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Author

Rathus, Zoe

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Articles

A call for clarity in the use of social science research in family law decision-making

Zoe Rathus AM *

The article addresses the proclivity of family law judges in Australia for using social science research material at the point of decision-making and argues there is a lack of clarity about the legal basis on which this occurs. It analyses the relevant rules of evidence regarding the reception of extrinsic materials and demonstrates the difficulties associated with the use of those rules in the case of social science research. It then examines a range of cases from the first year of operation of the Family Court of Australia until the present day, to trace judicial use of social science literature and demonstrate the confusion surrounding the legal basis for its use. The article argues that the necessarily selective use of social science literature in these cases reveals the possible risks of judicial referencing of specific research in this complex and contested field of scholarship and practice. Finally the article considers the Family Violence Best Practice Principles 'for use in parenting disputes when family violence or abuse is alleged' and argues that these do not resolve the jurisprudential problems. The article touches briefly on some possible procedures and approaches that could be considered to deal with some of the identified concerns and concludes that, to continue the productive partnership between family law and social science, this area of law and legal practice is in need of urgent review and reform.

Introduction

Over the last few years there seems to have been an increase in the extent to which family law judges are turning to the social sciences in their decision-making.¹ In many ways this practice is to be applauded. Social science practitioners have worked along side family lawyers and family law

* Senior Lecturer in Law at Griffith University, Brisbane. This article is dedicated to the doctors, nurses and health care workers at the Intensive Care Unit and Haematology Team at the Royal Brisbane and Women's Hospital who saved my partner's life during the time I started to write. Many people have assisted me to bring this to the point of publication. I particularly wish to thank Professor Richard Chisholm AM and my colleague Dr Kylie Burns. I also thank Professor Julie Stubbs, Donna Cooper, Professor Gary Edmond and Dr Jane Wangmann who looked at various versions and my late friend Federal Magistrate Keith Slack, who sadly passed away in December, 2011 and who, until nearly the end, was sending me the most recent decisions - with comment!

¹ This topic will form the basis of a plenary session at the 15th National Family Law Conference, Family Law Section, Law Council of Australia in Hobart in October 2012 and is on the program for the 27th Annual Calabro SV Consulting Family Law Residential — Day 1 in August. It has also been on the program at a range of conferences since 2006 and is a topic of significant interest to the family law community. See T Altobelli, 'The Effective Use of Social Science Research in Family Law in Australia' *12th National Family Law Conference*, Perth, Family Law Section, Law Council of Australia, 2006; Women's Legal Services NSW, 'How to Win Cases and Influence Judges: Using Social Science Research in

judges since the establishment of the Family Court of Australia in 1976.² The new court included an in-built counselling section and family reports (originally called ‘welfare reports’) which have been a regular feature of parenting proceedings from the beginning.³ There is also a long history of judicial officers referring to social science research in their judgments, the practice having commenced in the first year of operation of the court.⁴ The community now expects judges to undertake education about issues central to family law cases, such as gender, race, family violence and mental health.⁵ Much of the information and knowledge absorbed through such education is drawn from the social sciences.

Judges look for ways to understand the complex cases over which they have to preside. The families who commence litigation are often those experiencing violence, abuse, substance misuse or conflict. The judge must sift through disputed facts to determine what might be in the best interests of the children — the paramount consideration in family law.⁶ It is not surprising that in this sphere of family disruption and intimate conflict some judges reach out to the social sciences to ‘fill the gap’⁷ between the facts and the law. Given the potential influence of such material on decision-making, it is important that there is certainty about the status of such material when it enters the court room.

Family law trial judges⁸ and appellate courts have described a range of options relating to the status of the material and discuss various legal bases for reference to social science research including judicial notice, s 144 of the Evidence Act,⁹ and some specific sections of the Family Law Act 1975 (Cth) (FLA), including, most recently, s 69ZT.¹⁰ In contrast, some cases make no mention of any legal basis that allows the material to be used, while others

Family Law Matters’, National Association of Community Legal Centres Conference, Perth, 2009 and papers on Family Violence at the Family Law Intensive, Family Law Section, Law Council of Australia, Melbourne.

2 H Rhoades and S Swain, ‘A Bold Experiment? Reflections on the Early History of the Family Court’ (2011) 22(1) *AFL* 11.

3 A quick search for ‘welfare reports’ in the first volume of CCH’s *Australian Family Law Cases* reveals many cases in which welfare reports were ordered (under the original Family Law Act 1975 (Cth) s 62(4)) and their benefits discussed. See, eg, *In the Marriage of Ryan* (1976) FLC 90-144 and *In the Marriage of Wood* (1976) FLC 90-098.

4 See, eg, *In the marriage of Raby* (1976) FLC 90-104.

5 The first judicial education event for family court judges of which I am aware was organised by the Gender Awareness Committee of the Australian Institute of Judicial Administration after Justice Neil Buckley had undertaken a study tour to Canada, the United States and the United Kingdom. Held in Queensland in 1994 speakers included Professor Kathleen Mahoney of the University of Calgary, a world renowned pioneer of judicial education and Professor Regina Graycar, an Australian scholar and innovator in feminist jurisprudence. See Z Rathus, *Rougher Than Usual handling: Women and the Criminal Justice System*, 2nd ed, Women’s Legal Service, 1995, pp 192–3.

6 Family Law Act 1975 (Cth) s 60CA (FLA).

7 K Burns, ‘The Way the World Is: Social facts in High Court negligence cases’ (2004) 12 *TLJ* 215 at 237.

8 I use this term to describe judges in the Family Court of Australia and Family Court of Western Australia and federal magistrates in the Federal Magistrates Court.

9 Evidence Act 1995 (Cth).

10 See the discussion in Part III about *McGregor v McGregor* [2012] FamCAFC 69; BC201250279 (28 May 2012). Other sections include FLA s 69ZN and s 69ZX(3).

have said that, although the material was discussed, it was not evidence and was not being relied on. Some of these latter cases specifically exclude judicial notice or s 144 of the Evidence Act as the legal bases relied on for the entry of the material but did not nominate a clear alternative. The concept of judicial access to ‘social facts’¹¹ has been canvassed and even the suggestion of a ‘category of its own’ made.¹² It is arguable that there is a lack of clarity as to the status of social science research and the proper process to adopt to ensure its fair and appropriate use. This means that parties may be unprepared or uncertain about how to challenge cited research which is detrimental to their case.

The nature of social science literature also raises concerns about its use by judges in their decision-making. There is not usually just one social science view about an issue, so reference to any article (or even a set of articles) by a judge will necessarily be selective. This could lead to a focus on propositions that are not widely held, but rather are the views of a particular scholar or group of scholars. Social science is by its nature changeable and debateable but in some recent cases judges have drawn quite extensively from particular literature about both shared parenting after separation and family violence — areas of significant contestation within the social sciences.¹³

Although the Full Court of the Family Court has generally been uncomfortable with extensive referencing of social science literature by judges, paradoxically the use of social science in the courts has been arguably encouraged, or even endorsed, by the adoption of a set of *Family Violence Best Practice Principles* ‘for use in parenting disputes when family violence or abuse is alleged’ (the *Best Practice Principles* or BPP) in 2011.¹⁴

Part I contains a brief analysis of the relevant rules of evidence regarding the reception of extrinsic material, paying attention to the possible consequences of the recent High Court decision of *Aytugrul v R*¹⁵ which potentially abolishes the possibility of judicial use of social science literature which has not come through an expert witness.

Part II examines the use of social science literature in select cases from two different time periods — the mid 1970s and the mid 1990s. This part will demonstrate the change in jurisprudence around its use and highlight connections between the social science research being cited and prevailing research and policy trends.

Part III describes the ways in which social science research has been used in family courts since the 2006 amendments¹⁶ and analyse trial and appellate judicial discussion about the status of the material, the basis of its admission and the way it can be relied on or used. Part IV briefly examines aspects of the

11 This is simply the tradition of judges making statements about facts of the wider world. It will be discussed in some detail in Part I.

12 See the discussion of this point in *Roth v Roth* [2008] FMCAfam 781 (25 July 2008) later.

13 These two issues reflect the primary considerations in the list of factors to be taken into account when determining the best interests of a child: FLA s 60CC(2)(a) and (b).

14 Family Court of Australia and Federal Magistrates Court of Australia, *Family Violence Best Practice Principles*, July 2011, at <<http://www.familylawcourts.gov.au/wps/wcm/resources/file/eb6f65040e33d79/FVBPP%20Report%20Final%20July%202011.pdf>> (accessed 21 September, 2011).

15 (2012) 286 ALR 441; 86 ALJR 474; [2012] HCA 15; BC201202158 (18 April 2012).

16 Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

Best Practice Principles to ascertain whether or not they provide guidance as to how social science research can be fairly and appropriately incorporated into family law decision-making.

In conclusion it is argued that insufficient attention has been paid to the legal basis of the use of the social science material within the courts and this is creating uncertainty and potential unfairness. The *Best Practice Principles* do not, it is suggested, solve the problems. Some approaches to the issues that are worthy of examination are proposed and it is concluded that this is an area ripe for review.

Part I: Extrinsic material and the rules of evidence

Before examining what has happened in family law cases over the years regarding the use of social science literature it is important to understand the rules of evidence relating to the reception of extrinsic material into the courtroom.

Judicial notice

Traditionally, one of the most common mechanisms used by judges to introduce extrinsic material into their decision-making is the doctrine of judicial notice. This is an exception to the rules of evidence. While generally 'all the facts in issue or relevant to the issue in a given case must be proved by evidence', judicial notice allows a court to declare that a fact exists even though its existence 'has not been established by evidence'.¹⁷ In its 'classical application' it 'operates to relieve the parties of the burden of proving notorious facts'.¹⁸ Judicial notice of notorious facts can be taken without inquiry or after inquiry.¹⁹ The latter kind of judicial notice is the one most relevant to the discussion in this article. But even where judicial notice is taken after inquiry:

the inquiry must be into the 'common knowledge of educated men' as revealed in 'accepted writings', 'standard works' and 'serious studies and inquiries' . . . In short, matters judicially noticed at common law must be indisputable.²⁰

In the context of family law, by the end of the 1990s Graham Mullane²¹ contended that family law judges were 'consciously or unconsciously' increasingly taking judicial notice of some social facts regarding family violence. Writing extra-judicially he observed that this was occurring 'in the context of the ongoing public debate' on the subject²² and provided a number of examples including:

¹⁷ J Heydon, *Cross on Evidence*, 7th ed, LexisNexis Butterworths, 2004, p 143.

¹⁸ *Ibid*, pp 144–5. An example of the former often cited is that there is no need to prove that Christmas Day is celebrated on 25 December.

¹⁹ *Ibid*, pp 146–50.

²⁰ Per Dixon J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; [1951] ALR 129; (1951) 24 ALJR 485; BC5100030 as cited by Heydon J in *Thomas v Mowbray* (2007) 233 CLR 307; 237 ALR 194; [2007] HCA 33; BC200706044 at [619].

²¹ Then a sitting judge on the bench of the Family Court of Australia.

²² G Mullane, 'Evidence of Social Science Research: Law, practice, and options in the Family Court of Australia' (1998) *ALJ* 434 at 446. The instances may include judicial notice both without and after inquiry.

- That witnessing family violence can cause children serious emotional problems.
- That a boy who witnesses his father use violence against his mother is more likely to use personal violence in his personal dealings.²³

These examples are key learnings on family violence that were generally accepted in the literature and by practitioners. Mullane identified the limits of what would be admissible, stating that judicial notice ‘could not be stretched to justify the direct adoption of research which is not generally known or is controversial’.²⁴ As will be seen in the examination of the post 2006 cases in Part III, it is suggested that this is precisely what is happening now. The level of sophistication and specificity of the works referred to is different from the earlier years. Some judges are adopting particular research ideas from complex research and incorporating them into their decision-making. This exacerbates problems caused by the selective nature of the practice, as a judge can only cite a fragment of the available works, and raises questions about what role these kinds of complex materials should have in judicial decision-making.

Section 144 of the Evidence Act

When the Commonwealth Evidence Act was introduced in 1995, s 144 was seen largely as a codification of the doctrine of judicial notice. It states:

Matters of common knowledge

- (1) Proof is not required about knowledge that is not reasonably open to question and is:
 - (a) common knowledge in the locality in which the proceeding is being held or generally; or
 - (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
- (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
- (3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.
- (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

Critically, when considering the use of social science research by judges the tests this material must pass are that it must not be ‘reasonably open to question’ and it must be either ‘common knowledge’ or authoritatively ‘capable of verification’. Then, if it passes those very difficult tests, the provisions of s 144(4) regarding notice and procedural fairness must be

²³ Mullane, above n 22, at 446. Mullane saw these facts entering the courtroom under the common law doctrine of judicial notice, not s 144 of the Evidence Act, which had only been enacted for a short time when he wrote.

²⁴ Mullane, above n 22, at 446.

followed for the material to actually be admitted, or perhaps more accurately, be material before the court.²⁵

Although s 144 clearly encompasses the idea of judicial notice, authoritative commentaries such as *Cross on Evidence* have suggested that the ‘common law principles of judicial notice [continue to] operate alongside’ the section.²⁶ This may have meant that judicial notice could be taken of a fact in a manner that is outside of the framework of s 144. However, the High Court seems to have conclusively closed down any distinction in *Aytugrul v R*,²⁷ a murder case where the trial had centred around certain technical scientific evidence regarding DNA testing. In his dissenting judgment on the Court of Appeal McCellan CJ at CL referred to literature, not about the evidence itself, but about the impact of giving that evidence to a jury in a particular way — it was the psychology of juries at issue rather than the scientific information itself. The appellant then incorporated some of that literature into his appeal to the High Court. The majority followed an earlier decision²⁸ and held that ‘there would appear to be no room for the operation of the common law doctrine of judicial notice, strictly so called, since the enactment of the Evidence Act 1995 (NSW), s 144’.²⁹

The majority³⁰ took the view that the appellant was trying to establish a ‘general rule’³¹ about this way of giving evidence derived from the literature and found that ‘knowledge of the proposition in question could not be said’ to pass the requirements of s 144(1).³² They continued:

No proof was attempted, whether at trial or on appeal, of the facts and opinions which were put forward (by reference to the published articles) . . . And absent the proof of such facts and opinions (with the provision of a sufficient opportunity for the opposite party to attempt to controvert, both by evidence and argument, the propositions being advanced) a court cannot adopt such a general rule based only on the court’s own researches suggesting the existence of a body of skilled opinion that would support it.³³

These remarks seem largely to close the door on judges using social science literature in their decision-making at all (unless it has come in through an expert witness) and it will be interesting to see whether reference is made to *Aytugrul* in the Family Courts in the near future.³⁴ There is arguably a small chink still open when a judge refers to the literature but it is said that she or

25 Usually the term ‘admitted’ relates to evidence, whereas material that is judicially noticed is not evidence — indeed it is an exception to the rules of evidence.

26 Heydon, above n 17, p 173. Mullane agrees that the common law concept of judicial notice has not been extinguished by s 144. See Mullane, above n 22, at 443.

27 (2012) 286 ALR 441; 86 ALJR 474; [2012] HCA 15; BC201202158.

28 *Gattellaro v Westpac Banking Corporation* (2004) 204 ALR 258; 78 ALJR 394; [2004] HCA 6; BC200400236.

29 *Aytugrul v R* (2012) 286 ALR 441; 86 ALJR 474; [2012] HCA 15; BC201202158 at [21] per French CJ, Hayne, Crennan and Bell JJ. The Evidence Act 1995 (NSW) is identical to the Commonwealth Evidence Act.

30 Per French CJ, Hayne, Crennan and Bell JJ.

31 (2012) 286 ALR 441; 86 ALJR 474; [2012] HCA 15; BC201202158 at [22].

32 *Ibid*, at [21].

33 *Ibid*, at [22].

34 No reference to this case by the Family Court of Australia, the Full Court or the Federal Magistrates Court could be found at the time of writing.

he is not *relying* on it. It will be demonstrated in Parts II and III that there is a recurring theme of the Full Court of the Family Court accepting this proposition, therefore allowing the reception of the material to stand outside of any categorising (s 144(1)) or procedural fairness (s 144(4)) requirements of the Evidence Act or judicial notice. It will be argued that this is an unsatisfactory practice that should not be encouraged. Once materials have been referenced it is likely that they will influence judicial thinking and will almost certainly be perceived to have done so by the parties before the court.

Legislative facts

The minority judgment of Justice Heydon³⁵ in *Aytugrul* explains that there are two broad kinds of facts in litigation — ‘adjudicative’ facts and ‘legislative’ facts. ‘Adjudicative facts are those facts which are in issue or are relevant to a fact in issue and are determined by the jury, or, in non-jury trials, by the trial judge.’³⁶ In family law cases this would consist of the detail set out in the parties’ and witnesses’ affidavits and oral evidence. On the other hand, ‘[l]egislative facts are those which help the court to determine what a common law rule should be or how a statute should be construed’.³⁷ In this case, according to Heydon J, the legislative facts would be ‘found in the expert material’ (ie, the research literature).³⁸ They do not relate to the particular case.

In Heydon J’s opinion, the courts have viewed legislative facts as being matters of “common knowledge” in a sense much wider than that used in s 144³⁹ to the extent that ‘they have resorted to legislative facts even though they could not be said to be “not reasonably open to question” because minds differ about them’.⁴⁰ However, he was discomforted by the use of the particular material in this case declaring that ‘the level of technical sophistication involved in [this material] . . . is so great that it would not be satisfactory for this court to take it into account without the assistance of expert witnesses who had been cross-examined’.⁴¹ This would seem to suggest that the complex and contested nature of much social science research also renders it unable to be defined as legislative fact.

Social facts

The use of legislative facts by judges is part of a long tradition or custom of judges using social facts (referenced and unreferenced) in their decision-making. Burns has investigated the use of social facts in High Court negligence cases and explains that they include statements about human

35 Justice Heydon has extensively discussed these issues judicially and extra-judicially. See *Thomas v Mowbray* (2007) 233 CLR 307; 237 ALR 194; [2007] HCA 33; BC200706044 and J Heydon, ‘Developing the Common Law’ in J Gleeson and R Higgins (Eds), *Constituting Law: Legal Argument and Social Values* The Federation Press, 2011, p 93.

36 *Aytugrul v R* (2012) 286 ALR 441; 86 ALJR 474; [2012] HCA 15; BC201202158 at [70].

37 *Ibid*, at [71].

38 *Ibid*, at [71].

39 *Ibid*, at [74].

40 *Ibid*, at [74].

41 *Ibid*, at [74].

behaviour, the nature of society and social values.⁴² Although Australian judges regularly make use of information from the wider world, particularly at appellate level,⁴³ this reality has not received much judicial or scholarly attention and is perhaps not always recognised. In an examination of family law cases at the end of the 1990s Mullane suggested that '[e]vidence of social science research is useful to prove issues of social fact'.⁴⁴ He made the point that such research has been used by judges to prove social facts in the United States for over a century. According to both Mullane and Burns, Australian judges often cite no references when they pronounce social facts.⁴⁵ Interestingly, in the post 2006 family law era, it seems that social facts are being accessed through social science research and the case of *Murphy v Murphy*,⁴⁶ will be discussed as a rare instance in which this concept is named.

A complicating feature of the jurisprudence in this area is that the use of social facts by judges appears usually to be limited to appellate courts. Certainly it is at appellate level that the use of social facts as *legislative* facts — to elucidate the law — seems most appropriate. However, a detailed analysis of the jurisprudence dealing with the use of social facts by courts has not been undertaken in family law.

Scholars in the United States have proposed a third category of facts⁴⁷ called 'social framework' which involves 'the use of general conclusions from social science research to determine factual issues in a specific case'.⁴⁸ In Part III it will be seen that this concept may come closer to what Carmody and Benjamin JJ (in *Murphy*⁴⁹ and *Maluka*⁵⁰ respectively) were desirous of achieving and would be worth exploring in any future review or clarification of the processes under discussion in this article.

Discussion

Although judicial notice or s 144 of the Evidence Act are often proffered by family court judges as the legal basis for the admission of social science literature it may well be that the High Court has now made this almost

42 Burns, above n 7, at 220

43 Mullane, above n 22; Burns, above n 7; A Serpell, 'Social Policy Information: Recent Decisions of the High Court of Australia' (2011) 21 *JJA* 109.

44 Mullane, above n 22, at 435.

45 Mullane used the data from a survey of 151 judgments of Family Court of Australia from 1990 to determine the ways in which judges used social facts. His study revealed that social fact findings were made in 30% of cases. In 60% of those the court provided no source for the statement while identified sources of research were only present in 1%. See *ibid.*, at 453; Burns, above n 7, at 221.

46 *Murphy v Murphy* [2007] FamCA 795; BC200750675 (20 July 2007).

47 In *Thomas v Mowbray* (2007) 233 CLR 307; 237 ALR 194; [2007] HCA 33; BC200706044 at [613] Heydon J suggested that there are *five* categories of facts 'which may have to be established in litigation'.

48 J Monahan and L Walker, 'Judicial Use of Social Science Research' (1991) 15(6) *Law and Human Behaviour* 571 at 580–1. For example, social science information about typical traits of abused children could be applied to assist a jury to understand otherwise 'puzzling aspects' of a complainant's behaviour. The authors suggest that this research has the general characteristics of legislative facts and the specificity of adjudicative facts.

49 *Murphy v Murphy* [2007] FamCA 795; BC200750675 (20 July 2007).

50 *Maluka v Maluka* [2009] FamCA 647; BC200950527 (24 July 2009) and *Maluka v Maluka* (2011) 45 Fam LR 129; (2011) FLC 93-464; [2011] FamCAFC 72; BC201150189.

impossible. Even if this over-states the consequences of *Aytugrul*,⁵¹ family court judges already allude to the boundaries of these bases and in other cases they expressly exclude them as possible avenues. The general attitude of the Full Court seems to be disapproval of judicial referencing of significant numbers of articles under any guise.⁵² This may just lead to trial judges drawing from the research without mentioning it and simply raises different concerns about transparency. Judges will always bring their own accumulated personal and professional knowledge into the courtroom⁵³ but perhaps when *particular* material is in the judicial mind this should be disclosed.

The practice of judicial use of social facts seems to encompass a wider range of facts than would be permitted by s 144 of the Evidence Act, but even this potentially wider category of information may not extend to include complex social science literature. Burns suggests that Australian rules of evidence have been designed to deal with adjudicative facts — the ordinary evidence in a case — ‘without any significant consideration of how to respond to the wider role of social facts in judicial decision-making . . . The reference to such material has apparently developed without any guiding principles as to authenticity, notice or necessary evidential support’.⁵⁴ It seems that defining social science research as ‘social facts’ will not provide a satisfactory legal basis for the use of such material.

Part II: Two snapshots of the use of social science in family law

The first year

By 1976, when the Family Court commenced operation, there was a growing array of literature about child development and marriage breakdown⁵⁵ but very little about violence in the family. Erin Pizzey’s ground-breaking book, *Scream Quietly or the Neighbours Will Hear* was only published in 1974 in the United Kingdom.⁵⁶ Therefore, in the case of *Heidt*⁵⁷ in 1976, Justice Murray would have had almost nowhere to turn in the established social

51 Perhaps the complexity of the proposition in *Aytugrul* will be a ground for distinguishing the case.

52 *Dylan v Dylan* [2008] FamCAFC 109; BC200850151 (23 July 2008); *SCVG v KLD* [2011] FamCAFC 100; BC201150258 (6 May 2011) and *Salvati v Donato* [2010] FamCAFC 263; BC201051271 (24 December 2010).

53 As the Full Court said in *Baranski v Baranski* (2012) 259 FLR 122; [2012] FamCAFC 18; BC201250070 (10 February 2012) at [154], we cannot expect judicial officers ‘to be hermetically sealed and protected from knowledge of matters other than those which occur in court during the course of a trial’.

54 Burns, above n 7, at 221–2.

55 See, eg, the range of literature from the 1950s, 1960s and early 1970s referenced in I Bretherton, ‘The Origins of Attachment Theory: John Bowlby and Mary Ainsworth’ (1992) 28 *Developmental Psychology* 759 and the materials cited in S White and K Mika, ‘Family Divorce and Separation: Theory and Research’ (1983) 6 *Marriage and Family Review* 175.

56 Queensland Domestic Violence Taskforce, *Beyond These Walls*, Brisbane, 1988, p 33. Rhoades positions the beginning of public discussion about family violence in Australia in 1977. See H Rhoades, C Frew and S Swain, ‘Recognition of Violence in the Australian Family Law System: A long journey’ (2010) 24 *AJFL* 296 at 304.

57 (1976) FLC 90-077.

science literature to assist her to understand the ramifications of the evidence before her of serious violence perpetrated by the husband against the wife. What did this mean for the best interests of the children in a parenting case? Subsequent to separation the husband had removed the three older children from their mother, leaving the 3 month old infant with her. Although Murray J ultimately awarded custody to the mother, in the course of her judgment she said:

there has been no suggestion that Mr Heidt has ever treated the children with the violence with which he has treated his wife. . . . The conduct however, of a parent in relation to custody is relevant only so far as it reflects upon his or her fitness to take charge of a child . . .⁵⁸ Mr Heidt's affection for his children is evident, and in assessing his potential as a custodial parent I have largely disregarded his behaviour as a husband.⁵⁹

This case has become infamous as an example of the lack of judicial understanding of family violence at that time,⁶⁰ but, arguably it was partly an absence of available research that required Murray J to settle on commonly, though erroneously, held views about domestic violence.⁶¹ Since then a massive literature on family violence has emerged and such ideas have been well and truly denounced by social scientists and others working in the area. *Heidt* is no longer good law⁶² and a growing knowledge of this research by the judiciary and legal profession has contributed to a changed view of the relevance of family violence.

But clearly the early court was not troubled about delving into social science literature. Less than 4 months after *Heidt*, in *Raby's* case⁶³ the Full Court of the Family Court heard an appeal against a decision to place another child who had been living with his father in the custody of his mother. In considering whether or not a 'maternal preference' operated in family law, the court firstly traversed significant case law on the point and then quoted extensively from an article by Richard Chisholm and Clare Petre which, in

58 Here two cases are cited: *Barnett v Barnett* [1973] 2 NSWLR 403; (1973) 2 ALR 19; 21 FLR 335 and *H v H & C* [1969] 1 All ER 262; [1969] 1 WLR 208.

59 *Heidt* (1976) FLC 90-077 at 75,362. The judge's insightfulness in respect of some of the husband's conduct should be noted. She explained that she believed that, despite his genuine affection for children, his motivation for removing them from his wife was to use them as a weapon against her: at 75,362.

60 She was cited in A Thacker and J Coates, *Submission to the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act*, National Committee on Violence against Women, OSW, Canberra, 1991, p 17.

61 This myth is still being dispelled. See Domestic Violence London, 'Understanding Victims: Myths Dispelled' in *A Resource for Health Practitioners*, at <<http://www.domesticviolencelondon.nhs.uk/2-understanding-victims>> (accessed 4 May 2012). This is an example of potentially dangerous judicial reliance of what might be considered 'social facts'. It demonstrates the problems of reliance on unreferenced 'social facts' which has been criticised in the context of High Court negligence cases. See Burns, above n 7.

62 It is notable that in 1995 Murray J published something of a retraction of her statements in *Heidt*: 'the dictum that "a man can be a bad husband but a good father" is rapidly becoming outmoded where domestic violence is perpetrated by him upon the mother, either in or out of the presence of children'. See K Murray, 'Domestic Violence and the Judicial Process: A Review of the past 18 Years — should it change direction?' (1995) 9(2) *AJFL* 26 at 38.

63 *In the marriage of Raby* (1976) FLC 90-104.

part, examined the ‘mother principle’ and concluded that there was ‘absolutely no evidence to support it’.⁶⁴ The court also made brief reference to materials cited by Chisholm and Petre⁶⁵ and found ‘that the suggested “preferred” role of the mother is not a principle, a presumption, a preference, or even a norm. It is a factor to be taken into consideration where relevant’.⁶⁶ While it was obviously open to the court to find there was no legislative presumption of this sort, more importantly this was underpinned by a consideration of the social science support for adopting any such position. That case signalled the beginning of discussion of social science literature in our Family Courts and the beginning of the end of any maternal preference in Australian family law.⁶⁷

The first half of the 1990s

By the first half of the 1990s there was a growing recognition of the relevance of family violence in family law decision-making.⁶⁸ Civil legislation for domestic violence had been introduced around Australia during the 1980s and the Minister Assisting the Prime Minister for the Status of Women,⁶⁹ established the National Committee on Violence Against Women (NCVAW) in 1990.⁷⁰ In 1991 the FLA was amended by the inclusion of a specific provision which required the court in children’s cases to consider the need to protect a child from abuse, ill-treatment and psychological harm.⁷¹ The Federal Government also announced an inquiry into the operation and interpretation of the FLA and the issue of family violence was placed on the agenda by a number of submissions.⁷² The NCVAW prepared a submission which it published and disseminated widely.⁷³ It recommended that the FLA should include a definition of family violence and that the subsection dealing with

64 R Chisholm and C Petre, ‘Of Children, Custody and Cliches’ (1976) *Australian Current Law Digest* 233. Richard Chisholm was then an academic in the Faculty of Law at the University of NSW and Clare Petre was a social worker at the Royal Prince Alfred Hospital. Professor Chisholm AM’s on-going analyses of social science research are still being cited in our Family Courts — see *Allen v Green* (2010) 42 Fam LR 538; [2010] FamCAFC 14; BC201050093 (9 February 2010) and *Salvati v Donato* [2010] FamCAFC 263; BC201051271 (24 December 2010).

65 J Goldstein, A Freud and A J Solnit, *Beyond the Best Interests of the Child*, Macmillan, 1973 and a Report by ‘Justice’ (British Section of ICJ), *Parental Rights and Duties and Custody Suits*, Stevens, London, 1975. The court also discussed a further article which seems to have been put forward by one of the parties: ‘The Dangers of a Change of Parentage in Custody and Adoption Cases’ (1967) 83 *QLJR* 547 as cited at 75,483.

66 *In the marriage of Raby* (1976) FLC 90-104 at 75,486.

67 It was unequivocally ended by the High Court in *Gronow v Gronow* (1979) 144 CLR 513; 29 ALR 129; 54 ALJR 243; 5 Fam LR 719.

68 See Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues*, 2009, p 34, citing *Jaeger v Jaeger* (1994) FLC 92-492.

69 The Honourable Wendy Fatin. The Prime Minister was Robert Hawke.

70 Thacker and Coates, above n 60, p 4.

71 FLA s 64(1)(bb)(va).

72 Joint Select Committee, *Report on Certain Aspects of the Operation and Interpretation of the Family Law Act*, 1992, Commonwealth of Australia, p 145.

73 Thacker and Coates, above n 60. It was this document which publicly highlighted the problems with Justice Murray’s assertions in *Heidt* at p 17.

child abuse should be extended and prioritised.⁷⁴ At the close of the inquiry the government commenced the development of legislation that would significantly reform the FLA.⁷⁵

An important case from this era was heard in 1994. *Patsalou*⁷⁶ was an appeal against a decision of Justice Moore by the father who claimed, *inter alia*, that her Honour had referred to a ‘body of research’ about domestic violence in her judgment ‘which was not the subject of any evidence before her’ and about which no submissions had been invited.⁷⁷ On appeal the lead judgment of Justice Baker set out a list of eight social science resources to which the trial judge had referred to as part of a ‘considerable body of research’ about ‘inter-spousal violence’.⁷⁸ He noted, however, that she did not ‘extrapolate any views or comments from those articles or otherwise rely on them in any way’⁷⁹ and held that her findings were available on the ordinary evidence in the case. It will be seen later that the Full Court continues to find that trial judges have not relied on social science research they have cited in the post-2006 cases.

Baker J agreed with the trial judge’s assertion that the father’s physical assaults on the mother and denigration of her to the children and others did ‘not establish him as a consistently desirable role model for the children’.⁸⁰ Consequently this case is treated as having established the proposition that a father who is violent towards the mother is a poor role model for the children.⁸¹ It is intriguing that, although the trial judge was found not to have relied on the social science literature to which she referred, her findings about role modelling were almost certainly partly drawn from that very literature.⁸² They were then ventriloquised, through Baker J, to become authoritative, despite the total lack of any material to support this idea at appellate level.⁸³

74 Thacker and Coates, above n 60, pp 5–7 and 16–19.

75 This process culminated in the Family Law Reform Act 1995 which became operative in 1996.

76 *Patsalou v Patsalou* (1995) FLC 92-580.

77 *Ibid*, at 81,752.

78 *Ibid*, at 81,753.

79 *Ibid*, at 81,753.

80 *Ibid*, at 81,753.

81 See, eg, the recent appellate decision of *Cameron v Walker* (2010) FLC 93-445; [2010] FamCAFC 168; BC201050832 at [106]–[123] where there was discussion about the father as a potentially poor role model in the context of allegations of family violence. See also *Carlton v Carlton* [2008] FMCAfam 440; BC200804424 at [61] and [79]. *Colson v Olds* [2007] FamCA 668; BC200750563 and *Dafoe v Dafoe* [2011] FMCAfam 151; BC201101734 both cite *Patsalou* as authority for the connection between family violence and poor role-modelling.

82 For example, one of the articles by A Blanchard, ‘Violence in Families: The Effect on Children’ (1993) 34 *Family Matters* 31 discusses the fact that particularly boys who have lived with violence in the home may start to role model their father’s behaviour in adolescent years.

83 Mullane discussed the way in which findings that relate more to the social sciences than to the law can almost acquire the status of legal precedent. The well-known case of *Cilento v Cilento* (1980) FLC 90-847 laid down the rule that stability and status quo for children should be maintained at interim hearings where possible (eg, where no risk) and that remained good authority for 26 years (until *Goode v Goode* (2006) FLC 93-286). No social science research or other evidence was cited in the case as support for this proposition and Mullane suggests it was a finding of ‘social fact’. See Mullane, above n 22, at 447.

Baker J made no comment about any legal basis by which Moore J could have technically introduced the materials.⁸⁴ Because he found she had not *relied* on them, it seemed their status was not relevant.

A number of other significant cases from that era drew from the social sciences and other analogous research about changing social values and understandings.⁸⁵ So, although social science has been referenced from the commencement of the Family Court of Australia and judges have taken on board new ideas emerging from these disciplines, in recent years, as will be demonstrated in Part III, some judges have adopted an approach which integrates the research more overtly into their decision-making. This is problematic because the literature a judge uses will necessarily be selective and any party who feels aggrieved by the final outcome is likely to hold an understandable perception that the extrinsic material was influential.

Part III: Post 2006 cases and social science

Introduction

While the mid 1990s were a time of significant discussion about family violence and gender issues in the family law world, it seems that the post 2006 period is also engendering dialogue, this time in the wake of the development and implementation of the recent reforms which were intended to ‘represent a generational change’ in the family law system.⁸⁶ The new legislative terminology of ‘meaningful relationships’ almost mirrors social science language⁸⁷ and the lengthy development of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) involved both wide public debate and multi-layered conversations within the family law community about issues such as ‘fatherlessness’, shared parenting and family violence. It

84 Kay J touched on the question of the status of the materials suggesting that the manner of appointment of family court judges entitles them ‘to make comments on the societal nature [of matters such as spousal violence]’ (under s 22(2) of the FLA judges are appointed by reason of their ‘training, experience, and personality’). *Patsalou v Patsalou* (1995) FLC 92-580 at 81,755.

85 In *In the marriage of JG and BG* (1994) 122 FLR 209; 18 Fam LR 255; (1994) FLC 92-515 Justice Chishom made findings about the damaging impact of witnessing domestic violence, in *B and R and the Separate Representative* (1995) 127 FLR 438; 19 Fam LR 594; (1995) FLC 92-636 the Full Court examined copious material about the removal of Indigenous children from their culture and in *Mitchell v Mitchell* (1995) FLC 92-601 the gendered realities of the economic consequences of divorce were recognised.

86 Attorney-General’s Department, ‘Information Paper — Changes to the Family Law Act 1975 in the Family Law Amendment (Shared Parental Responsibility) Bill 2005’, Paper at National Workshop for the Children’s Contact Services Guidelines Project, 2006.

87 I have argued elsewhere that the language of the 2006 amendments co-opts social science concepts, giving the law an aura of ‘truth’. See Z Rathus, ‘Social Science or “Lego-Science”? Presumptions, Politics, Parenting and the New Family Law’ (2010) 10(2) *QUTLJ* 164. See also a number of articles about the meaning of ‘meaningful’: R Chisholm, ‘The Meaning of “Meaningful”’: Exploring a key term in the *Family Law Act* amendments of 2006’ (2008) 22 *AJFL* 175; L Moloney, ‘“Meaningful relationships” in the Family Law Amendments of 2006: A socio-legal perspective on fathers, mothers and the “sharing” of parenting after separation’ (2009) 15 *Jnl of Family Studies* 9; L Trinder, ‘What might children mean by a “meaningful relationship”? (2009) 15 *Jnl of Family Studies* 20 and D Cooper, ‘Continuing the critical analysis of “meaningful relationships” in the context of the “twin pillars”’ (2011) 25 *AJFL* 1.

is not surprising that judges reach out to the social science literature of those times and what has been emerging subsequently to understand this law⁸⁸ and how to apply it to the complicated facts in the families they see.⁸⁹

Two separate, but sometimes inter-related, areas of social science literature frequently accessed now are those addressing the impacts of shared parenting time and family violence — a reflection of the two primary considerations in the ‘best interests’ factors list in the FLA since the reforms.⁹⁰ The social science research in these fields has changed considerably since the 1990s. There is now wide acceptance of a range of assumptions or concepts⁹¹ but some of the social science literature referred to by judges is highly specialised. It includes diverse papers on particular hypotheses about when shared parenting time and shared parental responsibility really work, different kinds of family violence and whether future violence can be predicted.

Despite quite regular use of the literature at trial level and a growing jurisprudence regarding this at appellate level it is suggested that the cases continue to demonstrate a lack of clarity and consistency in approach. There is little agreement about the legal basis for reference to the material, its status or how it can be used. The next part of this article describes and unpacks some of the many ways in which judges are turning to the social sciences.

Section 144 — a hypothetical answer

McCall v Clark

The first case post 2006 to be examined is one in which the Full Court effectively chastised the trial judge for not referring to social science literature. Although the discussion is obiter, *McCall v Clark*⁹² has been cited in a number of later judgments considering the use of social science literature by judges.⁹³ Ironically, although the Full Court considered that the judge should have used attachment theory research, it did not actually reach a clear conclusion about any legal basis for the introduction of such material. The trial, which was heard before Slack FM, involved a boy aged 2½ (at the time of trial) who had been living overseas with his mother and having little contact with his father.⁹⁴

The legal basis

The Full Court first set out FLA s 69ZX(3) which relates to transcripts and findings of other courts. It then remarked that Slack FM was not ‘referred to

⁸⁸ Which would be a form of ‘legislative fact’.

⁸⁹ Interpreting ‘adjudicative facts’ perhaps.

⁹⁰ See FLA s 60CC(2)(a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

⁹¹ For example, that witnessing family violence damages children, that children generally benefit from an on-going relationship with both parents (except where the relationships are not safe or healthy) and that post-separation parenting arrangements often change over time.

⁹² *McCall v Clark* (2009) 41 Fam LR 483; (2009) FLC 93-405; [2009] FamCAFC 92; BC200950264. The members of the court were Bryant CJ, Faulks DCJ and Boland J.

⁹³ See *Maluka v Maluka* [2009] FamCA 647; BC200950527 (24 July 2009) at [378]; *Maluka v Maluka* (2011) 45 Fam LR 129; (2011) FLC 93-464; [2011] FamCAFC 72; BC201150189 at [100] and *Allen v Green* [2010] FamCA 14; BC201050024.

⁹⁴ The extent to which the mother had intentionally obstructed contact between the boy and his father was contested.

any matter which could fall within the purview of s 69ZX(3) to inform himself of matters relevant to establishing a meaningful relationship⁹⁵ between the young boy and his father in the circumstances of the case. Their Honours continued:

Neither party tendered to the Federal Magistrate any of the *well recognised peer reviewed research* on the establishment of primary and significant attachments of infants and young children, nor did the Federal Magistrate raise with the parties that he could have recourse to such material.⁹⁶

The Full Court then suggested the Federal Magistrate ‘could not have informed himself of such matters’ without reference to these materials because they would not ‘fall within the term “common knowledge” in s 144(1)(a) of the Evidence Act’.⁹⁷ The problem with this statement is that if he had referred to such materials they would have contained complex social science research and would not have fallen within s 144(1)(a) either. The Full Court then tentatively proposed that such material may be admissible under s 144(1)(b) as ‘knowledge that is not reasonably open to question and is . . . capable of verification by reference to a document the authority of which cannot reasonably be questioned’. But theories about infant attachment cannot be classed as indisputable. There are clear tensions in the writings on shared care research in Australia about attachment theory and its relevance to parenting arrangements for infants and young children.⁹⁸

The use of the material

Interestingly the Full Court’s concerns with the Federal Magistrate’s lack of social science information related to its interpretation of the first primary consideration in the best interests factors. FLA s 60CC(2)(a) requires a court to consider ‘the benefit to the child of having a meaningful relationship with both of the child’s parents’. The real *ratio* of this case is a finding that a ‘prospective approach’ is the preferred interpretation of this subsection⁹⁹ — ie, the court should normally be considering what orders can be framed to ensure

95 *McCall v Clark* (2009) 41 Fam LR 483; (2009) FLC 93-405; [2009] FamCAFC 92; BC200950264 at [126]. It is not at all apparent how s 69ZX(3) would support the admission of the relevant social science research — scholarly articles on attachment theory — as evidence. Such works are not the transcripts or findings of other proceedings — although no doubt some have been cited in judgments.

96 *Ibid*, at [126] (emphasis added).

97 *Ibid*.

98 J McIntosh, B Smyth, M Kelaher, Y Wells and C Long, *Post-separation Parenting Arrangements and Developmental Outcomes for Infants and Children — Collected Reports*, Family Transitions, 2010; J Cashmore, P Parkinson, R Weston, R Patulny, G Redmond, L Qu, J Baxter, M Rajkovic, T Sitek and I Katz, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms*, Social Policy Research Centre, University of New South Wales, 2010; the follow up academic debate: J Cashmore and P Parkinson, ‘Parenting arrangements for young children: Messages from research’ (2011) 25 *AJFL* 236, the comment that followed: B Smyth, J McIntosh and M Kelaher, ‘Research into parenting arrangements for young children: Comment on Cashmore and Parkinson’ (2011) 25 *AJFL* 258 and the response to the comment: J Cashmore and P Parkinson, ‘Parenting arrangements for young children — A reply to Smyth, McIntosh and Kelaher’ (2011) 25 *AJFL* 284. See Rathus, above n 87.

99 *McCall v Clark* (2009) 41 Fam LR 483; (2009) FLC 93-405; [2009] FamCAFC 92; BC200950264 at [118].

that a child will have a meaningful relationship with both parents in the future?¹⁰⁰ It was in this context that the court raised the absence of attachment theory literature. However, this is a very specific way to expect a trial judge to draw from social science literature. If Slack FM had referred himself to some attachment theory literature, he may well have come to exactly the same conclusion. In fact the trial decision suggests that he drew on his 30 years of family law experience as a solicitor, barrister and judge and the knowledge thereby gathered. Considering the mother's proposal he said:

[The boy] will continue to predominantly live with his mother who is his most secure emotional attachment and it is not in his interests to have that disrupted. His strongest emotional attachment is to his mother and she argues that it is in his interests for that not to be disrupted.¹⁰¹

The Full Court did not appear even to identify this as use of knowledge about attachment theory principles. Rather, it had a view about the way in which attachment literature would enhance decision-making in this case — and it was about the future, not the past. Their Honours suggested that Slack FM might have drawn from the literature to predict or even shape the future — to make an order that would create and nurture a meaningful relationship — not to make an order that would support the existing emotional and psychological bonds. This case exemplifies the kinds of complications which may arise when judges use social science research as it may be prone to very different interpretations and uses by different judges.

This case hints at potential difficulties inherent in considering what might amount to appropriate notice. If Slack FM had wanted to refer to social science articles it may not have been sufficient for him merely to give notice of his intention to rely on the materials when they can obviously be relied on in varying ways that may lead to diametrically opposed outcomes for the parties. It was the *manner* of use of social science literature that led to a successful appeal in the next case — *Maluka. McCall v Clark* does not present any clear basis for the use of social science materials by a judge and s 144 of the Evidence Act is shown to be problematic when scholarly works are under consideration.

The problems of actual reliance on s 144

The next two cases discuss s 144 of the Evidence Act as an avenue for admission of social science material but problems are noted by the courts and not satisfactorily resolved.

Maluka v Maluka

In *Maluka v Maluka*¹⁰² both the trial judge and the Full Court discussed s 144 as a possible mechanism for the introduction of social science literature into the courtroom. The case involved applications for parenting orders for two

¹⁰⁰ For a discussion of recent cases concerning the interpretation of this primary consideration see Cooper, above n 87.

¹⁰¹ *McCall v Clark* (2009) 41 Fam LR 483; (2009) FLC 93-405; [2009] FamCAFC 92; BC200950264 at [80].

¹⁰² *Maluka v Maluka* [2009] FamCA 647; BC200950527 (24 July 2009) and *Maluka v Maluka* (2011) 45 Fam LR 129; (2011) FLC 93-464; [2011] FamCAFC 72; BC201150189.

girls aged 7½ and 5½ at the time of the hearing. The mother alleged serious family violence which included ‘stalking, vandalism to [her] property . . . and [that of] her . . . partner, intimidation, threats of violence (including a history of death threats), verbal abuse, controlling behaviour, isolation and dominance’.¹⁰³

The legal basis

After the trial Justice Benjamin decided that he wanted to make reference to a set of three articles that emanated from a conference on family violence convened by key national family law bodies in the United States in 2007.¹⁰⁴ To inform the parties of his intention, Benjamin J arranged for his associate to write to all of the parties’ lawyers advising this and enclosing copies of the articles. Written and oral submissions were invited and received.

The Wingspread Conference (as it is known) was attended by a small invited group of ‘experienced practitioners and researchers’ from a wide range of disciplines who had gathered to examine issues for working effectively with families affected by violence.¹⁰⁵ The articles represented some of the research that informed that conference and its deliberations. One of the articles, by Joan Kelly and Michael Johnson, focused on their conceptualisation of four patterns or ‘types’ of domestic violence:

- ‘coercive controlling violence’,
- ‘violent resistance’,
- ‘situational couple violence’, and
- ‘separation-instigated violence’.¹⁰⁶

This article is one of Kelly and Johnson’s many joint and several contributions to the scholarly project of identifying ‘typologies’ of family violence. As will be discussed shortly however, there are researchers who are wary of this approach.

Benjamin J made mention of some sections of the FLA as being potentially relevant to the reception of the material¹⁰⁷ but he asserted that the notice he gave when he contacted all parties was ‘in accordance with s 144 of the Evidence Act 1995’.¹⁰⁸ This implies that he was relying on that section as the basis for the admission of the materials. But, as noted in *McCall v Clark*, s 144

103 Ibid (24 July 2009), at [4].

104 National Council of Juvenile and Family Court Judges and the Association of Family and Conciliation Courts. The three articles were: N Ver Steegh and C Dalton, ‘Report from the Wingspread Conference on Domestic Violence And Family Courts’ (2008) 46(3) *Family Court Review* 454; J Kelly and M Johnson, ‘Differentiation Amongst Types of Intimate Partner Violence: Research Update and Implications for Interventions’, (2008) 46(3) *Family Court Review* 476 and P Jaffe, J Johnston, C Crooks and N Bala, ‘Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans’ (2008) 46(3) *Family Court Review* 500.

105 T Altobelli, ‘Family violence and parenting: Future directions in practice’ (2009) 23 *AJFL* 194 at 194. This article provides a very useful and comprehensive summary of the issues canvassed at this conference.

106 J Kelly and M Johnson, ‘Differentiation Amongst Types of Intimate Partner Violence: Research Update and Implications for Interventions’ (2008) 46(3) *Family Court Review* 476 at 476.

107 Including FLA s 69ZN and s 69ZT.

108 *Maluka v Maluka* [2009] FamCA 647; BC200950527 (24 July 2009) at [374] referring to the Evidence Act 1995 (Cth).

does not allow for the introduction of a set of detailed social science articles. To fall within the section, the knowledge relied upon must be 'not reasonably open to question' and must either be widely known (locally or generally) or must be drawn from incontrovertible authority. These prerequisites are simply not present in the literature referenced by Benjamin J. They offer theories and hypotheses to explain and describe what the researchers and scholars have derived from their clinical work or scholarly engagement, not categorical indisputable statements of fact. The judge pondered the question of whether s 144 'deal[s] with . . . reports and papers',¹⁰⁹ but, with respect, his Honour did not really answer the question satisfactorily. He opined that 'common knowledge is at the end of the day evidence' and 'if learned papers are before the court they must form part of the body of evidence'.¹¹⁰

Announcing that a particular fact is 'common knowledge' does not make that fact evidence and thus provides no legal basis for the reception of this material as evidence. In fact common knowledge, if this is something of which judges can take judicial notice, is an exception to the rules of evidence. Despite this the Full Court¹¹¹ agreed with Benjamin J that 'the use of social science material is governed by s 144 of the Evidence Act'¹¹² but then went on to make the point that such material could only take on the character of common knowledge if it comprised information that was 'not reasonably open to question'.¹¹³ It continued with the observation that Benjamin J 'relied upon a number of articles, which together traverse many matters. Nowhere in his Honour's reasons did he disclose the *matters of common knowledge which he took from this material . . .*'.¹¹⁴ This seems to mean that these articles, as a whole, could not assume the character of knowledge which was admissible under s 144 of the Evidence Act or the doctrine of judicial notice.

However, the italicised words perhaps suggest that the judge could have drawn some information from the articles that is so generally accepted or acknowledged as to amount to common knowledge. Even within the small group of scholars directly cited there is a variety of views about 'types' of family violence¹¹⁵ but maybe there are kernels of 'common knowledge' within those works. In fact in one of the articles, which presents an overview of the conference, the author suggests that 'researchers agree that exposure to domestic violence is harmful to children's development'.¹¹⁶ Maybe this is common knowledge.

109 Ibid (24 July 2009), at [378].

110 Ibid (24 July 2009), at [381]. An earlier comment in [378] suggests that he is discussing the meaning of the term 'common knowledge' within s 144 of the Evidence Act.

111 Which comprised Bryant CJ and Finn and Ryan JJ. It is interesting to note that 4 months subsequent to this decision the Chief Justice published the new *Family Violence Best Practice Principles* and that Justice Ryan chaired the Family Violence Committee which developed them.

112 *Maluka v Maluka* (2011) 45 Fam LR 129; (2011) FLC 93-464; [2011] FamCAFC 72; BC201150189 at [98].

113 Ibid, at [103] in accordance with s 144(1) of the Evidence Act.

114 Ibid, at [103] (emphasis added).

115 N Ver Steegh and C Dalton, 'Report from the Wingspread Conference on Domestic Violence And Family Courts' (2008) 46(3) *Family Court Review* 454 at 454.

116 Ibid, at 456.

The use of the material

Benjamin J considered that the social science literature could not ‘be used to establish whether the father did or did not commit [particular] . . . acts of violence . . .’, however, it could ‘be used to categorise the nature of the violence and provide a clearer understanding of the overall nature of that violence and to give context to the behaviour and its impact on the mother and the children’.¹¹⁷ It enabled the court to categorise the ‘father’s violent pre-disposition’ and provided ‘further evidence of the likelihood of the continuation of that violence’.¹¹⁸ He found that the father had perpetrated ‘continuing coercive controlling violence’¹¹⁹ and ordered that there be no future contact between him and his children. Arguably this is an example of social facts (as Carmody J says in *Murphy*’s case)¹²⁰ being used to understand adjudicative facts.

The Full Court held that ‘that the use of the social science material to constitute “further evidence” of the likelihood of future violence . . . was erroneous’.¹²¹ It found that the trial judge had not given notice of his intention to use the material *in the way he did*,¹²² nor explained how it had ‘influenced his reasons for judgment’, which was critical given the ‘forensically sensitive nature’ of its use.¹²³ But given the views of the Full Court regarding other problems with s 144, the judge’s use of the material may still have come under a shadow even if he had advised more clearly of his intentions. And how specific did Benjamin J need to be?¹²⁴

While the Full Court left open the question of whether simply using the literature to categorise the father’s violence would have been acceptable, it is arguable that there are serious problems with judges assessing categories of family violence from the facts.¹²⁵ Jane Wangmann explains that ‘typologies seem to offer a highly attractive simple “demarcation” (even scientific approach) to assist . . . practitioners . . . working in the family law arena . . .’ and tellingly describes the risks of trying to make clear distinctions between the categories:

Not only is there no tool to distinguish between different types of [intimate partner violence] . . . and perpetrators, there are also questions about how clearly defined the

117 *Maluka v Maluka* [2009] FamCA 647; BC200950527 (24 July 2009) at [382] and [383].

This seems somewhat akin to the idea of ‘social framework’ facts propounded by Monahan and Walker which was discussed in Part II.

118 *Maluka v Maluka* [2009] FamCA 647; BC200950527 (24 July, 2009) at [385].

119 *Ibid* (24 July 2009), at [427].

120 *Murphy v Murphy* [2007] FamCA 795; BC200750675 (20 July 2007) — see below.

121 *Maluka v Maluka* (2011) 45 Fam LR 129; (2011) FLC 93-464; [2011] FamCAFC 72; BC201150189 at [104].

122 *Ibid*.

123 *Ibid*, at [105].

124 It is arguable that the court has applied a wide interpretation of what is meant by ‘acquiring or taking into account of knowledge of’ in the notice provision — s 144(4). Does this just require notice that a fact or document will be taken into account, or does it require notice as to the way it will be taken into account as the Full Court seems to be suggesting? I thank my colleague Dr Kylie Burns for suggesting this argument.

125 One of the papers cited by Benjamin J notes concerns from the Wingspread Conference about who might be responsible for making differentiation determinations. See Ver Steegh and Dalton, above n 115, at 456.

differences are, what the boundaries and parameters between each type are, and questions about violence that does not fit within any of the types that have been suggested.¹²⁶

This analysis typifies the critique of the typology literature which is necessarily absent from discussion when a judge selects a set of articles to use in decision-making. This article cannot do justice to the critique here but the crucial point is that the literature is contested.¹²⁷ Some commentators, such as Wangmann, are concerned by its application and possible implications, yet other researchers look at family violence through an entirely different lens.¹²⁸ It is interesting to observe that in 2009 Australia's most recent committee to investigate and report on violence against women did not canvass the concepts of 'typologies' of family violence in their *Background Report*.¹²⁹ Although the parties in *Maluka* were given an opportunity to make submissions in respect of the articles chosen, nothing in the case suggests that anyone offered up any scholarly works that express disquiet about this approach.

Although Benjamin J used the social science literature to categorise the father's violence he did not make a simple linear connection between this and his ultimate parenting orders. In his 92 page judgment his Honour comprehensively canvassed the factual evidence, the expert evidence, the case law, the legislation, the *2009 Best Practice Principles*¹³⁰ and the submissions of the parties. Notwithstanding giving the parties notice of an intention to rely on the literature and his Honour's clear attention to all of the evidence led in the case, the appeal was successful mainly because of the way the trial judge used the social science literature.

126 J Wangmann, 'Different Types of Intimate Partner Violence: An Exploration of the Literature', *Issues Paper 22*, Australian and Family Violence Clearinghouse, 2011, p 15. Ver Steegh also cautioned that no clear dividing lines or distinct categories had emerged at the Wingspread conference: Ver Steegh and Dalton, above n 115, at 456. Professor Chisholm noted 'the potential risk . . . that we might come to think that every instance of family violence will fit within one category or another . . .'. See R Chisholm, *Family Courts Violence Review*, Australian Government, Attorney-General's Department, 2009, p 30.

127 There is significant discussion in the literature relating to methodological concerns which cannot, for space reasons, be canvassed here.

128 For example, see D Buss and J Duntley, 'The Evolution of Intimate Partner Violence' (2011) 16 *Aggression and Violent behaviour* 411 and L Merrill, C Thomsen, J Crouch, P May, S Gold and J Milner, 'Predicting Adult Risk of Child Physical Abuse from Childhood Exposure to Violence: Can Interpersonal Schemata Explain the Association?' (2005) 24(7) *Jnl of Social and Clinical Psychology* 981. The latter article references a wide range of social science research about family violence without any recourse to the typology literature. Feminists working in the area of violence against women particularly advocated for recognition of non-physical abuse: see D Bagshaw, D Chung, M Couch, S Lilburn and B Wadham, *Reshaping Responses to Domestic Violence*, Partnerships Against Domestic Violence, Commonwealth of Australia, 2000, p 24; D Rowan, 'The Syndrome of Battered Women', *National Conference on Domestic Violence*, Australian Institute of Criminology, Canberra, 1985, Vol I, p 27 and L McKinnon, *Hurting without Hitting: Non-physical Contact Forms of Abuse*, Stakeholder Paper 4, Australian Domestic and Family Violence Clearinghouse, February 2008.

129 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021*, Commonwealth of Australia, 2009. It listed emotional, social, verbal, economic, psychological, spiritual, physical and sexual abuse at pp 13–14.

130 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes when Family Violence or Abuse is Alleged*, 2009.

It is arguable that neither s 144 of the Evidence Act nor the doctrine of judicial notice provide a clear legal basis for judges to introduce social science literature into the court room — possibly even if notice has been given. *Maluka* demonstrates the problems posed by seeking to rely on s 144 rather than showing it to be a solution. Given these inadequacies judges have suggested other means to bring in social science literature.

Social facts

Quite soon after the introduction of the 2006 amendments Justice Carmody delivered some decisions that drew heavily from social science literature and a range of other materials. In one of these cases he ventured into the tradition of social facts, defining social science literature as social facts so as to justify his use of the material in question.

Murphy v Murphy

The legal basis

In *Murphy v Murphy*,¹³¹ Carmody J cited over 30 references in a 140 page trial judgment. He asserted that ‘published research and social science literature’ were ‘[s]ources of social fact’¹³² and took the view that ‘judges are relatively free to consult accredited writings and make their own extrinsic enquiries from non-legal materials in forming and applying their own views on social issues’.¹³³

The use of the material

His Honour particularly turned to the material when considering the question of ‘unacceptable risk’ where child sexual abuse had been alleged. He explained that ‘[j]udges need to pay attention to how the world works’ in making ‘value judgments’ about what children need at different stages of development and ‘what and how much of a risk to the safety and welfare of a child [is posed] in a given set of circumstances, [and] how likely is further abuse related harm to occur on unsupervised contact’.¹³⁴

Carmody J described social facts as being ‘non-legal matters relevant to the development of the law generally’¹³⁵ but, with respect, this is perhaps more accurately a description of *legislative* facts being used by an appellate court. His Honour then used social science literature (which he had categorised as social facts) to assess and understand *adjudicative* facts (which was also done in *Maluka* by Benjamin J). This does not seem to be the role anticipated for legislative facts in Heydon J’s account in *Aytugrul*.¹³⁶

This conflation of the role of the social facts and legislative facts and their use to assess adjudicative facts potentially confuses trial and appellate court functions. It may explain the strength of the Full Court’s response when

131 [2007] FamCA 795; BC200750675.

132 Ibid, at [340].

133 Ibid, at [341].

134 Ibid, at [334].

135 Ibid, at [338] per Carmody J.

136 This was discussed in Part I of this article. See *Aytugrul v R* (2012) 286 ALR 441; 86 ALJR 474; [2012] HCA 15; BC201202158 at [70]–[74].

Carmody J's decision in the next case was appealed. It is for this reason that the social framework construct of Monahan and Walker is attractive — using social facts to understand adjudicative facts at trial level.

Dylan v Dylan

Seven months after *Murphy* in *Dylan v Dylan*,¹³⁷ Carmody J proffered no legal basis for the citing of well over 20 social science articles and other materials dealing with shared parenting, parenting time and children's participation in parenting proceedings. He then made an order that did not follow the children's wishes and was contrary to the recommendations of the independent children's lawyer, the family report writer and the child psychiatrist saying that:

My judgment and my conscience tell me that, despite what they themselves think or believe, the children should be spending more time with their father than they currently do.¹³⁸

The mother appealed the decision on the basis of the use of material not before the court and lack of procedural fairness. On the central issue of 'reliance' the Full Court determined that Carmody J had not directly relied on 'extraneous material . . . as support for a conclusion forming part of his reasons for any particular order made'¹³⁹ and therefore the lack of procedural fairness was not fatal. Although the court dismissed the mother's appeal in relation to the parenting orders, it raised concern about the perception of the influence of the material on the judicial mind. It does seem possible that discussion of the social science literature bolstered the judge's confidence (or conscience) to make findings against the proposals and recommendations of all the other actors in the case. Of course there is a careful analysis of the evidence in the 65 page judgment, but even that discussion is dotted with references to articles and conference papers.

The Full Court in this case was extremely critical of the judge's excessive use of the literature, highlighting the inappropriateness of a trial judge taking this course:

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.¹⁴⁰

It also remarked that such references are likely to lead a litigant to think that 'irrelevant considerations may have influenced the final result'.¹⁴¹ This issue of perception is an important one that the Full Court returns to in its later decisions as will be seen.¹⁴²

137 [2007] FamCA 842; BC200750499.

138 Ibid, at [263]. It must be noted that he changed the current arrangement by adding Thursday night to an every second Friday–Sunday regime.

139 *Dylan v Dylan* [2008] FamCA 55; BC200851301 at [76].

140 Ibid, at [1] per Warnick, May and Boland JJ.

141 Ibid, at [2].

142 *SCVG v KLD* [2011] FamCAFC 100; BC201150258 at [56].

The issue of reliance

Allen v Green

Before examining the cases which intentionally exclude judicial notice and s 144 of the Evidence Act as bases for the use of social science research it is important to briefly touch on the vexed question of reliance as it becomes essential to the judicial approach adopted in those cases. In *Allen v Green*,¹⁴³ Justice Boland on appeal¹⁴⁴ was realistic about the trial judge's reliance on the material in question. Her Honour excluded s 144 as a possible basis for the introduction, without notice,¹⁴⁵ of two scholarly works about shared care time in the trial judge's decision because she considered such materials could not 'fall within the description of "common knowledge"'.¹⁴⁶ She then turned to the question of procedural fairness and observed that the lack of notice would not constitute appealable error if Sexton FM had not relied on the material in making her decision. If it were merely "'background" to the proceedings' lack of notice would be rendered irrelevant, but 'if her decision rested on this material . . . and [it] was integral to her exercise of discretion' procedural fairness would be essential.¹⁴⁷ She found that the Federal Magistrate had relied on the research and upheld the appeal.

So it seems that whatever the basis for the admission of material, whether or not it falls within s 144 of the Evidence Act or judicial notice, courts will expect natural justice and procedural fairness to be accorded — in theory. But if the judge does not actually *rely* on the material, if it simply forms part of the 'background' of the judge's decision, procedural fairness is not required. Reliance on the research will be a very difficult matter to ascertain in many cases. It is simply not possible to tell what factors have influenced a judge. As will be seen this issue comes under close judicial scrutiny in a number of cases to be discussed shortly.

But *Allen v Green* leaves some questions hanging. What would have happened if Sexton FM had given notice? How should the parties have responded? Could they have tendered many more of the available articles about shared care? Would the judge have had to limit each to a certain number — given the extraordinary breadth of the field? Could the authors be called to be cross-examined on their works? And how would this debate have played out in the court room? The Full Court in *Baranski* offered a picture of this as will be seen later.

143 [2010] FamCA 14; BC201050024.

144 Hearing the appeal as a single judge pursuant to s 94AAA(3) of the FLA.

145 One had been raised in the cross-examination of the expert child psychologist but not tendered in evidence — J McIntosh and R Chisholm, 'Shared Care and Children's Best Interests in Conflicted Separation: A Cautionary Tale from Current Research' 20(1) (2007) *AFL* 3; the other had not been mentioned during the proceedings at all and A Tucker, 'Shared Parenting — Public Perceptions vs Legislative Reality: Our Role in Making it Work for Children', 13th National Family Law Conference: Families: Broken Blended Mended, Adelaide, Family Law Section of the Law Council of Australia, 2008.

146 *Allen v Green* [2010] FamCA 14; BC201050024 at [47].

147 *Ibid*, at [54] and [56].

Declared as neither evidence nor judicial notice

In a number of cases Federal Magistrate Altobelli has endeavoured to establish the status of the material from the outset and excluded judicial notice or s 144 of the Evidence Act as options.

Roth v Roth

In 2008 in *Roth v Roth*¹⁴⁸ Altobelli FM was dealing with technical scientific evidence in a case where the father's consumption of drugs was an issue. In the course of his reasons, he referred to five scientific articles about drug testing and hair analysis and two articles about the use of social science material in family law cases.¹⁴⁹

His Honour explained that the scientific material could be used 'in assessing and understanding the evidence' of the expert witness, a toxicologist, and then specifically excluded it as coming with s 144 of the Evidence Act because it could not be common knowledge nor could its authority not reasonably be questioned:

it is the very nature of both social science and scientific research that it is constantly being questioned, and knowledge is in a constant state of evolution.¹⁵⁰

Altobelli FM then mounted a quite convincing case about the usefulness of social science research in family law cases and, implicitly, the need for recognition of some category of information which does not have the 'status of either evidence or common knowledge derived from judicial notice'¹⁵¹ to allow such material to be used by the court:

Having regard to the importance of both scientific and social science research in family law parenting matters, perhaps it can also be argued that this is of a category of its own . . .? To exclude this knowledge would otherwise lead to determination of the best interest of children being entirely 'surrendered into the hands of the litigants'.¹⁵² This is surely inconsistent with contemporary approaches to child-focussed decision making. Of course precautions need to be taken, and in particular, where possible, the spirit of s 144(4) of the Evidence Act 1995 should be implemented, but that is not always possible in parenting cases in this court. So long as scientific and social science research is not used to make specific findings or conclusions, there is significant benefit to be derived from having regard to this knowledge, even if not referred to by the parties to the proceedings.¹⁵³

There are two things being said here. The first, and arguably less contentious point, is about the importance of social science material and establishing ways to ensure courts can reap the benefits of such research. The less compelling point is about the extent to which natural justice must be

148 [2008] FMCAfam 781; BC200805667 (25 July 2008).

149 Mullane, above n 22 and Altobelli, above n 1.

150 *Roth v Roth* [2008] FMCAfam 781; BC200805667 (25 July 2008) at [34] — as the shared care and family violence literature evolve.

151 *Ibid* (25 July 2008), at [38].

152 This is a reference to *Cross*' discussion of the High Court case of *Gerhardy v Brown* (1985) 159 CLR 70 at 141–2; 57 ALR 472; 59 ALJR 311; (1985) EOC 92-123 in which Brennan J noted the need for courts to draw from information beyond the evidence presented by the parties — particularly where issues regarding the validity or scope of a law are involved.

153 *Roth v Roth* [2008] FMCAfam 781; BC200805667 (25 July 2008) at [39].

followed. Courts should arguably not be relaxed about procedural fairness, even when the material is apparently not being relied on. This is a slippery slope as it is not clear why adhering to the ‘spirit’ of s 144 would not generally be possible in parenting cases. The sense of reliance is likely to be a subjective one in the eyes of the parties to the proceedings.

But it may be that Altobelli FM is right — perhaps social science research should be considered as a ‘category of its own’; or maybe it is akin to the concepts of social facts and social framework considered earlier. His Honour progressed his ideas forward in later cases suggesting that because he was not *relying on* or directly employing the social science material to which he referred it did not have the legal status of evidence and was not received into the courtroom on the basis of either judicial notice or s 144 of the Evidence Act.

Salvati v Donato

The legal basis

In *Salvati v Donato (No 2)*¹⁵⁴ Altobelli FM canvassed relevant social science literature under the headings of ‘significance of time’¹⁵⁵ and ‘parental conflict and shared parenting’.¹⁵⁶ In his 5 page overview of the research his Honour cited three primary articles which made reference to six further articles and made no mention of the family before the court or the ordinary facts of the case. At the end of the discussion he said:

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 is background material, and it assists in understanding the expert evidence provided by the Family Consultant. One also lives in hope that parents might learn from it.¹⁵⁷

The use of the material

The case was appealed, but not on the ground of the use of the social science literature. However, the Full Court still chose to comment on the matter, noting that ‘despite [the Federal Magistrate’s] disclaimer regarding the use which would be made of the material’ he referred to some of it in the ‘context of discussing the orders he proposed’¹⁵⁸ (that is, he actually did rely on it). The Full Court continued:

We consider that it was inappropriate for the Federal Magistrate to refer to the journal articles and for them to inform his decision in circumstances where they had not been tendered by either party or the Independent Children’s Lawyer and where the parties had not been given the opportunity to make submissions in relation to them.¹⁵⁹

Full Court disapproval of use of social science literature — at least without notice — continued.

154 [2009] FMCAfam 883; BC200909154.

155 Ibid, at [14].

156 Ibid, at [16].

157 Ibid, at [19].

158 *Salvati v Donato* [2010] FamCAFC 263; BC201051271 at [104]. A Special Leave application to the High Court of Australia was refused: *SCVG v KLD* [2011] HCATrans 285.

159 *Salvati v Donato* [2010] FamCAFC 263; BC201051271 [113].

SCVG v KLD

Altobelli FM was later unsuccessfully appealed on the precise point after using an almost identical paragraph in *SCVG v KLD*.¹⁶⁰ It was clear at the appeal that none of the counsel for the parties shared a position on the principles which would govern the use of the social science research, but all parties, including the court, agreed that it could not permissibly have been relied on.¹⁶¹

The appellant's main contention was this: 'why refer to the "research" if it was going to be ignored'?'¹⁶² The Full Court dismissed the appeal, finding that there was ample ordinary factual evidence to support Altobelli FM's decision, however, it lightly rebuked¹⁶³ him on his approach, making similar comments to the Full Court in *Salvati v Donato*.¹⁶⁴ A concern about the nature of the material was also implied when the court observed that it 'would cause some disquiet in the mind of the litigant as to just how they might, consciously or unconsciously, have influenced the judicial mind'.¹⁶⁵ The submissions of the appellants in *Patsalou, Dylan, Allen v Green* and *SCVG v KLD* all demonstrate disquiet for the parties when social science literature may seem to have played a role in the decision made.

Discussion of the Altobelli cases

Arguably Altobelli FM's discounting of s 144 of the Evidence Act and judicial notice anticipated the High Court's 2012 decision in *Aytugrul v R*. He has posited a way of drawing attention to the social sciences without offending the rules, but there remains the concern that this approach, at the very least, can be perceived to deny procedural fairness — and it is entirely possible that judges are more influenced than even they realise. An experiment conducted with judges in the United States showed that they had difficulty disregarding information which they knew to be inadmissible — a different but analogous task to not relying on cited research material. The information included demands at a settlement conference, a conversation protected by legal professional privilege and the prior sexual history of a rape complainant.¹⁶⁶ The authors propose that:

Insulating a decision-making process from inadmissible information requires preventing this information from influencing how subsequent information is processed. This can be challenging because information changes how we think. It creates beliefs that can guide the integration and assessment of subsequent information.¹⁶⁷

No doubt litigants intuitively understand this and are therefore concerned by reference to extrinsic material of which they had no notice.

160 [2011] FamCAFC 100; BC201150258.

161 Ibid, at [51].

162 Ibid, at [52]. This had been the mother's argument in *Dylan*.

163 To borrow from the words of Bell J in *SCVG & KLD* [2011] HCATrans 285 at 9.

164 [2010] FamCAFC 263; BC201051271.

165 *SCVG v KLD* [2011] FamCAFC 100; BC201150258 at [56].

166 A Wistrich, C Guthrie and J Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2004–2005) 153 *U Pennsylvania LR* 1251.

167 Wistrich, Guthrie and Rachlinski, above n 166, at 1265.

An undisclosed source — but no reliance?

Baranski v Barnski

In the recent case of *Baranski*¹⁶⁸ the parties realised only in retrospect that Federal Magistrate Brown had drawn from a social science report in an English case to formulate some of the questions he put to the family report writer. When he delivered judgment and then quoted significant parts of this case, it was clear that some of his questions arose from that information, but at the time of the trial he did not disclose this source. The influential English case, *Re L*,¹⁶⁹ brought together four appeals involving applications for contact in families where there was domestic violence. A report was commissioned from two psychiatrists, Drs Danya Glaser and Claire Sturge and it covered a vast range of issues relevant to cases involving these issues. Brown FM had drawn quite liberally from this report.¹⁷⁰

The legal basis

Counsel for the father appealed on the basis of impermissible use of specialist research on the impact of domestic violence on children and failure to accord procedural fairness.¹⁷¹ As with other cases examined above,¹⁷² the Full Court found that his Honour did not rely on ‘anything said’ in *Re L* to exercise his discretion.¹⁷³ His findings were based on the evidence before him and therefore the provisions of s 144 of the Evidence Act did not apply. Nevertheless his Honour’s failure to disclose ‘the source of the questions’ which had given rise to that evidence still raised doubt about whether the parties had been denied natural justice.¹⁷⁴

The court ultimately concluded that natural justice had not failed because the relevant issues had been addressed through the course of the trial¹⁷⁵ but added that ‘we are not to taken to thereby be encouraging the course which his Honour took with respect to the report’.¹⁷⁶ They went on to say:

Natural justice and procedural fairness are the cornerstones of our judicial system. Transparency is also integral to the judicial process. . . . 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

168 *Baranski v Baranski* (2012) 259 FLR 122; [2012] FamCAFC 18; BC201250070.

169 *Re: L, V, M and H (Contact: Domestic Violence)* [2000] 2 FCR(UK) 404; [2000] 4 All ER 609; [2001] 2 WLR 339; [2000] 2 Fam Law R 334.

170 Which in fact is largely contained in the *Best Practice Principles*, 2011.

171 *Baranski v Baranski* (2012) 259 FLR 122; [2012] FamCAFC 18; BC201250070 at [90].

172 *Dylan, Patsalou and SCVG v KLD*.

173 *Baranski v Baranski* (2012) 259 FLR 122; [2012] FamCAFC 18; BC201250070 at [102]. There is a complication in this case because the report is not a standard piece of social science literature. Arguably its incorporation into *Re L* changed its status and placed it on the ‘public record, and thus able to have been known by . . . Counsel for the parties’ at [93] and [138].

174 *Ibid*, at [103].

175 For example, the findings extracted through the judge’s questions relating to the father’s ‘insight into the predisposing or aggravating causes of his violence, and his insight into and contrition for his violence’ had been ‘agitated during the cross-examination of the [expert] both before and after his Honour raised the issues’ at [130].

176 (2012) 259 FLR 122; [2012] FamCAFC 18; BC201250070 at [153]. The Court then cited *SCVG v KLD* [2011] FamCAFC 100; BC201150258 with approval.

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.¹⁷⁷

To illustrate this point the court accepted submissions that where a judge consults 'authoritative works or experts' or uses extrinsic materials this must be identified for all the parties and they must be 'given the opportunity to test such evidence, adduce other evidence in relation to the topic addressed by such evidence and/or make submissions about the evidence'.¹⁷⁸ These processes seem similar to the steps taken by Benjamin J in *Maluka* and yet he was found to have been insufficiently comprehensive or precise. It can be seen, therefore, how complicated and potentially expensive the exercise could become.

The use of the material

In terms of use of the material, this case perhaps exemplifies an on-going, somewhat disingenuous approach from the Full Court regarding the fine line between reliance and non-reliance and therefore when thinking may be influenced. Clearly this report was in the judge's mind and assisted him to formulate his questions. It would be better if his Honour had raised its use instead of springing it on the parties when delivering judgment. It is argued above that in *Dylan* support from the social sciences may have assisted the judge to make orders contrary to the recommendations of all of the parties and experts, despite the Full Court finding on appeal there was no reliance, and in *Patsalou* no reliance was found despite clear connections between the writings referred to and the judge's findings. However, if his Honour had not mentioned *Re L* in his judgment — even though it was in his mind — he still could have made most of the same findings and may not have been appealed. Silence does not seem to be the appropriate way to deal with these problems though — that is not transparency.¹⁷⁹

It is interesting to note that many aspects of the Sturge and Glaser report have been incorporated into *Best Practice Principles* in Australia, but no mention was made of that document by the trial judge or the Full Court in *Baranski*. This could suggest that the detailed contents of the *Best Practice Principles* are not yet well known to the legal community.

¹⁷⁷ Ibid, at [154].

¹⁷⁸ Ibid, at [91]. These submissions were said to be based on *Lamereaux v Noiro* (2008) 216 FLR 432; (2008) FLC 93-364; [2008] FamCAFC 22; BC200850163 and *Maluka v Maluka* (2011) 45 Fam LR 129; (2011) FLC 93-464; [2011] FamCAFC 72; BC201150189.

¹⁷⁹ Peggy Davis' research shows that in the United States there is little discussion about 'the appropriateness of judicial resort to extra-record literature'. She argues that judges and litigants should be encouraged to directly address the use of such materials, 'rather than leave them *sub rosa*'. See P Davis, "'There is a Book Out . . .': An Analysis of Judicial Absorption of Legislative Facts' (1986-87) 100 *Harvard LR* 1539 at 1603 (*sub rosa* = in secret).

The latest word

McGregor & McGregor

*McGregor and McGregor*¹⁸⁰ is the latest case in which the Full Court has examined the issue. The material under scrutiny consisted of two papers about parental alienation — a vociferously contested area of social science opinion.¹⁸¹

The legal basis

Although *Aytgurul* was not cited¹⁸² the Full Court seems to have agreed with the High Court — s 144 of the Evidence Act is simply not available as the basis to support the introduction of these kinds of articles. Extrinsic materials dealing with ‘social science issues in parenting proceedings’ could not fall with s 144(1)(a).¹⁸³ The court concluded:

It is not open to a judge to use s 144 . . . to ‘inform’ him or herself of matters in respect of which reasonable minds might differ.¹⁸⁴

The Full Court provided an intricate analysis of the intersection of the evidentiary provisions of the FLA and the Evidence Act and determined that these papers could be considered opinion evidence. The strange outcome of the interaction between the two pieces of legislation is that the FLA allows the admission of *any* opinion without the usual rules and exceptions that relate to opinion evidence.¹⁸⁵ Without describing the whole interpretative package here, the court found that s 135 of the Evidence Act did still apply and contained concepts relevant to natural justice and procedural fairness. It says:

General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

180 [2012] FamCAFC 69; BC201250279 (28 May 2012). In this case, unusually, it was the father who was under scrutiny for alienating the children who had lived with him since separation. At first instance O’Dwyer FM changed the living arrangements so that the children resided with the mother, against their ostensible wishes.

181 The two papers were B Fidler and N Bala, ‘Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, And Conundrums’ (2010) 48(1) *Family Court Review* 10 and T Altobelli, ‘When a Child Rejects a Parent’, *College of Law, Advanced Family Law CLE*, August, 2010. This latter paper has since been further developed and published in this *Journal* — T Altobelli, ‘When a Child Rejects a Parent: Why children resist contact’ (2011) 25 *AJFL* 185. In terms of the debate see, eg, C Wood, ‘The Parental Alienation Syndrome: A Dangerous Aura of Reliability’ (1994) 29 *Loyola of Los Angeles LR* 1367; J Hoult, ‘The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law and Policy’ (2006) 26 *Children’s Legal Rights Journal* 1 and J Kelly and J Johnston, ‘The Alienated Child: A Reformulation of Parental Alienation Syndrome’ (2001) 39(3) *Family Court Review* 249. For a recent discussion of ‘parental alienation syndrome’ in the courts which draws on some of the competing social science literature see *Maurer and Van Laren*, [2012] FamCA 8 (13 January 2012).

182 It was delivered just over a month before *McGregor*.

183 *McGregor v McGregor* [2012] FamCAFC 69; BC201250279 (28 May 2012) at [68].

184 *Ibid* (28 May 2012), at [74].

185 Because the application of those sections of the Evidence Act has been excluded by s 69ZT(1) of the FLA. See *McGregor v McGregor* [2012] FamCAFC 69; BC201250279 (28 May 2012) at [74].

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

Although these tests are quite different from the notice provision in s 144(4), there is a similar need to examine carefully the nature of the material and consider questions of fairness. The court here found that this particular material could not be fairly admitted, so although a door may have been opened by s 69ZT it was closed again in this particular case. It is easy to see that s 135 of the Evidence Act would often block the reception of complex and contentious material.

The use of the material

The highly contested nature of this field of research suggests that it is particularly inappropriate for judges to refer to a small selection that has come to their attention. In fact it seems that the trial judge¹⁸⁶ made substantial use of the work of Richard Warshak which was cited *within* one of the papers he discussed. The court found that his Honour had ‘applied findings drawn from the evidence to Warshak’s criteria’ [of parental alienation].¹⁸⁷ It ultimately concluded that:

The content of the articles became, in effect, a prism through which the evidence was viewed and its complexion determined.¹⁸⁸

Again the Full Court can be seen to be discouraging the use of social science research by judges, particularly where procedural fairness has not been afforded. And again no clear guidelines have been provided as to how such material might properly be utilised. The repeated failure of judges to give any notice continues to mean that there is scant authority on how the process might operate in practice. It is interesting that, although the decision directly relates to judicial use of social science literature and was handed down just over a month after *Aytugrul*, the High Court case was not cited and nor were many of the Full Court decisions discussed in this article. This might be the latest word, but it will not be the last!

Part IV: The Family Violence Best Practice Principles

Introduction

The *Family Violence Best Practice Principles* for dealing with cases involving family violence, jointly released by the Family Court of Australia and Federal Magistrates Court in March 2011¹⁸⁹ are a formalised representation of social science permeating family law. First produced in 2009, the 2011 version

¹⁸⁶ O’Dwyer FM.

¹⁸⁷ *McGregor v McGregor* [2012] FamCAFC 69; BC201250279 (28 May 2012) at [15].

¹⁸⁸ *Ibid*, at [117].

¹⁸⁹ Family Court of Australia and Federal Magistrates Court of Australia, *Family Violence Best Practice Principles*, July 2011, at <<http://www.familylawcourts.gov.au/wps/wcm/resources/file/eb6f65040e33d79/FVBPP%20Report%20Final%20July%202011.pdf>> (accessed 21 September 2011). They were developed by a committee comprising representatives of both courts, chaired by Justice Judy Ryan and launched jointly by the Chief Justice of the Family Court of Australia, Diana Bryant AO and the Chief Federal Magistrate, John Pascoe AO CVO.

demonstrates the continued commitment of the Family Courts to work towards improving the family law system's response to family violence.¹⁹⁰ Their publication on the website makes them accessible to all interested persons.

The legal basis

The *Best Practice Principles* (BPP) contain considerable information from the social science literature and encourage its use, but they do not provide any real guidance as to how this should occur. The only mention of any legal basis for reference to this material is the unsatisfactory s 144 of the Evidence Act which is footnoted without elucidation after a paragraph stating that:

Courts may be assisted by evidence about current research from fields of psychology, psychiatry and social work to assist in determining the likely impact of family violence on child development, child health and parental capacity.¹⁹¹

The use of the material

The BPP incorporate two particular areas of social science literature on family violence that have been discussed through the cases presented in this article. The first is the literature regarding typologies of family violence cited in *Maluka* and the second is the Sturge and Glaser report referenced in *Baranski*.

The BPP devote a page to 'Different Types of Family Violence'. The introduction to this section states that there is 'growing acceptance that violence can generally be defined as being within four categories'.¹⁹² The Kelly and Johnson article (on which Benjamin J relied in *Maluka*), is cited as authority for this proposition and the four categories are then provided with brief descriptions. But no reference is made to any of the critique of this literature. The BPP can only present a snapshot of a burgeoning field of research — devoid of much of the detail contained in the original works from which it was drawn. This means that the nuanced nature of the concepts, the qualifications applied by the authors and their own acknowledged limitations and constraints are not identified — potentially dangerous in such a contested field of scholarship and opinion.

The BPP also set out considerable detail from the Sturge and Glaser report referenced in *Baranski*. Under a heading of 'Matters to consider where findings of family violence or abuse, or an unacceptable risk of family violence or abuse, have been made' there is a long list of 'factors' drawn from that report which provide a very different lens through which to examine family violence from the typology literature. It includes ideas such as:

190 They largely emerged out of the Family Court of Australia's *Family Violence Strategy*. Family Court of Australia, *Family Violence Strategy*, 2004–2005, p 12 at <<http://www.familycourt.gov.au/wps/wcm/resources/file/ebafe24a321c9b8/violence.pdf>> (accessed 26 October 2011) and were modelled on work undertaken in the United Kingdom in the late 1990's and early 2000's. See in particular the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law, *Guidelines for Good Practice on Parental Contact where there is Domestic Violence*, 2002, at <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/family/abfldomviol.htm>> (accessed 27 October 2011).

191 Family Court of Australia and Federal Magistrates Court of Australia, *Family Violence Best Practice Principles*, July 2011, p 19.

192 *Family Violence Best Practice Principles*, p 6.

- Effect of family violence on the child
- Effect of family violence on the parent with whom the child is living
- Degree of insight the perpetrator has shown
- Degree of acknowledgment of the violence

The BPP suggest that judges should use this literature to understand the facts of the case and determine appropriate orders. This seems to be exactly what Benjamin J did in *Maluka* and Brown FM did in *Baranski*. Thus, there seems to be a disjunction between what the BPP encourage and what the Full Court has said about judges using social science literature. If Brown FM had said in his judgment that he had formulated his questions using the BPP would this still have been appealable? Are all parties supposed to be on notice that judges may use this resource in any relevant case? Is the social science information in the BPP unassailable? It is interesting that the case makes no reference to the BPP despite their recommended recourse to this very literature.

In his commissioned report on family violence and the Family Courts, Richard Chisholm observed that the few comments he received about the *2009 Best Practice Principles* were generally favourable and he recommended that measures be considered that might make them more ‘influential’.¹⁹³ He saw them as a ‘valuable initiative’¹⁹⁴ but noted that they had ‘no legal binding force’.¹⁹⁵ Until there is a clearer picture or consensus about the role of social science in family law decision-making it is difficult to see precisely how their influence might be appropriately enhanced.

Conclusion

It is interesting to ponder the fact that, by the time of the 2006 amendments to the FLA, all judicial officers in the family law system in Australia would have practised or held office for most of their professional lives under the regime that commenced in 1976. They have a familiarity with both social scientists and social science and some have developed a genuine expertise in some areas.¹⁹⁶ Perhaps this is why they turn so readily to social science literature — which they have been reading for many years. It is also without doubt that this on-going relationship between lawyers and the social sciences has enriched the practice of family law and enhanced the delivery of family law services to separating families.

Part II demonstrated the consequences of deciding cases where there was no social science information available. Although Murray J found in favour of the mother in *Heidi*’s case, she was arguably misguided about the impact of the father’s violent conduct by prevailing but incorrect societal norms about family violence. As social science around family violence and other issues relevant to family breakdown began to be published, judges sought ways to draw it into their decision-making to assist them to ‘fill the gaps’ between the facts and the law.

¹⁹³ Chisholm, above n 126, pp 175–6.

¹⁹⁴ *Ibid*, p 175.

¹⁹⁵ *Ibid*, p 273.

¹⁹⁶ At the very least Federal Magistrate Tom Altobelli and Justice Robert Benjamin fall into this category — as do many others.

On the other hand, it has been argued here that the content of the social science literature now being accessed is complex and contested and therefore the use of a selective set of materials chosen by a presiding judge, often only at the time of judgment delivery, is inherently problematic. Judges may gravitate towards labels and categories and miss the nuances or qualifications in the original research, pulled by the law's tendency to be reductionist.¹⁹⁷ They may be influenced to consider the facts through a particular lens, such as one branch of the parental alienation literature, when there are many other ways to look at them. Application of these concepts to particular families arguably requires professional training and clinical experience. Such use of the material may have critical consequences for the parties in any case and their children and may well be highly detrimental to one party and advantageous to another — or at least seem so to the parties.

Burns suggests that 'very significant issues [are] raised where . . . social fact statements [used by courts] are highly contentious and debatable or involve the discussion of "facts" . . . which ostensibly draw on the expertise of other disciplines'.¹⁹⁸ The social science on family violence, shared parenting and parental alienation in family law are clear examples of 'contentious and debatable' literature and the unanswered procedural and content issues do not seem particularly satisfactory in a jurisdiction where the best interests of children are paramount.

It has also been demonstrated that there is currently no clear legal basis for the introduction of such materials in any event — and in fact any use at all may have been abolished by *Aytugrul*. On the one hand, failure to refer to social science has been criticised by the Full Court,¹⁹⁹ but clearly substantial use is also disapproved.²⁰⁰ Most social science research does not seem to fall within the ambit of s 144 of the Evidence Act or judicial notice and s 69ZT of the FLA may pose similar difficulties. The use by judges of social facts at trial level is not a well developed approach in Australia, although the US concept of social framework is worthy of exploration.

Perhaps one question that needs to be asked is: Do we want family law judges in Australia to be able to reference social science literature that has not been introduced through an expert witness? If the answer is 'no' — then clear prohibiting legislation is needed because the practice is common. But the likely consequences of such a step will just be on-going *unacknowledged* use of such materials.

If we want judges to be able sometimes to turn to this vast and relevant body of research, then it is necessary to develop an appropriate process that provides fairness and certainty. At present there is an expectation of natural justice in that parties will be given notice and an opportunity to respond — but the precise details of the necessary notice are not clear and there is little jurisprudence about how parties should conduct serious challenges to

197 See B Neale and C Smart, *Agents or Dependents?: Struggling to listen to children in family law and family research*, Centre for Research on Family, Kinship and Childhood, 1998 (also drawing on King and Piper) at <http://www.sociology.leeds.ac.uk/assets/files/FLaGWorkingPapers/WP3_Neale_Smart.pdf> (accessed 28 January 2012).

198 Burns, above n 7, at 237.

199 *McCall v Clark*.

200 *Dylan, Baranski, SCVG v KLD*.

information sought to be used or referenced by a judge. It also seems that, if it can be established that the judge did not rely on the material, the rules of natural justice may be waived and the status of the material or the legal basis for its presence are rendered irrelevant. Unfortunately the BPP do not seem to have resolved the issues raised by the cases.

This lack of clarity leaves many unanswered questions. What is to happen if a judge decides a parenting case drawing on some cited social science research or the BPP and makes a finding that the parents have been engaging in 'situational couple violence', that the children are not at risk of actual abuse in either home and that, although there is conflict, the best interests of the children will be served by a shared care parenting arrangement? Can the mother seek to admit peer reviewed social science research which critiques the Kelly and Johnson model or must she call an expert witness to counter the view propounded in the literature and give professional evidence about what kind of violence occurred in that particular family? Would she obtain permission to re-open her evidence to do this?²⁰¹

Or how does the father respond when he realises that the judge is going to find that he perpetrated 'controlling coercive violence' and may order that he has limited or no parenting time, partly as a result of that finding? What about the expense of this extra work — whether private or legally aided? And who will debate all the contradictory or different ideas in the research? These are not appropriate matters to be resolved by the lawyers and self-represented litigants in the courtroom.

An analysis of the BPP suggests that they feature characteristics of both a practice direction and a bench book. Some aspects lean more towards *process*, perhaps akin to practice directions. These suggest steps that need to be taken at hearings and provide a 'checklist of legislative requirements to follow in all parenting cases' involving family violence. Other aspects are more *content* centred, containing social science information about family violence, something like a bench book.

It is interesting to observe that the UK *Good Practice Guidelines*, on which the *2009 Best Practice Principles* were largely modelled, have now been replaced with a practice direction which has an emphasis on procedural matters.²⁰² Although there is some content about the effects of family violence and other issues there is no direct reference to any social science research. It could be useful to consider the development of a set of guidelines in the nature

201 Rhoades noted procedural issues which were likely to arise when judges introduce social science research into judgments which are delivered after the parties have closed their cases. It could lead to applications to re-open the evidence, re-interview the child, recall the experts and make new submissions; H Rhoades, 'The Dangers of Shared Care Legislation: Why Australia Needs (yet more) Family Law Reform', (2008) 36 *FL Rev* 280 at 294. This argument was put by the father's counsel in *SCVG v KLD* [2011] FamCAFC 100; BC201150258 at [48], contending that the lack of notice by the Federal Magistrate of his intention to refer to the material meant that 'the parties were denied the opportunity to put such material to the single expert, to submit 'different research material' to the single expert and/or his Honour, and to make submissions to his Honour as to how the research material ought 'assist' his Honour'.

202 Practice Direction 12J, 'Residence and Contact Orders: Domestic Violence and Harm', *Family Procedure Rules*, at <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/family/pdf/practice_directions/Web_pd_part_12j.pdf>

of practice directions as part of the solution to the process issues.

In terms of bench books, interest has been shown in Australia in the *Electronic Bench Book on Domestic Violence and Family Law* developed by the National Justice Institute in Canada (EBB)²⁰³ and a number of recently commissioned Federal Government inquiries and reports have suggested the development of a model or national bench book which would cover violence against women generally.²⁰⁴ The EBB incorporates an ‘embedded library of materials enabling a judge to gain full access to statutes, cases, on on-line domestic violence literature by the use of a “click” of a mouse’.²⁰⁵ Justice McGarry explained that the EBB offers judges ‘guidance, tools and options [they] can use when [they] find [themselves] in complex and sometimes confusing situations’.²⁰⁶ But decision-making in family law cases is always difficult even with access to such a vast array of resources: ‘there is no simple solution, no “silver bullet” or formulae to be applied’.²⁰⁷

In its 2009 advice to the Federal Attorney-General on family violence issues the Family Law Council proposed the development of a ‘common knowledge base that can be accessed by those assisting people affected by family violence’ and which must also be ‘available to the judiciary’.²⁰⁸ It also suggested the ‘establishment of a reference group to oversee and lead the development, implementation and maintenance of [the] common knowledge base’.²⁰⁹ This might also assist in addressing the issue.

Ideas like the development of practice directions, a bench book or a common knowledge base and clear guidelines for their use are inviting but I suggest that there is quite an urgent need for a more wide-ranging inquiry to investigate the appropriate use of social science research in family law and propose guidelines to facilitate that use.

(accessed 9 August 2012). This Practice Direction was first issued in 2008, was amended in 2009 (District Judge Julie Exton, *Law Society Gazette*, July 2009) and became part of the *Family Procedures Rules* in 2011.

203 The Australian Institute of Judicial Administration invited people closely involved with the project to speak at its *Family Violence Conference: Towards Best Practice* in Brisbane in 2009. See L Neilson and Justice J McGarry, *Domestic Violence and Family Law in Canada: A Handbook for Judges*, (extracts) National Judicial Institute, Ottawa, Canada, 2009. Justice McGarry sits on the Superior Court of Ontario. The EBB is available at <<http://aija.org.au/Family%20Violence%2009/Papers/McGarry&Neilson.pdf>> (accessed 27 October 2011). The EBB was also mentioned in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response*, ALRC Report 114, 2010, p 1466.

204 The National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021*, p 121 and Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence: A National Legal Response — Final Report*, Commonwealth of Australia, 2010, pp 1465–9. This was partly in response to identified concerns about a lack of knowledge and training for judicial officers in family violence.

205 Judge Hyman of the Superior Court of California, commenting on the EBB in Neilson and McGarry, above n 203.

206 Neilson and McGarry, above n 203, p 2.

207 Judge Lilles in Neilson and McGarry, above n 203, p 3.

208 Family Law Council, above n 68, p 38.

209 *Ibid*, p 39.