The Role of Social Science in Contemporary Family Law

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Why Did You All Register?

- Growing interest in the intersection of social science and the law
- Roles of each discipline within the other not much investigated in Australia – just assumed
- This is not a “how to” seminar
- So - sit back, absorb and ponder!
- Consider new ways to view the system you work in
- Lawrie and I have been disagreeing - and agreeing - for years – so you will hear differing ideas
What I Will Cover

• Social science was embedded from the start

• It has many places of influence:
  1. in family law policy
  2. in the courts
  3. in the legislation
Counsellors in the Court!

- Family Court of Australia devised in the 1970’s – a time of great social change in Western world
- 1973 USA – Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child*
- Innovation – counsellors in the court
- “When I arrived it was a scene of great disorganisation ... I, as did others, wandered around with a copy of the Family Law Act, trying to see what we should be doing. There seemed to be little or no plan for the [counselling] staff to be integrated into the system.”
  
  – Audrey Marshall (first Director of Court Counselling, Sydney)
In the Cases from the Start

• Bryant CJ, *Judicial Conference of Australia*, 2012
  – Used 2 very different cases from 1976 to expose the ‘exquisite dilemma in the use of extrinsic materials’ by judges

• *Raby, FCA, 1976*
  – Examined SS materials - article by Chisholm and Petrie + Goldstein et al and others - to assist in determining whether there was a still a maternal preference
  – Concluded that ‘the suggested “preferred” role of the mother is not a principle, a presumption, a preference, or even a norm.’

(per Watson, Fogarty and Lindenmayer JJ)
Epperson and Dampney – 1976

NSW Court of Appeal per Glass JA

I am directed by authority to apply the common knowledge possessed by all citizens of the ordinary human nature of mothers. That knowledge includes ... awareness that young children are best off with both parents, but if the parents have separated, they are better off with their mother. ... the mother’s attachment is biologically determined by deep genetic forces which can never apply to [fathers and step-mothers].

• Not a specialised court
• No reference to social science
The CJ’s ‘Exquisite Dilemma’

Can Law & Social Science Mix?
Law and Science: Inherently Different

**Law**

- Binary nature - something must be one way or another (Finley)
- Uses power of inclusion and exclusion (this is DV; that is not)
- Adversarial + case specific
- Seeks to resolve conflict and create certainty

**Science**

- Investigative, speculative ... and thoroughly fallibilist – sooner or later ideas may be discarded (Haack)
- Tentative and generalising
- Contested – and content with that
Social Science in Family Law Policy
Best Interests of the Child

• In line with emerging child development and divorce literature of 1960’s and 1970’s
• But perhaps this is just a façade?

Re: Marion (1992)

High Court (per Brennan J citing Prof Ian Kennedy)

[BIC] ... is not really a test at all. Instead, it is a somewhat crude conclusion of social policy. It allows lawyers and courts to persuade themselves and others that theirs is a principled approach to law. ... and allows the courts to atomise the law, to claim that each case depends on its own facts. **The court can then respond intuitively to each case while seeking to legitimate its conclusion by asserting that it is derived from the general principle contained in the best interests formula.**
FRG’s and Social Science

• By mid 1980’s father’s rights groups (FRGs) claiming that FCA biased against them
• Gender wars of family law policy really began
• Martha Fineman (USA 1980s):
  – Suggested that the ‘fetish for gender neutrality’ of the best interests test and its ‘rhetoric of joint custody silenced mothers’ claims for sole custody arrangements’ - their concerns could not be expressed through the existing and accepted discourses
• Susan Armstrong (Australia about the mid 1990s):
  – Demands of FRGs synchronised with the prevailing child welfare view that father absence was the most damaging outcome of divorce
1995 *Family Law Reform Act*

- Enshrined a child’s right to contact with both parents
- Parents (particularly fathers) interpreted this as *their* right to contact with their children
- A pro-contact culture emerged
  - Fewer unsupervised and no contact orders (at interims)
- There was an increase in litigation and fathers increasingly became applicants in family law proceedings
- But FRGs were not satisfied
2003 Joint Custody Inquiry

- FRGs instrumental in triggering Inquiry
- Prime Minster John Howard announced it in Parliament
- Terms of Reference included:
  ... whether there should be a presumption that children will spend equal time with each parent, and, if so, in what circumstances such a presumption could be rebutted.
Introduction of a Presumption

• That equal shared parental responsibility (ESPR) is in the best interests of children
  *(sounds a bit like social science!)*

• Linked to time when applied
  - consider whether equal time is BIC; and
  - consider whether equal time is reasonably practicable; and, if so →

  consider making an equal time order

If not, consider a making a substantial and significant time order by same process
Problem with the Presumption

• Parades as a social science ‘truth’
• But this is legislation not a social science text
  o Some legal authors who use social science data present them as though they reflect and represent a coherent world of rationality, of truths and of values. (Fineman)

• Presumptions are really legal fictions:
  o A legal fiction is ‘wholly safe only when it is used with a complete consciousness of its falsity’. It becomes dangerous ‘as recognition that it is in fact false diminishes’ (Smith)

• Was intended to limit discretion
What we (sort of) know about shared care

- It works really well for some kids – co-operative, child focussed parents, flexible, live close
- Frequent transitions are often difficult to manage
- Longer periods of contiguous nights means longer absences
- Where parental conflict - kids can feel ‘caught in the middle’
- But kids sometimes say they want equal time to ‘keep the peace’ between their parents
- The research about young children and shared care is very contested – attachment theory not simple (see (2011) 25 AJFL)
- There are lots of changes in post-separation arrangements – often informal
- Shared care quite often drifts to primary – usually M – but sometimes F – particularly with older kids
- But primary care also drifts to shared
Social Science in the Courts
Judges Reached for Social Science to Understand the New Law

• Shared care

• s 60CC(2)(a) benefit of a meaningful relationship with both parents

• Family violence

• s 60CC(2)(b) protection from harm and abuse

• The two primary ‘best interests’ considerations – predictive / philosophical?

• But what is the legal basis for doing this?
  – s 144 Evidence Act 1995 (Cth)? Judicial notice?
A Couple of Shared Care Cases

- ‘Social facts’ – Carmody J – Murphy (+ 30 refs) and Dylan (+ 20)
- Full Court in Dylan:
  - Some sublime articulations of legal principles and of the philosophies and policies underpinning them appear in cases in which the expression was not strictly necessary to the disposition of the particular cause. However, usually, the statements … were made by appellate courts, with a responsibility for development and explication of the law.
- Non-reliance – ‘background’ - Altobelli FM
- Salvati v Donato (No 2) – 5 primary refs (+ 6 more within)
  - This research is background material to my judgment. It is not evidence. It is not material in respect of which I take judicial notice, and I make no findings of fact as a result of this material. … it assists in understanding the expert evidence provided by the Family Consultant. One also lives in hope that parents might learn from it.
Judge used SS research to formulate questions to experts
Appeal unsuccessful – issues ventilated through evidence - but Full Court not impressed:

Natural justice and procedural fairness are the cornerstones of our judicial system. Transparency is also integral ... Whilst judicial officers cannot be expected to be hermetically sealed and protected from knowledge of matters other than those which occur in court during the course of a trial, they should be vigilant to ensure that any matters which may assume significance which are derived from sources other than those emerging in open court during the course of proceedings should be revealed in open court, so that the parties and their legal representatives may challenge, refute or otherwise engage with them.
CJ’s comments on use of extrinsic material:

- *McGregor* must put in doubt any tacit support for use of extrinsic materials as ‘background’
- Background should emerge from admissible evidence or be a matter of consensus
- Litigants cannot be supposed to accept that materials cited were not relied on or influential
- Social science is contestable:
  - ‘there may be differing views as to what is, or is not, the contemporary orthodoxy’
Social Science

in the FLA?
Context and Use of ‘Typologies’ in Australia

• Came to attention of family law community in Australia in 2007
• Benchmarking Report of Australian Institute of Family Studies
• Has been used in judgments:
  – directly (cited)
  – indirectly (not cited but implicitly informing)
• Used in training and professional devt programs
• One aspect of *Family Violence Best Practice Principles* – for use by judges and everyone
• BUT there is vocal criticism of this approach
Descriptions of the ‘Types’

Best Known Version – J Kelly and M Johnson

Four Types

- **coercive controlling violence** - ‘a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners’

- **violent resistance** – reacting violently to a partner who uses coercive controlling violence

- **situational couple violence** – ‘does not have its basis in the dynamic of power and control’ but results from ‘situations or arguments between partners that escalate on occasion into physical violence’

- **separation instigated violence** – violence that first occurs in a relationship after the couple have separated
s 4AB FLA as amended 2011

• Definition of family violence

... *family violence* means violent, threatening or other behaviour by a person that *coerces* or *controls* a member of the person’s family ... or causes the family member to be fearful.
New Definition and the Typologies

• New definition uses some of the same language as the typologies
• May be understood to mean Kelly and Johnson’s ‘coercive and controlling violence’
• Scholars and judges have made this connection in articles, speeches and judgments
• Eg. Parkinson, Strickland J, Chisholm, Brown FM
ALRC rejected the typology literature:

- concerned about the meaning and parameters of each category and the problem of mutual exclusivity
- ‘... the task of defining the typologies with any degree of certainty and precision appropriate for legislative application is fraught with difficulties’
- ‘... legislative inclusion of the typologies could lead to a rigid and artificial hierarchy and ... misapplication’
Problems with the Typologies in Law

• It is selective – a theory about FV held by some scholars
• Many social scientists don’t use that theory at all
• It is contested and changeable
• What are the boundaries & parameters between each type?
• May ‘seem to offer a highly attractive simple demarcation’ (Wangmann, 2011)
• Lawyers like to categorise – back to the binary
• Altobelli, 2009

... there are inherent dangers in the differentiation process. Not only does accurate differentiation depend on the existence of clear evidence but also on the skills and experience of the one undertaking the differentiation
Exclusionary

• Law’s reductionist tendency – one thing or the other
• Is this coercive controlling violence or situational couple violence or separation instigated violence?
• The definition could be rendered quite narrow – only Johnson’s CCV or fear
• Situational couple violence, violent resistance and separation instigated violence would not be ‘family violence’ under FLA
• BUT they are just different kinds of FV according to Johnson
Do we want it to be all over?

• Altobelli FM in *Roth and Roth* – justifying his use of technical scientific articles:
  – Argued that, if there is no clear legal basis for admitting the material, perhaps it should be developed as a ‘category of its own’
  – Had regard to the importance of both scientific and social science research in family law parenting matters:
    • To exclude this knowledge would otherwise lead to determination of the best interest of children being entirely ‘surrendered into the hands of the litigants’. This is surely inconsistent with contemporary approaches to child-focussed decision making.
CONCLUSION

• Why have we been demanding judicial education on matters of social science?
• Why do lawyers and social scientists attend the same conferences and read some of the same research literature?
• We want this body of knowledge drawn on
• But risks:
  – There is no current legal basis so judges may be opaque about their use
  – Without clear guidelines there is no protection against selective use, misuse and misinterpretation
  – There is no guarantee of natural justice
• Should be an inquiry into the appropriate use of SS which can recommend guidelines
Selected References

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• M Kearney, ‘The Scientists are Coming: What are the courts to do with social science research’ 15th National Family Law Conference, Hobart, 2012
• J Kelly and M Johnson, ‘Differentiation Amongst Types of Intimate Partner Violence: Research Update and Implications for Interventions’ (2008) Family Court Review 476
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• L Moloney, B Smyth, R Weston, N Richardson, L Qu and M Gray, Allegations of family violence and child abuse in family law proceedings: A pre-reform exploratory study, Australian Institute of Family Studies, 2007
Cases Discussing Use of SS Literature

- *Allen v Green* [2010] FamCA 14
- *Aytugrul v R* (2012) 286 ALR 441
- *Baranski v Baranski* (2012) 259 FLR 122
- *Dylan v Dylan* [2008] FamCA 55
- *Dylan v Dylan* [2008] FamCAFC 109
- *McCall v Clark* (2009) 41 Fam LR 483
- *McGregor v McGregor* [2012] FamCAFC 69
- *Murphy v Murphy* [2007] FamCA 795
- *In the marriage of Raby* (1976) FLC 90-104.
- *Roth v Roth* [2008] FMCAfam 781
- *Salvati v Donato* [2010] FamCAFC 263
- *SCVG v KLD* [2011] FamCAFC 100
Cases Using Typology Literature

• Carlton & Carlton [2008] FMCAfam 440
• Carrow and Burke [2009] FMCAfam 603
• Kucera and Kucera [2009] FMCAfam 1032
• Dafoe and Dafoe [2011] FMCAfam 151
• Maluka v Maluka [2009] FamCA 647
• Maluka v Maluka (2011) 45 Fam LR 129
• Watkins & Minnow [2010] FamCA 1059

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Cases Dealing with FV Since 2011 Reforms

Family Court of Australia

- *Schieffer & Schieffer* [2013] FamCA 168, 20 March 2013, Austin J

Federal Magistrates Court of Australia

- *Gipson & Gipson* [2012] FMCAfam 774, 2 August 2012, Lapthorn FM
- *Carra & Schultz* [2012] FMCAfam 930, 31 August 2012, Hughes FM
- *SR & NH* [2012] FMCAfam 1198, 18 October 2012, Riley FM
- *Parr & Rolfe* [2012] FMCAfam 1246, 5 November 2012, Scarlett FM
- *Chapa & Chapa* [2012] FMCAfam 1420, 18 December 2012, Halligan FM
- *Bell & Bell* [2013] FMCAfam 6, 21 March 2013, Pascoe CFM
- *Kapoor & Shah* [2013] FMCAfam 256, 22 March 2013, Kemp FM

- With acknowledgements to Justice Strickland for this list