Evidence and Child Sexual Abuse - Obfuscation or illumination?

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In an earlier article in this journal (Bates, 1992), I suggested that, 'Legislation and traditional legal principle seems to have been used to obfuscate, rather than enhance, the fact finding process.' The cases discussed in that article (*Minister of Community Welfare* v *B.Y. and L.F.* (1988) F.L.C. 91-973; *In the Marriage of Y and F* (1990) F.L.C. 92-141; *In the Marriage of D and B* (1991) F.L.C. 92-226) documented that administrative processes were far from satisfactory in the way in which they dealt with allegations of child sexual abuse and so, perhaps, was the way in which the courts viewed expert evidence. Unfortunately, the process does seem to be continuing and must, therefore, be appropriately documented.

The first case which falls to be considered is the decision of the Queensland Court of Criminal Appeal in *R* v *Link* (1992) 60 A. Crim R. 265. There, the appellant had been convicted of sexual offences against his daughter. At trial, evidence was admitted in relation to the child's distressed condition when she was in her father's company. However, the evidence related to a period which was, at least, eight months subsequent to the last alleged offence. By a majority, the Court of Appeal allowed the appeal and substituted a verdict of acquittal.

Before attempting to analyse the various judgments, it should be said that anyone concerned with the law as it relates to child sexual abuse and the fact-finding process should find the majority view extremely disquieting. The first point made by the judges in the majority (Macrossan C.J. and McPherson J.A.) was that (at 266) that distress had been recognised as being capable in law of constituting a corroborative circumstance able to be considered by the jury. They said:

> But it has also been acknowledged that before it is capable of being so considered, there is an initial causal connection to be determined. It is whether a reasonable inference from the evidence that a causal connection exists between the matter of the complaint alleged and the distressed condition.

The authority which was used for that proposition was the decision of the Full Court of the Supreme Court of Victoria in *R* v *Flannery* [1969] V.R. 586. In that case Winneke C.J. said (at 591) that:

> ... evidence of the distressed condition of a prosecutrix may or may not be capable of amounting to corroboration according to the particular facts of each case. In determining whether it is so capable, regard must be had to such factors as the age of the prosecutrix, the time interval between the alleged assault and when she was observed in distress, her conduct and appearance in the interim, and the circumstances existing when she is observed in the distressed condition. Without attempting to enumerate exhaustively the circumstances in which such evidence may amount to corroboration, we are of opinion that if, regard being had to factors of the kind we have mentioned, the reasonable inference from the evidence is that there was a causal connection between the alleged assault and the distressed condition, evidence of the latter is capable of constituting corroboration. If such inference is not open, the evidence is not, in our opinion, capable of amounting to corroboration.

It must be said that *Flannery* was decided quite some years ago, when public attitudes towards allegations of rape (which was the subject of the charge in that case) were rather different from that which they are now. In addition, the victim in *Flannery* was considerably older than the victim in *Link* and was not a member of the accused's family. In this writer's view, it is not an especially happy precedent.

The majority then went on (at 591) to refer to the earlier decision of the Queensland court in *R* v *Roisseter* (1984) 11 A. Crim. R. 325 at 329 (of which McPherson J.A. was also a member) where it was said that were the relationship between the distressed condition and the alleged assault to be 'tenuous or remote,' then it was the duty of the trial judge to withdraw the evidence from the jury. This view was likewise followed by the same court in *R* v *West* (1991) 51 A. Crim. R. 317 at 321. (It should be said that in both of those cases the evidence of distress was admitted as corroborative).

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In *Link*, the alleged victim's distressed condition on a date in October 1990 was admitted as corroborative of events which had allegedly taken place between December 1989 and February 1990. In consequence, the majority (at 266) took the view that, in view of the length of time which had elapsed between the alleged offence and the observed state of distress was:

> ...plainly one in which the causal connection or apparent relation was 'tenuous or remote'. In addition, the inherent weakness of distress as a corroborative circumstance is more than usually visible in this case.

The reason for the latter comment was that the surrounding evidence showed that the complainant's distressed condition was:

> ...at least as, if not more likely to have

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> been the product of a general antipathy to her father quite unrelated to any alleged sexual interference with her.

There was evidence supporting such a general antipathy in the shape of a letter which the complainant had written to her father shortly after her parents had separated.

When one takes the remainder of the evidence into account, the picture becomes still more confused: in the words of the majority (at 267) the complainant's account was not wanting in persuasive detail, but she had also admitted that she was receiving sex education at school and the majority considered that it was not impossible that she had learned what she had recounted from girls older than she. The appellant had, inevitably perhaps, made an emphatic denial of the allegation. There was also some apparently inconclusive medical evidence. In the end, though, the issue which the judges in the majority regarded as being determinative of the issue was the 'tenuous and remote' connection between the alleged offence and the distressed condition which rendered the latter incapable of amounting to corroboration. Their Honours also said (at 267) that there were sound reasons for supposing that the complainant might have fabricated her account of events.

In dissent, Pincus J.A. first pointed out (at 268) that the trial judge's direction to the jury was, in fact, not helpful to the Crown as had been argued and, indeed, was of little value to either side in that it was, by its very nature, circular. Put another way, what the trial judge had said was that the jury could not have been satisfied that the distress was caused by the accused having committed the offence unless they were first satisfied that the accused had, in fact, committed the offence and the supposed purpose of the corroboration was to prove that very thing!

Pincus J.A. then turned his attention (at 269) to the matters which had been raised in the majority judgment: first, he examined the conduct of the complainant from which the court at first had inferred that she had disliked her father sufficiently so as to fabricate the relevant complaints. One reason for her so doing, Pincus J.A. noted, might have been so that she would be able to stay with her mother and step-father. However, as the judge pointed out, there did not appear to have been any suggestion that the father could have been awarded custody or that there had been any suggestion made to the complainant that he might. In the event, Pincus J.A. reached the conclusion (at 270) that the only special reason for doubting the complainant's account was that she disliked her father. The long delay between her distressed condition and the alleged offence could be accounted for by a threat which her father had allegedly made in relation to her mother. The majority (at 267) had not taken the threat seriously on the grounds that the complainant was sufficiently self possessed as to have written (above) to her father after her parents' separation.

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Pincus J.A.'s attitude towards the medical evidence, which the majority (at 267) had found to be inconclusive. In dealing with this issue, his Honour referred (at 270) to the comments of Grunseit (1990). That writer had said that:

> There is a persistent myth that girls frequently sustain accidental injury to their genitalia including the hymen by falling, by playing sport and that accidents of this kind, though not remembered or reported, are a likely cause of hymeneal tears even though a girl claims she has been sexually abused.

The judge then went on to say that, putting the matter at its lowest, it was of assistance to the prosecution that the medical evidence was consistent with a substantial object having been thrust into the complainant's vagina. He further stated that a court could hardly hold that the child's saying, even before the alleged incident, that she did not like the accused much was a strong circumstance which rendered fabrication of the complaint likely. Similarly, Pincus J.A. refused to ascribe a high degree of probability to any theory that, having unwillingly submitted to the accused's attentions for a considerable period of time, the complainant tired of it and decided to concoct the story.

On the issue of fabrication, Pincus J.A. referred to the work of Spencer and Flin (1990) who, relying on an analysis of copious literature concluded that cases of fantasisation and/or fabrication in such cases are very rare. Pincus J.A. (at 271) agreed when he said that:

> ...as a matter of common experience, it is surely an improbable assertion that children of 10 or 11 years of age are especially likely to invent elaborate accusations against others and adhere steadfastly to them. Children, like adults, commonly lie, but the child's inferior ability to keep to a false story under rigorous questioning is well known. Their lack of skill in keeping to the details of a story, when pressed, is simply a product of their state of intellectual development and limited experience in verbal contests.

This view, indeed, is re-emphasised by Spencer and Flin, relying on research by Vizard and others (1987), who are especially troubled by the high rate of false retractions of abuse. On the facts of *Link*, Pincus J.A. noted that the complainant had been subjected to strenuous cross examination both at committal and trial and, in addition, the jury had had the advantage of seeing the child being questioned by police on police video.

Even though Pincus J.A. made substantial reference to Spencer and Flin (1990) he continued by saying that it would be 'unorthodox' to derive views as to the likelihood of the complainant's story being true - the court must rely on its own views. For himself, the judge did not accept (at 272) any view that fabrication by children in such cases was common. It followed that he was not convinced that there was any reason to doubt the jury's verdict. He concluded his judgment by stating that:

> The detection of a possible motive for lying, such as that the complainant child did not like the allegedly incestuous father having access to her and did not like him much even before

> the alleged incidents cannot, in my respectful opinion, justify setting the conviction aside. It would not be astonishing to find that an incestuous father has had an bad relationship with his child, even before committing incest on her; after incest, one would expect the child to express dislike.

Link, in almost startling fashion, demonstrates many of the problems which are central to any attempt at sorting out the difficulties relating to child sexual abuse and the fact finding process. In the end, it is not hard to agree with Pincus J.A.'s conclusion that there was really very little reason for which the initial jury verdict could have been overturned. The relative emphasis of the judges in the majority and minority will only have been too apparent from the preceding discussion. Although the length of time which had elapsed between the alleged (and it will be remembered that a verdict of acquittal was ultimately substituted) offences and the distressed condition are, indeed, disquieting. On the other hand, the manner in which the complainant stood up to the interrogative processes could well cancel that out. One heartening factor, to this writer at any rate, was Pincus J.A.'s recognition of non-law materials. It should also be said, in that broad context, Pincus J.A. (at 270) had also said that, as was the case with many disciplines:

> ...this area of knowledge has been affected by suspicion attaching to views expressed by people on one side of the argument or the other who may have a financial interest in establishing a reputation as suitable expert witnesses. It may be platitudinous to say this, but the matter of proper ascertainment of child sexual abuse is too important a matter for disputes between involved groups to continue. It should also be born in mind that *Link* involved a criminal prosecution, and one can only speculate as to the reaction of a judge in a contested custody or access case towards evidence of the kind presented in that case.

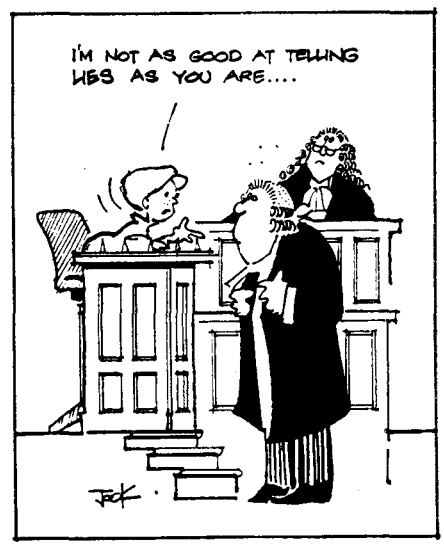
The central issue of reliability of evidence was raised in the recent decision of the Alberta Court of Appeal in *Millar* v *Millar* (1992) 41 R.F.L. (3d) 193, which did involve a custody and access dispute. In *Millar*, the parties had separated in 1987, following some nine years and six months of marriage. During the marriage, the mother had been the primary care-giver for the children involved. At the time of the separation, the wife was suffering from post-natal depression so that, in consequence, the father took custody of the children. Subsequently, the mother was granted interim custody and the father was granted access. In 1988, the father and his mother became concerned that the two oldest children had been sexually abused by the wife. During the proceedings at first instance, the grandmother (who produced over 100 pages of alleged documentation) stated that the children had complained to her about the abuse. On the other hand, other people reported that the eldest child had refused to accuse the mother. The trial judge found that the children had been sexually abused whilst in their mother's care and, significantly, the judge had particularly exonerated the wife's new male partner from any blame in that regard. Accordingly, he granted custody of the children to the father.

The Court of Appeal (Fraser C.J.A., Kerans and Stratton JJ.A.) allowed the mother's appeal in part and ordered a new trial. A major reason for so doing was that the appellate took the view (at 196) that the trial judge had failed to address the 'important question' of whether the eldest child had actually been subjected to any sexual abuse at all and, as a result, whether the eldest child had told her grandmother the truth. As the court put the matter:

> this was a critical issue in this case, where for over two years this child, then aged five, was subject to tremendous pressure from both sides to 'deliver' on a complaint or a denial, pressure that unfortunately has continued since the trial. It is at least possible that [the eldest child] deliberately dissembled.

Second, it appeared as though the trial judge had not taken into account whether the grandmother had observed innocent events through jaundiced eyes. Hence, the initial findings of abuse could not stand.

There are disturbing aspects of the *Millar* case, and many of these are reflected in the attitude of the majority in *Link*. First, it seemed to be assumed that the eldest child, at least, might have been lying for whatever reason - the views expressed by, and the literature referred to by Pincus J.A. in *Link* seem, on a global basis at least, to suggest that that might not have been the case. On the other hand, there was the intermediary figure of the grandmother and, in an Australian context, one cannot help but be reminded of the case of *In the Marriage of E. (No 2)* (1979) 36 F.L.R. 12 (Bates, 1981) where there was dispute between the judges of the Full Court of the Family Court of Australia as to whether a maternal aunt, who was a party to the custody dispute, had coached the child in her accusations against her father or had merely been hysterically mistaken.



There are two other issues which arise from the *Millar* case: first, there was the allegation that the abuse had been perpetrated by a woman. That, of itself is unusual. At least one commentator (Campbell, 1988) seems to suggest that the child sexual abuse is exclusively a male activity. Second, as in *Link*, the court found (at 194) the medical evidence to have been inconclusive. Elsewhere, the present writer (Bates, 1989) has urged the congruence of legal and medical procedures. The consequences of inadequate procedures, as represented by cases such as the English case of *C* v *C (Child abuse : Evidence)* [1987] 1 Fam L.R. 331 (Bates, 1989) can be little short of disastrous for all parties. *C* involved, *inter alia*, no transcript of an interview being taken, notes lost and video

being accidentally erased. It is hard to understand why 'inconclusive' medical evidence should seem to be the norm.

With each new case, from Australia and elsewhere, the situation regarding child sexual abuse and the fact-finding process seems to be ever more confused. Thus, admittedly in a case which did not involve intrafamilial child sexual abuse, – *R* v *Schlaefer* (1993) 61 A. Crim. R. 1 – the South Australian Court of Criminal Appeal (Matheson, Olsson and Debelle JJ.) held that an eleven years old victim of sexual assault and her ten years old brother should not have been permitted to give sworn evidence on the ground that the trial judge had not applied the common law test of belief in God and the divine power to reward and punish as a consequence of an oath taken in God. The relationships between the law and bureaucracy (Bates, 1992) and the law and the clinical practice (Bates, 1989) may be complex enough, but added theism provides an even more obfuscatory mix. ♦

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