Legal Ethics and the Family Lawyer

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I: INTRODUCTION

It is a truism to assert that family law practitioners may occasionally become involved in ethical dilemmas in which, by advocating the position of a client, the welfare and interests of third parties are unjustly affected.[1] An example of this arises where an abusive parent seeks to obtain custody of a child and admits to his or her legal representative having physically or sexually abused the child. This is particularly difficult where no other party is aware that abuse has occurred and the child is unable to disclose such information. A practitioner placed in such a situation is faced with the unenviable task of attempting to determine what he or she *ought* to do.

Orthodox legal ethical theory does not provide sufficiently clear guidance in practical ethical dilemmas such as this. The current theory is premised upon a restricted conception of what a practitioner may consider morally relevant. Nowhere within this framework is a direct concern placed upon the interests of third parties such as the child. Furthermore, it remains arguable whether a practitioner, in determining what course of conduct to take, may even *consider* the interests of third parties in deciding what he or she ought to do.

1 Smith argues that it is only very rarely that a practitioner will *know* that the client is seeking to pursue a lawful but unjust end: "Reply to David Luban" (1991) 10 Law and Philosophy 427, 428. However, there are several cases in which ethical dilemmas such as this have arisen. See *Re A* [1992] 2 FLR 473; *Essex County Council v R* [1993] 2 FLR 826; *Barking and Dagenham London Borough Council v O* [1993] 2 FLR 651.

A key issue to be resolved is whether practitioners have the moral autonomy to consider such external interests. This article argues that practitioners do have such autonomy. The weight which ought to be accorded to these considerations is then examined. This writer proposes a heavy prima facie presumption which limits the influence of these considerations to cases where there is a real risk of grave and unjust harm to third party interests.

II: THE ORTHODOX ETHICAL FRAMEWORK

1. The Two Duties: to the Court and to the Client

The boundaries of a practitioner's ethical framework are set by two fundamental duties. Both are contained in Rule 8.01 of the *Rules of Professional Conduct for Barristers and Solicitors*.[2] The first duty is owed by the family law practitioner towards the Family Court, the second towards his or her client. Where conflict arises, the first duty overrides the second.

The commentary to Rule 8.01 provides assistance in defining what the duty to the court means in practice. Several requirements are imposed upon the practitioner, the most important of which is the duty not to mislead the court. Although this rule restricts what evidence may be presented by a practitioner, it does not offer watertight protection for a third party whose interests are at stake. If this restriction is applied to the example referred to earlier, it is apparent that the practitioner cannot lead any evidence which would mislead or deceive the court concerning the abusive conduct of the parent. However, it is arguable that it is not misleading towards the court to present information which is not directly related to the past abuse, and that casts the abusive parent in a favourable light.[3] A good example of this might be that the parent has recently secured employment, which reflects upon the future ability of the parent to provide adequately for the child. Furthermore, the practitioner is not misleading the court where he or she attacks the credibility of the other parent, indirectly strengthening the case of the abusive parent. Therefore, the duty owed by the practitioner towards the court does not sufficiently protect the interests of the abused child.

The duty owed by the practitioner to his or her client places even greater restrictions upon a practitioner's ability to consider the interests of third parties. This duty requires that:[4]

2 New Zealand Law Society, *Rules of Professional Conduct for Barristers and Solicitors* (2nd ed 1993).

3 In response it could be argued that the abusive parent's future ability to care for the child is so flawed that *any* evidence which is led to the contrary is misleading or deceptive. On this view the practitioner's duty to the court is necessarily invoked.

4 Commentary to Rule 8.01, supra at note 2.

> The practitioner, whilst acting in accordance with these duties [to the court], must fearlessly uphold the client's interests, without regard for personal interests or concerns.

If the elements of this duty are applied to the practitioner who faces the moral dilemma above, it would appear not only justifiable but indeed mandatory for him or her to present the abusive parent's case for custody in the most favourable light. This would be so despite the risk of harm to the child.

2. Principles Underlying the Practitioner's Duty to his or her Client

(a) The principle of partisanship

The principle of partisanship maintains that, subject to the duty owed to the court, a practitioner must at all times fully advance the interests of his or her client.

> When acting as an advocate, a lawyer must, within the established constraints upon professional behaviour, maximize the likelihood that the client will prevail.[5]

An historical antecedent to the principle of partisanship is the oft-quoted defence of Queen Caroline by Lord Brougham: [6]

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

The requirement of partisanship is, according to Ewin, a common feature of codes of professional ethics in common law countries.[7] Thus, as an example, the *Professional Conduct Rules of the Law Society of Western Australia* provide that: [8]

> Subject at all times to the duty of practitioners to the court a practitioner shall give undivided fidelity to his client's interest, unaffected by any interest of the practitioner or of any person or by the practitioner's perception of the public interest.

Similarly, Canon Seven of the American Bar Association's *Code of Professional Conduct* states that:[9]

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5 Schwartz, "The Professionalism and Accountability of Lawyers", (1978) 66 Calif L Rev 73, cited in Luban, "The Adversary System Excuse" in Luban (ed), *The Good Lawyer - Lawyers' Roles and Lawyers' Ethics* (1983) 83, 84.

6 Nightingale (ed), *Trial of Queen Caroline* (vol 2 1820-21) 8, cited in Luban, ibid, 86.

7 Ewin, "Personal Morality and Professional Ethics: The Lawyer's Duty of Zeal" (unpublished) p2.

8 Cited by Ewin, ibid, p1.

9 Cited by Luban, supra at note 5, at 88.

> The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.

New Zealand's *Rules of Professional Conduct* also contain the principle of partisanship.

(b) The principle of neutrality

This principle requires that a practitioner must pursue the objectives of the client, regardless of the personal view which the practitioner holds as to the morality of the objectives:[10]

> Samuel Johnson is often quoted in support of this ideal: "A lawyer" he said, "has no business with the justice or injustice of the cause which he undertakes .... The justice or injustice of the cause is to be decided by the judge."

(c) The principle of non-accountability

Finally, the principle of non-accountability provides that the moral responsibility of the practitioner is separate from and not implicated by either the moral status of the client or the morality of the ends which the practitioner is instructed to obtain on the client's behalf.

> No matter that the lawyer knowingly helps his client attain a goal which everyone involved and all those who hear of the case judge to be wicked, the lawyer who helps the client attain that goal is in no way morally responsible.[11]

3. Implications of these Principles: Role-based Morality and Moral Autonomy

It follows from these principles that practitioners are required to follow clients' instructions, notwithstanding that this may result in the pursuit of immoral ends.[12] Thus, lawyers have: [13]

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10 Dare, *Good Lawyers and Bad Clients* (unpublished) p3.

11 Ibid.

12 Use of the word "immoral" in this context "includes only unconscionable or overreaching behaviour by which one person exploits another. The consequence of this type of behaviour is a gain to the exploiter and a concomitant loss - injury or damage - to the person exploited. It may, as will appear, include other types of lawful and harm-inflicting behaviour as well." Schwartz, "The Zeal of the Civil Advocate" in Luban, supra at note 5, at 150, 161.

13 Dare, supra at note 10, at p3-4.

> [A] duty to further the interests of clients, even where the lawyer judges those interests to be wicked or immoral .... [Lawyers are] insulated from the moral censure that those interests might quite appropriately attract were they performed by a nonlawyer or nonprofessional.

(a) Role-based morality

The standard way to justify this pursuit of immoral ends is through the concept of role-based morality. This theory differentiates between the morality a practitioner possesses as a lawyer and the morality that he or she possesses as an individual. Thus, an action which would be immoral for an individual may be acceptable for a lawyer.

(b) Lack of moral-autonomy

Embedded within this role-based view of the morality of practitioners is the notion that practitioners lack moral autonomy. Thus, practitioners determine their ethical obligations by reference to their role, without any reference to non-role based moral considerations, including the interests of third parties.

> [C]ases may arise in which an agent is required by his role to act without considering the full range of moral reasons before him; rather he must consider only those moral reasons within his particular moral universe.[14]

Landesman distinguishes between the approaches of two groups.[15] The first accepts that, in some cases, it might be necessary to depart from role-based morality. However, in reality, such departure is rare. Landesman argues that this group does exercise moral autonomy since, if their consideration is genuine, "they do deliberate and attend to circumstances".[16] The second group lacks moral autonomy entirely. This group is content to act automatically according to their role, viewing the role obligations of practitioners as absolute and incapable of admitting exceptions. In the custody situation referred to above, such a lawyer would feel obligated to maximise the abusive parent's case for custody or access. Conversely, members of Landesman's first group would at least go through the *process* of considering whether, despite the principle of partisanship, there were any reasons to qualify the principle in some way to provide for the interests of the child.

Luban considers that the role obligations of practitioners place them squarely

14 Postema, "Moral Responsibility in Professional Ethics" (1980) 55 NYULR 63, 71.

15 Landesman, "Confidentiality and the Lawyer-Client Relationship" in Luban, supra at note 5, at 190.

16 Ibid, 199.

within the second group. As a consequence he advocates a type of civil disobedience to what he perceives to be the requirements of role morality:[17]

> [W]hen the lawyer faces a conflict between role-obligation and ordinary moral obligation, the latter usually should triumph. Then the lawyer must become a civil disobedient to his or her role-obligations.

It must be asked whether Luban has correctly understood the dictates of role morality, which he sees as requiring a complete sacrifice of moral autonomy:[18]

> Role morality, however, establishes a monolithic point of view. Its vice lies in its virtue - in the fact that the role agent is no longer responsible for the whole of morality. The complexity of the moral world is thereby reduced and made manageable. But this is done by parcelling out responses to given situations in such a way that no single role is sensitive to all situations or has available to it a full range of responses.

In contrast to Luban's position, the writer believes that the role obligations of a practitioner do permit moral autonomy. It is therefore consistent with a practitioner's duty to his or her client to consider the interests of third parties. The issue is rather the weight which ought to be assigned to such considerations.

III: MORAL AUTONOMY WITHIN THE ROLE-BASED VIEW

There are two essential arguments which support a view of the practitioner's role as permitting moral autonomy. The first argument, of which there are at least two variations, maintains that it is in some way intrinsic to the role of the practitioner that he or she consider non-role based moral obligations. The second argument places a restricted interpretation on the wording of the partisanship principle employed in the *Rules of Professional Conduct*, so that consideration can be extended to the interests of third parties.

1. Intrinsic to the Lawyer's Role

The first variation of the first argument is premised on the view that moral arguments play an important part in the formulation and practice of law, and hence it is inherent in the lawyer's role that he or she will refer to non-role based moral principles:[19]

17 Luban, "Smith against the Ethicists" (1990-1991) 9 Law and Philosophy 417, 428-429.

18 Luban, *Lawyers and Justice - An Ethical Study* (1988) 127.

19 Postema, supra at note 14, at 79.

> Both positivist and natural law theorists agree that moral arguments have an important place in the determination of much of modern law. [Hence] the lawyer who must detach professional judgment from his own moral judgment is deprived of the resources from which arguments regarding his client's legal rights and duties can be fashioned.

The second variation upon this argument starts from Kronman's premise that practitioners in the real world require practical judgment skills, particularly given that the practice of law is peculiarly case-centred. Thus it is necessary for lawyers to be able to consider specific moral as well as legal issues that arise from each case:[20]

> The cases with which lawyers deal always arise ... within the framework of general norms and a knowledge of this framework, or at least the relevant portion of it, is something a lawyer cannot do without. What gives such knowledge its relevance or meaning for the lawyer, however, is its relation to the case at hand. The case is a kind of prism which refracts the lawyer's more generalised doctrinal knowledge, and when he looks at the law he always does so from the perspective of a case and through the medium of its dense particularities.

Indeed, Kronman states that it is a feature of the practical wisdom which practitioners must possess that they are able to consider the interests of third parties.[21] According to Dare, it follows from this case-centred view of the role of lawyers that practitioners are necessarily morally autonomous:[22]

> [I]n interpreting the constraints of one's role, just as in interpreting the effect of rules upon cases, the lawyer must engage their capacity for judgment. They must employ the skills as practical reasoners which marks their profession, and in so doing they will have to engage with the problems not as mere technicians but as involved parties.

2. Restrictive Interpretation of the Partisanship Principle

The second argument which supports the view that practitioners are morally autonomous is specifically addressed to the issue of third party interests. The partisanship principle is generally perceived to focus exclusively upon the duty of the practitioner to maximise the interests of the client. However, if a restrictive interpretation is placed upon the wording of the commentary to Rule 8.01, then it is possible to argue that the interests of third parties are not excluded from consideration. Rule 8.01 states that "the practitioner ... must fearlessly uphold the client's interests, without regard for *personal* interests and concerns".[23] It can be argued that the use of the words "personal interests and concerns" may be interpreted

20 Kronman, "Practical Wisdom and Professional Character" 4 Social Philosophy and Policy 203, 204.

21 Ibid, 213.

22 Supra at note 10, at p18.

23 Emphasis added.

narrowly, to refer solely to the private or "self" interests and concerns of the practitioner, as opposed to the interests and concerns of others. Accordingly, the wording of the partisanship principle does not rule out consideration of third party interests. The wording of Rule 8.01 may also be distinguished from, for example, s 7.1 of the *Professional Conduct Rules of the Law Society of Western Australia*, which expressly forbid such considerations:[24]

> Subject at all times to the duty of practitioners to the court a practitioner shall give undivided fidelity to his client's interest, unaffected by any interest of the practitioner *or of any person* or by the practitioner's perception of the public interest.

This recognises that the interests of the practitioner do not include the interests and concerns of third parties.

Such an interpretation is certainly open to argument. To avoid the possibility of a "slippery slope" of civically minded practitioners exceeding the expressed wishes of their clients in the interests of what they consider to be maligned third parties, the weight which may be attributed to third party interests or non-role moral obligations will have to be strictly circumscribed. Requiring practitioners to forsake consideration of the facts or issues of a case on the basis of the partisanship principle is to oust practitioners' moral autonomy. This impoverishes their potential to provide adequate advice to clients.

IV: WHAT WEIGHT SHOULD BE ACCORDED TO THIRD PARTY INTERESTS?

The preceding discussion has sought to illustrate that it is within the ethical boundaries of a practitioner to consider external interests. This part of the article examines the weight that ought to be assigned to such considerations. It is submitted that, except within a narrow class of "hard cases" in which there exists a real risk that grave and unjust harm may result to the interests or welfare of a third party, the practitioner ought to assign a low weight to such external interests. In all other cases, the principles of partisanship, neutrality and non-accountability should prevail. Smith supports such an argument when he states that:[25]

> [T]here are a variety of persuasive arguments to the conclusion that lawyers' professional obligations are strong prima facie moral obligations, which must ordinarily carry the day, *except when a lawyer is confronted with the gravest of moral reason to the contrary.*

24 Supra at note 8. Emphasis added.

25 Smith, "Should Lawyers Listen to Philosophers about Legal Ethics?" (1990) 9 Law and Philosophy 67, 85. Emphasis added. Smith makes this statement as a response to Luban's exhortation to practitioners to become civil disobedients, see supra at note 17 and accompanying text. Therefore it is expressed as a rejection of Luban's view that lawyers ought not to follow their professional obligations.

Smith acknowledges that hard cases arise, and suggests two possible situations where this could happen. First, where there exists uncertainty as to the ambit of legal professional obligation, and there is a real risk that third party interests will be gravely and unjustly affected. Second, where it is prima facie apparent that a legal professional obligation requires a certain course of conduct, but there is a real risk this conduct will result in potentially grave and unjust harm to the interests of a third party. Whether an ethical dilemma falls within one of these categories is more a matter of degree than a clear-cut issue.

It will frequently be difficult for a practitioner to judge exactly whether a third party's interests will potentially suffer grave harm. In the dilemma posed at the beginning of this article, it *is* possible to foresee grave potential harm arising to the child if he or she were placed in the custody of the abusive parent. However, this might not be so readily apparent where, for example, a parent seeking custody admits to psychiatric illness or drug dependency.

Where a situation does appear to fall within either of these categories, the practitioner is faced with a further difficulty. It is one thing to say that weight ought, in these contexts, to be assigned to the interests of the third party. However, this does not provide sufficient guidance as to what, in a concrete dilemma, a practitioner should do. Indeed, it is submitted that this is a matter which largely depends upon the circumstances. In some cases, it may be enough merely to advise clients not to proceed with their stated aims, giving proper reasons why the interests of third parties should be taken into consideration. Luban acknowledges this strategy as potentially effective:[26]

> [C]lient counselling ... means discussing with the client the rightness or wrongness of her projects, and the possible impact of those projects on "the people," in the same matter-of-fact and (one hopes) unmoralistic manner that one discusses the financial aspects of a representation.

In some situations, as Luban suggests, it may be necessary to apply to resign from the case. This is particularly so where the practitioner feels that in some way his or her duty to the court would be compromised by proceeding with the client's aims.[27] If either of these options will not satisfactorily resolve the dilemma which the practitioner faces, he or she may need to apply to the Ethics Committee of the New Zealand Law Society for a ruling on the matter.[28]

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26 Supra at note 18, at 173.

27 Note that Rule 10 of the *International Code of Ethics* (1988) states: "Lawyers should only withdraw from a case during its course for good cause and if possible in such a manner that the client's interests are not adversely affected." See *Rules of Professional Conduct*, supra at note 2, appendix III(3).

28 For reasons of confidentiality, this option requires the consent of the client. Alternatively, the practitioner may be able to apply for guidance from the Family Court, for example, for a ruling upon the admissibility of privileged information under s 28 of the Guardianship Act. In all these cases, a practitioner should certainly consider seeking advice from the Friends Panel of their Law Society.

V: PRACTICAL APPLICATION

If it is accepted that the appropriate action for a practitioner to take will depend largely upon the facts involved, then it may be asked how a family law practitioner should respond when he or she is instructed to apply for custody by a parent who admits to having abused the child.

In providing a solution, it is helpful to refer to the English decision of *Essex County Council v R.*[29] This case involved an application for permanent custody by the Essex County Council, following the death of the parents' other child in suspicious circumstances. The parents' lawyers were in possession of a psychiatric report disclosing that one parent had abused a drug, causing violent behaviour. This report was not disclosed to the Court. The information came to light only when the psychiatrist alluded to it in her oral evidence at trial.

The ethical issue which arose for determination concerned whether the practitioners were entitled to prevent disclosure of the report on the grounds of legal professional privilege. Thorpe J posed the ethical dilemma in the following way:[30]

> In relation to this issue, what was the professional responsibility of the mother's legal team? Obviously the report was the subject of legal professional privilege. Was it discoverable, or were the mother's advisers in any event entitled to conduct the case as though the report had never been made?

The facts of the *Essex* case conform quite closely to the second category of hard cases described above. There was a prima facie legal professional obligation owed by the practitioners acting in that case - a duty of confidentiality owed to the mother not to discover the findings of the privileged report - which had to be balanced against the potentially grave harm which might arise to the interests of a third party (the risk faced by the child in the light of the report's findings). Thorpe J imposed a type of passive ethical duty onto the practitioners, who were held to be unable to resist disclosure of information which suggested that there might be a real risk in placing the child with its parents, solely by reliance upon legal professional privilege.

Having considered the ratio of *Essex*, it is timely to return to the example posed at the beginning of this article. As a preliminary step, the practitioner could counsel the client to seek the assistance of a professional counsellor, and ought to advise against seeking custody (or even unrestricted access) until such time as the client had overcome his or her abusive behaviour.[31] However, if this fails, under

29 Supra at note 1.

30 Ibid, 827.

31 At the same time the practitioner ought to warn of the possible criminal consequences if the abusive parent discloses. Note, however, that s 18 of the Family Proceedings Act 1980 protects disclosures made to a counsellor who is "exercising his functions under this Act". According to Judge Bisphan, "an admission made by a father during counselling that he had sexually abused his child ... would be privileged in terms of s 18 and could not be evidence in a criminal prosecution": *M v M* (1988) 5 NZFLR 539, 541.

the *Essex* ratio, the practitioner might consider himself or herself under a passive duty not to resist disclosure on the grounds of legal professional privilege. But the problem is that on these facts, no-one will seek disclosure because no-one knows that the abuse has occurred. The only way in which the interests of the child will therefore receive protection is if the practitioner does some positive act in favour of the child's interests. In this regard, it is helpful to consider the comments of Thorpe J from the *Essex* decision: [32]

> For my part, I would wish to see case-law go yet further and to make it plain that the legal representatives in possession of such material relevant to determination but contrary to the interests of their client, not only are unable to resist disclosure by reliance on legal professional privilege, but have a positive duty to disclose to the other parties and to the court. To take this case as an instance: were it otherwise, a statement of great significance in judging the potential risk of the parents to their surviving child would have gone unsurveyed and its exclusion might therefore have resulted in a distorted assessment of that risk.

In this obiter statement, Thorpe J favours the imposition of a positive duty upon counsel to disclose information, notwithstanding that this may be subject to professional privilege, where such information is relevant to the determination of the future custodial arrangements of a child. This suggests that a very low threshold of risk is required to bring a case within the "hard cases" exception referred to above. In this writer's view, rather than simply being relevant to the determination of the case, the information should disclose a real risk of harm to a third party. It must be noted that Thorpe J's statement does not reflect the current law.

It is possible to argue that an intermediary position is available for practitioners placed in such ethical dilemmas so that some recognition is given to the interests of the child, while at the same time it is ensured that practitioners do not breach legal professional privilege. For example, a practitioner could recommend that counsel for the child be appointed, or recommend that a psychological assessment be made of the child under s 29A of the Guardianship Act.[33] It is submitted that such applications can (at least technically) be made without actually breaching the duty owed by the practitioner to his or her client not to disclose privileged information without express consent.

A problem which arises for consideration is that the options which are proposed convey the impression that the practitioner is "going behind the back" of the client. If the practitioner were to consult the client before acting, the client might either dismiss the practitioner, or alternatively, expressly forbid him or her to take such steps. How should a practitioner respond in such a circumstance? The answer to this problem relies upon an interpretation of Rule 8.01 of the Professional Code of Conduct which states that:[34]

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32 Supra at note 1, at 828.

33 Alternatively, the practitioner could directly approach counsel for the child with words to this effect: "I am unable to disclose the reasons why, but I suggest you have an assessment made of the child by a social worker or counsellor".

34 Supra at note 2.

> In the interests of the administration of justice, the overriding duty of a practitioner acting in litigation is to the court or the tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client.

On this interpretation, special significance may be attached to the reference in Rule 8.01 to the "best interests of the client" - a legal term which, at least in the context of child welfare law, is understood to encompass more than just the expressed wishes of the client. Therefore, the practitioner who does one of the positive acts outlined in favour of the child's interests may be justified on this interpretation of the Rule, provided that he or she does not directly breach ethical obligations of confidentiality.[35]

An immediate argument which may be raised against this interpretation is that it introduces a "slippery slope" in that practitioners will frequently rely upon their own paternalistic interpretations of the client's best interests to act in ways that are ultimately detrimental to the client. Although this consequence may be imputed as a result of the wording in Rule 8.01, it is not the writer's intention to make such an argument. Rather, such an interpretation of "best interests" ought to be restricted to situations where genuinely "hard cases" arise. This conclusion is perhaps reinforced by the focus on the "best interests of the child" which is the key issue, for practitioners as well as Family Court Judges, in all cases involving custody matters. In this regard, the comments of Gallen J in *M v B*[36] are apt:[37]

> [I]n *Official Solicitor to the Supreme Court v K*[38] ... it was accepted that in certain circumstances the welfare of the child may overrule ordinary rights of a party in an adversarial situation. The second [point] is that there is a perceptible movement in the Guardianship Act and indeed in other matters which relate to the care of children from a purely adversarial situation towards a more investigative approach. That follows from the emphasis upon the welfare of the child [in s 23] and from the ability to obtain the report dealt with by ss 29 and 29A themselves.

VI: CONCLUSION

A practitioner placed in the situation described at the beginning of this article ought not to assume merely that he or she has a clear-cut duty to maximise the interests of the client, subject only to his or her duty owed to the court. The

35 Furthermore, given that sexual abuse is a crime, it is difficult to conceive that it is in the best interests of the client to allow him or her unfettered access or custody to the abused child in circumstances where there is a real risk (or indeed any risk) of re-abuse. In addition to the harm which may be caused to the child, the client is placed in a situation in which he or she may commit further offences against the child, thereby increasing the potential criminal sanctions which he or she faces. It may also be possible to invoke the practitioner's duty to the court, given that there is a possibility that the abusive parent in the situation considered above may commit a criminal offence in the future.

36 (1993) 10 FRNZ 433, 438.

37 Ibid, 492.

38 [1965] AC 201.

practitioner ought to consider the serious harm which may result to the interests and welfare of the child if the parent were to be awarded custody or unrestricted access.

To conclude, it seems appropriate to quote from a recent *Listener* interview with Neil Pugmire, a psychiatric nurse who was suspended for breach of patient confidentiality, but later exonerated. Pugmire faced a moral quandary not unlike the type of dilemma discussed above. Pugmire's prima facie duty of confidentiality towards certain patients had to be balanced against the threat that the patients (at least one of whom was a recidivist paedophile) posed towards the public:[39]

> He [Pugmire] was caught between his professional duty of patient confidentiality and his duty to warn the world. "Any professional who works in this area, like a nurse, or a doctor, or a priest, knows that confidentiality is one of the pillars of the job", he says. "However highly a CHE [Crown Health Enterprise] may hold this as one of their rules in the rule book, I believe that a professional would hold it a great deal higher. It would only be in the most extreme circumstances, where there were other ethical issues that took precedence, that you would ever question confidentiality." Unfortunately, this seemed just such a case. "It was extremely hard. It's probably the hardest thing I've ever had to do. It's something that I anguished about for quite some time.

Pugmire's candour serves as a valuable lesson for family law practitioners. In order to maintain one's integrity, a practitioner must have the courage to respond appropriately to the hard cases.

39 Hubbard, "Why I blew the Whistle" *Listener* (May 14 1994) 16, 18-19.