

WOMEN AND JUSTICE – IS THERE JUSTICE FOR WOMEN?

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We live in a democratic society governed by a constitution and the rule of law. The legal system in such a society is predicated on the assumption that all citizens, whatever their sex, race or religion, or their access, or lack of it, to wealth and power, are equal before the law and will receive equal and fair treatment by the law. To suggest that this is not true for any individual or social group is to question the very basis of our civil society, our democracy. Each citizen of this country is entitled to expect justice according to law.¹

Women interact within the legal system in two major ways: as participants within it, and as citizens affected by it. The judicial system is the third arm of government and, like the legislative and administrative arms of government, affects each one of us even if we are not active participants in it. It is necessary therefore to examine the legal system to determine whether, and in what ways, women are treated unfairly or face discrimination within it because of their gender.²

It is hardly controversial these days to point out that women, along with many minority groups, have not received equal treatment in the past in our courts. Two related questions then require examination:

1. Do the doctrines and practices of the past which led to injustice to women continue to inform current legal practice and judicial decision making?
2. If they do, what has been done and what should be done to correct this situation? Are there still laws which need to be reformed before women can expect true equality before the law?

I will consider each of these difficult issues in turn.

* This is a slightly edited version of a keynote address given by the Honourable Justice Roslyn Atkinson at the inaugural Australian Women Speak Conference hosted by the Commonwealth Office of the Status of Women at the National Convention Centre in Canberra on 27 August 2001. The audience comprised invited representatives from a large number of government and non-government organisations, not predominantly lawyers.

1 The quest for equality is one of the most powerful political impulses of liberal democracy and yet there remains a significant gap between liberal theory and the operation of law which purports to enhance and give effect to either formal or substantive equality: M Thornton, *The Liberal Promise* 1990, Oxford University Press.

2 Recent research suggests that the confidence that non-users have in courts is affected by their perception of whether there is equal treatment by the courts so that women and minority groups are not discriminated against: S C Benesh and S E Howell, 'Confidence in the Courts: A Comparison of Users and Non-Users' (2001) 19 *Behavioural Sciences and the Law* 199, 211.

I UNJUST PRACTICES

Women participate in the legal system as litigants, victims, defendants or witnesses; or as lawyers, jurors, or much more recently, as judges. The under-representation of women in the judiciary and indeed, until the appointment of Roma Mitchell to the Supreme Court of South Australia in 1965, their complete absence, led to women being treated not as equals but as what Simone de Beauvoir referred to as the *other* – beings with a different, less rational and hence less reliable view of the world. This reflected itself in the type of legal reasoning which was applied to women. Let me give an example.

The evidence of women and children was historically treated with suspicion in the criminal courts.³ In part this was due to the insidious influence of myths and stereotypes and in part, particularly where they claimed to be victims of sexual offences, it was due to rules relating to the corroboration of the evidence of such witnesses. Why should the evidence of certain witnesses be considered unreliable? If, for example, two people commit a crime together and one gives evidence implicating the other as having greater responsibility, a jury may be entitled to treat the evidence of the accomplice with some suspicion, particularly if that offender has been given immunity from prosecution. Judges therefore often warn juries that it is dangerous to convict on the uncorroborated evidence of an accomplice.

Unfortunately, however, the rule did not stop there. Let me give a reasonably recent example of the way the rule extended, offensively, to put victims of sex crimes in the same category as accomplices. As recently as 1987, the Law Lords who comprise the Judicial Committee of the Privy Council in London held:⁴

The rule requiring a warning to be given to a jury of the danger of convicting on uncorroborated evidence applies to accomplices, victims of alleged sexual offences and children of tender years. It will be convenient to refer to these categories as ‘suspect witnesses’.

It is precisely because the evidence of a witness in one of the categories which their Lordships for convenience have called ‘suspect witnesses’ may be of questionable reliability for a variety of reasons, familiar to generations of judges but not immediately apparent to jurors, that juries must be warned of the danger of convicting on that evidence if not corroborated; in short because it is suspect evidence.

The generations of judges to whom they refer did not include women. There has never been a female judge in the House of Lords, England’s highest court of appeal. In 2001, a woman, Dame Sian Elias, sat for the first time on the Privy Council⁵ which sits in London and hears appeals from some Commonwealth countries, but that was only because she is the Chief Justice of New Zealand and entitled because of her position to sit in the Privy Council. The senior Law Lord, Lord Bingham said on his appointment

³ D J Bonface, ‘Ruining a Good Boy for the Sake of a Bad Girl: False Accusation Theory in Sexual Offences, and New South Wales Limitations Periods – Gone But Not Forgotten’ (1994) 6 *Current issues in Criminal Justice* 54.

⁴ *A-G of Hong Kong v Wong* [1987] AC 501, 509, 511.

⁵ *The Times*, 6 February 2001, 9.

last year that he expected there to be an appointment of a woman to that court within five years.⁶

It is perhaps little wonder that there was great controversy last year when feminist lawyers argued that the all male Law Lords were an inappropriate body to adjudicate on a test case on rape law to determine whether a woman's previous sexual history should be admissible evidence in a rape trial.⁷ The case went ahead.⁸

The rule to which I have referred, that the evidence of 'victims of alleged sexual offences' had to be corroborated, drew upon various obnoxious stereotypes:

- (a) that women are irrational and unreliable;
- (b) that a woman was either an unwilling participant in sexual activity outside of marriage or, if she was not, she was a whore or an adulterer. A woman could not in law therefore be raped by her husband;⁹
- (c) that, from the male perspective, rape is an easy accusation to make and a very difficult one to disprove.

This rule led to various complex, and once more arguably stereotypical, evidentiary rules such as:

- (a) fresh complaint. A woman is expected to complain of a sexual offence against her at the first reasonable opportunity – doing so is said to be expected of a truthful woman who has been sexually assaulted.¹⁰ If she doesn't so complain, the jury would be able to take that in account in deciding whether to believe her;¹¹ and
- (b) distress. The distressed condition of a woman or girl as observed by third persons was said to be capable of corroborating her complaint of rape. However the rule could be used to further humiliate a female victim. In a Queensland case decided in 1965,¹² a number of men were convicted after a 17 year old trainee nurse was pack-raped. After the first pack-rape, the victim escaped but was then taken by other men to a rubbish dump where she was raped by five more men. She was taken elsewhere, again raped by the same men and then abandoned. She was admitted to hospital where she was a patient for eight weeks, emerging from time to time to give evidence at committal hearings. The witness who first saw her after she had been so brutally raped said she was in a dazed and hysterical condition, dishevelled

⁶ F Gibb, 'The Supreme Sacrifice' *The Times*, 17 July 2001.

⁷ F Gibb, 'All-male Law Lords "Biased Over Rape Case"' *The Times*, 20 March 2001, 4; F Gibb, 'Law Lords Reject Sex "Bias" on Rape Law' *The Times*, 21 March 2001, 8; M Stephenson, 'Absence of Women in Highest Court' *The Times*, 23 March 2001, 23.

⁸ *Regina v A* [2001] UKHL 25.

⁹ M Hale, *Historia Placitorum Coronae* (1734) 636 quoted in G Geis, 'Lord Hale, Witches and Rape' (1978) 5 *British Journal of Law and Society* 26, 40-41.

¹⁰ *R v Lillyman* [1896] 2 QB 167; Hawkins' Pleas of the Crown: "It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact." A woman was expected to raise a hue and cry as a preliminary to an accusation of rape: *R v Osborne* [1905] 1 KB 551.

¹¹ *Kilby v The Queen* (1973) 129 CLR 460, 465.

¹² *R v Richards* [1965] Qd R 354.

and dirty.¹³ The accused each gave evidence alleging she had consented. The court held on appeal:¹⁴

I have come to the conclusion that the evidence had no weight as corroboration and that it should not have been left to the jury as corroborative evidence at all ... I [do not] think that in the circumstances of these cases, the evidence tended to show that the crimes charged in the indictments had been committed. It seems to me that the complainant's dishevelled condition is equivocal; as the Judge suggested to the jury in one of the cases, it may have been caused by rough handling during a succession of acts of intercourse to which she had consented. Her condition of distress could also perhaps have been caused by remorse. The evidence, therefore, lacks both the essential characteristics of corroborative evidence. It did not, in my opinion, in any of the cases, confirm the evidence that the crimes had been committed, or that the accused committed them.

Is it any wonder that women were reluctant to press ahead with such charges after they were the victims of an offence if they were to be then further victimized by such attitudes.

Parliaments in this country have attempted to change this situation by passing laws¹⁵ saying that a judge is not required to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of a witness. While a judge is not prevented from making a comment on evidence given in a trial that it is appropriate to make in the interests of justice, the judge must not warn or suggest in any way to the jury that the law regards any class of complainants as unreliable witnesses. I am unaware of any other case in which distress following an alleged pack-rape has been held to be ambivalent and the authority of the decision I referred to has subsequently been rejected.¹⁶ The High Court has observed that the assumption that a victim of a sexual offence will complain at the first reasonable opportunity is an assumption of doubtful validity.¹⁷

How did the law become imbued with these attitudes? As I have noted, the first reason was that women were not amongst the decision makers within the judicial system. Secondly, many of the men who were, held biased views about women which went unchallenged. One of these was the seventeenth century judge Lord Hale who is the source of many of the inaccurate observations about women who had been sexually assaulted. It was he who first made the inaccurate observation that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."¹⁸ His observations about women in other

¹³ Ibid 360.

¹⁴ Ibid.

¹⁵ See, eg, *Criminal Code* (Qld) s 632; *Criminal Law Consolidation Act 1935* (SA) s 242(4); *Evidence Act 1906* (WA) s 35; *Evidence Act 1995* (NSW) s 164; *Evidence Act 1971* (ACT) s 76F; *Crimes Act 1958* (Vic) s 61.

¹⁶ *R v McK* [1986] 1 Qd R 476, 481; *R v Major and Lawrence* [1998] 1 Qd R 317.

¹⁷ *M v The Queen* (1994) 181 CLR 487, 515; *Suresh v R* (1998) 72 ALJR 769, 770; see also *R v Schneider* QCA No 128 of 1998, [11] – [12] (Thomas JA).

¹⁸ S C Taylor, "And Now Your Honour, for my next Trick ..." Yet Another Defence Tactic to Construct the Mad, Bad and Colluding Mother and Daughter in Intrafamilial Sexual Assault Trials' (2000) 14 *Australian Feminist Law Journal* 121, 125; G Geis, 'Lord Hale, Witches and

contexts are therefore instructive. Ironically, one of the most notorious witches' trials of the seventeenth century was held before the same Sir Matthew Hale, who was a fervent believer in witchcraft.

Part of the evidence in the trial of the alleged witches was given by a doctor. He had suggested hanging up a blanket for a night outside the home of the apparently bewitched to see what came to inhabit it. A toad fell from the blanket which exploded when thrown into the fire. The next day one of the accused women was seen with burns to her face, leading to the inference being drawn that she had disguised herself as the toad on the previous night and was burnt when it was thrown onto the fire.

Some of the lawyers involved in the case were still doubtful so an experiment was conducted. The children who were said to be bewitched went into paroxysms when they saw the accused witches. The fits stopped it was alleged only when a witch touched the children. An experiment was carried out where an accused witch was sent for when the child was in such a state but an apron was held in front of the child's face so the child could not see who touched him. Another, entirely innocent, old woman touched the child. The paroxysm immediately ceased. The doubts of the sceptics were confirmed. But Lord Hale accepted the unlikely explanation given by the father of the children who claimed that this was positive proof of bewitchment since it was obviously further sorcery that led the child into error. The two unfortunate widows accused of being witches were convicted and hung. Lord Hale was, it seems, as gullible about accusations of witchcraft against women as he was sceptical of claims of rape by women.

Unfortunately, Lord Hale's adages with regard to rape and the reliability of the evidence of women who claimed to be victims remained as unquestioned axioms of the law long after his deluded views on witchcraft had been forgotten. The stereotypical assumptions have formed part of the fabric of the common law.

II HAVE WOMEN ACHIEVED TRUE EQUALITY UNDER THE LAW?

We have come a long way from the days when women were accused of witchcraft. There are, however, a number of problems suggesting the need for reform remains. Many of these laws affect men as well as women but in practice have a greater impact on women than on men. In other words the discrimination wrought by these laws is indirect rather than direct. They appear on their face to be neutral but have a differential impact on women from their impact on men.

The legal system has for the past decade been endeavouring to deal with the emotional and physical damage suffered by children who are now adults, who allege they were physically or sexually abused in their homes or in institutions where they lived or by other people whom they trusted, and who exercised control over them. Complex directions, such as to the effect of delay, are required to be given in criminal prosecutions of these alleged predators. A trial judge is required to warn a jury that it is dangerous to convict the accused in a case where the prosecution relies on the evidence

Rape' (1978) 5 *British Journal of Law and Society* 26; G Geis, 'Revisiting Lord Hale, Misogyny, Witchcraft and Rape' (1986) 10 *Criminal Law Journal* 319.

of a complainant who alleges sexual abuse many years ago.¹⁹ In civil cases, plaintiffs have to overcome the minefield of Limitation Acts²⁰ which prevent them from having their claims go to trial.

In civil cases, if a woman's husband is killed by another's negligence she is still required to undergo the humiliation inherent in a judge determining how "marriageable" she is and therefore by how much her damages should be reduced.²¹ Age and conventional good looks have traditionally been used as markers of the marriagability of women. A man who is economically dependent on his wife finds himself in the same position but such a case is much more uncommon and a man's physical attractiveness has never, to my knowledge, been considered.

A few other examples can be listed. I do not suggest these are exhaustive.²² In personal injury cases where damages are awarded for care provided free of charge, more often than not by a wife, mother or daughter, no mechanism exists for that award to be made to her or held on trust for her.²³ There has been legal uncertainty as to the availability of fertility services regardless of a woman's marital status or sexuality.²⁴

In the criminal law, the law has had great difficulty giving effect to the different ways in which women tend to react when provocation or self-defence may be open as defences to a criminal charge against them.²⁵ Some women are further victimized by other factors. Aboriginal women not only represent a disproportionate percentage of victims of violent crime, but also of the female offenders sentenced to imprisonment.²⁶

It is in the broadest interests of the community that law reform in these and many other specific areas be considered.

III MOVES FOR REFORM OF THE LAW

The Supreme Court in Canada has been outspoken in endeavouring to redress the balance, to address and reject stereotypes. In *R v Ewanchuk*,²⁷ for example, the court roundly criticized the mythical assumptions made both by a trial judge who took the

¹⁹ See, eg, *Doggett v The Queen* [2001] HCA 46. But note the criticism of McHugh J particularly at [81].

²⁰ *Limitation of Actions Act 1974* (Qld); *Limitation Act 1969* (NSW); *Limitation Act 1985* (ACT); *Limitation of Actions Act 1936* (SA); *Limitation Act 1974* (Tas); *Limitation of Actions Act 1958* (Vic); *Limitation Act 1985* (WA); *Limitation Act* (NT).

²¹ *Row v Willtrac*, Supreme Court of Queensland, 6 December 1999, [33]; but now see *De Sales v Ingrilli* [2002] HCA 52 which is discussed as a postscript to this paper.

²² See, eg, R Graycar and J Morgan, *The Hidden Gender of the Law* (2nd ed, 2002).

²³ P W Young, 'Fairness and damages for carers' (2001) 75 *Australian Law Journal* 213.

²⁴ *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; 18 April 2002.

²⁵ B A Hocking, 'Frightened Women, Angry Men and the Law of Provocation' (1999) 6(1) *Psychiatry, Psychology and Law* 57; 'Gender-Specific Response Patterns in Criminal Defences' (1996) 20 *Criminal Law Journal* 185; P Esteal, 'Reconstructing Reality' (1995) 20 *Alternative Law Journal* 108; G Hubble, 'Self-Defence and Domestic Violence: A Reply to Bradfield' (1999) 6(1) *PPL* 51.

²⁶ E Baldry, 'Convicted Women: Before and After Prison' (1997) 8 *Current Issues in Criminal Justice* 275, 277.

²⁷ [1999] 1 SCR 330, [87] – [88].

view that a woman who said ‘no’ to sexual activity was really saying ‘yes’, ‘try again’, or ‘persuade me’ and also by an appeal court judge who said of the woman who was sexually assaulted by the accused in his caravan when she went for a job interview, ‘it must be pointed out that the complainant did not present herself to [the accused] or enter his [caravan] in a bonnet and crinolines.’ He also thought it relevant to mention that she was a mother of a six-month-old baby who lived with her boyfriend and another couple. As Madam Justice L’Heureux–Dubé observed,²⁸ even though the appeal court judge asserted he had no intention of denigrating the complainant:

... one might wonder why he felt necessary to point out these aspects of the trial record. Could it be to express that the complainant is not a virgin? Or that she is a person of questionable moral character because she is not married and lives with her boyfriend and another couple? These comments made by an appellate judge help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. Based on those attributed assumptions, the implication is that if the complainant articulates her lack of consent by saying “no”, she really does not mean it and even if she does, her refusal cannot be taken as seriously as if she were a girl of “good” moral character. “Inviting” sexual assault, according to those myths, lessens the guilt of the accused ...

Madam Justice L’Heureux–Dubé is one of three female Justices, which include the Chief Justice, of the Supreme Court of Canada. They represent one-third of the membership of the court.

Australia, on the other hand, has had only one woman Justice on our highest court, Justice Mary Gaudron who was appointed in 1987, who gave generous acknowledgment to the pioneering work of Dame Roma Mitchell on her appointment. In other courts, there has been a steady increase in the number of women appointed to the bench in recent years. At the beginning of 1998, the Supreme Court of Queensland had only one female judge and 22 male judges. By the following year there were four female judges. Now on a court of 24 judges, 7 are female and 17 male. At almost 30% this is the highest proportion of female judges in any superior court in Australia. While 28% of the Family Court, 17% of the Northern Territory Supreme Court, 12% of the Supreme Court of Western Australia judges are female, only 10% of the Federal Court, 9% of the Supreme Court of New South Wales, 7% of the Supreme Court of South Australia and 6% of the Supreme Court of Victoria judges are female; and there are no female judges in Tasmania or the ACT.²⁹

I suggest that the appointment of women as judges has two linked effects, although neither is easy to quantify. The first is that it demonstrates in a very tangible way that women have a right to take their place, an equal place, amongst those who govern our

²⁸ Ibid [89].

²⁹ Approximations based on the following statistics as at August 2001: Family Court of Australia – 15 female judges out of a total of 53 judges; Supreme Court of the Northern Territory – 1 female judge out of a total of 6 judges; Supreme Court of Western Australia – 2 female judges out of a total of 17 judges; Federal Court of Australia – 5 female judges out of a total of 49 judges; Supreme Court of New South Wales – 4 female judges out of a total of 45 judges; Supreme Court of South Australia – 1 female judge out of a total of 14 judges; Supreme Court of Victoria – 2 female judges out of a total of 31 judges.

society, and secondly that justice should be dispensed by, as well as for, women as well as men.

Women as judges should and will, in my view, make a difference to the vindication of the rights of all people. Empirical research in the United States has tended to confirm this. In an attempt to determine the decision making patterns of women judges, research was undertaken into the decision making of state supreme court judges from 1982 to 1998 in two substantive areas of law not generally identified as 'women's issues': obscenity and death penalty sentencing. Controlling for other variables, the research found that women judges in state supreme courts tended to make more liberal decisions to uphold individual rights in both death penalty and obscenity cases. Interestingly, and as the researchers said, equally importantly, the presence of a woman on the court tended to increase the probability that male judges would adopt a similar position.³⁰

The point is not to replace a judiciary which has been perhaps unconsciously biased in favour of a male point of view with one which is biased in favour of a female point of view, but to ensure that the public has faith that the court will be impartial and be able to recognise and therefore eliminate unconscious bias. This can only happen if we do not confuse objectivity as being defined by a male point of view or perspective. Only then will women and men both place trust in the legal system. A survey recently conducted in New Zealand showed that women who have experience of the civil court or tribunal system were far less confident that they were treated fairly and that a fair result had been achieved than men who had experience of the civil system.³¹

The Senate Committee³² of the Australian Parliament, which reported on Gender Bias and the Judiciary in May 1994, noted the arguments in favour of the appointment of more women to the judiciary were first that, to maintain public confidence in the judiciary, it must be *seen* to reflect the different parts of the population it serves and to offer role models for women. And second, the appointment of significant numbers of women is likely to affect the nature of judicial decision-making through potentially different decision-making styles, and by redressing areas of law developed from distinctly male perspectives such as those dealing with women's sexuality.³³

Justice Mary Gaudron said on the formation of the Australian Women Lawyers in September 1997:³⁴

I believe that having acknowledged and asserted their difference, women lawyers can, with the assistance of feminist legal theorists, question the assumptions in the law and in the administration of the law that work injustice, either because they proceed by reference

³⁰ D R Songer and K A Crews-Meyer, 'Does Judge Gender Matter? Decision Making in State Supreme Courts' (2000) 81 *Social Science Quarterly* 750.

³¹ J Morris, 'Women's Experiences of the Justice System' (1997) 27 *Victoria University of Wellington Law Review* 649, 662.

³² Parliament of the Commonwealth of Australia, *Gender Bias and the Judiciary*, Report by the Senate Standing Committee on Legal and Constitutional Affairs, 1994.

³³ B Naylor, 'Equality Before the Law: Mission Impossible? A Review of the Australian Law Reform Commission's Report *Equality Before Law*' (1997) 23 *Monash University Law Review* 423, 432 – 433.

³⁴ Hon Justice M Gaudron, 'Speech to launch Australian Women Lawyers' (1998) 72 *Australian Law Journal* 119, 123 – 124.

to differences which do not exist or because they ignore those that do. And having become sensitive to those matters, it will not be long before there is a realisation of the need to be sensitive to the different experiences and circumstances of others, to articulate those differences when necessary, to question the assumptions of the law as it affects them. In short, to be sensitive to the needs of justice.

In July 2000, her Honour's sentiments were echoed in England by Cherie Booth QC who said:³⁵

Judges and lawyers should be diverse because the issues they handle [are] diverse. Law and the legal profession must be representative to strengthen public confidence. It must be multi-faceted, then it will be more in touch with society.

In July 2001, Ms Booth said that the under-representation of women as judges threatens to undermine the legitimacy and authority of international courts. 'A court without women, or with an insufficient number of them, cannot be representative of the "main forms of civilisation"'.³⁶

However, the appointment of women to the bench is only one of the changes to the legal system which must occur. While the appointment of female judges is necessary, it is hardly sufficient.

Judges are after all obliged to apply the laws passed by parliament and follow binding precedent no matter what their personal views may be. Justice should be dispensed for women, not just by women. The rights of all citizens free of irrelevant bias, such as gender bias, can only be protected if those rights are able to be vindicated by the substantive law. In Canada, for example, in common with most democratic and developed countries, a citizen's right to be free of sex discrimination is constitutionally protected. The effect of this can be seen in the analysis of the court in the case to which I have referred when Madam Justice L'Heureux-Dubé said:³⁷

Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. As Cory J wrote in *Osolin*,³⁸ sexual assault 'is an assault upon human dignity and constitutes a denial of any concept of equality for women'. These human rights are protected by s 7 and 15 of the *Canadian Charter of Rights and Freedoms* and their violation constitutes an offence under the [criminal code].

In Australia, equality rights are protected by the Commonwealth *Sex Discrimination Act* and State *Anti-Discrimination Acts*. While, in my experience, these Acts have been effective in allowing women and men to take action against discrimination in various important areas of activity, they do not have the overriding force given to Charters and Bills of Rights and other means of constitutionally protecting rights and freedoms and eliminating unfair discrimination.

³⁵ F Gibb, *The Times*, 20 July 2001.

³⁶ C Booth and P Sands, 'Keep Politics out of the global courts' *The Guardian*, 13 July 2001.

³⁷ *R v Ewanchuk* [1999] 1 SCR 330, [69].

³⁸ *R v Osolin* [1993] 4 SCR 595, 669.

The need for an overriding protection of human rights has been recognised in jurisdictions very similar to our own. In July 2001, Lord Woolf, the Lord Chief Justice of England and Wales, delivered a strong speech to a conference of Hong Kong judges and lawyers concerning the need for global human rights enforced by strong independent judiciaries.³⁹

The emphasis on the vindication of rights empowers those who have been the object of discrimination. In South Africa, rights to equality are protected by s 9 of the Constitution. The inspirational and aspirational nature of the Constitution is then reflected in the preamble of their Equality Act⁴⁰ which provides:

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

Unlike South Africa, our democracy was born out of consensus not struggle. We have perhaps more in common with Canada, the United Kingdom and New Zealand. Yet all of these nations have recognised the importance of human rights. The Canadian Charter of Rights and Freedoms was enacted in 1982; in 1990 New Zealand passed a Bill of Rights Act; and the Human Rights Act became law in the United Kingdom in 1998. The fabric of society in those countries has been strengthened rather than torn by the protection of human rights.

In conclusion, in answer to the question, is there equal justice for women, the answer must unfortunately be that there is not; not entirely; not yet. Fundamentally women's rights are human rights. By protecting human rights we enhance women's rights by ensuring we strive for a just society free of irrelevant inequality. To ensure equal justice for all of our citizens, there may be great value in having a yardstick against which issues of equality can be measured as they are in other common law countries. The real advantage of the legislative or constitutional protection of human rights may well be that it would enhance the prospects not only of justice for women but justice for all members of our society.

Postscript:

In November 2002, the High Court in *De Sales v Ingrilli*⁴¹ considered the common law rule that in an assessment of damages for a surviving spouse and the children of the parent and partner, the prima facie value of what is lost should be reduced for the contingency that the surviving partner will remarry. The joint judgment of Gaudron, Grummow and Hayne JJ held⁴² that ordinarily, no deduction should be made on this account, whether as a separate deduction, or as an item added to the amount otherwise judged to be an appropriate deduction for the vicissitudes of life. Their Honours referred to the:

³⁹ F Gibb, 'Woolf Stresses Human Rights' *The Times*, 25 July 2001, 2.

⁴⁰ *Promotion of Equality and Prevention of Unfair Discrimination Act 2000*.

⁴¹ [2002] HCA 52.

⁴² Ibid [46].

very great changes [which] occurred during the last half of the twentieth century in the nature and durability of family relationships, in the labour market, and in the expectations that individual members of society have for themselves and about others – economically, socially, domestically, culturally, emotionally. Even if once it were the case, no longer can a court make any assumption about the role that an individual can be expected to play in the family or in the economy. Yet it is assumptions of conformity to some unstated norms which underpin the making of a ‘discount for remarriage’.⁴³

Kirby J., in a concurring judgment, also referred⁴⁴ to the change in social circumstances including the increase in the number of judges who may be less likely to refer to the physical attractions, warmth of personality and remarriage prospects of a widow based on stereotyped assumptions about the considerations that contribute to the initiation and continuance of domestic partnerships.⁴⁵

43 Ibid [65].

44 Ibid [152]-[165].

45 Ibid [153].