“THE FAMILY COURT, DOMESTIC VIOLENCE AND ‘THE BEST INTERESTS OF THE CHILD’

The Family Court has since the early 1990’s introduced initiatives to assure increased responsiveness to the issue of domestic violence as it presents in cases heard before the court. Legislative change, protocols, education and training implemented in the past 15 years however, have not effected desired change. Research findings confirm the writer’s practice experience that vulnerable parents and children are less likely than ever, to be afforded safety. The juxtaposition between community mythology and practice reality continues to impede perception and decision making. The paper will explore the psychodynamics of denial, collusion, and the anxiety of collaboration as underpinning the inability of the system and its professionals to fulfil their professional, moral and mandated responsibilities for the vulnerable and at risk.

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INTRODUCTION

We talk about the “best interests of the child”. However, we placate the perpetrator, we punish the messenger and we continue to do so in spite of our increased knowledge.

This talk is about all of us. There is in our society continued widespread abuse of defenceless people. We each contribute to greater and lesser extents to the community and social avoidance. Our fear, idealism, sense of disempowerment, denial of realities, wanting something to be that isn’t, contribute to the continued refusal of our society to provide protection to the vulnerable and defenceless. In this talk I would like to address some of the dynamics that contribute to what I have experienced as an increasing difficulty to achieve protection for the vulnerable who present to the Family Court system.

The Family Court understands that violence, child abuse and neglect are significant issues in the majority of cases that come before it. Despite the awareness, the good intention, the initiatives to provide protection for women who have been in violent relationships, the training over the past 15 years across all disciplines in the court, judicial, legal and counselling, research and practice experience support that vulnerable parents and children are less likely than ever to be afforded safety and protection by the system.

In fact the reverse, children are ordered to visit perpetrators, or are placed with the perpetrator, and the mothers continue to be threatened with loss of residence or jail. In all too many instances assessing experts pathologise the mother, making diagnoses of borderline, histrionic, depressed or psychotic and all too frequently the protective parent is treated like a criminal by the court.

Parallels can be made with the treatment of child sexual abuse victims in criminal proceedings as so well documented by Caroline Taylor in her aptly titled book ‘Court Licensed Abuse”. As with child witnesses in criminal proceedings, the protective parent more often the mother in Family Court proceedings, is subjected to extensive cross-examination. Three days is not unusual, while the alleged perpetrator may be in the witness box for three hours.

It is of note that there are significant reforms in relation to the testimony of child witnesses in child sexual abuse cases in the criminal justice system where the evidentiary requirements are more rigorous, while the so called ‘softer’, more client focussed Family Court, with an evidentiary requirement based on ‘balance of probability’, is not providing in court decisions or in the assessment process, protection for the children or women victims of seriously violent and frightening perpetrators.

Children and their victimised mothers are required to attend family report and psychiatric assessments with no account given for their experience with the offending parent. There is little recognition of children’s accommodating and complying behaviour in the presence of an adult with whom they feel unsafe (consciously or sub-consciously). Children frequently present as excited and affectionate when meeting with such a parent. There would seem to be little recognition of the dynamics of trauma bonding and proximity seeking, behavioural and psychological adaptations, enabling a sense of safety and control in relation to the unsafe parent.

Children’s behaviour is read at face value and reported in its most simplistic presentation. Telling the court that these children have a close and loving relationship with that parent, results in contact and residence orders being made placing these children, unprotected with those people, and such report recommendations would appear to give the court licence to threaten, demean and persecute the usually very vulnerable parent who is trying to protect the children.

WHAT WE KNOW

It is well researched and documented that women and children are the victims in over in 90% of cases of family violence, that violence of men against women is more severe and results in greater physical injury, than violence of women toward men, that women experience an average of 35 assaults before reporting violence, that women report more truthfully than men on the violence, that women and children on leaving a violent relationship are usually in a state of traumatic shock, dissociated and in a degree of denial, that until distance, protection and safety are afforded to these women and children, they continue to present as ambivalent, confused, blaming themselves and continuing to appease their ex-partners to maintain safety for themselves.

Being able to name the violence and take protective action for oneself and one's children takes courage and time. One has to move from a place of 'immersion' with the perpetrator through coercive control, and confront disbelief, fear, associated guilt, shame and confusion, to reclaim oneself. No time is allowed for these women to separate, repair and recover before being plunged into the litigation process.

It is well documented that where there is domestic violence, the risk of child physical and sexual abuse is greater by 15 times. It is well established that children who live in a violent household and witness abuse of their mother are hurt emotionally and psychologically, that these children are frequently forced to intervene to protect their mothers rather than be protected themselves.

If safety is not afforded to these children and their mothers, by the time they are of primary school age their intrapsychic accommodation is distorted to such an extent that they will start to blame their mothers because she has not been able to protect them. They are unable to blame the perpetrator because that would be too dangerous. They see also the perpetrator as having the power. To survive they side with the power, and how much is this an underlying dynamic in our society, which contributes to the ongoing re-victimisation of the victims across all systems.

By adolescence, in many cases these children will be hurting their mothers in ways that have been modeled to them over the years of their childhood and a whole new generation of bullies and victims will have been shaped and conditioned.

KNOWLEDGE, AWARENESS, SKILL IN ASSESSMENT

In my experience with these matters there are a number of impediments to achieving protection for children in the family court system. However, the court requires evidence to make a protective determination. Evidence is provided through material put forward by legal advocates on behalf of their clients, expert reports and oral evidence. The way the evidence is shaped in court is determined by cross-examination and many of these women face cross-examination by their self-representing ex-spouse.

It is of interest that advocates representing alleged perpetrators, in my experience, seem to work more effectively and with greater success for their clients, than those advocating for the vulnerable parties.

What is needed is knowledge, skill and awareness in expert assessments, in legal presentation of affidavit material and in judicial determination. Evidence is acquired through in depth history taking, being able to recognize patterns and ask pertinent questions of both parents. Patterns of violence have been researched and documented, which can assist in assessment and determination of issues, when presented with parties with opposing stories. (Jacobson & Gottman; Johnston and Campbell; Sturge and Glaser) The knowledge base is extensive, and professionals who work in this area, whatever the discipline should be well informed.

RESEARCH FINDINGS – RIGHT TO CONTACT OVER CHILD SAFETY

Research findings post the Family Law Reform Act of 1995 found that "the right to contact principle had taken precedence over concerns about children's exposure to domestic violence (Rhodes, Graycar and Harrison, 1998), despite the fact that child abuse cases, with serious and multiple forms of family violence, are the core business of the Family Court and the Family Court makes decisions on residence and contact arrangements based on poorly investigated evidence (Brown, 1998). Rendell, Rathus and Lynch (2000) found an idealized view of co-operative parenting post-separation in a context of non-acknowledgement of domestic violence and diminished priority given to the 'best interests of children' in judicial decision-making result in children being less protected than when the parents were together. The Family Law Council Report on "Family Law and Child Protection" (2000) argued that the current system did not adequately address the issue of child protection within family law proceedings.

So why, despite increased awareness, despite education, training, the decisions still support the perpetrator. It is not just an issue of the law being black and white as a barrister recently said to me; it is in my opinion an issue of interpretation of the law underpinned by largely pre-conscious psycho-dynamic factors at a societal, professional and individual level.

DYNAMICS OF 'DEAFNESS'

What is it causing the 'deafness' in this jurisdiction, the inability to hear the evidence before the court and see the implications of that evidence. I do not today have the time to go into case examples, but the stories, and I am sure that you all have your own examples, are for me, and any decent person, beyond comprehension.

Why would we rather see a woman condemned as a liar than acknowledge that there has been, and we have colluded with there being, violation of young children or extreme abuse and denigration and almost destruction of women, and some men in certain circumstances.

What is this attachment to a belief that women lie and cannot be trusted, when the research shows that woman report more truthfully in these situations of violence? I would note at this point, if you do a survey of the television programs currently, I did one over a few months last year, and found in 9 out of 10 detective - crime stories, women were found to be the murderer. This is totally contrary to the statistics and the facts of who does the killing and homicides in Australia and in the world. More recently, I saw what I thought was going to be a nice village murder story. In this case it was three children who murdered six people, being led by an 11-year old female sociopath. I was so horrified by this particular subliminal message that I turned the television off.

What this is doing subliminally is saying and repeating over and over, that women are evil, women cannot be trusted, women are killers, and in the legal arena, you cannot trust the evidence of women or children.

In what area of crime does the alleged perpetrator, the person being questioned, acknowledge their guilt? The whole Police investigation process is around finding evidence to challenge the perpetrator's denial of their crime. Yet in this area, denial by the alleged perpetrator is accepted. Allegations are made, disclosures are made by children in whatever form the age of that child determines, the alleged perpetrator is interviewed and, because he says he didn't do it, he is believed and the focus is turned on to the parent making the complaint. What is happening to the assessment, the investigation, whereby all the issues of the child's behaviour, disclosures, physical symptoms, emotional and disturbed behaviour are taken into account and risk to the child determined.

PSYCHODYNAMIC FACTORS

We are not going to hear, see, feel what is in front of us if we:

- don't want to believe abuse occurs; (despite statistics to the contrary);
- believe women lie despite research findings to the contrary;
- our training is to protect the rights of the defendant; (twelve guilty men free)
- as a society have an innate identification with the perpetrator

We should not underestimate our 'defences against the pain of reality':

- Our need to hang onto the illusion (happy families, people are good)
- To continue to hold unrealistic hope (it is not as bad as it seems)
- inability acknowledge the unacceptable to protect ourselves against reminders of our own earlier traumatic injury, or merely to protect our sensibilities.

Non-identification with the victim

One Judge after long and intense discussion about this issue came back to a friend of mine with an unusually honest insight that he does not/ cannot identify with the victim. I suggest that this reflects the thinking and accommodation of the majority of people in society. Why is this? We need to fight / deny reality to (as do children who are witness to DV in their families):

- ward off a sense of helplessness
- maintain a sense of power/control
- as a defence against guilt (of non-action or powerlessness)
- And then, as is so common in this jurisdiction prove the complainant to be unreasonable to justify our denial.

Innate identification with the perpetrator

What is this innate identification with the perpetrator? To what extent is the vulnerability of the victim threatening to us. What place inside ourselves does vulnerability, or in the reverse, bullying behaviour take us.

If we break the world up into 'victims', 'perpetrators' and 'others', we have a complex mess of shame, denial, dissociation, ignorance and fear contributing to all parties colluding with avoidance of the problem.

SHAME – individually, in families and in society

- Shame inhibits disclosure by the victims. However if they do not tell their stories the court has limited evidence to make protective determinations.
- Most of the women in this audience will have experienced some form of sexual assault, some childhood experience of abuse, exposure to psychological, emotional or physically violent relationships. What does the internalisation of those

experiences do to us, and how does it affect our representation of these issues when we are advocating on behalf of other people?

- What happens for those professionals representing or making determinations on these cases who have their own secrets, and associated shame, conscious or unconscious, when confronted with issues they would rather not know about because of denial and suppression of their own pain.

THE ISSUE OF NAIVETE

I have come to some realisation over recent months that it would be simplistic and naive to think, just because we have named these issues and there is increased awareness and study of these issues, that there would be a true responsiveness to providing protection.

I feel that there have been forces at work for thousands of years where this type of behaviour has been part of our existence, unacknowledged, and to think that we could overcome those forces by stating the problem is simplistic and naïve.

We are talking about a consciousness change, which requires many levels of experience, understanding and awareness before there is a move to a new level of consciousness, of recognition and of willingness to stand and name the issues.

There is the principle also of social recognition. A few isolated lone voices speaking out, no matter whether they are speaking the truth and fact, in the face of gross social denial the effectiveness to create the change is limited. There is a need for a more cohesive and orchestrated approach with information to the media as part of a broader educational strategy.

As people have found in trying to present reasoned, research-supported arguments and submissions to the Parliamentary Committee currently addressing and implementing the changes to the Family Law (re shared custody), there is no capacity to hear, understand or accept those well-reasoned, research-supported arguments.

So what are the factors that are inhibiting the hearing of the facts and realities?

Politically and socially at the moment there is a desire for acceptance of the father's rights movements, that men are deprived, disadvantaged and the victims of malicious and vicious women. I feel, at a more subtle level however, we are really talking about deep unconscious forces that we need to examine, spell out and start to challenge at that level. For instance, how much does this reflect deep unconscious grief and longing for paternal involvement shaped by childhood experiences of absent, punitive or disconnected fathers.

We are talking to the converted at this conference, but I feel that we really need to look at making more public, spelling out the facts that we know, the realities that we know. We need to be challenging the fact that what is written in law does not happen in practice, that in making determinations the interpretation is biased one-way, and to be able to identify how that interpretation is biased. We need to be able to look at cases and the cross-examination of witnesses in those cases, and identify how that process is also biased and how matters are pre-determined.

We need to be able to spell out how the experts who are commonly used and much appreciated in the Court system are people who minimise violence and abuse, who make appalling recommendations that are in fact, professionally negligent. With the result, if you have assessing experts who are people who are actually not making findings of abuse, then the Court is very limited in how it can find abuse.

We need to identify why it is that these people are appreciated in the system and used by the system, as opposed to people who are identifying the risk. So what is the actual dynamic happening that causes this biased use of certain types of professionals?

We need to spell out this whole business of what is expertise, who does have the expertise. In medical areas, in psychiatry, there is not training in child abuse. As Freda Biggs recently was quoted in the papers in Brisbane saying that she would like to see the introduction of training in child abuse, through all areas of tertiary education and professional development. There is a misguided, and I would suggest convenient assumption that if you have a psychiatric qualifications or even a psychologist's degree, you are more qualified to speak, and to assess issues of abuse.

We need to be demanding that people demonstrate their qualifications and practice experience to make assessments in the area of domestic violence, child sexual abuse and coping of children at risk.

The Victorian Law Reform Commission (2003) noted that past experience has shown procedural and evidentiary reforms are unlikely to make the system more responsive unless accompanied by cultural change and support from those who work in the system. It is clear from the decisions being made that the cultural shift is yet to be made by those assessing, representing and making judicial determinations in this area.

I would end by saying that it takes courage and willingness to confront our own demons which may be inhibiting our participation and contribution, as well as courage and tenacity to continue to challenge the blocks and impediments in the external world.

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