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NEW ZEALAND AOTEAROA

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Why a Feminist Law Bulletin?

The Feminist Law Bulletin:

- *Identifies when feminist issues arise in policy, legislative proposals, and the practice of law;*
- *Provides an opportunity for exploration and discussion of some of these issues;*
- *Enables a general readership to gain an introduction to feminist analysis of the law.*

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Judge for Yourself: Court of Appeal Decision a Violation of Women's Human Rights?

Earlier this year the Court of Appeal hit a new low in its landmark ruling on when exemplary damages can be awarded in negligence. The case concerned Gisborne pathologist Dr Michael Bottrill and the misreading of cervical cancer smears.

The Facts

The woman, known only as "Patient A" or "Jane", suffered invasive cancer after Dr Bottrill misread her smear test slides. She sued him for exemplary damages of $100,000. Four smears were taken between November 1990 and December 1994. Dr Bottrill found the first smear, taken when Jane was pregnant, was "outside normal limits" and recommended post-natal a repeat test.

A month later, however, Jane had another test and Dr Bottrill reported "no abnormal cells seen." He reported nothing abnormal in a May 1992 test although inflammation was present. When a fourth test was carried out in December 1994 abnormal cells were detected by the pathologist, who recommended a referral for assessment. Three weeks later biopsies revealed cancerous cells a gynaecologist diagnosed invasive hysterectomy and extensive radiation therapy.

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A subsequent examination revealed all four smears had been wrongly read. The first three revealed high-grade lesions and the fourth showed an invasive carcinoma.

Jane had a successful claim for accident compensation and disciplinary proceedings found Dr Bottrill guilty of conduct unbecoming a medical practitioner. The only punitive sanction was a fine of $400.

An initial application for a trial on exemplary damages was refused. However, Jane applied for a new trial after a large number of slides were sent to Sydney for re-reading. Of 857 slides found to be abnormal, Dr Bottrill had reported 562 of them as normal.

The High Court Decision

Justice Young found that Dr Bottrill's active interest in his own continuing education began to flag; that his health was suspect; that he was genuinely suspicious of the benefits of what are largely document-based accreditation systems; that he was disinclined to participate in quality control systems, partly because of a suspicion of "new-fangled" ideas, and also a reluctance to incur costs and time in relation to his own professional development given the comparative imminence of his intended retirement.

The Judge also found that at a very general level Dr Bottrill believed that the availability of a recommended quality assurance programme was not appropriate for New Zealand conditions or at least cost-effective for him.

In relation to this trial the judge found that there was no evidence that suggested any systematic pattern of under or over reporting of slides. In fact, there was no evidence that the slides were consistently wrong. If Dr Bottrill was persistently wrong in his reporting, the judge thought this would have shown up.

However, the judge concluded Dr Bottrill was guilty of negligence in misreading and misreporting the slides.

Justice Young decided that the case did not fall into the category of cases where exemplary damages could be awarded because:

- There was no fair suggestion of bad faith, high-handedness or contumelious disregard for the rights of others.
- There was no suggestion he acted outside the relevant requirements of his profession apart from non-participation in the external quality control programme.
- There was no evidence of recklessness in that he didn't realise failing to go along with these practices would in fact cause an appreciable risk to women.
- He wasn't satisfied that independent screening, quality control programmes or accreditation would have precluded the errors.

However the Judge ordered a new trial because he considered it was at least possible that Dr Bottrill had some inkling of questions over his reporting and the judge wasn't prepared to resolve that question before a new trial.

The Court of Appeal's Decision

The Court of Appeal reviewed the judge's order for a new trial and over-ruled it. The majority decision confirmed that the evidence from Sydney did not show that Dr Bottrill was actually aware of his deficiencies, let alone that he was actually misreading slides and putting women at risk.

The question facing the Court was: is deliberate or conscious recklessness required before exemplary damages can be awarded?

<u>The majority view</u>

The majority of the Court of Appeal said it was. In other words, because Dr Bottrill did

not know he was incompetent it couldn't be said that he knowingly put his patients at risk. While the majority said that the purpose of exemplary damages was to punish the defendant it was the quality of the conduct, not the actions or behaviour itself that was the issue. In order to qualify the conduct had to be "wilful", "extreme", "oppressive", or "malicious." An ignorant blindness to quality control requirements was not sufficient for these purposes.

The majority said it was irrelevant that the medical disciplinary proceedings or the ACC scheme were inadequate in providing compensation to the patient. The purpose of the damages was not compensation but to punish the defendant. The only question then was whether the conduct of the doctor was so outrageous that it deserved an award of exemplary damages and a new trial to consider that point.

The dissenting view

In contrast Justice Thomas took a purposive approach by simply looking at why there were laws on exemplary damages in the first place. Justice Thomas said that the purpose of exemplary damages was to make an example of the defendant for their behaviour. Justice Thomas said that he would not exclude unintentional wrongs from this concept. Justice Thomas believed there should have been a new trial. To say otherwise was effectively taking the floor out of appropriate medical standards.

Judge for Yourself:

The effect of the Court of Appeal's decision is that a person who does not know they are incompetent cannot be sued for exemplary damages.

Article 12(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides that states must take all measures to eliminate discrimination against women in the field of health care in order to ensure access to health care services.

Article 1 of CEDAW defines discrimination to mean any provision which has the *purpose or effect* of discriminating against women. Article 2 requires the state to ensure that women have effective protection from national courts and tribunals for any act of discrimination. The Human Rights Act 1993 also makes sex discrimination in the provision of goods and services illegal.

- Did the Court of Appeal's judgment effectively discriminate against the women patients of Dr Bottrill by finding that women treated by an incompetent doctor cannot pursue a legal remedy to ensure health care services have a minimum standard of competence?
- What are the wider implications for women of a Court ruling that does not require their doctors to be aware that they do not meet professional standards?
- Whose interests were really protected by the effect of this judgment?
- What does this decision mean in the case of a doctor who simply fails to consider his or her patient's welfare?
- If wilful ignorance does not qualify for exemplary damages what conduct ever will?
- What confidence can ordinary women have in a Court of Appeal that refuses to protect their guaranteed human rights?
- Is the existence of a Court of Appeal that has no clear concept of its own inadequate analysis of gender issues a violation of women's human rights?
- Is this a case that should be considered for a complaint to the United Nations under the Optional Protocol to CEDAW?
- Justice Thomas has consistently been the only Judge in the Court of Appeal to clearly demonstrate intellectual credibility on issues related to women (including lesbians). Is it time for judicial appointment processes to be changed to actually require judges to prove they can analyse cases for gender issues?

Legislation Update:

Injury Prevention and Rehabilitation Bill

This Bill, which is still before a select committee, will make major changes to ACC law, but has received very little public comment.

There is much about the new Bill that is likely to receive public support. For example;

- there is an increased emphasis on injury prevention
- there are to be new rules on the management of injury-related information
- an expanded meaning of rehabilitation is to be introduced
- lump sum payments will be reinstated
- there will be more flexible assessment of loss of earnings and more flexible products for self-employed
- there is a proposed Code of ACC Claimant's Rights.

However, women are major funders of the accident insurance scheme and major recipients of its assistance (although women do not lodge as many claims as men). There are significant issues for women in the proposed changes:

- The Bill will allow for a new code of claimant's rights but there is no way for these rights to be enforced and no sanctions for non-compliance.

- As traditional carers and nurturers, women frequently carry the burden of caring for children, husbands, and brothers in the home where social assistance falls short. Research shows that women are the main providers of unpaid child-care and home help for those who suffer accidents. The Bill will perpetuate this gender inequity by not supporting this unpaid work financially. ACC will be able to determine the amount to be paid for child-care and home help by taking into account the extent to which "other family members" might be expected to provide for these.

- Lumps sum compensation for victims of sexual violation and sexual abuse will be reinstated but only where there is an impairment or physical injuries. There will be no compensation for pain and suffering, showing a clear lack of gender analysis of the impact of sexual abuse on women. In addition, the American Medical Association guidelines will be used to determine the level of impairment, but these guidelines state that that they should not be used for deciding financial compensation.

- Claims for compensation will have to be lodged within 12 months of the personal injury. However, research in New Zealand and overseas shows that victims of sexual violation and abuse are extremely unlikely to report abuse to authorities within 12 months of the incident occurring.

- The Bill will change the definition of "personal injury by medical misadventure" to provide that personal injury caused by medical misadventure does not include a delay in receiving treatment or the failure to provide treatment, if the delay or failure is attributable to the "resource constraints of the health system." A similar provision was proposed in the ACC amendments in 1991 and was considered unconstitutional.

- A large amount of the detail of how the changes will operate is to be left to regulations rather than being clearly stated in the legislation itself. In the past, regulations have been severely criticised as being less open and accountable.

The Transport and Industrial Relations Select Committee finished hearing submissions at the end of May and is due to report the Bill back to the House by the end of July.

Restructuring the Legal Profession: issues for women

The Government is currently considering changes to the operation of the legal profession in New Zealand. Details have been under discussion with the New Zealand Law Society for several years and the Government is expected to introduce legislation before the next election.

Statistics show that in 2001:

- There are 8279 lawyers holding practising certificates in New Zealand
- 2817 (34%) of these are women, 5391 men, and 71 unspecified
- Of 909 barristers, 269 (29%) are women, 630 are men and 10 unspecified

It appears that under the proposed restructuring there will be two main functions of the NZLS and district law societies.

The first will deal with regulatory functions such as admission requirements, complaints and law reform matters. These will remain with the national New Zealand Law Society. The second will deal with "voluntary" functions such as the provision of district law society libraries and services to local members. These will fall to district law societies.

One concern is whether issues for women in the law will be left under the voluntary aspects of the restructuring, rather than being seen as a core aspect of the regulatory part. This would put at risk the wide range of legal issues for women on which slow progress is being made.

For example, as the Law Commission *Study on Women's Access to Legal Services* by Joanne Morris shows, women are most likely to complain about particular types of issues such as the cost of legal services, communication difficulties with lawyers, and the degree of control exercised over their proceedings by their lawyers. This suggests that there should be clear requirements in the complaints system to ensure that issues for women will be dealt with properly.

In addition, women in New Zealand generally have lower incomes and are less educated than New Zealand men, which may also affect the types of complaints they make and their ability to access complaints systems.

The fact that there may be specific gender elements to complaints makes it necessary to ensure that those hearing those complaints have the skills to understand and deal with those complaints appropriately. That also means appointing persons who represent the wide range of people in New Zealand including women, Maori, Pacific Islands people, and so on. In addition, appointees should also reflect the diversity of the profession in terms of regional spread, gender, ethnicity, race, sexual orientation, age and so on.

The law reform component of NZLS work is an area where traditionally women's issues have been able to be addressed such as through submissions on legislation. This area has a high public profile and a large public interest element. It is vital that this component reflects the various issues for women in the law.

Regulation of the profession should ensure that the highest possible standards of conduct are maintained. There are a wide variety of measures that still need to be taken to ensure appropriate professional conduct standards are set and maintained under the new regime. For example, there remain no specific professional training requirements in relation to practice safety (such as sexual harassment prevention training).

As yet there has been no clear Government statement on how the proposed restructuring will be designed to improve access to justice and outcomes for women, Maori, or Pacific Islands people.

Domestic Violence Act: Process Evaluation

The Ministry of Justice and the Department for Courts have released an evaluation of how well the aims and objects of the Domestic Violence Act are being achieved. The evaluation is one in a series of studies about the Act drawing on a wide range of data including Court statistics, 335 individual case files, a national survey of Family Court judges and lawyers, and interviews with police, programme providers, community groups and victims of domestic violence.

Main findings

- 92% of applications are by women
- 62% of the applicants are aged between 25-44 and 19% between 17-24
- Over three quarters of applicants were married or in a partnership with the respondent
- About three quarters of the applicants had children
- 82% of applications cited physical abuse and 78% cited psychological abuse

People on low incomes but above the threshold for legal aid, Maori, Pacific peoples, men, people in same sex relationships, and victims with gang associations were least likely to apply for a protection order. Barriers to applying included:

- Cost of legal proceedings
- Fear of violence or repercussions from the abuser
- Fear or lack of confidence in court process
- Shame and embarrassment
- Not knowing protection orders were available
- Personal and cultural acceptance of domestic violence

Processes and Orders

Applicants

There was an extremely low take-up of protected persons' programmes. These are designed to help women understand why and how domestic violence happens and help them to recover from any domestic violence they have suffered. The main reasons for this low take up included:

- Not knowing that the programmes existed
- Not knowing the programmes were free
- Not understanding how the programme could help them
- The upheaval surrounding the relationship breakdown and the stress of Court proceedings making it difficult for women to focus on their own needs and to commit themselves to a programme

Respondents

On average orders took two days to serve, with service usually by the Court bailiff, Police or a private agent. Of the 355 case files, only 18% of those who were served with applications actually went on to defend them and permanent orders were only made in half of those cases that were defended. The main reasons for this low rate of defended hearings were settlement of the issues without the need to go to Court, the making of suitable arrangements for access to children, or legal advice for the respondent not to defend the application.

Only 80 out of 221 respondents directed to a programme actually completed it or was in the process of completing it. In some cases there were valid reasons (such as where the Court had ordered that attendance was no longer necessary). However, in many cases where there was no obvious reason for non-attendance and no action had been taken by the Court. In 1998 less than 20% of those sanctioned for not attending a programme received a custodial sentence. Thirty per cent were convicted and discharged or told to come back for sentencing if called upon. On the other hand, almost without exception those respondents who had attended programmes were very positive about the experience.

Copies of the report are available for free at www.justice.govt.nz or from Legislation Direct, PO Box 12418, Wellington, for $29.95 plus $3.75 postage. (Thanks to *Women's Refuge National Journal*, March 2001).