Beyond Common Knowledge: Reviewing the Use of Social Science Evidence in Australian Courts

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Courts are increasingly called upon to adjudicate hard cases involving questions of social facts. In deciding these matters, in a just and efficient manner according to law, courts will desirably have recourse to social science material and, perhaps less desirably, be influenced by underlying assumptions based on the decision-maker's personal views. This article comments on three ways in which courts use social facts and treat social science material in the course of judicial decision-making. The authors suggest a 'best practice' approach for judges in approaching these questions, in the light of identified problems with the status quo.

I Introduction

Dinner parties often provide the stage for interesting exchanges, where robust discussion can occur under the veneer of politeness and badinage. It seems it was no different for Sir Owen Dixon who, at a dinner party at the Australian Club during his tenure as Chief Justice, was said by his biographer to be in conversation with

> a woman seated next to him [who] was enthusing about how splendid it must be to dispense justice. Dixon replied, in a tone that could only be his:
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> > 'I do not have anything to do with justice, madam. I sit on a court of appeal, where none of the facts are known. One third of the facts are excluded by normal frailty and memory; one third by the negligence of the profession; and the remaining third by the archaic laws of evidence'.[1]

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1 Philip Ayres, 'Owen Dixon's Causation Lecture: Radical Scepticism' (2003) 77 *Australian Law Journal* 682, 693, cited in Justice Stephen Gageler, 'Evidence and Truth' (Speech, Australian National University, 4 March 2017) 2.

Sir Owen's remarks are prescient in circumstances where Australian courts are increasingly called upon to adjudicate complex disputes that raise novel questions. These questions may be novel in a number of senses. They may raise a set of facts that would have been — to use a Rumsfeldian phrase — 'an unknown unknown' when the legislative enactments that were designed to deal with the underlying dilemma were brought into force. For example, when the *Transplantation and Anatomy Act 1979* (Qld) was legislated, its use in an application to authorise the use of spermatozoa retrieved post-mortem in IVF treatment would have been unthinkable.[2]

Alternatively, a case may be novel in the sense that it calls on a judge to consider a question that does not have a statutory regime, or line of authority applicable to it, and instead requires a trier of fact to reach for an answer that is melded from 'common sense' or the use of contentious social facts.

With this in mind, we seek to complete two tasks in this article. In Part II, we will explain the ways in which judges in Australian courts use, and admit, social science material, and related 'social facts', in their decision-making. This will comprise an analysis of the applicability of the doctrine of judicial notice, the pitfalls associated with admission of social science evidence by way of expert evidence, and a critical evaluation of the adoption of social facts by judges as 'a commonsense background' to their adjudication of a dispute. In Part III, we will propose ways to counter difficulties that emerge from the discussion in Part II. Part IV provides a conclusion to this discussion.

This discussion will reveal limitations in the ways in which social science evidence, and social facts, are introduced into evidence. These limitations, in our view, can result in injustice to litigants, particularly in novel cases. Accordingly, we will suggest strategies for courts to adopt in ensuring that decisions are based on the best social science evidence available, while also ensuring procedural fairness is afforded to litigants.

When we refer to 'social science material' (or words to that effect) in this article, we refer to work, research and data that goes to 'the scientific study of human society and social relationships'.[3] We adopt a broad definition of the term, taking it to refer to a wide species of material, depending on the particular context. For example, in negligence cases, the use of social facts by judges will often hinge on the interpretation of medical evidence,[4] and personal views about social facts, such as the nature of care-giving roles to an unintended child of a

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2 See, eg, *Re Cresswell* [2019] 1 Qd R 403 ('*Cresswell*').

3 *Oxford Dictionary* (online at 29 August 2019) 'social science' <http://www.oxforddictionaries.com/definition/english/social-science>.

4 See, eg, *New South Wales v Lepore* (2003) 212 CLR 511.

wrongful birth.[5] In the case of regulatory matters alleging unconscionability, a relevant social fact is the vulnerability of a particular class of persons, which we posit is a matter that is inherently subject to a judicial normative evaluation.[6] However, in 'penumbral' cases, such as those squarely raising complex questions of social facts and social science (for example, the making of declarations with respect to the use of spermatozoa retrieved post-mortem),[7] social science material may refer to the reports of state, territory and Commonwealth law reform commissions, to journal articles prepared by specialists in the field or judicial attitudes to questions of social value (such as children being raised in single-parent households).

II How Do Judges Use Social Science Evidence?

The use of social science material by courts in Australia is a vexed question. The question needs to be assessed in the context of data that indicates that the use of social science material by courts has increased in recent years.[8] While some authors have undertaken content analyses of the instances of the use of social facts and social science evidence in particular contexts, such as family law[9] and negligence suits,[10] there does not appear to be a clear schema to articulate the appropriate use of social facts. Zoe Rathus has written that judicial notice is the 'most obvious avenue' for admitting social science material into evidence,[11] and it is for this reason that we turn to it first.

A *Judicial Notice of Social Science Material and Social Facts*

The ability of a judge to take judicial notice of certain facts is an important exception to the rule of evidence that all facts in issue (or relevant to the issue) in a proceeding must be proved by admissible evidence.[12] Different jurisdictions in

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5 See, eg, *Cattanach v Melchior* (2003) 215 CLR 1, 22–3 [36] ('*Cattanach*').

6 See, eg, *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18. These questions are fraught with controversy. Note, in particular, the 4:3 split with Kiefel CJ and Bell J, Gageler J and Keane J in the majority, and Nettle and Gordon JJ and Edelman J in dissent.

7 See, eg, *Cresswell* (n 2).

8 Zoe Rathus, 'Mapping the Use of Social Science in Australian Courts: The Example of Family Law Children's Cases' (2016) 25(3) *Griffith Law Review* 352, 353–4.

9 Ibid.

10 Kylie Burns, 'The Way the World Is: Social Facts in High Court Negligence Cases' (2004) 12(3) *Torts Law Journal* 215.

11 Rathus (n 8) 355.

12 JD Heydon, *Cross on Evidence* (LexisNexis, 8th ed, 2010) 191.

Australia deal with the doctrine of judicial notice divergently depending upon whether they have adopted the *Uniform Evidence Law*.

In the Commonwealth context, s 144 of the *Evidence Act 1995* (Cth) provides that 'proof is not required' about 'knowledge' that is 'not reasonably open to question' providing that it is 'common knowledge' or 'capable of verification' by reference to an authoritative document. The section provides for procedural fairness by ensuring that the parties are put on notice of the use of the material and provides an opportunity for the parties to put on submissions with respect to it.

The High Court was called upon in 2012 to consider s 144 and its applicability to social science literature on DNA evidence in *Aytugrul v The Queen* ('*Aytugrul*').[13] In that case, the published research on jury perceptions of DNA evidence was referred to in the appellant's submissions to the High Court and appeared only in a dissenting judgment in the New South Wales Court of Criminal Appeal. Their Honours held in *Aytugrul* that s 144 restricts judicial use of social science material. The Court held that social science material may only be used if the stringent conditions of s 144 are met and that the parties have been put on notice that the material will be considered.[14]

It is important at this juncture to recognise the distinction between adjudicative and legislative facts.[15] The former refers to a fact that must be decided by the trier of fact in order for a dispute inter partes to be resolved, whereas the latter refers to questions of law and policy which inform the exercise of judicial discretion. In the context of adjudicative facts, the concept of judicial notice is necessarily limited on account of the adversarial system in which disputes are resolved. In other words, unless a fact is so obvious it goes without saying, the matter must be determined on the evidence.[16]

Heydon J in *Aytugrul*, who also concurred with the orders of the majority, considered the difference between adjudicative and legislative facts.[17] His Honour considered, in obiter dictum, that s 144 does not operate to permit a judge taking 'notice' of legislative facts.[18] In so holding, his Honour had particular regard to the Australian Law Reform Commission's report on the law of evidence that counselled against extending s 144 to allow for the admission of constitutional

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13 (2012) 247 CLR 170 ('*Aytugrul*').

14 Ibid 183–4 [21]–[22].

15 KC Davis, 'An Approach to Problems of Evidence in the Administrative Process' (1942) 55(3) *Harvard Law Review* 364.

16 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 ('*Woods*').

17 *Aytugrul* (n 13) 200–1 [70].

18 Ibid.

facts, as a subset of legislative facts.[19] His Honour also made reference to legislative facts as being unlikely to be uncontroversial such that they are appropriately the subject of judicial notice.[20]

The High Court, 10 years before the decision in *Aytugrul*, had been required to consider the question of whether judicial notice could be taken of statistics concerning the frequency of helmet collisions in indoor cricket in assessing the content of the duty owed by the operator of a sport facility.[21] In terms of the substantive appeal, Gleeson CJ, Hayne and Callinan JJ were in the majority, whereas McHugh and Kirby JJ were in dissent. Of particular note is the different approach taken by McHugh J on the topic of judicial notice to that embraced by Callinan J. McHugh J opined, in obiter, that judges should be relatively free to apply their own views about, and to make their own enquiries into, questions of policy, psychology, history and ethics.[22] McHugh J referred to the judgment of Brennan J in *Gerhardy v Brown*,[23] where his Honour said that a court considering the validity, or scope, of a law is not bound 'to reach its decision in the same way as it does when it tries an issue of fact between the parties'.[24] In contrast, Callinan J was of the view that this is not the case. Callinan J wrote that parties must be given an opportunity to make submissions on matters the court intends to have regard to in its disposition of a controversy. In that vein, Callinan J opined that legislative facts are frequently controversial, making it inappropriate for judges to take judicial notice of them.[25]

Despite this judicial disquiet, there have been a number of instances of courts relying on s 144 to admit social facts by way of judicial notice. In particular, French J considered in *Victorian Women Lawyers' Association Inc v Federal Commissioner of Taxation* ('*Victorian Women Lawyers' Association*')[26] that the court could take judicial notice of the fact that women legal practitioners experienced disadvantage in career development and participation.[27] In particular, his Honour was satisfied that the proposition was expressed at a level of generality that could not be doubted and the matter was raised in the written submissions of the applicant such that the Federal Commissioner was on notice of the matter.

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19 Ibid.
20 Ibid.
21 *Woods* (n 16).
22 Ibid [65].
23 (1985) 159 CLR 70.
24 Ibid 141–2.
25 *Woods* (n 16) 511–12 [165].
26 (2008) 170 FCR 318 ('*Victorian Women Lawyers' Association*').
27 Ibid [116].

The New South Wales Court of Appeal considered the 'authoritative document' element of s 144 in *Norrie v New South Wales Registrar of Births Deaths and Marriages* ('*Norrie*').[28] The Court of Appeal considered whether the Registrar had the power to change a person's sex on their birth certificate. Their Honours were satisfied that a paper, written by Professor Greenberg on her area of expertise, 'Intersexuality and the Law', was properly the subject of judicial notice as it was extensively referred to, with approval, by Chisholm J in the earlier case of *Kevin v Attorney-General (Commonwealth)*.[29] It would seem to us that if judicial approval is a basis upon which to rely on a study as *authoritative*, there must necessarily be a point in time where a judicial officer is entitled to be the first to treat it as such.

Social facts perhaps more readily feature in the family law context. This may be because societal norms and analysis of parenthood are critical when family law courts undertake their statutory task under the *Family Law Act 1975* (Cth) in the making of parenting orders. That is, to give effect to the best interests of the child.[30] Two sources of social fact that family courts have considered in the context of parenting orders are (1) theories of parental alienation,[31] and (2) theories of domestic and family violence.[32] However, the decision of the Full Court of the Family Court in *McGregor v McGregor* ('*McGregor*')[33] illustrates the difficulty with judicial use of social science material in the Family Court. *McGregor* was a case where a Federal Magistrate heavily relied on a paper by two authors on parental alienation that was *not* referred to in the hearing. The Federal Magistrate preferred the views expressed in that article over the properly admitted expert evidence of a medical practitioner, in circumstances where the parties were not able to offer any comment on the social science evidence relied on by the judge, nor was the expert asked to opine on the contents of the article. The Full Court held per curiam that the appeal must be allowed because neither party was in a position to assert the correctness of the conclusions contained in the article and that natural justice requires that anything relied upon by the court must be made known to the parties.[34] The Full Court also held that, in circumstances where there are differing credible expert opinions in relation to a given matter, s 144 could 'demonstrably' not apply given, in effect, the parties are deprived of an

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28 (2013) 84 NSWLR 697 ('*Norrie*').
29 (2001) 165 Fam LR 404.
30 *Family Law Act 1975* (Cth) s 65AA.
31 See, eg, *McGregor v McGregor* (2012) 47 Fam LR 498.
32 See, eg, *Maluka v Maluka* [2011] FamCAFC 72.
33 *McGregor* (n 31).
34 Ibid [54], [55].

opportunity to make submissions on a controversial topic.[35] In the aftermath of the *McGregor* decision, Rathus has written that judicial references to social science material in the family law courts have 'vastly reduced'.[36]

In states such as Queensland the position is different. In that State, since the *Uniform Evidence Law* has not been adopted, the common-law position applies. That position, which was authoritatively stated by Isaacs J in *Holland v Jones*,[37] is that 'where a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the court "notices" it'.[38] Cases in the Supreme Court of Queensland that have considered the common-law doctrine of judicial notice have rarely taken notice of matters which the judicial officer doubts or lacks familiarity with, such as 'usual business practices'[39] or the calculations underlying certain statistics.[40] However, many other cases, which will be described in greater detail below, do not deal with judicial notice explicitly and instead adopt social facts as 'common sense' or as part of the background context to a particular controversy.

As the foregoing analysis demonstrates, there are difficulties with the deployment of the concept of judicial notice in the context of social science evidence and social facts. In particular, there seems to be a reticence on the part of the Family Court to grapple with the post-*McGregor* landscape and difficulties associated with the contestability of matters the subject of social science evidence have made courts reluctant to adopt the doctrine. Further, the operation of the common law in states that have not adopted the *Uniform Evidence Law* presents the same difficulty with matters that are contested. We will now turn to the difficulties associated with the admission of social science evidence as expert evidence.

B *Social Science Material as Expert Evidence*

Courts in the common-law tradition have acted on the opinion of experts since at least 1553.[41] Although by the 18th century judges were receiving and analysing expert evidence in a way that is familiar to a practitioner in 2019, anxieties remain about the admission of expert evidence.[42] These anxieties reflect the risk of bias

35 Ibid [71].
36 Rathus (n 8) 371–2.
37 (1917) 23 CLR 149.
38 Ibid 153–4.
39 *Emanuel Management Pty Ltd v Foster's Brewing Group Ltd* [2003] QSC 205 ('*Emanuel*').
40 *Williams v Partridge* [2009] QSC 278.
41 *Buckley v Thomas* (1554) 1 Pl Com 118, 124.
42 See, eg, Heydon (n 12) 1089–93.

on the part of an expert witness,[43] the costs associated with gathering the evidence,[44] and experts who 'take on themselves the illegitimate role of an omniscient inspector-general of the whole of the evidence tendered'.[45]

Despite this, expert evidence is seen as a practical necessity in complex litigation in the common-law world.[46] If purported expert evidence is relevant in the sense that, if accepted, it is evidence that could rationally affect — directly or indirectly — the assessment of the existence of a fact in issue,[47] it is prima facie admissible.[48] The evidence must also — in Queensland, as in other Australian common-law jurisdictions — meet the tripartite test set out by the High Court in *Clark v Ryan*:

1. the subject is outside the scope of common knowledge and requires an expert opinion ('the common knowledge rule');
2. the matter lies within a field of expertise; and
3. the expert giving evidence is sufficiently skilled or qualified to be considered an expert.[49]

In contrast, those practicing in the Commonwealth jurisdiction will need to satisfy the integers of s 79 of the *Evidence Act 1995* (Cth). That provision provides for an exception to the rule against opinion evidence if a person has 'specialised knowledge' based on 'training, study or experience' if their opinion is admissible to the extent that it is based on that knowledge.

Litigants seeking to persuade a judge to admit social science material as expert evidence have generally needed to grapple with a view that the research or other material is merely seeking to 'reiterate common sense' (albeit in a more authoritative and convincing manner).[50] There is also a related concern that prejudice might flow from the adoption of social science research that supports a particular proposition advanced by the parties dressed up in a particularly convincing way, when it is a view that the trier of fact should simply form themselves on the basis of adjudicative facts admitted properly into evidence.

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43 *Lord Abinger v Ashton* (1873) LR 17 Eq 358, 374.

44 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Report, 1996) vol 1, 137 [2].

45 *Pora v R* [2016] 1 Cr App R 3, [28], cited in Heydon (n 12) 1090–1.

46 *Chicago College of Osteopathic Medicine v George A Fuller Co*, 801 F 2d 908, 911 (7th Cir, 1986).

47 *Goldsmith v Sandilands* (2002) 190 ALR 370, 371 [2].

48 *Evidence Act 1995* (Cth) s 55; *HML v The Queen* (2008) 235 CLR 334, 351–2 [5].

49 (1960) 103 CLR 486, 491 (Dixon CJ).

50 See, eg, *R v Fong* [1981] Qd R 90 ('*Fong*'); *R v Ashcroft* [1965] Qd R 81; *R v McEndoo* (1980) 5 A Crim R 52.

In the 1987 Victorian case of *R v Smith*,[51] Vincent J stated that 'the workings of the ordinary human mind in a variety of different areas have been regarded as matters which may be competently approached by such a tribunal and accordingly expert testimony has not been permitted in relation to them'.[52] His Honour continued:

> the fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.[53]

Similarly, in *Fong*,[54] the trial judge held that evidence regarding memory was inadmissible on the basis that 'the jury has been empanelled to decide every day matters … [W]hat a person remembers and how they are likely to remember and the manner in which the human memory works by reconstruction or suggestion or otherwise are every day matters well within the field of knowledge of juries'.[55]

However, research conducted by Daniel Simons and Christopher Chabris suggests otherwise. They conducted an extensive representative telephone survey in the United States to assess popular beliefs about the properties of memory.[56] The results of the survey revealed that there was a significant difference between the respondents' perceptions about various memory disorders as opposed to what statistical data collected by psychologists reflected. For example, 82.7 per cent of respondents agreed that 'people suffering from amnesia typically cannot recall their own name or identity', whereas all 16 'experts' surveyed disagreed. As Simons and Chabris point out, this has significant repercussions for a jury's treatment of eyewitness testimony.[57] In Australia, however, the concern with eyewitness testimony is somewhat ameliorated by the *Domican* direction.[58] That direction seeks to alert the jury to the difficulties associated with the correctness of visual identification evidence given by one or more witnesses. The rationale that lies behind it is that it is possible for an honest witness to make a mistaken identification, and for that erroneous evidence to be nonetheless convincing.[59]

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51 [1987] VR 907.
52 *R v Smith* [1987] VR 907, 909.
53 Ibid 910.
54 *Fong* (n 50).
55 Ibid 95.
56 Daniel J Simons and Christopher F Chabris, 'What People Believe About How Memory Works: A Representative Survey of the US Population' (2011) 6(8) *PLoS ONE* 1.
57 Ibid.
58 *Domican v The Queen* (1992) 173 CLR 555.
59 Ibid [5].

In *R v LM*, [60] a Queensland case concerning expert evidence given by a psychiatrist about factious disorder by proxy (formerly known as Munchausen syndrome by proxy), the Court of Appeal observed that the psychiatrist's evidence 'was only admissible if it was relevant expert psychiatric evidence'.[61] The Court noted that because the term 'factitious disorder by proxy' is 'merely descriptive of a behaviour', rather than a recognised psychiatric disorder or mental illness, 'it does not relate to an organised or recognised reliable body of knowledge or experience'.[62] Accordingly, the psychiatrist's evidence was inadmissible. Evidence given by other medical specialists concerning maternal responsibility for deliberately reporting false systems was also found to be inadmissible because, as was held in *Fong*, it 'related to matters able to be decided on the evidence by ordinary jurors'.[63]

The distinction drawn in *R v LM* reflects a similar distinction previously drawn by the High Court in *Farrell v The Queen*,[64] between common knowledge as to how alcoholism and drug abuse manifests on the one hand, and a psychiatrist's evidence about the presentation of antisocial and borderline personality disorders on the other, on the basis that the latter was beyond average human experience. As the learned author of *Cross on Evidence* explains, if there is a body of science that deals with the relevant behaviour, a suitably qualified expert may be called to give opinion evidence about it.[65] For example, in *Norrie*, the New South Wales Court of Appeal referred to the expert evidence of an endocrinologist when discussing the errors that may arise in the process of sex differentiation.[66]

The use of social science material as expert evidence is difficult. On the one hand, where there is a body of established work a suitably qualified expert may have their evidence admitted. However, in matters concerning social fact analysis (discussed more fully below), there appears to be a reticence on the part of courts to depart from the view that the subject upon which a purported expert seeks to opine is merely a matter of 'common sense'. We will now turn to the use of social facts by judges as 'common sense' or 'contextual' matters.

C *Social Facts as Common Sense*

Despite the strictures of the doctrine of judicial notice, judges have continued to refer to extrinsic materials, particularly in cases raising complex social questions.

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60 [2004] QCA 192.
61 Ibid [60] (McMurdo P, McPherson JA and Holmes J concurring separately).
62 Ibid [67].
63 Ibid [69].
64 (1998) 194 CLR 286.
65 Heydon (n 12) 1096–7. See also *Transport Publishing Co Pty Ltd v Literature Board of Review* (1956) 99 CLR 111, 119; *Murphy v The Queen* (1989) 167 CLR 94, 111.
66 *Norrie* (n 28) [150].

Predictably, the manner in which judicial officers have sought to introduce and use that material varies. The authors suggest that the current ad hoc approach to the question is justified in the usual course as providing 'background' or 'context' to a given dispute or as 'common sense', without referring to the doctrine of judicial notice.

A variety of approaches have been taken to 'background' or 'contextual' social facts. In a speech following her Honour's judgment in *McGregor*, the Honourable Diana Bryant, the then Chief Justice of the Family Court, evinced some support for the use of extrinsic material for providing background to a matter as long as they are 'extraneous to the decision', and must emerge from 'admissible evidence or be a matter of consensus which is recorded by the trial judge'.[67] It has been suggested that such an approach effectively closes the door on the use of social science literature.[68]

A brief survey of judicial approaches reveals that many judges rely on social science material in their decisions. For example, Riley J in *Malave v Ratcliffe* ('*Malave*')[69] was prepared to allow the parties to tender, *by consent*, six pieces of research (comprising articles, excerpts from books and papers) concerning the topic of parental alienation. The material was used in examination-in-chief, cross-examination and in submissions. Her Honour considered the material in detail and made a number of observations concerning the contested literature around the concept of parental alienation as background to her determination of the matter.

Another judge of the Federal Circuit Court referred to social science research on shared parental responsibility in two decisions as background to his Honour's decision. Judge Brown posed the question 'will a shared living arrangement in this parental context lead to an experience for the child of being richly shared, or deeply divided?'[70]

In *Cresswell*,[71] a case in which a superior court relied on a report of the Victorian Law Reform Commission,[72] a number of journal articles relating to the ethical dilemmas associated with the posthumous removal and use of spermatozoa were handed up to the Court by the Attorney-General, who appeared

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67 The Hon Diana Bryant, 'The Use of Extrinsic Materials — with Particular Reference to Social Science and Family Law Decision-Making' (Speech, Judicial Conference of Australia Colloquium, 2012) 16.

68 Zoe Rathus, 'A Call for Clarity in the use of Social Science Research in Family Law Decision-making' (2012) 26(2) *Australian Journal of Family Law* 81, 86.

69 [2015] FCCA 201('*Malave*').

70 *Meyer v Shipton [No 2]* [2013] FCCA 2198 [394]; *Liddell v Liddell* [2014] FCCA 2813 [44].

71 *Cresswell* (n 2).

72 Ibid [211] n 191.

as amicus curiae, by consent.[73] An additional article, written by Dr Rebecca Collins, which was not referred to by the parties in their written submissions, was nevertheless quoted by Brown J in relation to the effect of a surviving spouse's wishes and the 'presumption against consent' with respect to the use of the spermatozoa.[74] Interestingly, Brown J refers in her reasons to a need for further academic work to be undertaken on the topic, and called on the Law Reform Commission to consider the matter as a precursor for parliamentary intervention.[75]

Literature in the United States has emphasised the use of social facts and social science material for the purposes of providing context for a particular dispute. This conceptual framework seems to draw a distinction between social facts as contextual matters and social facts as substantively determinative. Walker and Monahan have proposed 'social framework' as a modification to the adjudicative/legislative fact distinction.[76] In their view, the traditional distinction fails to acknowledge the use of social facts in judicial reasoning. They posit that 'social framework' provides background context and allows a trier of fact to interpret the validity and relevance of adjudicative facts.[77] Part of the reason for this difference in approach is that statutory provisions in the United States permit judicial notice to be taken of facts that are 'capable of accurate and ready determination by utilising sources whose accuracy cannot reasonably be challenged'.[78] This broader framework allows judges to take judicial notice of facts that are of verifiable certainty.[79]

There are a number of instances, however, where a judicial officer may not explicitly refer to the basis of their social fact assumption or statement of social science — that is, where statements of a social fact are made without reference to any particular research, reports or data. We argue that it is in these penumbral cases that judges bring to bear their assumptions, biases and prejudices about so-called 'social facts', being the nature and behaviour of people and institutions. Kylie Burns has conducted a content analysis of the use of social facts in negligence cases brought in the High Court.[80] The study examined the role social facts play in judicial reasoning and how frequently they are used to address the

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73 Ibid [213].
74 Ibid [214].
75 Ibid [235].
76 Laurens Walker and John Monahan, 'Social Frameworks: A New Use of Social Science in Law' (1987) 73(3) *Virginia Law Review* 559, 568–70.
77 Ibid.
78 *Federal Rules of Evidence* r 201.
79 *West v GD Reddick Inc*, 302 NC 201, 274 (1981).
80 Kylie Burns, 'The Australian High Court and Social Facts: A Content Analysis Study' (2012) 40(3) *Federal Law Review* 317.

elements of a cause of action in negligence (for example, 'reasonable foreseeability' or 'causation'), which Burns says are inherently normative questions and involve a judge engaging in matters of legal policy.[81]

Burns' ultimate conclusion is that judges use social fact reasoning in a range of ways, including in measuring or evaluating adjudicative facts and as part of the creation of general background or content for their decision.[82] One decision in particular referred to by Burns clearly demonstrates the point. In *Cattanach v Melchior* ('*Cattanach*'),[83] the High Court was called on to consider a case in which a couple became the parents of an unintended child as a result of negligent advice and a failure to warn by the doctor who had performed a sterilisation procedure upon the mother.

The key issue in dispute before the Court was whether damages could be recovered for the costs of raising a child following a failed sterilisation. Burns suggests that the social facts referred to by their Honours,

> included some quite contentious, contestable and value laden statements including inherent social values of human life especially the lives of children, the nature of the nuclear family as the central unit of our society, the effects of commodifying children, [and] the nature and incidents of the parent/child relationship in modern Australian society…'[84]

Heydon J, in his first judgment as a Justice of the High Court, wrote in dissent and posited that 'the confidentiality which surrounds adoption suggests a perception by the legislature of the damage which can flow to children from learning that their parents regard them as a burden'.[85] His Honour articulated a concern that 'a child is not an object for the gratification of its parents, like a pet or an antique car or a new dress … it is contrary to human dignity to reduce the existence of a particular human being to the status of an animal or an inanimate chattel or a chose in action or an interest in land'.[86] His Honour's judgment has been described as conservative,[87] and reflective of his anxiety about judicial activism.[88] Burns argues that Heydon J's reasoning is based on 'older' practices of adoption,

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81 Ibid 318–19.
82 Ibid 327.
83 *Cattanach* (n 5).
84 Burns (n 10).
85 *Cattanach* (n 5) [384].
86 Ibid [353].
87 Kylie Weston-Scheuber, 'Victory for Reluctant Patients: *Cattanach v Melchior*' (2003) 26(3) *University of New South Wales Law Journal* 717.
88 JD Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) (Jan–Feb) *Quadrant* 9, 10.

and is not based on any contemporary research that would, in fact, seem to suggest the opposite.[89]

The majority, comprising McHugh, Gummow, Kirby and Callinan JJ, who allowed the Melchiors' claim for the costs of raising the child, also embraced a number of social facts in their reasoning. One example is the majority's interpretation of community standards, the value of human life and the stability of the family unit as not mitigating against recovery by the Melchiors.[90] Burns' research indicates that cases which involved 'complex, novel or highly disputed legal issues' were more likely to include larger numbers of 'judicial [social fact] statements'.[91] In her article, Burns found that *Cattanach* contained 167 references to social facts, whereas the cases of *Czatyrko v Edith Cowan University*[92] and *Manley v Alexander*,[93] which involved, respectively, more straightforward questions of contributory negligence and breach of duty of care, had no social fact statements.[94] This argument is borne out by the research of Zoe Rathus on family law cases which demonstrates that, following the introduction of family law reforms in 2006–07 aimed at encouraging post-separation shared parenting,[95] the use of social science evidence has arisen, with judges referring increasingly to research on questions of attachment and alienation.[96]

Having articulated the manner in which judges introduce social facts and social science evidence into their reasoning, we now turn to outline our suggestions for how the difficulties identified may be addressed.

III How Should These Difficulties be Addressed?

It is our view that courts in the discharge of their decision-making duties should and do use social science evidence. We accept the force of the foregoing criticisms of, and concerns raised by, this practice, but believe that the proper, fair and principled treatment of social science material in court can only lead to better decision-making in, most relevantly, hard cases.

Zoe Rathus has summarised the key concerns raised in the literature and case law concerning the use of social science and social facts in judicial decision-making. She summarises five central concerns:

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89 Burns (n 10) 232.
90 *Cattanach* (n 5) [55] (McHugh and Gummow JJ); [145]–[154] (Kirby J); [298]–[302] (Callinan J).
91 Burns (n 10) 330.
92 (2005) 214 ALR 349.
93 (2005) 223 ALR 228.
94 Burns (n 10).
95 *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).
96 Rathus (n 8).

- natural justice must be accorded to the parties and the judge must identify material being used;
- often no source is identified;
- social science is contested and changeable;
- judges have inadequate skills in and understanding of how to use social science research; and
- using social science in court risks inappropriately applying the general to the particular.[97]

We respectfully adopt this catalogue of existing concerns.

The first two concerns articulated by Rathus deal with, effectively, procedural fairness. The methodology used in her article was to survey five focus groups of family law practitioners during 2012 and 2013 in Brisbane and Cairns. Three groups consisted of lawyers and two were groups of non-lawyers.[98] Rathus explained that 'many' group participants reported that judges 'non-transparently' brought social science ideas into court. In one instance, a participant anecdotally remarked that a judicial officer had said that 'the research is showing' certain matters about child rearing.[99] Rathus does not appear to view this, of itself, as particularly concerning because 'the appellate decisions around this issue have generally occurred in cases where specific social science evidence is cited'.[100] Rathus does not cite any particular decisions to support this claim. However, her contention is supported by the Honourable Graham Mullane, a former Justice of the Family Court, who conducted research into the use of social facts.[101] He found, inter alia, that five per cent of expressions of social facts were unsourced.[102]

In our view, the facts giving rise to these figures remain contrary to the administration of justice and are not necessarily reflective of other jurisdictions (noting, of course, that Rathus writes in this instance with specific reference to family law). Burns' research indicates that, in negligence cases in the High Court in the years of her analysis, 74 per cent of social fact statements had no judicial reference or source. Rathus's answer to this discrepancy is that, in the family law context, particularly following the enactment of the *Family Law Amendment*

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97 Zoe Rathus, '"The Research Says …": Perceptions on the Use of Social Science Research in the Family Law System' (2018) 48(1) *Federal Law Review* 85, 98.

98 Ibid.

99 Ibid 99.

100 Ibid.

101 The Hon Graham Mullane, 'Evidence of Social Science Research: Law, Practice, and Options in the Family Court of Australia' (1998) 72(6) *Australian Law Journal* 434.

102 Ibid 453.

(Shared Parental Responsibility) Act 2006 (Cth), there has been significant growth in published social science material on family law concepts.[103]

We contend that the grave procedural concerns articulated in cases like *McGregor* and in the literature can be assuaged. *McGregor* sits at the extreme end of the spectrum in terms of the use of social science material without notice to the parties. Ideally, as occurred in the decisions of *Cresswell*, *Malave*, *Liddell v Liddell*[104] and *Meyer v Shipton [No 2]*,[105] parties should confer on the provision of social science material and social facts, and include them in a tender bundle to be provided to the trier of fact. This material can then be used by parties in their cross-examination and submissions and allay procedural fairness concerns. Of course, it would be overly optimistic to presume that all such matters can be settled by consent. We argue that when at least one or more parties are litigants in person this is unlikely to be an option. Rathus argues that there is nothing then stopping a judge from issuing directions to deal with the matter and asking for the parties to submit social science material. Procedural fairness is fundamental to the justice system,[106] and requires any judge, who seeks to rely on social facts or social science material not supplied by consent, to invite submissions on the topic and to notify the parties. In our view, to rely on unreferenced social fact statements is deeply problematic (unless the matter is properly the subject of judicial notice) and is best dealt with by judges expressly raising their desire for the 'best' social science evidence with the parties.

The second concern is that social science material is by its nature changeable and *open to question*. This, of course, is a significant barrier to a judge 'noticing' the material if it is seriously open to question.[107] This is a real concern with the use of social science evidence and is well reflected in the different outcomes reached in *Cresswell* (and the line of authority referred to therein) and in *Re Gray*.[108] In the latter case, Chesterman J refused an application by the deceased's wife to use her late husband's spermatozoa. His Honour, in deciding against exercising his *parens patriae* discretion, found that it was not in the best interests of the child to 'grow up fatherless'.[109] In contrast, Brown J in *Cresswell* considered that it was difficult to assess the best interests of a child that may never exist,[110] and was satisfied that

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103 Rathus (n 97) 87.
104 [2014] FCCA 2813.
105 [2013] FCCA 2198.
106 *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 229 CLR 577, [117] (Kirby and Crennan JJ). See also Rathus (n 97) 97.
107 Cf *Evidence Act 1995* (Cth) s 144(1).
108 [2001] 2 Qd R 35.
109 Ibid [23].
110 *Cresswell* (n 2) [194].

society had progressed to a state where it was not considered detrimental to be born fatherless.[111] In particular, Brown J held:

> The nature of society and what is regarded as acceptable and not acceptable changes over time. While no doubt, the notion of having a child without a father after the father's death would have been unthinkable in the 1960s, that would not appear to be the case now. Single parents are choosing to have children alone. While it is likely that Australian society would still regard the traditional family unit as the best situation for a child's upbringing, there are studies suggesting that, of itself, it is not detrimental to a child to be born using ART and brought up in more unconventional households.[112]

Of course, there are cases in which the social science is significantly contested. Rathus observes, for example, that one issue of the *Australian Journal of Family Law* contained a number of articles that were diametrically opposed on the topic of parenting arrangements.[113] In such instances, it would be a matter for a judicial officer to decide between competing matters of social science or, perhaps more appropriately, to decline to enter into a debate that is not settled and is inapt for judicial determination without hearing from an appropriately qualified witness.

Such an approach is consistent with the third concern provided by Rathus. We agree with Heydon J's warning in *Aytugrul* that it would be unwise for the court to 'embark — without a pilot, rudder, compass or radar — on an amateur's voyage on [this] fog-enshrouded sea'.[114] As trial judges sitting in the Supreme Court of Queensland have warned in declining to take judicial notice of certain matters, it is impossible for a trial judge to take 'notice' of contested matters in which they have no expertise.[115] We consider that judges should be alive to this concern and not seek to navigate contested notions of social science, lest they fall into the error identified in *McGregor*.

The final concern raised above is that using social science risks applying the general to the particular. In certain circumstances, such a process of reasoning can present difficulties. In particular, a general statement of social science may be irrelevant to the controversy between the parties but may provide important background context. As French J observed in *Victorian Women Lawyers' Association*, a general statement of disadvantage faced by women in the legal profession is important background information to the dispute in that case: namely, whether a certain structure was a charitable institution for tax purposes.[116] Judges must

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111 Ibid [198]–[199].
112 Ibid [211] (citation omitted).
113 Rathus (n 97) 100.
114 *Aytugrul* (n 13) 203 [74], quoting *United States v Flores-Rodriguez*, 237 F 2d 405, 412 (2nd Cir, 1956) (Frank J).
115 *Emanuel* (n 39) [92].
116 *Victorian Women Lawyers' Association* (n 26) [116].

always be alive to reasoning from the general to the particular, and that remains true with social science material and social facts. We agree with the learned work of Walker and Monahan in embracing a third category of facts with context,[117] framed by social facts and related social science evidence, making an important contribution to the analysis of adjudicative facts by a judicial officer.

The difficulties faced by all decision-makers in proceedings that raise novel, or otherwise contested questions of social facts, may have particularly grave consequences for litigants. We think that social science evidence and social facts, when identified and properly marshalled, assists judicial reasoning. However, we agree that a judge must avoid the pitfalls identified above.

IV Conclusion

Judges and other triers of fact have always made factual assumptions and associated claims about how society, and the individuals that operate within it, function. Advances in social science research, however, indicate that some of these assumptions have been incorrect, or have changed significantly over time. The medical, biological and other natural sciences that define the bounds of many disputes are becoming increasingly complex. Accordingly, it is necessary to recognise that in order to properly grapple with novel cases, judges should — in order to reason on the basis of the best evidence — have regard to verifiable, reputable research. This recognition is important in seeking to regularise the use of social science evidence that may already feature, if opaquely, in the judicial method.

As we have set out in Part III of this article, we believe that there are important ways in which courts and tribunals may mitigate against reliance on unsourced social fact reasoning and ensure that decisions are made on the best evidence available.

However, it should be acknowledged that given the exigencies of modern practice such as the lack of legal aid and other facilities to represent litigants on the one hand and the inadequate funding of courts on the other, there are significant pressures of time and resources. Any reforms in this area must take account of the realities of litigation in the 21st century.

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117 Walker and Monahan (n 76).