Values and Assumptions in Judicial Decisions

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Every judge on his appointment discards all politics and all prejudices. You need have no fear…[2]

Lord Denning (in 1982)

Decision-making in any circumstances is a complex function combining logic and emotion, rational application of intelligence and reason, intuitive responses to experience, as well as physiological and psychological forces of which the decision-maker be only partly aware.

…Tracking those choices and recognising the considerations which may influence them is a newly acknowledged and additional obligation which judges, especially of appellate courts - and particularly of ultimate courts - must accept. Inescapably, their written reasons can reveal only part of the journey to the moment of decision. But should we dig deeper or will doing so merely cast doubt on the certainty and objectivity of the law which Frank says is a deeply felt, but child-like, human need? When the declaratory theory of the judicial function was overthrown, it left us, the judges of the new age, with many uncertainties. Those uncertainties will not disappear merely because we turn our backs on them.[3]

Michael Kirby (in 1998)

Introduction

It is now generally accepted that the judge's own values and assumptions play a part in judicial decisions-making. But how does it happen? To what extent? What we should do about it?

In addressing those questions, I will draw considerably on my own experience as a judge of the Family Court of Australia. This ought to be relevant, because in family law, the legislative provisions tend to be general principles and guidelines rather than specific rules. So it would seem likely that the judge's values would play a large part in the decisions. This is particularly so in children's cases, which are governed by the principle that the child's best interests must be regarded as the 'paramount consideration'.[4]

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2 Lord Denning, *What is Next in the Law* (1982), 330.

3 The Hon Justice Michael Kirby AC CMG, 'Judging: Reflections on the moment of decision' (paper at Fifth National Conference on Reasoning and Decision-Making, Wagga Wagga, 4.12.98).

4 Family Law Act 1975 s 60CA. The Act also sets out detailed provisions to guide the determination of what is in the child's best interests. It is not the purpose of this paper to explore the extent to which these provisions control the decisions. This is a complex issue

The paper may be summarised as follows. Part 1 introduces the 'values problem' and suggests that it is considerably contained by a number of things about the way judicial decisions are made: the familiar legal framework, the emergence of uncontroversial values in the course of a hearing, and judicial professionalism. However all this relates to 'case-specific' values, and Part 2 argues that decisions are also influenced by more subtle and elusive sorts of values and assumptions. Part 3 explores the relevance to lawyers of the wider literature on decision-making.

Part 1: The 'values problem' and how it is contained

The 'values problem'

Before I was appointed to the Family Court, I was a legal academic specialising mainly in family law. I had always thought that an article by Robert Mnookin in 1975[5] contained an illuminating analysis of the process of deciding children's cases. He said that when applying the principle that the child's best interests must be paramount, the court does two things. First, it *makes predictions* about things that might happen in the child's life.[6] Second, it *assigns values* to them.[7]

The first is obviously correct: most of the time in children's cases is spent trying to determine past events to help predict what might happen in the future. For example, considering whether a parent has neglected a child in the past is relevant because it may indicate whether the parent might do so in the future.

As to the second task, assigning value to things, Mnookin had posed the problem thus:[8]

> *'Where is the judge to look for the set of values that should inform the choice of what is best for the child? Normally, the custody statutes do not themselves give content or relative weights to the pertinent values. And if the judge looks to society at large, he (sic) finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.'*

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familiar to family lawyers. Discussions include H. Rhoades, 'The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform' (2008) 36 *Federal Law Review* 279; Patrick Parkinson, 'Decision-making about the best interests of the child: The impact of the two tiers' (2006) 20 *Australian Journal of Family Law* 179; R Chisholm 'Making it work: Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 *Australian Journal of Family Law* 143.

5 R Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226.

6 See the discussion at 251ff and 257ff.

7 See the discussion at 260ff.

8 Page 262.

Where to look indeed! Suppose in a particular case one parent wants the child to go to a private school and the other would prefer a public school. Or suppose there is a contest for residence between a parent who is in employment, and one who is not. On the face of it, deciding these cases would seem to involve the judge in making value decisions: whether private schools or public schools are preferable; and whether child care is desirable. These matters are the subject of reasonable differences of opinion in the community, and presumably the judge would have his or her own views. Are those personal views going to govern the decision?

In the 1980's, a common theme of critical legal commentary (for convenience, I will call it 'realist'[9]) was that judicial decisions reflected a set of values that judges typically held. Here is Griffiths:[10]

> *The higher judiciary... have by their education and training and the pursuit of their profession as barristers, acquired a strikingly homogeneous collection of attitudes, beliefs and principles, which to them represents the public interest. They do not always express it as such. But it is the lodestar by which they navigate…*

Similarly, Sexton and Maher, while perhaps taking a more nuanced view, start with rule-scepticism and suggest that personal values fill the gap:[11]

> *To a large extent the law is seen as a set of immutable principles that have always and will always exist, and lawyers as the priests who revealed these principles to laymen, always with a remoteness and neutrality, especially in the case of judges, that transcend any question of personal values or interests... the most cursory glance at the Australian legal system demonstrates that this idea of the law is a myth...*
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> *[Judges] do have, like everyone else in the community, a set of broad social and political attitudes that influence their conduct even when they are not conscious of their existence. What form these attitudes take depends on a complex set of factors -- parents, schooling, friends, work, income, travel -- with influence of any one factor varying from person to person.*

For convenience, I will refer to the problem identified by Mnookin and the writers I have quoted as the 'values problem'. I would state it this way:

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[9] Of course realist critiques had a much earlier history. Felix S. Cohen suggested in 1935 that 'the political, economic, and professional background and activities of our various judges' were the 'the motivating forces which mould legal decisions': "Transendental Nonsense and the Functional Approach", (1935) 35 *Columbia Law Rev* 809, 846 (quoted by Guthrie, Chris, Rachlinski, Jeffrey J., Wistrich, Andrew J. 'Inside the Judicial Mind', (2000-2001) 86 *Cornell L. Rev*. 777-830).

[10] J A G Griffith, *The Politics of the Judiciary* (1981), 212-3.

[11] M Sexton and L W Maher, *The Legal Mystique: The Role of Lawyers in Australian Society* (1982).

> The application of open-ended principles requires the judge to apply his or her own personal values, and these will therefore affect the decisions.

Being persuaded by this realist critique (and lacking the confidence displayed by Lord Denning in the opening quote), when I was appointed to the Family Court I expected that a daily challenge would be to try to ensure that my decisions were not unduly influenced by my personal values.

But what happened to it?

After some years, to my surprise, I noticed that the values problem seemed to be strangely absent: making decisions on children's and other matters seemed to be entirely concerned with running the hearing, determining the facts, applying the law, and trying to get the judgments done in a reasonable time. I found it hard to think of a case in which my personal values had played a large part in the decisions; or even of a case in which I had really needed to struggle to ensure that my personal values did not intrude.

How so? Maybe I was simply unaware of the values I was applying (an issue to be considered later). But there seem to be at least three other possible explanations of the dissonance between the 'values problem' and the experienced reality of my judicial work. I explore them in the next section.

Three factors that tend to contain the 'values problem'

In this section I will suggest three ways in which the impact of judges' personal values is contained. The first is the familiar set of legal constraints for judicial decision-making. The second is a fascinating phenomenon, in which a set of agreed values relevant to the case tends to emerge as the case progresses. The third is judicial professionalism.

Factor one: The legal constraints on decision-making

I will mention five interlocking aspects: the legal principles, the rules of evidence, arguments, reasons for decision, and appeals.

The legal principles

Despite the width of the discretion it entails, the command to treat the child's best interests as paramount is not equivalent to the law telling judges to decide the cases however they choose. Their 'choices must be made in accordance with binding law'.[12] Most obviously, in children's cases the

[12] Justice Michael Kirby, 'Family law and human rights' (2003) 17 *Australian Journal of*

paramountcy principle prevents the Court from applying some different principle, such as balancing the interests of the parents, or using a children's case to make an example of a 'bad' parent. Whatever the range of views about a child's best interests, that standard prevents the court from applying some other standard.

Next, the increasingly detailed legislative provisions and the body of case law provide guidance, although there is room for debate about its extent, since the result must depend on the particular facts. Examples of relevant lines of case law are decisions about the relevance of homosexuality in a parent,[13] or of family violence.[14] In these matters one can discern changing guidelines from the Full Court, and I have no doubt that these guidelines have had an impact on decisions. Similarly, there is evidence that two sets of amendments, in 1995 and 2006, which essentially revised the legislative guidelines for determining the child's best interests, have had an impact on decision-making.[15]

Evidence

One factor that constrains the role of the judge's own values is the fundamental principle that the judge decides the case on the evidence, which is known to everyone in the case. If the judge takes into account something that is not in the evidence, the process will have violated the rules and the decision can be upset on appeal.[16] Using game analogies, a judgment is more like a move in chess than a move in poker or bridge: all the pieces are on the table, visible to each player.[17]

Argument

Next, the court process includes argument on behalf of the parties. This normally provides a

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Family Law 6.

[13] The leading case is probably *Marriage of Schmidt* (1979) 5 Fam LR 421.

[14] *Marriage of Jaeger* (1994) 18 Fam LR 126 (FC).

[15] In relation to the 1995 amendments, see eg Helen Rhoades, Reg Graycar, Margaret Harrison, *The Family Law Reform Act 1995: the first three years* (University of Sydney & Family Court of Australia, 2000); Dewar, J., Parker, S, Tynan, B. & Cooper, D. (1999), 'Parenting, planning and partnership: the impact of the New Part VII of the Family Law Act 1975', 13 *Australian Journal of Family Law* 96. In relation to the 2006 changes see, eg Patrick Parkinson, 'The realities of relocation: Messages from judicial decisions' (2008) 22 *Australian Journal of Family Law* 35; Patricia Easteal and Kate Harkins, 'Are we there yet? An analysis of relocation judgments in light of changes to the Family Law Act' (2008) 22 *Australian Journal of Family Law* 259.

[16] A classic family law case is *Re JRL* (1986) 10 Fam LR 917 (HC).

[17] The rule about judicial notice is not an exception, since procedural fairness will normally require that the parties have a chance to address the matter. See the discussion in *Marriage of Patsalou* (1994) 18 Fam LR 426 (FC).

framework for the decision. Broadly speaking, the judge is constrained by the way the case is presented. There are some exceptions to this, of course. In children's cases the judge is not bound by the parties' submissions or proposals, and may make orders sought by none of the parties.[18] However fairness requires that a judge who proposes to do something different should indicate that possibility to the parties, so they can address it. In practice, the extent to which argument provides a framework depends on the adequacy of representation. Obviously, where parties are unrepresented, or badly represented, this factor may be less of a constraint than it would otherwise be.

Reasons

The requirement to provide reasons in a judgment is an important constraint. Whatever part might be played by intuitive judgment, the judge has an obligation to formulate reasons justifying the decision: failure to do so is a ground of appeal.

Judgments will inevitably indicate the reasons imperfectly. The extent to which a judgment reveals the reasoning will depend among other things on its quality: the better the writing, the more clearly the reasons will emerge. (I am sure that many Family Court judgments - including my own - are clearer than they otherwise would have been because of the education we received from Jim Raymond, who I'm delighted to see is attending the conference). Of course, no judgment could be a *complete* account of the reasoning. Especially in cases where there is a wide discretion, it is impossible, even in a detailed judgment, to capture in words every detail and every nuance.

More fundamentally, to the extent that the judge's reasons are unconscious ones, of course the judgment will not deliberately disclose those processes (even if astute readers might guess at them, reading between the lines). I return to this issue later.

Appeals

The presence of an appeal imposes a discipline on the trial judge. To be safe from being overturned, the judge must ensure that the judgment sets out the reasoning that led to the decision, and must ensure that the submissions of the parties have been adequately covered, and that the necessary findings are made, and are open on the evidence. It is a safe bet that no trial judge likes to be overturned on appeal. Again, the value of this part of the system can be variable. It is weakened to the extent that parties are unable to appeal because of costs, delay, and similar factors.

These five factors, I believe, operate to impose *some* constraints on the part played by the judge's

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[18] See eg *U v U* (2002) 191 ALR 289; 29 Fam LR 74.

own values. I hope that the later analysis will help explain why.

Factor Two: the emergence of noncontroversial Case-specific values

Some of the values that underpin the judgment do not derive from the personal values of the judge. Those values are not there at the start of the case. Between the time the judge first opens the file and the time of the judgment, a set of values has become identified for the particular case ('case-specific values'), and that set of values uncontroversially underpins the decision.

By 'case-specific values', I mean views about the desirability of matters that are evidently relevant to the case at hand. As will be seen, the term includes such matters as the benefits or detriments of private or public schools, sexual orientation of a parent, child care, and so on. (These case-specific values will later be contrasted with 'underlying values', that is, more fundamental values that are not normally articulated or considered in the case, but may impact on the decision.)

How does this happen?

The parties take neutral positions on values in the presentation of their cases

Sometimes, although the case would appear to involve competing values or standards, the parties present it in such a way that the court is not invited to prefer one set of values to the other. In my experience this is quite common.

Take, for example, the case in which both parents are involved with the child. The father proposes an equal sharing arrangement: the child to be with each parent on alternate weeks. The mother says the child should be with her during the week and with the father on alternate weekends. Assume that the evidence indicates that the parents take different views on such matters as what videos the child should watch, or the time at which the child should go to bed, or how much time should be spent on homework.

In such a case, the father will often choose not to argue that his parenting style is inherently superior to the mother's. He might argue that exposure to the different styles of parenting would not be harmful, and might even benefit the child. Similarly, the mother might not ask the Court to prefer her style of parenting. Instead, she might argue that if the child were required to live with each parent on a week about basis, the child would suffer from different approaches, and it would be likely that there would be many disputes. In dealing with these arguments, the judge is not asked to decide, and normally would not decide, that one parenting style is preferable to the other.

Another example might be involvement in after-school activities. People differ about how much

organised after-school activity is desirable. Some take the view that it is good for children to have their weekday afternoons jam-packed with sporting and other activities, from netball to tuba practice: their day is school, organised activity, dinner and homework, and bed. Others take the view that it is good for children to have unstructured time, to be with their friends or by themselves. In my experience, if there is a children's case in which each parent takes a different view, the most common approach is that each party accepts that there is a difference of opinion about this matter. It is uncommon, at least where the parties are represented, that the judge is asked to prefer one view to another.

This pattern is not invariable. In particular, sometimes it is argued that practices of a minority group may be harmful to the child. This problem can arise in cases involving a difference between parents about practices associated with particular religions. But these cases are few, and the courts try hard to be open-minded in cases involving minorities of various kinds.[19]

A homeschooling case

I once had to deal with a matter that, on the face of it, seemed to require the court to make a difficult value judgment. The mother wanted to have the child educated at home, while the father wanted the child to go to a regular school. There are, of course, competing views about the value of homeschooling for children.

How does such a case get decided? In the case I had, there was a great deal of evidence and argument about the mother's capacity to educate the child at home. There were also some specific arguments about the particular home school curriculum that she proposed to use. She was cross-examined some length about the level of her understanding of these matters. The mother was unrepresented, and she put before me a great deal of published material about homeschooling.

However, in the end, the father expressly said that he did not assert as the generality that homeschooling was inferior to education in ordinary schools. His argument was that school was better for *this* child, having regard to the specifics: the available schools, the proposed homeschooling arrangements, and the mother's limited personal capacity to provide adequately for the child's education. Similarly, the mother did not really press the argument that homeschooling was inherently preferable. The evidence and argument canvassed the range of matters, and it was generally agreed that the alternative proposals should be reviewed against their value for the child in particular areas, notably development of knowledge and skills, and social and emotional

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19 See, for example *In the Marriage of DKI and OBI* (1979) 5 Fam LR 223; *H v H* (2003) 30 Fam LR 264; 198 ALR 383; *In the Marriage of Morrison* (1995) 19 Fam LR 662; *In the Marriage of B and R* (1995) 19 Fam LR 594.

development.

In the end, while I would not assert that no values were involved in the judgment, by and large I felt that there was a large measure of agreement about the needs of the child and the relative advantages and disadvantages of homeschooling and the school in the particular case. While it was necessary for me to weigh up a number of specific matters, I certainly did not need to form a view about whether homeschooling is, in general, more or less desirable than education in ordinary schools. So far as I'm aware, my own experience of school played no part in the decision.

This would seem to have been exactly the sort of case that would have troubled Mnookin and the realists. They might have wondered whether a judge who had experienced conventional schooling would bring a bias towards it in a case where the issue was whether a child should be home schooled. And yet, in that case, when all the evidence and submissions were in, the judgment (I believe!) largely involved decisions about matters of fact in the context of largely agreed values.

Common values can emerge from evidence and submissions

Apart from cases where the parties expressly agree, common values can arise implicitly.

Most obviously values emerge from the parties' submissions. From the case outlines to the final submissions, the presentations of each party generally identify faults in the other party's behaviour and parenting capacity, and merits in those of their own client. Thus if a father leads evidence to show that he helped a child with homework and attended school functions, he is implicitly asserting that such activities are desirable. If he leads evidence to the effect that the mother paid little attention to the child, he is implying that this is undesirable: parents should be attentive. If there is an evidentiary battle about these matters, whatever the findings to be made, it is clear that both parties accept that it is good for the child for parents to be involved. That value is unremarkable, but it is there.

Value position can also emerge from the way evidence is led. Here is a fragment of imaginary but typical cross-examination. A father is being cross-examined by the mother's lawyer in a children's case.

> *Q.* *Have you ever hit the child?*
>
> *A.* *Only with my hand.*
>
> *Q.* *I suggest that you used to hit the child with a stick?*
>
> *A.* *No, never. Only with my hand.*

This little passage of evidence does much more than provide the judge with a bit of information. It

provides the judge with a common value.

Look what has happened. The father admits hitting the child with his hand. The cross-examiner does not comment on this, but puts to the father that he hit the child with a stick. This is denied. The cross-examiner then moves to other topics.

Now look at the values that emerge from this. The father's answers to the questions reveals his values relating to corporal punishment. His position is that it is wrong to hit a child with a stick; but acceptable, at least in some situations, to hit the child with a hand.[20]

More importantly, it is a reasonable inference that the *mother* also takes the view that hitting the child with a stick is wrong, but hitting the child with a hand is acceptable. Her counsel never suggested that the father should not have hit the child with his hand. Failure to make that suggestion – and thus failure to allow the father an opportunity to refute it – would make it impossible for the mother to submit, at the end of the case, that the father's hitting of the child with his hand was a fact that should support her case.

I suggest, therefore, that from this apparently inconsequential fragment of evidence, a value has emerged which, unless contradicted by something else that happens, will normally be adopted by the judge and will form part of the set of values that would inform the decision. This particular value is that it is acceptable to hit a child with a hand but not with a stick.

It is possible, of course, that the evidence would go like this:

> *Q.* *Have you ever hit the child?*
>
> *A.* *Never! I do not believe in hitting children.*
>
> Q. *I suggest that, at least when you are angry, you do sometimes hit the children?*
>
> *A.* *No, never.*

This bit of evidence would normally suggest, I think, that in the particular case both parties believe that parents should not hit the children at all. Depending on the way the case is conducted in other respects, this might become a common value for the purpose of the case.

Again, assume cross-examination of a father proceeds like this:

> *Q.* *During the marriage, you agreed that the child should go to the XYZ private school?*

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[20] To some extent, such inferences can be affected by demeanour. The inferences to be drawn from 'no, never' might be stronger if the words are uttered immediately and firmly, in a tone suggesting that the question is offensive; weaker if the answer comes after a pause, scratching of the head, looking to other people in the court, consulting diary notes, etc.

A. *Yes.*

Q. *But you have recently enrolled the child in the ABC state school?*

A. *It was all I could afford.*

Q. *But you have not sold your motorboat?*

A. *That is true.*

Q. *Or given up your holidays on the snow?*

A. *Well, I suppose so.*

Q. *I put it to you that you give more importance to your own pleasure and lifestyle than to your child's education?*

A. *No; I work very hard and I am entitled to have some leisure of my own. Anyway, even if I did give up those things I would still not be able to afford to send the child there.*

The big point here is what is *not* said. The father accepts that the parties had previously decided on private education. He has not referred to any development to suggest that this is not still desirable from an educational point of view. He has not said, in particular, that he thinks a state school, or a particular state school, would provide as good an education for the child.

On this evidence, I think the judge would normally conclude that both parties have accepted the desirability of private school education, either in general or at the XYZ school in particular. Given that, there might be substance in submissions at the end of the case that the father's unwillingness to pay the fees while he maintains his own diversions constitutes a failing in his parenting. However in the absence of that common value emerging, it would have been difficult to argue that a parent's decision to send a child to a public school showed a failing of parenting. Indeed, I can imagine that if a judge so held, the decision might well be overturned on appeal.

Factor Three: Judicial professionalism

I do not know of any research on this topic, but I believe that judges in family law would see it as part of their professional task to contain the extent to which their personal values drive their decisions. To take a mundane example, a judge who had grown up in the care of a full-time mother would try to keep an open mind about whether children benefit from child care. The judge might have had a happy or an unhappy experience of his or her own mother, but would take care to keep an open mind about the pros and cons of child care. He or she would normally be exposed to the literature on such issues, whether by way of general reading, attending seminars, or listening to expert evidence in children's cases. The judge would, I think, take care to remember that his or her experience might not be typical, and would avoid over-generalising from it. The same applies, I

think to the relevance to children of such matters as sexual orientation: for example, I imagine that all judges would agree that the outcome of a case involving a homosexual parent should not be affected at all by whatever sexual orientation the judge happened to have. The same can be said in relation to other matters, such as private or public schools.

Judges of specialist family law court should be better able than most to contain the impact of their personal values. Arguably, they will more experienced in dealing with family issues, more exposed to the wide range of family patterns and experiences, more familiar with principles of child development and other relevant fields, and more familiar with the need to minimise the impact of their own values. Such things *ought* to be true: the Family Law Act 1975 provides that a judge of the Family Court must be ‘by reason of training, experience and personality, a suitable person to deal with matters of family law’,[21] and the Court encourages judges to participate in various forms of continuing education, and that should help them transcend the limitations of their personal knowledge.

Conclusion

I started with the ‘values problem’ – the danger that decisions will depend on the personal values of each judge – and with my surprise that when I became a judge it did not seem as great a problem as I had expected. I have suggested that there could be three factors reducing the extent of the problem: the legal constraints for decision-making, the emergence of what I have called the ‘case-specific values’, and judicial professionalism.

Nevertheless, even if these factors help to contain what I have called the ‘case-specific’ values, like the relevance of a parent’s sexual orientation, or a choice between ordinary schooling and home schooling, judges’ decisions may reflect other sorts of values and assumptions: such things as intuitive responses, unrecognised assumptions, and emotions. What about them?

Part Two: The problem of underlying values

Introduction

This part provides some illustrations of types of values and assumptions that do seem to play a part in decisions, and could be properly seen as part of the ‘values problem’ previously discussed, in that

[21] Family Law Act 1975 s 22(2).

the outcome of the case will reflect, in part, the individual judge's values or assumptions. I call these 'underlying' to distinguish them from the case-specific values considered above.

Homosexuality and parenting decisions

I start with an illustration. Some decades ago, it would have been unthinkable for the courts to make custody orders in favour of gay or lesbian parents: they had enough trouble bringing themselves to allow a child to be in the care of a parent who had committed adultery.[22] I imagine that one strand of the thinking behind this reluctance had to do with factual assumptions. I imagine that they might have involved assumptions that children brought up by homosexual parents are more likely to 'become homosexual'.[23] They might have thought that homosexual persons were more likely than heterosexual persons to involve children in sex; or that their sexual activities were somehow especially prominent in their family life; or that they would avoid the company of heterosexuals, or involve the children in campaigns, and so on.[24]

One way of looking at these decisions is that in the early cases the judges were making a series of *factual assumptions* that are not now regarded as plausible. Thus, the necessary corrective was to point out the falsity of these assumptions. Some of them are fairly obvious, notably the assumption that a child brought up by a homosexual parent would be more likely to become a homosexual adult. There is now plenty of research evidence to the contrary. Similarly, as I understand it the evidence does not support fears that children would suffer various sorts of harm if brought up by a homosexual parent. Some of the more recent cases refer to such evidence.

Sometimes, the key step seems to be to identify the assumption and articulate it. Once that is done, we can take a cool look at whether it is likely to be true. In one of the decisions that marked a turning-point in this area, Chief Justice Elizabeth Evatt said:[25]

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22 See eg *Re L* (1962) 3 All ER 1; *McManus v McManus* [1970] ALR 186; *D v D* [1968] WAR 177. These and other such decisions are discussed in John Eekelaar, *Family Law and Social Policy* (2nd ed, 1984) at 77-78.

23 The phrase is used in, for example, *Marriage of L* (1983) FLC 91-353. It depends on some questionable assumptions about the nature and origins of sexual orientation.

24 A window on such assumptions is provided in *Marriage of L* (1983) FLC 91-353, where the trial judge, although awarding custody to a lesbian mother, set out a list of matters to be considered. The items on the list, such as "whether a homosexual parent would show the same love and responsibility as a heterosexual parent", suggest the assumptions the courts might formerly have made. The decision has been criticised as in effect requiring the homosexual parent to rebut a series of adverse assumptions: see the commentary to s60CC in the Butterworths Family Law Service.

25 *Marriage of Schmidt* (1979) 5 Fam LR 421. We should not underestimate the quality of thinking behind this passage. Deep thoughts can come in nicely turned and simple language.

> *It is necessary for the court to consider the extent to which a homosexual or lesbian relationship affects the parenting abilities of the mother... There may be many variations in the personalities involved, in the intensity of feeling, in the social relationship with other persons, male and female, heterosexual or homosexual. It could be a mistake to regard a person's sexual proclivities as the dominating trait of their personality as if it were something that occupied their sole attention and thoughts...*

The force of this historically important passage, is, I think, that it challenges those who might approach these cases with a vague sense that there is something wrong with a gay or homosexual parent bringing up a child to say exactly what they think the problem might be. In effect, Evatt CJ is saying that in the absence of evidence to the contrary, there is no reason to assume that it has any effect on parenting abilities, or that sexual matters dominate the parent's life.

These days, I think it is fair to say that a parent's sexual orientation is rarely an issue in children's cases. Of course, if there was evidence that in some way the child was being affected, that evidence would be examined: but the days are over, I think, when the courts would assume that some sort of disadvantage would flow to the child from being brought up by a homosexual parent.

I doubt, however, whether the earlier approach to homosexuality and parenting cases can be entirely attributed to mistaken factual assumptions. That early approach probably depended on values disapproving of homosexuality, or unconsciously reflecting a fear of it, or hostility to it. If so, the change of approach resulting from cases like *Schmidt* seems to be a good example of the benefits of reasoning: the earlier prejudices did not survive the blow-torch of rational examination, and they no longer disfigure this part of the law.

Some other family law examples

We saw that the value or prejudice against homosexual parenting, when subjected to examination, seemed to depend, at least in part, on a set of factual assumptions whose truth could be tested. The same seems to apply to other values relevant to children's matters.

Take the view that young children should be in the care of a parent rather than in child care. On the face of it, this is a value position or assumption. But it too might depend on a series of factual assumptions about such things as the amount of attention children receive in child care, the amount of stimulation they would receive from a parent, and so on. If each of these factual assumptions were shown to be false, a person who took this view might accept that it was wrong, and change their view accordingly. This analysis seems to apply to the particular instance and to the general proposition. Thus the person might be persuaded that child care is not bad for a particular child if

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I would guess that it draws on Evatt's deep knowledge and on what she must have learned in the course of such projects as the Royal Commission on Human Relationships.

reassuring evidence were presented about the particular child and the particular child care arrangements. And a person who embraced a general anti-child care position might be persuaded to change his or her mind if presented with evidence that showed that in general the various particular matters of concern did not in fact occur. Similarly, evidence to the contrary would presumably lead supporters of child care to reconsider their position. In other words, what presented as a difference of values could turn out to be (in part, perhaps) a difference about factual assumptions.

Another example is family violence. People's understanding of this may vary, influenced no doubt by their personal experiences and their reading. It is now widely understood that family violence can involve a pattern of violence by men against women, used to dominate, terrify and control them. But recent research indicates that this is not the only form that violence can take. Exposure to this literature would lead the judge to attend carefully to the facts of each case and avoid the trap of thinking that all family violence is of a similar form.[26]

Another children's case nicely illustrates the distinction between case-specific values and underlying values. The father - who was a good father – suffered from depression, and had a history of attempting suicide. On one occasion, he had hanged himself in a garden shed, but was still alive, and he was found there by one of the children: it must have been a very traumatic event for her.

The mother wanted the children to maintain a relationship with the father, but was terrified that he might attempt suicide while they were with him. So, her position was that his contact should be supervised. The father, however, wanted unsupervised contact. He said that supervision inhibited his contact and made it more difficult to have a normal relationship with the children.

There was quite a lot of medical evidence about the level of risk that the father might make another attempt on his life. He was receiving appropriate therapy and medication, and the expert evidence was that the risk was 'low'. The judge's task in that case was to weigh the benefits to the children of unsupervised contact against the risk of a traumatic and damaging event, namely another suicide attempt.

As usual, there was agreement about the case-specific values: the children would benefit from a close relationship with the father, but would be harmed if they were exposed to another suicide

[26] I was helped to see this by the work of Dr Janet Johnson, and had the opportunity to apply this insight in *JG v BG* (1994) 18 Fam LR 255. For an illuminating recent exchange about this controversial topic, see Lawrie Moloney, Bruce Smyth, Ruth Weston and Hal Ewan, 'Different types of intimate partner violence? Reply to Wangmann's comments on the AIFS report' (2008) 22 *Australian Journal of Family Law* 279.

attempt. The real issue, I think was about how these competing considerations should be balanced: weighing the benefits of unsupervised contact if things went well against the small risk of serious harm to the children if they went badly. This assessment raises an underlying value, about *risk taking*. People differ in their willingness to take risks, and, I assume, some judges would be more cautious, more risk-averse, than others. The outcome of such this case might well depend on the extent to which the judge is risk-averse (an underlying value) even though the parties agree on the what would benefit the children, and what would harm them (the case-specific values).[27]

Relocation cases are among the toughest in family law. One parent, usually the mother, wants to relocate to another city, or state, or country, with the children. Usually she has good reasons: a new partner, better work prospects, a fresh start in life, the support of family members. But the move will mean that the children see less of the father, and his side of the family; and if it's a long way, especially if there is not much money to pay for regular visits, the move might greatly reduce the children's relationship with the father, who opposes the move. These cases, like children's cases generally, are governed by the principle that the child's best interest must be paramount. However it is a striking fact that some judges seem more likely than others to make orders allowing the relocation. Why so? Are some judges more inclined than others to have empathy with the parent seeking to relocate? Do the judges' own family lives influence their decisions? Do the decisions merely reflect different predictions about how things would be likely to turn out for the children if the relocation were allowed, or prevented?

Interestingly, in recent times the courts have been inclined to say, in relocation cases more than in other sorts of children's cases, that although the child's best interests are the paramount consideration, they are 'not the only consideration'. This suggests, but does not quite state, that competing considerations, such as the relocating parent's freedom of movement, can compete with the child's interests. Could the continued use of this mantra in relocation cases reflect a stronger underlying empathy for the relocating parent than for the child? If so, it would reflect an unstated emotional reaction rather than an assumption of fact – a matter to be considered further below.

There is one further example I want to include. This time it involves values at the top, since the case (which involved children in immigration detention) went to the High Court. But because it is complex, and might spoil what I hope is the flow of the argument, it is relegated to the Appendix.

Emotional reactions and rational decision-making

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27 As it happens, while I remember vividly the nature of the problem, I do not recall what conclusion I reached.

There are numerous ways in which the judge might have an emotional reaction related to the subject-matter of the case. A hypothetical example, perhaps, would be a case in which the court was asked to sanction the procedure of cliterodectomy on a young girl, or, perhaps more realistically, where there was a parenting application by a person who, if successful, might arrange for such a procedure on the child in another country.[28] I imagine that if this issue had ever come before me, my first (instinctive) reaction would have been a sense of revulsion. Perhaps there would be arguments presented to the effect that the procedure might be in the interests of a child because of cultural or religious beliefs and traditions within the child's family and community. If so, I would have had to address such arguments. It would be unthinkable to base a judgment on the feeling of revulsion at the procedure, and it would be the judge's task, however difficult, to deal fairly with the evidence and the arguments made. I suppose if a particular judge felt that his or her revulsion at the prospect made it impossible to consider the issues objectively, the judge might have to consider standing down from the case (whether by formal disqualification or by quietly arranging for it to come before another judge).

More fundamental values and assumptions illustrated: competing approaches to characterising people with transsexualism

The next example is of values and assumptions that lie even further below the surface. *Re Kevin and Jennifer*[29] was a case about the validity of the marriage of Kevin, a female-to-male post-operative transsexual, who went through a ceremony of marriage with a woman. The Commonwealth Attorney-General argued that the marriage was invalid because Kevin was in law a woman, and marriage has to be between a man and a woman (that latter proposition was accepted as being the law). The argument was that a person's sex is finally determined at birth. For this proposition the Attorney-General relied mainly on an English decision, *Corbett v Corbett*.[30] Unsuccessfully, though: I held that Kevin was a man for the purpose of the law of marriage, and the marriage was valid.

In the judgment I suggested that the reasoning in *Corbett* and similar decisions may have been underpinned partly by an unstated assumption of a philosophical kind, about the relationship between words and the world.[31] The assumption was that words like "man" and "woman" stand for

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[28] For a discussion, see the Family Law Council's Report *Female Genital Mutilation*, 1994 (available on the Council's website).

[29] *Re Kevin: Validity of Marriage of Transsexual* (2001) 28 Fam LR 158. (The Full Court dismissed the Attorney-General's appeal in February 2003). *Attorney-General for the Commonwealth v Kevin and Others* (2003) 30 Fam LR 1.)

[30] Corbett v Corbett (Otherwise Ashley) (1971) P 83.

some essential element, maleness or femaleness. On that assumption, the task for the law was to look for signs that this fundamental quality (the person's "true sex")[32] either existed or did not exist.

I disagreed with this assumption, and took the view that the law's task was to *assign* the applicant (Kevin) to one category or the other on the basis of appropriate criteria, rather than to pretend there was some mysterious entity (maleness) that was either present or absent.

Philosophically, the problem is about classification, and is similar to the one that faces scientists when a new animal is discovered. Think of Antounie Caen, a Dutch explorer who first saw black swans in Australia, up til then (1636) having always believed that all swans were white. He would then have to choose whether to categorise the new creature as a swan (notwithstanding its colour) or as some other kind of bird (notwithstanding its other swan-like qualities). The appropriate response is to review all the evidence and make a decision, a choice, about whether to categorise it as a swan or something else. It would be unhelpful and misguided to think in terms of whether the creature had or did not have some specific quality or characteristic, "swan essence".

So, if I am right about all this, the reasoning in *Corbett* was based on this rather fundamental assumption ("essentialism") about the relationship between words and the world. Of course it was not articulated in the *Corbett* judgment: it was, so to speak, below the line of vision. Invisible though they might be, such fundamental assumptions can play an important role.

As it happens, though *Corbett* was the first English case on the problem, much earlier, in the 1940s, there had been a Swiss decision on the same point, *Re Leber*.[33] In that case, the court considered a post-operative transsexual to be a member of the reassigned sex. That Court engaged in the task of classification in a way that I thought was logical and sensible. It did not make the mistake of asking, in effect, whether the individual in question has the essential quality of maleness or femaleness.

The contrast between the Swiss decision and *Corbett* is fascinating. It seems to stem from differences that are so fundamental that they are assumed or taken for granted rather than articulated. The include differences about the role of the law in such cases, the centrality of biology, and much else. Whatever these differences are, they operate under the radar, and are not the subject

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31 The philosopher Wittgenstein had much to say on this subject, for example that common words like 'sport' did not refer to some single element, but that the various activities we treat as sports share, to varying degrees, a range of 'family resemblances'. An entertaining introduction to Wittgenstein and his world is David Edmunds and John Eidinow, *Wittgenstein's Poker* (Faber & Faber, 2001).

32 The phrase used by Ormrod J in *Corbett* [1971] P 83, 104.

33 *Re Leber*, discussed in *Re Kevin* at paragraphs [112] ff.

of evidence or argument in the course of the hearing.

How did it come about that a court in one country took one starting point and another took such a fundamentally different one? Was it because of different types of thinking in the two countries, or different language structures? Did it reflect the type of thinking of each of the two judges who happened to decide the cases?[34] Did it reflect different values, or different emotional reactions? Could it be that what was driving the difference between the two approaches was not so much a conceptual difference as a different emotional reaction as would be the case if one judge felt uncomfortable with the idea of a transsexual and the other did not? And could these reactions be triggered, in part, by the particular facts of each case?

Lloyd's Bank v Bundy

By way of a postscript to this aspect, I suggest that emotional and intuitive reactions can also underpin decisions in other areas, even commercial law. In this as in so much else, Lord Denning's judgments are particularly revealing. Here is the (famous) opening of *Lloyd's Bank v Bundy*:[35]

> *Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was Yew Tree Farm. It went back for 300 years. His family had lived there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and sell it....*
>
> *At the trial his plight was plain. The judge was sorry for him. He said he was a "poor old gentleman". He was so obviously incapacitated that the judge admitted his proof in evidence. He had a heart attack in the witness-box. Yet the judge felt he could do nothing for him. There is nothing, he said "which takes this out of the vast range of commercial transactions" He ordered Herbert Bundy to give up possession of Yew Tree Farm to the bank. Now there is an appeal to this court...*

As it happens, in my research for this paper I stumbled across a draft judgment that seems to have been penned by Lord Denning, and then abandoned, presumably because he changed his mind about what the outcome of the case should be. It reads:

> *Broadchalke farmers over the generations have always looked for support to Lloyd's Bank. The Broadchalke branch is one of the oldest and most charming buildings in the village, and its successive managers have been among the most prominent and respected men in the community. The funds it provides have been the life blood of farmers in the community. The present manager, Mr Goodheart, knows the farmers well. They are his friends. He*

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[34] It is interesting that the judge in *Corbett*, Ormrod J, was qualified in medicine as well as law. I wonder if this might have led to a strong focus on the medical aspects at the expense of others.

[35] *Lloyd's Bank v Bundy* [1975] QB 326, 334, Denning MR.

> *understands their business and their lives because he too is part of the community. He has often explained that the bank could not continue to help farmers unless it had some security, and the only security the farmers usually had was their farms. He has explained that he could not do favours to particular farmers, and had to treat them all the same.*
>
> *In the old days, a handshake was enough: a man's word was his bond. Today everything has to be in writing. But even today Mr Goodheart makes it his practice to see all the farmers personally when they borrow money. He did this when he saw Mr Bundy, a farmer who wanted to borrow as much as he could. He gave Mr Bundy plenty of time to consider the matter before signing the form. But Mr Bundy thought he knew what was best. He did not take the trouble to get advice. He went ahead and signed. Now, when things have gone against him, he asks the court to tear up the contract he made. He says he should not be bound by it. The judge thought he should be bound by his word and decided accordingly. But now Mr Bundy complains to this court…*

This alternative draft is incomplete, unfortunately, and its authenticity has been questioned. If genuine, it might suggest, contrary to Lord Denning's reassuring words quoted at the start of this paper, that judgments can be built on a myriad of assumptions and value judgments, such that in some cases, even before the facts have been outlined, the outcome of the case is not in doubt.

Part 3: Looking ahead

The values problem as involving case-specific values and underlying values

I started with the 'values problem' – the worry that the outcome of a case would reflect the personal values of the judge, rather than a rational application of the law. Part One focused mainly on 'case-specific' values, and argued that the law's techniques can prevent them from being too much of a problem. Part Two moved to underlying values, that had to do with emotion and intuition, and often lay below the consciousness of the judge. The discussion so far suggests two tentative hypotheses.

First, the 'values problem' involving case-specific values seems more familiar, and more readily addressed, than the problem of underlying values. Judges should be aware of case-specific values, and able to control for them. Case-specific values can sometimes to shown to depend on a series of factual assumptions, which can be identified and tested. And case-specific values will usually have an obvious relevance to the cases in which they arise. If what I have suggested is correct, we seem to have some success in containing this aspect of the values problem. But in terms of a judge's *underlying* values (including emotional and intuitive components of the decision-making process), the values problem seems more intractable. It may be difficult for judges to be aware of them, and aware of the part they play; and if so, the problem cannot be addressed by argument or evidence in

court. So far as I am aware, we have not much grappled with this aspect of the values problem. Perhaps we do not really know to what extent decisions reflect individual judges' underlying values, and as yet have not really identified to what extent it might be a problem, and if so what we might be able to do about it.

Second, it seems likely (as Mnookin and the others suggest), that case-specific values will be influenced by judges' early and continuing education, and their personal and professional experience throughout life. By contrast, underlying values and assumptions may be more deep-seated. Thus a judge's views about parenting may be influenced by the judge's own experiences of family life, but whether the judge is risk-averse, or empathetic, may reflect more deep-seated characteristics.[36]

Tapping into the literature on decision-making

In the course of preparing this paper, I became aware for the first time of the large and complex literature on decision-making, learning, and associated topics. The literature includes ancient wisdom, research by economists and marketing people interested in how people make economic choices, various branches of psychology, philosophy, and much else; including, as with most topics, the extraordinary insights that are emerging from new techniques for scanning the brain and imaging what goes on when mental events take place.

I did not find it easy to access this literature: as a newcomer, I could not easily identify the good research from the bad, and some of the material seemed impenetrably technical. Also, much of the experimental research, fascinating as it is, involves types of decision-making rather different from what judges do. Thus it is no easy task to work out what parts of this literature will be most relevant to what we do.

I will therefore end with a whimper rather than a bang: in what follows I do little more than note some ideas that may have potential value for us in the law.

The quick and the slow

Much of the legal and what little of the non-legal literature I have read seem to suggest a broad distinction between what we could call the quick and the slow aspects of decision-making. The quick aspects are those characterised by such words as instinctive, intuitive, unconscious, and

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[36] It seems, for example, that men are greater risk-takers than women: see Christine R. Harris, Michael Jenkins and Dale Glaser, 'Gender Differences in Risk Assessment: Why do Women Take Fewer Risks than Men?' *Judgment and Decision Making*, Vol. 1, No. 1, July 2006, pp. 48–63. It would be interesting to know if women judges are inclined to favour less risky outcomes, as in the suicide case described above.

emotional; the slow aspects as deliberate, rational, or cognitive.

It seems likely that the brain works differently in each case. The quick aspects are more like a flash or insight or of anger, recognising a face, love at first sight, or - even more satisfying - getting the nine-letter word in the Sydney Morning Herald. The slow aspect suggests mapping out a journey, or doing a sudoku. In science, I suppose, the quick is the inspirational flash, the slow is the painstaking work to convert it to a coherent theory. Perhaps most satisfying tasks involve elements of both.

A recent publication on moral decision-making reflects the pervasiveness of such a distinction:

> *In common with other psychologists, we use the term intuition to refer to reasoning from unconscious premises, or from aspects of premises that are unconscious, to conscious conclusions. In contrast, we use conscious reasoning to refer to reasoning from conscious premises to conscious conclusions. The distinction between intuition and conscious reasoning is similar to "dual process" theories of reasoning advocated by many psychologists…. These theories distinguish between rapid automatic inferences based on heuristics and slower conscious deliberations based on normative principles.*[37]

Although the distinction often seems to involve the part played by emotion, this does not always seem so. A recent article gives a lovely example.[38] Consider this question:

> *Everyone is prejudiced against prejudiced people.*
>
> *Anne is prejudiced against Beth.*
>
> *Does it follow that Chuck is prejudiced against Di?*

The authors point out that our intuitive response is to say *no*, because nothing has been asserted about Chuck or Di. But careful application of conscious reasoning leads to the opposite conclusion:

> *Because Anne is prejudiced against Beth, it follows from the first premise that everyone is prejudiced against Anne. Hence, Di is prejudiced against Anne. So, Di is prejudiced, and it follows from the first premise again that everyone is prejudiced against her. And that includes Chuck. So, Chuck is prejudiced against Di.*

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[37] Monica Bucciarelli, Sangeet Khemlani and P. N. Johnson-Laird, 'The psychology of moral reasoning' *Judgment and Decision Making*, Vol. 3, No. 2, February 2008, pp. 121–139. See also Robin Hogarth, 'Deciding Analytically or Trusting Your Intuition? The Advantages and Disadvantages of Analytic and Intuitive Thought' in Betsch and Haberstroh, ed, *The Routines of Decision-making* (Lawrence Erlbaum Associates, 2005), 67-82.

[38] Monica Bucciarelli, Sangeet Khemlani and P. N. Johnson-Laird, 'The psychology of moral reasoning' *Judgment and Decision Making*, Vol. 3, No. 2, February 2008, pp. 121–139.

This neatly fits the simple characterisation of quick vs slow reasoning. The quick, intuitive response is a kind of response that serves us well lots of the time, because it is fast and usually correct. But sometimes it leads us astray, and a more careful analysis is required. I suppose good decision-makers are skilled at knowing when it is sensible to bring the slow and thorough method to the problem.

Individual preferences: ambiguity and uncertainty aversion

In talking about cases and fact situations with judicial colleagues, I have often been struck by how some tend to come to a quick preliminary view, while others seem to hold off until their deliberations have led them to a conclusion. Those in the first group seem to have a lower tolerance for ambiguity and uncertainty: one feels their need, or desire, to come to a decision quickly and firmly. I was interested to see that the literature also notes that some people tend to be more averse to risk, or to ambiguity than others: 'risk aversion' and 'ambiguity aversion' are well known terms.[39]

In all cases, I am sure, each judge would ultimately carefully review the evidence and arguments, and it might not be evident from the final judgments whether the judge tended to fall into one group or the other. I do not know whether the difference is likely to be reflected in the ultimate decisions. But it may be relevant to the sort of work that judges most enjoy, or do best: I imagine, for example, that judges in the first group would be particularly comfortable with, and good at, the fast and furious work that sometimes needs to be done in the duty lists. And self-awareness of their own temperamental tendencies in this area could help judges take them into account.

Respect for intuitive aspects of decision-making

The whole apparatus of judgment-writing, and perhaps some of our legal traditions, may suggest that intuitive and emotional aspects of judging are inherently bad and should be minimised or eliminated, and that we should seek to use only rational and deliberative methods. However the decision-making literature seems to me to be surprisingly respectful of the intuitive aspects of decision-making. A theme of some of it is that good judging should involve both aspects.

This idea seems to fit neatly with what actually happens with judicial decisions. I can think of at least two ways in which it is recognized that instinctive or intuitive responses play a part in decision-making. One is a judgment by Kirby J in which he refers immediately to his intuitive response to

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[39] See, for example, L. Robin Keller, Rakesh K. Sarin and Jayavel Sounderpandian, 'An examination of ambiguity aversion: Are two heads better than one? *Judgment and Decision Making*, Vol. 2, No. 5, December 2007, pp. 390–397.

an issue, and then goes on to develop legal arguments that confirmed him in his view.[40] Another is a remark that one often hears about appeal, namely that the test for whether an appeal will succeed is the "Oh my goodness" test (there are more vulgar variants, I'm sorry to say): on first learning of the decision, does the appeal judge react with incredulity at the result? This bit of folk lore tells us that the appeal will fail unless the appeal judges' first reaction is of that type.

A possible view about the part played by instinctive decision-making is that it is preliminary and tentative. Judges may well experience such a quick reaction, but then test it thoroughly – even try to abandon it - before reaching a final conclusion. On the other hand, some would say that it is unwise to disregard that first intuitive judgment altogether. That view is consistent, perhaps with one of the recommendations of the appeal bench of the Family Court for trial judges, both in relation to children's cases and property cases. The recommendation is that towards the end of the judgment, the judge should 'stand back', as it were, and try to articulate briefly the main threads of the decision. This idea has a resemblance to Jim Raymond's stress on the importance of the 'first page' of a judgment, the bit that reflects how you would have summarised the case to a colleague, if you had popped into the colleague's office for a chat.

A related matter is the new respect for the part emotions play in decision-making. The traditional view, perhaps, has been that we should suppress emotions to make good judgments.[41] But since 1980s, research has indicated that emotions are 'indispensible components of judgment', and are 'inexplicably involved in assessments, evaluations, and choices at a fundamental level'.[42]

Empathy is important.[43] Mood, too, has been shown to affect decision-making. It seems that happy people make less careful decisions, with less insight, than depressed and sad people.[44] But positive affect stimulates creativity and problem-solving (which explains, I assume, why Google provides a famously relaxed and pleasant environment for its creative staff). One scholar concludes:[45]

> *The pursuit of analytical rigor should supplement rather than supplant the exercise of intuition and emotional intelligence. To judge well is to reject both sterile logic and*

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[40] Minister for Immigration and Multicultural and Indigenous Affairs v B (2004) 219 CLR 365; 31 Fam LR 339.

[41] Leslie Paul Thiele, *The Heart of Judgment: Practical Wisdom, Neuroscience, and Narrative* (Cambridge Uni Press, 2006)('Thiele'), 164f.

[42] Thiele, 165.

[43] Thiele, 186ff.

[44] Thiele, 179ff.

[45] Thiele 281-2.

reactive impulse. Only whole-brain judgment allows for robustness in our assessments and responsiveness in our evaluations and choices.

The modern theories about the different components of decision-making resonate with much earlier ideas about decision-making. Herodotus reported about the ancient Goths:[46]

> *It is also their general practice to deliberate upon affairs of weight when they are drunk; and then on the morrow, when they are sober, the decision to which they came the night before is put before them by the master of the house in which it was made; and if it is then approved of, they act on it; if not, they set it aside. Sometimes, however, they are sober at their first deliberation, but in this case they always reconsider the matter under the influence of wine.*

This wonderful story seems to reflect a very modern respect for the emotional and intuitive, as well as the rational, aspects of decision-making.

Stress

Justice Kirby broke new ground some years ago, I think, in writing about judicial stress.[47] I was intrigued to find in the decision-making literature a reference to the stress of decision-making that is comforting, perhaps, in that it shows we are not alone:

> *Choices that require picking the best option among several unattractive possibilities, however, typically induce a sizable degree of decision anxiety.*[48]

Some specific lessons from research

Perhaps the research can tell us things about what we can and can't actually achieve when making decisions. One study of judges (in the legal sense) found that the judges who participated in the study had difficulty ignoring inadmissible information.[49] The extent to which they could do so,

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46 Herodotus: *On The Customs of the Persians* in The Histories: Translated by Waterfield, for Oxford World Classics, p 61 (accessed via the Internet). The story was retold by Sterne in *Tristram Shandy*, and referred to by Jerome Frank: see *Inside the Judicial Mind*, at 830. By contrast, it has been said that 'The shrewder mobs of America, who dislike having two minds upon a subject, both determine and act upon it drunk … as it is universally allowed that when a man is drunk he sees *double*, it follows most conclusively that he sees twice as well as his sober neighbour"): Washington Irving's *A History of New York* (ed. Edwin T. Bowden (New Haven: College and University Press and Twayne Publishers, Inc., 1964), IV, v, 194-195].

47 Kirby J, 'Judicial Stress' (address to Annual Conference of the Local Courts of NSW, 1995).

48 Sarah Lichtenstein, Robin Gregory, Julie Irwin, 'What's bad is easy: Taboo values, affect, and cognition' *Judgment and Decision Making*, Vol. 2, No. 3, June 2007, pp. 169–188.

however, seemed to vary according to the nature of the material and the reason for inadmissibility. For example, the judges found it difficult to disregard demands disclosed during a settlement conference, conversations protected by the attorney-client privilege, and prior sexual history of an alleged rape victim even when they had ruled that these things were inadmissible. Yet they were able to ignore certain other inadmissible material, such as information obtained in violation of a criminal defendant's right to counsel. These days, it is common for judges to scrutinise material in order to determine if it is to be admitted, and information helping to identify the circumstances in which judges are actually able to put such things out of their minds could be helpful to judges, and also to those who draft the legislation that requires them to do so.[50]

Hueristics and biases

The decision-making literature has identified a range of subtle types of bias. The literature is not specifically about judicial decisions, but much of the research seems to have a general application to decision-making. Some of the research is about the role of ‘hueristics’ in decisions.[51] This term seems to mean something like short-cuts in solving problems. According to *Wikipedia*:

> *In psychology, heuristics are simple, efficient rules, hard-coded by evolutionary processes or learned, which have been proposed to explain how people make decisions, come to judgments, and solve problems, typically when facing complex problems or incomplete information. These rules work well under most circumstances, but in certain cases lead to systematic errors or cognitive biases...*

Here are some examples. The ‘availability heuristic’ leads people to inflate their estimations of the probability of an event by how easily they can bring it to mind. Thus most people, it is said, falsely believe that there are more words that start with the letter ‘r’ than there are words that have ‘r’ as the third letter: this is because words starting with ‘r’ are more easily brought to mind.[52] The ‘contrast’ effect is another: the weight of an object seems lighter if a heavier object is lifted first, and tepid water feels warmer to the touch if the hand has previously been in cold water.[53] The ‘actor/observer effect’ prompts people to understand their own behaviour in terms of situational

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49 Jeffrey J. Rachlinski, Andrew J. Wistrich, Chris Guthrie, ‘Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding’ University of Pennsylvania Law Review, Vol. 153, 2005.

50 See, eg Evidence Act 1995 (Cth) s 85, 97, 103.

51 See eg Kardes and others, ‘On the Conditions under which Experience and Motivation Accentuate Bias in Intuitive Judgment’ in Betsch and Haberstroh, ed, *The Routines of Decision-making* (Lawrence Erlbaum Associates, 2005), 139 – 154. Another approach, which I found helpful, was to look in *Wikipedia* under “heuristic’.

52 Thiele, 64.

53 Thiele, 65.

requirements while viewing that of others as the product of the person's character (presumably, I bought my four-wheel drive because I need it for camping trips, but those people down the road wanted theirs because they are pretentious yuppies).[54] The 'rationalisation effect' leads people to search for reasons that support their pre-judgments, and to bring their beliefs into line with their behaviour: thus voters raise their estimates of the merits of candidates when those candidates are elected to office.[55]

Such aspects of reasoning, it seems, can sometimes be illustrated by brain imaging. Thus, I learn from *Wikipedia*:

> *Recent studies have used functional Magnetic Resonance Imaging to demonstrate that people use different areas of the brain when reasoning about familiar and unfamiliar situations. This holds true over different kinds of reasoning problems. Familiar situations are processed in a system involving the frontal and temporal lobes whereas unfamiliar situations are processed in the frontal and parietal lobes. These two similar but dissociated processes provide a biological explanation for the differences between heuristic reasoning and formal logic.*

Making various uses of insights from the decision-making literature

What can lawyers learn from this body of knowledge? First, if it helps us improve our knowledge of what judges do, that is surely a good thing in itself.

Second, perhaps it can help us improve decision-making. It's quite possible that the literature will support many of the things that we are already doing. One researched-based piece of advice for decision-makers trying to reduce the effect of biases seems to fit comfortably with much of what we think useful in writing judgments:[56]

- *Survey a wide range of objectives;*
- *assess all relevant values;*
- *canvass alternative courses of action while evaluating the positive and negative effects, costs and risks of each;*
- *search for and assimilate new information, including data that counters current biases and effects;*
- *avoid rapid closure to the decision-making process;*
- *make extensive provisions for the implementation of decisions; produce contingency plans to address the ramifications of initial decisions.*

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[54] Thiele, 66.

[55] Id. There is a wonderful example at 171.

[56] Thiele, 68.

Less obviously, perhaps it can lead to improvements in other aspects of law and the legal system. One example is legislation. It is possible that the drafting of legislation is based on a particular assumption about the nature of judicial decision-making. If that assumption is wrong, there could be advantages in reconsidering the drafting of legislation in the light of a fuller understanding of what judges do.

Another example is the role of appeal benches. Traditionally, we have said that the trial judge has the advantage of seeing the witnesses, and where credit is involved, appeal benches – which do not see the witnesses – should be slow to intervene. However we now know that nobody is very good at detecting from people's manner whether they are telling the truth. So, should appeal benches intervene more readily?

A study of the decision-making literature might suggest not. It might suggest that the trial judge has advantages that are more subtle than detecting who is telling the truth; and that the intuitive aspects of a trial judge's decision should be respected. If so, since these matters can never be completely stated in words, there could be a somewhat different argument for respecting a trial judge's decision. I once had a case in which I found that a witness told the truth about some things and lies about others. The Full Court said, as I recall, that since I found that the witness told lies about some things I should also have rejected what he said about other things. Perhaps a greater understanding of the complexities of decision-making might lead to appeal benches being slower to substitute their own views on such things for those of the trial judge. The philosopher G E More once pointed out that our capacity for good judgment far exceeds our capacity to explain its components.[57] Some of the literature suggests that even sophisticated formulations of rules prove inadequate to describe the complex process of decision-making in natural settings: those processes are 'always richer and more sophisticated than that which can be explicated'.[58] And there is a body of research that indicates that explanations for decisions are often rationalisations that can be shown not to reflect the actual processes of making the decision.[59]

Is it wise to 'dig deeper'?

A possible view is that these things are too elusive, too far below the surface, to be addressed. It could even be argued that dwelling too much on such things could be disabling – one thinks of the story about the centipede who was asked to explain how it could walk, with so many legs: it then

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[57] See Thiele, 102.

[58] Thiele, 147.

[59] Thiele, 147ff.

became so preoccupied with the complexity of the task that it became unable to walk at all.

I prefer the view of Kirby J that we should dig deeper. As Guthrie and his colleagues say, 'a greater understanding of these cognitive processes can only improve the legal system, whereas ignorance can only undermine it'.[60] I assume that we will never fully understand or be able to contain the impact of the personal characteristics of individual judges on their decision. But knowledge is better than ignorance, and I hope that our knowledge of judicial decision-making will be increasingly informed by our developing understanding of decision-making in general, and the complex interplay between the various factors involved.

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[60] Guthrie, Chris, Rachlinski, Jeffrey J., Wistrich, Andrew J. 'Inside the Judicial Mind', (2000-2001) 86 *Cornell L. Rev*. 777-830.

Appendix 1:

Values at the top: *MIMIA v B* (children in immigration detention)

This appendix deals with a single case. The question was whether the Family Court could apply the principle that the child's best interests must be paramount to enable it to order the release of children from immigration detention. Ultimately the case went to the High Court. The judgments illustrate the way underlying values and assumptions can influence decisions, even at the highest level and even in apparently technical judgments.

The story is this. The trial Judge had held that the Family Court had no jurisdiction to order the children's release. The Full Court of the Family Court allowed the appeal, however, and held that the Family Court could exercise certain jurisdiction in relation to children held in immigration detention.[61] In particular, it could order that the children be released from detention, *where it found that they were illegally detained*. It therefore ordered a re-trial. Following the retrial, and a further appeal, the Family Court did order that the children be released. The basis for holding – on an interim basis – that the children were illegally detained was, in a word, that they could not go back to their home country and that in such circumstances the detention was indefinite; and that the Migration Act did not authorise indefinite detention (since indefinite detention could not be seen as implementing the Act).[62] However on appeal from the original Full Court decision, the High Court held that the Family Court had no jurisdiction.

I now have to introduce a deeply unsavoury character into the drama, namely the appalling s 69ZH, whose content is as unpleasant as its title. To understand the argument, you need to know that another provision, s 67ZK, said, in effect, that the Family Court possessed the *parens patriae* jurisdiction in relation to children (an incient and wide-ranging jurisdiction formerly exercised by the Court of Chancery. Here is the ghastly s 69ZH, in truncated form (my summaries are in square brackets):

s 69ZH Additional application of Part

69ZH (1) Without prejudice to its effect apart from this section, this Part also has effect as provided by this section.

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[61] *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 30 Fam LR 181.

[62] Subsequently, the High Court effectively overruled the Federal Court decision that had so held: *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562.

> *(2) By virtue of this subsection [the provisions relating to parenting, including s 67ZC] have the effect, subject to subsection (3), that they would have if:*
>
> > *(a) each reference to a child were, by express provision, confined to a child of a marriage; and*
> >
> > *(b) each reference to the parents of the child were, by express provision, confined to the parties to the marriage.*
>
> *(3) The provisions mentioned in subsection (2) only have effect as mentioned in that subsection so far as they make provision with respect to the parental responsibility of the parties to a marriage for a child of the marriage […]*

> *(4) By virtue of this subsection, [this Subdivision and certain other provisions, eg relating to enforcement of parenting orders, and* not *including s 67ZC] have effect according to their tenor.*

This is a bit like those perceptual games that psychologists play, where they show you a picture that looks alternately like a vase, or two faces confronting each other. Here is one way of looking at it:

> The section is clearly intended to add to the Court's jurisdiction, not to reduce it. Look at the explicit words of the title, and sub-s (1). What part of 'additional' and 'Without prejudice to its effect apart from this section' is hard to understand? Also, the Explanatory Memorandum makes it clear that the legislature intended to accommodate the problem that some states, Queensland and Western Australia, did not refer power to the Commonwealth.[63] The purpose of Subdivision F (in which s 69ZH appears) was, therefore to provide a legislative framework to accommodate the reference of powers in relation to ex nuptial children by some, but not all, of the States and to give the *Family Law Act* such operation as the Constitution permits in the States that have not referred powers.[64]

Here is another way of looking at it:

> Sub-s (4) must have been intended to mean something. If all the other provisions in Part VII were to mean what they said ('have effect according to their tenor'), sub-s (4) would be useless. So we can infer that the other provisions were *not* to have effect according to their tenor. Also, looking at the Act as a whole, it is all about parental responsibilities, not about children's interests as such. Also, there would not be a 'matter' as required by the Constitution unless there were an issue to be determined about parental responsibilities.

Neither of these is a complete statement of the particular view, but the first attempts to capture the essence of the Full Court's view, and the second the view of 6 members of the High Court, who held that the Family Court had no jurisdiction.

It seems to me that it is difficult to say that either view is untenable. If this is so, then the judges had a choice. What influenced the choices they made?

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63 It is quoted by the Full Court at paragraph 110.

64 This sentence quotes Nicholson CJ and O'Ryan J, in *B v MIMIA*, above, at paragraph 111.

We don't know, of course. But one can readily see why the Full Court of the Family Court, against the background of family law's persistent focus on the interests and rights of children, would tend to favour the first approach, the one that maximises the Court's jurisdiction.

Is it inherently likely that the members of the High Court, not being specialist family lawyers, would favour the second? Not necessarily. In some earlier cases, the High Court has opted for views of the law that have expanded the Court's jurisdiction.[65] But in this instance, the question of jurisdiction arose in what I think was a very unfavourable context, namely the question whether the Family Court could make orders releasing children from immigration detention. For the reasons Kirby and Callinan JJ gave, the idea that the Family Court could order children to be released from immigration detention – in circumstances where Kirby J considered it was obviously lawful detention – was counter-intuitive. Thus, I think the case presented an unfavourable setting in which to explore the outer reaches of the Court's jurisdiction.

It is possible, therefore, that at some level of consciousness, the choice made by the 6 members of the High Court on this apparently technical matter may have been influenced by an intuitive factor, the perceived oddness of the Family Court exercising jurisdiction in the circumstances of *MIMIA v B*.[66]

The fact that the High Court could have based its conclusion on more than one ground is illustrated by Kirby J's judgment. His approach was to leave the jurisdictional issues for another day, and decide this case on what for him (and for Callinan J) was an obvious basis, namely that the parliament had, in the Migration Act, made it clear that children can be placed in immigration detention. Being able to resolve the case on this basis, Kirby J found it unnecessary to decide the

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65 *Russell v Russell* (1976) 134 CLR 495; 9 ALR 103; 1 Fam LR 11,133; 50 ALJR 594; FLC 90–039; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Marion's Case*) (Family Court may authorise sterilisation of severely mentally handicapped girl, where to do so would be in her interests; and parents lack authority to do so). In *P v P* (1994) 181 CLR 583; 120 ALR 545; 17 Fam LR 457; FLC 92–462 the High Court followed *Marion's case*, and affirmed the Family Court's jurisdiction in a case that arose in a state – *Marion's case* related to the Northern Territory – and also affirmed that its orders could override (under s 109 of the Constitution) the provisions of state legislation which would have limited such surgery.

66 An example of this sort of intuitive judgment is that of the customer at the supermarket, who leaves it to the check-out assistant to have the total of the weekly trolley of groceries calculated by the computer, and is handed a bill for $2,451.76. The shopper's gasp – the instant intuition that this could not be right - is based on some mental process that is quite different from, and much faster than, an actual calculation of the total of each item: see Hogarth, at 72.

scope or validity of the provisions for the welfare jurisdiction of the Family Court under the Family Law Act.[67] He also gave a persuasive reason why it was also *prudent* not to do so, namely to avoid 'unnecessary *obiter dicta*', and to conform with the Court's usual practice of putting aside questions of constitutional validity where possible, and starting with questions of statutory construction.[68]

If the other justices had taken this approach (and had they agreed with Kirby J on the result, as seems likely), then the jurisdictional issues could have waited for another case.

So why did the other six justices take the jurisdictional route? I can think of two possible reasons. The first is that at the initial hearing of *MIMIA v B*, the challenge to the Court's involvement was indeed heavily based on these general jurisdictional grounds, rather that the argument that the terms of the Migration Act precluded the Court from making orders. So it was entirely appropriate that the ultimate appeal court should rule on the matters that formed the core of the case as originally presented.

The second possible reason is that members of the High Court might have not wanted to say anything that might impinge on other issues relating to immigration that might come before them. At the time there were pending a number of cases raising issues about the legality of detaining children, or some children, in immigration detention. One of these related to the argument that children born in Australia, even of parents who are 'illegal non-citizens' (to quote the Migration Act) are entitled to Australian nationality, and that anything to the contrary, eg in the Citizenship Act, would be unconstitutional. Another, more likely to overlap with the facts in *MIMIA v B*, raised more general issues about whether or not the length and conditions of detention are factors that might affect the lawfulness of immigration detention in Australian law.[69] Perhaps, then, those members of the High Court who decided to deal with the matter on general jurisdictional grounds saw some attraction in this course: it would not involve any danger of commenting about immigration issues that might come before them in a different case.

Would it have made a difference to the development of the law on jurisdiction over children's matters if the other members of the High Court had followed the lead of Kirby J and simply decided

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[67] Paragraph [135].

[68] Paragraph [141].

[69] *Applicants M276/2003, Ex parte – Re Woolley & Anor* [2004] HC Trans 2 (3 February 2004). And see *SHDB v Godwin* (A253/2003), *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (A254/2003) and *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (A255/2003), in which the High Court of Australia reserved its decision on 13 November 2003.

the matter on the basis that the peremptory terms of the Migration Act excluded the Family Court's jurisdiction?

It might have. We already had two cases that emphasised the width of the jurisdiction, *Marion's Case* and *P and P*. Suppose that the next case to pop up in the High Court had not been an immigration case (where one way or another it seems that the High Court would have ruled against the exercise of jurisdiction) but a case that came before the Family Court shortly before the High Court ruling, and was decided amid much publicity by the former Chief Justice: *Re Alex*.[70]

In that case, Nicholson CJ held that the Court's authorisation was necessary for what was proposed, namely the administration of hormonal therapies that would commence a 'sex change' process for a 13 year old child who was anatomically and legally a girl but had been diagnosed as having gender identity dysphoria. Of course, he followed the Full Court's decision in *MIMIA v B* (which had not at that point been reversed by the High Court), and had no difficulty in holding that the Court had jurisdiction; and the question of jurisdiction was not argued.

But in the light of the High Court's analysis in *MIMIA v B*, it seems to me now problematical whether the Court did have jurisdiction in *Re Alex*. The problem is that the child was under the legal guardianship of a government department, and that department made the application, submitting that the program was in the child's interests (as Nicholson CJ agreed it was). Applying the reasoning of the 6 High Court justices in *MIMIA v B*, the question would seem to be whether the orders had to do with parental responsibility. It is not obvious that they did; rather, arguably, they had to do with how the government department should exercise its powers, and what was best for the child. On this analysis, the application would appear to fall outside the Family Court's jurisdiction.

I wonder, however, whether the jurisdictional developments might have been different if *Re Alex,* rather that *MIMIA v B,* had come before the High Court. If *Re Alex* had been the case to come before the High Court, the Court's intuitive reaction might have been favourable: it might have seemed inherently sensible for the Family Court to have been able to deal with this difficult matter, as it had seemed sensible to the High Court for it to deal with the sterilisation issue in *Marion's Case*. Maybe in this context, the High Court would have taken the other view of the provisions of the Act, and would have held that the case fell within s 67ZC, which gave the Court the old *parens patriae* jurisdiction, and that this would be a natural enough progression from *Marion's case*, and *P and P*.

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70 *Re Alex* (2004) 31 Fam LR 503.

If there is substance in these speculations, *MIMIA v B* provides an example of the profound influence of emotional and intuitive responses, and unstated assumptions, not only for the outcome of the case, but the development of the law.