



BOND DISPUTE RESOLUTION NEWS

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Recent Activities of the Dispute Resolution Centre	Visitors to the Dispute Resolution Centre	Recent and Forthcoming Publications
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Recent Activities of Bond University Dispute Resolution Centre

6-9 April

Basic Mediation Course – held at the Sofitel Gold Coast, presenters, Professors Laurence Boulle and John Wade.

27-30 July

Basic Mediation Course – held at the Marriott Resort Surfers Paradise, Gold Coast, presenters, Professors Pat Cavanagh and John Wade.

Evaluation of course:

<http://www.bond.edu.au/law/centres/drc/feedback/GoldCoastJuly2006.pdf>

LAURENCE BOULLE

3-5 May	Presented opening keynote address at National Mediation Conference, Hobart, on a National Mediator accreditation System. See report below.
10-11 April	Attended members meeting of National Native Title Tribunal, Melbourne.
27-28 April	Conducted with Pat Cavanagh Conflict Management course for REIQ.
10 May	One day workshop for Residential Tenancies Authority for Australian Centre for Peace and Conflict Studies, University of Queensland.
27 May	Presentation on National Mediator Accreditation System at the Institute of Arbitrators and Mediators of Australia annual conference, Palm Cove, Queensland.
5-15 June	Conducted LLM <i>Mediation</i> course, with guest presentations from Professor Thomas Trenczek, Professor Nadja Alexander, John Spender QC, and Pat Cavanagh.

JOHN WADE

20 April-17 May	Negotiation training courses for Blake Dawson Waldron, Lawyers in Sydney, Melbourne and Brisbane
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14-20 June	Mediation and Arbitration training courses for Federal Department of Foreign Affairs and Trade in Beijing and Bangkok, together with Professor Jeffrey Waincymer from Monash University
11-13 August	Visit Woody Mosten in Los Angeles
14-19 August	Lead Five day mediation course at Southern Methodist University, Dallas Texas
28 August	Negotiation training for Freehills, Lawyers and clients in Sydney
30 August	One day conflict management workshop for Public Sector In-House Counsel, Hyatt Hotel, Canberra

Visitors to the Dispute Resolution Centre

- ▶ Professor Dr.iur. Thomas Trenczek, from Steinberg Institute for Mediation & Conflict Management Hannover Germany, 7 & 8 June 2006, presented at the LLM *Mediation* course.
- ▶ Assistant Professor Laurence Boo, Singapore Arbitration Centre, National University of Singapore, 10-26 July 2006, taught post-graduate course, *International Commercial Arbitration Law*.
- ▶ John Spender QC, Distinguished practitioner in residence, presented to *Mediation Masters* class, 12-16 June 2006.
- ▶ Professor Bengt Lindell, Uppsala University, Sweden, 20 June 2006 for two weeks.
- ▶ Henry Jolsen QC, Melbourne Solicitor and Barrister.
- ▶ John Zeleznikow, Victoria University, Melbourne, 28-29 June 2006, presented a workshop on *Online Dispute Resolution*.

Recent and Forthcoming Publications

Laurence Boule

Review of Bernadine Van Gramberg, *Managing Workplace Conflict – ADR in Australia* (2006) ADR Bulletin p 134.

Published chapter in 2nd edition of Vicki Wayne (ed) *Guide to Arbitration Practice in Australia* (2006).

Published article on “Law of Globalisation” in 2006 Legal Eagle.

Produced 3 issues of the *ADR Bulletin*.

National Mediator Accreditation System

At the National Mediation Conference in Hobart in early May this year delegates endorsed the establishment of a national system of mediator accreditation.

This endorsement was the result of a process commenced at the mediation conference in Darwin two years earlier which mandated the directors of National Mediation Conference Pty Ltd to use monies granted by the Attorney-General’s Department in

Canberra to investigate the feasibility of such a system. This was preceded by a NADRAC paper, "Who Says You're a Mediator?" which was issued in 2004, and also by innumerable mediator discussions on the topic over many years.

Between the two conferences a consultation was held involving written submissions and public forums in all capital cities. This process was facilitated by Laurence Boulle. During this process nearly 400 mediators and many organisations took the opportunity to be involved in developing the system.

The new system will allow mediators who wish to opt into it to be accredited to the National Mediator Standard (NMS) if they satisfy the requirements of the system.

Only Recognised Mediator Accreditation Bodies (RMABs) will be able to accredit mediators to the NMS. RMABs will be the bodies which satisfy the criteria set out in the new system, and in practice they will comprise the community justice programs, tribunals and agencies, and professional bodies and membership associations currently undertaking training, education and service-provision in mediation.

The conference set up an Implementation Body, broadly representative of the diversity of mediation practice in Australia, to establish the new system. This body is developing a number of specialist committees to fine-tune details of the system. Terry Austin from the Cairns DRC will be involved in the implementation body's activities over the next months.

One of the important functions of the implementation body will be to recognise existing bodies as RMABs and to establish criteria for those individuals who, on the basis of prior education, training and experience, will be given immediate access to the system. The implementation body will also develop Code of Conduct which will be binding on all mediators accredited to the NMS and the CPD requirements for continuing accreditation.

The Code of Conduct will be a basis for complaints and disciplinary action against accredited mediators. This part of the system is likely to be operated by the RMABs.

A final aspect to the system will be a national register of accredited mediators. This will provide basic information on those accredited to the NMS and will be accessible by potential consumers and the public.

Initially the system will feature only one level of mediator accreditation, though advanced levels may be added at later stages. It also provides for only a generalist accreditation, and again additional systems might be introduced in the future for those mediating in workplace, family, anti-discrimination or personal injury disputes.

The new mediator accreditation system is based on the principle of self-regulation of mediators by mediators. It does not entail any government involvement and will not require legislation to be given effect.

The system also does not constitute a licensing system. It will not be mandatory for mediators to obtain the accreditation in order to mediate in the diverse contexts of Australian mediation practice. It is essentially an opt-in system for those who wish to have a recognition in addition to that which they already possess and which is transportable across state and practice boundaries. However if public and private sector bodies begin requiring accreditation to the NMS there will be an inducement for practitioners to seek the qualification.

For further information on the system see www.mediationconference.com.au .

John Wade

August 2006 – Four chapters in Schneider and Honeyman (eds), *The Negotiator's Fieldbook* (American Bar Association: 2006).

Forthcoming with Jeffrey Waincymer, an article on *International Trade and Conflict Management* (Australian Government).

Forthcoming Courses of the Dispute Resolution Centre

Bond University Short Courses				
21-24 September 2006	Sheraton, Noosa	Short course – 4 days	Advanced Mediation Course	Boulle, Wade
12-15 October 2006	Melbourne	Short course – 4 days	Basic Mediation Course, in conjunction with Leo Cussen Institute. Phone 03 96023111 email: lpd@leocussen.vic.edu.au	Boulle, Wade
23-24 November 2006	Bond University, Gold Coast	Short course – 3 days	Advanced Commercial Negotiation Strategies	Cavanagh
30 November - 3 December 2006	Gold Coast	Short course – 4 days	Basic Mediation Course*	Boulle, Wade
* This course also has a Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators)				

View feedback from the recent course on the Gold Coast.

Thoughts and Themes

CYCLICAL CAUSES OF WAR

MYTHOLOGY TO REALITY AND AROUND AGAIN?


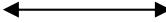
Chris Hedges suggests a cycle in human behaviour in relation to war – namely, the development or rediscovery of “mythology”, followed by the harsh “reality” of war, followed by collective amnesia, and more mythology etc.

Mythology of War		Reality of War
We are good/they are evil	↔	There is evil and good on all sides
We are conquering evil	↔	We are committing organised murder of innocents
We are helping the local freedom fighters	↔	We are arming local gangsters and drug lords
Our young men are glorious warriors	↔	Our young men are confused, corrupted, expendable and maimed pawns
The media reports the “truth”.	↔	The media profits magnificently from the advent of war and then makes less from emerging mutual atrocity
The country is unified against outside evil	↔	Evil lies within also
Dissenters are unpatriotic and must be silenced	↔	The dissenters are an embarrassment. They remind us of our failures.
Smell, music, sights and sounds of war are glorious	↔	The stench and horror of organised industrial murder
Lies are a necessary strategy	↔	Lies are lies; we have been conned again.
We sacrifice together	↔	Only some sacrifice; others are safe and make fortunes
We will start and finish the war when we want and when we “win”	↔	Starting is easy; but we cannot get out
Human rights and respect can be suspended in an emergency	↔	Once suspended, escalated mutual atrocity is morally OK
We want to make things better	↔	We seem to have made things worse
We are momentarily violent for good	↔	Constant hate of other races and tribes gives us meaning and unity

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Our soldiers will be heroes	←→	Our soldiers will be derelicts or dead; our leaders will write books
Our soldiers will recall the glory	←→	Many soldiers will be too ashamed to speak, except about camaraderie
We will bring the criminals to account	←→	We have become criminals; are we to be tried now? The criminals are now our trading allies
There will be some unfortunate collateral damage	←→	We intentionally murdered as many civilians as we could
We are avenging historical wrongs (cultivation of “victimhood”)	←→	We have no idea why we are here. Everyone can find a reason to be a victim.
Good men go to fight for justice	←→	War becomes a business opportunity for the dregs of society
We kill with reluctance	←→	We kill, torture and mutilate with delight
We must all use the right language (“brave; heroic; war against terror; freedom fighters”)	←→	We have been deceived again; we learn for a short moment: “never let this deception happen again”
We are helping the freedom fighters	←→	We are helping mass murderers
We will support our brave young soldiers	←→	Our economy can no longer afford to support these emotionally dependant people
The dead will be buried with honour	←→	The body pieces cannot be found, especially of the civilians and children
Fight for country, freedom and justice	←→	Look after your immediate soldiering comrades, as we all live and die in fear
An outbreak of flags, delight, emotion, ceremonies, patriotism, nationalism, praise of mythical heroes, passion, friendship, church, social solidarity, conversation, collective amnesia, intoxication	←→	A need to hate someone, or anyone (“find me a new enemy”) in order to give meaning to “ordinary” life.

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Don't confuse us with facts; everything is clear; the media is patriotic and responsible		Messy facts keep slipping out; nothing is clear anymore. The media was sycophantic, conformist, lazy and greedy
Collective amnesia, collective euphoria and collective kitsch (where are the memorials to the dissenters?? And to the innocent civilians killed??)		Momentary wake up to various "realities"; then embarrassment by the self-insight and self deception; recreate a new amnesia and mythology around "support the troops" and "lest we forget" (what are we trying not to forget?); and heroic Hollywood war movies

(See C. Hedges *War is a Force that Gives Us Meaning* (NY: Anchor, 2003); abacus by John Wade)

ARBITRAL DECISION MAKING IN FAMILY PROPERTY DISPUTES – LOTTERIES, CRYSTAL BALLS, AND WILD GUESSES

John Wade*

Outline

240 expert family lawyers in Australia, acting as arbitrators, wrote judgments/awards on an identical set of facts. These decisions varied dramatically in outcomes. This paper describes the process and varied outcomes. It then discusses why the consistently diverse range of outcomes caused such grief for these experts; what are the possible explanations for these diverse outcomes; and what are some possible implications if expert decision-makers consistently reach such diverse decisions?

Introduction – Historical Background

In 1991, a group of people associated with the Dispute Resolution Centre at Bond University were invited by the Law Council of Australia to design a three-day training course for arbitration of family property disputes.¹

The designers attempted to follow adult learning theories and used learning ideas from the successful mediation courses run through the Dispute Resolution Centre at Bond University.

The family arbitration course has since been held on nine occasions around Australia and over 240 of the most respected and “expert” family law specialists in the nation have attended.² Many hoped to become family arbitrators, or to participate in family arbitrations as legal representatives, due to legislative developments in that field in Australia in 1990s.³

The Decision-Making Exercise

One of the learning modules at each of the nine arbitration courses required each family lawyer participant to write a judgment overnight on a set of facts which were given to each person at the end of the second day of training. This exercise replicated a budget arbitration-on-the-papers, which was predicted to be the most popular form of family property arbitration, particularly for poor and middle-class families in

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¹ The group included Professors John Wade, Laurence Boulle and Bobette Wolski, lawyers Rick Jones and Phil Theobald, and Sartaj Gill. Phil provided the original inspiration – see Family Law Council, *Arbitration in Family Law* (Canberra: AGPS, 1988). See also now Catherine Morris, *Arbitration of Family Law Disputes in British Columbia* – a paper prepared for the Ministry of Attorney General of British Columbia, 2004.

² Trainers have included Laurence Boulle, John Wade, Bobette Wolski, Phil Theobald, John Hertzberg, John Dorter, Bill Westbrook.

³ See J.H. Wade, “Arbitration of Matrimonial Property Disputes” (1999) 11 *Bond Law Review* 395-434 for a background and analysis to the legislative reforms in Australia.

Australia. (In reality, on-the-papers arbitration is unlikely to blossom until successful pilot projects are funded by Legal Aid offices around Australia.)

These are the instructions attached to this exercise. The facts in the problem were the same in each of the nine courses, though dates of events were adjusted to make the family separation occur close to the date of the course.

“AWARD WRITING – FRED AND MABEL

- (i) You have been appointed arbitrator in a budget “paper” arbitration. The attached two submissions from Fred and Mabel have been faxed to you together with an “arbitrator’s fee” of \$400.
- (ii) You are leaving for overseas this afternoon and the parties want an immediate result (reasons for the judgment are to be given).
- (iii) If more time and money to pay you and the legal representatives and/or valuers were available, what (i) extra steps and (ii) extra information would you have liked?”

In summary, the facts of the case involved a nine-year marriage between Fred and Mabel; three children residing with the mother; and a pool of assets valued between \$80,000 and \$92,000 to be divided between the husband and wife. The actual copies of the submissions faxed to each arbitrator are attached to this paper as Annexure “A”.

The participants wrote their judgments and reasons overnight, and handed these in at 9am on the third day of the course. The vast majority of the over 240 judgments conformed with judicial style of writing and the majority were model judgments *in form*. This occurred presumably because of the expertise of the nine groups as family lawyers, and some guidance on form of judgment writing in the course materials.⁴

An example of the high standard of judgment writing from these courses is attached to this paper as Annexure “B”.⁵

Two members of the training team (often John Hertzberg and another) then took two hours to compile the *substantive* results of each group of participants, and to compare these. A written summary of decisions was then distributed, explained and a discussion session followed.

This exercise provided a rare opportunity for over 240 expert family lawyers to make a considered decision in writing on an identical set of facts. The results uniformly were controversial, not predicted, and shocking for each group of experts.

The Arbitral Awards

On nine occasions, these groups of experts, using identical facts, reached decisions which were apart by at least 30%. On all but one occasion they were apart by 35%. That is, some arbitrators gave the husband 25%, and others gave him 60%. Conversely, the wife received anything between 75% and 40%.

Example Awards – Course “A”

Set out below is a summary of the 22 judgments at one arbitration course, labelled Course “A”. This was the course with the tightest bunching of judgments. The left-

⁴ eg see *Whiteley and Whiteley* (1996) FLC 92-684 (Full Court of the Family Court describes how to write a judgment).

⁵ One participant, clearly unsuited to the arbitral role except for selected artistic clients, wrote his judgment as doggerel poetry – see Annexure “C”.

hand column represents the arbitrators' decisions on which valuation to accept, and the middle column what percentage division to use. The third column represents the arbitrator's actual cash award to the wife, Mabel. The third column, which shows the actual cash award, also indicates that occasionally there are puzzling discrepancies between the percentage division allegedly applied, and the cash award actually made. Most lawyers are not mathematicians.

COURSE A

FRED (F) AND MABEL (M) – CASE SCENARIO

SUMMARY OF ARBITRAL JUDGMENTS – COURSE “A”

Which valuation?	What percentage? F : M	What cash payment to Mabel?
M	60:40	\$40,000
M	50:50	\$36,000
M	45:55	\$40,600
M	47:53	\$38,500
F	30:70	\$38,500
Split	50:50	\$30,500
None	25:75	\$40,000
F	35:65	\$40,000
F	40:60	\$38,000
F	36:64	\$59,000
M	40:60	\$38,000
F	30:70	\$54,400
F	45:55	\$30,250
F	40:60	\$38,000
Split	50:50	\$31,500
F	40:60	\$38,000

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M	56:44	\$30,000
M	35:65	\$49,800
M	46:54	\$40,000
M	46:54	\$40,000
F	40:60	\$38,000
M	46:54	\$40,000
M	45:55	\$40,200
M	35:65	\$49,800
M	40:60	\$45,000
Split	50:50	\$33,000
F	50:50	\$30,000

SUMMARY – COURSE A

Mabel’s valuation accepted by 14 decisions; Fred’s valuation accepted by 8 decisions	Mabel received between 40% - 75%; Fred received between 25% - 60%	Mabel received between \$30,000 and \$59,800
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Nevertheless, in this course A, there is a considerable bunching of cash outcomes between \$38,500 - \$40,000. Fourteen out of twenty two judgments come within this narrow band. That is, from this group of arbitrators, there was a 63% chance of receiving a “consistent” result, and a 37% chance of receiving an outcome outside this majority band.

Of course, 63% “consistency” does not indicate either predictability or a client’s perception of “justice”. But nevertheless, consistency is one important element of predictability, and of “justice”.

Upon analysis, these 22 outcomes indicate a greater degree of consistency than is anecdotally attributed to judges by legal practitioners in Australia by the saying - “six different judges, six different results.”

Example Substantive Results – Course “B”

Again, set out below are the 20 tabulated arbitral decisions from another course, labelled course “B”.

COURSE B

FRED (F) AND MABEL (M) – CASE SCENARIO

SUMMARY OF ARBITRAL JUDGMENTS – COURSE “B”

Which valuation?	What percentage? F : M	What cash payment to Mabel?
M	30:70	\$54,000
M	40:60	\$42,000
F	69:31	\$25,000
Split	30:70	\$51,600
Neither; value determined by ordered sale	15:85	
M	49:51	\$37,500
M	40:60	\$43,000
F	25:75	\$40,000
M	50:50	\$36,000
M	43:57	\$42,300
F	45:55	\$34,000
F	45:55	\$34,000
F	39:61	\$38,500
M	40:60	\$45,200
Split	40:60	\$40,000
M	42.5:57.5	\$41,000
F	40:60	\$35,000
M	46:54	\$40,000
M	30:70	\$54,000
F	42:58	\$36,500

SUMMARY – COURSE B

<p>Mabel’s valuation accepted by 10 decisions; Fred’s valuation accepted by 7 decisions; 2 arbitrators split the difference; One determined value by ordering a sale</p>	<p>Mabel received between 85% - 51%; Fred received between 15% - 49%</p>	<p>Mabel received between \$25,000 and \$54,000</p>
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In course “B”, there was a “bunching” of only six decisions between \$40,000 and \$43,000 – that is, only 30% of the awards were “consistent”. The remaining 70% were more scattered across a good day – bad day range of 34%.

These 20 neophyte arbitrators indicated that predicting an outcome is indeed a “lottery”.

The Grieving Process – 240 Loose Cannons?

For experienced family lawyers, the outward consequences of experiencing “wild” collegial decision-making have been many. These arguably reflect the grieving process, and the “loss” of beliefs of collegial competency and precision.

Shock. There is a numbing silence when the tell-take systematic table of scattered outcomes is uncovered on a white board.

Denial. A number of participants begin to challenge: “You must have made a mistake”; “That cannot be correct”; “Strike off the two/four/six most extreme results and see if we are then closer to agreement”. That is, get rid of the crazy minority, and the myth of expert wisdom and rationality will be reinstated. These excisions have never narrowed the divergence markedly.

Sadness. “This outcome is very disturbing, we are worse than our judges”; I could never trust anyone here as an arbitrator for one of my clients”.

Anger. “What a stupid exercise, it did not prove anything”; “You must be wrong; no judge would ever reach a decision like that”; “You must be from Adelaide – the practice in Melbourne is different to out in the colonies”.

Collegial Comfort. “Who are the other people who made a decision close to mine”. Once similar-deciders are identified, lunchtime conversations have been overheard – “I think that we have similar thinking, Mary, perhaps we could cross-refer arbitration cases? We would obviously have confidence in one another.”

Acceptance. A small minority of the expert participants in these training courses make anecdotal comments during debriefings which indicate their acceptance of this perceived disturbing divergence in their own expert decision-making. “So, I guess that the judges are not so flawed after all”; “It is going to be difficult to find an arbitrator in whom we have confidence”; “It is a shock to discover that we are not as good as we thought”.

It appears to be easy to discover flaws in the decision-making process of other people, but not so easy to discover starkly and experientially that our own decision-making process is so unpredictable.

Of course, there are possible explanations, or guesses, to understand the divergence of outcomes in these expert groups. These will be considered later in this article.

Shattered Myths?

Why has this decision-making exercise caused such grief and shock amongst expert family lawyers?

One possible hypothesis to explain the grief and shock is that the *experience* has undermined or even shattered beliefs and mythologies. As experiential learners, arguably the majority of lawyers are untouched by sociological and psychological insights contained in books. Thus decision-making theory is neither accessible, or of interest, or even “true”. Lawyers learn swiftly by personal and collegial pain and story-telling.

Anecdotally, the writer suggests that experienced family lawyers share the following seven beliefs:

- (1) We can estimate the outcome (or “value”) of a family property dispute within a 10% range of accuracy.
- (2) In more than 90% of disputes, we can estimate the outcome (or “value”) of a family property dispute within a 10% range of accuracy after only *one* interview with our client. That is, a small number of key alleged facts provide the key to decision-making. Fine-tuning by collecting many “extra” facts rarely changes the predicted range of outcomes.
- (3) So long as the other spouse consults one of our experienced colleagues, property division will resolve by agreement as our experienced colleague shares beliefs (1) and (2) above.
- (4) Experienced family lawyers will, by a process of education and persistence,⁶ eventually persuade their clients to settle within the 10% range which they have predicted.
- (5) When dealing with an experienced family lawyer, there may be some delay in settling a dispute. However, this does not normally arise because the practitioner has made a “mistake” in deciding upon the 10% range of outcomes of the dispute. It arises from other factors such as an emotional client who is “difficult” to educate and control; or the need to collect extra facts or evidence which could occasionally lead to a revision of the originally “correct” decision and advice.
- (6) It is inefficient for a client to consult an inexperienced family lawyer as they will be likely to give a predicted judicial outcome which is outside the experienced practitioners’ 10% range.
- (7) Inexperienced family lawyers are a key cause of conflict as they give clients flawed expectations by predicting outside a “standard” 10% range; or they delay giving accurate predictions until unnecessary time and money has been expended collecting the ubiquitous “more facts”.

All seven of these beliefs are questioned, if not shattered, by this decision-making exercise. This revelation, momentarily, and perhaps permanently, undermines self-confidence, the concept of “expertise”, confidence in colleagues, thousands of

⁶ A. Sarat and W. Felstiner, *Divorce Lawyers and Their Clients* (New York: OUP, 1995).

decisions made in the past, habitual language used (eg “This is the range”; “You are entitled to...; “That advice is wrong”; that is a “mistake”), and the concept of “knowledge”.

What are Possible Explanations for this Diversity of Decision-Making Outcomes?

The shock of experiencing first hand such divergent arbitral decisions has encouraged attempted explanations or rationalisations. Is this “normal” divergence? Or are there “special” factors present which make the scatter-gun outcomes exceptional?

Normal Diversity?

It is possible that this degree of divergence in substantive outcomes of family property division, even between experts, is quite statistically “normal”.

There is a considerable body of knowledge and research which suggests that we as (expert) human beings, are hard-wired to make unpredictable decisions.⁷ This knowledge has, until the last decade, been missing from law libraries and the lawyers’ canon of rationality.⁸

What is unusual is to have nine large gatherings of experts in one field, who then make considered written decisions upon identical facts. If such gatherings of experts could be organised regularly in many fields of law, or in other kinds of decision-making, then similar results may follow. That would be an interesting body of research which may additionally change some people’s behaviour by the actual process of participation.

To repeat, diverse outcomes may be normal, whereas the opportunity to observe and personally experience diversity in a repeated and structured format, is abnormal. “I always knew that, but now I really know that.”

If such diversity of decision outcomes between experts is normal, the vast majority of the 240 participants did not perceive it to be normal. Somehow, through decades of legal practice, they had preserved the belief in self and other expert colleagues, that expertise and experience would produce common thought patterns, reasoning and outcomes within a narrow 10% range.

How were such strong beliefs in the certainty of expertise and rationality held for so long among so many lawyers? What psychological and sociological factors foster such a delusion about the power of rationality? Anecdotally, lawyers are quick to see inconsistency among clients, judges and other inexperienced lawyers.⁹ However, these exercises compelled participation which indicated *personal* inconsistency with respected peers. Lawyers do not like to make “mistakes”, and yet these exercises seemed to indicate that the majority of experts were making “mistakes” (and had been making them for decades).

⁷ J.S. Hammond, R.L. Keeney and H. Raiffa, *Smart Choices – A Practical Guide to Making Better Decisions* (Boston: Harvard Business School Press, 1999); S. Plous, *The Psychology of Judgment and Decision Making* (New York: McGraw-Hill, 1993).

⁸ The writings of the legal realists in the USA in 1920s and 1930s reflects the passing influence of psychological studies upon lawyers’ beliefs and behaviours; eg see J. Frank, “Facts are Guesses” in *Courts on Trial* (1949) ch 3; W. Twining, “Taking Facts Seriously” (1984) 34 *J of Legal Education* 22. See the very helpful A Kapardis, *Psychology and Law* (Cambridge UP, 2003).

⁹ See Sarat and Felstiner *supra* note 6.

Surely, the principle of predictable unpredictability being extracted from the arbitration exercises must be wrong, or “distinguishable”?

Exceptional Diversity?

As the consistently inconsistent outcomes of the arbitration exercises were so shocking to the orthodox beliefs of expert family lawyers, it is important to hypothesise on why these results may be exceptional, unusual, abnormal and misleading. These hypotheses may be delusionary rationalisations to placate orthodoxy; or may indeed help to explain an exceptional situation. Here are some of the factors which may distinguish this situation and preserve orthodox faith in the accuracy of expert decision-making:

(1) Wide Statutory Discretion

These experts were applying vague statutory criteria under section 79 of the *Family Law Act 1975* (Cth). These criteria amount to a “shopping list” of factors which are common to discretionary family property systems around the world. Even though there is thirty years of case law to give some backbone to this flab of discretion, it can be argued that vague rules will always lead to a range of results. That is, all lawyers have this “handicap” of unpredictability where the rules contain vague discretions and unranked statutory shopping lists of “factors”. Such vagueness is particularly present in disputes about succession, taxation, family property, unconscionable contractual dealings, certain torts and discrimination.

(2) Destabilising Fact(or)s

In family property disputes in Australia and elsewhere, there are a number of fact patterns or family “types” where the range of percentage outcomes arguably remains even more unpredictable than “normal” unpredictability. These include family property disputes which involve low value assets, high value assets, pre-marriage contributions, inheritances, damages awards, lottery wins, alcoholism, drug use, physical injury, and low asset – high earning capacity.¹⁰ These “exceptional” fact patterns may occur in the majority of Australian families, thereby rendering them “unexceptional”.

(3) Low Asset Cases – Scarcity of Precedent

Although the facts used were based on a frequent pattern or “type” of family, it involved distribution of assets valued below \$100,000. Such disputes are hardly ever litigated, let alone reported as precedents. Thus (it can be argued), even the experts who settle these types of disputes regularly, have little case-law to guide them towards more uniform results. This hypothetical argument was consistently undermined at the arbitration training courses as the 240 participants also wrote several short judgments on anonymous (but reported) fact patterns. Over 30% diversity in the range of outcomes was again normal.

(4) Diverse “Settlement Laws”

Over 95% of family property disputes in Australia which become visible by filing in a Court, are settled by negotiation, mediation or abandonment between disputants, often assisted by lawyers. When settling cases, mediators, registrars and lawyers apply principles of local “settlement law”. These rules of thumb or “going rates” differ from

¹⁰ For ‘normal’ unpredictability, see P Parkinson, “Quantifying the Homemaker Contribution in Family Property Law” (2003) 31 *Federal Law Rev* 1.

city to country, and state to state in Australia. These divergent “settlement laws” are statistically far more important than judge-made law, and are sometimes strangely resistant to “official” versions of law coming from above.

Accordingly, these national gatherings of family law experts may have been applying their local, and *different*, settlement laws to reach different outcomes.

(5) More Facts

These experts made their decisions based on six pages of summarised facts, evidence and argument. Perhaps the wide range of outcomes would have narrowed with more documents and more face-to-face questioning? Where the documents submitted for an arbitration on the papers are clumsy, rambling or leave out “key” factors, then more evidence and discussion would undoubtedly be helpful. Garbage in – garbage out.

However, in the actual exercises, very few wanted any more information, and most commented that the information exceeded in content and clarity what would normally be available when legal advice is given initially.

(6) More Practice

Anecdotally judicial friends tell me that it took them about four years of practice and feedback to become comfortable and confident in their role as judges.

The socialisation process toward certain degrees of conformity had scarcely begun with the expert family lawyers who attended the arbitration training courses. (Though a number were very experienced registrars or arbitrators in other fields of dispute).

Accordingly, it could be argued, (though no-one did!), that the diversity of outcomes would narrow from say 30% to 15% with the passage of time, practice, peer feedback and appellate reprimand. Again, if this interesting “conformity” hypothesis is “correct”, by anecdote or research, it would restore some confidence in the greater degree of predictability of the college of judges.

(7) Modification by Market Forces?

Another possible explanation for the wide diversity of outcomes, is that these role-playing arbitrators were not subject to the normal market pressures of keeping repeat and paying customers satisfied. That is, a practising arbitrator is consciously or subconsciously aware that both parties can bring future business, and so tries to find a result which will “give everyone something”. This is one of the standard critiques of arbitrators (and sometimes judges also), namely that they tend to split the difference between two extreme claims – or divide the assets, and then refuse to award costs to the perceived “winner”.

Role-players may feel freer to decide upon their perception of “justice”, without the modifying market pressure to keep both “customers” satisfied.¹¹

Possible Implications of Diverse Outcomes?

What are some of the possible implications from these diverse outcomes for (expert) family lawyers? There are many. Six of these are set out below.

- multiplying “error” rate of decisions made by experts in isolation

¹¹ V. Aubert, “Competition and Dissensus: Two Types of Conflict and Conflict Resolution” (1963) VII *Conflict Resolution* 26, 39-42.

- doubt-creation by story telling
- sheltered denial – the missing spot lights
- legal education revisited
- arbitration demythologised
- the reform pendulum between discretion and rules

(1) Multiplying “Error” Rate of Decisions Made by Experts in Isolation

When family lawyers “make decisions” in isolation, that is, give advice to clients, then the likelihood of the range of outcomes spreading even further multiples dramatically. If they decide across a 30% range while arbitrating-on-the papers, then it can be hypothesised that the range will expand in some fact situations by at least another 10% when experts give advice in isolation. Additionally, any “bunching” within the range will diminish. Why? Because so many extra well-documented variable pressures on decision-making come into effect in the normal daily practice of (family) lawyers when making decisions. The following table illustrates these variables.

Where a Lawyer's Decision (Advice) is Based on Client Interviews:	Where a Lawyer's Decision is based on Arbitration on the Papers:
1. Client gives only one initial version selected "facts" and perceptions (garbage in – garbage out). ¹²	1. Both clients give summarised, written, facts and evidence at the same time.
2. Initial "facts" and perceptions presented are jumbled by each client.	2. Both clients give summarised, written, facts and evidence at the same time.
3. Lawyer selectively hears only some facts. ¹³	3. Lawyer-arbitrator has no contact with client or oral presentations; lawyer-arbitrator uses reading and wordsmith skills.
4. Across town, the other client is giving another vastly different set of "facts" and perceptions to another set of lawyerly ears. ¹⁴	4. Both clients give summarised, written, facts and evidence at the same time.
5. Lawyer is influenced by emotional transference from clients.	5. No living clients are present; emotional transference is reduced by cold print and immediate printed rebuttal.
6. Initial facts and perceptions of the client are not converted initially into legal categories.	6. Submissions to the arbitrator contain at least some conversion into legal categories.
7. Initial advice is <i>not</i> experienced in a disciplined document which balances each argument and counter argument.	7. Initial advice is expressed in a disciplined, ritualised form of judgment writing.
8. Advice influences whether lawyer will be hired and paid.	8. Arbitrator's fees are payable no matter what is the decision.
9. Advice is influenced by reactive devaluation towards the history of offers already made by "the other side".	9. Arbitrator has no knowledge of the history of offers; nor is there an "opposition" to react to.
10. Advice of lawyers tends to be "overly optimistic" towards their own clients. ¹⁵	10. Arbitrator is influenced by pressures to make wise decision in the face of precedent; avoid judicial overruling; find middle ground to "satisfy" all interests.

¹² P. McDonald (ed), *Settling Up: Property and Income Distribution in Australia* (Melbourne: Prentice Hall, 1986).

¹³ A. Sherr, "Lawyers and Clients: The First Meeting" (1986) 49 *Modern Law Rev.* 323.

¹⁴ McDonald *supra* note 12.

¹⁵ J.H. Wade, *Representing Clients at Mediation and Negotiation* (Bond University, 2000) p 189.

<p>11. Experts giving advice in isolation tend to fall into the <i>overconfidence</i> trap.¹⁶</p>	<p>11. Any expert overconfidence on the part of the arbitrator is qualified by the immediate visibility of written, summarised conflicting facts, perception, evidence and claims.</p>
<p>12. Then the lawyer is subject to the normal trap of finding evidence over months or years to <i>confirm</i> what (s)he has already spoken/written/advised.¹⁷</p>	<p>12. Any expert overconfidence on the part of the arbitrator is qualified by the immediate visibility of written, summarised conflicting facts, perception, evidence and claims. Also the arbitrator on the papers will receive no further evidence; and is part of a decision making culture which cognitively tries to “suspend judgment”, till everything has been read (or heard) in the very short time frame available.</p>
<p>13. Then the lawyer consciously or subconsciously frames the claim and version of events favourable towards his/her client to provide a starting point in predicted negotiations.</p>	<p>13. An arbitrator’s decision does not serve the extra purpose of commencing negotiations, or of providing a starting point from which concessions can be made.</p>
<p>14. Because expert lawyers tend to work in relative isolation, their non-publicised (often initially oral) advice is not subject to peer review or accountability.</p>	<p>14. The expert arbitrator’s decision is under the spotlight of being fully written, vigorously analysed by clients and lawyers, and perhaps on appeal by a public judge. Additionally, there is pressure for the decision to be so impressive that the arbitrator will be hired again, preferably by <i>both</i> referring lawyers, and by other lawyers, who gossip constantly about the competence of various service-providers.</p>

To repeat, it is reasonable to hypothesise that all these extra well established variables will create even wider diversity, and less bunching, in the advice (decision-making) of expert family lawyers. Accordingly, it should be no surprise that some lawyers begin negotiations with such wildly divergent advice and claims, other than as a conscious bargaining tactic. This is not a counsel of despair, rather of humility and caution.

¹⁶ Hammond *supra* note 7.

¹⁷ *Ibid.*

(2) Doubt-creation by story-telling

Some lawyers who attended the various family arbitration courses over 10 years now use the results of this exercise (and other similar decision-making exercises conducted at the course), to create doubt and lower expectations during negotiations and mediations. They have another story in their repertoire. “Mary, how can you be so confident of that percentage? Did you know that when you give an identical fact pattern to 24 expert family lawyers, their predicted outcomes are more than 30% apart? I saw it happen before my very eyes. On that evidence, your client’s predicted good-day bad-day range should be 30% apart” etc. This is life imitating role-playing from role-playing which was imitating life.

Lawyers rarely use statistics or “controlled” experiments to establish a “truth”. Much to the despair of our more disciplined scientific colleagues, we prefer anecdote and story-telling from which to abstract “truth”.¹⁸

This is especially so, if the anecdote and abstraction comes from a judge. Thus some mediators and negotiators give the following quote to lawyers who appear to be over-confident about the precision of their own decision-making and crystal ball gazing abilities.

“[1]....it is often impossible to predict the outcome of litigation with a high degree of confidence. Disagreements on the law occur even in the High Court. An apparently strong case can be lost if evidence is not accepted, and it is often difficult to forecast how a witness will act in the witness-box. Many steps in the curial process involve value judgments, discretionary decisions and other subjective determinations which are inherently unpredictable. Even well-organized, efficient courts cannot routinely produce quick decisions, and appeals further delay finality. Factors personal to a client and any inequality between the client and other parties to the dispute are also potentially material. Litigation is highly stressful for most people and notoriously expensive. An obligation on a litigant to pay the costs of another party in addition to his or her own costs can be financially ruinous. Further, time spent by parties and witnesses in connection with litigation cannot be devoted to other, productive activities. Consideration of a range of competing factors such as these can reasonably lead rational people to different conclusions concerning the best course to follow.”¹⁹

(3) Sheltered Denial – the Missing Spotlights

Some lawyers continue to deny that this experiment could have produced such uniformly “random” results on nine separate occasions. Perhaps, seeing would induce belief. Perhaps not.

A few commercial lawyers deny that consistently random decisions are a problem for their more “rational” universe. Others debunk that alleged commercial rationality as mythology.²⁰

¹⁸ See Sarat and Felstiner *supra* note 6.

¹⁹ *Studer v Boettcher* [2000] NSWCA 263 at 63 per Fitzgerald JA (S.C. of NSWCA). See also G.L. Davies “Fairness in a Predominantly Adversarial System”, ch 7 of H. Stacey and M. Lavarch (eds) *Beyond the Adversarial System* (1999).

²⁰ See R. Benjamin, “Negotiation and Evil: The Sources of Religious and Moral Resistance to the Settlement of Conflicts” (1998) 15 *Mediation Q.* 245.

Presumably the denying family lawyers will continue to give 10% (or less) range legal advice confidently based upon rationality and expertise. There is little public accountability for this arguably erroneous advice, possibly due to a number of interesting structural causes. First, in Australia 97%–99% of family property disputes are settled by negotiation, abandonment or mediation. The confident and wrong advice (“I have decided that this is what a judge will do in two years’ time”) is hardly ever put under the public spotlight. In those 1%–3% of situations where the accuracy of the expert advice is actually tested by a final judicial decision, then it is easy to explain the “irrational” (ie outside the narrowly predicted range) outcome as “exceptional” due to factors such as “the wrong judge”, or “weak witness”. Moreover, few surviving clients have the funds or stamina or risk tolerance to ask three allegedly “rational” appellate judges to override the allegedly “irrational” trial judge.²¹

Secondly, lawyers do not have an established culture of peer mentoring or supervision. Initial oral or written advice is not systematically put under the spotlight by learned colleagues (who are isolated, busy and working on their own billable hours).

Thirdly, lawyers do not have established practices of regularly sitting in with colleagues to study different interviewing and advice-giving habits.

Fourthly, more publicly visible letters of demand, initial written offers, and court documents engage in predictable high claims or low offers. This normal tactical method of commencing negotiations effectively hides what “real” advice has been given to a client behind the inflated or deflated visible demands.²²

Fifthly, it is rare for lawyers to invite the spotlight into their offices in the form of researchers to record, systematise and critique patterns of interviewing and advice – giving behaviour.²³

These are five structural reasons why there is little accountability or transparency for lawyers when making decisions which lead to key advice being given to clients. This assists the “ten-percent delusion”.

Thus the Gnostic belief system that (my) expert decision-making processes produce a narrow range of outcomes has some high protective walls. What can be done about this structural self-delusion? The delusion may also serve the useful social purpose of “ending” some disputes, even if confidence in the “accuracy” of the expert’s decision is not statistically justified.

(4) Legal Education Revisited

²¹ Although court statistics are difficult to interpret, there were approximately 12,692 applications made for property orders in the Australian Family Court between 1 July 1999 and 30 June 2000. Less than 5% of these reach a full judicial hearing. Less than 9% of full judicial hearings receive appellate decisions. See Family Law Council, *Statistical Snapshot of Family Law 2000-01* (Commonwealth of Australia, 2002).

²² For the standard arguments and research favouring commencing some negotiations “high-soft”, “low-soft”, or near to the “insult zone”, see R Lewicki et al, *Negotiation* (New York: McGraw-Hill), 2006, p 48. For legislative attempts to control this common practice, see for example *Legal Professional Act 1987* (NSW) s 198 J (lawyers must certify that claims have “reasonable prospects of success”); and attempted rebuttal in N Beaumont, “What Are Reasonable Prospects of Success?” (2002) *August Law Soc J* (NSW) 42. See also W Pengilly “But You Can’t Do That Anymore! – The Effect of Section 52 on Common Negotiation Techniques” (1993) 1 *Trade Practices Law J* 113.

²³ Compare Sarat and Felstiner *supra* note 6.

Pre-law, law school and continuing legal education have been subjected to constant criticism for a century in Australia and elsewhere. The critics queue up to tilt at windmills and to heap scorn on the random and destructive goals, methods, resources, culture, timing, sequence, feedback, assessment, outcomes, teacher selection and training at law schools in Australia and elsewhere.²⁴ Law schools are not alone as any educational institution can attest.

This study only adds ammunition for the critics. Where can the more-than-nominal, less-than-amateur study of the psychology and sociology of human decision-making (arguably the bread and butter of any lawyer) be fitted into an already overcrowded law school curriculum? What coverage is “dropped out”? Which teachers and researchers should be sacked, retrained or hired?

The Law school staff, curriculum and language strongly emphasises the power and correctness of “legal reasoning”. How can these important foundational skills of deductive and inductive reasoning be balanced by insights from psychology, sociology and communication? This is a repetitive cry from the wilderness, though some small steps back and forth have occurred over the last 80 years.²⁵

(5) Arbitration Demythologised

These startling results have made *some* experts who attended the family arbitration courses reluctant to pioneer the use of family arbitration. They discovered

²⁴ eg see note 25, Twining, Arthurs and MacCrate; *Law Schools and Professional Education* (ABA, 1980: “The Cramton Report”); J. Richardson, “Does Anyone Care for More Hemlock?” (1973) 25 *Journal of Legal Education* 427; D.D. McFarland, “Self-Images of Professors: Rethinking the Schism in Legal Education” (1985) 35 *J Legal Educ* 232; F.A. Allen, “The Causes of Popular Dissatisfaction with Legal Education” (1976) 62 *ABAJ* 447; D.C. Bok, “A Flawed System of Law Practice and Training” (1983) 33 *J Legal Educ* 570; B. B. Boyer and R.C. Cramton, “American Legal Education: An Agenda for Research and Reform” (1973-74) 59 *Cornell Law Rev* 221; R. Cramton, “Professional Education in Medicine and Law: Structural Difference, Common Feelings, Possible Opportunities (1986) 34 *Clev St Law Rev* 349; A. D’Amato, “The Decline and Fall of Teaching in the Age of Student Consumerism” (1987) 37 *J Legal Educ* 461; M.L. Levine, *Legal Education* (England: Dartmouth, 1993); “Legal Scholarship in the Common Law World” (1987) 50 *Modern Law Review*; D. Pearce et al, *Australia Law Schools* AGPS 1987; J.H. Wade, “Legal Education in Australia – Anomie, August and Excellence” (1989) 39 *J of Legal Educ* 189; A. Ziegart, “Legal Education and Work: The Impossible Task of Teaching Law” (AULSA Conference, 1988); P. Spiller, “The History of New Zealand Legal Education: A Study in Ambivalence” (1993) 4 *Legal Educ Rev* 223; W. Twining, “Developments in Legal Education: Beyond the Primary School Model” (1990) 2 *Legal Educ Rev* 35; J.H. Wade, “Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges” (1994) 5 *Legal Educ Rev* 173; W. Twining, “Preparing Lawyers for the Twenty-First Century” (1992) 3 *Legal Educ Rev* 1; W. Twining, “Bureaucratic Rationalism and the Quiet Revolution” (1996) 7 *Legal Educ Rev* 291; T. Voon and A. Mitchell, Professor, “Footnotes and the Internet: A Critical Examination of Australian Law Reviews” (1998) 9 *Legal Educ Rev* 1; V. Brand, “Decline in the Reform of Law Teaching?: The impact of Policy Reforms in Tertiary Education” (1999) 10 *Legal Educ Rev* 109; P. Ramsden “Improving the Quality of Higher Education: Lessons from Research on Student Learning and Educational Leadership” (1995) 6 *Legal Educ Rev* 3; E. Clark, “Australian Legal Education a Decade After the Pearce Report” (1997) 8 *Legal Educ Rev* 213; D. Weisbrot, “Competition, Cooperation and Legal Change”, 4 *Legal Educ Rev* 1; O. Kahn-freund, “Reflections on Legal Education” (1966) 29 *Modern Law Rev* 121; A Kapardis, *Psychology and Law: A Critical Introduction* (Cambridge UP: 2003).

²⁵ W.L. Twining, *Law in Context – Enlarging a Discipline* (Oxford: Clarendon, 1997) esp. chapters 3 & 4; 14-16; Social Sciences and Humanities Council of Canada, *Law and Learning* (1983: “Arthurs Report”); ABA, *Legal Education and Professional Development – An Educational Continuum* (1992: “MacCrate Report”).

experientially that the enemy lies within. Predictably, attendees uniformly expressed a litany of grievances towards the litigation system in Australia.²⁶

However, some were obviously disappointed that the decisions of expert colleagues were even more unpredictable than those of Family Court judges.

The voluntary use of arbitration faces a predictable hurdle. How to find an arbitrator who has a publicised record across a variety of disputes which indicates acceptable process, and ranges of substantive outcomes which receive majority approval in the “expert” community of referring family lawyers? Catch-22.

The only eligible candidates appear to be recently retired, highly respected, motivated and still energetic Family Court judges. A neophyte arbitrator may be advised to set up a website of his/her anonymised and indexed awards, so that potential go-between lawyers can develop some confidence about where (s)he falls in the ($\pm 30\%$) range of family property division.

(6) The Reform Pendulum Between Discretion and Rules

These “experiments” indicate (yet again) a dramatic level of unpredictability in human decision-making, even among “experts”. This may reopen the ongoing tension between fixed rules and uncertain discretion in family property, or any, legislation. Is it better to have the injustices of certainty, than the injustices of discretion?²⁷

The latter appears to be the consistently preferred end of the rule-discretion spectrum in Australia. If so, then family lawyers should continue to advise clients (as they already do), that litigation and arbitration outcomes are indeed a lottery.

Moreover, if judges and arbitrators regularly cannot provide *substantively* just or predictable outcomes, then it arguably becomes vital for them to offer respect, listening skills, intelligence and other forms of *emotional* and *procedural* “justice”.

Conclusion

This article has provided yet another illustration of the unpredictability of human decision-making in the context of written arbitration awards in family property disputes. Moreover, expertise, experience and education do not apparently give much comfort that the range of outcomes will be narrow or predictable.

Attempts can, and should, be made to explain, rationalise or “distinguish” this conclusion of uncertainty. Nevertheless, most of these attempts ring hollow.

Lawyers have always advised clients that judges and suburban practitioners (non-experts) are irrational and unpredictable. But to discover experientially that the dragon lies within self and within expert colleagues is a sobering event. Learned books may have exposed the dragons of decision-making for centuries. We lawyers neither read nor believe those books. They are not “law” books. We have special and marketable immunity via education, experience and “rationality”. However, holding the dragon by the tail has proved to be an uncomfortable learning experience.

²⁶ See Australian Law Reform Commission (ALRC) *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 2000).

²⁷ eg. Australian Law Reform Commission Report, *Matrimonial Property* No 39 1987; D. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (OUP, 1986); J.H. Wade, “Recurrent Themes in Family Law: Everything Old is New Again” (1991) 12 *Australian J of Marriage and Family* 97.

“A”

WRITTEN SUBMISSION OF FRED TO ARBITRATOR

Facts: Mabel and I married in 1992. We lived together for a total of eight and a half years between 1992 and 2000 in the Lismore area. We mainly lived on a small farm which I bought in joint names in 1993 with an inheritance of \$40,000 received from my mother. Mabel left finally in 2000 taking our three children now aged 8, 6 and 4 years. She lives with a friend on the Gold Coast in a rented house. She is on social security. I live on the farm with my girlfriend. I was paying \$117 per week child support between 2000 and January 2001. I have not paid anything since January.

There has been a lot of arguing. Mabel is greedy and unreasonable. She does not get on with my relatives.

Assets	Husband's value	Wife's value
Farm in Lismore	\$55,000	\$67,000
H's furniture in farm	Nominal	Nominal
W's furniture in her rented premises	Nominal	Nominal
W's Harley Davidson	\$10,000	\$10,000
H's Harley Davidson	\$10,000	\$10,000
H's band a/c (left over from mother inheritance)	\$5,000	

Income:

Wife Social Security

Husband 2000 - \$480 per week average (see attached income tax return)

 At present - \$370 per week with risk of retrenchment

Debts:

Wife \$3,000 owed to valuer and lawyer

Husband \$1,700 owed to lawyer

Issues:

(i) What is the correct value of the farm?

- (ii) How much property is each entitled to?
- (iii) Over what time should the property be paid out?

Fred's submissions

(i) Valuation

My valuer should be accepted (valuation is attached). He lives in the area and is well known. No houses have sold on our street in the last two years for over \$50,000. My town is very depressed economically.

Mabel's valuer drove down from Queensland. He is an outsider. His valuation describes my workshop as "large" and the property as being "well orcharded with orange trees". My workshop is small and most of the trees are not fruit bearing. Mabel's valuer is also a friend of her new boyfriend.

(ii) Percentages

My mother's inheritance paid for the farm completely. I maintained the farm completely between 1992 and now, doing planting, mowing, fixing, fencing as well as my handyman job. Mabel looked after the children – she did a good job there. She never had a job – I paid for everything. She had a good life and everything would have been ok if she didn't keep packing up and leaving. She was influenced by her feminist friends (and still is).

My job is very uncertain due to the recession and less work in the town.

Orders sought by Fred

- (i) I pay Mabel \$22,000 in 4 equal \$5,500 amounts each four months over the next 16 months; or
- (ii) I pay Mabel \$20,000 within 4 weeks of this order being made;
- (iii) In either case interest of 10% to run on any late payments;
- (iv) The farm be immediately transferred to me and Mabel can protect her interest by caveat.

Signed *Fred*.....

Dated.....2001.

VALUATION FOR FRED - 17 MARCH 2001

Farm - 17 Daffodil Street, Lismore

I am a registered valuer with Smiters & Co in Lismore. I have 8 years of experience selling farms in the Lismore area.

The Lismore area continues to be depressed. Sales of small farms are slow.

This farm at 17 Daffodil Street (photo attached) was on the market 4 years ago with our firm. No realistic buyers emerged. It is a subsistence farm for chickens, sheep and a few cows. It is not near to public transport and is surrounded by numerous derelict properties.

Its redeeming features are a well kept bitumen driveway, a neat flower garden and a compact workshed.

One small 3 hectare farm in Lilifield Street in Lismore sold in December 2000 for \$69,000 but it was well kept, in good position with fences in a good state of repair.

I would value this farm at \$55,000.

Signed*Bob Jones*.....

WRITTEN SUBMISSION OF MABEL TO ARBITRATOR

Facts: I agree with most of Fred's facts dated..... 2001, but I am not greedy and unreasonable.

I have had three children (and one abortion) due to Fred. I now have the care of three demanding children. I am constantly stressed and exhausted. I did not work between 1992 and 2000 because Fred insisted that I stay at home and care for him and the children.

I worked very hard on the farm – feeding chickens, cleaning the house, washing, cooking, ironing, driving children around.

The reason I had to leave so often was that Fred's relatives are interferers and never thought I was good enough for Fred.

The farm was put in joint names in 1993 because I said to Fred that I did not feel secure for the future. He wanted me to stay.

Fred says his job is insecure but he has always wanted to reduce his workload.

Assets:

I agree with Fred's chart

Debts:

I agree with Fred's chart

Issues:

I agree with Fred's chart

Mabel's submission:

(i) Valuation

My valuer (valuation attached) is attached to a reputable company. Fred's house and farm are the best on the street. His workshop is beautifully lined. I have planted a beautiful garden.

(ii) Percentages

I deserve the biggest percentage as:

- (i) I gave the family the best years of my life;
- (ii) I received little parenting help from Fred and total hindrance from his nearby relatives;
- (iii) I have a long future committed to the children with few prospects;
- (iv) Fred's mobility and job prospects have not been harmed by the relationship

Orders sought by Mabel:

- (i) Fred pay Mabel \$40,000 within 4 weeks;
- (ii) In default, the farm be put up for sale and if need be, be auctioned and from the net proceeds Mabel be paid (i) \$40,000 and (ii) any arrears of child support which the Child Support Agency says is owing at that time.

Signed*Mabel*.....

Dated2001

VALUATION FOR MABEL - 13 JANUARY 2001

Farm – 17 Daffodil Street, Lismore

I am a registered valuer with McArthur & Co, Warwick, Queensland. I have 22 years of experience in valuing properties in Queensland and NSW.

I viewed the property at 17 Daffodil Street, Lismore (photo attached) and some other comparative farms in the area which have been sold over the last year. Sales of small farms have been slow for the last three years but are picking up over the last 6 months.

The farm consists of 4 hectares of flat grassland with some fences in a state of disrepair. There is a three bedroom house, a large workshop which is used for repairing machinery and the south eastern corner is well orcharded with orange trees.

Comparable small farms have been sold in the area for \$53,000, \$69,000 and \$59,000 over the last three months.

This farm is at the higher end of that range due to the workshop, orchard, well kept gardens and sweeping bitumen driveway. I estimate the current value at \$67,000. This may increase over the next year.

Signed*Peter Boston*.....

“B”

IN THE MATTER OF FRED AND MABEL

REASONS FOR DECISION

Background facts

Mabel and Fred married in 1992 and separated in 2000. 8.5 year cohabitation in the Lismore area. There are three children of the marriage, aged 8, 6 and 4 years. The wife is now living in rented accommodation with the three children. The husband has remained in the matrimonial home since separation.

The issues

1. the value of the former matrimonial home at 17 Daffodil Street, Lismore
2. each party's entitlement to property pursuant to Section 79 of the Act
3. the period over which the property should be paid out (if applicable).

The evidence

The following facts were not in dispute:

- (i) in 1993 the parties purchased a property in joint names, using an inheritance of \$40,000.00 received from the husband's mother.
- (ii) the husband was in full employment during the period of cohabitation and remains in full time employment.
- (iii) the wife took a full time role as homemaker and parent during the course of cohabitation.
- (iv) the wife is dependent on social security for hers and the children's support.
- (v) The husband stopped paying any child support in January 2001.
- (vi) The husband has a new partner. There was no evidence of her income or financial resources.
- (vii) With the exception of the former matrimonial home, the assets of the parties total \$25,000.00, and their debts, including both parties legal fees amount to \$4,700.00.

The following facts were in dispute:

- (i) the value of the matrimonial property
- (ii) the wife's contributions beyond those of homemaker and parent

- (iii) the husband's likely future employment prospects

Findings

1. The value of the former matrimonial property

Both parties had formal valuations of the property prepared. Mr Jones, Fred's valuer who had worked in Lismore for 8 years, said the farm had a value of \$55,000.00, based on the following considerations:

- (a) depressed sales in the Lismore area
- (b) lack of interest in the property 4 years ago
- (c) distance from public transport
- (d) proximity to derelict properties
- (e) the neat flower garden
- (f) compact work shed
- (g) a well kept bitumen driveway

and one comparable sale of a property of 3 hectares, [smaller than the subject property] which was sold in December 2000 in good condition for \$69,000.00.

Peter Boston is a valuer of 22 years experience having valued properties in NSW and Qld. He considered a number of sales in the Lismore region in the past 12 months. In particular he referred to 3 recent sales of comparable properties and in his opinion, although sales have been slow in recent years, there has been improvement in the last 6 months. He commented favourably on the bitumen driveway, the orchard, the gardens and the workshop.

I prefer the evidence of Peter Boston. I am satisfied that comparative sales indicate an improvement in the market and accept his view that the subject property is at the higher end of the price range of those sales given the special features described in his report. I have noted that Mr Jones was also impressed by those same features.

I therefore find the value of the property is \$67,000.00 and the total net assets of the parties amount to a total value of \$92,000.00 - \$4,700.00. I have included both parties legal fees in this calculation. I have no evidence of the precise break down of the wife's debts, and as the parties legal fees appear to be about the same, I see no prejudice to either party if I take this course.

Wife's additional contributions

On the basis of the wife's evidence I am satisfied that she played a role on the farm beyond her role as homemaker. The husband in his submissions has asked me to accept that his wife played no role in improvements to the property. However, both valuers have commented favourably on the beautiful garden the wife submits she created. In addition, she looked after the children, the household tasks and was mainly responsible for ferrying the children to their various activities. I am satisfied that Fred performed the majority of tasks on the property, as well as contributing his income from his employment to the family.

Application of the law

Contributions

1. The only factors which I have considered in departing from a finding of equal contributions by both parties to the acquisition, conservation and maintenance of the property, is the husband's contribution in 1993 of \$40,000.00 received by way of inheritance from his mother and the husband's exclusive occupation of the home since separation. It is evident the husband has been in a much stronger financial position in the last year or so.
2. Although I do not accept the husband's submission that he did 100% of the work on the property, I do accept that this windfall as I will call it, allowed the parties to purchase the Daffodil Road property. It was a significant contribution which enabled the parties to acquire the property in the first place. Taking into consideration the fact that the husband has had the benefit of the home since separation I have determined the level of the husband's contribution at 63% and the wife's at 37%.

Section 75(2) factors

The relevant factors include

1. the wife's continuing care of 3 young children which is a very significant factor in diminishing her prospects for an improved income position.
2. the husband's failure to pay child support since January 2001 and his submission that he is unlikely to be in a position to pay child support in the foreseeable future.

I make an adjustment pursuant to Section 75(2) in favour of the wife of 20%.

Determination

The husband will receive 43% of the net pool of assets, and the wife 57%. As the wife already holds assets of \$10,000 less \$3,000.00 in debts = \$7,000.00 she requires an additional \$42,761.00 to hold 57% of the pool. The husband already holds assets of \$15,000.00 less debts of \$1,700.00 = \$13,300.00.

Given the husband's income and poor employment prospects, I believe on the evidence between me that it is unlikely the husband will be in a position to pay to the wife the sum required to satisfy these Orders. However, as both parties submit that if possible, the property should be transferred to the husband, I have made Orders to give him that option. In the event the husband is unable to satisfy the Order, the property will be sold.

Orders

I make the following Orders

1. That on or before 20 January 2002 the husband pay to the wife by way of property settlement the sum of \$42,761.00 payable as follows:
 - (a) \$7,761.00 on or before 20 August 2001
 - (b) \$7,000.00 on or before the 20th day of each subsequent calendar month
2. That simultaneously with the final payment referred to in Order 1 herein, the wife will do all things necessary to transfer to the husband all her right title and interest in the property known as and situated at 17 Daffodil Street, Lismore, being all the land contained in Folio Identifier...
3. That in the event the husband does not pay any instalment by the due date, the parties shall do all acts and things necessary to list the property for sale by private treaty and by way of consequential arrangements in relation to the sale:
 - (a) details of agents, sale price, etc
 - (b) and the property shall remain on the market until sold
4. Order about interest payable in accordance with the Rules
5. That except as otherwise provided in these Orders, the parties to retain all... etc
6. That except as otherwise provided in these Orders, the parties to be responsible for all debts held in their respective names... etc

Arbitrator²⁸

5.30am 20 July 2001

²⁸ All arbitrators worked through the night after a course dinner to produce their awards.

“C”

Poetic Justice for Fred and Mabel

I've been asked to decide between Fred and his Mabel
And to divide up their assets as best as I'm able
This arvo I'm jetting off to Nepal
But there's still enough time cause they've got bugger all.

They lived on a farm just near Lismore
They've got that and their Harley's and not much more.
You have to wonder what they're like
To buy the world's most expensive motor bike.

I reckon while their kids were running the streets
These two were off at parties and swap meets.
They were always headed for matrimonial troubles
When he joined Hells Angels and she joined the Rebels.

It wouldn't be hard to divide what they've got
She's got the kids so she should get the lot.
But back in 93 Fred really lucked it
And got lots of cash when his Mum kicked the bucket.

Apparently the old lady was loaded
But when he read her will Fred nearly exploded.
Cause in it she said to him 'good riddance'
And gave his brothers heaps, but left him a pittance.

She never liked the company he'd choose
His wife or their clothes and especially his tattoos.
They run from his back right down to his hand.
His mother hated them, so she left him 40 grand.

Now once he received this paltry sum
Which with bad grace he took from the estate of his Mum.
Fred thought of how to get back at his mother
She'd hated his Harley, so he'd buy another.

But Mabel kept Fred on a really short rope
She'd long wanted somewhere to cultivate dope.
She told him "There'll be no new Harley, you dumb-arse"

We're buying a farm so we can grow grass."

So they grew their dope and stopped being poor
Till the new police inspector bought the property next door
At that point Mabel decided Fred really crapped her
And she ran off with the leader of the Gold Coast Rebel chapter.

Fred didn't fret cause he had his doll
The local Hells Angels motorcycle moll.
We have to decide who gets the loot.
The wife with the kids or the tattooed galoot.

Some say we don't have enough of the facts
We need to know more so we can cover our backs.
I reckon I know enough of this couple
And for \$500 bucks I won't take much trouble.

I'd give him the farm and she gets no money
'cept a couple of chooks and some cheese and some honey.
But every year whether or not the crop is flash
He must give her 10 kilos of premium grade hash!

(Dennis Farrar, Family Arbitration Course, July, 2001, Melbourne)

Bonding to Bond

If you have any suggestions about this newsletter; *OR* if you or your colleagues would like to be included on, or excluded from receiving this occasional newsletter, **please send us a message** with your email address to:

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J H WADE
Director

Bond University Dispute Resolution Centre