EXPERT EVIDENCE IN CASES INVOLVING CHILDREN

INTRODUCTORY

The admissibility of expert evidence, as an exception to the rule generally prohibiting opinion evidence, has been known to the common law since the fourteenth century when surgeons assisted the court in deciding whether an injury had resulted in mayhem.[1] Since then expert evidence has been received by courts on a wide variety of topics ranging, on the one hand, from whether an embankment had caused the silting of a harbour[2] to whether certain pictures would have the damaging effect on children,[3] on the other. A clear principle regarding the admissibility of expert evidence was enunciated by Dixon CJ of the High Court of Australia in the case of *Clark v Ryan,*[4] where it was said that, ' . . . the 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'. It is clear that the term *science* as used by Dixon CJ must be interpreted widely[5] but, even if such an interpretation were not to be used, expert medical evidence in cases concerning the adoption and custody of children would strictly be admissible. It is the purpose of this article to consider, first, the attitude of the courts to such testimony and, second, what the true role of the expert in such proceedings ought to be.

1 See Nokes, INTRODUCTION TO EVIDENCE (4th ed 1967) at p 176.

2 Folkes v Chadd (1782) 3 Doug KB 157.

3 DPP v A & B C Chewing Gum Ltd [1968] 1 QB 159.

4 (1960) 103 CLR 486 at p 491. Clark v Ryan was a case involving the capacity of a consulting engineer to give evidence regarding the behaviour of a semi-trailer in an articulated vehicle.
The Chief Justice's remarks were adopted from the notes by J W Smith to Carter v Boehm, 1 Smith LC (7th Ed 1876) at p 577.

5 The matters on which expert evidence is necessary will, of course, vary with the state of human knowledge generally at particular times. In the words of Lord Parker CJ in DPP v A & B C Chewing Gum Ltd [1968] 1 QB 159 at p 164, ' . . . I cannot help feeling that with the advance of science more and more inroads have been made into the old common law principles'.

THE ATTITUDE OF THE COURTS TOWARD EXPERT EVIDENCE

There can be little doubt that psychiatric evidence in cases involving children is viewed with some suspicion by many members of the Anglo-American judiciary.[6] Michaels suggests[7] that the reason for this attitude is that a complete deference to evidence of this kind would ' . . . not only transfer the effective role of decision-maker from the judge to the doctor but would soon lead to a position where no judge would feel that he ought to make an order removing a child from a settled home because of the risks involved'. A similar view was, in fact, taken by Pearson LJ in the case of *Re C (an infant)*,[8] where his Lordship said[9] that he felt hesitant about refusing to interfere with the finding of a trial judge who had accepted strong, uncontradicted medical evidence because such acceptance might result in the decision being taken out of the hands of the courts, who were intended to make such decisions. Bevan[10] agrees with Pearson LJ on the grounds that automatic acceptance of such medical evidence by the courts ' . . . could lead exceptionally to abuse with private arrangements being entered into between an unscrupulous doctor and the applicant for adoption'.[11] In the event, the Court of Appeal, in *Re C (an infant)* set aside the natural mother's refusal of consent to an adoption order being made. The relevant evidence included testimony by a consultant paediatrician of thirteen years standing to the effect that there would be a considerable risk of psychological damage to the child were it to be taken from the applicants, who presently had care of it. The medical evidence was accepted by the Judge at first instance and described by Diplock LJ in the Court of Appeal[12] as ' . . . the most important factor'.

In *Re C (an infant)* hesitancy was expressed by the Court despite the fact that the medical evidence was strong, detailed and uncon-

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6 See Michaels, *The Dangers of a Change of Parentage in Custody of Adoption* Cases (1967) 83 LQR 547 at p 550; Hopkins, *Medical Evidence in Adoption and Custody Cases* (1969) 9 *Med, Sci and the Law* 31 at p 38 and Bradbrook, *The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes* (1972) 11 J Fam L 557.

7 loc cit at p 550.

8 [1964] 3 All ER 483.

9 Ibid at p 494.

10 The Law Relating to Children (1973) at p 347.

11 Bevan's comments would, presumably, also apply to cases involving custody.

12 [1964] 3 All ER 483 at p 496.

tradicted. It is clear, however, that such strong evidence will not always be available. For example, in *Re C (an infant)* reference was made[13] to the unreported case of *Re W (an infant)*[14], which was distinguished on the grounds that in the earlier case the evidence in respect of the likely effect of the change in parentage on the child was indecisive. In *Re W (an infant)* the medical evidence was to the effect that a change in parentage would have a profund effect on the child, but went no further. Ormerod J remarked that he was left with the feeling that the medical evidence was based on ' . . . pure speculation' and, that being the case, it was something which failed to have any effect on his decision. Another instance of similarly vague evidence is provided by the case of *Re C (M A) (an infant)*[15] where a psychiatrist had given evidence regarding the dangers of a change in custody which Willmer LJ had described[16] as ' . . . rather confusing'. However, Willmer LJ, unlike Ormerod J, refused to discount the evidence entirely, despite the fact that the witness[17] ' . . . was only able to speak in generalities' and despite the fact that he had never seen one of the parties. Willmer LJ considered that[18] ' . . . it was always open to the father to call evidence for himself from another psychiatrist who had actually seen the father's wife and who might be able to show that [the] general evidence did not apply to the facts of this case'. Since no evidence of this kind was called, the existing medical evidence, in Willmer LJ's words ' . . . holds the field'. However, it is clear that Willmer LJ did not attach much weight to the psychiatrist's testimony. Had contrary evidence been available it seems likely, from Willmer LJ's comments, that he might well have given more weight to the evidence of the psychiatrist who had seen the father's wife. Such was the situation in *Re E (an infant)*[19] where Wilberforce J stated:[20] ' . . . I have had the benefit of the evidence of two eminent medical psychiatrists. There is not much diagreement between them. Where they do differ, I prefer the evidence of the psychiatrist on behalf of the applicants who had the benefit of seeing the child with the applicants'.

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13 Ibid at p 493 per Pearson LJ.
14 (1963) Unreported.
15 [1966] 1 WLR 646.
16 Ibid at p 666.
17 Ibid at p 667.
18 Ibid at p 667.
19 [1964] 1 WLR 51.
20 Ibid at p 61.

Perhaps the most strongly worded comment on the use of psychiatric evidence in cases involving children was made by Begg J of the Supreme Court of New South Wales in the case of *Lynch v Lynch*.[21] There, the judge was of the opinion[22] that evidence of a psychiatrist generally had little place in contested custody applications. 'It is not,' he said, 'the province of psychiatrists to determine questions of custody on one-sided versions of disputed evidence which is subject to examination and cross-examination and without consideration of the legal principles upon which the court is required to adjudicate on the exacting questions of legal custody'. Begg J then went on to say[23] that so far as the personality, the intelligence, the truthfulness and the wishes of the child and whether the child had been subject to influences in expressing its wishes ' . . . a judge will usually be able to determine this without the aid of psychiatrists in the normal case and, in my view, it will be both presumptuous and superfluous for a psychiatrist to express views as to which parent should have custody . . . '

Begg J's remarks were adopted by Selby J, also of the New South Wales Supreme Court, in *Neill v Neill*,[24] a fact which is the more surprising in view of Selby J's decision in the case of *Downey v Downey*.[25] Downey was a case involving access to a child by a non-custodial parent and Selby J made considerable reference to the evidence of two psychiatrists. It would seem to be anomalous if more weight were to be given to psychiatric evidence in cases involving access, arguably a less immediate matter, than in cases involving custody or adoption.[26] However, two recent cases, one from New South Wales and the other from South Australia, show that a more scientific approach to the problem is developing in Australia. In *Barnett v Barnett*,[27] Hutley JA of the New South Wales Court of Appeal paid considerable attention to the evidence of a child psychologist in arriving at his decision and, in addition, proved highly sceptical of many of the more traditional criteria. In *Campbell v Campbell*,[28] Bright J

21 (1965) 8 FLR 433.
22 Ibid at p 433.
23 Ibid at p 434.
24 (1966) 8 FLR 461 at p 462.
25 [1964-5] NSWR 1357. See also Bates, *The Problem of Access* (1974) 48 ALJ 339 at 340.
26 See Bates loc cit at p 344.
27 (1973-4) 2 ALR 19. In the present writer's view Barnett v Barnett is arguably the most important custody case to be decided since World War II. For a more detailed consideration see Bates, *Custody of Children: Towards a New Approach* (1975) 49 ALJ 129.
28 (1974) 9 SASR 25.

awarded the custody of two young boys to their mother, who was living in a homosexual relationship but added the condition that they should be seen annually by a child psychiatrist.

Not all judges have been as unsympathetic to expert evidence as Begg J however. In two cases, *Re W (infants)*[29] and *Re S (an infant)*,[30] Cross J, as he then was, has made valuable observations regarding the role of psychiatrists in cases involving children. In *Re W (infants)*, Cross J referred[31] to the rules, if such they can properly be called, which had been earlier used by the court in determining questions of custody and adoption. 'In the case of young children', the judge said, 'it was, I think, probably assumed that, given that the person to whom the child was to be handed over was capable of bringing up a child of that age and anxious to assume the responsibility of doing so, the child itself would not be likely to suffer. In the case of older children the courts, I think, tended to express the view expressed by Eve J in the well known passage in his judgment in *Re Thain, Thain v Taylor* . . . ' The passage referred to by Cross J in *Re Thain, Thain v Taylor*[32] is, indeed, well known. There, Eve J had said,[33] in reference to a child who was nearly seven years of age: 'It is said that the little girl will be greatly distressed and upset at parting from Mr and Mrs Jones. I can quite understand it may be so, but, at her tender age, one knows from experience how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollections of former days and kind friends and I cannot attach much importance to this aspect of the case'. In *Re W (infants)*, Cross J contrasted this statement with the views which had been expressed by the child psychiatrist in the case at hand and said:[34] 'But the child psychiatrists who give evidence in these cases nowadays, though they do not always agree in detail, all emphasise the risks involved in transferring young children from the case of one person to another, particularly between the age of one and a half and three, while, as to the views of Eve J, [the psychiatrist], when they were put to him, plainly regarded them much

29 [1965] 3 All ER 231.
30 [1967] 1 All ER 202.
31 [1965] 3 All ER 231 at 248.
32 [1926] Ch 676.
33 Ibid at p 684. Strongly supported by Warrington LJ in the Court of Appeal (ibid) at p 691 on the grounds that, ' . . . what he said appeals to the common sense of human nature'.
34 [1965] 3 All ER 231 at p 248.

as Thomas Huxley would have regarded the suggestion that the world came into being in the manner set out in the first chapter of Genesis'.

In *Re S (an infant)*, Cross J was at pains to point out[35] that, even though the terminology employed in the wardship jurisdiction was archaic, it did not mean that the court lived in the past and had no time for psychiatric evidence.[36] The judge then went on[37] to consider the place of psychiatric evidence in wardship cases. First, he was of the opinion that the examination of a ward by a psychiatrist was an important step and, as such, ought not to be undertaken without the consent of the court. Second, if both parties to the litigation are agreed on the need for an examination and on the person or persons to conduct it, then the court would not normally refuse to follow their wishes. On the other hand, if they disagree, then the Official Solicitor, who should be appointed guardian of the ward, should decide, subject to the wishes of the court, whether an examination is needed. Third, if the Official Solicitor decides that an examination is needed, he should ensure that the psychiatrists involved have all the relevant material and have the opportunity of seeing both parents. Cross J then emphasised[38] that he did not envisage ' . . . that there should be anything in the nature of a panel of court experts whose views would be in any sense sacrosanct. Any psychiatrist instructed by the Official Solicior can be cross examined'. The comments made by Cross J in *Re S (an infant)*, which have received strong support from Hopkins,[39] and *Re M (infants)* seem to be fair in that no oblique criticism of the expert witness is apparent. In addition, the safeguards proposed in *Re S (an infant)*, having regard to the jurisdiction in which they were made, do not seem unreasonable, provided that the Official Solicitor is able to make an accurate and informed decision.

A rather different distinction from that drawn in *Re S (an infant)* was pointed out by Lord Upjohn in the leading case of *J v C*,[40] who was of the view that there were two different cases to be considered. First, his Lordship considered that where the child was under, or required treatment for some ' . . . physical neurological and psychological

35 [1967] 1 All ER 202 at p 208.
36 In order to demonstrate the truth of his remark Cross J usually gave his judgment in wardship cases in open court.
37 [1967] 1 All ER 202 at p 209.
38 Ibid.
39 loc cit at p 37.
40 [1970] AC 668 at p 726.

malady or condition' medical evidence, if accepted, would weigh heavily with the court. Second, on the other hand, if the child was not in need of treatment, medical evidence would only be of value, ' . . . to support the general knowledge and experience of the judge in infancy matters, and a judge, in exercising 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 right one'. Lord Upjohn's remarks tend to bear out Michaels' comment[41] that the modern cases ' . . . reveal a tendency to minimise the effect of medical evidence and, wherever there are other significant factors in the case, to rely on these in preference or in addition to the medical evidence'.[42] One can only hope that the other factors which are regarded as significant do not degenerate into the rules of thumb such as that enunciated by Eve J in *Re Thain, Thain v Taylor.*

In the United States, in comparison, it would appear that the courts are rather more willing to appraise expert evidence in a scientific manner than their counterparts in England and Australia. In the case of *Root v Allen,*[43] for example, Day CJ of the Supreme Court of Colorado refused to reverse the decision of a trial judge who had found against a natural father seeking to recover custody of his ten year old daughter. 'The sum of the testimony', said the Chief Justice,[44] 'including expert witnesses was that Sharon, for all practical purposes, was the true daughter of respondent Allen, accepted as such and treated as such'. A still more striking instance is provided by the important case of *Painter v Bannister,*[45] certain aspects of which will be considered later. There, Stuart J of the Iowa Supreme Court relied heavily on the evidence of the Head of the Department of Child Development at Iowa State University in refusing to return a seven year old boy to the custody of his natural father.[46] In the words of Stuart J:[47] 'We do not believe it is for Mark's best interest to take him

41 loc cit at p 550.

42 In support of her contention Michaels cites (loc cit at 550) Re E (an infant) [1964] 1 WLR 51 and Re R (M) (an infant) [1966] 1 WLR 1527.

43 (1962) 377 P 2d 117. See also a useful note at (1963) 73. Yale LJ 151.

44 Ibid at p 121.

45 (1966) 140 NW 2d 152.

46 In the event, the boy was ultimately reunited with his natural father. See Paulsen, Wadlington and Goebel, CASES ON DOMESTIC RELATIONS (1970) at p 779.

47 (1966) 140 NW 2d 152 at p 158.

out of this stable atmosphere in the face of warnings of dire consequences from an eminent child psychiatrist . . . '

Medical evidence given by psychiatrist is not the only expert evidence which may be received by the courts in cases involving children. Reports by social welfare officers are frequently relevant and, at first sight, it would appear that the courts are less suspicious, in England and Australia, of such evidence than they are of psychiatric evidence. Notably, the strict rules of evidence have not generally been applied to reports by social welfare officers. In the case of *Offical Solicitor v K*,[48] Lord Devlin was of the opinion that the test relating to the admissibility of such reports was convenience and, hence, matters of hearsay contained in them were admissable. Lord Devlin commented that '[R]eports on such matters as the conditions prevailing at the school to which it is proposed to send an infant or of a house in which he is to reside may often be of great assistance and I think it might often adversely affect the interests of the infant if a judge were debarred from acting on them'. His Lordship then went on to say that, although the liberty to tender hearsay evidence could be abused, a judge would normally be able to deal with any such problems by indicating ' . . . in advance that he will pay no attention to grave allegations that are based only on heresay'.

A similar view was adopted by Gowans J of the Supreme Court of Victoria in the difficult case of *Priest v Priest,* [49] who considered that '[T]o impose more stringent requirements on welfare officers who are not trained as lawyers, or greater limitation on the use that may be made of their reports by judges hearing those cases, would be likely to emasculate a useful procedure'. Further, Burbury CJ of the Supreme Court of Tasmania in *Sing v Muir*[50] extended the principle to include matters of opinion, although he reaffirmed the existence of a judicial discretion not to receive such evidence and stated that it was always for the judge to decide what weight should be given to the evidence. This last is, of course, a fairly substantial *caveat* and is well illustrated by the decision of Barry J of the Supreme Court of Victoria in *P v P*[51] who stated, when concluding[52] his judgment in a contested custody suit, that 'I should mention that the

48 [1965] AC 201 at p 242.
49 (1965) 9 FLR 384 at p 409.
50 (1969) 16 FLR 212 at p 216. See also Votskos v Votskos (1967) 10 FLR 219.
51 (1964) 5 FLR 452.
52 Ibid at p 458.

welfare officer's report has been received in evidence and has been available to both counsel, but I have arrived at my conclusion on the testimony before me and at my assessment of the personalities in this case independently of the opinions expressed by the welfare officer'.

In the United States, it would appear at first sight from the cases that the emphasis placed by the courts upon such reports in the trial structure differs slightly from that placed upon them by the courts in England and Australia. In the United States, the courts have emphasised the requirements of due process when considering the effect to be given to reports of social welfare officers. For example, Moore CJ of the Supreme Court of Colorado, in the case of *Anderson v Anderson*,[53] commented: 'The act of the legislature purporting to authorise the trial court to call upon the probation department for a report concerning "the ability of each party to serve the best interests of the child" and further directing the "Each report shall be considered by the court in making the award to custody" cannot be so construed as to deny due process which includes the right to be heard in open court and to have a determination of issues based upon competent evidence offered by persons who submit themselves to cross-examination'. It may also be that the courts in the United States are less willing to modify the strict rules of evidence than are their counterparts in England and Australia, an attitude which stems from the emphasis placed on the requirement of due process. In the case of *Beamer v Beamer*[54] for example, Cole J of the Ohio Court of Appeals, refused to admit the report of an investigation by the court to the extent that it was based on hearsay. On the other hand, however, Van Voohis J of the Court of Appeals of New York, in the case of *Kesseler v Kesseler*,[55] stated that, '[C]ustodial questions have sociological implications, and we are confronted here by a situation where common law adversary proceedings and social jurisprudence are not entirely harmonious and where some reconciliation between them is necessary'. Hence, despite the apparent differences in emphasis and terminology, the approaches of the courts in the three jurisdictions considered are substantially similar.

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53 (1968) 445 2d 397 at p 399. See also the decision of the Supreme Court of California in Fewel v Fewel (1941) 114 P 2d 592.

54 (1969) 244 NE 2d 775 at p 778.

55 (1962) 180 NE 2d 402 at p 405. See also Lincoln v Lincoln (1969) 247 NE 2d 659.

THE ROLE OF EXPERT EVIDENCE

The one point which clearly arises from these judicial utterances is that no coherrent or generally acceptable policy has been devised with regard to the role of expert evidence in cases involving children. However, a valuable starting point is provided by the remarks of Saunders J in the case of *Buckley v Rice-Thomas*,[56] decided in 1554. There it was said that '[I]f matters arise in our laws which concern other sciences and faculties, we commonly call for the aid of that science or faculty which it concerns, which is an honourable and commendable thing. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them . . . ' As has been observed, this admirable statement of principle has not always been applied to evidence given by experts in cases involving children. The true role of the psychiatrist and social worker has been variously interpreted by judges and commentators, from on the one hand, Bevan[57] who suggests that ' . . . medical evidence should be made compulsory in all contested adoption cases—and if for the purposes of adoption, should it not logically be so in other type of case where the question of removing the child is in issue, for example in contested custody proceedings' to the more sceptical approaches of Hopkins,[58] who submits that contested custody cases may involve considerations beyond those on which the medical expert can speak with authority, and Begg J.[59]

The first problem which accordingly arises, it is suggested, involves the difference existing between the psychiatrist and other kinds of expert witnesses. The psychiatrist giving evidence in a contested custody case and, say, an orthopaedic surgeon giving evidence in a case involving negligence on the highway are both experts and both are providing the tribunal with specialist information which is likely to facilitate a process of rational decision making. However, as Diamond and Louisell point out,[60] there may be a substantial differ-

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56 (1554) 1 Bl Com 118 at p 124.

57 Op cit at p 346.

58 loc cit at p 38.

59 Supra text at n 21.

60 *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations* (1964-5) 63 Mich LR 1335 at p 1335. The writers take as their example a psychiatrist giving evidence in a murder trial where elements of the *mens rea* are in issue. However, it is suggested that many of the same considerations are involved.

ence between the functions carried out by the two experts. The surgeon, they suggest,[61] can, in a well run personal injury trial, ' . . . be close to the ideal of the uninvolved, objective impartial expert' whilst the psychiatric expert witness poses a different and more complex problem. First, Diamond and Louisell point out[62] that the psychological sciences differ from most other fields of which expert evidence may be required in that their subject matter is not visible. 'The investigator must therefore rely', they state,[63] 'upon inferences made from derivatives: speech, non-verbal communication, actions, behaviour'. Accordingly, psychiatry and psychology cannot be described as exact sciences, the more so as psychological experiment is necessarily limited in its scope.

The second problem arises directly out of the first: lawyers like to think of their own discipline as logical and precise. Given the nature of the psychological sciences, how the two successfully interact? It is commonplace today that the processes of law and lawyers' reasoning are by no means as dispassionate and objective as was once supposed[64] and, therefore, criticisms relating to those deficiencies in the psychological sciences from the often isolated lawyer are perhaps not worth a great deal. Diamond and Louisell suggest[65] that the value of psychiatric evidence cannot be determined by the exactness or infallibility of the evidence given, but rather by the probability that what the psychiatrist has to say ' . . . offers more information and better comprehension of the human behaviour which the law wishes to understand'. A somewhat similar view has been taken by Baroness Wootton who says that[66] '[W]ithout question, therefore, in the contemporary attitude towards anti-social behaviour, psychiatry and humanitarianism have marched hand in hand . . . for today the prestige of human proposals is immensely enhanced if these are expressed in the terms of medical science. Indeed we might go so far as to say that, even if the intelectual foundations of current psychiatry were to be proved to be totally unsound, and even if psychiatric "science" was exposed as nothing more than fantasy, we might yet have cause to be

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61 loc cit at p 1336.
62 loc sit at p 1340.
63 loc sit at p 1340.
64 For an entertaining, recent commentary see Roebuck, *Modern Society and Primitive Law* (1970) 3 U Tas LR 258.
65 loc cit at p 1342.
66 SOCIAL SCIENCE AND SOCIAL PATHOLOGY (1959) at p 206.
67 BEYOND THE BEST INTERESTS OF THE CHILD (1973).
68 Op cit at p 19. See also *A Model Child Placement Statute* at pp 97-101.

grateful for the result of so beneficient a delusion'. Although Baroness Wootton was writing specifically of the criminal law, it is suggested that her comment is also applicable to cases involving children. In fact, judicial comments based on expert evidence tend to sound more realistically humanitarian than those, such as made by Eve J in *Re Thain, Thain v Taylor,* which were not.

However, Goldstein, Freud and Solnit in an important new work[67] have emphasised a concept which, if generally accepted, would lead to a substantially more significant role for the expert witness. They emphasise the importance of the *psychological parent* and state[68] that whether ' . . . any adult becomes the psychological parent of the child is based . . . on day to day interaction, companionship and shared experiences. The role can be filled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be'. Goldstein, Freud and Solnit continue[69] by saying that where such parent/child relationship is not based on a mutual relationship with a psychological parent ' . . . the consequences become obvious in later childhood and adult life. They take the form of the individual's diminished care for the well-being of his own body, or for his physical appearance and clothing, or for the image presented to his fellow beings. What is damaged is his love and regard for himself, and consequently his capacity to love and care for others, including his own children'. It is highly significant that the evidence given by the expert witness in the case of *Painter v Bannister,* earlier referred to,[70] included the following statement:[71] 'I was most concerned about the welfare of the child, not the welfare of Mr Painter, not about the welfare of the Bannisters. In as much as Mark has already made an adjustment and sees the Bannisters as his parental figures in his psychological make-up, to me this is the most critical factor. Disruption at this point, I think, would be detrimental to the child even though Mr Bannister might well be a paragon of virtue'. As has already been observed,[72] the court in *Painter v Bannister* gave considerable weight to this evidence. It is suggested that, if the views of Goldstein, Freud and Solnit and Dr Hawks in *Painter v Bannister* are to be accepted, it is only a medical expert who will be able to

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69 Op cit at p 20.
70 Supra text at n 45.
71 (1966) 140 NW 2d 152 at p 157.
72 Supra text at n 45.

ascertain a child's psychological parent. It is, of course, likely that many members of the judiciary will not be willing, at first, to accept the concept whether presented to them by thorough expert opinion or common-sense observation.[73]

It is here that the concept of the Family Court becomes of importance. It is not the purpose of this paper to analyse and evaluate the idea of the Family Court, but merely to suggest how such a court could facilitate the reception of expert evidence. The present writer sees the Family Court[74] as a part of the court of highest jurisdiction in the particular system, which deals with all matters concerning family law, is staffed by a suitably qualified personnel and in which normal court procedure is adapted to the needs of the litigants and the subject matter of the litigation. Of the essence is a suitably qualified staff and, quite apart from the necessary support staff of psychiatrists and social workers, a skilled sympathetic judge is essential if expert evidence is to be accorded its true value. Finlay refers[75] to a suggestion by Toose J of the Supreme Court of New South Wales for a post graduate course in Family Law and Domestic Relations which would include *inter alia* an introduction to marriage guidance procedures and basic psychology and behavioural science as relevant to family relations. If a Family Court judge were required to have undergone such a course it might well be that fewer of the problems earlier discussed would have arisen. Further, some modification of the strict rules of admissibility of evidence, it is suggested, would be desirable so that all the information gathered by the expert witness could be placed at the disposal of the court.[76] As Diamond and Louisell have suggested,[77] '[I]n all instances the psychiatric expert (should) be allowed to relate to the court exactly how he reached his opinion and what were the sources of his information. He should be required to describe in fairly precise terms his own process of revealing his source material: what information did he accept, and what did he reject;

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73 Occasionally with disastrous consequences. See, notably, Howells, REMEMBER MARIA (1974).

74 As Finlay, *Family Courts: Gimmick or Panacea?* (1969) 43 ALJ 602 at p 602, has commented when people talk of Family Courts they frequently invest the term with their own meaning. For a useful model see Purves, *Rationale for a Family Court'* (1971) 1 RFL 402.

75 loc cit at p 608.

76 In some situations this has, of course, been already achieved. Supra text at n 46.

77 loc cit at p 1354.

what sources did he place great weight upon, and what sources did he minimise; and why did he evaluate the clinical material in these ways'.

CONCLUSIONS

Unlike many of his counterparts in other spheres of scientific inquiry, the expert witness in cases involving children has been treated with undue suspicion. Lawyers must, it is suggested, face the fact that the psychiatrist, clinical psychologist and social worker possess qualities and expertise which they do not and in cases concerning the welfare of children there can be no place for the lawyer's traditional insularity. The sole criterion must be whether the machinery of the law adequately safeguards the welfare of the child and, to this end, the lawyer, in whatever capacity he operates, and the expert in other disciplines must combine to create a truly realistic and professional approach to child law.

FRANK BATES*

* Senior Lecturer in Law, University of Tasmania. (This article was originally presented to the World Conference of the International Society of Family Law in Berlin, April 1975).