists.[72] Parkinson illustrates the above by referring to instances where the Family Court may be called upon to assess future risks on the basis of what is already known:[73]

> [T]he risk for example, that a mother who has once been on drugs will relapse; the risk that a child will experience future difficulties because of the homosexuality of a parent or because the parent belongs to an unorthodox religious group. These are assessments of risk, but what distinguishes them from the sexual abuse situation is that *certain facts are already acknowledged as true*, whereas the very predicament faced by the court in *M v M* was that it was unable to say whether the allegation was true or not.

Parkinson highlights the proposition, that in cases where it is unclear whether sexual abuse has taken place, and there is no proof as to 'propensity' in the alleged perpetrator, the case is difficult to decide and the test of *unacceptable risk* is ambiguous and indeterminate.[74]

Parkinson clearly prefers the English and Canadian decisions where the courts are not reluctant to make findings on the balance of probabilities in custody and access cases. He states:[75]

> Those who are accused of sexual abuse should not be left in the position where the allegation is not sustained even on the balance of probabilities, and yet they are not declared innocent of the allegation. Although family law proceedings are not criminal in nature, the distinction may be lost on those who are parties to its proceedings.

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[68] P. Parkinson, 'Child Sexual Abuse Allegations in the Family Court', (1990) AJFL 60.
[69] He also considers the reliability of child evidence in sexual abuse cases — another issue which could and should continue to be addressed at length.
[70] Presumably, there would need to a finding on relevant facts to support this.
[71] 'Appropriate' is the author's word.
[72] The proven abuse need not be in respect of the 'subject' child.
[73] Parkinson, *supra* n. 68 at 79.
[74] *Id.* 80.
[75] *Ibid.*

He also suggests supervised access[76] as a workable compromise in situations where the court has concluded that there is no real risk to the child on the present evidence. This is aligned with the comments of Kay J in his honour's dissenting judgment in *K v B*.[77]

Parkinson does, however, recognise that the courts may be reluctant to make a finding as to the occurrence of abuse on the balance of probabilities because of a reluctance to accept uncorroborated evidence of children.[78] He suggests that, where it is unclear whether sexual abuse has occurred, the court should consider factors which may reduce the 'risk' to the child:[79]

> The fact that the custodial parent will in future be on the lookout for any sign of abuse. ... The possibility that the child can be taught protective behaviours. ... The presence of another partner in the [alleged perpetrator's] life who might provide some protection for the children, just by reducing the opportunities for [them to be alone]. ... The [alleged perpetrator's] awareness that they are under scrutiny and that a proven further occurrence of abuse will lead not only to the permanent denial of access, but may lead to criminal charges.[80]

Evidential Concerns

Apart from the criterion used by the courts to determine whether future contact with the accused parent should be denied, it is essential to recognise that evidence presented to the courts in these matters gives rise to some particular problems. Problems that have been identified revolve around the inadequacies of evidence given by children. Tilmouth identifies some particular matters; namely:[81]

> ... the question of reliability of statements made by children ... the inadequacies of uncorroborated evidence ... delay that may exist between alleged abuse taking place and the reporting of it ... problems in obtaining objective expert evidence; the susceptibility of children to suggestion and 'tutoring' ... the inadequacies of video recorded evidence [the reliability of which depends on the lead-up to the videotaping taking place] ... and the tendency of courts to admit sometimes 'doubtful' evidence in these cases.

Tilmouth perceives the problems in this area of the law as primarily evidential concerns. In situations where interim access is applied for, he

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[76] *Id.* 82.

[77] (1994) FLC 92-478.

[78] The reliability of children's evidence is another issue, which is obviously relevant to cases where allegations of sexual abuse exist.

[79] This may be another way of examining the evidence — i.e. considering the relevant proven facts, and making a finding on the balance of probabilities as to whether an unacceptable risk exists.

[80] Parkinson, *supra* n. 68 at 83.

[81] S. Tilmouth, 'Child Sexual Abuse: Forensic and Evidentiary Aspects', (1994) AJFL 67.

considers that 'in all but the most blatant of cases, supervised access should be granted'.[82] Tilmouth further suggests that the current position in Australia is that courts feel compelled to apply the 'relatively undemanding' criterion of *M v M* to deny access to the accused parent, even where the court cannot make conclusive findings as to past abuse. Further, the onus is clearly on the accused parent to remove doubts of risk of abuse taking place. Tilmouth recognises and agrees that the predominant objective must at all times be the welfare of the child, but he considers that the psychological damage to children and the consequences to innocent parents are just too high a price for the system to bear when the alleged risks are not borne out.[83]

Parkinson also highlights the evidential problems associated with child sexual abuse allegations. He notes the following concerns:[84]

> [E]ven where a medical examination of the child has taken place, in most cases it is still inconclusive as to whether sexual abuse has occurred ... the questionable reliability of children's evidence ... children characteristically don't reliably remember dates or the order in which things occur ... children are more open to suggestion ... and, children can have problems distinguishing fact from fantasy.

Parkinson does, however, support the notion that statements by children containing a high degree of detail, made in the course of free recall and objective questioning, may be quite reliable.'[85]

Courts are no doubt aware of the evidential problems peculiar to these matters. It is conceivable and quite likely that some of these problems underlie the rationale of the High Court in *not* requiring a finding on the facts as to whether the alleged sexual abuse has occurred or not.

An important Australian decision to note here is *In the Marriage of D and Y*.[86] In this case the allegations were found to be groundless. The Full Court of the Family Court recognised that there may be dangers in a too ready acceptance of complaints of some children. The court was of the view that courts and expert witnesses are obliged to consider that an allegation might be untrue.

CONCLUSION

The House of Lords in *Re H & Ors* was concerned with an application for a care order. The application was based on allegations of sexual abuse with respect to a child who was not the subject of the proceedings. The

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[82] *Id.* 87 (as the chances of re-establishing access following a final hearing are slim).
[83] *Id.* 88.
[84] Parkinson, *supra* n. 68.
[85] *Id.* 72.
[86] (1995) FLC 92-581.

House of Lords considered whether a *care order* should have been made. It is submitted that some analogy can be drawn for applications in the Family Court in Australia for residence and/or contact orders, where allegations of child sexual abuse have been made. This is notwithstanding the different statutory framework that applies in the Family Court where the court must consider the best interests of the child as paramount.

Both applications — namely, an application under the *Family Law Act* (that an accused parent have no further contact with the child) and an application under the UK *Childrens Act* (that the child be placed into care and have no future contact with the accused parent) — if successful, effectively deny the accused parent contact with the child or children who are the subject of the application.

Certainly, the arguments of the majority in *Re H & Ors* give further support to the arguments of those who question the High Court's 'unreasonable risk' criterion for determining whether future contact with a child should continue.

This is a difficult area which unfortunately confronts judges too often. It is no doubt difficult, in instances where inconclusive allegations of past abuse have been made, to know what decision will lead to the best outcome for the child.

In placing the child's best interests as the paramount consideration, it is both logical and reasonable to consider at the outset whether allegations are true or not. The court should make a finding on the relevant facts and *then* make a determination of *unacceptable risk.* The resulting decision is then based on sound legal principle rather than upon vague notions such as 'lingering doubts' or 'suspicion'. The former approach is appropriate despite any argument that there are broader issues which are also relevant in determining whether contact should be denied in the light of allegations of sexual abuse. (For example, a child's[87] belief that abuse has occurred may affect contact to such an extent that it is in the child's best interest that contact not take place.[88])

Much could be written focusing on the problems associated with the inadequacies of the evidence (particularly when reliance must be placed on statements of young children) presented in child sexual abuse cases. Undoubtedly, the problems here are recognised by Australian courts and these are the concerns which underlie the reason why no finding as to past abuse is presently required where allegations of past abuse have been made. However, perhaps recent decisions such as in *G v M*[89] and *In the Marriage of D and Y*[90] signify a move afoot in the Family Court to make an actual finding as to the truth of sexual abuse allegations.

The courts perform several delicate balancing acts when considering

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[87] Or a parent's?
[88] See *M v M, supra* n. 40.
[89] (1995) FLC 92-641.
[90] (1995) FLC 92-581.

allegations of child sexual abuse. These allegations are serious. Child sexual abuse is a heinous offence which is difficult to prove conclusively. Allegations are also seemingly as difficult to disprove as they are easy to make. Nevertheless, it is the interests of the child which are of paramount consideration. In requiring a finding as to past abuse as a basis for assessing *unacceptable risk*, it is not sought to balance the interests of the child against those of the parent. It is the competing interests of the child alone which must be considered. Children have a right to be protected from harm and abuse, and they also have the right to a relationship and contact with both parents. These are the considerations which must underlie the court's balancing act in determining what is in the best interests of the child.

While courts continue to make decisions based upon 'lingering doubts' and suspicion, they may leave themselves open to making decisions which are not in the best interests of the child. Certainly, in making a finding as to past abuse, some decisions would necessarily remain unaltered. The inherent benefits, though, would lie in obtaining decisions derived from clear, logically applied legal principles.