Griffith UNIVERSITY

Griffith Law School Seminar Series

A Call for Clarity: The Troubling Use of Social Science in Family Law

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Social Science and Family Law

- Social scientists were always part of my practice world in family law
- Counselling section established as part of new Family Court of Australia in 1976
- New and radical approach within the legal system
- The Women's Legal Service and other community legal centres have involved social workers etc for decades

Key Features of 2006 changes to *Family Law Act* (FLA)

- Presumption that equal shared parental responsibility is in the best interests of children (s61DA)
- New best interests of children consideration - benefit to the child of having a 'meaningful relationship' with both parents (s60CC(2)(b))
- If presumption applied – equal or substantial and significant time must be considered by court (s65DAA)

Use of Social Science since 2006

- Seemed to be increasing
- 2006 Act arguably incorporated SS concepts
- Presumption almost parades as a ‘social science truth’ about children
- The language of SS becoming part of the language of law?

Funding for Research

- Thanks to Griffith Law School
- Completed one article about legal process
- Engaged Dr Cate Banks
- Conducted focus groups of lawyers and non-lawyers in FLS about use of SS
- Selected through Qld Family Law Residential contact list, email lists (FLPA and Pathways) and personal contacts

Structure of Paper

- Identified two areas for investigation:
  - What is the legal process that allows judges and others to use the SSs
  - How could the quality and impartiality of this research be assured when the SSs are inherently complex and contested
- Themes emerging from focus groups
  - Conducted in Sept and Oct 2012 – very early musings

The Family Law System is Saturated with Social Science

- Clients bring in articles
- FDRPs (mediators) are reading this literature, disseminating it and receiving prof devt training about it
- Lawyers read it and provide relevant materials to their clients
- No wonder judges refer to it
- Only group that does not refer to it – the social scientists!

Expertise – Like a Cloak

… clinicians arrive at court **cloaked in the presumed objectivity of behavioral science** when many subjective values are directing their conclusions (e.g., boys do best with their fathers, children do best with their primary attachment figure, joint plans are bad for young children, etc.). Few clinicians are up front with the legal consumers of their reports about the degree to which the **assumptive underpinnings of their recommendations are highly subjective and controversial**. (Tippins and Wittmann)

The research says …

- Most common expression used by judicial officers – “The research says …”
- Followed by a two sentence summary of that judges view of the SS on attachment theory, family violence, shared care after separation, breastfeeding or whatever the issue …
- How accurate can this be?

Go Outside and Settle

Is used as an 'invitation' to settle:

1. Draws first on the SS about impact on children of parental conflict after separation as the reason *to* settle
2. Judge then incorporates SS about whatever issues are present in that particular case to point to *how* to settle

Judicial Notice

Usually all facts in a case must be proved by evidence

- JN is an exception to this rule
- Allows judges to take notice of ‘notorious facts’
- Relieves burden of proving such facts
- Common example – that Christmas Day is celebrated on 25 December

- Does not seem to allow complex contested content.

s 144 *Evidence Act 1995* (Cth)

s 144 - *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. …

4) The judge is to give a party such opportunity to make submissions, … to ensure that the party is not unfairly prejudiced.

Maluka v Maluka [2009] FamCA 647
Maluka v Maluka (2011) 45 Fam LR 129

- Mother alleged serious family violence
- After case closed Benjamin J wanted to refer to 3 social science articles about family violence
- Sent copies to all lawyers – invited and received submissions
- Judge found father had engaged in 'coercive controlling violence' (as discussed in one of the articles)
- Ordered no contact

The Key Article

J Kelly and M Johnson, 'Differentiation Amongst Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) *Family Court Review*

Four 'types' of FV

- 'coercive controlling violence,
- violent resistance,
- situational couple violence, and
- separation-instigated violence'

What the Judges Said

- Full Court:
  - the use of SS material is governed by s144
  - to come within the section the material must be "common knowledge" - not reasonably open to question.
  - the TJ did not identify the matters of CK he took from the material.
- Trial judge (TJ) - SS could not be used to establish whether the father had committed particular acts of violence but could be used as '"further evidence" of the likelihood of the continuation of that violence'.
- Full Court - this went too far – although the TJ had given notice of his intention to use the material, he had not given notice to use it *in the way he did*.

Baranski v Baranski (2012) 259 FLR 122

Judge used SS research to formulate questions to experts

Appeal unsuccessful – issues ventilated through evidence - but Full Court not impressed:

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

Salvati v Donato (No 2) [2009] FMCAfam 883

After citing a number of articles and shared care and other issues:

> 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. (per Altobelli FM)

Full Court has expressed disapproval. See *SCVG v KLD* [2011] FamCAFC 100

McGregor v McGregor [2012] FamCAFC 69

- 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.
- Complex analysis of possible legal avenues – but all had problems
- Found that the judge had 'applied findings drawn from the evidence to Warshak's criteria' [of parental alienation] (as published in a cited article)
- 'The content of the articles became, in effect, a prism through which the evidence was viewed and its complexion determined.'

Family Violence Best Practice Principles

- Published in 2009, revised in 2011 and 2012
- Reference the typologies literature
- [~~There is growing acceptance~~] One well known classification system holds … that violence can generally be defined as being within four categories
- Also reference literature about culture and research from Australia, Canada and the USA on FV and parenting cases

Law and Science are Different

Law

- Doctrinal
- Bound by precedent
- Predictable
- Certain

Science

- Experimental / investigative
- Comprises theories and hypotheses
- Changeable
- Qualified / tentative

Susan Haack - Professor of Law and Philosophy, University of Miami

The culture of law is adversarial, and its goal is case-specific, final answers. The culture of the sciences, by contrast, is investigative, speculative, generalizing, and thoroughly fallibilist: most scientific conjectures are sooner or later discarded, even the best-warranted claims are subject to revision if new evidence demands it (2003).

Gunter Teubner

… social science constructs are not only transformed or distorted, but constituted anew, if they are incorporated into legal discourse. They are not imported into the law bearing the label “made in science”, but are reconstructed within the closed operational network of legal communications that gives them a meaning quite different from that of the social sciences (1989)

- Scholar in the theory of law. Posts include University of Bremen (1977 – 81), London School of Economics, Universities of The Hague and Maastricht (2009 – 2010) and the "ad personam" Jean Monnet Chair at the International University College of Turin (2011)

The Debate: (2011) 25 *Australian Journal of Family Law*

- A critical review of the research: J Cashmore and P Parkinson, 'Parenting arrangements for young children: Messages from research'
- The comment that followed from some of the researchers: B Smyth, J McIntosh and M Kelaher, 'Research into parenting arrangements for young children: Comment on Cashmore and Parkinson'
- The reply to the comment: J Cashmore and P Parkinson, 'Parenting arrangements for young children — A reply to Smyth, McIntosh and Kelaher'

Typologies Detailed in 2007 AIFS Report

- Intimate terrorism
  - Strongly gendered and linked to control and patriarchal assumptions
- Situational couple violence
  - Greater sense of reciprocity
  - Not fundamentally gendered in nature – although physical strength relevant

Parts of Michael Johnson's Website

Michael P. Johnson

Emeritus Professor of Sociology, Women's Studies, and African and African American Studies

*My Definition of Feminism**
You're a feminist if you believe that (1) men are privileged relative to women, (2) that's not right, and (3) you're going to do something about it, even if it's only in your personal life.

*We haven't reached post-feminism yet (Johnson, 2010).

Problems with the Typologies in Law

- Many social scientists don't use that theory at all
- It is changeable
- It is contested
- It exploits the law's tendency to be reductionist, to label and pigeon-hole

Changeable: Early Categories

- Janet Johnston - 1993:
  - Episodic male battering
  - Female instigated violence
  - Male-controlling interactive violence
  - Separation-engendered post-divorce trauma
  - Psychotic and paranoid reactions
- Amy Holtzworth-Munroe - 1994:
  - Family only
  - Dysphoric/borderline
  - Generally violent/antisocial

The Law is Reductionist: SS Categories are Indistinct

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 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 (Jane Wangmann 2011)

Naming and Categorising

Putting ‘name’ to an event, action, experience, or idea is a powerful act. “Naming” is an act of defining and authenticating that provides the person or group, which has successfully conducted the naming, with the authority to say what something is and what it is not.

- E Pence and S Das Dasgupta, 2006. Ellen Pence co-founded the Duluth Domestic Abuse Intervention Project

s4AB FLA as amended 2012

- **Definition of family violence**

  For the purposes of this Act, *family violence* means violent, threatening or other behaviour by a person that **coerces or controls** a member of the person's family (the *family member*), or causes the family member to be fearful.

Rules for Advisers – s60D and s63DA

- Must inform parent that the best interests of the child are paramount
- Must encourage them to act on the basis that BIC are best met:

  (i) by the child having a meaningful relationship with both of the child's parents; and

  (ii) by the child being protected from … family violence

  (iii) greater weight is to be given to (ii)
- Must inform parents to consider making a parenting plan
- Must discuss equal or S and S time arrangements.
- ***advisers***: legal practitioner, family counsellor, family dispute resolution practitioner and family consultant

Conclusion

- Relationship between social science and the law is uneasy
- SS is also embedded in policy and legislative developments
- Everybody is talking SS from the clients to the judges
- There is a need for clear guidelines

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