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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It is also possible to illustrate how the narrower environment of the Court complicates decision-making. The easiest illustration is the artificial environment within which the hearing itself takes place, subject to rules and procedures which are often unintelligible to family and child, and in which we observe persons who, in the midst of the worst crisis of their lives, are functioning in ways which may only vaguely resemble their normal behaviour. Two less obvious examples are these:

(a) Matters often come to the Court after those involved in the case have endured months of uncertainty about how to respond. Differing views and extensive debate may have characterized much of the time spent in case conferences and planning sessions. Once the decision to go to Court is made, there is a natural tendency for expert opinion to coalesce around the decision which has been taken, the option which is about to be recommended. Tension and misunderstanding may result when one then encounters a Judge whose uncertainty demonstrates that he or she is back at the stage others were at several months ago. Unhappiness with the process may become attenuated when the sudden coalescing of opinion at the last case conference is questioned.[46]

(b) Also of interest are those sociological studies which talk about how organizations and those who are members of them develop separate needs of their own that must be met if the organization is to function smoothly.[47] The Court has been seen as an entity which may be subject to the same pressures; decisions must be made occasionally which reaffirm the legitimate role of regular participants - lawyers, representatives of child welfare agencies, crown attornies, or administrators.[48] The Court environment as a whole thus may have a subtle and indirect impact upon some of the decisions made about parents and children who appear before it.

8. A final point should be made, even though it is, strictly speaking, not part of the discussion. This is that, of course, what is presented to the Judge may bear little relationship to that which anyone might characterize as a full presentation of the information

relevant to the issues at hand. The reasons for this may be both obvious and many in number: not all parties are represented; representation is inadequate on one or more sides; lawyers are demonstrating the role confusion which is the norm in these matters;[49] much of the information discussed earlier in this paper is not known by those presenting the case to the Court; much of it either is not seen as relevant, or is clearly inadmissable; only one expert is available and he or she has firm views on the issue of causation or risk of further abuse; insufficient time is available for the matter because of the pressure of court dockets; the factual data presented to the Court is both imprecise and incomplete; and so on. The only thing which might make the decision-maker's task more difficult than the knowledge which can be gleaned from other disciplines, might be the fact that usually only bits and pieces of that knowledge and other important facts are presented to the Court.

Paradoxically, the most difficult child protection cases may be those in which almost no information at all is presented because the application is going ahead with the consent of all parties before the Court. Here the Judge, aware of the enormous implications of the order being requested, is faced with the task of determining how extensive his or her intervention into the proceedings should be. In most jurisdictions the statute authorizes transfers of parental authority on consent alone,[50] and in many cases (eg. the young single mother surrendering her new-born child for adoption) the role is easily identified as generally one of making sure everyone is aware of the implications of the order about to be made. However, the issues become much more complicated when one is dealing with an older child whose parents are unable to control him, a handicapped child being offered up because the parents are unable to accept the handicap, a case of adoption breakdown after several years of placement, or a request for a temporary order to provide the parents with time to resolve other difficulties within the family or to pass through a temporary crisis. The Judge will be aware of case law which at least suggests one should look behind the consent to the factors which support or have perhaps induced it.[51] Child welfare statutes by their nature encourage some form of inquiry into the matter; at least some rationale for the requested order must be presented to the Court.[52] The Judge recognizes that he or she is often the only person in the Court who is eager to hear more than that which is being presented; even the facts which are revealed

are often done as euphemistically as possible to avoid future problems for those working with the family, to save the parents public embarassment or to avoid a contested application where only the facts, not the proposed disposition, are in dispute. This, coupled with the usual pressure to move through a crowded court docket, must have its effect upon the Judge. Yet he or she must deal with the realization that a temporary order is often the first step in a fairly inexorable march to permanent wardship,[53] and that there is a fairly unequal relationship between the welfare agency and those parents with whom they work. There is of course the fear that a consent matter may appear otherwise from the parents' perspective. However, apart from this, we know how difficult it is for a protection worker to distinguish between situations in which he or she is acting as a supportive resource to the family, and those in which the role becomes one of carrying out the protective but coercive powers of the state;[54] consider then, how difficult it must be for the parent to make the same distinction in a consent matter in which both offers to help and veiled threats are inevitably mixed together. Finally, there is the suggestion that weak and passive parents are more apt to offer up their child on consent, where work with the family might have been the better course of action, while those who offer strong and determined resistance are able to prevent ongoing intervention in cases where removal would seem to be indicated.[55] An awareness of the pressure upon the agency and the individual front line worker makes this easy to understand when it occurs. All of this may help to explain why a Judge hearing a succession of consent matters, may leave the Court with a pervasive sense of unease and uncertainty about his or her role within the Courtroom.

D. Coping Within a Complex Process

Assuming that the discussion in the preceding section has achieved its purpose, it remains to suggest means by which one might cope with the uncertainty which the knowledge from other disciplines can create while, at the same time, using that knowledge to improve decision-making in child protection cases. A number of suggestions are offered, ranging from the very broad to the quite specific, the only unifying factor being that the writer has found them to be valuable in the past.

1. The first recommendation is also the easiest and most general: it is that one should be very careful not to adopt extreme or categorical positions in child welfare matters. An openness to information from other fields, coupled with a healthy sense of doubt and a respect for those who do not offer up easy and predictable solutions, would seem essential. If one admits how tempting it can be to see most abusive families as beyond repair, or state intervention as usually destructive, or future abuse as highly predictable, or social workers as relatively incompetent, then the chances of resisting such temptations should be quite high. For me, the most sobering studies are those which show us how differently we, as Judges, respond to similar fact situations;[56] not to be affected by such findings would, I think, require a self assurance we would rarely, if ever, accept in an expert witness.

2. It should be recognized, as noted above, that recent case law and newly-enacted legislation are providing much clearer direction than before and may greatly assist the Judge in particular cases. Three examples are as follows:
   (a) The case law which distinguishes between what must be proved at the adjudication and disposition stages of a hearing[57] as the evidence on both issues is often heard at the same time, it can be easy to forget this vital distinction, with the child's needs becoming determinative before the court has obtained jurisdiction to even consider what order might best meet those needs.

   (b) Statutes which attempt to define "best interests" more clearly - for me this is the most important part of the new Ontario Child Welfare Act,[58] with the requirement to compare what is available in care with that which the family has to offer constituting the most essential part of the new definition.

   (c) The tendency of recent legislation to establish certain requirements designed to aid in decision-making; e.g. the obligation placed on the child welfare agency to present a plan of care for the child;[59] or the requirement that a Judge's decision include reasons which must state why it was decided that certain

alternatives would be rejected.[60]

It may seem paradoxical that the discussion in this paper would lead to a recommendation that child welfare law function as the essential framework for decision-making that it obviously is. The recommendation is not made as a means of avoiding the issues raised earlier; the fact is that the law now provides guidance in ways it simply did not before.

3. One should encourage and promote all measures designed to produce full disclosure between the parties, conciliation and possible settlement of cases. The potentially traumatic, even personally destructive, Court process is thereby avoided or at least reserved for issues on which there is clear disagreement. More importantly, I think there is much to suggest that a voluntarily worked out settlement between all parties (including the child, where possible) is more apt to be successful. This is not to imply that the Judge's role is to accept passively whatever settlement is presented to the Court. Rather, there is a clear need to ask those questions which help to determine whether there is a true consent and whether the facts and plan of action seem generally consistent. In some cases this will lead to a conclusion that a fuller hearing must be held. However, the need to review the proposed solution, and occasionally to reject it, should not obscure the essential point being made: the Court process should be avoided wherever possible through the use of appropriate conciliation and other techniques. If these are available early in the proceedings, the chances of resolution out of Court are, I think, markedly improved. The odds improve even more if the parties begin discussions knowing that, at the end of the process sits a Judge who is adamant about full disclosure and meaningful efforts to settle.

4. There are a number of measures which I would suggest can be adopted as a means of improving individual decision-making:
   (i) Periodically review the last fifteen or twenty child protection matters that have to come before you. Do they disclose patterns of decision-making which should at least be questioned (eg. a tendency always to make temporary wardship orders of a certain length, or to order permanent

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wardship in all sexual abuse matters)? Patterns which emerge might be quite justifiable, but should nonetheless be examined for their justification.

Identifying patterns which seem to withstand obvious differences in cases is not the same as discovering that one's decisions have become fairly predictable. It is not necessarily a criticism to say that those involved in child protection matters know how you, as the Judge, usually respond to certain fact situations. I think I would worry more, if after substantial experience with the decision-making of a particular Judge, it was impossible to make such predictions.

(ii) Attempt to identify those persons or situations which tend to cloud your individual judgment. In this way they can be recognized, and steps can be taken to neutralize their impact.

(iii) If you are able to obtain feedback about yourself as a Judge in child protection matters, feedback which is honest and has been obtained in a way which is not compromising, this may be valuable information to have when you engage in your periodic efforts to review your own decision-making. The perceptions may be inaccurate but they are worth being aware of.

As a related issue, we need to realize how selective is the feedback we usually receive as to outcome in cases which have come before us. Those in which family or the agency make great gains are usually much less well-known than those in which the opposite occur; a plan which turns out badly with the child at home is more visible than one which turns out badly with the child in care. It is difficult to obtain good, representative feedback about the results of one's decisions. At a minimum, this suggests that we should recognize that few conclusions can be drawn from the random information we normally receive.

(iv) Read materials in the field from a number of the related disciplines, particularly those which challenge opinions you may already hold. It is sometimes said that a Judge should not do this for fear of being unduly affected by the particular opinions contained in the books or articles which are chosen. There is some risk of this, particularly if one is open only to materials which reaffirm existing perceptions. However, I think it is worth remembering that a Judge who does not seek to do such reading is not necessarily keeping an open mind, but rather may simply be keeping to the views which he or she has already filled that mind with.

(v) When formulating a decision it is important to ask oneself what , if any, assumptions are being made in doing so. Such assumptions should at least be recognized and tested. In some cases, the assumptions we may fail to test are basic to most of our decisions (eg. "the interests of the state and the child are identical in child protection matters") In others, they are more specific to the decision at hand. The possible examples are almost endless and include the following:

- This expert's opinion is worthy of great weight simply because he is an acknowledged expert in the field, without necessarily going into the amount of work which he has done in this particular case.
- I am placing greater weight on one expert's testimony because she sounded much more certain in her opinions.
- This is an inexact field and so my opinion on matters of causation is of equal value to that of experts.
- The plan put forward by the agency need not be as exact as that presented by the parents because the child's needs are so open to change.
- I am well able to interview young children and to determine what they are saying, both verbally and nonverbally.
- The proposal put forth would not be presented if it were not well thought out and implementable.
- The fact that this expert has been working with the family does not affect his ability to be objective.

5. Of one thing there is little doubt, that delay can be very damaging to the child whose interests are at stake in the proceedings. Thus, anything which can be done to minimize such delay may be extremely valuable. In this adult world of decision-making, there

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there may be a natural tendency to seek as much time as possible to prepare for Court, to complete assessments or to explore possible dispositions. If there were more evidence that decision-making improved in direct relation to the increased accumulation of information and opinion, the risks of long delays might be justifiable. Encouragement from the Judge to respect the child's unique sense of time, coupled with a clear unwillingness to tolerate lengthy and unnecessary adjournments, can have a substantial impact.

Of course there is an equal obligation upon the Court as an institution not to function as a major source of delay in itself.[61] Child protection matters should be of the highest priority in all Courts which hear them; one's most important task as a Judge in such a Court may be to dedicate oneself to the resolution of child protection matters as quickly as possible. This may require major steps related to the functioning of the Court as a whole and the scheduling of protection matters, or more personal but equally important measures, such as always setting for oneself a date within which a reserved case will be decided

The need to avoid unnecessary delays also supports the use of such measures as conciliation and pre-trial. Further, it should make one wary of lengthy temporary wardship orders, unless one is perceiving obvious advantages in making them.

6. As noted above, present child welfare legislation tends to encourage a more active role for the Judge than is the case in most civil litigation (eg. the power to call witnesses).[62] For many Judges, deciding how active a role to adopt may be extremely difficult. While there are clearly approaches which amount to excessive intervention in the process, it is my view that the Judge should, where necessary, respond positively to this legislative encouragement. For example, one might ask to hear from long-term foster parents who have not been called, when one is reviewing a child's progress in care; it only makes sense to ask an expert what work he or she has done with the family or whether the entire family has even been seen, if this has not been asked during examination or cross-examination; if the child is older and unrepresented, the Judge may have to take special steps to safeguard the child's right to be heard on the issues before the Court; one should not hesitate to ask those questions

which ensure that the agency's plan of care is fully presented. These are only examples and clearly "involvement" can become "unwarranted interference". However there is little reason why the Judge should be left in a position in which it is impossible to determine such matters as the weight to be placed upon evidence before the Court.

7. There are a number of indicators which should signal possible difficulties which may be occurring, both inside and outside of the Courtroom. Some examples include the following:

- The fact that the agency is bringing matters before the Court which seem extremely weak or which should have been easily resolved on consent - this may suggest an unwillingness as an agency to make necessary but risky decisions in the present environment.
- The fact that the same expert is used in almost all cases and that person's testimony demonstrates remarkable predictability and self-assurance - it may be that the complexity of at least some of these cases is being avoided.
- Evidence as to the child's need for protection may be almost impossible to separate from evidence relating to best interests - this may suggest that for those presenting their cases the distinction between the two is not understood; if so, it is reasonable to predict that the reasons given for the decisions ultimately reached by the Judge may be equally difficult for them to understand.
- A normal course of action on the part of the applicant may be to seek a temporary period of time in care in almost all cases rather than facing, either the need to fashion an appropriate plan to support the child at home, or the need to seek a permanent order at this early stage - this may betray a willingness to create uncertainty for the child in order to avoid difficult decisions (until such decisions are almost inevitable); alternatively it may reflect the agency's perception of the Judge's unwillingness to make hard decisions at either end of the spectrum.

Once again, the intention is only to provide a few examples of those things which should at least create a willingness to explore further for reasons which may be insupportable.

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8. Most of the above recommendations focus upon the process at the Court of first instance. With respect to appeals of child protection cases, only one area of concern will be raised. First of all, it is suggested that there is no justification for legislation which calls for a trial de novo on appeal.[63] The implications in terms of delay for the child are obvious and demonstrable. Where the appeal is not de novo, and even where the statute suggests some caution in terms of hearing fresh evidence,[64] the parties tend, I think, to see themselves as able to offer extensive, additional evidence at the appeal hearing. The desire to do so, and the temptation to respond positively, are quite understandable. However I would suggest that both the law and the interests of the children in these cases argue in favour of caution on the matter of fresh evidence. The risk of returning to a virtual trial de novo situation becomes substantial and this I think would be very unfortunate. This is not to suggest that evidence relating to events which have occurred since the original order was made should not be welcomed. However, concern should arise when the party wants to introduce expert evidence which he or she neglected to call at the initial hearing or wishes to call someone who was readily available at the time of the earlier proceedings. An appeal judge may feel a great reluctance to rule such evidence inadmissable given the issues at stake. On the other hand, broad opportunities to relitigate the cases may ultimately have a major effect upon the process as a whole.

As has already been stressed, there are no measures which will make child protection cases other than difficult to resolve. Simply knowing why this is so is an important beginning in the effort to improve one's decision-making. It is hoped that, as well, some of the above suggestions will prove to be useful for those learning to cope within this extremely complex field.

Judge G. M. Thomson

FOOTNOTES

1. It should be noted that one of the points to be made in the paper will be that there are major difficulties with much of the research in the field; at the same time reference will be made to findings which run counter to accepted theory in order to show there are few easy answers for the Judge. The research is not cited with the assertion that it is reliable while other work in the field is not, but only to illustrate the point being made about complexity. However, one should be aware of the inevitable bias in the choices which are made.

2. Found in Eli Newberger: "Interdisciplinary Management of Child Abuse: Problems and Progress", in Fourth National Symposium on Child Abuse: A Collection of Papers (1973), 16 at 17.

3. For the purposes of the discussion, we will assume that criminal proceedings have not been taken against the abuser. The reasons for this could be many in number, e.g.: different standard of proof, problems associated with a child witness, lack of police involvement, unwillingness of the mother to be cooperative, etc.

4. > "Radiology plays an essential part in the investigation and diagnosis of the Battered Baby Syndrome. By this examination the radiologist should be able to state that not only are certain skeletal injuries caused by child abuse, but that these injuries are caused in a certain way and are of a certain age."

   Found in J.M. Cameron and L.J. Rae: Atlas of the Battered Child Syndrome (London: Churchill Livingston, 1975), at 2.

5. See, for example: re Tanya G (1981), 6 A.C.W.S. 114 (Ont. Prov. Ct. Fam. Div.).

6. Child Welfare Act, S.O. 1978, c.85

7. Section 19(1)(b): "child in need of protection" means
   (v) a child found associating with an unfit or improper person,
   (vii) a child where the person in whose charge the child is is unable to control the child,...

   See also Children's Services Act, S.N.S. 1976, c.8

   Section 2(m) "child in need of protection" means
   (i) a child who is without proper supervision or control,
   (ii) a child who is living in circumstances that are unfit or improper for the child, ,,,

Child Welfare Act, R.S.A. 1970, c.45
Section 14(e) "neglected child" means
(i) a child who is not being properly cared for;
(iv) a child who is living in an unfit or improper place; ...

8. See for example: Protection and Care of Children, and Proceedings Against Them, Massachusetts Statutes 1972, c.785 Section 21 "child in need of services": a child below the age of seventeen who persistently runs away from the home of this parents or legal guardian, or persistently refuses to obey the lawful and reasonable commands of his parents or legal guardina, thereby resulting in said parent's or guardian's inability to adequately care for and protect said child, or a child between the ages of six and sixteen who persistently and wilfully fails to attend school or persistently violates the lawful and reasonable regulations of his school.

9. Robert Mnookin: "Foster Care - In Whose Best Interest?" (1973), 43 Harvard Educational Review 599-637.

Robert Mnookin: "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975), 39 Law and Contemporary Problems 226-293.

Michael Wald: "State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards" (1975), 27 Stanford Law Review 985-1040.

10. Re Mugford, 1970 1 O.R. 601, 9 D.L.R. (3d) 113. Affirmed 1970 S.C.R. 261 (sub nom. Children's Aid Society of Ottawa v. Mugford 1970 1 O.R. at 610n, 9 D.L.R. (3d) at 123n.

Re Golka (1973), 13 R.F.L. 167 (Ont. Prov. Ct Fam. Div.)

11. St. Pierre v. Roman Catholic Children's Aid Society for Essex County (1976), 27 R.F.L. 266 (Ont. Div. Ct).

12. Children's Aid Society v. Reeves (1975), 23 R.F.L. 391 (Ont. Prov. Ct Fam. Div.).

Re Brown (1975), 9 O.R. (2d) 185, 21 R.F.L. 315 (Co. Ct).

13. Mooswa v. Minister of Social Services (Sask.) (1976), 30 R.F.L. 101 (Sask Q.B.).

14. "Results from previously reported studies indicate varying percentages of recurrence of child abuse. The range is large. Some studies report 20% or lower recurrence; others report as high as 60% of families in which abuse or neglect recurs."

Roy Herrenkohl, Ellen C. Herrenkohl, Brenda Egolf, and Monica Seech: "The Repetition of Child Abuse: How Frequently Does It Occur" (1979), 3 Child Abuse

and Neglect 67-72, at 67.

15. "Dr. S and Dr. B were unequivocal in their views, which were in effect that to return Moheni to her family home would result in excess risk of re-abuse to the child. The statistical evidence in this regard given by Dr. S was particularly impressive."

Re Mahase, unreported decision of Webb, Co. Ct J., 10 July, 1981, at 17.

See also David M. O'Brien: "The Seduction of the Judiciary: Social Science and the Courts" (1980), 64 Judicature 9-21, and David M. O'Brien: "Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law" (1981), 64 Judicature 285-289.

16. "Now this, you may be thinking, is surely an appropriate role for the expert psychiatrist. But just how expert are psychiatrists in making the sorts of predictions upon which incarceration is presently based? Considering the heavy-indeed exclusive-reliance the law places on psychiatric predictions, one would expect there to be numerous follow-up studies establishing their accuracy. Over this past few years I have conducted a thorough survey of all the published literature on the prediction of anti-social conduct. I have read and summarized many hundreds of articles, monographs, and books. Surprisingly enough, I was able to discover fewer than a dozen studies which followed up psychiatric predictions of anti-social conduct. And even more surprisingly, these few studies strongly suggest that psychiatrists are rather inaccurate predictors; inaccurate in an absolute sense, and even less accurate when compared with other professionals, such as psychologists, social workers and correctional officials, and when compared to actuarial devices, such as prediction or experience tables. Even more significant for legal purposes: it seems that psychiatrists are particularly prone to one type of error-overprediction. In other words, they tend to predict anti-social conduct in many instances where it would not, in fact, occur. Indeed, our research suggests that for every correct psychiatric prediction of violence, there are numerous

> erroneous predictions. That is, among every groups of inmates presently confined on the basis of psychiatric predictions of violence, there are only a few who would, and many more who would not, actually engage in such conduct if released."

Alan M. Dershovitz: "The Law of Dangerousness: Some Fictions about Predictions" (1970-71), 23 J. of Legal Education 24-47, at 46.

See also Bruce J. Ennis and Thomas R. Litwack: "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom" (1974), 62 California Law Review 693-752, and Ernst J. Wenk, James O. Robison and Gerald W. Smith "Can Violence Be Predicted?" (1972), 18 Crime and Delinquency 393-402.

17. > "While social workers are trained to observe and evaluate social factors, a line must be drawn between their expertise and that of qualified psychiatrists."

Re Mahase, supra fn. 15, at 16.

18. > "In sum, studies of clinical inference generally have led to negative conclusions about its predictive validity ... Experienced clinicians tend to be no more accurate than inexperienced nonprofessionals like secretaries ... The accuracy of trait inferences is not improved by clinical training; when the [clinician] departs from common stereotypes he may become less accurate ... Moreover, these conclusions generally obtain regardless of the test data on which [clinicians] base their interpretations ... Thus while clinical judgements are often better than random guesses, they usually provide poorer predictions than those available from cheaper and simpler sources like biographical and social case history information, or from the combination of facts by statistical rules (called "actuarial prediction"..."

Walter Mischel: Introduction to Personality, 2nd edition (New York: Holt, Rinehart and Winston, 1976), at 187.

See also Dershovitz, supra fn. 16.

19. > "... if anything, clinical training and experience may be somewhat detrimental and reduce judgmental accuracy, or at least introduce systematic biases such as

greater emphasis on pathology and less favourable prognosis."

Phoebe C. Ellsworth and Robert Levy: "Legislative Reform of Child Custody Adjudication An Effort to Rely on Social Science Data in Formulating Legal Policies" (1969), 4 Law and Society Review 167-233, at 199.

20. Ron C. Plotkin, Sandra R. Azar and Craig T. Twentyman: "A Critical Evaluation of the Research Methodology Employed in the Investigation of Causative Factors of Child Abuse and Neglect" in Abstracts, papers presented at the Third International Congress of Child Abuse and Neglect (Amsterdam, 1981), at 9.

21. Srinika Jayaratne: "Child Abusers as Parents and Children: A Review (1977), 22 Social Work 5-9.

Farrell Crook: "Findings on Abused Children Contradict U.S., U.K. Studies" Toronto Star (20 July 1981).

Dorothy Miller and George Challas: "Abused Children as Adults: A Twenty-Five Year Longitudinal Study" unpublished paper prepared by the Institute for Scientific Analysis, San Francisco, 1981.

See also Alfred Kadushin and Judith Martin: Child Abuse, An Interactional Event (New York: Columbia U. P., 1981), at 19-21.

22. Cecilia Sudia: "Current Status of Research on Child Abuse and Neglect" in Abstracts Supplement, papers presented at the Third International Congress of Child Abuse and Neglect (Amsterdam, 1981), at 2.

23. Reinhart Wolff: "Origins of Child Abuse and Neglect Within the Family" in Abstracts Supplement, a speech presented at the Third International Congress of Child Abuse and Neglect (Amsterdam, 1981), at 2.

24. See Barbara Chisholm: "Principles, Rights and Responsibilities: The Context of Children's Legislation", unpublished paper prepared for the Children's Services Division, Ontario Ministry of Community and Social Services, 1979, and H. Philip Hepworth: Foster Care and Adoption in Canada (Ottawa: Canadian Council on Social Development, 1980).

25. Mnookin, supra fn. 9.

Alan Sussman and Stephan Cohen: Reporting Child Abuse and Neglect: Guidelines for Legislation (Cambridge, Mass.: Ballinger, 1975)

Marcia R. Lowry: "The Judge v. the Social Worker: Can Arbitrary Decisionmaking Be Tempered by the Courts?" (1977), 52 New York U. Law Review 1033-50.

26. J. Dennis Semler: "A Child's Emotional Health -- The Need for Legal Protection" (1980), 15 Tulsa Law Review 299-326.

27. "Even if "emotional neglect" could be defined, recognition of how little we know about the "right" treatment, and how little consensus there is about treatments, should caution against using the power of the state to intrude."

Joseph Goldstein, Anna Freud, and Albert J. Solnit: Before the Best Interests of the Child (New York: Free Press, 1979), at 77.

28. See Mischel, supra fn. 18.

29. "Services to children in Ontario are jeopardized by the present practice of placing workers who are inexperienced and untrained in child welfare into front line responsibility for abuse and neglect cases. The selection of workers for these positions is limited by the high proportion of applicants who have no experience. The problem is compounded by the lack of basic training programs for beginning workers in either schools for social work or agencies in the specialization of child welfare work ...
The prevalence of high turnover rates and burnout symptoms in child welfare agencies has been well documented ... Freudenburger, Pines, and Maslach suggest burnout leads to a deterioration in the quality of service, in low morale, turnover and absenteeism... High turnover rates have an especially serious effect on client service in a field where the parents are difficult to engage, and tend to be hostile and suspicious of new workers. There may be an even more serious effect on the child who has been separated from his family. If the worker has been the one constant factor in the child's move from his own to foster family or interim places of care, he will be especially important to that child. The loss of such a worker will be one more damaging experience to the developing child's ego that can lead to his withdrawal from trust in relationships and eventually result in psychopathic behaviour... The overall turnover rate at this agency is approximately 20% but in 1979, 47 or 32.4%

> of the family service workers left that department for other employment. The median length of stay in Family Service Departments is now 1-1/2 years compared to six years or more in other departments that employ social workers... In this agency during 1979, 72% of the newly employed family service workers went directly into their job responsibilities with no experience or training in child welfare work. For most of these it was a first job."

Nancy Falconer: "Pre Work Training Program in Child Welfare" a proposal prepared for the Children's Aid Society of Metropolitan Toronto, 1980, at 1-2.

30. Ellsworth and Levy, supra fn. 19.

31. See Mnookin, supra fn. 9, at 229.

32. > "There is clearly a hierarchy of preferences in the minds of prospective adoptive applicants -- the white unhandicapped infant being at the top of the ladder; the older,mentally retarded, physically disabled, minority group child being toward the bottom. As children become increasingly scarce at the top of the ladder, adoptive applicants move down the ladder to choose a child whom they prefer less. As a consequence of the siphoning off of children who were only yesterday regarded as being unplaceable because no one wanted them, the children who remain behind and are currently available for adoption have more serious problems. They generally present more than one kind of special need."

Alfred Kadushin: "Children in Adoptive Homes" in Social Service Research: Reviews of Studies, edited by Henry Maas (Washington, D.C.: National Association of Social Workers, 1978), at 49.

See also Hepworth, supra fn. 24.

33. > "Memories of natural parents are jealously preserved and frequently recalled. Experienced workers in child welfare have made the following statements: even when a parent is unloving, the foster child clings to him stubbornly, with frustrating and destructive results; unless there is some continuing connection with his own family, the child feels desolate and is likely to minimize the present while seeking a "never-never" past."

Sally Palmer: "The Decision to Separate Children from Their Natural Parents" (1971), 39 Social Worker 82-87, at 86.

34. Kadushin, supra fn. 32.

35. Alfred Kadushin, editor: Child Welfare Services, Third Edition (New York: Macmillan, 1980), at 530, 545.

36. Palmer, supra fn. 33.

37. Joseph Goldstein, Anna Freud and Albert Solnit: Beyond the Best Interests of the Child (New York: The Free Press, 1973), at 40.

38. "The Child Care Crisis: 'Some May Die'" Toronto Star (7 October 1979).

"Child Abuse Must Be Curbed" Toronto Star (24 June 1979).

39. Victor Malarek: "CAS may defy court order after reported rape of ward" Globe and Mail (20 June 1979).

Patricia Hluchy: "Girl, 15, raped by foster dad Man Charged" Toronto Star (20 June 1979).

40. Sudia, supra fn. 22.

41. Sanford N. Katz: When Parents Fail The Law's Response to Family Breakdown (Boston: Beacon Press, 1971), at 23-27.

See also Wald, supra fn. 9, at 998, 1001.

42. Ibid.

43. Katz, supra fn. 41, at 59.

John Hogarth: Sentencing As a Human Process (Toronto: U of Toronto Press, 1971), at 210-217.

43 a. Hogarth: supra at 374.

44. David Finkelhor: Sexually Victimized Children (New York: Free Press, 1979).

45. "Traditionally, with the discovery of an incestuous relationship, either the victim or the perpetrator is removed from the family or the issue is avoided, suppressed, and never addressed. In either event, the family is left fragmented and traumatized. The trauma experienced by a child who is sexually abused by a stranger or friend is not to be excluded from therapeutic consideration. Ofttimes, the event becomes "the straw that broke the camel's back" for a family already coping with other stressful events. In either case, the assessment and treatment program must identify support systems to help the healing process and reconstitute the family if possible."

David L. Corwin: "Sexual Abuse of Children: Issues, Evaluation and Treatment" in Abstracts, papers presented at the Third International Congress on Child Abuse and Neglect (Amsterdam, 1981), at 104.

46. Re Jamie T., unreported decision of Nasmith, Prov. Ct J., dated 29 November 1978. (Ont. Prov. Court, Family Div.)

47. David Matza: Delinquency and Drift (New York: John Wiley & Sons, 1964), at 120-121.

48. Ibid.

49. W. Vaughn Stapleton and Lee E. Teitlebaum: In Defence of Youth A Study of the Role of Counsel in American Juvenile Courts (New York: Russel Sage, 1972).

Jeffrey S. Leon: "Recent Developments in Legal Representation of Children: A Growing Concern with the Concept of Capacity" (1978), 1 Canadian Journal of Family Law 375-434.

50. Child Welfare Act, S.O. 1978, c. 85, s. 25(1).

Children's Services Act, S.N.S. 1976, c. 8, s. 8.

Child Welfare Act, S.M. 1974, c. 30/C80, c. 13.

51. Re Golka, supra fn. 10.

Ex parte D (1971), 5 R.F.L. 119 (Ont. H.C.).

52. Re Golka, supra fn. 10.

53. Palmer, supra fn. 33.

54. Kay Drews: "The Role Conflict of the Child Protective Service Worker: Investigator Helper" (1980), 4 Child Abuse and Neglect 247-254.

55. Palmer, supra fn. 33, at 83.

56. See, for example, Michael A. Phillips, Ann W. Slayne, Edmund A. Sherman, Barbara L. Haring: Factors Associated with Placement Decisions in Child Welfare (Child Welfare League of America, 1971).

57. See St. Pierre, supra fn. 11.

58. Child Welfare Act S.O. 1978, c. 85, s. 1(b)(i)-(viii).

59. Child Welfare Act S.O. 1978, c. 85, s. 36(c).

60. Child Welfare Act S.O. 1978, c. 85, s. 36.

61. Jessie Watters, Robert Bates, Paula Caplan, Georgina White and Ruth Parry: "Preliminary Report of Toronto Interagency Child Abuse Project", unpublished paper prepared for oral presentation at the Third International Congress of Child Abuse and Neglect (Amsterdam, 1981), at 14-15.

62. Child Welfare Act, S.O. 1978, c. 85, s. 28(2).

Child Welfare Act, S.M. 1974, c. 30/C80, s. 25(8).

63. Children's Services Act, S.N.S. 1976, c. 8, s. 73(3).

Family Services Act, R.S.S. 1978, c. F-7, s. 36.

64. Child Welfare Act, S.O. 1978, c. 85, s.43(8).

Supreme Court of Ontario Rules of Practice, R.R.O. 1970, Reg. 545, as amended, Rule 234.

McCluckie v. McMillan (1973) 2 O.R.(2d) 56.