JUDGING JUDICIOUSLY IN CHILD WELFARE CASES

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It is a commonplace assertion that most family law matters which come before the Courts raise issues of interest and relevance to not only the law, but many other disciplines. That point can, of course, be made in relation to all areas of law, but in the family law field, there tends to be much more open recognition of the ways in which both the written law, and the decision-making process are, and in fact must be, strongly affected by the knowledge which comes to us from those with expertise in such related fields as psychiatry, psychology, pediatrics, sociology, and social work.

Perhaps no field better illustrates this interdependence than child welfare. Statutory reform is increasingly guided by the most recent findings of those who are knowledgeable about child development and about family function and disfunction. Expert testimony in child welfare cases is becoming the norm and many written judgements are heavily laden with discussion of how that testimony has affected the ultimate decision. It is now an accepted fact that the discretion vested in the Judge would be almost impossible to exercise in at least the most difficult matters if such input were not available.

Notwithstanding these developments - an evolution which one would assume would make the decision-making task easier, - much of this paper is designed to demonstrate the opposite - to show how complex and difficult decision-making in child protection matters becomes if one realistically assesses what it is that these other disciplines are both able and unable to tell us. One simple fact situation involving child abuse will be used as a framework for the analysis. For the most part, the paper will avoid issues relating to the admission of such material into evidence. Little effort will be made to relate the information to the statutory language that guides the decision-maker (partly because the breadth of that language usually vests enormous discretion in the Judge to determine what, in his or her opinion, is admissable). The discussion will not lead inexorably to any particular outcome and it is hoped that the information will be presented in a way that at least masks the writer's biases and personal preferences. [1]

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A. Objectives

The exercise which follows is undertaken with four main objectives in mind, beyond that of demonstrating why a decision in a child protection matter is one of the most difficult in the entire area of family law. These objectives are as follows:

(i) Given the fact that the law and the environment in which these decisions are made both permit and invite extensive input from other disciplines, it is vital that the decision-maker recognize the limits of the assistance which can be offered and the risks which flow from uncritical acceptance of the information that is provided. These limits have been ably drawn by Felix Frankfurter. To him interdisciplinary work was not without its hazards:

> "Concerned lest the boundaries of each professional domain be eroded in a headlong effort to foster mutual enrichment, or cross fertilization, he warned of a possible "sterilization" of the disciplines, where uncertainty in one profession would be resolved by resorting to a dubious truth in another."[2]

We are all aware of the natural tendency to seek refuge in the sanctuaries of other disciplines when we are unsure of the answers our own can give us, sometimes overlooking the fact that those who are knowledgeable in those fields are constrained by the same uncertainty. A healthy awareness of the limits of understanding in all the human sciences is, then, a valuable point of departure. In addition, if we begin from the premise that the state of the art is less than perfect and that all professionals are fallible, then there is less likelihood that we will generally condemn any one profession or professional group when that fallibility emerges in a particular case.

(ii) Understanding the complexity of child protection cases must include an awareness of the impact which a Judge's individual values, background and beliefs can have upon his or her decision-making. This will be discussed later in the paper. The point to be made here is this: when one combines an imprecise law with an issue as serious as a child's protection, along with an awareness of the emotionally charged environment in which the matter must be decided, the likelihood of subjective decision-making is particularly great. It may amount to excessive optimism,

even naivete, to believe that one can neutralize these factors; nonetheless, we cannot even begin to deal with them until we are aware of their existence and of what those who study us as decision-makers can tell us about their impact.
(iii) In child welfare matters, Judges tend to display understandable uncertainty about the role or roles they are to assume, an uncertainty which is often shared by many of those who appear before the Court. The common-law traditions which the Judge inherits and the fact that this is a civil matter suggest a restrained and passive role; and yet the statutory law and the unique nature of child welfare matters tend to invite fairly active involvement in the proceedings, often on the Judge's own initiative. The Judge in a typical child welfare hearing may feel called upon, at different stages of the proceedings, to function as a decision-maker, a symbolic representative of the authority of the state, an investigator, a parent, and a therapist. An understanding of the complexity of the issues at hand may caution one against undue reliance on the efficacy of any one of those roles.
(iv) Finally, it is hoped that recognition of the difficulty of these cases, coupled with acceptance of the fact that increasing knowledge in each of the related disciplines shakes the foundations of many of the principles or theories that in the past have made answers much easier to find, will enhance our decision-making (provided of course, that the uncertainty does not produce paralysis). Decisions perhaps become much harder to reach, but there ought to be a corresponding increase in their quality.

B. Fact Situation

An 11 year old native Canadian girl, who lives on a reserve with her mother, has been physically injured by her mother's common-law partner. There have been previous incidents of corporal punishment inflicted by the mother, none of them having resulted in any injuries. In this incident, with the mother present in the home, quite serious physical injuries have been inflicted, although the child is recovering

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well. The abuser is no longer in the home on a full-time basis, but is a member of the reserve band and is known to be at least living close to the child's home.[3] The child welfare authority has apprehended the child and is asking you to find that the child is in need of protection, and to order her permanently removed from the home. These facts should be sufficient for the general discussion which follows, although there will be occasional reference to areas in which further information might be required.

C. Informing the Decision-maker

1) Proof: Little reference will be made to the the possible problems involved in proving that, in fact, abuse occurred. The reason for this is that proof should not be a problem in this particular case. However, there is perhaps some merit in making three general points about the issue of proof. The first is that the ability to diagnose non-accidental injury has improved substantially over the past fifteen years. This development can be attributed not only to the use of more sophisticated measures of detection[4], (such as the full skeletal x-ray) and an increase in the number of medical professionals who specialize in the diagnosis of children's injuries, but also to increased emphasis upon those measures which aid in the proof of abuse in non-medical ways (e.g. the simple recording of explanations given close to the time of the injuries so that later, inconsistent stories can be exposed). This is an important point to make, particularly for those who have sat in judgment of these matters for some years. The increasing assurance of doctors who testify in these cases is firmly grounded in the remarkable advances in knowledge and technology that have been made.

The second point is that, notwithstanding the advances, it may still be very difficult in selected cases to determine whether specific injuries are the probable result of abuse.[5] Some of the reasons for this are obvious. They include the fact that most of these injuries occur in private; often one is relying upon the evidence of young children; it is difficult to translate medical evidence of what injuries are "consistent

with" into findings of probability; we all tend to display a real reluctance to believe parents are intentionally abusive. One proceeds with inevitable caution simply because so much can hinge on the determination of whether abuse has occurred. In the area of emotional abuse, where definitions are imprecise, the risks of subjective decision-making are high and the dangers of interpreting poverty, cultural differences or certain family arrangements as parental inadequacy are substantial, the problem of proof can be much greater.

Finally, I think one of the factors that can complicate the proof issue is the tendency to blur the two stages of a child protection matter as it is being heard. This will be discussed below, but the evidence of what has already happened can be very difficult to analyse when it is heard together with extensive testimony about the ongoing and future needs of the child and the family.

2) Taking Direction from the Law: the Judge's primary guide should be the law which applies to the issues before him or her. In this case the first point of reference is the child welfare legislation applicable in the relevant jurisdiction. Two general statements can be made about that legislation. The first is that stated grounds for a child's need for protection tend to be all-encompassing. Ontario is a case in point[6] At the moment, a convincing argument can be made that most children in the Province could be placed, at least at some point in their lives, within one or more of the many definitions of "child in need of protection"[7]. Even when fewer criteria are used, they usually do very little to structure the discretion of the decision-maker.[8] This is, I think, intentional, resulting from the natural fear that tightly worded criteria will prevent intervention in some cases where children are clearly at risk.

Secondly, when one reaches the stage of determining what kind of intervention is appropriate, most statutes invite little more than consideration of the "best interests" test, a criterion characterized by many as one of the strongest invitations to differential and subjective decision-making.[9]

Two caveats should be placed upon these general assertions. The first is that recent case law has managed to place substantial clothing upon the bare and imprecise statutory language. It is not possible to illustrate this in detail here, but one can point to cases which have, for example, added to consent as a ground for protection,[10] cases which have distinguished between the protection and disposition stages of a proceeding,[11] those that have attempted to establish the level of neglect or improper care which must exist before any state intervention is permissible[12] and those which have attempted to recognize that the way one applies legislative criteria should change when one is dealing with a unique cultural or ethnic community.[13] The increase in written and reported child welfare decisions has been an enormously positive development for those seeking more direction from the law. The second caveat is that there has been a recent tendency to rewrite the legislation in more precise and measurable terms. This will be discussed in the final section of the paper.

Despite this, it is still true that the law which applies to the case before us tends to be replete with the broad phrases characteristically found in family law statutes, phrases which not only provide limited guidance, but encourage one to see each case as different and therefore requiring individualized decision-making. That, in turn, induces one to turn to other disciplines for assistance in the performance of the task.

At this point, we will turn to those other disciplines. The analysis which follows is not comprehensive and reflects the author's view (not necessarily that of the law) of what is relevant to an appropriate decision.

3) The Risks of Further Abuse: from a common sense perspective, a Judge is naturally concerned about risks of future abuse; thus, expert testimony on this issue is welcomed and often provided. However, the reality is that expert opinion varies enormously, both in terms of the level of risk and in the certainty of the predictor.[14] The choice of witness, particularly

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if that person is speaking from his or her own clinical research rather than from a review of the literature as a whole, may have a major bearing upon the content of testimony which is received on this issue. Even if one is able to wrest a percentage prediction from the expert (who is often properly cautious on the issue) the question becomes what one does with it. If we know that there is a 20% chance of further serious injury, does that support decisions which would leave all such children at home knowing that there will be, overall, an 80% success rate? - or does this argue in favour of the removal of all such children, even though 8 out of 10 would not have been abused again? The question is asked not to invite an answer but to suggest that such evidence should be placed into some perspective. We sometimes have the tendency to embrace warmly and rely heavily upon predictions which have a strong statistical flavour to them.[15]

Of course, entry into the task of predicting future human behaviour invites an understanding of the general ability of professionals to do so, and the simple fact is, that in the absence of past similar behaviour, particularly a pattern of such behaviour, there is much to suggest that the state of the art is weak at best. No better example can be found than those studies which demonstrate how difficult it is to predict dangerousness.[16] The suggestion that past behaviour is the best predictor has obvious and unsettling implications for those addressing the child abuse issue from a prevention perspective.

There is, as well, the question of identifying those professionals who are "expert" at predicting future abuse. The child abuse field is peopled with a vast range of professionals. Persons from many disciplines have played an active role and are seen to be contributors to a growing body of knowledge. It is commonplace for a judge, in a single case, to hear from persons with wide ranging backgrounds and levels of training. This raises the question of whether one profession is better able to predict risk than another. For a host of reasons there is, I think, a tendency to want to draw lines based upon the expert's profession and level of training,[17] and yet there is little to suggest that such lines can validly be drawn.[18] Within

this inexact science of prediction, no one profession seems to have claim to any superiority. In fact, there is even some evidence to suggest that added training not only does not improve our powers of prediction, it may do the reverse.[19] There may be much better potential in an approach which focuses upon the individual's demonstrated capability in the past, regardless of professional affiliation, and particularly upon the work undertaken by the witness to merit "expert" status in the particular case before the Court.

The prediction of risk may be very much tied to the identification of the person who has perpetrated the abuse. When, as in our case, the abuser is a temporary member of the family, the task may be more one of deciding whether he will return to the home of mother and child - ie. should you believe her promises to keep him away in the future? Here the judge may be faced with the problem of what may be called the "passive acceptor". There is a natural inclination to judge harshly the parent who turns a blind eye to the abuse committed by another adult residing in the home in the hope that the problem will go away. And yet, who can fully understand the plight of the single parent faced with a decision which will bring to an end a relationship that has provided relief from long-term financial and emotional hardship? And even if we do understand, does that understanding help or hinder our task?

4) Causation: tied closely to the issue of risk is that of causation. One's perspective on the likelihood of recurrence of the abuse, with or without assistance or treatment, may be considerably influenced by an understanding of what caused the abuse which has brought the matter before the Court. One should enter into this area with a healthy awareness of the limits of existing research into causation. Consider the following recent summary of an analysis of the existing literature:

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> "The term child abuse elicits an emotional reaction because of the pervasiveness and destructiveness this phenomenon has on the children of society. However, the serious problem of child abuse has been virtually ignored by the behavioural psychologist and has suffered from a lack of scientific inquiry. Even though hundreds of published papers have addressed the issue of etiology, this should not foster the sense of assurance that we are approaching an understanding of the controlling variables of this phenomenon. The present assessment of the literature pertaining to the causative factors of child abuse was conducted to determine the scientific merits of the existing literature in this field....It was discovered that the quality of this scientific inquiry was variable and often not satisfying the basic requirements of sound experimental design. In fact, the majority of papers reviewed presented no original data to support their positions. Those studies incorporating empirical evidence were frequently plagued with methodological and statistical problems.[20]

The state of research should not be interpreted as an indicator that assertions regarding causation are invalid; however, it does suggest that one should be wary of opinions which tie the risks of initial or future abuse too closely to any one theory of causation. This is vitally important because there can be, I think, a tendency to leap to easy connections which in turn begin to have an inordinate impact upon the decisions one makes in individual cases. For example, we often read about the research which suggests some connection between present abuse and the fact that the perpetrator was himself or herself abused as a child. Not only is there at least <u>some</u> doubt as to the weight one should give to that research,[21] but it is somewhat of a leap to use that connection as a major factor when predicting possible future abuse, and making decisions as a result of this.

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That is not to say that different answers as to why the particular abuse took place should not have an impact upon one's response as a judge and one's openness to measures designed to prevent its recurrence. If, for example, we are talking about an isolated, incident-specific beating, the issue to decide may properly be whether the incident that provoked the abuse will recur, or whether measures can be taken to reduce that likelihood. This may be particularly relevant in the case before us, where the serious abuse stands out as an aberration from the history of parenting which preceded it. In many abuse cases, we may be dealing with simple ignorance about child development or the frailty of young children, and so the focus shifts to whether the biological parents can be taught to parent. A parent may be very eager to provide excellent care for his or her child, but possess a certain mental handicap that reduces the capability of doing so. Here, the issue of risk may be resolved by concentrating upon those supports which are available to compensate for the handicap. If one is dealing with a case in which the abuse is the result of a growing frustration arising out of unemployment, financial difficulty and material instability, then of course the measures which might be undertaken to reduce the risk of abuse are quite different. If we are also talking about a child who has special characteristics which make him or her very difficult to live with, the focus may be slightly altered. On rare occasions, one may be dealing with a pathological abuser or someone with a clear and consistent history of dangerous behaviour toward others; in some respects these become the easiest to respond to.

Another recent analysis of research in child abuse and neglect notes that "current findings indicate that abuse and neglect occur in combination with a great many other psychological, social and economic pathologies which persist in some families over time".[22] Knowing this does not necessarily make decision-making easier. If, in our fact situation, we are dealing with a child living on a reserve which, in itself, has limited

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viability because of various social and economic factors, (such as pollution of the river which formed the economic base of the community) and this in turn has had a devastating effect upon the psychological well-being of all who live on the reserve, one has identified a causal factor which extends well beyond the individuals involved to touch us all. The ultimate cause is known and yet the ability to devise measures which reduce the risk of abuse is limited at best. We have a tendency to look for causal factors which are located within, or at least close to the members of the family involved in the case because these are more manageable[23] - and yet there is much to suggest that manageability is purchased at the cost of denying factors which, although of greater impact, are beyond our capability to respond.

The Judge who recognizes that a parent in a particular community should be judged by standards held by that community, standards that are based upon what is realistically possible, given local conditions, merits considerable admiration; and yet that same Judge may feel a sense of despair and frustration knowing that the child in such circumstances is a hostage to conditions which, as a society, we are unable or simply fail to overcome.

5) Devising the Appropriate Response: If one assumes that the Judge has been able to determine that the child is in need of protection, the next task is to determine the appropriate response. In all of the provinces, there are generally three possible orders: one which leaves the child at home, subject to assistance and/or supervision from the child welfare authority, one which removes the child temporily from the home, and one which removes the child permanently, with the possibility of adoption placement. What is there to assist the Judge in devising the appropriate remedy?:

If one asks those who are experts in the field, the answers range from one extreme to the other. There are those who criticize the alledged tendency to work with the family much too long, thus exposing the child to needless added risk.[24]

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Such arguments often proceed from an assertion that we still place too much emphasis upon parental authority and "ownership" of children. Reference is usually made to tragic cases of children left at home who suffered very badly. At the other end of the spectrum are those who argue that we intervene much too soon and too often.[25] Such arguments are usually based upon the view that, in general, family autonomy is to be supported, absent demonstrable abuse of a physical nature, and the position is taken that the grounds for intervention must be narrowed considerably. Reference is usually made to tragic cases of children who were taken out of the home and fared very badly. The debate is most visible in relation to the issue of emotional abuse. There are those who suggest it is at least as dangerous and prevalent as physical abuse, and argue for much earlier recognition of, and response to it,[26] while others would eliminate emotional abuse completely as a ground for involuntary intervention.[27] Of course, there are many who position themselves somewhere in between these two polarities and struggle very hard to find an appropriate middle ground. As has already been mentioned, for many the appropriate response is very much dependent upon which causal factor seems to be prevalent in the particular case. However, it can be said with some confidence, that only by artificially narrowing one's perspective to the views of one or two specially picked experts, is it possible to come up with easy answers; in other words, as one's perspective broadens, conflicting expert opinion becomes the norm. Here, as well, one is faced with the question of identifying who is an "expert" when it comes to recommending an appropriate disposition. As already noted, the range of professionals prepared to offer opinions on the issue can be very broad, and the Judge may have enormous difficulty assessing whose opinion should be given greatest weight. Once again, there is little to suggest that there is any logical basis for ranking experts by professional category.[28]

At a minimum, it seems obvious that the weight to be attached to a psychiatric opinion in cases of individual pathology may be very different than a similar opinion expressed in cases

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of parental instability arising out of social and financial difficulties. Even within a single profession one must question the "expertness" of the expert. For example, in child protection cases the expert most often heard is the social worker employed by the applicant child welfare agency. The known facts about staff turnover in such agencies and the different qualification levels held by those who appear before the Courts,[29] make it obvious that determinating who is an expert and who is not is not an easy task. How long must one have worked at an agency to qualify? Is the answer different if one begins with a BA in psychology as opposed to an MSW? This issue may be particularly relevant in our case because, if we are talking about a northern, reserve community we are also dealing with a geographic area where staff turnover is high, cultural differences between staff and client are likely, and the ability to attract highly qualified staff is limited. And how does one also incorporate the research which suggests that one's capabilities do not necessarily improve as one acquires more knowledge or experience?[30]

Beyond this, there is the all-important question of whether the individual qualifies as an expert <u>in this case</u>. It is one thing to be highly capable in the field; it is another to have done the work to be considered highly capable in a particular matter involving a particular family.

There is a third factor, highly positive, but one which can create major difficulties for the Judge seeking a resolution to a case such as the one being discussed here. This is, as has been already mentioned, that we know so much more than we did twenty years ago and as a consequence many of the assumptions we used to make as part of our decision-making can no longer be trusted. This added knowledge is very valuable, but it can make answers to the issues we must decide very difficult. Here are some examples:

a) At one time there tended to be a general assumption that the progress of children in care was quite favourable. Some have argued that the Judge's decision was a somewhat blind one because the family was being compared to an unknown alternative.[31] The Judge could make a permanent order with the vision of an ideal adoptive home in his or her mind. However, over the past two decades a great deal of research has been done which demonstrates that for some children the

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prognosis in care is very guarded. For some the probability is a bewildering procession of foster home, group home and treatment centre placements. In our case, this is an important factor because the research suggests that the likelihood of serial placement is much greater if the child is older and belongs to a cultural minority. [32] The research also demonstrates the emotional impact which the fact of separation can have upon a child who has formed a close psychological bond with his or her natural family, [33] often regardless of the quality of life within that family. [34] It can be argued that, given an identical family situation, one's decision to return or to remove a child might be very different, depending solely upon the age of that child.

b) It was once assumed that an order of Crown wardship should rarely, if ever, be accompanied by an award permitting access on the part of the child's parents. In this way, the child is quickly and easily freed up for permanent adoption placement. We now know that for some children adoption is not a high probability or even a preferred course of action. We are learning much more about the incidence of adoption breakdown, [35] particularly for older and more difficult children. As well, there is much to suggest that success in care may be directly related to the amount of ongoing contact the child has with his or her family. [36] This information is very relevant to the Judge who is attempting to determine the appropriate response.

c) As decision makers, we have learned to obtain as much relevant information as possible before making a decision that has such significant impact on the child's future. The judge who fails to provide parties with every opportunity to present their case to the Court is the Judge who invites reversal on appeal. And yet we also know much more than we did about the possible effect of long delays, particularly on younger children. [37] The tension this knowledge can create as a hearing drags on interminably from adjournment to adjournment may be well known to us.

Knowing how children can suffer while sitting in limbo may, I think, be of real significance when one is considering a temporary case order.

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Unless such orders are made with a clear understanding of what will be tried during the period of care, and of what can thereby be accomplished, the worst of all possible worlds may be created for the child, who has no real parent or committed parent substitute available to him or her.

d) One of the three possible orders involves return of the child home, subject to supervision by the child welfare agency. For many this combines the appropriate approach to rehabilitation of the family with a monitoring device which can assure that the abuse does not recur. In the fact situation presented here, this may be the preferred resolution. And yet we also now know much more about the realities of such supervision. With large caseloads and the pressure of many high risk families to work with, a protection worker knows that a supervision order usually means sporadic contact; the family is on its own for most of the time. If the case involves a family on a distant, isolated reserve, this reality is virtually guaranteed.

e) The previous point ties into a much broader issue: what effect should the fact of limited resources in the child welfare system have upon our decision-making? Once again, we know a great deal more about the impact of finite budgets and financial restraint.[38] A common response by those faced with individual cases of inadequate care or negligence is to point to the quality of care which might have been provided if funding had been adequate.[39] "Accountability" is one of the major bywords of the 80's and we are continually reading of the mixed results of assessments made of government programs and agencies funded by government to provide care to children and others. In theory, this information should not affect our decisions. If a child is in need of alternative care, one ought not to reassess the family in light of the fact that the care we visualize is not available for financial reasons. And yet, acceptance of such a position can mean that many children needlessly receive less than the best care available <u>in the circumstances</u>. For the decision-maker the choice becomes either one of balancing realistic alternatives, knowing that the state may thereby be permitted to continue to offer less than the best, or making an order which hopefully, has the effect of producing the necessary resources, with no guarantee or perhaps even likelihood that this will happen. The problem is most apparent when the family before the court is disintegrating, simply because it lacks adequate income support, or housing, or some other basic necessity of life.

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f) We know a great deal more about the effectiveness of those things we do to treat child abuse and to ameliorate the factors which brought it about and unfortunately, what we have learned does not give cause for great rejoicing. Not only is much of the research methodologically unsound, but even that which is of high quality suggests that the jury is still out on the effectiveness of much of what we do. Perhaps the most succinct summary of the state of the art is a recent assertion that "treatments have limited effectiveness, are long term and expensive".[40]

Such findings should not leave one with the pessimism some people suggest. In general the most honest answer is not that we know that our interventions are not effective, but that we often don't know what works. Nonetheless, the research does, at a minimum, suggest that one should be careful not to receive uncritically any broad assertions of past accomplishments or unqualified predictions of future success, regardless of the technique being employed with the family or with the child. It may also suggest that there is some logic in an approach to treatment which is hesitant to try major interventions until the less extensive measures have first been tried.

The foregoing are only some examples of the new realities which become relevant to our decision-making. There are many others: the method by which agencies are funded may create inducements to recommend particular options; the way agencies organize themselves by separating protection work from work with the child in care may operate as a lever to seek a decision which passes on responsibility for a difficult child; federal government cost-sharing approaches may force provinces to alter the nature and type of programs offered to children. Examples become more esoteric and ultimately well beyond that which any decision-maker can assimilate, even if there were a way to introduce all of this information into the proceedings.

6) The Subjectivity of Decision-making: Perhaps the most difficult information which comes to us from other disciplines relates to how all of us, whether expert witnesses or decision-makers, are affected by factors unique to us as persons, our values, our personal

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backgrounds and experiences, and our individual beliefs. I have mentioned earlier in this paper that the tendency to be affected by these factors is perhaps greatest when family law issues, and child abuse issues in particular, are at stake. Studies which have been done, for example, within the social work field confirm the fact that the middle class background of many who work in the area has a clear impact upon the judgments which are made and the opinions which are expressed about individual children and families.[41] The tendency to see poverty as inadequacy, or the obvious difficulties which can arise from the fact that one comes from an entirely different cultural background, are illustrations of this.[42] There is a risk (of obvious relevance to the fact situation we are considering) that a non-native worker may be faced with the task of assessing the strengths of a single mother or of a community of persons who possess attitudes, strengths, and traditions totally foreign to him or her. The point which is being made here has nothing to do with the question of competence and everything to do with the fact that we are human beings.

At the simplest level, the judge may be faced with the task of distinguishing between a failure to co-operate with family counselling because of inability or unwillingness, and the situation in which such failure is due to the interpersonal strains which can develop in any counselling relationship, particularly when power is vested in only one of the participants.

As Judges, we must recognize that the same factors can and do produce subjectivity in our decision-making.[43] Of particular interest, because we make our decisions on the basis of received oral and written information, is the fact that we may tend to select out from the presented material that information which reinforces the views we bring to the issue at hand.[43a] Further, there is the problem that, for reasons related to the need for independence and open-mindedness, we can become insulated from both feedback and new information. The risk that existing values and beliefs may rarely be challenged and thereby tested and even altered, is obvious.

7) <u>The Environment</u>: A further factor relates to the environment within which these decisions are made. On a broader, societal level note the following:

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(a) In most jurisdictions the issue of child abuse is not only receiving major attention generally, but is the subject of extensive media coverage. Further, the results of a decision not to intervene in a family tend to be much more visible than the results of one which brings the child into the care system (or at least the causal connection between the decision and the results is more tenuous in the latter situation, given the fact that responsibility for decisions on behalf of the child are usually spread amongst a number of people). When these two factors are combined, it is easily recognized that the environment within which decisions are made is having a clear impact upon what is recommended. Appropriate risk-taking in this world of fallible decision-making becomes very difficult when one's whole career may be destroyed by a single decision to return a child home, if that child is then subjected to further abuse. This is particularly so when, conversely, the decision to take the child out of the home normally passes responsibility on to someone else. As a Judge, it can be very difficult to assess whether, at least subconsciously, possible proposals to the Court are being rejected because of the environment in which they would be carried out. And it is only logical to ask whether this also affects the Judge, who must feel a sense of personal responsibility for the results when a child is returned to his or her home. This is perhaps less likely to be present when the child is removed and placed in the care of the state.

(b) an area of abuse which tends to be responded to within a highly emotionally charged environment is that of sexual abuse. Now that the alarming incidence of such abuse is being recognized,[44] it becomes incumbent upon us all to ensure that the response to the abuse does not do as much, if not more, harm than did the abuse itself. To accomplish this it may be necessary to adopt approaches which in many cases involve what will be perceived as extensive risk-taking, and an inappropriately lenient response to the abusive behaviour.[45] It remains to be seen whether this will be done either easily or often, given the emotions which such behaviour brings out in all of us.

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