JOSHUA WILLIAMS MEMORIAL ESSAY 1973 —

A CRITICAL EXAMINATION OF JUDICIAL INTERPRETATION OF A CHILD'S BEST INTERESTS IN INTER-PARENTAL CUSTODY DISPUTES IN NEW ZEALAND

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Sir Joshua Strange Williams, who was resident Judge of the Supreme Court in Dunedin from 1875 to 1913, left a portion of his estate upon trust for the advancement of legal education. The trustees of his estate, the Council of the Otago District Law Society, have therefrom provided an annual prize for the essay which in the opinion of the Council makes the most significant contribution to legal knowledge and meets all requirements of sound legal scholarship.

It is with pleasure that we publish below the prize winning entry for last year.

This paper is designed to examine the principles evolved by the courts in interpreting statutory provisions relating to custody disputes between parents, to discuss the shortcomings of the present system, and to suggest means of improvement.

The central question in any custody dispute is — which of the arrangements offered in a given case are in the best interests of the child concerned? The courts over the years have evolved certain principles in relation to determining what is in a child's best interests and these find expression in a considerable volume of case law. It will be appreciated however that because of the personal nature of custody disputes every case turns on its own facts and the precedent value of the cases referred to in this paper is therefore to some extent minimised.

Because of the human element involved this is not a field of law that calls for the strict application of inflexible legal principles. In the words of Dr Inglis[1] "few areas of law are less suited to formal treatment than those relating to custody and guardianship of children". The outcome of any given case will ultimately depend on a subjective assessment by the judge or magistrate of the merits and demerits of the respective "contestants" viewed in the light of the child's welfare. Such an approach has much to commend it but the question remains — are judges suitably qualified to make these assessments? It is submitted that in many cases they are not. In making this submission the present writer does not wish to infer any disrespect to the undoubted capabilities of our judiciary. One readily understands the difficulties involved in adjudicating this type of case and the agony involved in reaching a decision which will have far reaching effects on the lives of human beings. The

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1 (1964) 1 N.Z.U.L.R 310.

dilemma is perhaps best summed up in the words of an American judge, Mr Justice Botein[2]:

> A judge agonises more about reaching the right decision in a contested custody issue than about any other type of decision he renders.

In all human probability it will be very difficult for a judge to make a proper assessment of a complex situation in two or three interviews. Despite the lack of formality which has become a feature of custody proceedings in recent years, many may nevertheless be over-awed by the judicial process and put up an unimpressive performance in court. On the other hand it is not impossible that a person with a serious personality defect which may render him unable to supply a child's basic emotional needs may put up a good appearance in court. It certainly seems that judges are very much influenced by their assessment of the character of the parents gained from their appearance in court. It is not uncommon to find in the reports expressions such as "X impressed me as a sensible, kind and understanding woman able and willing to give a good home to the children"[3] and there is little doubt that such assessments have, in many instances, a material bearing on the outcome of the case.

The dangers involved in too much reliance on the subjective assessments are obvious. Adrian Bradbrook[4] considers that judges are making "intuitive guesses" as to what is in the best interests of children. A good example of one such intuitive guess is contained, it is submitted, in the judgment in *In re O.* [1962] 1 W.L.R. 724 where the judge gave custody of a little girl aged four to her mother in England and her brother aged five to the father in the Sudan. He supported his decision to separate the children by saying that the little girl would be less adaptable in the Sudan. There was no medical evidence to back up this conclusion and the award appears to have been in the nature of an "intuitive guess" in an attempt to do justice between the parties in what was a very difficult case. It is my submission that such an approach does not give paramountcy to the child's best interests and the proper course to have taken would have been to call for a psychologist's report to assess the effects of the alternative arrangements proposed on the long term welfare of the children. The importance of expert medical evidence in these disputes will be discussed in detail *post.*

It is certainly open to argument that a judge, untrained in the behaviourial sciences, may be coloured by his own family experience and sexual role in society in deciding what is in a child's best interests. For this reason Child Welfare reports have an important part to play in this type of dispute and the advantages and shortcomings of these reports will be discussed shortly.

2 Quoted by Adrian Bradbrook, "The Relevance of Psychological and Psychiatric Studies to the further Development of the Laws Governing Inter-Parental Child Custody Disputes" 11 J.F.L. 557.
3 *Welford* v. *Welford* (1961) 10 M.C.D. 293.
4 B.A., LL.M. Ass. Professor of Law, Dalhousie University, *loc. cit.*

The Welfare of the Child as the First and Paramount Consideration

In New Zealand questions of custody are governed by the Guardianship Act 1968. Section 23 of that Act provides that in any custody dispute "the Court shall regard the welfare of the child as the first and paramount consideration".

Welfare is an all-encompassing and elusive term which in this context at least defies precise definition. As has been pointed out by the courts on many occasions there are several different aspects of welfare and it is left to the court's discretion as to what weight it will give to any particular aspect in a given case. The ultimate question is — "Which parent can provide an atmosphere most conducive to the child's long term welfare?" The concept of what is in the child's best interests necessarily changes with changing community values and moral standards and therefore older cases should be viewed with caution. In particular it appears that some of the older cases would not today be followed as they tend to give undue emphasis to material, moral and religious considerations and ignore the child's mental and emotional well-being.

Although the Act speaks of welfare as the "first and paramount consideration" it is not the exclusive consideration. Other factors can of course be considered but they must necessarily be subordinated to that of the child's welfare. What is actually involved is a balancing of all the relevant considerations bearing in mind that the child's welfare comes first and takes priority.

Modern research in psychology has shown that transferring custody of a child may have detrimental if not disastrous effects by depriving it of the security and stability it has known and plunging it into a strange environment. In the light of this the courts have shown a tendency to be more concerned with what is called the "long range view" of the child's welfare and have emphasised the desirability of continuity of custody.

The continuity factor weighed heavily with the Court of Appeal in *Palmer* v. *Palmer* [1961] N.Z.L.R. 702 where the court gave custody of a two-year-old boy to his father. The boy had actually always been in his father's custody, having been cared for by his paternal grandmother since the age of three months, and the courts considered it desirable in the child's interests that this arrangement should continue. The court forsaw that even if custody were given to the mother at this stage it was likely that it would later be desirable that it be re-transferred to the father and they therefore held that it was in the child's long term interests that the father retained continuous custody.

The desirability of continuity of custody was also recognised in *Norton* v. *Norton* [1951] N.Z.L.R. 678 where it was established that if custody went to the father the children would be in the care of his parents who were in their mid-sixties. The court forsaw that the wife's custody was more likely to endure throughout the infancy of the children and this factor weighed heavily with the court in awarding custody to the mother. In *H.* v. *H. and C.* [1969] 1 W.L.R. 208 it was held that where a child is happy and secure in its environment then it can seldom

be in its best interests to remove it to the custody of someone who, to it, is a comparative stranger.

There have been other decisions, however, some in recent years, which take quite a different view of the importance of this continuity factor. There are two English decisions, one a recent Court of Appeal decision, and the other an older Chancery decision, which are somewhat startling in their results in the light of modern child psychology. In *B. (M.)* v. *B. (R.)* [1968] 1 W.L.R. 1182 the Court of Appeal was faced with a custody dispute over a seven year old girl who had been living with her paternal grandparents since the age of three. The Court of Appeal refused to interfere with the discretion of the judge at first instance in giving custody to the mother who had had only minimal contact with the child over the preceding four years. The order was affirmed despite evidence to the effect that the child was happy and well-adjusted in her present environment, backed up by a pediatrician's report which stated that a change in custody would run the risk of grave disturbance and upset. With respect it is submitted that it is impossible to see that this decision was in the child's best interests. The judge at first instance was influenced by two factors — the mother principle and the fact that the mother was a more truthful witness. It is my submission that this case stands as an example of a judge being overly influenced by his assessment of character of the parties from their appearance in court to the detriment of considerations of the child's long term interests in terms of its underlying emotional needs.

An even more startling decision is that of *In re Thain* [1926] Ch. 676 where a father sought to have returned to his custody a girl seven years old who had been in the custody of her aunt and uncle almost since birth and had scarcely seen her father. In awarding custody to the father the judge said:

> It is said that the little girl will be greatly distressed and upset at the 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 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 weight to this aspect of the case.

It is my submission that the above reasoning would appall modern day psychologists and sociologists and the statement has in fact been severely criticised in recent years.[5] Finlay and Bisset-Johnson[6] consider that "[i]t seems likely that the undesirability of such changes are better appreciated today than they were in 1926 and that this factor will therefore be given more adequate recognition".

What the present writer considers somewhat alarming in view of this is that *In re Thain, supra,* has, in relatively recent years, been cited as authority for the proposition that the initial

5 See Naomi Michaels, "Dangers of a Change of Parentage in Custody and Adoption Cases" (1967) 83 L.Q.R. 547; Finlay and Gold, "The Paramount Interest of the Child in Law and Pyschiatry" (1971) 45 A.L.J. 82.

6 *Family Law in Australia* (1972) 546.

unhappiness caused by the transfer of a child's custody is a transient emotion: in New Zealand, in *In re P.* [1954] N.Z.L.R. 93, and in England as late as 1962 in *In re O.* [1962] 1 W.L.R. 724.

In determining what is in a child's best interests another factor which has weighed heavily with the courts is the degree of stability and security offered by the alternative arrangements. This also requires a "long range" view to be taken and is integrally linked with the desirability of maintaining continuous custody.

In *Meraunt* v. *Meraunt* [1922] N.Z.L.R. 262 custody of three children was given to their mother because she could offer a greater degree of security owing to the fact that she was able to provide a stable home and continuous care and attention whereas the father was engaged in an occupation which necessitated his being away from home for long periods and the care of the children would necessarily be delegated to a variety of servants. In *In re H.* [1940] G.L.R. 165 the custody of two boys aged thirteen and three was given to their mother because in the judge's words "family life with the mother would be better than family life with the father". Here the father was in grave financial difficulties and was under severe stress and strain and the indications were that his times of trouble were far from over.

Subsidiary Principles

Over the years guidelines have developed through judicial interpretation of what is in the best interests of children and it is possible to isolate three subsidiary rules which the courts frequently apply in deciding custody disputes. Not one of these principles is necessarily of itself decisive of custody but must be weighed with the totality of all competing considerations.

(a) *The Mother Principle*

Generally the courts have considered that where all other things are equal, the best interests of children of tender years are served by placing them in their mother's care,[7] and there also seems to be general acceptance by the courts that growing girls are better off in the care of their mother.[8] The courts have made it clear however that the presumption is not in any sense a rule of law and is liable to be displaced by other considerations in the child's best interests. As the Court of Appeal said in *D.* v. *R.* [1971] N.Z.L.R. 952:

> The law has never recognised the mother principle as having the status of a rule of law. It is a factor of importance which varies from case to case.

All child psychologists stress the need for continuous and consistent interaction between mother and child for the full development of intelligence and personality. A leading child psychologist in England, Dr John Bowlby, whose research has won world wide acclaim, carried out detailed research into the effects on children of maternal deprivation and came to the

7 *Norton* v. *Norton* [1961] N.Z.L.R. 678.
8 *Morton* v. *Morton* (1911) 31 N.Z.L.R. 77.

conclusion that in the majority of cases it leads to retardation and regression in intellectual and emotional development.[9]

There is little evidence in reported decisions that Bowlby's findings are being studied by the courts in deciding custody disputes concerning young children. Admittedly many of the decisions coincide with his findings but there are enough cases where his conclusions are not being implemented to cause concern, e.g. *B. (M.)* v. *B. (R.)*, *supra.*

Bowlby's findings should not be taken as meaning that the mother is always the best person to have custody of young children. Certainly all young children need mothering but his findings have shown that just as much harm may be done by a bad or indifferent mother. It would not be in the child's best interests for custody to be given to the mother where her relationship with the child is destructive, where she is significantly mentally ill or where someone else has replaced her in the child's life as the established mother-figure. Where a substitute mother can offer continuous and permanent care and the natural mother cannot then it may be better that the child stays with the substitute mother. Each case must be considered in the light of its particular circumstances and with consideration to the particular stage of development the child has reached. Clearly the mother principle will be displaced if the mother is unfit to have custody but the evaluation of her fitness may depend on a multitude of factors, the assessment and relativity of which is no easy matter. The assessment of such factors as the quality of the relationship between mother and child, and the degree of attachment a child may have to a mother substitute are complex and it is in this sphere that it is suggested that psychologists could play a vital part in assisting the court to evaluate these and to achieve the ultimate goal of the arrangements which are in the child's best interests.

(b) *The Father Principle*

The courts over the years have consistently taken the view that where all other considerations are equal, it is in the best interests of growing boys that they should be in the care of their father.[10] Like the mother principle it is not an inflexible rule of law and is liable to be displaced if its application would not be in the child's best interests.[11]

Until ten years ago, the role of the father in the development of the child had been virtually ignored. All the studies purporting to deal specifically with maternal deprivation are in fact dealing with parental deprivation and no researchers have dealt specifically with children raised by fathers alone. It may well be that further research will lessen the strength of the "mother principle" from the medical point of view, if it is found that a father can provide that degree of security which at present it is thought only a woman can provide. Until more research is undertaken however, it seems desirable that the mother

9 Bowlby, *Child Care and the Growth of Love.*
10 *M.* v. *M.* [1941] G.L.R. 396.
11 *In re H.* [1940] G.L.R. 165.

principle should remain a strong one in the case of children under the age of seven years.

What studies have been undertaken in the last ten years with regard to paternal deprivation reinforce the view taken generally by the courts that boys approaching adolescence are better off in the care of their father. Studies have shown a variety of adverse effects on boys from the age of seven onwards ranging from delinquency to several categories of mental illness.

(c) *That Brothers and Sisters should not be Separated*

The third principle evolved by the courts is that it is generally better for children to reap the advantages of brotherhood and sisterhood[12] and the courts will hesitate to separate children by means of a custody order.[13]

This rule, like the mother and father principles, is not inflexible and the courts have not hesitated to depart from it when they have considered that it would be in the children's best interests to do so.[14]

The Role of Independent Expert Evidence

The preceding discussion has indicated that in recent years, the courts in ascertaining what is in a child's best interests have tended to place less emphasis on the more concrete factors such as physical comfort and financial considerations and to attach more weight to awarding custody to that parent who is best able to provide that degree of stability and security which will best satisfy the particular child's underlying emotional needs. In view of the importance of these factors, the competency of the courts to deal with custody unaided must be called in question. The court is guided by its "knowledge" of human relationships based on "common sense" and its observations of human behaviour, but it is at least arguable whether a judge or magistrate, untrained in the techniques of communicating with people at the psychological and emotional level, has the necessary skills to perform his task.

The New Zealand legislature has to some extent given recognition to these inadequacies in sections 28-30 of the Guardianship Act 1968 which allow the court the utmost latitude in the information which it seeks to assist it in the exercise of its parental and administrative jurisdiction. It is submitted by the present writer that this may not however be sufficient to allow a completely full assessment to be made of what is in a child's best interests. With a view to a discussion of this aspect, this topic will now be sub-divided as follows:

1. The Present Framework:
   (a) Evidence
   (b) Child Welfare Reports
   (c) Appointment of Independent Counsel
2. Extension of the Present Framework: The desirability of independent medical evidence.

12 *Soler* v. *Soler* (1897-8) 17 N.Z.L.R. 49.
13 *In re Besant* (1879) 11 Ch.D. 508; *B.* v. *B. and S.* noted [1970] N.Z.J.L. 367.
14 *Lambert* v. *Lambert* [1942] G.L.R. 452.

1. *The Present Framework.*

(a) *Evidence*

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.

English practice has always shown a great deal of flexibility in this respect, e.g. see *W.* v. *W. and C.* [1968] 1 W.L.R. 1310 where the unsworn report of a minister of religion was admitted as fresh evidence on appeal.

Section 28 restates English practice and 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 enquiry into all matters bearing on a child's welfare and these cannot be thwarted by technicalities.

Admirable although this provision is, it should be noted that the section states "receive such evidence" and not "call such evidence". It appears therefore that evidence admitted by virtue of this section is restricted to any evidence which either of the parties may choose to submit and does not allow the court to call evidence on its own initiative. 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 they are always liable to be prejudiced, perhaps quite unconsciously, by the views of the person for whom they are giving evidence. The danger of this was pointed out in *W.* v. *W. and C., supra,* where a clergyman undertook an independent investigation at the instigation of the mother's relatives. Although the court had no hesitation in admitting the report in evidence, Sachs L. J. commented:

> One finds (and it is not entirely strange) that, although he regards himself as an investigator bound to be scrupulously fair, it is difficult — indeed, I am not sure that it may not be impossible — 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.[15]

The same criticism can be levelled to some extent at medical evidence called by one party, as will be discussed at length presently.

It is submitted therefore, that the courts are justified in viewing with the same caution, any evidence adduced by one party alone, despite the independent status of that witness.

(b) *Child Welfare Reports*

Section 29 of the Guardianship Act provides:

> (1) In any case where the Court so directs . . . a copy of the application shall be served on the Superintendent of Child Welfare. . . .
> (2) The Superintendent or a Child Welfare Officer shall report on the application, and may appear on any application by himself or by solicitor or counsel.

15 [1968] 1 W.L.R. 1314.

In *Sing* v. *Muir* (1970) 16 F.L.R. 211, 214, Burbury J. said of section 85 (2) of the Matrimonial Causes Act 1959 (the Australian equivalent of section 29):

> The clear purpose of the Legislature in enacting s. 85 (2) was to give the court a robust initiative . . . to make further enquiries 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.

The obvious value of these reports lies in the conveyance of an independent and impartial evaluation of the alternative custody arrangements available to the child. Yet despite their obvious value Finlay and Bisset-Johnson[16] note that very few judges in Australia call for them of their own accord and generally do not rely on them to any great extent. An investigation undertaken in England for the Law Commission by Hall (1966)[17] showed a considerable divergence among judges in asking for welfare officers' reports.

New Zealand practice shows that judges frequently call for these reports. From an examination of some of the decisions where these reports have been referred to, it seems that they are confined to a factual evaluation of such matters as the financial position of the parties, the attributes of the respective homes, the wishes of the children, with a few general observations of the character of the parties as parents. Examples are contained in *Welford* v. *Welford* (1961) 10 M.C.D. 293, where the officer's report appears to have been very factual and confined to commenting on the physical attributes of the respective homes and the state of health of the children, and in *B.* v. *B. and S.* [1970] N.Z.L.J. 367 where the report dealt in the main with conditions in each home and the financial resources available.

It is my submission that these reports do not, in their present form, contribute greatly to the outcome of any custody dispute. In submitting this the present writer does not doubt that they are of immense value in conveying to the judge an unbiased picture of the respective environments available. In this sense, it is not denied that they do contribute to the outcome of the dispute. But we are concerned here to find the solution which is in every case truly in the particular child's best interests and because of their factual nature and lack of real depth the value of these reports in the achievement of this goal is to some extent minimised.

It is my contention that these reports would be of greater value if officers were encouraged to include in them views that they have formed on the character of the respective parties and their qualities as parents. The welfare officer, in the course of his detailed investigations would, it is submitted, have a much better opportunity of doing this than would a judge during a brief encounter in court.

16 *Family Law in Australia* (1972) 551.

17 Hall, *Family Law; Arrangements for the Care and Upbringing of Children*, Working Paper No. 15 prepared for the Law Commission (U.K.) and referred to in the Commission's Report for 1968.

New Zealand judges have, however, shown hostility towards welfare officers who have gone beyond the confines of a factual report. In *B.* v. *B. and S., supra,* the welfare officer stated in his report that he would hesitate to disturb the present arrangements. Hardie Boys J. accepted this view as having been offered in good faith but indicated that it should never have been uttered in that it necessarily tended to trammel the view of the court and to usurp its proper function. With this should be compared the attitude of the English courts exemplified by *W.* v. *W. and C.* [1968] 1 W.L.R. 1310 where a great deal of praise was lavished on a careful and thorough report of a court welfare officer which concluded with a recommendation (which, incidentally, was followed) that the child would be better off with its father. The difference in attitude may derive its explanation from the fact that the English welfare officer was an officer of the court whereas in New Zealand we do not have court welfare officers and a child welfare officer is more properly regarded as a witness or a representative of the child.

It is my submission that it would be desirable to allow welfare officers to include these sorts of recommendations in their reports, not as the last word on the matter but rather to supplement the judge's evaluation of the situation. The ability of a judge to decide these matters unaided has already been called in question in this paper; here is an excellent opportunity, within the present framework, to utilise expert knowledge so that it may be of assistance to him. It is contended that as long as the present attitude of our courts continues and the reports continue to be confined to the more factual aspects of the situation their value will be strictly limited in the attainment of the ultimate goal.

(c) *Appointment of Independent Counsel*

Section 30 of the Guardianship Act provides:

> The Court may appoint a solicitor or counsel to assist it or to represent any child who is the subject of . . . proceedings under this Act. . . .

This section enables the court to appoint independent counsel to carry the principal burden of investigation in a custody dispute. It may be regarded as complementary to section 29 for it appears that the function of independent counsel will be substantially the same as that of a child welfare officer. Independent counsel appointed in a recent case, *F.* v. *G.* [1971] N.Z.L.R. 956, inspected conditions in the respective homes, brought the child welfare report up to date and called on the children at home and, as White J. acknowledged, "was able to learn their views . . . and bring this information to the Court's attention, thus giving effect to s. 23 (2) of the Act in a more effective way than an interview by a Judge in his chambers".[18]

As the independent counsel is an officer of the court, one wonders if a recommendation by him as to what the outcome of the dispute should be, would be any better received than that of the Child Welfare Officer in *B.* v. *B. and S., supra.*

18 [1971] N.Z.L.R. 959.

2. *Extension of the Present Framework: the desirability of independent medical evidence.*

> Pyscho analysis may provide insights to prompt modification of the ways and means by which society, through law, seeks to fulfill its goals.
> Goldstein, *Psycho Analysis and Jurisprudence — the Pyscho Analytic Study of the Child,* Vol. 23, (1969) 459.

As was suggested at the outset of this paper, the outcome of many disputed custody cases appears to virtually depend on a subjective assessment by the judge of the parties concerned, based on common sense and the judge's experience in the observation of human nature. Without wishing to be too critical of this approach to a very difficult issue, it is suggested that in an area where the lives and happiness of human beings are so vitally concerned and expert opinion is available then it should be sought and utilised to its fullest advantage. In view of the recent developments in child psychology, medical or psychiatric evidence may be of vital importance in helping the court to assess the likely effect of any particular custody order on any particular child.

It is at least arguable whether some of the assumptions made by the courts coincide with the paramountcy of the child's interests as a matter of scientific fact. Take, for example, the decisions in *B. (M.)* v. *B. (R.)* and *In re Thain* discussed previously. How can a judge, untrained in the behavioural sciences assess the real effect upon the developing psyche of a child of the alternative arrangements proposed in a custody order? There is simply no guarantee that assumptions made by judges are correct, particularly in matters concerning medicine and psychology. Judges are virtually self-taught in psychology and may be labouring under basic misconceptions. Expert evidence may be invaluable in assessing the true nature and quality of the relationship which each parent can offer the child.

There have been relatively few cases in which the courts have been prepared to accord decisive significance to medical evidence and judges have, in the main, rejected the contention that such evidence can be sufficient foundation for the judgment of the court.

One of the few decisions in England, Australia or New Zealand where the court has resorted to the findings of modern medical science in order to arrive at its decision was the Australian decision in *Harnett* v. *Harnett* [1954] V.R. 533 where Barry J. referred with approval to the findings of Dr John Bowlby. His works were said to contain "a good deal of material . . . which is of considerable importance to those concerned with the problems relating to the care and custody of young children". In England the case which has come closest to holding that medical evidence alone justified the court's decision is probably that of *In re C (L)* [1965] 2 Q.B. 449 where strong and uncontradicted medical evidence stated that transfer of custody would run serious risk of severe psychological damage to the child, but in delivering his judgment, Pearson L. J. adverted to the danger of allowing the medical profession to usurp the functions of the judiciary.

In general however there is little evidence in the reported judgments that the findings of modern psychiatry are being studied and implemented by the courts. One only has to look to *B.* (*M.*) v. *B.* (*R.*), *supra,* where the court transferred custody of a small girl in the face of a pediatrician's report that to do so would cause grave disturbance. In the House of Lords in *J.* v. *C.* [1970] A.C. 668 it was stated that in the case of a "happy and normal" infant the evidence of a psychiatrist on the dangers of taking particular courses may be valuable but can only be, as Lord Upjohn expressed it, "an element to support the general knowledge and experience of the judge".

Why are courts wary of giving any decisive weight to expert medical evidence? It is my submission that it is possible to isolate three broad factors:

(a) In many cases where the judges have shown themselves hostile to medical evidence that evidence has come from an expert instructed by one party alone. In these circumstances the evidence will essentially consist of a hypothesis based on certain initial facts regarding the medical history and condition of the child, supplied to him by the party who is instructing him. If the information supplied is false or is distorted then his hypothesis is likely to be inaccurate and to this extent may not be an "honest document" in that it may quite unconsciously be biased in favour of the party calling him. A doctor is in no position to detect falsities in the background information supplied to him. This aspect was the subject of judicial criticism in *Lynch* v. *Lynch* [1967] A.L.R. 510:

> I have noticed a tendency is developing to employ a pyschiatrist virtually to argue the applicant's case . . . it is not the province of pyschiatrists to determine questions of custody in one sided versions of disputed facts.

Unless medical evidence is introduced on the joint instructions of both parties then it is submitted that the courts are justified in being critical of its bearing on the case.

(b) The possibility of disagreement between experts may discredit such evidence in the eyes of the court. Medical research into many aspects of child psychology is incomplete and there is a great deal of divergence of medical opinion on some matters. It is possible in this type of case (as often happens in criminal proceedings) to get two medical witnesses in court advocating different theories, which in terms of the legal dispute would produce opposite results. Take for example the New Zealand Court of Appeal decision in *Palmer* v. *Palmer* [1961] N.Z.L.R. 702. Here we had a medical witness called for the father who outlined the effects of a break with an established mother figure and said that the paternal grandmother had become the child's "mother figure". Another medical witness called for the mother did not materially disagree with this but said that there was just no real substitute for the natural mother if she was available. Faced with this sort of dilemma the court is pushed back on its own "knowledge and experience" and is forced to make its own evaluation as to which medical view should dominate. The court is not suitably equipped to assess

the reliability of this evidence and cannot be blamed if it simply decides the issue on a "common sense" approach based on its observations of human nature and its own assessment of the character of the parties and their suitability as parents.

So long as medical research remains incomplete and the medical profession remains unable to quantify convincingly the element of risk involved in any particular arrangements, then it is submitted that the court's caution is probably justified.

(3) The third factor is simply the conservatism of the courts in refusing to allow psychologists and sociologists to enter into the sphere of law and to "usurp the functions of the judiciary". The courts tend to consider themselves to be the judge of what is in a child's best interests and are resentful when anyone tries to "tell them" what they should do. Perhaps the attitude is best exemplified by Lord Upjohn's comments in the House of Lords in *J.* v. *C.* [1970] A.C. 668. He said, that in exercising his discretion a judge should not hesitate to "take risks" and go against medical evidence, if on a consideration of all the circumstances he considers that the paramount interest of the infant points to a particular course as being the proper one.

General Conclusions

It is submitted by the present writer, that in view of recent developments in psychology and medicine, expert medical evidence may be of crucial importance in cases concerning young children. In stating this, the writer does not mean to go as far as to say that lack of expertise of the judges in the behavioural sciences can be miraculously overcome by the introduction of expert evidence. Admittedly some of the findings of psychology are open to question and there is divergence of medical opinion on many matters but nevertheless, it is submitted that medical evidence can still be of great value.

It has been suggested by some judges that it is desirable that the parties to a disputed custody application co-operate in jointly instructing a psychologist. The suggestion has merit but there will still be many cases where this is not done and it is my submission that the best solution is the appointment by the court of a psychologist with a completely independent standing as an officer of the court. Such an officer could make a comprehensive investigation of the whole situation, interviewing children, parents and other persons concerned, investigating previous medical histories and seeking information wherever they please. Such an officer would necessarily usurp the role of the present Child Welfare Officer in this respect and would fulfill the welfare officer's functions as well as furnishing a detailed medical report.

It is submitted that medical evidence can provide valuable guidance for the court on such matters as the basic emotional needs of the child and the ability of either parent to supply these needs, and there seems no reason why, when this evidence points strongly in one direction, the court should not regard it as the deciding factor.

The Houghton Committee in England (1970) has suggested that the courts be given a discretionary power to appoint an

expert to enquire into a particularly difficult case and report back to the court. Although this suggestion has merit, it fails to meet the case where a judge fails to appreciate that a particularly complex situation exists. It is my contention that to achieve the best results an independent psychologist should be appointed to investigate every disputed custody issue.

Because of the subjective nature of custody disputes it is impossible to draw any general conclusions. There is simply no way of discovering whether the principles employed by the judges are working out in practice to be in the child's best interests. There is no "feed back" by which we can assess results. Because of the high degree of uncertainty, it seems apt to conclude with a question posed by two Australian commentators:[19]

> The rules evolved by the courts may satisfy the dictates of conventional morality; do they however, reflect the findings of modern science?

19 Finlay and Bisset-Johnson, *Family Law in Australia* (1972).