

## **Should judges be socio-legal scholars?**

**Lady Hale**

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The short and easy answer to this question is 'no, of course not'. Judges should be legal scholars but even this can be dangerous if carried too far. Indeed, there are some who think it dangerous for judges to have studied law at University level and thus acquired some acquaintance with legal scholarship. And leaving the comfort zone of legal scholarship is even more dangerous.

Take the example given me recently by Virginia Bottomley, social worker and magistrate before politician, head-hunter and University Chancellor. A young black lad, good at school and anxious to get on, is bullied mercilessly by his less successful and differently ambitious peers; eventually he can take no more and attacks them with a broken bottle; if he is given a custodial sentence, his whole life may be ruined; but he has caused serious injuries which may have lasting effects upon at least one of his victims. Justice according to law demands consistency in sentencing; provocation may be mitigation, but is unlikely to make the difference between custody and not in such a case. The judge or the magistrate has to abide by the sentencing guidelines or, these days, be subject to a possible appeal. No amount of social or economic data suggesting, or even proving, that the eventual cost to society as well as the individual of abiding by the law can make it right not to do so.

Even resort to legal scholarship can be dangerous if it tempts the judge to reach a decision which is not in accordance with principle and authority. Last July, Lord

Neuberger, soon to become President of the Supreme Court, delivered a lecture to the Max Planck Institute entitled ‘Judges and Professors – Ships passing in the Night?’ The quotation comes from Longfellow:<sup>1</sup>

‘Ships that pass in the night, and speak each other in passing,  
Only a signal shown and a distant voice in the darkness;  
So on the ocean of life we pass and speak once another,  
Only a look and a voice, then darkness again and silence.’

Longfellow was discussing the relationship between two people while one of them waits for the answer to a proposal of marriage. Lord Neuberger was discussing the convention that judges did not cite works of legal scholarship in their judgments, at least until the author was dead – the ‘better read when dead’ convention, referred to as by Lord Buckmaster in *Donoghue v Stevenson*:<sup>2</sup>

‘. . . the work of living authors, however deservedly eminent, cannot be used as authority, though the opinions they express may demand attention.’

But, as Lord Neuberger pointed out, only some dead authors achieved the status of authority, and these were almost always judges or eminent practitioners rather than academics: Bracton, Coke, Hale and the like. Lord Eldon’s view was that ‘One who had held no judicial situation could not regularly be mentioned as an authority’.<sup>3</sup> But it also appears that exceptions were made for some living authors who fell into this category,

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<sup>1</sup> HW Longfellow, ‘The Theologian’s Tale: Elizabeth’ in *Tales of a Wayside Inn*.

<sup>2</sup> [1932] AC 562, at 567.

<sup>3</sup> *Jones v Jones* (1814) 3 Dow 1, 15; 3 ER 969.

such as Lord Redesdale (who later became Lord Chancellor of Ireland)<sup>4</sup> and Edward Burtenshaw Sugden (an eminent member of the Bar).<sup>5</sup>

Lord Neuberger went on to discuss – and mostly rubbish – the reasons given for the convention, drawing heavily on the work of that well-known legal scholar, Neil Duxbury.<sup>6</sup> Among the more respectable reasons were the relatively late emergence of English law as an academic discipline in its own right; the tendency of English scholars to express opinions aggressively and to relish disagreement with one another; and Sir Robert Megarry’s famous words in *Cordell v Second Clanfield Properties Ltd*,<sup>7</sup> when disagreeing with something he had said in one of his own books:

‘The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole . . . But . . . he lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law.’

Of course he was not saying that judges should not look at academic material:

‘I would, therefore, give credit to the words of any reputable author in book or article as expressing tenable and arguable ideas, as fertilisers of thought, and as conveniently expressing the fruits of research in print, often in apt and persuasive

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<sup>4</sup> Author of a *Treatise on the Pleadings in Suits in the Court of Chancery by English Bill*.

<sup>5</sup> Author of *A Practical Treatise on Powers* (1856).

<sup>6</sup> *Jurists and Judges: An Essay on Influence* (Hart, 2001).

<sup>7</sup> [1969] 2 Ch 9, at 16-17.

language. But I would do no more than that; and in particular I would expose those views to the testing and refining process of argument.’

In that spirit, academic writings are now regularly cited to us in court, though not usually as works of authority, but rather as lending weight to the argument. Apparently in Germany and other civil law countries academic writings are treated with more reverence: their legal hierarchy tends to be the reverse of ours, with judges at the bottom, practitioners next and professors at the top. Lord Neuberger attributes this to the differences between our legal systems – the ‘life-blood of the civil law is principle and logic, whereas the driving force of the common law is experience and common sense’. Scholars, he says, have a far greater role to play in relation to principle and logic, as opposed to experience and common sense. He likens this to the difference between rationalists and empiricists and quotes Francis Bacon: empiricists were ‘like ants’, in that they ‘collect and put to use’, whereas rationalists were ‘like spiders; they spin threads out of themselves.’<sup>8</sup>

I hope you can now see where I am going with this. What sort of legal scholarship is Lord Neuberger discussing? Clearly the traditional doctrinal scholarship which I still think is the proper basis of all legal scholarship. It is that sort of scholarship which leads to meaningful dialogue with the judges – Glanville Williams, Sir John Smith, Gareth Jones (albeit in collaboration with a judge), Hazel Carty, to name some obvious examples. He is not talking about even the sort of contextual legal scholarship which most of us now engage in, still less about the socio-legal research which this association exists to promote and support. So can we imagine a brave new world in which socio-legal

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<sup>8</sup> Lord Neuberger does not give the source and I have so far been unable to trace it.

scholarship enjoys the same dialogue with the judges as doctrinal legal scholarship now does?

Is there any reason why it should? We<sup>9</sup> have looked for judicial citations of the work of a miscellaneous collection of socio-legal scholars – mostly of course those well known to me – to try to find some answers. This totally non-scientific sample has revealed several reasons why judges may refer to socio-legal or social research in their judgments. No doubt if we had found time to look up a few more names we could have found a few more answers.

The first and most obvious is where social science is used to inform the evidence of expert witnesses. Some of this is not ‘socio-legal’ as such, but social and psychological. We take it for granted that medical and scientific expert witnesses will draw on research in forming their opinions – although some of the most attractive medical experts are those who draw more heavily upon their own clinical experience. We are perhaps less receptive to social worker experts who rely heavily upon research. In the Supreme Court at the moment we are wrestling with the question of when the risk of future psychological harm can justify removing a child at birth and placing her for adoption.<sup>10</sup> It is quite clear to me that the judge was more respectful of the opinions of the psychiatrists, not only as to the mother’s diagnosis but also as to the risks this posed for her child, and of a psychologist, than he was of the research-based views of an independent social work expert and of the children’s guardian. But I can contrast this with the respect shown in a case from Northern Ireland to the views of Professor John

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<sup>9</sup> My judicial assistant, Penelope Gorman, has, as always, been a great help in researching this paper.

<sup>10</sup> On appeal from *Re B (a child)* [2012] EWCA Civ 1475.

Triseliotis, who is famous for his work on the identity of adopted children.<sup>11</sup> The question was whether a little girl with alcoholic parents should be freed for adoption before prospective adopters had been found. Professor Triseliotis agreed that it would be disastrous to return the child to her parents, but emphasised that every effort should be made to find adopters who would support continued contact with her parents. He proposed adjourning the freeing application to enable this to be done. In response to his evidence, and some pressure from the trial judge, the Trust had changed its stance against contact and was prepared to look. Was it unreasonable for the parents to respect the views of Professor Triseliotis and withhold their consent to the adoption until at least an attempt had been made? I said ‘no’ but everyone else said ‘yes’ and the Strasbourg court later held that this was well within our margin of appreciation.<sup>12</sup> But the case has been very influential in changing the approach to adoption in Northern Ireland – a good example of evidence-based development of the law.

The second is where the judge takes into account material which is not adduced in evidence but is nevertheless helpful in informing the court about the real world. If the life-blood of the law is experience and common sense, then whose experience and common sense are we talking about? Surely it cannot only be the experience and common sense of the judges, many of whom have led such sheltered lives? As I was once rude enough to say publicly, ‘one man’s common sense is another woman’s hopeless idiocy’.<sup>13</sup>

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<sup>11</sup> *Down Lisburn Health and Social Services Trust v H* [2006] UKHL 36, [2007] 1 FLR 121.

<sup>12</sup> *R v United Kingdom* (2012) 54 EHRR 2, [2011] 2 FLR 1236.

<sup>13</sup> Bar Law Reform Lecture 2004, referring to the belief that a girl of 13 who became pregnant would be so likely to lie about the identity of her abuser that the offence of unlawful carnal knowledge could only be prosecuted if she complained within three months, before any pregnancy became apparent: see *R v J* [2004] UKHL 42, [2005] 1 AC 562.

I can give a few examples of where I have found it useful to be able to cite the findings of socio-legal research to support a particular view of experience and common sense. In *Stack v Dowden*,<sup>14</sup> I was able to refer to the research of Gillian Douglas and others to support a statement that people tend not to have a full understanding of the legal effect of the choices they make as to property ownership.<sup>15</sup> This is an unsurprising finding but supportive of the ‘common sense’ view that if people put property into joint names they probably intend it to be jointly owned. I was also able to refer to the research of Anne Barlow and others on why people live together without marrying to support of the ‘common sense’ view that they are not necessarily rejecting the legal consequences of marriage.<sup>16</sup> And if the research by Anne Barlow and Janet Smithson on attitudes to pre-nuptial agreements<sup>17</sup> had been published before *Radmacher v Granatino*,<sup>18</sup> I would no doubt have referred to it in my dissenting judgment. In *Miller v Miller*<sup>19</sup> I cited the findings of Sue Arthur and others (including Mavis Maclean) on the financial arrangements which people make after divorce or separation to the effect that our present law is more successful in maintaining the family home for the children than it is in securing a comparable income for them in future.

You could say that all of these examples were simply background, unlikely to make much difference to the result. But sometimes counsel do cite research to us because they want it to influence the result. An example is *Re W (children) (family proceedings: evidence)*,<sup>20</sup> where the issue was whether there should continue to be a presumption against children giving evidence in care proceedings. Counsel cited Joyce Plotnikoff and Richard Woolfson’s

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<sup>14</sup> [2007] UKHL 17, [2007] 2 AC 432.

<sup>15</sup> ‘Dealing with property issues on cohabitation breakdown’ [2007] Fam Law 36, at [67].

<sup>16</sup> ‘Just a piece of paper? Marriage and cohabitation’, in A Park (ed), *British Social Attitudes: Public policy, social ties. The 18<sup>th</sup> Report* (SCPR, 2001), at [45].

<sup>17</sup> ‘Is modern marriage a bargain? Exploring perceptions of pre-nuptial agreements in England and Wales’ (2012) 24(3) CFLQ 304.

<sup>18</sup> [2010] UKSC 42, [2011] 1 AC 534.

<sup>19</sup> [2006] UKHL 24, [2006] 2 AC 618, at [128].

<sup>20</sup> [2010] UKSC 12, [2010] 1 WLR 701.

work evaluating the special measures to protect child witnesses in criminal proceedings.<sup>21</sup> Special measures had indeed made the position better but many children still find giving evidence difficult and stressful. So, the argument ran, we should not allow a procedure designed to protect children from harm to be an instrument of causing them harm. Quite so and that supports a cautious approach to whether and how they give evidence. But the child's right to be protected from harm has to be balanced against the alleged abuser's right to defend himself. It will do the child no good if the wrong factual findings are made.

Another example of the same authors' work being cited by counsel in an attempt to influence the result came up in *R v H*.<sup>22</sup> The issue was whether a special advocate could be used to help the judge to evaluate claims for public interest immunity in relation to the disclosure of unused material in a criminal case. In arguing that there could be such a procedure in an appropriate case, counsel for the accused cited findings that the Criminal Procedure and Investigation Act 1996 was not always being operated by the CPS as Parliament had intended.<sup>23</sup> They won that argument. But I find it interesting that Lord Bingham, giving the opinion of the appellate committee, merely observed that 'it would be unduly complacent to suggest that the guiding principles are now uniformly applied as they should be' (at [34]) and referred to the example of a previous decided case<sup>24</sup> rather than to the research. My guess is that he found the case more persuasive than the research. But the point about research is that it can indicate prevalence rather than an isolated example.

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<sup>21</sup> *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (Nuffield Foundation and NSPCC, 2009)

<sup>22</sup> [2004] UKHL 3, [2004] 2 AC 134.

<sup>23</sup> 'A fair balance'? *Evaluation of the operation of disclosure law*, Home Office Research Development and Statistics Directorate, RDS Occasional Paper No 76 (2001).

<sup>24</sup> *R v Early* [2003] 1 Cr App R 19.

Another example of research which is quite regularly cited in an attempt to influence the result is Cheryl Thomas' work on juries.<sup>25</sup> This can be relevant to so many issues. *Attorney-General v Associated Newspapers*<sup>26</sup> was a prosecution of the Daily Mail and the Sun for contempt of court in publishing in their on-line (but not print) editions a highly prejudicial photograph of the accused during his trial for murder. In assessing the risk, not only of members of the jury accessing the material but also of its influencing their verdict, the court observed rather dismissively that 'there are those who rely on research to doubt whether juries obey the prohibition not to search the internet' (at [54]). But it then went on to reason that although the courts do trust jurors to obey a prohibition on consulting the internet, they have been concerned to meet the problem – instant news requires instant and effective protection of the integrity of a criminal trial. So the newspapers were guilty of contempt despite the courts' confidence that the jurors would do as they were told.

The same point can be made by defendants who complain of pre-trial publicity. In *R v Ali*<sup>27</sup> one of the many questions was whether a re-trial was an abuse of process because no jury could be impartial in the light of the publicity which had been given to the first trial and remained accessible on the internet. Counsel cited Cheryl's research in support of the argument that the new jury could not be relied upon to follow the judges' directions not to do research on the internet. She reported that 26% of her sample in high profile cases said that they had *seen* information on the internet, although only 12% were prepared to admit that they had *gone looking* for it. So it was highly likely that in this very high profile case there would be jurors who were very well aware of what had gone on before.

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<sup>25</sup> *Are Juries Fair?* Ministry of Justice Research Series 1/10 (2010).

<sup>26</sup> [2011] EWHC 418 (admin), [2011] 1 WLR 2097.

<sup>27</sup> [2011] EWCA Crim 1260, [2011] 2 Cr App R 22.

The answer given – which some may find less than convincing – was that for this to have any effect upon the jury would require all the other jurors to disobey their oaths. The same research had earlier been referred to by the Lord Chief Justice in *R v Thompson*,<sup>28</sup> for the finding that jurors were uncertain what to do if they were concerned that something improper or irregular had occurred or was occurring amongst them. The court had taken the opportunity of emphasising that, from the moment they are sworn, jurors take collective responsibility for ensuring that each member obeys the jury oath and that the judge’s directions are followed. Both the judge’s directions and the literature given to jurors should make this clear. And of course specific directions should be given about the use of the internet.

These have been followed by what some might feel are draconian sentences on those who disobey the direction and not only do the research but are unwise enough to share it with their fellow jurors, one of whom is now bound to shop them.<sup>29</sup> So a third use of Cheryl’s research has been to justify such deterrent sentences on the ground that some jurors do indeed disobey and should be taught a lesson.

This is a very good example of the problems which such findings can pose for the legal system. On the one hand, they reveal the unsurprising fact that jurors do not always understand the judge’s directions and even if they do understand them they do not always follow them. So the courts are understandably anxious to address the problem. On the other hand, the courts cannot risk accepting that a large number of jurors may be deciding the case by what they have learned outside the courtroom and will not

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<sup>28</sup> [2010] EWDA Crim 1623, [2011] 1 WLR 200.

<sup>29</sup> *Attorney General v Dallas* [2012] EWHC 156 Admin, [2012] 1 WLR 991.

understand how unfair this is. The courts have to go on trusting the jury otherwise the whole system will collapse. We clearly need more research on what works and what does not work in getting juries to do as they are told.

But socio-legal research can also be used to help persuade the court, not just in the particular case, but also to change the law. The best-known example is Hazel Genn's research for the Law Commission, *Personal Injuries Compensation: How Much is Enough?*<sup>30</sup> This cropped up in not one, but two important cases where the law was changed. First was *Wells v Wells*,<sup>31</sup> where the question was whether the lump sum damages for future financial loss should be discounted by the conventional 4 to 5% assumed return from a mixed portfolio or by the lower return from investing in index linked government securities. Three trial judges had gone for the lower rate but the Court of Appeal had reversed them, accepting the argument that it was reasonable to expect personal injury victims to invest in a mixed portfolio including equities despite the increased risk. On appeal to the House of Lords, counsel relied on the finding that claimants preferred to put their money into banks and building societies rather than invest in equities. Lord Lloyd pointed out that the assumption that victims would invest in equities was not borne out by the research, but then went on to say that how they actually spend their money is irrelevant to the question. The question is whether they should be obliged to invest in equities to make the money go round, and the unanimous answer of the House of Lords was 'no'. Lord Lloyd and Lord Steyn referred to the research (which Lord Steyn called 'in-depth'), they and Lord Hutton referred to the Law Commission's report which had recommended the change,<sup>32</sup> but Lord Hope and Lord Clyde answered the question from first principles without relying on any of the background.

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<sup>30</sup> Law Com No 225 (1994).

<sup>31</sup> [1997] 1 WLR 652, CA; [1999] 1 AC 345.

<sup>32</sup> Law Com No 224, *Structured Settlements and Interim and Provisional Damages* (1994).

I think that this is a good example of using research to counter what the judges might otherwise think was experience and common sense. But the same piece of research was also relied upon in the Court of Appeal in *Heil v Rankin*<sup>33</sup> as part of the support for the Law Commission's later recommendation<sup>34</sup> that general damages for pain, suffering and loss of amenity should be raised, especially for the more serious injuries. Hazel's survey of victims had shown the very significant and long-lasting effects of personal injuries upon them and that they thought their damages had been too low. Added to this was a public opinion survey conducted by the Office of National Statistics with the help of Mavis Maclean who had 'played a prominent part in its design', which showed that generally the public thought that the current levels of damages were too low.

The Court of Appeal thought that the Law Commission had been over-influenced by the research. The ONS survey did not explain what else the victims would get, on top of their general damages; nor did it clearly explain that insurance premiums would rise and the NHS might have less money to spend on patient care; indeed 'we have reservations whether it is possible to design a survey of this nature which would be capable of doing more than confirming or otherwise, in general terms, the message provided by other material' (at [88]). The victim study 'we regard as being of interest, but again its results are capable of being explained, at least in part, by other reasons for dissatisfaction with the level of damages than dissatisfaction with the levels of damages for PSLA' (at [90]). The Court of Appeal were much more impressed with the response to the Law Commission's consultation (having earlier commented that Lord Bingham was one of the respondents) and with the increased life expectancy of those with very serious

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<sup>33</sup> [2001] QB 272.

<sup>34</sup> Law Com No 257, *Damages for Personal Injuries: Non-Pecuniary Loss* (1999).

injuries, who would therefore have to tolerate their effects for much longer. So although the research had had an important effect upon the Law Commission's thinking, the court was not prepared to accept that it had an important effect upon theirs.

There is another context in which we may have to become more sensitive to the findings of socio-legal research and that is in assessing the justifications for interfering with qualified convention rights. I say this because, although we are deciding the individual case, we are often ruling on the proportionality of an interference stemming from a rule or policy which will be applied to other people. And it is our duty to make that assessment for ourselves, rather than deferring to the assessment of others. Although we have been slow to acknowledge this, this does involve us in merits review of government policy in hitherto unprecedented ways. If we are going to look so closely at government policy, we obviously have to look at the evidence upon which it is based.

A good illustration is *R (Quila and Bibi) v Secretary of State for the Home Department*.<sup>35</sup> This was about raising the minimum age at which a person could sponsor and be sponsored to come to this country as a spouse, first from 16 to 18, and then from 18 to 21. The Home Secretary was adamant that this was not being done as an immigration control measure but in order to prevent or deter forced marriages. The Home Office had commissioned research into the effect of raising the age from Marianne Hester,<sup>36</sup> but had then ignored the results, allegedly because of criticisms from peer reviewers. They relied upon the results of their own consultations which provided less than a ringing endorsement. I commented that it was odd to criticise the study for sampling bias when 'Clearly, those who choose to respond to consultation papers are even less representative

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<sup>35</sup> [2011] UKSC 45, [2012] 1 AC 621.

<sup>36</sup> *Forced Marriage: the risk factors and the effect of raising the minimum age for a sponsor and of leave to enter the United Kingdom as a spouse or fiancé(e)* (2007).

than the organisations, individuals and focus groups who were chosen for the purpose of the academic research' (at [77]). The majority of the court had little difficulty in agreeing with courts below that the evidence of the good the change might do was nothing like strong enough to justify the harm that it must do, not only to some victims of forced marriages, but also to all the young couples who desperately wanted to marry one another.

This brief sketch of some of examples of how socio-legal research might be of use to the courts also shows that the courts are extremely wary about using it. Why might this be?

First, of course, they have doubts about its quality and how to assess this. They can do this if they have competing expert opinions, but it is much harder to do with research which is deployed as part of the argument. Counsel are supposed to draw the court's attention to any authorities which are adverse to their case, but as far as I know there is no such rule in relation to empirical research. They may well be tempted to find a study which supports their case and rely upon that, rather than upon a literature review or meta-analysis which tries to draw together and analyse the sum total of data on the subject. It is rare to find what happened in *Wells v Wells* and *Heil v Rankin*, where the insurance industry hired an expert to find the flaws in the research upon which the Law Commission had relied. This certainly led the Court of Appeal to treat the findings with more caution than they might otherwise have done.

Secondly, of course, socio-legal scholars are no less prone than any other kind of scholar to disagree with one another and to point to the flaws and omissions in other people's work. Indeed, they may have to do this in order to get their work funded or to prove its originality and distinctive intellectual contribution. A tendency to vehement disagreement

within the academy is one of the reasons given by Lord Neuberger for our comparative lack of respect even for doctrinal legal scholarship. But at least we are able to assess that for ourselves by reading the cases and materials upon which it is based. We are not so well placed to assess the comparative merits of competing views of socio-legal scholars – those, for example, who consider that the benefits of mediation are well-established, compared with those who consider that they are as yet unproven. It is tempting to brush the latter under the carpet if they do not coincide with the prevailing judicial orthodoxy that ADR is a good thing.<sup>37</sup>

The difficulty of assessing the validity and weight of socio-legal research can lead to what some may think to be over-reliance on even less reliable sources. The government in *Quila and Bibi* had to fall back on consultation because almost everyone else was telling them that the case for change was not proved. But the court in *Heil v Rankin* was more impressed with the results of consultation than it was with almost anything else. We all know that consultation cannot possibly be as objective as a representative sample of public opinion. As a matter of principle, why should the courts regard the opinions and assertions of other lawyers and judges as more authoritative than the opinions and attitudes of ordinary people as revealed in a well-designed research study?

But even if less representative, the response to Law Commission and other consultations is almost always better informed. We found that when trying to divine public opinion about a possible change in the ground for divorce. It was extremely difficult to give the public enough information about the present law and practice to enable them to make an

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<sup>37</sup> See the reference to Hazel Genn's 'excellent' report on *Court based ADR initiatives for non-family civil disputes: the commercial court and the Court of Appeal* in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002, at [6].

informed assessment. So there are undoubtedly problems with attitudinal research, no matter how carefully it is conducted.

But I think that the courts' respect for consultation may also have quite a lot to do with the standing and authority of the people who are consulted. Judges respect authority. They work in a hierarchical world. They are always looking for the case which gives them the answer to the difficult question they have to decide. So perhaps it is natural for them to defer to the extra-judicial views of those whom they respect judicially. Just as we look to see who was on the court which decided a particularly important case, we look to see who was on the committee or commission which made a particularly important recommendation, and we look to see who were the respondents to the consultation which resulted in their recommendations. I do not think that it was any co-incidence that in *Heil v Rankin* the Court of Appeal picked out Lord Bingham's name amongst those who had responded positively to the Law Commission's consultation on general damages.

It is wrong to suggest that judges are all the same. No doubt some judges are much more ready to refer to extra-judicial sources generally than others are. I suppose that I am one of those. (I have not checked whether Ross Cranston is another, but surely he should be.) There are several possible reasons for this. One is my background in contextual legal scholarship. Another is the nature of family law, which is not my main field of activity these days but used to be when I was first a full time judge. I wonder if the whole idea of justice in family law cases is different from the idea of justice in most criminal and civil law cases. We are no longer about redressing the wrongs of the past – divorce is not a punishment for matrimonial crime, the future care and upbringing of children does not depend upon the rights and wrongs of the parental break-up, for the most part the

distribution of matrimonial resources looks to the future rather than the past. We are trying to devise the best solution for the future of the whole family rather than to redress or punish the wrongs done in the past. So perhaps that makes us more interested in what works and what does not work on the ground. How do shared care arrangements work out; what are the plus factors and what are the minus ones? What does and does not make contact happen and then make it work? How can we best take account of the wishes and feelings of the child? How can we weigh the long term harm of losing touch with one parent against the short and medium term harm of living with a parent who cannot cope?

I have just been reading a very thoughtful discussion by Rhona Schuz of the relevance of empirical studies to child abduction cases.<sup>38</sup> We know that the framers of the Hague Convention had in mind the paradigm of a parent who had lost or feared losing custody and abducted the child from her rightful carer. We know from statistical studies by Nigel Lowe and others that the paradigm is now different.<sup>39</sup> 69% of abductors are mothers and 73% are sole or joint primary carers. But there is a gender difference. While only 13% of mother abductors are non-primary carers, 65% of father-abductors fall into the traditional paradigm and are not primary carers. There is also reason to believe, from much smaller qualitative studies, that domestic violence and abuse of children are among the most common reasons for abduction.

This new paradigm clearly has implications for how the convention might be interpreted and applied in individual cases. The purpose of the convention was to protect children from harm – the harm which the individual abducted child suffers from being uprooted

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<sup>38</sup> *The Hague Child Abduction Convention: A Critical Analysis* (Hart, forthcoming 2013).

<sup>39</sup> N Lowe, *A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the civil aspects of international child abduction*, Part I – Global Report (November 2011); Part III – National Reports (May 2011).

from her home and primary carer and the harm which other children would suffer unless the so-called 'scourge' of child abduction is deterred by the rapid return of the child to her home country. But if a common motivation for abduction is the fear of further domestic violence or abuse of the child, how likely is the prospect of speedy return to be a deterrent? And if those motivations are or may be justified, will the harm done by returning the child be greater than the harm done by not doing so? If the abductor is primary carer and for whatever reason is unable or unwilling to return with the child, once again will the harm done to the child outweigh the harm done by not doing so?

Clearly social or psychological research might help to provide us with some answers to these questions. Unfortunately, rather a lot of what has been done does not distinguish between abductions by and abductions from primary carers, or between abductions where children are hidden from and lose contact with the left-behind parent and abductions where they remain in touch. Yet continuity of primary care, coupled with the quality of the relationship with the other parent, are usually of critical importance in securing good outcomes for children. So once again we are back with the dilemma of what to make of it all at the level of the individual case.

Rhona also points to the dangers of uncritical reliance on theories which may claim to have a basis in objective research but which may in fact be seriously flawed. She has in mind the contested parental alienation syndrome. Courts in Israel have relied on this to refuse to listen to the objections of an abducted child on the ground that they cannot possibly be independently formed<sup>40</sup> and also to assume that the long term damage from alienation will be greater than the likely damage from return.<sup>41</sup>

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<sup>40</sup> Referring to the Israeli case of FamA (Dist TA) 28/97 *Plonit v Almonit* 19/4/99.

<sup>41</sup> Referring to the Israeli case of FamC (Dist BSH) 3450/07 *RB v VG Nevo* 09/01/08.

So what are the morals I would draw from this brief canter through the judicial experience of trying to handle social research?

The first is to agree with Sir Robert Megarry that the activity of judging is indeed very different from the activity of authorship. Authors do have the benefit of wide-ranging research, hopefully a comprehensive knowledge of the field, and time to reflect and hone and rehone their ideas. But authors do not have to decide real cases, with real people in front of them, who stand to lose their lives, their liberty, their health, their livelihood or a great deal of money if the judge gets the answer wrong. The first job of a judge, as I said in a recent case,<sup>42</sup> is to make up her mind. No more the handy resort to ‘the better view’ as so many legal authors quite properly put it. No more tentative conclusions as so many socio-legal authors quite properly put it.

The second is also to agree with Sir Robert Megarry that, just as ‘argued law is tough law’, argued – or contested – empirical evidence is tough empirical evidence. Socio-legal scholars do not often have their work subjected to the intense critical analysis to which the forensic process subjected them to in *Heil v Rankin*. I have a slight sense that the judges did not feel qualified to rule upon a dispute between Mavis Maclean and the insurance industry’s expert, but in principle they should have been just as able to adjudicate upon this as any other dispute. The dangers of judges reading round the subject and coming up with empirical material or social theories which the parties do not have the opportunity of subjecting to the same level of critical scrutiny as they would any other kind of evidence are obvious. That is why it is so much easier to take account of

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<sup>42</sup> *Re L and B* [2013] UKSC 8, [2013] 1 WLR 634.

such material when it forms the basis of an expert's opinions in the particular case than it is to take account of it in general.

Thirdly, however, I think that judges ignore the wider context in which they do their work at their peril. I agree with Lord Neuberger that the life-blood of the common law is experience and common sense: after all, we are only agreeing with that great judge, Oliver Wendell Holmes, that 'the life of the law has not been logic; it has been experience'.<sup>43</sup> And it is therefore dangerous for the common law to rely upon the experience and common sense of a comparatively narrow section of society. One counter to this is the study of law in its wider context. Another, of course, is to recruit our judges from a wider section of society – but that's another story and I doubt whether the organisers of this conference wanted me to set off on another of my hobby horses today!

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<sup>43</sup> *The Common Law* (1881), at p 1.