

FEMINIST LAW BULLETIN

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REPORT ON THE RAPE CONFERENCE: PART ONE

An interdisciplinary conference on "Rape: Ten Years Progress?" was held in Wellington on 27-30 March. A main aim of the conference was to evaluate the legal and process changes that have occurred since 1985. (These were outlined in the last issue of the Bulletin.) The following is the first part of a summary of issues discussed at the conference, focusing on reporting, police procedures and the substantive law. In the next issue we will cover the trial process, sentencing and prevention.

Reporting

A number of speakers discussed the low reporting rates for rape and the

reasons that women might decide not to involve the police. Professor Mary Koss (US) pointed out that our culture promotes narrow stereotypical views of the definition of rape so that many women may not know that their experience is legally rape. Also societal attitudes still tend to blame the victim in rape cases, for example pointing to the woman's drinking as a reason for the rape. Non-reporting is a particularly serious problem when the woman is in the 15 to 24 year age group, and when the perpetrator was an acquaintance.

Jan Jordan and Elisabeth MacDonald, Senior Lecturers at Victoria University have just completed a study examining adult women's experiences of reporting rape. Forty eight survivors of rape were interviewed. The conclusions emphasised the need for women who do report rape to be heard, believed and respected, and given some control over the process.

Police Procedures:

The study found that about half the women interviewed were not satisfied with their treatment by the police when they reported the rape. Two decided not to proceed because of the negative police attitude. The degree of dissatisfaction had increased slightly since a 1983 study.

The women interviewed had mixed feelings about male police officers taking their initial calls, interviewing them and arriving at the scene. Jan Jordan stressed the need for women to be given a choice of male or female interviewing officers, and the need for any officer who may be involved with rape complaints to have appropriate qualities and training.

While there had been some improvements in police training, the expectations of complainants had justifiably increased and women's experiences of the system (and even whether a case goes to trial) should not be dependent, as Brenda Heather said, "on the personality, experience and training of the officer in charge of the investigation and the prosecutor."

Jan Jordan and Professor Warren Young both discussed the problem of police officers focusing too strongly on 'getting the evidence' at the cost of respect and support for the victim. Police training should also emphasise the need for cultural sensitivity, ongoing liaison with the victim.

When the police believe there is not enough evidence to prove the case beyond a reasonable doubt, the case may be cleared as "disclosing no offence." Young stressed that the police may still believe there was a rape in these cases.

Most of the women interviewed were satisfied with their treatment during the medical examination, largely as a result of the Doctors for Sexual Abuse Care protocols.

Professor May Koss cited US research on variables affecting police decisions.

Police were more likely to find a rape complaint founded if: a female officer was involved in the investigation, the perpetrator was in custody and/or there was injury to the sexual organs.

Police were less likely to find a rape complaint founded if: the complaint had been using drugs, went with the perpetrator voluntarily, had prior sexual experience, delayed reporting, had inconsistencies in her story after repeated re-tellings (eg up to 27 times), was African-American, "ugly or obese", failed to produce any corroboration, had been hitchhiking, had any emotional or mental problems, was on welfare, had a prior police record and/or the perpetrator was of the same age, or had no criminal record.

The Substantive Law:

Despite changes to the law which have had an impact on the courts, the conviction rate has remained largely unchanged. It is hard to evaluate the impact of the changes on the reporting and prosecution rates.

The Court of Appeal has made it clear that consent must be genuine and freely and voluntarily given. Chief Justice Eichelbaum did suggest that more fully detailing the circumstances which did not constitute consent might be an area for further reform.

Ruby Woodward (Victoria University) discussed possible changes to the definition of rape

which focus on the woman's sexual autonomy. In this way the focus would be shifted to the woman's experience of the event, rather than her non-consent to the man's sexual initiative.

"The reality is that not only married women, but also women men know or live with, can be raped at will. Men know this. Rape is not illegal, it is regulated."

Catharine MacKinnon

Statistics discussed at the conference suggest:

- 1 in 10 rapes are reported.
- 45% of reported rapes are cleared by the police as disclosing no offence.
- 43% of offenders tried are acquitted.

[This suggests that only about 3 out of 100 rapes result in a conviction]

-Jury acquittal rates increase as the degree of intimacy between offender and victim/survivor increases. (Eg Research in Washington DC found the jury conviction rate was 27% if the perpetrator was a stranger, but only 10% if he had been a friend.)

For Proceedings of the Conference contact: Claire Hurst, Fax 09 307 0599, Bldg 43, Auckland Hospital, Private Bag 92024, Auckland.

FEMINIST LEGAL DEBATES

Equality

In the last issue of the Feminist Law Bulletin, we started a series of articles which aim to introduce the reader to an area of theory relevant to some of the questions raised within that issue of the Bulletin.

In this issue we examine the different meanings of the term

equality and how these meanings impact on the law. The discussion is framed in terms of gender oppression, but the same models of equality can be useful in analysing racism and other forms of oppression.

While most people could attempt to define equality, the more we think about it, the more problems arise. Different branches of Feminism have defined equality in their own ways.

Liberal feminists, believe that if women are treated in an identical way to men, that achieves equality. This approach has benefited women in the past, for example when women got the vote in 1893.

However liberal feminism has been criticised. Cultural feminists believe that women should not aim for identical treatment because women are different to men. They believe that these differences should be affirmed rather than ignored. Cultural feminists identify not only physical differences between men and women, like pregnancy, but also differences in the way women think and behave.

For example, they believe that men tend to solve problems by applying abstract principles to the facts and by prioritising these principles, while women tend to focus on the relationships involved, the context, and the connections between different aspects of the problem.

Cultural feminists advocate legal reforms that better suit women's ways of dealing with the world. For example, many cultural feminists believe mediation and conciliation should be used more frequently instead of our adversarial system.

They also advocate paid parental leave so that care-giving is not undervalued.

Radical feminists have pointed out problems with both the cultural and liberal approach as both views still use men as their central reference point. While liberal feminists want women to be treated in the same way as men, the cultural approach wants women to be treated differently to men.

Radical feminists look at equality from another standpoint. They view it as an issue of power and oppression. Radical feminists believe that equality will exist only when women are no longer subordinated by men. They argue that cultural feminism reinforces stereotypes that women have been socialised into by the patriarchal system.

Radical feminism looks at issues like rape, domestic violence, sexual harassment and pornography to show men's systemic violence against women. They question whether the processes and outcomes of specific laws or legal practices further the subordination of women. For example, do they reduce women's autonomy, self-esteem, employment choices etc.

Equality is not solely or predominantly about gender; it is also about race, religion, sexual orientation, class etc. While there is no simple answer to its definition, in this issue we examine equality in light of the Human Rights Act, and give some examples of its application to different areas of law.

Further Reading: Margaret Davies - Asking the Law Question (Law Book Company, Sydney, 1994) Chpt 6.

When Looking at Issues in Terms of Equality for Women, it may be Worth Considering:

- Does this law/practice oppress women?
- Is the effect of this law/practice to treat women differently to men?
- Is that different treatment justified? On what basis?
- Does that different treatment stereotype women? How can that be avoided?
- How can this law/practice be changed so that women experience more pleasure and happiness and less pain and suffering?

Equality and the Human Rights Act 1993

Generally the Human Rights Act views equality as being about treating people in the same way. With some exceptions, it is illegal:

- to treat people differently to their disadvantage (ie to discriminate), on any of the grounds in the Act which include race, ethnicity, religion; sex, family or marital status etc.
- if a practice has the effect of indirectly discriminating on these grounds.

However there is also provision in the Act for measures which aim to achieve equality of outcome by treating a particular group or groups differently. Section 73 makes it a defence to any action if the conduct was:

- done in good faith;
- for the purpose of assisting a group against whom discrimination is unlawful;
- and the group need or can reasonably be supposed to need

assistance in order to achieve an equal place with other members of the community.

A recent case, *Amaltal Fishing Co Ltd v Nelson Polytechnic* CRT1/96 concerned the reservation of places on fishing cadet courses offered by the Nelson Polytechnic, for Maori or Pacific Islands people. The Complaints Review Tribunal held that the Polytech had an obligation to satisfy itself that these groups needed 'special treatment', and it had not done this.

The Tribunal stated that the Act enshrined the principle of equality of treatment for all. The Tribunal went on to say "[t]he legislation provides for special treatment for disadvantaged groups."

Issues

- Does the wording 'special treatment' and 'disadvantaged groups' take the focus away from the causes of that disadvantage and need?
- Did the Tribunal see section 73 as an exception to the equality principle, rather than part of it?
- Is section 73 the best way to recognise and make up for systemic discrimination in NZ (-the affirmative action programme for white middle and upper class men that has been in place for centuries)?

JUDGE FOR YOURSELF:

Nuthall v Heslop [1995] 13 NZFLR 755.

Nuthall is a case about property rights on the break up of a de facto relationship. It follows on from the

decision in *Lankow v Rose* discussed in the Feminist Law Bulletin Issue 1 1995 and raises questions about equality and the need for property reform in this area (see the last issue of the Bulletin).

Ms Nuthall (now Mrs Clark) and Mr Heslop lived together for five years. When they met, Mrs Clark worked as a full-time medical secretary. Largely at Mr Heslop's request she reduced her hours and then stopped this work in order to work, unpaid in Mr Heslop's jet boating business and to assist him on his farm. She also did some work on the cottage in which they lived.

Mrs Clark contributed financially to the relationship, including subsidising Mr Heslop's expenses, using the money she had received when working in her secretarial job, interest payments and some of the proceeds from selling a house she owned.

Mrs Clark claimed that she had an equitable interest in Mr Heslop's assets as, by their living off her earnings, she had enabled Mr Heslop to keep intact his shares and other assets (eg jet boats and farming assets). She also argued that she had contributed to his assets by working for him etc.

The Judge found that Mrs Clark had spent \$65,000 on their general living expenses (including some contributions to the businesses), as well as spending about \$7,000 on the cottage. He found that Mrs

Clark had contributed 65% of the living expenses, as opposed to Mr Heslop 35%. However, the Judge held that Mrs Clark was entitled to only \$2,800 which represented an increase in the value of the cottage over the period of the relationship.

Below are comments from Justice Tipping and some of the issues these raise:

"[The court's power in this area] is not an exercise in general wealth distribution. Nor is it a jurisdiction to award a plaintiff compensation for her disappointment or financial loss upon an intended permanent relationship coming to an end."

- Is Mrs Clark asking for compensation for her disappointment at the end of the relationship?
- Is the case about "general wealth distribution" or about a fair division of property on the break up of a specific relationship?

"The basis of the claim urged on behalf of Mrs Clark is really an invitation to the Court to adjust retrospectively the way the parties have chosen to run their domestic finances in the interests of some amorphous concept of equality. If the parties have chosen, for whatever reason, to proceed on a basis which departs from equality in respect of general living and related expenses, I can see no justification for the assumption by this Court of an ex post facto power to require equality by constructive trust or otherwise."

- Is equality in this case really shapeless as the Judge suggests?

What result would achieve equality here?

- If equality is a difficult concept to apply in a case, is it best for the court to opt out?
- Are there justifications for courts to intervene to achieve equality on the break up of a relationship? Is one, that parties often make their domestic arrangements assuming that a relationship will be ongoing?
- If parties depart from equal contributions in order to maintain one person's asset, should this be considered?

"Intangibles cannot logically be added to a purely financial exercise of the present kind. The only way in which they can count is if they can be shown to have found their way, directly or indirectly, into an asset separate from the arithmetical comparison which I am now considering. I find this has not been shown."

- If courts can gauge non-financial contributions to a marriage, should the constructive trust situation be a "purely financial exercise"?
- Why does unpaid secretarial work not "find its way" into the worth of the business?

The Judge held that a "major feature of the present case is that Mr Heslop did not and does not himself own the premises in which the parties lived during their relationship." Mr Heslop however owned \$85,000 worth of preference shares in the company which owned the house.

- If this type of feature is a consideration, does this serve to encourage men to set up family trusts and companies which leave women without recourse to property?

The Judge illustrated a difficulty with Mrs Clark's argument. His example was of a man who supported a family unit financially to a greater extent than 50%, and then claimed against an asset the woman has held throughout the relationship.

- Is this example a fair analogy to the present case? (Eg: it overlooks Mrs Clark's unpaid work in the businesses and her financial contributions to them.)
- Does this reasoning show the need for a more holistic approach to each case rather than a purely arithmetic approach? (Eg: taking into account unpaid work in the home, the societal inequalities in pay between men and women etc.)

Partner Abuse:

"Every year about 12 women die as a result of abuse by their partners, and five hundred women are hospitalised as a result of assault. Recent estimates suggest that family violence costs between 1.2 and five billion dollars a year."

From Fact Sheet produced by Injury Prevention Research Centre (based on research funded by Health Research Council of NZ and North Health)

Equality Issues in Matrimonial Property

When a marriage of 3 or more years breaks down, the Matrimonial Property Act 1976 applies. It is often assumed that this will ensure the property is divided in such a way as to achieve equality. The Act has a strong basic presumption that property should be divided 50-50 between the parties, yet this may not achieve real equality.

- In many marriages the woman puts her career on a back-burner while she brings up the children. A major asset in these marriages is the income generating capacity of the man, which leaves him in a much better financial position after divorce than the woman. Studies have shown that the partner who has had an uninterrupted career can recover financially from a divorce within two years and continue on to be better off than before. Meanwhile the partner who has stayed at home, often the woman, rarely regains her former standard of living.
- This problem is exacerbated when the woman also has custody of the children after divorce.
- Spousal maintenance is rarely granted and covers only the "reasonable needs" of spouses who cannot meet their own needs.
- Women can find it difficult to get their half of the property. Some property may have been siphoned off before settlement.

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DOMESTIC VIOLENCE ACT 1995

The Domestic Violence Act was passed at the end of 1995 and will probably come into force in June 1996. It replaces the Domestic Protection Act 1982 and attempts to give courts and the police more power to "reduce and prevent" domestic violence. Below we outline some of the main changes. (See also *Feminist Law Bulletin* Issue 6, 1994.)

- **"Domestic relationships"**: The scope of the protection has been widened to cover partners, expressly including those of the same sex, family members, those who ordinarily share a household (including flatmates) and those in a close personal relationship (not necessarily a sexual relationship).

- **"Domestic violence"**: Domestic violence is now defined and covers physical, sexual and psychological abuse. The latter includes intimidation, damage to property, harassment, threats and, in relation to a child, allowing that child to witness abuse.

- **General Protection Order**: A general protection order replaces non-molestation and non-violence orders. Under these orders, the respondent (the person against whom the order is taken) must not abuse or threaten the protected person/s nor damage or threaten to damage their property etc. Unless the protected person consents they also must not make contact, watch or follow the person etc. The orders become final after 3 months (unless there is no court hearing) and then must be discharged by the court.

- **Weapons**: The Act now makes it usually a condition of the orders that

the respondent must surrender all weapons, and any firearms licence they hold becomes suspended (if the order is temporary) or revoked (if the order is final).

- **Programmes**: The order will also usually oblige the respondent to go on an approved programme which aims to prevent the respondent's abuse. The Court has the power not to require attendance for good reason. If the respondent fails to attend the programme, the provider is obliged to inform the court. In addition, the applicant can obtain counselling for themselves or their children.

- **Breach of an order**: The sentence for breach of an order has now increased, with either a term of imprisonment of up to six months, or a fine of up to \$5000.

If a respondent has offended twice before within three years (other than for failure to attend a programme), the maximum term of imprisonment rises to two years. Where there has been such a breach of a protection order, the police can arrest without warrant and where charges are laid, hold the respondent for 24 hours.

Issues:

The Act does improve the capacity of the legal system to protect victims of domestic abuse. One question now is how effectively the courts and police will exercise their discretion under the Act. While the conditions relating to programmes for the respondents may aid prevention, is there still not enough focus on the prevention aspect?