

MACCABAEAN LECTURE IN JURISPRUDENCE

# Judicial Decisions and Social Attitudes

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## Introduction

1956 WAS THE TERCENTENARY YEAR of Jewish resettlement in England. The Jews had been expelled by Edward I in the year 1290 and were readmitted by Cromwell. The Maccabaeans is a society of Anglo-Jewish professional men and women founded in 1891 and the decision was taken by the then committee to commemorate the tercentenary of the resettlement by the foundation of the Maccabean Lecture in Jurisprudence under the auspices of the British Academy. A fund to endow the lecture was raised by an appeal to the membership. I was then a junior barrister of some six years standing in practice at the Chancery bar. I little realised, when I made my small donation to the appeal, that I would one day be a beneficiary of my own contribution. The lecture has acquired a very considerable prestige in the legal community and when I look at the list of previous lecturers I am very conscious of the honour done to me by the Council of the British Academy in inviting me to give this year's lecture.

The subject I have chosen for my talk is 'Judicial Decisions and Social Attitudes'. We do not have a written constitution in this country, save in so far as introduced by European law, so that judges do not, as they do in the United States, have to rule on the constitutionality of such matters as the effect of a statute prohibiting or regulating abortion,<sup>1</sup> but there are many areas under the law as it exists today in

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<sup>1</sup> *Roe v. Wade* (1973) 410 U.S. 113.

which judges have to make decisions which require them to make value judgments based on considerations of policy for which the law does not provide a ready or obvious answer.

I say 'under the law as it exists today' as I wish to make it clear that I do not intend here to add to the discussion on whether we should have a Bill of Rights or whether, as I personally favour, the European Convention on Human Rights should be incorporated into our domestic law. But even under the law as it now stands the necessity for decisions involving value judgments can arise in many areas: the extent of the duty of care in negligence; damages for nervous shock; public policy as applied to the doctrine of restraint of trade; the list is long and some of those I have mentioned are referred to in John Bell's book, *Policy Arguments in Judicial Decisions*,<sup>2</sup> to which I acknowledge my indebtedness. However, I wish to concentrate my attention on those areas where the value judgments to be made by the judge would seem to depend, at least in part, on the view which he or she takes of the attitude of society as a whole to a particular issue. I have in mind such matters as the institution of marriage, sexual mores and the position of children. In many cases the judge is given a very wide discretion, as for example in matters relating to the upbringing of children, where the only legal test (imposed by statute)<sup>3</sup> is that the welfare of the child is paramount and in the exercise of that discretion value judgments may have to be made where neither statute nor binding authority gives any firm guidance. Sometimes, as will become apparent later in this lecture, the court will take the view that authority previously considered to be binding no longer reflects current social attitudes. Many of these matters arise in the field of family law, a field in which much of my judicial experience has fallen, and so you will not be surprised that it is on these matters that I intend to concentrate my attention. In this talk, therefore, I shall try to consider some of the areas in which these problems arise, the decisions reached by the courts as evidenced by the case law and finally, the basis upon which the judges do, and should, approach problems of this nature.

<sup>2</sup> Oxford at the Clarendon Press, 1983.

<sup>3</sup> Now Children Act 1989, s. 1(1).

## Marriage

I turn first to the institution of marriage, because recent decisions both in this country and in at least one other common law jurisdiction illustrate very neatly how the courts have accepted and reflected what they have perceived to have been a change in the attitude of society towards marriage. I refer, of course, to the decisions in Scotland,<sup>4</sup> England and Wales<sup>5</sup> and Australia,<sup>6</sup> that a husband can be convicted of the rape or attempted rape of his wife. The old law was founded upon a pronouncement by Sir Matthew Hale (who died in 1676) that: 'the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.'<sup>7</sup> In the Court of Appeal Lord Lane, CJ giving the judgment of the court said that there could be little doubt that what Hale wrote was an accurate expression of the common law as it then stood.<sup>8</sup>

Although English law had over the years recognised exceptions to Hale's general statement, for example, where there had been a non-cohabitation order, as recently as 1954<sup>9</sup> Hale's proposition was ruled at first instance to be correct, and there was a decision to the like effect reported in 1990.<sup>10</sup> The Scottish courts rejected the husband's immunity from rape on his wife in 1989, and the following passage<sup>11</sup> from the judgment of the High Court of Justiciary delivered by the Lord Justice-General, Lord Emslie, recognised the change in social attitudes:

By the second half of the 20th century, however, the status of women and the status of a married woman, in our law have changed quite dramatically. A husband and wife are now for all practical purposes equal partners in marriage. . . . A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule. Nowadays it cannot seriously be maintained that by mar-

<sup>4</sup> *S. v. H.M. Advocate* [1989] S.L.T. 469.

<sup>5</sup> *R. v. R.* [1992] A. C. 599.

<sup>6</sup> *R. v. L.* (1991) 174 C.L.R. 379.

<sup>7</sup> *History of the Pleas of the Crown* (1736), vol. 1, ch. 58, p. 629.

<sup>8</sup> [1992] A.C. 604.

<sup>9</sup> *R. v. Miller* [1954] 2 Q.B. 282.

<sup>10</sup> *R. v. Sharples* [1990] Crim. L.R. 198.

<sup>11</sup> 1989 S.L.T. 473.

riage a wife submits herself irrevocably to sexual intercourse in all circumstances.

In the House of Lords in 1991 Lord Keith of Kinkel said that he considered the substance of that reasoning to be no less valid in England than in Scotland.<sup>12</sup> In South Australia the common law rule was abrogated by statute in 1976, but in 1991 the High Court of Australia felt able to say that, even without any statutory amendment, Hale's rule no longer formed part of the common law of Australia.<sup>13</sup> Three members of the court (Mason, CJ, Deane and Toohey, JJ) said<sup>14</sup> that 'this court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage.'

Another illustration, although not so dramatic as the subject of rape within marriage, of the reflection by the courts of society's changed attitude to the institution of marriage, is the approach adopted to the division of the property of the parties to a marriage consequent upon divorce. Here statute<sup>15</sup> gives the judge a wide discretion, listing a number of factors which are to be taken into account, including (apart from strictly financial considerations) the duration of the marriage and the contribution which each party has made or is likely to make to the welfare of the family 'including any contribution by looking after the house or caring for the family'.

A seminal English case in this field is *Wachtel*<sup>16</sup> in 1973 where the Court of Appeal, as well as considering the relevance of the conduct of the parties to the financial aftermath of divorce, emphasised the 'partnership' approach to the division of the matrimonial assets, even though suggesting a modification to the starting point of an equal division of the assets in those cases where the husband has to continue to make income provision for his ex-wife and children.

An interesting recent (1992) case in the Family Court of Australia,<sup>17</sup> reviews the Australian case law on this subject and the academic analyses of how to evaluate the quality of the respective roles of the parties to the marriage — the wife's role often being by contributing unpaid domestic labour. The conclusion reached is that in Australia

<sup>12</sup> [1992] A.C. 618.

<sup>13</sup> *R. v. L.* (1991) 174 C.L.R. 379.

<sup>14</sup> (1991) 174 C.L.R. 389.

<sup>15</sup> Matrimonial Causes Act 1973, s. 25.

<sup>16</sup> [1973] Fam. 72.

<sup>17</sup> *In the Marriage of Ferraro* (1992) 16 F.L.R. 1.

the legislation, as interpreted and applied by the courts, emphasises the social and economic partnership of marriage. Consequently, on the breakdown of a marriage the economic fruits, namely the property which the parties then have, should be divided between them having regard to those principles.

I would not think it unfair to say that the English courts may be tending towards a similar approach, although all too often the resources available to the parties are insufficient for full effect to be given to the principle of equality since other needs — for example, the provision of a home for the children — have to be given priority. Again the principle of equality is not applied in cases where the resources available are very large in relation to the parties' needs.<sup>18</sup>

Until comparatively recent times the concept of family was centred around the institution of marriage. Thus in 1950 the Court of Appeal held<sup>19</sup> that a man who had lived with a woman for 20 years, adopting her name and calling himself her husband, was not a member of her family for the purpose of succeeding to his tenancy under the Rent Acts. Asquith, LJ said:<sup>20</sup>

To say of two people masquerading, as these two were, as husband and wife (there being no children to complicate the picture) that they were members of the same family, seems to be an abuse of the English language. . . .

By 1975 the Court of Appeal felt able to say<sup>21</sup> that the popular meaning of the word family had changed to the extent of including at least the parties to a permanent relationship, even without the benefit of a marriage ceremony. Bridge, LJ said:<sup>22</sup>

. . . between 1950 and 1975 there has been a complete revolution in society's attitude to unmarried partnerships of the kind under consideration. Such unions are far commoner than they used to be. The social stigma that once attached to them has almost, if not entirely, disappeared. The inaccurate but expressive phrases 'common law wife' and 'common law husband' have come into general use to describe them. The ordinary man in 1975 would, in my opinion, certainly say that the parties to such a union, provided it had the appropriate degree of apparent permanence and stability, were members of a single family whether they had children or not.

The courts have also attempted, by a creative use of the doctrines of

<sup>18</sup> *O'Neill v. O'Neill* [1993] 2 F.C.R. 297.

<sup>19</sup> *Gammans v. Ekins* [1950] 2 K.B. 328.

<sup>20</sup> [1950] 2 K.B. 331.

<sup>21</sup> *Dyson Holdings Ltd. v. Fox* [1976] Q.B. 503.

<sup>22</sup> [1976] Q.B. 512.

trust law, to deal with the proprietary interests of an unmarried couple in their home, but it cannot be said that these efforts have met with unalloyed success.<sup>23</sup>

## Sexual Mores

I turn now to changing social attitudes to sexual mores. That such a change will affect the judicial approach is well demonstrated by cases relating to the custody of children. In 1962 the Court of Appeal had to consider, in the context of wardship, the care and control of two girls aged six and four whose mother had committed adultery, admitted that adultery to her blameless (or 'unimpeachable') husband, the girls' father, and subsequently left the matrimonial home.<sup>24</sup> The High Court judge gave her care and control of the two children, on the basis that that was best for the children. The Court of Appeal (Lord Denning, MR, Harman and Russell, LJJ) reversed his decision, holding that although the welfare of the children was the paramount consideration it was not the sole consideration, and the mother's conduct could not be ignored. Otherwise, as Russell, LJ said,<sup>25</sup> every mother who is in other respects a good mother could break up a home for a whim in the assurance that she would have awarded to her the care and control of the small children of the marriage, other things being equal. Or, as Lord Denning, MR said,<sup>26</sup> it was a matter of simple justice that the father should have the care and control. Only 13 years later, in 1975, a differently constituted court of Appeal (Stamp and Ormrod, LJJ and Sir John Pennycuik) refused to follow the 1962 decision, saying that it was no longer to be considered as authoritative.<sup>27</sup> They overcame the difficulty imposed by the doctrine of precedent by saying that in the meantime the House of Lords had, in a 1969 case,<sup>28</sup> made it clear that where the welfare of the child was the paramount consideration, it outweighed all other considerations, including justice to the unimpeachable parent. In the course of his judgment Ormrod, LJ whose

<sup>23</sup> See *Rayden and Jackson on Divorce and Family Matters* (16th ed.) para. 35–27 and cases there cited.

<sup>24</sup> *In Re L. (Infants)* [1962] 1 W.L.R. 886.

<sup>25</sup> [1962] 1 W.L.R. 892.

<sup>26</sup> [1962] 1 W.L.R. 890.

<sup>27</sup> *S (B.D.) v. S (D.J.)* [1977] Fam. 109.

<sup>28</sup> *J. v. C.* [1970] A.C. 668.

influence on the development of family law in the 1970s and 1980s cannot be over-emphasised, delivered a diatribe against the use of the phrase 'unimpeachable parent' and also against judges making the kind of value judgment that the use of the phrase implied. In a passage, which is echoed in his judgment at first instance in *Wachtel*, on the subject of the relevance of conduct to financial provision after divorce, he said:<sup>29</sup>

... it is quite impossible to decide whether a parent is unimpeachable or impeachable without an exhaustive investigation into the history of the married life. It also requires that the judge in question should not only find the facts relating to the ins and outs of the matrimonial life of the parents, if he feels it necessary to go into it — and it is not as a rule necessary to go into it — he has also to give some indication as to what moral standards he is using.

In the following year, 1976, a Court of Appeal with the same composition as in the 1975 case again refused to follow *Re L* (the 1962 case) and Ormrod, LJ repeated his view that in such cases justice between parents is never simple, but is a highly complex question which can very rarely be answered satisfactorily, and then only after exhaustive investigation.<sup>30</sup>

On practical grounds there is much to be said for the Ormrod approach, since in most custody cases it would be quite impossible for the court to investigate the question which parent was responsible for the break-up of the marriage, and since 1975 what I have called the Ormrod approach has been consistently adopted by the courts. The sexual mores of a child's parents, at any rate so long as they are heterosexual in inclination, are unlikely now to affect the court's decision relating to the custody (or, as one should now say, residence) of the child. Some may take the view that this non-judgmental approach has played its part in the disintegration of family life from which society presently suffers.

Where a parent has formed a homosexual relationship, the effect of that on his or her rights of custody (residence) and access (contact) to the child or children has been the subject of many cases in the United States and Australia although, curiously enough, not many in this country. The American decisions, all in state courts, show a range of approaches to the problem. At one end of the scale is the approach

<sup>29</sup> [1977] Fam. 116.

<sup>30</sup> *In Re K. (Minors)* [1977] Fam. 179.

which holds that homosexuality gives rise to an irrebuttable presumption of parental unfitness. The middle ground is exemplified by a finding that it is not mere homosexuality which renders a parent unfit, but the presence of a homosexual lover or other evidence of active homosexuality in the home which creates an environment which cannot be in the best interests of the child. Under this approach, if the parent is otherwise fit, custody may be granted on conditions, for example, upon the parent refraining from living with or associating with his or her lover in the child's presence. The third approach contemplates that children can be placed in the home of an active homosexual, but that the parent's sexual practices are a consideration in relation to custody only to the extent that they are shown adversely to affect the child's welfare — i.e. harm is viewed as possible, but is not presumed.<sup>31</sup>

The Australian cases, of which there is a line from 1977 onwards,<sup>32</sup> have adopted the third approach; homosexuality is relevant only if it affects the parenting abilities or the welfare of the child. They have evolved a checklist of eight matters which will normally need to be taken into account.<sup>33</sup>

1. Whether children raised by their homosexual parent may themselves become homosexual, or whether such an event is likely.
2. Whether the child of a homosexual parent could be stigmatised by peer groups, particularly if the parent is known in the community as a homosexual.
3. Whether a homosexual parent would show the same love and responsibility as a heterosexual parent.
4. Whether homosexual parents will give a balanced sex education to their children and take a balanced approach to sexual matters.
5. Whether or not children should be aware of their parent's sexual preferences.
6. Whether children need a parent of the same sex to model upon.
7. Whether children need both a male and female parent figure.
8. The attitude of the homosexual parent to religion, particularly if the doctrines, tenets and beliefs of the parties' church are opposed to homosexuality.

<sup>31</sup> See 'Custody Determinations Involving the Homosexual Parent by Robert A. Beargie' (1988) 22 Family Law Quarterly 71.

<sup>32</sup> *In the Marriage of Spry* (1977) F.L.C. 90-271; *In the Marriage of O'Reilly* (1977) F.L.C. 90-300; *In the Marriage of Cartwright* (1977) F.L.C. 90-302; *In the Marriage of Brooke* (1977) F.L.C. 90-235; *In the Marriage of L.C. and M.R.C.* (1978) F.L.C. 90-518; *In the Marriage of P.C. and P.R.* (1979) F.L.C. 90-976; *In the Marriage of Schmidt* (1979) F.L.C. 90-685; *In the Marriage of Shepherd* (1979) F.L.C. 90-729; *In the Marriage of L. and L.* (1983) F.L.C. 91-353; *In the Marriage of Doyle* (1992) F.L.C. 92-286.

<sup>33</sup> *In the marriage of L. and L.*; *In the Marriage of Doyle* (supra).



The only English reported decision on this point of which I know is one where I was a member of the court. It is reported under the name of *C. v. C.*<sup>34</sup> and concerned the custody of a six-and-a-half year old girl. Her parents were divorced: the father had remarried; the mother, who had been a prison officer, had formed a lesbian relationship with an ex-prisoner and set up home with her. The county court judge who heard the case at first instance had held that in carrying out the balancing exercise to decide in which parent's home the child's welfare would best be advanced — the only legal test being that he should regard the welfare of the child as the first and paramount consideration — he need not give any significant weight to the existence of the mother's lesbian relationship, since it was common ground that even if the mother did not have custody of the child, she would have substantial visiting access, so that the child would not in any event be ignorant of the mother's lesbian relationship. We (Glidewell, LJ and myself), without the benefit of any reference to the American and Australian authorities which I only discovered when doing research for this talk, decided that the judge was wrong. The fact that the mother had a lesbian relationship did not of itself render her unfit to have the care and control of her child; in fact Mrs Justice Booth, who heard the case after we had allowed the appeal and remitted it for re-hearing, gave custody to the mother.<sup>35</sup> Nevertheless we were clear that the relationship could not be ignored. In the course of my judgment I said:<sup>36</sup>

... although the judge may not allow his subjective views to affect his decision on what the child's welfare requires, he cannot abdicate responsibility merely because the issue is a sensitive one on which differing views are held. What standards then should he apply if he is not to apply his own subjective views?

In my judgment, he should start on the basis that the moral standards which are generally accepted in the society in which the child lives are more likely than not to promote his or her welfare. As society is now less homogeneous than it was 100 or even 50 years ago, those standards may differ between different communities, and the judge may in appropriate cases be invited to receive evidence as to the standards accepted in a particular community, but in default of such evidence and where, as here, the child does not come from a particular ethnic minority, the judge is entitled, and

<sup>34</sup> *C. v. C. (A Minor) (Custody: Appeal)* [1991] 1 F.L.R. 223.

<sup>35</sup> *C. v. C. (Custody of Child) No. 2* [1992] 1 F.C.R. 206.

<sup>36</sup> [1991] 1 F.L.R. 230.

indeed bound, to apply his or her own experience in determining what are the accepted standards.

Glidewell, LJ said,<sup>37</sup> in a passage with which I agreed:

Despite the vast change over the past 30 years or so in the attitudes of our society generally to the institution of marriage, to sexual morality, and to homosexual relationships, I regard it as axiomatic that the ideal environment for the upbringing of a child is the home of loving, caring and sensible parents, her father and her mother. When the marriage between father and mother is at an end, that ideal cannot be attained. When the court is called upon to decide which of two possible alternatives is then preferable for the child's welfare, its task is to choose the alternative which comes closest to that ideal.

This decision attracted severe criticism from Professor Susan Boyd of Carleton University, Ottawa in an article entitled 'What is a "Normal" Family?'<sup>38</sup> In relation to the passage cited above from the judgment of Glidewell, LJ, Professor Boyd said:<sup>39</sup>

Underlying this passage is a strong assumption that in order for a home to be loving, caring and 'sensible', heterosexual members of the opposite sex, preferably married, must constitute it. The use of the phrase 'it is axiomatic' renders this assumption a 'truth' about which there is no need to explain or justify, despite the fact that this 'truth' is challenged factually by the increasing diversity of familial forms. For instance, unmarried cohabitation and single families are increasingly common in countries such as England, and it is increasingly obvious that many apparently 'normal' heterosexual families are fractured by violence and abuse. The ruling ideal of the heterosexual nuclear family remains very powerful nonetheless, and since men tend to remarry more often than women, they are more likely to be able to present an image of an 'ideal' family to a court.

My approach was criticised by Professor Boyd as follows:<sup>40</sup>

The ways in which such an approach inevitably privileges the entrenched morals of a class-based exclusionary society built upon sexist, racist and homophobic 'morals' are not even considered in such a statement. Like the axiomatic nature of the normal living environment for a child, as articulated above by Glidewell LJ, the link between a child's welfare and 'common morality' seems to be viewed as unchallengeable by Balcombe LJ.

I believe Professor Boyd was wrong in her criticisms of our decision,

<sup>37</sup> [1991] 1 F.L.R. 225.

<sup>38</sup> (1992) 55 M.L.R. 269.

<sup>39</sup> *Ibid.* at 272.

<sup>40</sup> *Ibid.* at 273.

since she appears to speak from a sincere, but committed, minority viewpoint. As I say later, the judges must be prepared to speak for the 'silent majority'.

A similar problem arose in a case heard by Scott Baker, J in 1992,<sup>41</sup> but only recently reported. A lesbian couple applied for a residence order in respect of an eight-month-old girl who had been placed with them from birth under an arrangement with the child's natural parents very similar to a surrogacy arrangement. There were many problems in that case — in particular the stability of the relationship between the lesbian couple and the mental health of one of them — but in regard to the homosexual nature of the applicants' relationship the judge said:<sup>42</sup>

The fact that they are lesbians does not, according to the evidence that I have heard, make it any less likely that the placement will succeed than if they were an ordinary heterosexual couple. . . . In my view the fact that they are lesbians adds one more dimension to the considerable difficulties with which this little girl will have to come to terms if she grows up in their household.

In 1976 the House of Lords had to consider homosexuality in the context of adoption.<sup>43</sup> The parents of an eight-year old boy were divorced, and the mother and her new husband (the boy's stepfather) applied to adopt him. The boy's father, who was an admitted and practising homosexual, refused his consent. The issue before the court was whether the father's consent was being unreasonably withheld. The county court judge took the view that, because of his way of life, the father had nothing to offer his son at any time in the future, and that therefore he was unreasonably withholding his consent. His decision was reversed by the Court of Appeal but restored by the House of Lords. The speeches make it clear that, while the father's homosexual way of life was a highly relevant factor on the facts of that case, homosexuality *per se* was not in itself a reason for depriving a parent of access to his or her child or for holding that such a parent was unreasonably withholding consent to adoption.

Finally on the subject of sexual mores I turn to the unpleasant subject of sado-masochism. The recent case of *R. v. Brown*<sup>44</sup> concerned

<sup>41</sup> *Re H. (Child's Circumstances: Direction to Investigate)* [1993] 2 F.C.R. 277.

<sup>42</sup> [1993] 2 F.C.R. 282.

<sup>43</sup> *In Re D. (Adoption: Parent's Consent)* [1977] A.C. 602.

<sup>44</sup> [1994] 1 A.C. 212.

a group of sado-masochists who willingly and enthusiastically participated in the commission of acts of violence against each other for the sexual pleasure it engendered in the giving and receiving of pain. The House of Lords was divided 3:2 on the question whether consent afforded a defence to charges of assault occasioning actual bodily harm, and wounding or the infliction of grievous bodily harm, under the Offences against the Person Act 1861. Both the majority and the minority considered the relevance of social attitudes. For the majority Lord Templeman said:<sup>45</sup>

Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.

Lord Slynn of Hadley, one of the minority, after quoting the submission of the DPP that in the end it was a matter of policy: were the courts right to adopt a paternalistic attitude as to what is bad or good for subjects, said:<sup>46</sup>

I agree that in the end it is a matter of policy. It is a matter of policy in an area where social and moral factors are extremely important and where attitudes can change. In my opinion it is a matter of policy for the legislature to decide.

## Children

Another area in which the courts have been conscious of changing social attitudes is in the right of a child to take decisions relating to his or her own person. *Gillick*<sup>47</sup> was concerned with the right of a girl under 16 to consent to contraceptive advice and treatment, and to the parents' rights and duties in respect of their child. In relation to these issues Lord Fraser of Tullybelton said:<sup>48</sup>

It is, in my view, contrary to the ordinary experience of mankind, at least in Western Europe in the present century, to say that a child or a young person remains in fact under the complete control of his parents until he attains the definite age of majority . . . and that on attaining that age he suddenly acquires independence. In practice most wise parents relax their control

<sup>45</sup> [1994] 1 A.C. 237.

<sup>46</sup> [1994] 1 A.C. 282.

<sup>47</sup> *Gillick v. West Norfolk A.H.A.* [1986] A.C. 112.

<sup>48</sup> [1986] A.C. 171.

gradually as the child develops and encourages him or her to become increasingly independent. Moreover, the degree of parental control actually exercised over a particular child does in practice vary considerably according to his understanding and intelligence and it would, in my opinion, be unrealistic for the courts not to recognise these facts. Social customs change, and the law ought to, and does in fact, have regard to such changes when they are of major importance.

Nevertheless there remain limits on the ability of a child, even one close to attaining the age of majority, to refuse medical treatment. In one case<sup>49</sup> the Court ordered the compulsory treatment of a 16-year old anorexic girl, when the evidence was that without such treatment she would probably die or, at the least, suffer permanent damage to her brain and reproductive organs. I apprehend that this was a decision which would be supported by the public at large — certainly press comment at the time was to that effect.

The adoption of children raises other problems besides the sexual proclivities of their natural or adopting parents. Thus there is the vexed question of trans-racial adoption. Although the courts have not yet been required to answer the direct question whether it is contrary to the interests of a black child to be adopted by white parents, they may well have to do so. Then there is the general question of what is an unreasonable withholding of consent to adoption by a natural parent. This poses particular problems where the child is already in care because of some failure on the part of the parent. If the failure is inability to give the child the standard of care necessary for its social and emotional development, and that is primarily attributable to the limited intellectual capacity of the parent, should that be a ground, not just for placing the child in foster care, but for making an adoption order irrevocably terminating the parent's legal relationship with the child? To me that has the flavour of social engineering. To some extent the whole nature of adoption is now being called into question by the issue, which is arising with increasing frequency, whether an adoption order should include provision for the child retaining some form of contact with its natural parent.

The court is given express power by the Adoption Act 1976<sup>50</sup> to attach a condition to an adoption order at the time of making the order, and that condition can include provision for continuing contact to the child by a natural parent. The House of Lords has determined

<sup>49</sup> *In Re W. (A Minor)* [1993] Fam. 64.

<sup>50</sup> Section 12(6).

the principles by which such an application should be determined.<sup>51</sup> In a recent case<sup>52</sup> the natural mother of a child applied, some two-and-a-half years after an adoption order had been made with no condition for continuing contact by her, for leave to apply for a contact order under the separate provisions of the Children Act 1989 and in support of her application relied on the changing attitude of society, as demonstrated by published research material, to the importance of the biological family even after an unconditional adoption order. Thorpe, J. rejected her application, saying:<sup>53</sup>

It may be that in this society changes are in progress in our understanding of what best should be done for children whose parenting is through the route of adoption, but such changes can only be expressed through statutory reform. Principles that determine this application must be drawn from current law and practice.

A final example from the law relating to children of a judicial decision reflecting changed social attitudes comes from the law relating to the 'kidnapping' of a child by a parent from one country to another. The Hague Convention on the Civil Aspects of International Child Abduction, incorporated into English domestic law by the Child Abduction and Custody Act 1985, requires that cases concerning 'kidnapped' children should be dealt with by the courts of the country in which they were habitually resident before the kidnapping. This requirement only operates as between countries which have ratified the Convention. Nevertheless our courts have accepted<sup>54</sup> that incorporation of the Convention into English law represents an acceptance by the legislature that the welfare of children generally requires that parental kidnapping should be actively discouraged and that the principles of the Convention should be applied, where practicable, as between this country and a non-Convention country which adopts the same jurisprudential approach to questions concerning children as we do. This represents a substantial change from the attitude previously adopted, which was that our courts would normally accept jurisdiction to hear a case about a child who was present in this country, notwithstanding that its presence had come about by a wrongful abduction of the child from its normal home overseas.<sup>55</sup>

<sup>51</sup> *In Re C.* [1989] A.C. 1.

<sup>52</sup> *Re C. (A Minor)* [1993] 3 All E.R. 259.

<sup>53</sup> [1993] 3 All E.R. 264.

<sup>54</sup> *In Re F. (Abduction: Custody Rights)* [1991] Fam. 25.

<sup>55</sup> *Re L. (Minors)* [1974] 1 W.L.R. 250.

## Other Examples

Apart from the field of family law, there are other areas where the court has based its decision on changed social attitudes, for example, the recent recognition of the tort of harassment by the making of pestering telephone calls.<sup>56</sup> However, time does not permit the citation and discussion of further examples.

## Judicial or Legislative Decision

The examples I have given, taken from recent case law, demonstrate that in many cases the courts cannot, even if they might prefer otherwise, refrain from forming a view on social or moral issues which may be highly controversial. Lord Devlin once wrote that 'if a judge takes sides on such issues as homosexuality . . . he loses the appearance of impartiality and quite possibly, impartiality itself'.<sup>57</sup>

In a later passage in the same lecture, Lord Devlin wrote:

Ideas about sexual behaviour have recently changed with abnormal rapidity and the common law is quite out of touch. Parliament is unlikely to do anything about it and, if the more stringent rules are administered as they stand, the fabric of the law will be damaged.<sup>58</sup>

After giving examples of changes in heterosexual mores he concluded that topics of this sort offered scope for useful judicial activism (as opposed to dynamism) without recognising the apparent inconsistency with what he had previously said. It seems to me that if a judge is faced with the question: with which of its divorced parents should a child live: with the father who has remarried or with the mother, who now has set up home with her lesbian partner? the judge cannot avoid taking sides to some extent. To say that the lesbian home of the mother is wholly irrelevant to the decision is just as much taking sides as it is to express a view on the issue. Much as I suspect most judges would prefer not to express a view on a controversial issue, they may be compelled to do so if this is necessarily an element to be taken into account in the exercise of the discretion which the law has conferred

<sup>56</sup> *Khorasandjian v. Bush* [1993] 2 W.L.R. 476.

<sup>57</sup> *The Judge* (Oxford, 1979), p. 5.

<sup>58</sup> *Ibid.* p. 13.

upon them. It cannot be right to say: I cannot exercise this discretion because this is an issue on which Parliament alone can rule.

It will thus be apparent that I disagree with the approach of Thorpe, J which I quoted above<sup>59</sup> on the subject of a natural parent's application for leave to apply for a contact order after adoption. I have no reason to disagree with his decision in the particular case — indeed I share his view that adoption orders are intended to be permanent and final, and that such a fundamental question as contact should not be re-opened unless there has been some fundamental change in circumstances. But if there had been such a fundamental change, and the judge were satisfied that the adopted child's interests required that there should be continuing contact with either or both of its natural parents — and, what is more, that on the practical level the adopting parents could cope with such contact without detriment to their ability to care for and protect their adopted child — it would not be a satisfactory answer to such an application to say that Parliament must first change the law.

I agree with Lord McCluskey's approach to the question whether the judiciary, or only the legislature, can make policy choices. As he said:<sup>60</sup> 'life throws up unforeseen cases, and either they or **changes in society's perceptions** [my emphasis] show that the rules are inadequate. So they are changed. The courts are the laboratory in which the rules are tested against reality and proved for social justice. We can trust the judges to do that.' Then, if Parliament — in this sense representing society as a whole better than does an unelected judge — does not like the interim choice which the judge has made, it can and should change the law and enunciate a final policy choice on the issue in question — final, that is, unless and until it is subsequently reconsidered by Parliament. The problem, of course, is that Parliament may not choose to tackle the problem, either because of lack of available time or because, one suspects, that some issues in the area with which I am dealing are politically unattractive, in that to legislate on the issue may lose the votes of those who are committed adherents to a particular viewpoint, while there are no votes to be won from the 'silent majority' who have no such commitment.

Having said that, I do accept that our Parliament is sometimes

<sup>59</sup> [1993] 3 All E.R. 264.

<sup>60</sup> *Law, Justice and Democracy*, the Reith Lectures 1986. Sweet and Maxwell BBC Books, p. 33.



willing to accept responsibility and to legislate for controversial new social problems. Thus the Human Fertilisation and Embryology Act 1990 does deal with the issue of surrogacy and defines the mother as the woman who carries the child, even though she may not be the genetic parent. The Supreme Court of California recently (May 1993)<sup>61</sup> had to consider this problem and decided by a majority that the genetic mother was the child's natural mother and that the woman who carried the child (the gestational mother) had no rights, thus confirming the decisions of the trial court and the Court of Appeal. The judge in the minority would have determined the issue solely by reference to the best interests of the child. All the judges in the Supreme Court made the point that the matter would have been better decided by the legislature, which was better equipped to take into account all the social issues and interests involved. However, as the legislature had not done so, and as both the genetic parents, and the gestational mother, were claiming the child as from the moment of its birth, the court had no option but, reluctantly, to decide the issue.

### The Available Material

Once one accepts that the courts may have to base their decisions on the view they take of current social attitudes on issues, however controversial those issues may be, then it becomes necessary to consider the material which may be available to the court to help it reach its decision. It is highly improbable that there will be direct evidence, in the shape of the results of a referendum, or of opinion polls, of what is the attitude of the public to a particular issue. It is noteworthy that, in all the cases to which I have referred, the judges made unequivocal statements about the attitudes of society to, for example, the institution of marriage or unmarried partnerships, without giving any indication of how they had reached their views as to those attitudes. Inevitably the judge's view will be formed in part by his or her own education and upbringing, in part by personal and professional experience, and in part by what he or she reads in the press or in books, hears on the radio, or sees on television. Where it cannot be said with any certainty that there is an overall consensus on a particular issue then the judge is faced with a difficulty to which there is no obvious answer. There

<sup>61</sup> *Johnson v. Calvert* 93 Daily Journal D.A.R. 6409.

are today many pressure groups which are adept in securing publicity for their particular viewpoints and, if one were to rely simply on the published material, it would be reasonable to assume that the views advocated had become generally acceptable. Thus, to revert to the case of a child whose parent has formed a homosexual relationship, my impression is that the publicity on behalf of those who take the view that a homosexual relationship is just as 'normal' as a heterosexual relationship far outweighs any publicity for the contrary view. Yet this is contrary to the teachings of all the established religions, to which many people still adhere, and it seems improbable that long-established and deeply held views — which their opponents would no doubt describe as prejudices — will change in the lifetime of a single generation. The 'silent majority' is, I believe, a reality and not just a cliché. Accordingly the judge may in the last resort have to rely on his or her own assessment of what is the current social attitude to any particular issue, and how far any changes in any previous social attitude to that issue may have gone.

That is not to say that there may not be material available to help the judge in his decision. There may be public documents which assist. In cases concerning children the United Nations Convention on the Rights of the Child may be relevant. There may be a Government White Paper or a Law Commission Report or Consultation Paper on the subject. Sometimes — as in the case of child abduction between non-Convention countries — existing legislation may give guidance by analogy, or at the least indicate trends in social development. Sometimes a similar issue will have arisen in other jurisdictions, and the judge may be helped by being referred to the way in which the courts of other countries have dealt with the problem.<sup>62</sup>

There may also be material which can help the judge evaluate the possible outcome of the various courses open to him. Thus, to go back to the case of the custody of a child with a homosexual parent — which was the case which first aroused my interest in the subject-matter of this talk — there has been research on the effect that an upbringing by a homosexual parent may have on a child. When *C. v. C.*<sup>63</sup> came before the county court judge in the first instance he was

<sup>62</sup> In one case on restraint of trade, the House of Lords relied on overseas cases in deciding that a 5-year tie of a garage to a particular brand of petrol was reasonable, notwithstanding that no evidence had been led specifically directed to that question: *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.* [1968] A.C. 269.

<sup>63</sup> *C. v. C. (A Minor) (Custody: Appeal)* [1991] 1 F.L.R. 223.

given no material to help him with this point, nor was any such material available to the Court of Appeal. However, on the re-hearing before Booth, J,<sup>64</sup> evidence of this kind was given by a psychiatrist instructed by the Official Solicitor as *guardian ad litem* of the child, and it is apparent from the report of the case that that evidence was of great assistance to the judge. The Australian case of *Doyle* in 1992<sup>65</sup> refers to some of the published research on this subject. The judgments in the surrogacy case in the Supreme Court of California which I have already mentioned<sup>66</sup> are interesting in the width of the material to which they refer, including the writing of legal commentators, a bill passed by the California legislature which never became law because of the Governor's veto, the constitutional rights of the surrogate mother, the decisions of the courts of other States, articles by medical commentators, some model legislation on the subject (our nearest equivalent would seem to be a draft bill published by the Law Commission) and much else besides. This case provides a good example of the difficulties faced by the court when the legislature fails to deal with new problems created by advances in medical technology.

However there are practical difficulties in ensuring that all relevant material is always made available to the court. As every judge knows, much depends on the skill and experience of the advocate if relevant background material is to be drawn to the court's attention. To call an expert — such as a child psychiatrist — is expensive, lengthens the hearing of the case, and may not be justified where the expert's only function is to refer to published research material which may already be known to the judge if he or she is experienced in the particular field.

## Judicial Training

I believe that those problems can best be met by the Judicial Studies Board training judges so that, while inevitably not being up-to-date in their knowledge of the research in a particular field, they may at least be aware of the availability of relevant material and be alert to ask counsel for help by the provision of that material. While the courts in

<sup>64</sup> *C. v. C. (Custody of Child) (No. 2)* [1992] 1 F.C.R. 206.

<sup>65</sup> (1992) F.L.C. 92–286.

<sup>66</sup> *Johnson v. Calvert* 93 Daily Journal D.A.R. 6409.

this country do not have the advantage of being supplied with a Brandeis brief<sup>67</sup> — which on issues of the kind I am now considering could be very helpful — we do have the ability to ask for the appointment of an *amicus curiae*, and certainly an appellate court should be ready to ask for such an appointment in cases of this kind where it is not confident that the parties have placed before it all the material that may be relevant for its decision. In the case to which I have referred concerning the compulsory medical treatment of a 16-year old anorexic girl<sup>68</sup> the court had the assistance of counsel as *amici curiae*, who referred the court to relevant American and Australian authority, as well as to academic publications.

It will be apparent from what I have just said that I am an advocate of appropriate training for judges. The day has passed — if it ever existed — when the court can be confident that in cases depending upon a change in society's attitude to a particular issue counsel will provide relevant background material, even if limited only to a citation of comparable cases from other jurisdictions. A judge would have to be particularly confident to feel able to say that not only does he or she know about (say) society's attitude to homosexuality, but also how a child may or may not be affected by being raised in a homosexual household. If — which is by no means always the case — the judge has had long experience in cases concerning children — he or she may have some relevant background knowledge, but it would be unsafe to rely on that. Of course judicial training cannot make a judge an expert in every relevant field. But it can alert the judge to the possibility that in cases of this nature — which are, after all, very infrequent, even in an appellate court — there may be material of the kind I have mentioned which could be relevant and helpful and at the very least to seek help from counsel to ensure that before the decision is made as much relevant material as may be available is before the court. I believe that recent experience of the work of the Judicial Studies Board has shown that Lord Devlin's fears that judicial training would turn our adversarial system into an inquisitorial system were unjustified.<sup>69</sup>

<sup>67</sup> For an explanation of the Brandeis brief see the Oxford Companion to the Supreme Court of the United States (Oxford, 1992), p. 85.

<sup>68</sup> *In Re W. (A Minor)* [1993] Fam. 64.

<sup>69</sup> *The Judge*, pp. 18 et seq.

## The Judicial Approach

But I have digressed. I believe I have shown that from time to time a court is faced with a case where it seems apparent that social attitudes have changed. It will, one hopes, have been provided with as much relevant material as may be available. How then should it approach the task of making its decision?

One of the problems in trying to answer this question is that English judges in their judgments rarely seek to explain the particular thought processes which have led them to reach their decision on matters of this nature. All too often there is no more than a brief reference to phrases like ‘changed social conditions’<sup>70</sup> or ‘the consensus of judicial opinion’.<sup>71</sup> With some hesitation therefore, I venture the following propositions:

**1** Judges should seek to give effect to community values and not to their personal beliefs. However, this is more easily said than done. Take for example the question of religion. While the Church of England remains the established church in England (although not in Wales), no one would today suggest that the tenets of that church alone represent community values in today’s pluralistic society. As I suggested in my judgment in *C. v. C.*,<sup>72</sup> where the question at issue relates to a particular ethnic minority, it may be that the judge will have evidence of the values of that community, but failing that he or she will have to try to ascertain what are the values which the community at large accepts. I believe that, although the number of persons who attend organised religious services in church or synagogue may have declined over recent years, the values expressed in the Old and New Testaments — what is sometimes called the Judaeo-Christian ethic — still represent the values to which the majority of persons in this country aspire, even if they do not always attain them.

**2** As I have already said, except in the case of a particular ethnic minority (and even then probably not), the court is unlikely to have direct evidence about community values or social attitudes. While the court may be helped with material of the kind to which I have mentioned — UN or European Conventions, legislation, government papers, overseas cases, academic writings — it will probably have to

<sup>70</sup> *Khorasandjian v. Bush* [1993] 3 W.L.R. 476, 481.

<sup>71</sup> *McLoughlin v. O’Brian* [1983] 1 A.C. 410, 432.

<sup>72</sup> *C. v. C. (A Minor) (Custody: Appeal)* [1991] 1 F.L.R. 223.

rely on the personal knowledge and experience of the members of the court. However, when trying to assess community values or social attitudes, the judge must be alert to the possibility that his or her views are not necessarily those of society at large. Because our judges are appointed from the ranks of lawyers who have practised with some degree of success, they are inevitably in middle or late middle age — even, dare one say it, elderly. Their gender, education, religion and social class, as well as the area of their professional expertise, whether in practice or on the bench, will also have played a part in the formation of their views. All this is but to state the obvious, but it is something of which the judge must be conscious when coming to a decision which is to be based on his or her assessment of social attitudes.

3 If and so far as the judge seeks to find a societal consensus, that consensus will normally represent existing social structures, on which society is based. It is not the function of the judge to try to reform society — that would be what Lord Devlin calls dynamism, and is clearly the function of the legislature. However, if the judge is aware of new trends, then he or she must try and see how far those trends are supported by society at large and not just by a vociferous minority. Perhaps I may give examples from the matters of sexual mores to which I referred earlier in this talk. I believe that heterosexual cohabitation outside marriage, although contrary to the tenets of most established religions, is now accepted by society. I do not believe that the same is yet true in relation to homosexual cohabitation, although it may be that attitudes are changing. In making these comments, I express no view of my own in relation to either type of relationship. I am well aware that those who do not accept that homosexual relationships should be treated in the same way as heterosexual relationships are described as homophobic. Homophobia is by some equated with racism: both are politically incorrect. I personally do not accept that equation. However, until Parliament passed the Race Relations Acts the courts were reluctant to condemn racial discrimination as contrary to public policy<sup>73</sup> and even today it is unlikely that a court would hold that religious discrimination is contrary to public policy. Now that Parliament has, by the Race Relations Acts, made it clear that society should not accept any kind of discrimination on the grounds of race, the courts should reflect that view even in those cases which do not fall expressly within the terms of the Race Relations Act. However,

<sup>73</sup> *Re Lysaght decd.* [1966] Ch. 191, 206.

Parliament has not passed any similar legislation in relation to homosexual conduct, save to de-criminalise homosexual relations between consenting adult males,<sup>74</sup> and I stand firmly by the view that the judiciary should not be in the lead in seeking to change social attitudes in this field. If this relegates me to the company of timorous souls then, in Lord Justice Asquith's famous phrase,<sup>75</sup> I must bear that consequence with such fortitude as I can command.

4 Although the courts should be seeking to reflect, and not to change, community values, they must be aware of the possible repercussions from their decisions. In the area of sexual mores in particular the recognition by the law of some change in social attitudes may have the result of accelerating the rate of change, with results that may not be foreseen and, when they occur, may not be generally welcome. In 1966 a group appointed by the Archbishop of Canterbury (which incidentally included Lord Devlin as a member) in a report entitled: 'Putting Asunder: A Divorce Law for Contemporary Society'<sup>76</sup> recommended that irremediable breakdown of a marriage should be the sole ground for divorce and this recommendation was followed — with some variations on points of both detail and substance — when Parliament altered the law in 1969.<sup>77</sup> The position in England today is that one in every 2.3 marriages ends in divorce,<sup>78</sup> with the consequent disruption in the lives of the children. I wonder whether the members of the Archbishop's group foresaw that this might be the effect of their recommendations and, if they had contemplated this possible result, whether their recommendations would have been the same. In like manner the Wolfenden Committee,<sup>79</sup> which recommended that homosexual conduct between consenting adult males should no longer be a criminal offence, made it clear that they neither condoned nor encouraged private immorality. But — as the Chief Rabbi said in his Warburton Lecture at Lincoln's Inn<sup>80</sup> this summer — experience has shown that it is false to assume that you can change the law while leaving morality untouched. As he said:

The extent to which changes in the law set in motion a wholly unforeseen

<sup>74</sup> Sexual Offences Act 1967, s.1.

<sup>75</sup> *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, 195.

<sup>76</sup> London, S.P.C.K. 1966.

<sup>77</sup> Divorce Reform Act 1969.

<sup>78</sup> August [1993] Fam. Law 446.

<sup>79</sup> Report of the Committee on Homosexual Offences and Prostitution. Cmnd. 247 of 1957.

<sup>80</sup> Not yet published.

series of developments can best be measured by the fact that were the authors of the Wolfenden Report to repeat today that certain sexual behaviours whilst not criminal are nonetheless sinful, they would find themselves banned from most British classrooms and American universities. The liberalisation of the law has led to an astonishingly rapid eclipse of the very idea that there are shared moral norms. What a mere generation ago was the cutting edge of radical liberalism would today be seen as the politically incorrect face of moral fundamentalism.

Although both the examples I have given are from areas where Parliament has changed the law, the courts must also be alert to the possibility that a recognition by them of changed social attitudes may have long term effects. Thus to go back once more to the case of *C. v. C.*,<sup>81</sup> if we had accepted that the mother's lesbian household was a 'normal' home in which to bring up a child, it would have amounted to a recognition by the Court of Appeal that society as a whole no longer considers that the normal home in which a child should be raised is one consisting of two married parents with their offspring. While I am aware that there is a strong and frequently expressed viewpoint that other familial forms — for example, the 'one-parent family' — are perfectly normal, I remain unconvinced that this is the view of society as a whole. I end this talk with another quotation from the Chief Rabbi's Warburton Lecture:

... we are in danger of finding ourselves having gone too far in abandoning the idea of society as a shared moral project and this will have tragic consequences for both our public and private lives. . . . We must have the courage to make judgments, to commend some ways of life and point to the shortcomings of others, however much this offends against the canons of our non-judgmental culture.

<sup>81</sup> *C. v. C. (A Minor) (Custody: Appeal)* [1991] 1 F.L.R. 223.