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The Honourable Chief Justice Diana Bryant AO

The use of extrinsic materials – with particular reference to social science and family law decision making

Introduction

The use and misuse of extrinsic materials as expert evidence to inform decision making has been a recent topic for the High Court as well as the Full Court of the Family Court.

Social science research has proved a seductive force in family law decision making and I want to begin by exploring why that might be so. I postulate there are four, possibly five, features, some common to all courts but others particular to courts exercising jurisdiction under the *Family Law Act 1975* (Cth) ("the Act") and I will explore them more fully. In the course of that exploration I hope that the problems of extrinsic materials and their use in other courts will be revealed for discussion.

The four features are in summary:

1. Division 12A of the Act
2. The single expert
3. Judicial education and the well informed judge
4. The many legislative considerations to which the courts must have regard in determining what is in the best interests of a child

Arguably, a fifth feature is 'to explain human behaviour'.

Division 12A

In 2006, when the Government enacted significant amendments to the Act,[1] colloquially known as the "shared parenting amendments", a new Division, Division 12A, was inserted into Part VII. It applies to proceedings commenced on and after 1 July 2006. It applies to child related proceedings and, with the parties' consent, any other proceedings.[2]

Division 12A includes Subdivision D, which deals with matters relating to evidence and in particular sections:

[1] *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).
[2] *Family Law Act 1975* (Cth), s 69ZM.

- 69ZT (Application of rules of evidence)
- 69ZV (Evidence of children)
- 69ZW (Evidence relating to child abuse or family violence)
- 69ZX (Court's general duties and powers relating to evidence)

Section 69ZT and 69ZX bear closer consideration but at this stage suffice to say that section 69ZT in particular provides that particular provisions of the *Evidence Act 1995* (Cth) ("the Evidence Act"), including relevantly the sections that deal with expert opinion evidence, do not apply to child related proceedings.

In summary, unless the court is satisfied the circumstances are exceptional,[3] and has considered various matters,[4] the opinion rule does not reply in child related proceedings. Thus, any opinion evidence, including that of an expert, in any form, is admissible subject to requirements which I will discuss. I will return to a more specific consideration of those matters later in this paper.

I highlight section 69ZT at this point because on its face at least it could be argued that extrinsic materials might arguably be easier to admit in family law courts in child related proceedings than in other courts. I contend that on proper consideration of the interrelationship between Division 12A and the Evidence Act, that is not the case, but jurisprudence over the last few years may have led to some confusion about its admissibility and use.

The single expert

It has long been the position in the Family Court, for good reason, that in child related proceedings there should only be one expert witness. This can be seen to be part of the Family Court's endeavours to make child related proceedings less adversarial. However, use of a single expert pre-dates the less adversarial process introduced by the court at the same time as the shared parenting amendments.

It is rare to find more than one expert in child related proceedings; that expert normally being an in-house family consultant, usually a psychologist but sometimes social work trained, an external expert with similar qualifications, or a child psychiatrist. Section 69ZX facilitates the court making provision for a single expert and section 69ZX(1)(d) in particular provides that the court may give directions or make orders about:

- the matters in relation to which an expert is to provide evidence;
- the number of experts who may provide evidence in relation to a matter;
- how an expert is to provide the expert's evidence.

Social science theories will inevitably underpin the opinions of these experts. The extent to which their underlying assumptions require disclosure is something I want to

[3] Ibid s 69ZT(3)(a).
[4] Ibid s 69ZT(3)(b).

consider later in the paper, but the point to make here is that the expert witnesses are almost never challenged by contrary evidence being called, and rarely challenged by counsel, at least in regard to the underlying assumptions as to the opinions expressed in their reports.

Judicial education and the well informed specialist judge

The third factor I postulate which makes the use of extrinsic material seductive to judges exercising jurisdiction in family law cases is the training that they themselves receive and the knowledge they possess from practising as specialists for many years prior to their appointment.

In a broader context the judiciary in the 21st century is vastly different from the judiciary in the 19th century and much of the 20th century. Judges in the 21st century are expected to come to the role of judging with understandings in all sorts of areas that will inevitably inform their judgments. Family law judges, like other members of the judiciary, have for several decades been attending judicial education programs on a variety of subjects including gender awareness, Indigenous culture, characteristics and customs of other cultures, and the effects of family violence on children and on parties and witnesses and how it affects credibility. These are all designed to equip the judge with information to help them to understand the evidence and the context in which the evidence is given.

But at some point there must be a line drawn between information which is generally of assistance in helping to understand the evidence and information which may actually intrude upon the decision making process itself, particularly if unstated. This is the theme I want to explore in this paper.

I do not mean by this the general life experience one brings to the role. For example, in child related proceedings judges who are parents will inevitably, even if unconsciously, be influenced by their own experiences as a parent. I mean the wealth of social science research that we have all been exposed to over many years in our roles as solicitor, barrister and judge. Where this is not clear to the parties, and where the line is drawn, becomes of critical importance.

What falls on one side of the line, that is the permissible side, was cogently explained recently by Heydon J in *Aytugrul v R*. In a separate judgment, but agreeing with the plurality, his Honour said at [69] and [70]:

> The teachings of the expert material could have been employed in two ways. It could have been employed before the jury as a warning against the dangers of uncritically accepting the statistical evidence. So used, the material would have been similar to evidence admitted in the United States about the fallibility of eye witness identification, the low rate of recidivism among those convicted of murder on a hearing to determine sentence, the relevance of "battered women syndrome" to self defence and the

> characteristics of abused children. And, so used, it would have been similar to evidence admitted in Australia about "infantile amnesia", the effect of mental impairment on a witness's powers of observation, recollection or expression, the language or communications difficulties bearing on the ability of aboriginal witnesses to give reliable or complete evidence, the relevance of "battered woman syndrome" to duress, the incidence of recovered memory syndrome and the effects on children of separation from their parents.
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> Material of this kind does not establish "adjudicative 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. Dixon CJ described them as "ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse setup by the law." But the material just referred to establishes general principles against which the court can assess particular evidence, or the conduct of a party or witness. That is, it helps the court to assess adjudicative facts. When material of this kind is so used; **it must be established by evidence**.[5] (emphasis added)

This distinction is perhaps more easily blurred in family law parenting cases than others. As Zoe Rathus notes in a recently published article,[6] Family Court judges have been referring to social science material since the Family Court commenced in 1976, as other judges had done previously. For example, in *Raby v Raby*[7] Watson, Fogarty and Lindenmayer JJ referred to an article entitled 'Of children, custody and cliché' by Chisholm and Petrie and also to the seminal book by Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child*.

Looking back to their Honours' discussion in *Raby* emphasises the exquisite dilemma in the use extrinsic materials. An example is a quote from the Chisholm and Petrie article appearing in the judgment:

> In fact, there is absolutely no evidence to support the mother principle. It is believed by the evidence of infanticide, neglect and abuse, and the relative success of adopted children over their peers. Michael Rutter's respected review of the evidence related to 'maternal deprivation' states: 'Of course, in most families the mother has most to do with the young child and as a consequence she is usually the person with whom the strongest bond is formed. But it should be appreciated that the chief bond may not be with

[5] *Aytugrul v R* (2012) 286 ALR 441at 461-2, [69]-[70] per Heydon J.
[6] Zoe Rathus AM, 'A call for clarity in the use of social science research in family law decision-making' (2012) 26 *Australian Journal of Family Law* 81.
[7] *Raby v Raby* (1976) FLC 90-104 (Watson, Fogarty and Lidenmayer JJ).

> the biological parent, it need not be with the chief caretaker, and it need not be with a female.[8]

The discussion of this article and the text quoted was in the context of the Full Court considering the previously held views of judges about the maternal preference as a custodian, particularly of young girls.

The Full Court made reference to the NSW Court of Appeal decision, also in 1976, of *Epperson v Dampney* where Glass JA said:

> I am directed by authority to apply the common knowledge possessed by all citizens of the ordinary human nature of mothers. That knowledge includes an understanding of the strong natural bond which exists between mother and child. It includes awareness that young children are best off with both parents, but if the parents have separated, they are better off with their mother. The bond between a child and a good mother (as this applicant was found to be) expresses itself in an unrelenting and self sacrificing fondness which is greatly to the child's advantage. Fathers and stepmothers may seek to emulate it and on occasion do so with tolerable success. But the mother's attachment is biologically determined by deep genetic forces which can never apply to them.[9]

The exquisite dilemma to which I referred is writ large by these two cases decided by different courts, one a specialist court and the other not, in the same year. Both refer to notions of social science. At least the Family Court was able to identify recent references. But there is no room for a range in their respective views on which reasonable minds might disagree; one court is right and the other is wrong.

I leave for another day the tempting exploration of the stereotypical attributes of what constitutes a "good mother".

So, at least as far as social science is concerned, this highlights for me one of its dangers. That is to say, views change over time.

Indeed, our knowledge of almost everything increases, and sometimes changes 180 degrees. The judges of the Court of Appeal in NSW in 1976 thought that they understood the social science. So did the Family Court judges and only one group could be right. I imagine experts could have readily been found to support the views expressed in *Raby*. I doubt evidence would have been available to the NSW Court of Appeal to support Glass JA's views. That highlights for me the need for transparency whenever decisions are influenced by extrinsic matters.

This is so even if as Heydon J said in *Aytugrul*:

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[8] Ibid at 75,485.
[9] *Epperson v Dampney* (1976) FLC 90-061 at 75,302.

> Sometimes legislative facts can legitimately be derived by analysing factual material not tended in evidence either at trial or on appeal. That analysis can operate in many fields, but some of them are fields dependent on expert learning. Thus sometimes general references are made by courts to the causes of psychiatric injury and the diagnosis of psychiatric illness. Sometimes more specific reasoning is propounded after the court has had recourse to expert literature. Medical works have been taken into account in assessing the causation and foreseeability of psychiatric injury. Works on psychology have been considered in formulating rules about identification evidence, both directly and indirectly.[10]

However, as his Honour went on to observe, it would need to be made clear how the court could take the expert material into account. His Honour considered how this might have been done by either treating it as capable of being taken into account by way of judicial notice, or possibly as "common knowledge", but rejecting both. His Honour finally noted, that even if there was no significant challenge to the research relied on:

> If the expert material were to be taken into account, it was highly preferable that it be presented through expert witnesses, preferably during the pre trial hearing to determine admissibility. The admissibility and weight of the expert material could then be considered publically and critically.[11]

I think this is fundamentally important for reasons which I will develop.

The legislative considerations to determine the best interests of a child

The fourth area in which it may be thought that family law is somewhat different from other jurisdictions is in the legislative factors to which the court must have regard in considering what constitutes the best interest of the child as the paramount consideration in deciding whether to make a particular parenting order.[12] There are two primary considerations and a long list of additional considerations. Federal Magistrate Harman in a recently published article[13] suggested that many of these legislative considerations can be seen to be informed by social science. The problem with this, as I have indicated, is that social scientists do not always agree, and what informs the judge may depend upon the choice of social scientist. I return to this aspect when I consider adjudicative facts versus legislative facts.

[10] *Aytugrul v R* (2012) 286 ALR 441 at 462-3 per Heydon J.
[11] Ibid 74.
[12] *Family Law Act (1975)* Cth s 60CA and s 60CC(1).
[13] Federal Magistrate Joe Harman, 'In defence of the 2006 amendments to the Family Law Act' (2011) 1 *Family Law Review* 151.

A comparison with other specialist Courts and Tribunals

A problem inherent in family law proceedings, but not exclusive to them, is that the judge may have knowledge acquired from an expert or experts consistently appearing before the judge which will inform decision making in the case before him or her , but also in following cases. In some other specialist jurisdictions this is the subject of specific legislation. For example, section 25(3) of the *Dust Diseases Tribunal Act 1989* (NSW) provides that:

> Historical evidence and general medical evidence concerning dust exposure and dust diseases which has been admitted in any proceedings before the Tribunal may, with the leave of the Tribunal, be received as evidence in any other proceedings before the Tribunal, whether or not the proceedings are between the same parties.

But there are limitations. As the plurality pointed out in *Dasreef Pty Lty v Hawchar*:[14]

> It follows that, subject to whatever is specifically provided by other provisions of Pt 3 of the Act, or by the rules (56), proceedings in the Tribunal are governed by the rules of evidence. Those rules do not permit the Tribunal to take into account, in deciding one case, evidence given in other cases between different parties or findings of fact made in other cases between different parties.
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> Section 25B of the Dust Diseases Tribunal Act provides an important qualification to that general rule. That section provides:
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> > "(1) Issues of a general nature determined in proceedings before the Tribunal (including proceedings on an appeal from the Tribunal) may not be relitigated or reargued in other proceedings before the Tribunal without the leave of the Tribunal, whether or not the proceedings are between the same parties. (1A) If an issue of a general nature already determined in proceedings before the Tribunal (the earlier proceedings) is the subject of other proceedings before the Tribunal (the later proceedings) and that issue is determined in the later proceedings on the basis of the determination of the issue in the earlier proceedings, the judgment of the Tribunal in the later proceedings must identify the issue and must identify that it is an issue of a general nature determined as referred to in this section.
> > (2) In deciding whether to grant leave for the purposes of subsection (1), the Tribunal is to have regard to:
> > > (a) the availability of new evidence (whether or not previously available), and

[14] *Dasreef Pty Ltd v Hawchar* (2011) 277 ALR 611 at [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), (Heydon J dissenting).

(b) the manner in which the other proceedings referred to in that subsection were conducted, and

(c) such other matters as the Tribunal considers to be relevant.

(3) The rules may provide that subsection (1) does not apply in specified kinds of proceedings or in specified circumstances or (without limitation) in relation to specified kinds of issues.

(4) This section does not affect any other law relating to matters of which judicial notice can be taken or about which proof is not required."

The plurality pointed out that the *Dust Diseases Tribunal Rules* (NSW) provided that those intending to rely upon determination in other proceedings must give notice of that intention and the Tribunal is required to identify the issue in its judgment.

However even then there are strict limitations.

In *Dasreef* the NSW Court of Appeal had dismissed the main substance of the appeal and rejected challenges to the trial judge's admission of the evidence of an expert as to the numerical level of respirable silica dust in the respondent's breathing zone, and relevantly for this discussion, the trial judge's reliance on his experience as a professional tribunal.

In the High Court the plurality held that the trial judge was not permitted to take into account his experience that silicosis is usually caused by very high levels of exposure to silica dust. They also rejected the expert evidence on the basis that the expert had not demonstrated that he had specialised knowledge and that the opinion expressed was wholly or substantially based on that knowledge. However, they dismissed the appeal because, based on the other properly admitted evidence, the relevant causation was established. Heydon J, dissenting on the result, agreed with the plurality that the expert evidence was inadmissible and that the trial judge erred in relying on his experience as a member of a specialist tribunal.

In a lengthy judgment, Heydon J pointed out some of the challenges to trial judges with expert evidence. The judgment dealt in some detail with the extent of the requirement for the expert opinion to be based wholly or substantially on specialised knowledge, and the necessity for evidence capable of proving matters sufficiently similar to those assumptions, to render the opinion of value before it could be properly admitted. That is a topic for a paper in its own right.

For present purposes I intend to refer to his Honour's judgment in relation to his comments about "experience" evidence and the 'specialist' court.

First he rejected its admissibility on the basis that the trial judge did not notify the parties in advance of his intention to rely on that experience, even if it were otherwise open for him to do so. Secondly he said it was not a matter on which the trial judge could take judicial notice because the "factual conclusion to which the trial judge's conclusion led him was not sufficiently notorious to permit the trial judge to take

judicial notice of it" under the relevant legislation. Finally he was not entitled to use his experience to decide whether there had been a specific breach of duty and what its causative effect in a particular case was. His Honour said:

> The Court of Appeal supported the trial judge by contending that he was saying no more then that his experience helped him to understand the evidence. That contention was not defended by the respondent in this court and was not sustainable as a matter of construction.[15]

What is not permissible?

Two recent decisions, one of the High Court and one of the Full Court of the Family Court of Australia, have held that extrinsic expert evidence is unlikely to legitimately form the basis for judicial notice.

The Full Court of the Family Court

In *McGregor*[16] a Federal Magistrate had regard to extrinsic material, particularly in relation to what he referred to as "parental alienation". Early in his judgment the Federal Magistrate said:

> There is much literature on what is generally described as alienation by one parent of the other from their children; how to identify it, what the characteristics of it are and what are the best ways of addressing it. A recent paper by Fidler and Bala (Family Law Review, Vol. 48 No. 1, January 2010 10-47) canvasses much of the literature and approaches to adopt when faced with an alienation case.

In addition, the Federal Magistrate quoted from and made substantial use of the work of Warshak, which was cited within the paper he discussed. In relation to this the Full Court said:

> We are satisfied that while his Honour considered the evidence properly introduced and made findings of fact based on that evidence, his Honour then applied those facts to the criteria contained in the article of Fidler and Bala (and apparently incorporating the criteria of Warshak) and on that basis concluded that the children had been "alienated" from their mother as a result of a deliberate campaign by the father. It is clear from a reading both of his Honour's reasons and the way in which his Honour framed questions of Dr R, that his Honour was not using the term in an everyday sense but in terms that connote a product of a process and a process which had predictable and dire consequences, attended by serious psychological sequellae, for children who had been subject to it. It is also clear from his Honour's reasons that, having been persuaded of the

[15] Ibid at [144] (Heydon J).
[16] *McGregor & McGregor* [2012] FamCAFC 69.

> existence of alienation in the sense used by Fidler and Bala and the apparently inevitable psychological consequences, his Honour turned to consider how to protect the children from the onset of those sequellae. That much is abundantly clear from his Honour's questions to Dr R about the relative merits of removing the children immediately and, in that context, his Honour's reference to studies based on interviews with adults who had been "alienated" from a parent.
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> In so doing, the Federal Magistrate's later conclusions and determination were unduly confined to those that conformed to his Honour's understanding and acceptance of the Fidler and Bala assertions. The content of the articles became, in effect, a prism through which the evidence was viewed and its complexion determined.[17]

The Full Court went on to consider how the information might have legitimately been introduced :

> The article by Fidler and Bala, if tendered as opinion evidence under s 69ZT(1), would have required his Honour to consider whether to exclude the evidence under either s 55 or s 135, and if not, to consider what weight to give it. However, as no attempt was made to tender the Fidler and Bala article, none of the above matters was considered by his Honour and, most importantly for the purpose of this appeal, his Honour failed to give the other party the opportunity to make submissions about receiving it and, if received, what weight to accord it.[18]

Furthermore in *McGregor* the Federal Magistrate had relied on an extra curial paper delivered by another Federal Magistrate called 'When a child rejects a parent', discussing the dangers of seeking the wishes of children in alienation cases. Despite the respondent to the appeal's argument that the academic writing, literature and the article of the Federal Magistrate did not form the basis of findings, the Full Court rejected that submission, finding that Federal Magistrate took significant account of and placed significant reliance on the article by Fidler and Bala, the article of the other Federal Magistrate, and, it appeared, other "unidentified" literature on the topic of alienation of children. As the Full Court said:

> None of it was introduced into evidence, and none was tested nor the subject of submissions or contrary evidence. It represented a failure to afford the appellant natural justice and procedural fairness.[19]

The Full Court then discussed whether and on what basis the material might have been admissible.

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[17] Ibid [116] and [117].
[18] Ibid at [118].
[19] Ibid at [121].

The need to meet the requirements of natural justice and procedural fairness

Noting that in *Barclay & Orton* the Full Court had said in relation to reliance on academic articles:

> While of course it is entirely desirable that judges have the assistance of expert evidence it is not appropriate, in my view, that a Federal Magistrate inform himself about some academic writings and not provide those writings to the parties nor allow other expert evidence to be called. As it is quite clear his Honour relied upon his own appreciation of this expert evidence in making what was an important decision to the parties in this case, that is, what arrangements should be made during Christmas holidays, the appeal must be allowed.[20]

Judicial notice in section 144 of the Evidence Act

Observing in particular that the requirements of section 144 (1)(a) limit the potential operation of the section and may only be used where the evidence is not reasonably open to question **and** is "common knowledge" in the locality where the proceedings are being held or generally.[21] The Full Court said that in practice there would be few issues in respect of which reference to extrinsic materials would not be "reasonably open to question" and "This we think would be particularly so in relation to social science issues in parenting proceedings."[22]

The Full Court made reference to several cases in the Family Law jurisdiction which exemplify this point.

> *X and X*,[23] where the Full Court concluded the test prescribed by section 144 "would have not permitted the judge to accept without proof that it was genuinely known that genital herpes was a condition that may be incurable; that it may be dormant for lengthy periods; and it may surface from time to time."
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> In *KB & TC*[24] the court said that "the benefit to be derived for a child from sibling relationships is not a matter" of general common knowledge. The Court noted, as is frequently the case with respect to parenting issues, that there are various credible schools of thought which could not be enlivened by s 144.
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> *Mains v Redden*[25] involved consideration of whether administering a number of conventional and almost universally administered vaccinations of children

[20] *Barclay and Orton* [2009] FamCAFC 159 at [71].
[21] *Evidence Act 1995* (Cth) s 144(1)(a).
[22] *McGregor v McGregor*[2012] FamCAFC 69 at [68].
[23] *X and X* (2000) FLC 93-017.
[24] *KB & TC* (2005) FamCA 458 at [87].
[25] *Mains v Redden* (2011) FLC 93-478.

> against a variety of conditions was in the child's best interest. The conflict of expert opinion evidence in relation to the benefits and risks of immunisation precluded any prospect of the Court taking "judicial notice" under s 144 of the Evidence Act. If an issue in proceedings is controversial, it is almost inevitable that there will be differing credible expert opinions in relation to it and demonstrably it would not fall within the operation of s 144.[26]

The High Court

Two weeks before judgment in *McGregor* was delivered, the High Court published its reasons for judgment in *Aytugural*[27] and had reached the same conclusion about the use of section 144.

Aytugural was a murder case where the trial was centered on certain technical scientific evidence regarding DNA testing. In a dissenting judgment in the Court of Appeal McClellan CJ referred to a number of published articles examining the impact of giving of evidence to a jury expressed in a particular way. The plurality said:

> 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) as underpinning the adoption of some general rule that expressing the results of DNA analysis as an exclusion percentage will always (or usually) convey more to a hearer than the evidence allows regardless of what other evidence is given about frequency ratios or the derivation of exclusion percentages.[28]

In a separate judgment Heydon J considered whether the evidence could have been admissible under section 144 of the Evidence Act. Justice Heydon here explained that there are two broad kinds of facts in litigation: adjudicative facts and legislative facts. Adjudicative facts are those that are in issue or relevant in to a fact in issue. On the other hand[29] "Legislative facts are those which help to determine what a common law rule should be or how a statute should be construed" and are to be distinguished from adjudicative facts. He explained:

> Sometimes legislative facts can be legitimately derived by analysing factual material not tended in evidence at trial or on appeal. That analysis can operate in many fields, but some of them are fields dependent on expert learning.[30]

In her article Zoe Rathus says:

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[26] *Evidence Act 1995* (Cth) s 144.
[27] *Aytugrul v R* (2012) 286 ALR 441.
[28].Ibid at [22].
[29] Ibid at [70].
[30] Ibid at [71].

> In Heydon J's opinion, the courts have viewed legislative facts as being matters of "common knowledge" in the sense much wider then that used in Section 144 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.[31]

His Honour's rejection of use of the particular material in *Aytugural* negates the possibility, in my view, that his Honour was creating a much broader category for the acceptance of extrinsic material. However the use of extrinsic materials has been a subject explored by his Honour in a number of recent cases.

In *Thomas & Mowbray*[32] Heydon J divides facts which have to be established in litigation into potentially five categories:

1. The facts in issue or relevant to facts in issue.
2. The facts going to the constitutional validity of statutes, other enactments or executive actions done under those statutes or enactments.
3. Facts going to the construction of non-constitutional statutes.
4. Facts going to the construction of constitutional statutes.
5. Facts which relate to the content and development of the common law.

He further postulates that in each category there are potentially three issues which arise.

> One is whether it is permissible to take the fact in question into account, and for what purpose. The second is whether any evidentiary rules affect admissibility, and how they can be satisfied. The third is the extent to which the court can consider the facts in question without giving the parties notice that they are doing so.[33]

It must be remembered that *Thomas & Mowbray* was a case about an Interim Control Order made under the Commonwealth Criminal Code against Mr Thomas, who had received training with Al Qa'ida and whose knowledge and skills could provide a potential resource for the planning or preparation of a terrorist act in Australia.

The court was examining the extent to which evidence against him had to be proved, and the extent to which he was entitled to be made aware of that evidence. Whilst that is evidence of a different ilk from that which I am discussing, it is comforting to note that Heydon J agreed with Callinan J that in cases where the parties are not on notice, and in the other four categories, a party should not lose on a crucial point without being warned in advance the point may arise, and be invited to deal with it.

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[31] Zoe Rathus, 'Call for clarity in the use of social science research in Family Law decision making' *Australian Journal of Family Law* at p. 7.
[32] *Thomas & Mowbray* (2007) 233 CLR 307 at [614].
[33] Ibid at [617].

In *Gerhardy v Brown*[34] Brennan J said:

> There is a distinction between a judicial finding of a fact in issue between parties upon which a law operates to establish or deny a right or liability and a judicial determination of the validity or scope of a law when its validity or scope turns on a matter of fact. When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend on the course of private litigation.
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> …
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> The court may, of course, invite and receive assistance from the parties to ascertain the statutory facts, but it is free also to inform itself from other sources. Perhaps those sources should be public or authoritative, and perhaps the parties should be at liberty to supplement or controvert any factual material on which the court may propose to rely, but these matters of procedure can await consideration on another day. The court must ascertain the statutory facts 'as best it can' and it is difficult and undesirable to impose an a priori restraint on the performance of that duty.

Heydon J cited Callinan J in *Woods v Multi-sport Holdings Pty Ltd*[35] in response to Brennan J's remarks, saying that he did not take them:

> …to be a warrant for the reception and use of material that has not been properly introduced, received, and made the subject of submission by the parties. What his Honour said cannot mean that the interests of the litigants before the court can be put aside. They retain their right to an adjudication according to law even if other, conceivably higher or wider, interests may ultimately be affected.[36]

Agreeing with this proposition, Heydon J said:

> Whether or not a category one fact of which a court proposes to take judicial notice can be the subject of contrary evidence, the circumstance that this Court proposes to take judicial notice of a constitutional fact, or ascertain it without recourse to admissible evidence, ought not to deprive a party of the right to present evidence on the point.[37]

He then raised some important questions:

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[34] (1985) 159 CLR 70 at 141-2.
[35] (2002) 208 CLR 460 at 511 [164].
[36] Ibid at [636].
[37] Ibid at [638].

> If the rules of evidence need not be complied with, what limits are there on the capacity of the Court to take constitutional facts into account? The material ought to be sufficiently convincing to justify the conclusion that it supports a material constitutional fact, but does any more restrictive rule exist? Is it sufficient to rely on a natural inhibition against finding constitutional facts in a manner open to later public and professional criticism, and on the capacity of the parties, once advised of what possible constitutional facts may be found, and how, to protest, to argue for a contrary position, to call contrary evidence, and to point to other material not receivable under the rules of evidence?
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> …
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> If judicial power to find constitutional facts were wholly untrammelled, there would be risks of great abuse. The questions just posed are thus important ones, and it is necessary to reserve them for resolution in future cases.

Of course we are not generally troubled in the context of the extrinsic evidence sought to be relied upon in family law cases, with constitutional facts, but it is interesting to note that in all of the cases to which I have referred Heydon J emphasises the need for procedural fairness and transparency.

Whether that is the last word from the High Court in relation to constitutional facts remains to be seen. But even in relation to constitutional facts, the importance of the adherence to form, and in particular to notice, cannot be understated.

Is there then a permissible means of relying upon extrinsic materials?

As I hope I have pointed out, for the reasons articulated, it is becoming increasingly common for judicial officers to have, as part of their education, exposure to social science relevant to their areas of practice. As a colleague has recently put it succinctly in another paper[38] on this issue, there are three benefits in doing so:

1. It dispels misconceptions, for example sexual assault and "hue and cry complaint";
2. It challenges stereotypes;
3. It provides an informed basis on which a judge may ask questions of a properly qualified expert.

In my view its use in these three areas is acceptable.

[38] Justice Ann Ainslie-Wallace, *Social Science and the Judicial Process*, paper delivered at Salamander Bay conference, 2012.

The first two provide a prism through which to make findings of fact. The third is the best and perhaps in the end the only proper method of getting social science extrinsic material into evidence.

A recent example of this is *Baranski,*[39] a decision of the Full Court on appeal from orders made by a Federal Magistrate. The Federal Magistrate raised issues from extracts of a report of some psychiatrists in a family law case United Kingdom, and put them to the expert witness so that their opinions became part of the evidence.

Without its introduction into evidence, or agreement by both parties that it can be relied upon, there is no satisfactory way of making use of social science extrinsic material. I postulate this even though in several decisions the Full Court of the Family Court has upheld decisions of judges who have used the material as "background". Generally in those cases the appeals[40] were dismissed because the "background material" had not been relevant to the decision ultimately reached, or put another way extraneous to the decision.

To the extent that there was in some of those cases some tacit support for the use of extrinsic materials as "background" as long as they were extraneous to the decision, the correctness of that proposition must now be in doubt following the strong statements in *McGregor*.

In my view "background" should emerge from admissible evidence or be a matter of consensus which is recorded by the trial judge. If matters of "background" do not fall within Section 144 of the Evidence Act then there is considerable danger in referring to them at all. As was submitted in *SCVG v KLD*[41] a litigant cannot be held to understand and accept that matters of "background" which do not emerge from evidence in open court have not impacted upon the determination of his or her case. Additionally, reliance upon extrinsic material of which the parties are not appraised to assist in understanding expert or other evidence is dangerous. Assessing evidence by reference to undisclosed material thus inevitably gives rise to perception of lack of procedural fairness.

The best way to understand evidence, and expert evidence particularly, is to direct any uncertainty to counsel conducting the case or by putting material to the expert witness in open court. This should clarify the uncertainty or put the relevant social science facts before the court in an open and transparent manner. This will allow the parties to agitate the issues further if they seek to do so.

Even then there are dangers. In *Maluka*[42] the parties agreed to the admission of extrinsic material but the decision was overturned on appeal, one of the reasons being

[39] *Baranski & Baranski & Anor* [2012] FamCAFC 18.
[40] *Allen & Green* (2010) FamCAFC 14 and *SCVG &KLD* [2011] FamCAFC 100.
[41] *SCVG &KLD* ibid.
[42] (2011) FLC 93-464.

that the trial judge had not made clear the purpose for which he was admitting the material.

Transparency in my view is vital.

Rathus in her article discusses the concept of "social facts". She says:

> Australian judges regularly make use of information from the wider world, particularly at appellate level, this reality has not received much judicial or scholarly attention and is perhaps not always recognised.[43]

She further says:

> Scholars in the United States have proposed a third category of facts called 'social framework' which involves 'the use of general conclusions from social science research to determine factual issues in a specific case'.

The problem is that they still need to be facts which are generally accepted as being uncontroversial and if so would surely fall within section 144 of the Evidence Act.

The old adage "a little knowledge is a dangerous thing" come to mind as being relevant as well.

In both *Maluka* and *McGregor* the extraneous material seems to have come to the attention of the judicial officers as something hitherto unknown, but which both embraced for the assistance it appeared to offer. Someone more conversant with all the relevant social science may understand that an article or opinion is not necessarily uncontestable, that there may be differing views as to what is, or is not, the contemporary orthodoxy.

From time to time there have been suggestions, particularly from the Australian Institute of Family Studies, that a body of uncontroversial social science propositions and their research based genesis should be compiled for use by judicial officers in deciding family law child related cases. However, the fact that this has not yet been done suggests in my view that there continues to be a difficulty in establishing that there is in fact a recognised body of social science dogma which is uncontroversial. If there were, one would have expected that this work would have become established as it has been in other areas, such as to explain aspects of human behaviour.

Rathus suggests that the High Court may have made admission of social science literature under section 144 almost impossible. If this is so, then so has the Full Court and I am not uncomfortable with that formulation. If it is common knowledge and uncontroversial then it can be the subject of admission under section 144. Otherwise, surely it must be material that is put to an expert witness and introduced properly in

[43] Above n. 5, p. 88.

that way as evidence, or admitted by agreement for an identified purpose. Transparency must be the hallmark of its use.

Division 12A of the Family Law Act

I conclude with a brief reference to Division 12A[44]. The effect of section 69ZT(1) is to exclude certain sections of the *Evidence Act*, including relevantly hearsay and opinion evidence. Thus any opinion (including a representation in a document) is admissible in a children's case, but that does not mean it goes in unquestioned.

Importantly, section 55 of the Evidence Act is not excluded by section 69ZT and material that is not relevant is not admissible. The judge then still has to consider whether it should be excluded or limited under sections 135 and 136 – unfair prejudice (inability to cross examine is just one such matter) – and neither are excluded by s 69ZT.

There is then the question of weight because 69ZT(2) provides that the court may give such weight (if any) as it thinks fit to evidence admitted as consequence of the provisions of the Evidence Act not applying. Thus although section 69ZT gives wide latitude to the admissibility of evidence, including expert opinion, admissibility remains subject to relevance, exclusion under section 135 and ultimately the weight to be attributed.

Finally, it is open to the court to apply the provisions of the Evidence Act (a) if the court is satisfied that the circumstances are exceptional and (b) if the court has taken into account (in addition to any other matters the court thinks relevant):

(i) the importance of the evidence in the proceedings; and
(ii) the nature of the subject matter of the proceedings; and
(iii) the probative value of the evidence; and
(iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

Thus it has often been suggested that, for example, in cases where sexual abuse is being alleged and allegations are disputed, that would be the kind of circumstance in which the provisions of the Act should apply.

Perhaps the last word on the topic should come from the Australian Law Reform Commission[45] in relation to section 144 of the Evidence Act and rejecting a proposition for the introduction of "authoritative documentary sources", which said:

The Judge Informing Himself

[44] *Family Law Act 1975* (Cth) Div 12A.
[45] Australian Law Reform Commission, ALRC Interim report No 26, *Evidence*, vol 1 1985 at 545.

> Under the proposal judges can inform themselves about common knowledge and about knowledge capable of verification by authoritative documentary sources. …As to the latter category, there are dangers. …When a judge takes judicial notice of a fact outside the hearing, there are at least two safeguards. Ordinarily no judge will take judicial notice of a fact outside the hearing unless he is confident that the fact is not reasonably disputable and that it is unlikely the parties will want to dispute it. Further, if he is wrong in taking judicial notice of it, and the fact is significant to the issues, it is very likely that his judgment will not survive an appeal. …It is also proposed that where the judge makes his own enquiries to acquire either category of knowledge he should inform the parties where there is a risk of unfair prejudice.

My own view is that if the parties are uninformed about extrinsic material which the judge intends to use, or not given an opportunity to challenge it, there will always be a risk of unfair prejudice, either real or perceived.