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SEXUAL VIOLENCE AND EVIDENCE: THE APPROACH OF THE FEMINIST JUDGE

One of the enduring problems with the legal process 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 developed, initially by judges, which reflected and sustained these myths and stereotypes. Scholars have speculated on whether a feminist judge might be able to make a difference in such cases. Interviews conducted with judicial officers provide an opportunity to explore further the question of whether, and how, a feminist judge might be able to make a difference. This article draws on 41 interviews conducted with Australian judicial officers to consider how, as judges with a feminist world view, they see their role in relation to evidence issues in sexual violence cases. It begins by reviewing some of the ongoing issues scholars have identified about the prosecution of sexual offences, before outlining some of the strategies a feminist judge might employ in this context. The article then considers the strategies employed by interviewees in their judicial practice before, in the final section, drawing some conclusions about the role of feminist judging in cases involving sexual violence.

Introduction

One of the enduring problems with the legal process 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 have been made, initially by judges, which reflected and sustained these myths and stereotypes. Scholars have speculated on whether a feminist judge might be able to make a difference in such cases (Hunter, 2008, p. 12; Boyle, 1985). Interviews conducted with judicial officers as part of the Australian Feminist Judgments project (Douglas et al., 2014) provide an opportunity to explore further the question of whether, and how, a feminist judge might be able to make a difference. This article draws on 41 interviews conducted with Australian judicial officers to consider how, as judges with a feminist world view, they see their role in relation to evidence issues in sexual violence cases. It begins by reviewing some of the ongoing issues scholars have identified about the prosecution of sexual offences, before outlining some of the strategies Hunter (2008) suggests a feminist judge might employ. The article then considers the strategies identified by the interviewees, before, in the final section, drawing some conclusions about the role of feminist judging in cases involving sexual violence.

Rape Law: Reform, Translation, Implementation

There is a long history of feminist scholarly engagement and activism around sexual violence law reform. Many scholars have recognised that women's credibility has been at the centre of the rape and sexual assault trial (Kelly et al., 2006, p. 3). The presumption that rape victims are a class of particularly unreliable victims was developed by male judges centuries ago. The English jurist Mathew Hale commented that 'rape is an accusation easily to be made, hard to be proved, and harder yet to be defended' (quoted in *Kelleher* v *R* [1974] HCA 48, [17]), and this

view justified judges warning juries that without corroboration the testimony of rape victims was highly suspect. Temkin, and others, identify a number of highly resilient, damaging false beliefs about rape that persist, including: that false allegations of rape are common; rape is committed by strangers (Stern, 2010, p. 11); women ask for it through their dress, behaviour (i.e. drinking alcohol (Finch and Munro, 2007)) and taking risks; there are always injuries and victims report promptly (Temkin, 2010, p. 716).

Research has challenged many of these assumptions, demonstrating for example that false reports of sexual offences are rare and that these offences are often perpetrated by people well known to the victim (Belknap, 2010, p. 1336). Legislative reforms have attempted to eradicate or reduce the circumstances in which judicial warnings can be given about the unreliability of rape victims (Heath, 2010, p. 100; Wheatcroft and Walklate, 2014). The historical requirement for a recent complaint and the admission of sexual history evidence have also been used as techniques to challenge the victim's credibility (Ellison and Munro, 2013). Efforts have been made to remove the need for a recent complaint, in recognition that there may be good reasons for a victim to delay complaining, sometimes for years, because of the trauma of the rape (ALRC/NSWLRC, 2010, [24.63]). Law reform has also attempted to reduce the circumstances in which sexual history evidence can be given (Temkin, 2002, p. 266). In recognition of the trauma experienced by complainants required to give evidence in rape and sexual assault trials, various witness protection practices have been introduced to enable them to avoid a direct confrontation with their attacker; such practices include the use of screens in the courtroom and the possibility of giving evidence remotely by video (Ellison and Munro, 2014).

Despite these significant legislative and procedural advances in rape law reform, which have been led by feminist scholarship and activism, there does not appear to have been any perceptible increase in successful prosecutions for rape and sexual assault (Larcombe, 2011; Hester, 2013, p. 3). In Australia and the United Kingdom few sexual assault charges make it to court and when they do they have the highest rate of acquittal of any crime (Heath, 2010, p. 89; Hester, 2013, p. 3). Victims continue to report that they are often inadequately prepared for and supported during the trial (Konradi, 2007, p. 200). Studies continue to reveal that the legislative reforms have often been very loosely managed or interpreted 'generously' by judges. For example, in her study of rape trials in the United Kingdom, Kelly et al. (2006, p. 77) found that legislation aimed at reducing sexual history evidence has been 'evaded, circumvented and resisted'. In Australia one study found that despite the abolition of corroboration warnings, they were still given in 80 per cent of trials (Temkin, 2002, p. 66).

According to some scholars (Temkin, 2010, p. 714; Wells, 2004, p. 92), part of the reason for the persistence of these issues is an enduring problem of attitude among judges, and legal advocates, who continue to be influenced by outmoded assumptions about rape. As Heath (2010, p. 93) points out, if the relevant evidence laws are not enforced and rape myths remain unchallenged, low conviction rates are likely to persist as will traumatic experiences for victims in the court room.

The Possibility of a Feminist Judge

Given that some of the problems identified in relation to the legal response to sexual offences may relate to judicial approaches to the management of trials, might a feminist judge make a difference? Some feminist scholars have argued that a completely new system is needed if feminism and feminist principles are to be applied to the problems addressed by law. For example, Audre Lorde (1984, p. 112) famously stated that 'the master's tools will never

dismantle the master's house'. Smart (1989, pp. 26–49) has argued that the legal process, specifically in its response to rape, is at best ambivalent and at worst destructive. However, both Boyle (1985) and Hunter (2008) have argued for the possibility of a feminist judge. Hunter has suggested that a feminist judge should:

- 'Ask the woman question' and notice the gender implications of apparently gender-neutral rules, as well as the implications for other traditionally excluded groups;
- 'include women', writing women's experiences into the judgment (both as litigants and collectively) and in the construction of legal rules;
- challenge gender bias;
- contextualise and particularise, reasoning from context and making individualised rather than categorical or abstract decisions;
- seek to remedy injustice and improve the conditions of women's lives;
- promote substantive equality;
- be open and accountable about the choices made between competing interests; and
- draw on feminist scholarship to inform decisions.

In the following sections the experiences and strategies reported by feminist judges in the context of sexual offence cases are considered.

Interviews with Judicial Officers

Throughout 2012–2013 we approached judges who had publicly identified themselves, or been identified by their judicial colleagues, as 'feminist', for an interview. Ultimately 41 women judicial officers and one male judge were interviewed. They came from a range of different courts and places in Australia. The interviews covered questions such as what feminism means to the interviewee; what it means to them to be a feminist judge; what scope they have had for feminist decision-making; how, if at all, feminism has influenced their decision-making and to what extent they have drawn upon feminist theory in their decision-making. Even though we did not ask specific questions about sexual offences or gendered violence, unsurprisingly many discussed the issues they face in such cases and how they have responded to the challenges these raised. In the following sections the article explores how judges understand their feminism and its influence on their approach to judging in relation to protecting and supporting witnesses, especially rape victims, to give their testimony. Judges are identified by the transcript number and the court in which they practice by reference to the English equivalent court name. Notably, magistrates in Australia are all trained lawyers who usually work in the position full-time.

Feminism, women and judging

In signing consent forms, judges consented to being asked questions about 'their experiences and perceptions of the impact of feminist legal theory on their decision-making'. Only one judicial officer agreed to be interviewed and then refused to engage with the questions we asked. The remaining judges did not dismiss the idea that a feminist judge might make a

difference. However, the judges explained the relationship between their feminism and their judicial role in different ways. The largest group, around 24 of the interviewees, identified as feminist but did not consider themselves to be a 'feminist judge'; two identified as feminist but were not sure if they were 'feminist judges', and around 14 considered that they were 'feminist judges' (Hunter, 2015, p. 132).

At the outset of this project we did not define feminism to the participants. Most interviewees articulated their feminist outlook in terms of equality and thus held that there was little conflict between their feminism and their judicial role (Hunter, 2015, p. 121). For example, a High Court judge's (39) careful explanation of her understanding of feminism as centrally concerned with substantive equality reflects a common approach among the interviewees:

> It's a commitment to practical equality for women, formal and practical equality. [For example] the equality is not just having the same right to defend yourself as a man has or had before the changes to the law in this state, which were to do with meeting force with equal force and that kind of thing, but having a right to defend yourself which took account of your different stature and your different experiences and your basic human right to be safe. So that's the substantive equality but that's what I mean by practical equality.

Protecting testimony

When one of the magistrates was asked to think about cases where she thought being a feminist made a difference she went into some detail about a rape committal she had presided over. Committal hearings aim to determine whether there is sufficient evidence to take the matter to trial. The magistrate explained that in the particular case a young woman had returned to an apartment with a man she had met at a nightclub. He brought a friend along and they all drank alcohol and may have taken some cocaine. The woman refused the sexual advances of one of the men and then fell asleep. She woke up with his friend having sex with her without her consent. The magistrate described the scene as one that 'must be played out every Saturday and Friday night across the world and so ordinary sadly but so incredibly horrible and she went and reported it [to the police]'. The magistrate explained that she had made efforts to ensure that facilities were available so the witness could give evidence by video. However, despite these efforts the remote witness facilities did not work properly and so the complainant came to court to give her evidence. The magistrate (18) explained:

> [I] protected her because that is how it feels. [...] The task of [the evidence legislation] is to get the best evidence before the Court [...] you find yourself saying well I'm not going to judge that young woman. That's the issue and the fact that there were many questions asked of her which were inappropriate and I had to stop, in the end you let some of them through because it's actually getting nowhere and it doesn't matter because I don't have to take the answers into account because it's not relevant.

The magistrate described her role as a protective one in shielding the victim from incorrect assumptions and improper questions, essentially to safeguard the law. Clearly the facts of this case provided the defendant's lawyer with the potential opportunity to exploit various rape myths, i.e. that women are raped by strangers and can only blame themselves for rape as it results from their choices and risky behaviours (Temkin, 2010, p. 715). However, this magistrate (18) explained that she refused to presume that the victim should be blamed:

> [The complainant's] evidence was really sound but I don't assume because she said that's what happened it did. She still has to go through that process, but I've cleared - what I call I've cleared the fog to allow that to happen. So that feels to me that I am allowing and supporting the absolutely critical issue which is feminist that no matter whether she

> was drunk, drugged, normally goes and has sex with people at the end of the [nightclub] every night, that's just not relevant to what happened that night.

Indeed, similar to this magistrate, several judges identified vigilance about following court rules, especially in relation to cross-examination of complainants, when asked how their feminism informed their approach to decision-making. In particular, they identified the need to be attentive to the questioning by barristers to ensure that it did not stray beyond permissible limits. When it did stray they then needed to make decisions about the way to deal with the issue so they did not highlight the inappropriate material. For example, a feminist High Court judge (40) commented:

> A couple of times counsel have asked a series of questions and then, bang, have come out with this question. It's too late. The question's asked, answered and I've been caught off guard. If only I'd seen that coming I would have stopped it. That was just awful, an awful question. It's too late. You're just going to highlight it. You just sit on the edge of your seat, wait for the next one and be ready to pounce.

In the context of domestic violence cases, legal developments similar to those associated with rape law reform are beginning to take place. For example, in some jurisdictions legislation has been introduced that disallows the cross-examination of a victim by a violent ex-partner and [allows] the use of screens and remote evidence giving.[1] A District Court judge in the family jurisdiction (13) explained how abusers might use the justice process as an opportunity to abuse their ex-partner further (ALRC/NSWLRC, 2010, chapter 18) and the risk that a woman victim's difficulty with cross-examination may be interpreted in a way that fails to understand the complex and controlling dynamics of domestic violence. Similar comments could also be made in the context of a sexual offence trial. For example, this judge (13) said that she is very 'sensitive' about this context and explained that often she would behave as a kind of buffer to protect the victim. She reported that she might say to the male partner: 'you tell me what you want to ask, and I'll ask her…'. She provided an example of a case in which an unrepresented woman expressed such terror at the prospect of cross-examining her unrepresented ex-partner that she was unable to ask him any questions. The judge commented:

> You can see some aggressors trying to use the opportunity of cross examination to belittle, to continue the abuse. It's very helpful in a way to see them act like that, because it's exactly what they're saying they're not doing. You also have to be mindful about this. They shouldn't be using the opportunity to perpetrate the abuse.

While the problem of perpetrators using justice processes to re-abuse their victims is becoming better recognised, most Australian jurisdictions continue to allow parties to cross-examine each other directly in civil and family law cases even where there is domestic violence (Victoria Legal Aid, 2015). This means the approach of the judge may have a particularly important role in enabling safe cross-examination and evidence giving.

Clearly the adversarial system creates a very stressful environment, particularly for vulnerable witnesses. Some judicial officers identified that they tried to promote a supportive environment in order to get the best evidence from the parties. While there is arguably less scope to facilitate a more relaxed court room than, for example, in a tribunal setting, judges in trial courts suggested there is still scope within more formal court settings to support vulnerable witnesses. For example, one judge explained that her feminism was reflected in the way she managed the examination of vulnerable witnesses (although at the same time she recognised that both men and women judicial officers may take this approach). She said: 'I'm very careful and conscious of the need to manage a court and a trial fairly when it comes to women who are complainants for example […] it's how I'd do it but I'm sure that generally speaking all judges do that' (Crown Court judge: 24). Others identified analogous strategies as part of their feminist contribution to their judicial practice: 'I'm thinking about women as complainants […] I think I try and make people feel comfortable' (High Court judge: 37). Another pointed to 'acknowledging victims

[...] making them feel comfortable and encouraging them to give their evidence in a relaxed fashion. Making the experience less oppressive for them' (High Court judge: 41). Another judge described the difficulties for women who often come to court as victims of crime, commenting: 'they come to the court with a disadvantage. It's difficult to correct that, I think. All you can do is be alert to that' (High Court judge: 40).

While evidence of prior inconsistent statements may be highly prejudicial, there may be a number of reasons why a witness's story changes or why she no longer gives evidence that supports a prosecution. Understanding these possible reasons may be helpful in coming to a just determination in a case. A feminist County Court justice (working in family law) inferred that knowledge of social science research had helped to inform her views when she reflected on discrepancies between statements given to police and testimony provided in a domestic violence case. She speculated on the possible reasons for the contradiction between statements:

> Does it mean you were lying when you're saying what you said now, because you told the police something different? I mean there are masses of research about this sort of stuff [...]. Well it's trying to realise that that may not be the whole story and that when somebody, with support, says this is what happens, you don't automatically say oh yeah, that's what happened. But you don't either say well why didn't you tell that to those two police that came round at three in the morning (County Court - Family: 14).

Notably inconsistent statements made by a victim may also be a feature of a sexual assault trial. Relatedly, research has led to greater understanding about women's experience of violence and has identified there might be a variety of reasons why a person does not attend court when her matter is listed. For example, an applicant in a domestic violence protection order matter may face a variety of obstacles (Laing, 2013). She may fear reprisals from the perpetrator should she come to court to give evidence against them, she may fear the court process itself or there may be other more material obstacles such as childcare responsibilities. Similar concerns may arise in a sexual assault trial (Hester, 2013, p. 8). A magistrate (18) identified this as an issue and considered how she might respond to it:

> If 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...

Some of the judges talked about evidential rules and the procedures now available to protect vulnerable witnesses while they give evidence. One judge referred to the importance of 'being conscious of the rules' (High Court judge: 40) but at the same time she recognised there also needed to be consideration given to managing the physical space of the court room and attention paid to the practical effects of where people were positioned in the space. She explained:

> It can be even down to where people are sitting in the courtroom [...] you could have a situation where [...], just because of where our dock is positioned in the courtroom, an accused might be sitting at one end of the dock. That might be making things a little uncomfortable. Or the counsel may be standing in a position facing the witness so that the witness has to look at the accused. Well, I would [...] ask counsel to move. The witness didn't have to have the accused in their line of sight if that was obviously causing a discomfort or I was concerned that it may.

The judge's comments extracted here identify the need for her to remain vigilant about the implementation of rules and procedures and protection of vulnerable witnesses beyond merely the words in the statute if the spirit of the law is to be properly followed.

Judges' comments often showed how formal changes to the law were not [always] sufficient. Indeed the feminist contribution, as some of the judge's comments suggest, 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 that the persistence of myths and stereotypes around gendered forms of harm 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.

Some Conclusions

Many significant legislative and procedural reforms have been introduced in an effort to counter rape myths and improve the experience of complainants in sexual offence trials. For example, reforms to evidence rules in sexual offence trials include changes to corroboration warnings, delayed complaint and sexual history evidence (Heath, 2010, p. 88). The use of screens, the facilitation of evidence giving via closed circuit television and video-recorded evidence were procedural changes introduced to shield victims from the secondary victimisation that might occur in the cross-examination context and are now available in many trials (Ellison and Munro, 2014). Despite these developments, convictions for sexual assaults remain extremely low and the experience of complainants extremely poor (Kelly et al., 2005). Writing over ten years ago, Celia Wells (2004, p. 91) 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. At the same time she identified that the translation of legislative reform 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 realised' (Wells, 2004, p. 100). On this point Temkin (2010) has identified the rigidity of judges and lawyers in maintaining their attachment to outmoded stereotypes and their adherence to rape myths. This may be where a feminist approach to judging might make a difference.

A number of the approaches identified by the interviewees reflect the feminist strategies suggested by Hunter (2008) in relation to how feminist judges might approach their role. Many of the judges interviewed reported that they draw on their feminist world view to challenge assumptions and stereotypes, carefully consider context in order to understand behaviour better and work to ensure that women's voices can be heard. What also seems clear from many of the judges' comments is that they are careful to ensure that the current law is rigorously applied both according to its letter and its spirit. It is relevant that this article was concerned primarily with feminist judicial practices around sexual offences law, an area of law that has been the subject of extraordinary levels of legislative reform largely driven by feminist scholarship and activism over the past 50 years (Heath, 2010). It is not surprising then that judges who identify as feminist were keen to give full effect to those reforms.

Acknowledgement

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Notes

[1] See clause 5, Domestic and Family Violence Protection and Another Act Amendment Act 2015 (Qld); section 70 Family Violence Protection Act 2008 (Vic).

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Insights

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