COMMENTS ON RECENT DEVELOPMENTS IN THE LAW

JUDICIAL ATTITUDES TO THE USE OF EXPERT EVIDENCE IN CUSTODY PROCEEDINGS

Introduction

Since the fourteenth century the courts have recognised evidence given by expert witnesses.[1] The reason is that in certain areas of specialist knowledge these witnesses will be better able to draw inferences from the facts available than will the court. The scope of expert evidence was considered by the High Court of Australia in the case of *Clark* v *Ryan*[2] where Dixon C. J. made the following observation:[3]

> [T]he opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it.

The term "science" as used by Dixon C. J. has not been the subject of judicial definition. F.B. Adams J. pointed out in the case of *Granger* v *Attorney-General*[4] that whether a particular witness would be regarded as an expert was a question of fact and that it was impossible to give an exhaustive definition of the term. According to Bates[5] it is clear that the term "science" must be interpreted broadly and includes any topic which is the subject of a special study.

The purpose of this note is to assess the attitude of New Zealand courts to the use of expert evidence in custody proceedings. Two issues dominate the discussion. First, are custody proceedings by their nature matters which have been treated by the courts as requiring a sufficient degree of specialised knowledge to render expert evidence admissible? Second, if it is necessary for expert evidence to be given in custody matters, who should present such evidence, and upon what basis?

Traditional Approach

The distinction drawn in *J.* v *C.*[6] by Lord Upjohn sums up the general attitude of the courts towards the introduction of expert evidence in custody proceedings. First, his Lordship considered that where the child

1 As long ago as 1553 Saunders J. said: "[I]f matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation." *Buckley* v *Rice-Thomas* (1554) 1 Plowd. 118, 124; 75 E.R. 182, 192.

2 (1960) 103 C.L.R. 486.

3 Ibid., 491.

4 [1957] N.Z.L.R. 355, 356.

5 Bates, *Principles of Evidence* (1976) 162.

6 [1970] A.C. 668, 726.

is under or requires treatment for some "physical, neurological or psychological malady or condition",[7] medical evidence, if accepted, would weigh heavily with the court. On the other hand, if the child is not in need of treatment medical evidence would be of value "to support the general knowledge and experience of the judge in infancy matters, and a judge, in the exercise of his discretion, should not hesitate to take risks . . . and go against such medical evidence if on a consideration of all the circumstances the judge considers that the paramount welfare of the . . . infant points to a particular course as being the proper one."[8]

If the child has a medical problem, then a medical expert may give evidence on that problem. However, where there are no medical problems, a medical expert's opinion may be taken into account in considering what the welfare of the child requires, although in most cases the judge's experience in such matters will be the decisive factor. In other words, expert evidence which is given in custody proceedings will have no real effect on the final decision-making process. The issue to be resolved, viz., what the welfare of the child requires,[9] is not likely to be influenced by the opinion of experts. That issue does not partake of the nature of a science.

The submissions made by the Magistrates' Executive to the Royal Commission on the Courts[10] capture the attitude of that representative body towards the use of expert evidence in domestic cases. Under the rubric "Lay Participation in the Judicial Process" the following submission was made:[11]

> The ultimate task of any judicial tribunal is to make a decision. Lay participation in this process can only be justified if it is necessary for the proper administration of justice. . . . Our experience has shown that in the vast majority of domestic cases no special or complex issues arise.

The reasons for the courts' cautious attitude towards the use of expert evidence in custody proceedings is perhaps best summed up by the judgment of Street C. J. in *Epperson* v *Dampney*.[12] The Magistrates' Executive adopted the sentiments of the learned Chief Justice. The Executive stated:[13]

> [T]his case illustrates the difficulties and dangers which can stem from so-called "expert" evidence, and opinions, in an area where the judicial officer with his experience in custody matters, is the best arbiter of all the matters in dispute both factual and legal.

Two main arguments were put forward by Street C. J. for his wary approach to the opinion of experts in custody matters. The first was that the medical expert, as opposed to the judge, would not take all matters into account:[14]

> [T]he views of child psychiatrists and child psychologists will fall short of elucidating all of the matters that a judge must take into account in deciding

7 Ibid., 726.
8 Idem.
9 Guardianship Act 1968, s.23.
10 *Submission made by the Magistrates' Executive to the Royal Commission on the Courts,* June 1977.
11 Ibid., 17.
12 (1976) 10 A.L.R. 227.
13 Supra n.10 at 18. For a discussion in agreement with the tenor of Street C. J.'s analysis see Webb, "Forensic Psychiatry and Psychology" [1977] N.Z.L.J. 94.
14 Supra n.12 at 229.

> a custody dispute. Those views do not constitute expert opinion upon the persons who are principally to be judged — the competing claimants and others associated with them. It is to those persons, to their strengths, to their weaknesses, to their personalities and to their circumstances, that critical and anxious consideration must be directed before an order for custody or access is made. This it is that underlies the cautious attitudes of experienced judges to the use of child psychiatric evidence in custody disputes.

The second argument was that to allow experts too much influence in the proceedings may lead to the day of trial by experts. A strong warning was sounded by Street C. J. that "the antiseptic philosophy of Huxley's *Brave New World* has not yet rendered obsolete a human evaluation of the complex web of parental and filial emotion that entangles all the persons concerned in disputed custody cases."[15]

Current Attitude

When it was first reported in *New Zealand Recent Law,* the following passage from the judgment of Richardson J. in *H.* v *H.*[16] appeared to signal the acceptance by at least one member of the judiciary of the opinion of experts in custody proceedings:[17]

> Study of the psychology of children and of the influences of individual and group behaviour and attitudes has advanced to the point that there can be no question that the courts can benefit from the evidence of experts in the field. In accepting the assistance of those trained in observing children and analysing the influences that shape them, the courts do not abdicate their function in determining questions affecting human relations any more than in other areas where expert evidence is adduced.

This statement indicated that the learned judge was prepared to allow experts a share in the making of the final decision. However, no expert evidence was called in *H.* v *H.* The court lapsed into its own appraisal of the situation. Richardson J.'s framework of reference became the measure of what was in the best interests of the child. The approach set out in *Epperson* v *Dampney*[18] by Street C. J. was adopted by Richardson J., viz., the adjudicative process involved "the recognition of basic human standards and expectations within our community." The result was that the decision in *H.* v *H.* was made on the following basis:[19]

> All things being equal, it is an unnecessary complication for a child to live in a de facto association. Given community attitudes he may suffer from comments and reactions of others. With the best will in the world his parent and surrogate parent may reasonably be expected to justify their own position, or premarriage position if they later marry, at some cost to the development of the child's attitudes to community expectations and to responsibility to others.

In practice, the traditional attitude towards the use of expert exidence in custody proceedings has not altered. The following comment, made by McMullin J. in the recent decision of *S.* v *S.*,[20] severely limited the part an expert can play in custody proceedings:[21]

15 Ibid., 228-229. A similar warning was sounded in *Lynch* v *Lynch* [1967] A.L.R. 510, 511. Begg J. stated: "It is not the province of psychiatrists to determine questions of custody on one-sided versions of disputed facts."

16 Unreported decision, Supreme Court, Auckland, 22 August 1977 (M.614/77), Richardon J.; noted in [1977] N.Z. Recent Law 316.

17 Idem.

18 Supra n.12 at 229.

19 Supra n.16.

20 Unreported decision, Supreme Court, Auckland, 20 March 1978, McMullin J.; noted in [1975] N.Z. Recent Law 266.

21 Idem.

> [A] psychiatrist is entitled to express an opinion on respondent's general stability and state of health and . . . a paediatrician is entitled to express a viewpoint upon [the child's] state of health and the standard of care which he has received or may be expected to receive in the future while in his mother's custody. But I think that the evidence of the two doctors can be taken that far and that far only. It is not within the province of either of them to usurp the function of this Court in deciding, on all the evidence before it, what is in the best interests of [the child].

In other words, a clinical expert may comment on the physical and mental health of the child, but cannot make direct recommendations on the key issue, the welfare of the child.

Perhaps an exception to the general attitude of the courts towards the use of experts in domestic matters is the recent decision of Quilliam J. in *W.* v *W.*[22] The parties had consented to a transfer of custody and the issue to be resolved was that of access. A report of the Psychological Service of the Department of Education was read by the learned Judge before he made his decision. The interesting aspect of the decision was the part the Psychological Service was able to play in the carrying out of the access order. The following conditions in the order involved the Psychological Service:[23]

1. Travel arrangements shall be supervised by the Psychological Service of the Department of Education.
2. When the petitioner [mother] is in Wellington, access shall on each occasion be subject to the approval of the supervising psychologist.
3. John [child] and the respondent [father] shall attend upon a psychologist at the Psychological Service of the Department of Education once every month or every second month or as requested by the said Psychological Service until the further order of the Court.
4. John and the respondent shall, if requested to do so by the Psychological Service of the Department of Education, attend from time to time upon a nominated medical practitioner for the purpose of a report upon John's health.
5. A psychologist in the Psychological Service of the Department of Education shall continue to lodge with this Court annually a report on John's welfare provided that, in the event of the psychologist responsible for John being of the opinion that the custody or access arrangements are detrimental to John's welfare, such psychologist shall report forthwith to this Court.
6. John shall not be removed from St. Mark's School Wellington without prior consultation with a psychologist in the Psychological Service of the Department of Education responsible for John.

In effect, Quilliam J. was placing the access order in the hands of the Psychological Service of the Department of Education. The underlying impression one is left with is that the learned Judge was of the opinion that psychologists trained in children's behaviour were the most appropriate people to ensure that the welfare of the child was maintained.

Recommendations

A recent trend in custody decisions has been the shift in emphasis away from the financial and physical welfare of the child towards the

22 Unreported decision, Supreme Court, Nelson, 22 February 1978 (D.46/47), Quilliam J.; noted in [1978] N.Z. Recent Law 306.
23 Idem.
24 [1978] 1 N.Z.L.R. 285.

child's emotional needs. For example, in *B.* v *B.*[24] Jeffries J. defined the scope of the court's inquiry in the following manner:[25]

> The issue is always the welfare of the child. . . . If there has been a shift in the interpretation of what is the welfare of a child I think the courts have been less inclined in recent years to make objective valuations about what is, or ought to be, for the welfare of a child. The concept is now viewed more closely from the child's standpoint. For that child, which parent has historically done the parenting? Upon whom does that child fix psychologically as his or her parent if the child must in future settle for one? The answers to those questions are now recognised as being vital in deciding what is the welfare of a child.

If this new concept of the "psychological parent"is generally accepted, then it should lead to a substantially more significant role for the expert witness in custody proceedings. Section 28 of the Guardianship Act 1968 provides:

> In all proceedings under this Act . . . the Court may receive any evidence that it thinks fit whether it is otherwise admissible in a Court of law or not.

This section gives statutory recognition to the fact that because of the unique character of the court's jurisdiction in infant proceedings, there is a need for full inquiry into all matters bearing on a child's welfare and that these cannot be thwarted by technicalities. The weakness in the section is the word "receive". It appears, therefore, that evidence admitted by virtue of the section is restricted to any evidence which either of the parties may choose to submit and does not extend to evidence called by the court on its own initiative. In practice, where evidence is called by a particular party it is always open to the comment that no matter how sincere and independent the witness may be, he or she is always liable to be prejudiced, perhaps quite unconsciously, by the views of the person for whom the witness is giving the evidence. The danger of this was pointed out in *W.* v *W. & C.*[26] where a clergyman undertook an independent investigation of the mother's relatives. Although the court had no hesitation in admitting the report in evidence, it said:[27]

> One finds (and it is not entirely strange) that, although he regards himself as an investigator bound to be scrupulously fair, it is difficult . . . to find in the report one single phrase in favour of the father. That is the difference between reports by partisans and reports by court officers.

A means of circumventing the possibility of bias would be to amend section 28 and allow counsel for the child, or the court itself, to call the expert witness.

In custody adjudication a court should use whatever specialist resources are available in order to formulate a valid judgment based on the individual circumstances of the case before it. Section 29 of the Guardianship Act 1968 allows the court to call on a Child Welfare re-

25 Ibid., 289. See *D.* v *D.* [1978] 1 N.Z.L.R. 476. See also *J.* v *J.*, unreported decision, Magistrate's Court, Dunedin, September 1976, where Ross S.M. stated that "the court will take into account those factors which best lead to a child's emotional development in the fullest sense."

26 [1968] 3 All E.R. 408.

27 Ibid., 410 per Sachs L.J. See also the comment made by Cross J. in *Re S.* [1967] 1 All E. R. 202, 209: "I have no doubt that the psychiatrists who give evidence in wardship cases are persons of the highest integrity, but if they are instructed on behalf of one party their views are bound to be coloured to some extent by that party's view. Further, if they are ordinary human beings, as I hope and believe they are, they can hardly help having some faint desire that their side should win just because it is their side."

port if so required. It was stated in *Sing* v *Muir*[28] that the purpose of the equivalent Australian section[29] was "to give to the court a robust initiative . . . to make further relevant inquiries through a welfare officer in any case where it feels that the evidence which the parties have chosen to adduce is inadequate to enable a fully informed decision to be made in the best interests of the children." It is submitted that the courts should take such a "robust initiative" with regard to the evidence of clinical experts. Psychologists and psychiatrists are trained to elucidate factors which may well be central to the emotional and psychological well-being of the child. It is not generally appreciated that clinical techniques are available and allow an objective assessment of the strength of the emotional bonds felt by a child to its parents.[30] The Bene-Anthony test of family relationships is representative of such techniques.[31] The assessment involves the child in placing cards with such questions as "Who likes to tuck you in?" and "Who is a bit too fussy?" in slots of figures he or she has chosen as representing mother, father, brother or sister — or nobody if the question does not apply. The test is a guide to the child's feelings about his family and what he thinks his family feels about him. This box game, when used by skilled psychologists, is a means of assessing the emotional needs of a child of a broken marriage. The particular child plays the game and makes the choices. Such an approach seems more in keeping with the welfare of the particular child than the application of a broad principle such as the mother principle which is in effect asserting a parental right.

The value of clinical evidence cannot truly be determined by the exactness or infallibility of the evidence given, but rather by the probability that what the psychiatrist or psychologist has to say offers more information and better comprehension of the human behaviour which the law wishes to understand. Allowing expert evidence to play a meaningful role in the family law framework may help broaden lawyers' basic knowledge of human behaviour. Hutley J. A., the dissenting judge in *Epperson* v *Dampney*, admitted that "it is principally through the evidence of the learned that judges acquire new knowledge."[32] The following passage taken from Hutley J. A.'s judgment sets out reasons which could be well employed by our courts in giving weight to the opinion of specially trained clinicians:[33]

> A judge's experience may be very limited and, even if not limited, be capable of expansion by expert evidence which is itself a compendious way of expanding experience, the theory being, if sound, the condensation and refinement of the experience of many minds. One can only compare the understanding of the child since the concept of childish innocence has been replaced by an understanding of infant sexuality to which, to my knowledge, the general knowledge and experience of judges did not contribute, to appreciate that judges even in their special fields have to be free to utilise the evidence of the learned.

28 (1970) 16 F.L.R. 211, 214 per Burberry C. J.
29 Matrimonial Causes Act 1959-1966 (Cth.), s.85(2).
30 For a discussion of recent findings in the behavioural sciences see Goodman, "Child Custody Adjudication — The Possibility of an Interdisciplinary Approach" (1976) 50 A.L.J. 644; Jackson, "The Contested Custody of Children" [1977] N.Z.L.J. 356.
31 See Kauffman, "Validity of the Family Relations Test: A Review of Research" (1970) 34 *Journal of Projective Techniques and Person Assessment* 3.
32 Supra n.12 at 234.
33 Ibid., 233-234.

A custody decision does partake of the nature of a science. The welfare of children is the key issue to be resolved. Experts trained in the behaviour of children are available to assist the court in its decision. The evidence of such experts should be given weight, not just on the state of health of the child but also on what is in the best interests of the child.

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