CHILD PROTECTION IN NEW ZEALAND AND ENGLAND

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I. THE THEORETICAL DIFFICULTIES

Child protection law is about balancing the right of parents to bring up their child in whatever manner they think fit against the power of the State to intervene in family life to protect the child. Many children live in homes where they endure physical and sexual abuse. Many more are subjected to emotional neglect and ill-treatment.[1] As one of the primary functions of any legal system is to make sure that persons are afforded protection from personal injury, prima facie the solution is easy: the child should be removed from the source of the danger. Why then is the law relating to child protection so fraught with difficulty, and why is it so hard to get the balance right between child, parent and state?

The root of the problem lies in the dilemma that a child's best interests are often inextricably interwoven with his family relationships, particularly with his parents. He is dependent on his parents not only to supply his physical needs, but also to provide him with warm, inter-personal, relationships. The law can determine when the State is entitled to intervene on behalf of a child, and when it cannot do so. But the law cannot determine whether it is wise to intervene. Some theorists define this dilemma in terms of rights, for example, Morris, Giller, Szwed and Geach write:

"Every child must have the basic right of remaining in his own family unless there are compelling reasons which justify his removal. This presumption in favour of parental autonomy should only be rebutted by proof of some specific harm to the child or of the disruption or absence of parental ties. Even where this is proved, however, there should be a presumption against removal of the child from his home; such intervention should be the last resort. Removal should require a thorough survey of alternative ways of dealing with the situation (for example, by voluntary services and support) and evidence that such measures are inadequate."[2]

Goldstein, Freud and Solnit advance a similar theory.[3] However, as Dingwell and Eekelaar so clearly point out, a theory which identifies children's rights with a parental right to freedom from interference by the State is not truly a theory of children's rights. It is a theory about when it is proper for the State to intervene in families. Any true theory of children's rights must give proper recognition to the autonomy of the child, and to his needs as an individual.[4] But even a correct theory does not entirely resolve the dilemma as to when it is in the child's best interests to be taken away from his natural family, and when his interests would be better

[1] "There are no accurate figures available as to the extent of child ill-treatment and neglect in New Zealand. It can safely be said that ill-treatment and neglect are not uncommon and occur in all sections of our society". *Review of Children and Young Persons Legislation* (1984) p.7. In England, the gravity of the problem is revealed in the statistics produced annually by the N.S.P.C.C.

[2] *Justice for Children* (1980) p.128.

[3] *Before the Best Interests of the Child* (1980).

[4] *State, Law and Family* (1984) Ch.6 'Rethinking Child Protection'; and see Eekelaar in (1983) 7 Adoption and Fostering, 7.

served by his remaining at home, and for intensive work to be done with his parents in the skills of proper parenting.

The New Zealand discussion paper "Review of Children and Young Persons Legislation" highlights the problem. It lists seven propositions in respect of children in need of protection.[5] Proposition 4 states:

> "No consideration should be given to separating a child from his/her natural family unless it has been proven that the child has been, or is likely to be, harmed and cannot be protected within the home if services and support are provided to the family. Where the child is separated from the natural family the child should be returned home if it has been made safe within a time that is reasonable from a child's perspective."

Proposition 6 states:

> "Children who have been abused will often continue to be abused if they remain with their natural families, even when the family receives treatment."

Child protection law provides the framework within which these two propositions must be reconciled. The problems they pose are currently exercising the minds of law reformers in both New Zealand and England. In the discussion below the framework and grounds for intervention in child protection cases in each country are examined, with attention focussed on whether the current law affords the child adequate protection.

II. The Framework for Intervention

Three distinct groups of children can be brought before the civil courts of England and New Zealand on the grounds that they are in need of care (both countries), protection (New Zealand alone) or control (both countries).[6] These are, first, children who are being, or who are at risk of being, neglected or ill-treated in some way; secondly, children who are beyond the control of their parents, or not going to school; and thirdly, children who have committed offences. However, in England the philosophy which treats all problems of childhood as a presenting symptom, and which puts the delinquent child on a par with the child who is being physically abused, is in practice ignored. Less than one per cent of offending children are brought before the Courts in care proceedings. The rest are prosecuted in the traditional manner and can be sentenced punitively. In marked contrast, children between the ages of ten and fourteen cannot be prosecuted in New Zealand.[7] Both countries use court avoidance techniques to prevent young offenders being brought before the courts: in New Zealand through compulsory referral to Children's Boards;[8] in England through liaison between the police and Social Services Departments, and by an increase in official police cautioning. Perhaps it is time for each country cautiously to re-examine the merits of seeking to control the child who is offending, and to protect the child who is being ill-treated, under one piece of legislation

[5] At p.7.

[6] Children and Young Persons Act 1969, s.1 (England); Children and Young Persons Act 1974, s.27 (New Zealand).

[7] Children and Young Persons Act 1974, s.25 (other than for murder or manslaughter).

[8] Ibid, s.15.

which is informed by one social policy.[9] While court avoidance may be the best response to the child who is beyond control, it could prove disastrous to the child who needs care and protection. The essence of childhood is the vulnerability of the child. Because of age and immaturity he cannot assert his own rights and his own needs, others must do so on his behalf. The appalling statistics on child abuse and neglect bear witness to the claim that the needs of many children living at home are not being met, and that their rights are being violated. It is suggested that both in England and New Zealand too much weight is being given to the disadvantages to the child of removal from the home, and too little to the advantages. This is exemplified by the following assertions made in the New Zealand discussion paper:

"Any intervention in the family must be the least intrusive that is consistent with the protection of the child and must provide services to the child and the family aimed at ensuring the protection of the child within the family."

"A child can only be permanently removed from her/his family after a real effort has been made to ensure the child's safety and well-being within the family."[10]

Where in these statements, is there any hint that this approach poses risks for the child? Where is there any recognition of proposition 6 (above) which bears repetition?

"Children who have been abused will often continue to be abused if they remain with their natural families, even when the family receives treatment.[11]

It is suggested that a specific social policy which promotes a climate of unwillingness to intervene coercively to remove a child from his home falls into the trap of identifying the child's interests too closely with those of his parents. Furthermore, it fails to give adequate respect to the rights of the child as an individual.

III. The Grounds for Intervention

When child protection law states the grounds which must be proved before an order can be made to provide a child with care and protection it determines the minimum standard of child care which is acceptable to the community. If that standard is broken, the state, through the courts, is entitled to intervene. Once this standard has been determined, Parliament must translate it into legislation. Child care law must seek to avoid the pitfalls which are the hallmarks of all legislation: too precise drafting may inadvertently create loopholes; too loose drafting may permit intervention where there are insufficient reasons for it; for the courts must seek properly to interpret the will of Parliament and are not entitled to re-write ill-written Acts. The grounds for complaint proceedings in New Zealand and England are drafted in a similar, but not identical, fashion. It is therefore helpful

[9] In England this policy is not spelt out in the statute. By contrast, in New Zealand ss. 3, 4, 4A, 4B and 4C of the 1974 Act make specific policy recommendations.

[10] At p. 8.

[11] My italics.

to identify which forms of drafting afford the child the best protection, and which give rise to the biggest pitfalls.

It is interesting to note that although the main grounds for complaint in both countries are drafted in the present tense[12] this appears to have caused difficulties only in England. There lawyers representing the parent's interests have argued that "is" does not encompass "was", and that the grounds for intervention lapse if the child is no longer in the condition alleged by the time the case is brought before the court. But the English courts have refused to countenance this argument, and by adopting a realistic approach to statutory interpretation they have found that the child's health and development is being impaired and prevented and that he is being ill-treated not only when the child is currently living in a children's home or with foster parents, but also when he has been placed at home under an interim order pending the final hearing of the complaint, and where he has not come to harm during this pending period.[13] Recently the Court of Appeal has held that a child's proper development is a continuing process, and therefore the condition is proved where the evidence about the child's current development and health relates to what happened when the child was in its mother's womb.[14] Thus the English courts have endeavoured to ensure that protective legislation is not rendered ineffective by an over literal interpretation of the Act's provisions.

In New Zealand the courts have become entangled in the question whether proof of ill-treatment in itself provides sufficient grounds for a court order, or whether, in addition, the courts must be satisfied that the parent was culpable, or even had mens rea.[15] The incorporation of the criminal concepts of intention, recklessness or, at the least, negligence into the civil law of child protection was an unfortunate development, and one from which the Court of Appeal was quick to resile.[16] The error made in *R* v *J*[17] was to identify the child's need for care and protection with proof of parental fault. Often the two will coincide, but this is not always or necessarily the case. For example the parent may be so physically or mentally handicapped that he cannot avoid causing harm to his child. Or the parent may have a conscientious objection to certain types of medical treatment exposing the child to the risk of serious harm, or even death.[18] In *R* v *J* itself the court made a finding that non-accidental injury was caused to the child at a time when the parent's "back was turned". It concluded that because fault had not been established that the complaint must be dismissed. The child was returned home and, tragically, died some months later from severe, unexplained, head injuries.

The New Zealand Parliament responded to *R* v *J* with legislation.[19] It is suggested, however, that s.29A is clumsily drafted, and that it may lead to some children being denied the benefit of a compulsory order for care and protection which their circumstances dictate to be necessary. For

[12] Children and Young Persons Act 1969, s.1(2)(a); Children and Young Persons Act 1974, s.27(2)(a)(b) and (c). The use of the future tense in para. (c) is considered below.
[13] *M* v *Westminster CC* (1985) 6 FLR 325; *F* v *Suffolk CC* (1981) 2 FLR 208.
[14] *Re D* The Times, March 24 1986.
[15] *R* v *J* (1983) 2 NZFLR 49.
[16] *P* v *DSW* (1983) 2 NZFLR 321.
[17] Op. cit. n.15.
[18] Cf. *Re M* (1984) 3 NZFLR 63; *Re B* [1981] 1 WLR 1421.
[19] Children and Young Persons Act 1974, s.29A.

example, where the perpetrator of an assault or a series of assaults on a child has been sentenced to a lengthy term of imprisonment the parent will probably be able to satisfy the court that "the kind of harm suffered by the child will neither continue nor be repeated",[20] and that "the parent will be capable of ensuring that the kind of harm suffered by the child will be neither continued nor repeated."[21] For the phrase "kind of harm" is backward looking and relates to the damage which has already been done. However, a child who has suffered the trauma of severe physical, and especially sexual, assault and abuse is particularly vulnerable and needs specialised care and attention. But the parent may be incapable of giving the child this specialised care. Yet a strict interpretation of S.29A would appear to prevent any order from being made.

It might be preferable for Parliament simply to repeal s.29A. This would allow the courts flexibility to develop the law in the light of the decision in *P* v *DSW*.[22] Alternatively, Parliament might be well advised to adopt the model of the "care or control" test which applies in England. Under the 1969 Act, the court must be satisfied of two matters before a ground for intervention is proved. First, that the child is in the condition alleged, and second, that he "is in need of care or control which he is unlikely to receive unless the court makes an order."[23] The merit of this two-limbed test is that the court can only make an order if satisfied that one is needed. Clearly the presence or absence of parental fault is a highly influential consideration. However, it is not determinative, and the combined focus of the two-limbed test is on the child's condition and the child's needs. It is suggested that, when properly applied, this test affords a fair balance between the rights of the parents and those of the child.

A more contentious matter is whether the grounds for intervention should permit an order to be made where harm has not yet been caused to the child, but where it is predicted. Here English law is presently more restrictive than New Zealand law. In England, before an order can be made, it must first be proved that another child has already come to harm and that this makes it probable that the child before the court will come to harm.[24] In New Zealand an order can be made where a child "is likely to be neglected or ill-treated."[25] Of course, in many cases in practice the evidence relied on to prove likely neglect or ill-treatment in New Zealand will be the evidence which must be adduced before probable harm can be proved in England. However, in New Zealand Parliament has vested the weight to be given to predictive evidence firmly in the courts. In England the courts are constrained by statute, so much so that there is reason to believe that the English courts have felt unable properly to exercise their protective function. Furthermore it has been suggested that on occasions they have made care orders[26] without the legislative authority to do so.[27]

[20] S.29A(2) (a).
[21] S.29A(2) (b).
[22] Op. cit. n.16; and see *DSW* v *T & O* (1983) 2 NZFLR 358.
[23] Children and Young Persons Act 1969, s.1(2).
[24] Ibid., s.1(2) (b), (bb).
[25] Children and Young Persons Act 1974, s.27(2) (c).
[26] A care order is the English equivalent of an order placing a child under the guardianship of the Director General of Social Welfare under the 1974 Act.
[27] M.D.A. Freeman, "Removing Babies at Birth". (1980) 10 Fam. Law 131. The recent D.H.S.S. *Review of Child Care Law* (1985) recommends that intervention should be permissible when harm is likely, and that the present restrictions should be removed.

Clearly, intervention should only be permitted by law where the facts warrant it. The difficulty with predictive evidence is that there may be no proper facts, only fears. The issue can arise when the child is of any age, but normally with an older child there will be some evidence of past neglect or ill-treatment, which may be stale, but which adds support to the current reasons given for present fears for the child. The most difficult and contentious cases are those where an application is made to remove a first-born baby from his parents at birth. Here the evidence can only be presented in terms of fears for the future, and the reasons for them will be founded on an accumulation of items which, added together, point to the child being at risk. Consider, for example, how decision-makers and legislators should respond to the following circumstances. A child has recently been born, his mother is aged eighteen. She is single and is living with a man who has been violent towards her and who is not the baby's father. The mother was sexually abused when a child. The stepfather came into state care because of physical ill-treatment from his parents. The baby was born prematurely after a long and difficult labour. For several days he was in an incubator and the mother had limited physical contact with him. There is no wider family to provide the family with help and support. Statistically, each of these factors on its own is a predictor of risk; when added together the chances of the child coming to harm are very high. Should such circumstantial evidence precipitate intervention? Or should the social workers and medical personnel inject as much support into the family as the mother and stepfather are willing to accept, but wait and see whether their fears are realised?

If the law permits the removal of such a baby into state care before harm has occurred, inevitably this means that some parents will be deprived of their child when, if given the opportunity to care for him, they would have given him adequate parenting. On the other hand, the dilemma posed by the newly born baby who appears to be at risk is his physical fragility. Paediatricians are only too familiar with the infant who is brought to hospital with unexplained bruises and fractures. Sadly, one serious assault on a baby can often prove fatal. Because of their size babies are easy to shake, but a severe shaking can leave a child brain-damaged, blinded or both. It may be that the child's right to be protected from anticipated harm outweighs the parent's right to look after him when the predicted harmful consequences can be so serious. Such an approach to the rights of the child gives considerable weight to the child's autonomy. Is it unacceptable? Undoubtedly it would penalise the poor and underprivileged, but is that a proper reason for finding it unacceptable?

It is suggested that if a decision is made to order the removal of a first-born child from his parents it should be made by a High Court judge in wardship. For subsequent decisions concerning the choice of foster parents and the frequency of access allowed to the parents take on a particular significance in the case of new born infants, and require careful monitoring. Furthermore, because of the exceptional nature of the case, accountability to a court is desirable. And, importantly, the aggrieved parents should not be subject to any time period (twelve months in New Zealand, three months in England) within which the statutory code prevents an application being made to the court for the restoration of their parental rights.

IV. Can There Be A Sound Base to Child Protection Law?

Child protection law must strike an acceptable balance between child, parent and state, and Parliaments, as the elected representatives of the people, should set the standards for intervention. However, it has been demonstrated above how easy it is for too precise drafting to create loopholes in the law which leave some children unprotected. On the other hand, if legislation is drafted too broadly prima facie this will permit intervention in circumstances which do not warrant the exercise of state power. An example occurs in s.27(2)(d) of the New Zealand Children and Young Persons Act 1974[29]. What parent in the land has never failed, or never been unwilling, to carry out the duty and care of parenthood? There is no direct parallel to this provision in English child protection laws. Its nearest equivalent allows a local authority to assume parental rights over a child, already in voluntary care. However, the parent's failure must have been consistent, without reasonable cause and such as to render the parent unfit to have the care of the child.[29] Furthermore, the courts have required proof of a high degree of culpability on the part of the parent.[30] In consequence some children have been exposed to unacceptable risks of harm, which have only been resolved by the High Court exercising its wardship jurisdiction.[31] It is submitted that despite the criticism which can be made of the New Zealand provision, namely that large numbers of children may at some point in their lives fall within the legislation's scope, that nonetheless it strikes a fair balance between parent, child and state. Can this submission be substantiated? It is suggested that it can be for the following reasons.[32]

The decision to institute care and protection proceedings is made in both countries after a multi-disciplinary case conference has discussed a pool of information about the child. It is here that an assessment is made of whether the child is at risk of further harm. Opinions are liable to vary, both about the level of risk, and on whether legal intervention is appropriate. Many cases will be filtered away from the courts by this process. Other steps will be taken by various professionals to assist the parents in properly fulfilling their parenting function, for example, family counselling and therapy may be provided, or additional child care facilities may be offered. Furthermore, the current climate of social work opinion in England and New Zealand generally favours court avoidance, and seeks to resolve family problems within a more conciliatory and therapeutic setting. But where a decision is reached that a child should be brought before the courts then, at this stage, the decision-makers should not be constrained from reaching this conclusion by an over-tightly drafted statute. Similarly, the statutory language which guides the judge should be sufficiently flexible to enable him to make a protective order in all those circumstances which, in his

[28] The parent (i) has failed or is failing to exercise the duty and care of parenthood; or (ii) is unable or unwilling to carry out the duty and care of parenthood."

[29] Child Care Act 1980, s.3(l) (b) (c).

[30] *O'Dare* v *South Glamorgan CC* (1982) 3 FLR 1; *W* v *Nottinghamshire CC* [1982] 1 All ER 1; *Wheatley* v *Waltham Forest LBC* [1979] 2 All ER 289.

[31] See *O'Dare* v *South Glamorgan CC* op.cit. n.30; *Wheatley* v *Waltham Forest LBC* op.cit. n.30; *Crosby* v *Northumberland CC* (1982) 12 Fam.Law.

[32] It is emphasised that this argument is addressed solely to children who are in need of care and protection. It is not addressed to those who are in need of control because of anti-social or delinquent behaviour.

view, merit it. This, of course, places an enormous burden on the judge, and he, like other decision-makers in the child protection field, is fallible.[33] But even though he will be given a very considerable discretion there is reason to believe that it will normally be kept under reasonable control. For the judge will not be making a decision in isolation. He will be presented with both fact and opinion evidence. Child, parents and state authority are all likely to be legally represented. The judge will be aware, or will be warned, of the dangers of relying on predictive evidence; and the burden of proof throughout lies on the intervening authority. He will naturally be cautious before concluding that a parent is unfit or unable to care for his own child. Furthermore, he will be guided in his assessment of whether the child's condition requires his removal from the home by the professional judgments of other experts. In all, it is submitted that the forensic framework will impose its own restraints, and that broadly drafted legislation will not lead to large numbers of children being taken, wrongly, from their homes.

It is suggested that child protection legislation should focus both on the child and on his parents. But it is further suggested that a child protection framework which fails to separate and identify the child's rights and the child's needs from those of his parents is inevitably flawed. In particular it draws decision-makers into the trap of looking for culpability, whereas proof of fault and the proper recognition of the child's rights and needs may turn on different considerations. Undoubtedly, the relationship between parent and child is complex, and often the child's rights will best be served by affording proper recognition to the parent's rights. Nonetheless it is maintained that the only sound base to child protection law is one which recognises the individuality and autonomy of the child and which builds on this foundation.

[33] In England, child protection cases are decided either by benches of three lay magistrates or by stipendiary magistrates.