

SEXUAL VIOLENCE, DOMESTIC ABUSE AND THE FEMINIST JUDGE

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Abstract: One of the enduring problems identified by feminist legal scholars is the difficulty of implementing feminist legislative reforms in practice. In part, this occurs because myths and stereotypes about issues such as “real rape” and domestic violence continue to be reflected and sustained by some barristers and judges in trials and other court procedures. In this context, Christine Boyle speculated, over twenty years ago, on what difference a feminist judge might be able to make in a sexual assault case. Boyle’s question has been taken up and extended to other areas of law in feminist scholarship and feminist judgments projects in recent years. Interviews conducted as part of the Australian Feminist Judgments Project provide an opportunity to further explore the question of what difference a feminist judge might be able to make in a criminal case. Forty-one judges agreed to be interviewed on the basis of their identification as feminists. Many discussed the challenges they face in cases involving issues such as sexual assault and domestic violence and how they have responded to these challenges. This article considers how they perceive that their feminist worldview influences their approach to decision-making. Drawing on the interviewees’ comments, the article identifies feminist approaches to understanding key legal concepts, managing the courtroom, controlling the admissibility of evidence and cross-examination, and approaches to language.

Keywords: *Australian Feminist Judgments Project; domestic abuse; feminist perspectives; sexual violence; feminist judge*

I. Introduction

One of the enduring problems with the legal process that has been identified by feminist legal scholars is the way women’s evidence of sexual violence is excluded, marginalised and disbelieved. Myths and stereotypes have developed around “real rape” and legal rules were introduced, initially by judges, which reflected and

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sustained these myths and stereotypes. In this context, Boyle speculated, in 1985, on what difference a feminist judge might be able to make in a sexual assault case.¹ Interviews conducted with judicial officers as part of the Australian Feminist Judgments Project² provide an opportunity to further explore the question of what difference a feminist judge might be able to make in a sexual offence case. I include domestic abuse cases in this discussion as well, because similar issues around the stereotyping and silencing of women also proliferate in this sphere. This article draws on the judges' interview comments and considers how they see their role in relation to addressing outdated assumptions, myths and stereotypes surrounding sex offences and domestic abuse and in the treatment of witnesses who testify in their courtrooms. The article begins by reviewing some of the ongoing issues that scholars have identified about the prosecution of sexual offences and with respect to domestic abuse before outlining some of Boyle's key arguments. It then briefly reflects on the possibilities that have been opened up by feminist judgments projects, which have flourished in recent years³ before considering the strategies identified by the interviewees. In the final section, I draw some conclusions about the role of feminist judging in cases involving sexual violence and domestic abuse.

II. Law Reform — Translation and Implementation

A. Sexual violence

There is a long history of feminist scholarly engagement and activism around rape law reform. As scholars have recognised, women's credibility has been at the centre of the rape and sexual assault trial.⁴ The presumption that rape victims are a class of particularly unreliable victims was developed by male judges centuries ago. The English jurist Sir Mathew Hale infamously claimed that "rape is an accusation easily to be made, hard to be proved, and harder yet to be defended by the party

1 Christine Boyle, "Sexual Assault and the Feminist Judge" (1985) 1 *Canadian Journal of Women and the Law* 93.

2 Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter, Australian Feminist Judgments Project (2013), available at <http://www.law.uq.edu.au/the-australian-feminist-judgments-project>; and see Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Oxford: Hart Publishing, 2014).

3 *Ibid.*; Diana Majury, "Introducing the Women's Court of Canada" (2006) 18 *Canadian Journal of Women and the Law* 1; Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010), available at <https://www.kent.ac.uk/law/fjp/>; Northern Irish Feminist Judgments Project (2014), available at <http://www.feministjudging.ie/>; New Zealand Feminist Judgments (16 October 2015), available at <http://www.adls.org.nz/for-the-profession/news-and-opinion/2015/10/16/new-research-project-to-look-at-new-zealand-judgments-from-a-new-angle/>; US Feminist Judgments Project (2010), available at <http://sites.temple.edu/usfeministjudgments/>.

4 Liz Kelly, Jennifer Temkin and Sue Griffiths, Section 41: An Evaluation of the New Legislation Limiting Sexual History Evidence in Rape Trials (Home Office Online Report 20/06) pp.1–3, available at <http://tna.europarchive.org/20071206133532/homeoffice.gov.uk/rds/pdfs06/rdsolr2006.pdf> (visited 29 February 2016).

research had helped to inform her views about responding to discrepancies between statements given to police and testimony provided in court. She said:

“Does it mean she is lying ... now, because she told the police something different? I mean there are masses of research about this sort of stuff Well it’s trying to realize that that may not be the whole story. When somebody with support says this is what happened, you don’t automatically [accept] that’s what happened. But you [also] don’t ... say well why didn’t you tell that to those two police that came round at three in the morning. They would have looked after her”. (Family: 14)

Relatedly, research has led to greater understanding about women’s experience of violence and has identified that there might be a variety of reasons why a woman does not attend court when her matter is listed.¹⁰⁷ An applicant in a domestic abuse protection order matter may face a variety of obstacles. She may fear reprisals from the perpetrator should she come to court to give evidence against him or there may be other more material obstacles such as childcare responsibilities. Similar concerns may arise in a rape or sexual violence trial.¹⁰⁸ One magistrate identified this as an issue and considered how she might respond to it:

“[I]f you’re concerned that there may be issues that he may attack her again, and I’ve had cases where that’s why she’s not come to court, and I feel sound but brave and it feels again like going out on a limb saying I’m satisfied she’s not here because she’s likely to be assaulted. ... I’m going to allow the evidence in and then I appreciate I have to work through what I can do with that evidence ...” (Magistrate: 18)

It is important in this extract that this magistrate describes her approach as both sound and brave. Sound because she believes her approach is legally correct but nevertheless brave, underlining the courage needed to give the law its full effect.¹⁰⁹

V. Some Conclusions

This is a small group of interviewees, and although the judges interviewed provided examples of how their feminism informed their judging, many also recognised that other aspects of their identity also informed their approaches. Despite this

107 Lesley Laing, *It’s Like This Maze You Have to Make Your Way Through: Women’s Experiences of Seeking a Domestic Violence Protection Order in NSW* (Social Work and Policy Studies, Faculty of Education and Social Work, University of Sydney, 2013), available at <http://ses.library.usyd.edu.au/bitstream/2123/9267/2/It's%20like%20this%20maze.pdf>.

108 See Hester, *From Report to Court* (n.16) p.8.

109 See Hunter, “More Than Just a Different Face?” (n.79) p.22, who notes that “bravery is not on the judicial appointments list of judicial qualities and abilities. Perhaps it ought to be”.

qualification it is clear that many of the examples of feminist judging identified by the interviewees do reflect some of the feminist strategies suggested by Boyle and Hunter in relation to how feminist judges might approach their role.¹¹⁰ As Boyle suggested a feminist judge might, in dealing with sexual offences (and in cases involving domestic violence), many of the judges interviewed reported that they drew on their feminist worldview to challenge assumptions and stereotypes, carefully consider context to better understand behaviour and work to ensure that women's voices can be heard. Many of the judges' comments reported in this article emphasise their need to remain vigilant about the implementation of rules and procedures and the protection of vulnerable witnesses. Although formal changes to the law have been introduced to limit the reliance on myths and stereotypes and to improve the experience of complainants in the courts, the judges' comments show how formal legal changes may be insufficient unless they are vigorously implemented and protected by judicial officers. It seems clear from many of the judges' comments that the strategies they employ in sexual offence and domestic abuse cases are designed to give full effect to legal rules both in their "letter" and in their "spirit". As some of the judges' comments suggest, the feminist judge's contribution is one of careful attentiveness to protecting a space in the court room so that the best evidence can be given by witnesses — especially complainants. Given the persistence of myths and stereotypes around gendered forms of harm that continue to limit women's redress within legal processes, judicial vigilance to ensuring the law is followed may be seen as an important part of being a feminist (informed) judge.

It is relevant that this article was concerned primarily with feminist judicial practices around rape and sexual violence law and laws relating domestic abuse; areas of law that have been the subject of extraordinary levels of legislative reform that has largely been driven by feminist scholarship and activism over the past fifty years.¹¹¹ It is perhaps not surprising then that judges who identify as feminists were keen to give full effect to those reforms. Writing in 2004, Celia Wells recognised that the change in language and the concepts that inform many areas of criminal law can be attributed to the political influence of feminist writers.¹¹² However, at the same time she identified that the translation of legislative reforms and procedural change into practical effect was "another thing altogether" and that "a gendered understanding of criminal law and justice [had] yet to be fully realized".¹¹³ As Kelly and her colleagues have identified, "chasms"¹¹⁴ remain between the fact of sexual violence and its reporting, between its reporting and its prosecution, between

110 See Boyle, "Sexual Assault and the Feminist Judge" (n.1); Hunter, "Can *Feminist* Judges Make a Difference?" (n.62); Hunter, "Justice Marcia Neave" (n.63).

111 See Heath, "Rape Law" (n.8); Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (New Haven: Yale University Press, 2000) p.11.

112 Wells, "The Impact of Feminist Thinking on Criminal Law and Justice" (n.21) pp.88, 91.

113 *Ibid.*, p.100.

114 See Kelly, Lovett and Regan, *A Gap or a Chasm?* (n.16).

its prosecution and conviction, and complainants continue to report traumatic experiences as witnesses in the courts. Similar concerns persist in relation to domestic abuse.¹¹⁵ While the judges in this study appear to be trying to apply their feminist worldview to the practical task of judging in order to translate sexual violence and domestic abuse law reforms into practical effect, it is not clear what difference this makes to the experience of victims and the rates of conviction — this would be a worthwhile question for future research.

115 See Douglas, “The Criminal Law’s Response to Domestic Violence” (n.27).