

A woman's place is ... on the bench

Janet November

I am going to tell the stories of four Wellington women judges. They were all graduates of Victoria University, Wellington, and will inevitably be role models for women graduates embarking on a legal career. Theirs are success stories, but it is obvious that success came only after a great deal of hard work and determination.

Judge Henwood, after striving to advance to a partnership, then found herself under close scrutiny as the first Wellington woman judge. Judge Frater, starting her legal studies some four years later, completed her degree and then coped with the problems of raising a family of three children whilst pursuing her career. Judge Gaskell began law study when her children were babies, and so she also entered the profession with responsibilities for a young family. And Judge Lee came to New Zealand in her late twenties, alone with a small son, but did not begin her LLB until aged 39, and then had to prove herself not only as a woman lawyer but also as a member of an ethnic minority group.

In describing some of the Judges' experiences I will occasionally refer to material from the United States, Canada, Australia and England to show that women lawyers and judges in other parts of the world have had some similar experiences and have overcome similar obstacles.

I EARLY YEARS AND EXPERIENCES BEFORE STUDYING LAW

Judge Henwood has two sisters and a younger brother and when they were little:

It was taken for granted that we would educate ourselves and have a career.

At Queen Margaret College, Wellington, she was encouraged to be free-thinking and independent, and:

It was assumed we would have a career. I never saw myself as someone who would just get married, have children and rely on my husband financially. I was determined to be responsible for my own life.

She wanted to be a journalist when she left school, but the job she was offered fell through due to a takeover of the business. So she became a Justice Department officer in the former Supreme Court, studying for a BA at Victoria, part-time. After two or three years she became interested in doing a law degree.

When I saw the law clerks coming in from the various firms, all of them male, I realised that if they were capable of doing it I was probably capable too. I asked if I could have time off to do a law degree. That was declined (on the basis that I was likely to get married, I believe) although I was eligible. I appealed and won. But then I was

offered a job at Buddle Anderson, Kent & Co, I think because I was by now skilled at procedure. I commenced a law degree part-time in 1964 while doing mostly court work for Mr Kent. There was only a handful of women students.

As a child Judge Frater lived on a farm two miles from Waipawa in Hawkes Bay. Her parents were both teachers and very busy, and the children were encouraged to look after themselves and think for themselves. She had three older brothers, the youngest being three years older than herself, and as there were no other children in the immediate neighbourhood she spent quite a lot of time on her own, reading, drawing and making things such as dolls' clothes, a self-sufficient and independent little girl. The family, however, was very warm and supportive, and encouraging of whatever she did academically, and:

It was always anything my brothers could do, apart from sport, I would endeavour to do as well or better.

At high school Judge Frater thought the diplomatic corps sounded an exciting career. However, she eventually decided to study law, like her elder brother, partly from a feeling that "if my brother could do it, so could I".

Judge Lee was born in China and had an older sister and two younger brothers. As their father was in the Army the family had to travel quite a bit and a private teacher taught the four children together. The boys and girls were not treated differently.

I remember I was a bit of a tomboy because I used to play football with my brothers and I remember in particular there was a pole, quite a high pole and quite flexible, and I used to shinny up it like a monkey. I also recall being on the swings and our nurse crying out to me not to go so high and me just swinging as high as I wanted because I liked it, and also I think I wanted to scare her, which was very naughty.

I have always had a great sense of independence. I remember once I was playing with my brothers and there were some soldiers of my father's regiment. One of them asked one of my brothers to sing a song for a sweet, so he sang a song and was given a sweet, and then he turned to the other one and said "Now it's your turn, sing us a song". He sang them a song and was given a sweet, and then he turned to me and asked me to sing a song. I felt that nobody was going to make me do anything I didn't want to do and I said "I prefer my freedom".

By the time the future Judge Lee finished secondary school the family had left China because the father disagreed with the prevailing communist ideology, and they had gone to Hong Kong as refugees. It was when Judge Lee was about 13 or 14 that she became very interested in the law, through a family friend who was an eminent barrister. However, she had to wait about 25 years before the opportunity arose for her to study law. When she finished 5th Form her sister was ill, her father was teaching and her parents had lost money in a number of small business ventures, so instead of going into 6th Form, she left school and learnt shorthand, typing and filing skills, and went to work at 16 to help support the family.

I remember my headmistress was very sorry because she had offered me a scholarship to carry on in the 6th Form, but there really wasn't much choice because my family just needed the money.

She worked first as a typist, and at 19 went to Bangkok to work for the United Nations as a secretary. She married at 20, had a son and travelled fairly widely because of her husband's job. When her marriage broke up she was in New Caledonia, where she stayed for four years, and then decided she wanted to go to university.

Her boss was a New Zealander and he obtained a student visa for her to go to New Zealand with her son, then nine years old, in 1968.

I still didn't do law at that stage because I wasn't sure that I would want to settle in New Zealand, and I knew that law is something you should study where you intend to practise. So I went to university and did a BA, then I went to work for five years. When my son was in the 7th form, I suddenly thought, "Well, here's my opportunity". We saved some money and the following year he went to university and I went back and did law.

During the five years before studying law she had a variety of jobs: information officer for corso, researcher for the broadcasting corporation's current affairs programme, personnel officer and vocational training officer.

It is interesting to note that in contrast to both Judge Frater and Judge Lee, Judge Gaskell remembers having a more traditionally feminine upbringing. She was treated as a little girl, dressed in pretty clothes, played with dolls, went to ballet classes and, although she liked sport, she "was not really a tomboy". She had an older and a younger brother and even though she was quite independent she was given a degree of protection; for example, her father or brothers would drive her wherever she needed to go.

II LEGAL STUDIES

When the future Judge Frater entered Victoria in 1968 there were about 120 students in the legal system class, no more than 10 of whom were women, and only two of those women graduated in the minimum time.

As a student she became close friends with one of the other women studying law.

Initially at least I was too shy to go and discuss assignments with the men in the class. So I relied particularly on this other woman who was doing law with me. But I got good marks at the end of my first year. I was in the top group of my legal system class, so realised that I could do it. I carried on.

She remembers the male students as noisy.

Looking back they were so confident. ... I can remember sitting in a commercial law honours tutorial ... thinking what utter tripe some of the male students were talking. ... [The lecturer] knew so much more about the subject, ... but they just demanded to hold the floor I was often surprised when I got high marks. It was difficult doing

subjects like contracts and land law because as a 19 year old I had no practical experience of the things that were being talked about.

At least women were not "the brunt of the jokes" or simply ignored by the lecturers which was the experience of Eleanor Fox¹ as a law student in America in 1958.

Judge Lee's experience of the male students was similar, although by that stage roughly a quarter of the students were women. There were also some three or four female lecturers, who were all very good. The male students:

were certainly more confident, and by confident I mean they would be prepared to speak and talk about something even though they knew very little about it, whereas the women tended to be more careful and reserved, and would speak only when they knew what they were talking about.

Of her own son she said:

To begin with he was absolutely appalled that we were going to be in the same university, that he would meet me and he couldn't see himself behaving, or didn't know how to behave, so I said, "Look, if you're embarrassed about it, we won't say hello, we won't acknowledge each other, and I'll pretend you're not there and you can pretend I'm not there". Well, not far into the first term he started coming up to me, introducing me to his friends as "the old lady" and he would ring his friends and talk about "the old lady" and how well she was doing, and at the end of the year when we got our results, it was he who rang his friends and gave them my results, which he was really proud of at that stage.

He was soon doing his share of the household jobs too.

I made him. I don't think he could cook to begin with, and I made sure he learnt how, because I wasn't terribly fond of cooking. I remember asking him every day for three weeks what he wanted for lunch. He would tell me and then I would give him scrambled eggs. At the end of three weeks he learnt and started to cook. So in the end he was doing a lot of the shopping for groceries and so forth, and he took his turn cooking. He wasn't bad.

Judge Gaskell started her legal studies at the same time as Judge Lee in 1974, primarily for intellectual stimulation. Her twin daughters were 18 months old, so her life had to be totally reorganised.

Lectures weren't planned for people with young children. Going to 8 o'clock lectures for example. ... My husband would drop the girls at the university and I would take over, take them to creche, then go to contracts and so on

¹ EM Fox "Being a Woman, Being a Lawyer and Being a Human Being - Women and Change" (1989) 57 Fordham LR 955, 955.

The creche was available, but only for limited hours (10 or 12 per week). After that she relied on support from people in the community. Study had to wait until everyone was in bed.

Then I'd really get stuck in and I could go on till 2 o'clock in the morning. ... That was my best time. It was just a total reorganisation of my day.

Nothing was given up however, she still entertained people for dinner, was building a house, mothering young children and doing an honours degree at the same time.

At the end of her second year Judge Frater was awarded a Public Service bursary and at the interview was asked whether she was planning to get married and have children.

I remember there was a woman on the panel, and she told them they weren't allowed to ask questions like that and I wasn't to answer them. [But] when it came to the crunch, I realised that I didn't want to be a public servant. I wanted to be in a traditional law office.

Then she was invited to go into the honours class and so she declined the award.

III ENTERING THE PROFESSION

Judge Henwood remained at Buddle Anderson, Kent & Co throughout her law studies. She qualified in 1969.

They gave me an excellent training and very generously supported me through the degree, but the problem was I felt I didn't have a future as a woman. I had to face the fact that once I was qualified I would no longer be on the same footing as the male students. They could soar ahead but I felt I had no hope of a partnership. I may have been wrong of course.²

Then in 1970 I was approached by Olphert & Bornholdt, a smaller firm, with a very good offer, to do mainly commercial work. I did some court work as well at first, but it was very daunting being one of a few women lawyers in court.

1975 was International Women's Year and Judge Henwood became the convenor of an informal group of Wellington women lawyers.

2 Compare JS Kaye "Women Lawyers in Big Firms: a Study in Progress Towards Gender Equality" (1989) 57 Fordham LR 111, 119: "[D]ecades after their entry into the big firms women make a third or more of the associates, but less than 8% of partners." Compare the New South Wales experience: Jenni Mattila, past president of the Women Lawyers Association of NSW, is quoted as saying: "[T]he picture for senior women lawyers is still grim. It is worthwhile emphasising that a minimum of 50% ... of students are female ... overall women students tend to achieve higher marks than male students, and when applying for their first job are offered similar salaries. But equality deteriorates over time." V Lawson "The Invisible Bar. How Women Lawyers are Kept Out in the Cold" *Sydney Morning Herald*, Sydney, Australia, 28 November 1992, 43.

We met together to prepare papers for the 1975 Workshop on Women in the Law, and we started informal meetings to make submissions on [aspects of the law particularly affecting women], abortion law for example, and making child care tax deductible. We were all scattered and had to make a conscious effort to get together. It was the first time we'd ever looked at those issues as women's issues. At first we lacked confidence to speak out, there were so few of us... . Before 1975 it was odd to have a woman in your office, but after 1975 it was suddenly accepted.

Judge Frater had no "grand plan" for her career, her aspirations were in approximately three-year cycles; to get a good degree and then find an interesting job.

By the time I finished my degree I was married. Then there was a conflict. I knew I wanted to have children and I thought I wanted to carry on working, but that of course was relatively unheard of.

Judge Frater, graduating with good grades and with honours, was offered a job at her first interview.

I must admit that when I was looking for a job I contacted one of the partners my brother played cricket with, at Buddle Anderson, Kent & Co. I started work with the firm at the end of 1971.

All the partners were males though there were some very able women as staff solicitors.

Comparatively the partners were quite ready to employ women and to give women solicitors good work. As far as I'm aware at that stage I wasn't paid any differently from anybody else. I think in fact I got about \$2,500 - one of the highest salaries from my law class. It was quite understood that women didn't get partnerships. But I had very interesting work there. Initially I worked in conveyancing but soon moved into the family law area where I worked with Mr George Kent, who was the senior partner.

In her second year she did family law work more or less solely and quite frequently appeared in court. She doesn't recall a sexist problem with male solicitors and most clients were quite happy to deal with a woman.

I can remember one client writing in saying that she wanted Mr Kent to continue to act for her, effectively because she liked a father figure.

Then in 1974 she went to London for two years.

When my husband's firm paid for us to go overseas at the end of 1974 it never entered my head, because the idea was not encouraged, that I should ask for leave so that I could come back to the job and eventually secure a partnership. I just left. I was wished well and certainly helped to get a job in England by the firm.

Judge Gaskell likewise had no grand plan for a career. In fact she wasn't sure she wanted to work at all. When she applied for a job she was shortlisted with one other

person, a man, and after her interview was told to phone when they had interviewed him. She duly phoned and was told they had given the job "to the man". After that she decided not to apply for more jobs.

After graduation (with honours) Judge Lee definitely had plans to do court work as a barrister. She got a job as a law clerk in her final ("professional") year, with Young Swan McKay & Co.

I went to see Mr McKay (as he was then) and said, "I really want to work with you because I know you're a very good lawyer and I know I'd learn a lot from you". I was very lucky - he said yes, and I got the job. He was always very considerate and extremely courteous, and always felt bad about sending me out in bad weather! I spent long hours in the Law Society library doing devilling. I doubt that much of it was any use to him but once he told me, it was Papadopolous (No 2)³ actually, "I'm going to use what you gave me." I remember on that occasion I asked whether I could go and listen to him in the Court of Appeal and I did, and of course he was very impressive, so that was very interesting.

For personal reasons, at the end of the clerkship year she went to Nelson and worked for Hunter Smith & Co, at first under the tutelage of Mr John Smith, the senior partner, and also under Mr Doogue, now Mr Justice Doogue.

I went into the District Court every day, doing duty solicitor and legal aid work, and started from there.

She was at that time the only woman lawyer in Nelson appearing in court and found her male colleagues very helpful.

The only thing that was different being a woman was that at one of the first meetings I attended of the Law Society, just at the time that the jurisdiction of the District Court was increased, I remember the late Judge Headifen who was the resident Judge at that time, had a meeting with us all and he said that, whereas before he had allowed male lawyers to wear walk shorts and long socks in court, the judges had decided this had to stop. So he said, "You will have to wear suits now in court", and he turned to me and said, "Don't ask me what you're allowed to wear". At that stage I was the proud owner of a three-piece trouser suit, so for my first day in court I wore that, so I was just like the fellows!

IV COPING WITH A CAREER AND DOMESTIC RESPONSIBILITIES

Judge Henwood stayed with the same firm for the remainder of her career as a lawyer.

By 1975 my responsibilities and work at Olphert & Bornholdt had grown and I actually approached the senior partner about a partnership. He was really surprised. But I was made a partner ... and once I was one of the group I was treated completely as an equal.

3 [1979] 1 NZLR 629.

In 1978 her son was born.

I had made a conscious decision to delay having children until I was a partner. It was a difficult time for men and women competing for jobs and there was a lot of pressure to earn money for the firm.

[After my son was born] I was very conscious of the pressure to get back to work as soon as possible. I'd never do it again. I was breastfeeding and my friend across the road with a new baby looked after my baby in the mornings. I'd rush down to the office and do my dictation, then I'd rush home at lunchtime. Then in the afternoons I'd take the baby to the office in a carrycot. This turned out to be a fairly unsatisfactory arrangement. My husband helped a lot; he has flexible hours being an actor so the baby had a lot of contact with his father, but sometimes he had to go overseas. Later the firm provided a live-in nanny which was extremely generous, and enabled me to work much more effectively. I felt I was in the luxurious position of having time to spend with the baby because I didn't have to do housework (we shared the cooking), but I wouldn't put myself under the pressure of those early days again.

Later she had part-time help in the afternoon.

I was able to pay back my neighbour for looking after both boys as babies. Someone was always there at 3 pm when they came home from school.

Once her domestic responsibilities were satisfactorily organised, Judge Henwood concentrated on building up a thriving law practice as an experienced partner in the reconstituted firm, Olphert, Wilson, Henwood & Perry. She continued to practise for another seven years.

When Judge Lee went to Nelson her son stayed in Wellington to do an honours degree, so her domestic commitments decreased.

After a year Tripe Matthews & Feist offered her a position as a staff solicitor with a view to a partnership. So she returned to Wellington to take over the work of a common law partner.

Because I was taking over from the common law partner I did court work. Some of the cases were fairly complicated so it was an extremely good experience because I was handling a wide variety of things and, as with a lot of cases, they don't actually go to court, they are settled, but it does teach you. I learnt how to draft pleadings, which I consider is a very, very important thing to do properly, and I just learnt a lot.

Times had changed; women were beginning to be offered partnerships. Judge Lee says she was very fortunate, but I am sure that her promotion was due to her maturity and competence.

Towards the end of her time with Tripe Matthews & Feist the Wellington Women Lawyers' Association was formed and Judge Lee was the first convenor.

I thought in general it was a very good thing for women lawyers to get together, to have our own network, to meet on an informal basis. Unfortunately I became a judge soon afterwards, so as a lawyer I didn't get as much benefit as I'm sure I would have if I had stayed as a lawyer.

Judge Frater worked in the litigation department of a large London firm for almost two years, briefing barristers who appeared in the High Court or Court of Appeal - work she found very interesting. Then she and her husband decided to return to New Zealand.

I found for the first time ever I couldn't get a job and I found that terribly frustrating. So I took the only job I could get - at the Technical Correspondence Institute at Lower Hutt, being a tutor in law. It was well paid and you got lots of leave. I lasted two weeks and gave my notice. It was dreadful. I rapidly realised that I liked being directly involved in the law and I didn't want to be a teacher. Fortunately Buddle Anderson asked me to come back. So I did go back and was presented with a pile of Family Court files. It didn't take me long to work out that I really didn't want to do solely family law work either.

Stupidly I felt that I had to say to the firm that I wanted to start a family. This was my honesty, but it probably put me on the back foot straightaway. You wouldn't do that sort of thing now. It puts you in a lesser category, you're not really serious about your work. Eventually I did become pregnant and I said I wanted to carry on working, and that caused all sorts of problems because that situation hadn't happened before. They didn't know how to take it.

She asked for maternity leave with the right to return to work. At first there was no feedback; some of the partners seemed nonplussed - none of their wives worked. However, she did go back to work after about three months; it was difficult as she was still breastfeeding. The firm adopted a paternalistic attitude; she was told that she shouldn't be working full-time hours.

When she became pregnant again she asked for leave and a salary increase; most of her salary went to the children's Karitane nurse, who was very good. She returned to work, although in fact she had been doing some work during the three months "leave", but there was no mention of a salary increase until she raised the issue. Nor were the partners sympathetic to flexible hours. They then wanted her to work full-time in the office. She wanted to spend time with the girls in the afternoons and work in the evenings in lieu. She found the pressure of working in an unconventional manner difficult to cope with. Accordingly, she was delighted when, in November 1980, she was offered a job as a research assistant by Dr George Barton QC.

Quite clearly Judge Frater had encountered the conflicts faced by other working mothers of the 1970s and early 1980s, described, for example, by Judith Kaye.⁴ She had

⁴ Above n 2, 120-121. Apparently English women barristers face similar "unnecessary difficulties on resuming practice after taking time off to have a baby". See T Shaw "Bar Leaders Promise to End Sex Bias Amongst Judges and Barristers", discussing the report "Without Prejudice", compiled by TMS Management Consultants, in *The Daily Telegraph*, London, England, 25 November 1992, 9.

either to be a "superwoman", working full-time as well as coping with her growing young family, or go down the "mommy track" (working to fit in with the children) if she could persuade the firm to let her work flexible hours or part-time, but with the risk of little prospect of advancement because she was thereby seen to be not serious about her career.

Although blatant gender bias for professional working women may be disappearing (Kaye gives the example of a pregnant woman being made a partner⁵), according to Kaye the subtle bias is still prevalent, and prevents women rising to positions of greatest power; there is still a "glass ceiling".⁶

After her experience of applying for a job the future Judge Gaskell did not intend to try to combine a career with motherhood. However, when the twins were about eight she was contacted to see if she was interested in doing research for the Crown Solicitor. She worked four hours a day for a year, and was then admitted and offered a job as a lawyer.

We had a wonderful arrangement that I did the work allotted to me and if I wasn't doing it in the office after 3 o'clock that was perfectly acceptable

I had all school holidays off provided I did my court work. ... It lasted all the time the children were in primary school.

This flexibility "allowed me to do what I wanted in a way that I could organise". Nor did taking the "mommy track" jeopardise her future career. Judge Gaskell became one of the few women partners in the large city firms.

Judge Frater solved her "working mother" problem by working 30 hours a week for Dr Barton.

He didn't mind when or where I did the work so long as it was done, it was done well and on time, and that if he gave me warning that he wanted me to do such and such, that I was available to work longer hours as required. That gave me a lot of flexibility. I was practising as a barrister and I was free to take other work. From time to time work came from other solicitors to do opinions. But I didn't go looking for such work because I really had quite enough to keep me occupied.

5 Above n 2, 123, fn 69.

6 See also EM Fox above n 1, 958. Compare: "[E]ven in today's enlightened atmosphere law firms are preoccupied with issues such as whether a significant client will object to having a woman lawyer assigned to his case, the potential pregnancy of a female attorney and whether salary equalising is necessary when the woman's salary is the second income in the family", and "women are not being considered for upper echelon judicial positions in proportion as their numbers, experience and qualifications would justify. ... The politics of judicial selection is still a very tightly closed male dominated arena"; National Conference of Special Court Judges "Report to the American Bar Association Commission on Women in the Profession" (1989) 26 (3) Court Review 24, 27.

Dr Barton has a special practice. The type of work that he gets is extremely interesting. A lot of work that we did involved working on the boundaries of the law, pushing them out, clarifying grey areas.

[There was] a lot of administrative law. Later in my time with Dr Barton I was junior counsel to him in the case by the Proceedings Commissioner against Air New Zealand for failing to promote their female cabin crew. A tremendous amount of work was involved, months and months and months, and I was responsible for all the paperwork, drafting all the pleadings, interviewing witnesses and then preparing the submissions.

In 1983 Judge Frater gave birth to a third daughter. By 1988 all her children were at school and working at home in the evenings was more of a problem.

When the two older girls were babies I worked at the office until 2.30 or 3 pm, so I was home by about 3 pm each day. I probably carried on doing that at least until my third daughter was born. Over a period my office hours extended to 4 pm, then 5.30 pm or later when I was practising as a barrister on my own account. Now I employ a nanny until 6.30 pm. In some ways it would have been easier to have been working full-time, but I would have missed spending time with my children. As it was I ended up taking on other commitments. For example, I was president of the pre-school to compensate for not being involved with the children all day; I felt that the only way that I could get to know people and to find out what my children were actually doing was to be on the pre-school committee. I feel that I do know the children's friends and what they're doing, but it's been hard with my youngest one because I haven't had as much time, the way my practice developed as a barrister and now in this job, I don't have any flexibility to be able to say "yes I will go to school and see your concert tomorrow".

Children ... require your time, require your attention when you're there I have a study at home with a full set of statutes ... and now I do shut the door and say "look, don't bother me, I'm working".

But I've tried not to do this, particularly when the children were little. It wasn't fair on them and it wasn't fair on me, and so when they were awake I was available. But what has tended to happen is that they have horribly late bedtimes now. My husband has a very demanding job. If anything I personally miss out; I don't have much time to enjoy hobbies like going to art galleries or reading. I don't even do much cooking now. A large part of my weekends are spent shopping, working around the house, or helping the girls with their activities. We employ people but you still have to organise things.⁷

⁷ Compare V Lawson, writing of a woman partner in a Sydney law firm: "[S]he has a full-time live-in nanny but still feels the strain of having to be the home-manager, the delegator". Likewise Lawson quotes Justice Jane Matthews of the Supreme Court of NSW: "the Bar is a tremendously demanding sort of profession and very hard to combine with domestic duties"; above n 2, 43.

V FROM THE BAR TO THE BENCH

When she became a District Court judge in 1985 Judge Henwood found that the fact that she was a woman, in what had been until very recently an all-male position, was impressed upon her.

I found it was a shock to me to find that everyone thought of me in terms of being a woman. I'd been in practice for so many years I'd forgotten about the fact that I was a woman lawyer. Now I was assaulted from everywhere by people wanting to write articles on one of the first women judges. I found this most disturbing. I was constantly aware that my sex was something that made me stand apart. I was treated well, but perceived as different and I felt it made a credibility gap. People (the press and other lawyers) watched me very closely. I felt somewhat isolated and vulnerable, even though the other judges were very friendly and supportive. It's so much better now there are more women judges.

None of the judges planned a career on the Bench. Judge Lee said:

I must say that when I was approached to go on the Bench I did say "I don't want it to be just because I'm a woman and you want a woman, not on those terms thank you very much".

She doesn't think there are particular advantages or disadvantages in being a woman. She does, however, think that the Wellington women judges are extremely lucky that there are five of them, including the Chief Judge, Dame Silvia Cartwright, whose chambers are in Wellington too.

Actually the year that I became a judge things started to move quite quickly so far as an increase in the number of women judges was concerned. I think in my year there were three or four (including me) new women judges, and I remember our delight one day in the Auckland common room (I think there were four women judges on that day in the common room), when one of the male judges came in a bit surprised because he said the police sergeant called him "ma'am", and of course we thought that was wonderful!

Working for Dr Barton suited Judge Frater very well, but in about 1988 when all the children were at school she started thinking:

[T]his is fine, but I'm being seen as Dr Barton's offsider, I don't have any identity myself, I need to establish an identity. As a researcher you can shelter behind other people's work; while you are asked your opinion and give it, you don't have to answer to the clients or stand up in court. So I thought I should move on.

She was elected to the Law Society Council in 1988. This was not a new position for a woman.

Sandra Moran and Helen Cull were already on the Council. Council work was really interesting. It broadened my horizons. We were involved with issues concerning audits and conveyancing, and the running of partnerships, matters which I really hadn't come across in my practice, because I had never been a partner. But the work took time.

Then I thought about getting chambers on my own. John Upton and John McGrath had established new chambers in Wakefield House. They invited me to join them. It was a risk. I had to pay to get into the chambers. I was concerned that I didn't have sufficient contacts to get work. Barristers are instructed by solicitors. The solicitors who do the instructing are partners; partners are generally male; they instruct people they know, the people they went to school or university with, or go to the club with, or play squash with, or whatever. I think it was more difficult for a woman to practise successfully as a barrister.⁸ However, sufficient work did come my way. But I had to work at building contacts. I did this by spending long unpaid hours on the Law Society work. Other women lawyers were supportive too.

After she had been in practice as a barrister for a year Judge Frater was offered a District Court judgeship. She thought about it and decided that she really wanted to prove herself as a barrister, that she could be financially secure, could get the work and do it well. Then in 1990 she was asked again and this time offered a Family Court position in Wellington.

I thought about it and actually spent an afternoon with Margaret Lee who told me all the bad things about it, and decided yes I was interested, but naturally I had reservations. I was concerned about my lack of recent experience in either family law or criminal law. But I felt at ease in dealing with family law work in particular and I haven't regretted accepting a Family Court warrant.

I think in the Family Court there are real advantages being a parent. Certainly there are times when you can really empathise with a situation because you are aware of how your own children would react or how you as a parent would react. You know the problems that the parties are facing. You often draw on your own experience in making pragmatic decisions or in trying to guide parties to make a realistic decision for their family.

Having always worked in a profession that is male dominated she does not feel overwhelmed by male colleagues.

People in this job are uniformly supportive. When you are sentencing, you've got to work out what you feel comfortable with. You probably find approaches that different people have that are more in your line of thinking than others, so over time you would seek guidance from one person rather than another. The other Family Court judges have been particularly supportive. I think we have a really good group.

⁸ Compare the NSW and English experiences. Justice Jane Matthews said recently: ... "a lot of solicitors have reservations in instructing female barristers because they perceive that if the case goes badly, it might somehow be blamed on their unorthodox decision in briefing a woman"; Lawson, above n 2. In England a "survey commissioned jointly by the Bar Council and the Lord Chancellor's Department, showed substantial evidence of unequal treatment of women barristers from the outset of their careers through to their appointment as QCs and judges"; T Shaw, above n 4.

After so many years working essentially on her own Judge Frater appreciates being part of a team, and especially, like Judge Henwood, Judge Lee and Judge Gaskell, she values having women colleagues.

There are some things that we do as women, and we support each other as women and as friends. But we are all different people who have a different contribution to make.

Perhaps, it is also true, as Judge Joan Dempsey Klein says:⁹

The mere presence of women in the court has a salubrious effect on male colleagues. The day to day interaction at lunch, in the hall, at meetings etc, allows for discussion of sensitive subjects in a nonconfrontational, light manner, and can serve to "sensitize" and to raise the "conscious level" of male judges as to the reality of women's lives and their expectations

The atmosphere created by women judges' presence is a more natural and pleasant one. Also, the work environment improves for female employees, including potential for career advancement.

VI DO WOMEN JUDGES MAKE A DIFFERENCE?

Judge Henwood says:

I do believe that the judiciary should represent society as a whole. As women are so often the victims of criminal behaviour they should be represented in the implementation of the law. Having women judges broadens the base of the judiciary. The face of justice should show people coming from all types of background, all walks of life.

The Honorable Patricia M Wald, a United States federal circuit judge, believes there should be more women judges, not only for fairness sake, but also because they have something unique to contribute.¹⁰

Studies of American women judges' decisions to discover whether they differ from male judges' decisions, cited in Judge Joan Dempsey Klein's article,¹¹ are not conclusive, which is hardly surprising in view of the small number of women on the Bench, although most confirmed her own view that women judges consider themselves "keepers of women's issues".

9 Judge J Dempsey Klein "Women Justice: Does She View the Law Differently?" (1989) 26 Court Review 18, 23.

10 PM Wald "Women in the Law: Stage Two" (1983) 52 U Missouri Kansas City LR 45, cited in Judge Dempsey Klein's article, above n 9, 20.

11 Above n 9, 19-20.

Judge Klein herself thinks women and men judges are vastly more alike than different, largely because of their backgrounds, education and training.¹² However Kaye¹³ notes that:

[t]oday there is a growing voice for the view that recognising differences is essential to true gender equality.

So do women judges have something unique to contribute? Will they make a difference because they have a different world view or different life experiences?

Judge Lee says:

I think women do bring a different sort of experience. I really can't put my finger on it. I wouldn't be able to tell you specifically how we differ. I know we do. In discussions, for example, quite often there are differences of opinion between male and female judges. Not always. I don't think there's a clear dividing line among particular issues, but I do think that we do have different perspectives.

We value co-operation and seek to achieve through co-operation, whereas I think men are taught to seek achievement through competition.

This accords with much feminist theory.¹⁴ Judith Resnik concludes:

A touchstone of feminism is connection. Over and over again, feminist theories speak about our inter-relatedness, our interdependencies, ourselves and others as impossible of comprehension in isolation.

Judge Gaskell, too, thinks women judges will make a difference, but not the sort of difference feminists talk about.

Some judges are still of the older school of thought and they think women should be protected, and that women are in a different category to men; whereas female judges do not have a protective view towards women. If women choose to offend they should be treated just like male offenders.

So having women judges does not necessarily mean more sympathy for women offenders.

Judge Gaskell does not see gender as much of an issue in court.

12 Above n 9, 22.

13 Above n 2, 118.

14 For a summary of four approaches see J Resnik "On the Bias: Feminist Reconsiderations of the Aspirations for our Judges" (1988) 61 S Cal LR 1877, 1911-1921. See also FT Salka "A Not So Modest Proposal to Humanize the Legal Profession" (1992) 30 Family and Conciliation Courts' R 26, 28-30 re a proposal for the profession to accommodate women's styles.

As a judge I don't think of myself particularly as a female judge. A lot of my experiences are not just because I'm a woman. The number of female judges is not really important ... one does one's best whether male or female.

But she did concede that some of her life experiences would be uniquely those of a woman, and would influence and affect her decisions whether consciously or not. She would no doubt agree with the Hon Shirley S Abrahamson as, I think, would all the Wellington women judges:¹⁵

What does my being a woman specially bring to the Bench? It brings me and my special background. All my life experiences - including being a woman - affect and influence me. ... My point is that nobody is just a woman or a man. Each of us brings to the Bench experiences that affect our view of law and life and decision-making.

So whether or not women have a different world view, think differently, or have different responses to moral dilemmas,¹⁶ they do have some different life experiences which will affect their values and prejudices. As Madame Justice Wilson of the Canadian Supreme Court says:¹⁷

[i]f the existing law ... cannot be viewed as a product of judicial neutrality because "[e]very decision-maker who walks into a courtroom to hear a case is armed not only with the relevant texts, but with a set of values, experiences and assumptions that are thoroughly embedded,"¹⁸

then women judges are likely to make a difference.

Madame Justice Wilson does not, however, think that women judges can affect the development of the substantive law where it does not have a uniquely feminine perspective, such as in commercial or property law.¹⁹ Judge Lee disagrees with this. She thinks:

The fact that law is man-made makes it fundamentally "skewed" and recent amendments are attempts to regularise an essentially deficient product. For example, why is it that the maximum sentence for assault under the Crimes Act is one year's imprisonment, while for theft of something over \$300 in value the maximum is seven years' imprisonment? I believe this all stems from the origin of the (English and

15 Cited by Resnik, above n 14, 1878.

16 See especially the views of C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, Cambridge, Mass, 1982).

17 Madame Justice B Wilson "Will Women Judges Really Make a Difference?" (1990) 28 *Osgoode LJ* 507, 511.

18 Judge R Abella "The Dynamic Nature of Equality" in S Martin and K Mahoney (eds) *Equality and Judicial Neutrality* (Carswell, Toronto, 1987) 3, 8-9, cited by Madame Justice Wilson above n 17, 510.

19 Above n 17, 515. See also the views of Justice Mary Gaudron of the High Court of Australia and Justice Jane Matthews on the development of legal principles to correct the disadvantaged position of women, in Justice MD Kirby "Current Topics" (1992) 66 *Australian LJ* 775, 782-783.

Roman) law being essentially for the protection of the propertied classes. Hence the emphasis given to property as opposed to human beings.

As to changing the law when it does have a "gender bias", Judge Lee gave an example:

Chief Judge Cartwright was quoted recently, in the Sunday Times I think it was²⁰, as saying that the battered woman syndrome might be a defence for women. And what she was talking about is that in the criminal law, provocation and self defence, more in particular provocation, are available as defences only if one is under the heat of the provocation at the time of the alleged offence, whereas women who are constantly battered, constantly beaten, are in constant fear. So it is not a question of when was the last blow delivered, when was the last time the person threatened her or hit her or struck her or caused her actual physical fear. The woman lives in a perpetual state of fear. [The alleged offence] is the last straw, or the opportunity that the woman has to hit back, but she has been harbouring all these threats and all these beatings and they become a general atmosphere in which she lives. So the whole of her life is governed by violence, perpetrated on her, and by fear. I think that is a very apt example of how men's and women's experiences may differ. As the law stands at the moment provocation has to be when the last threat was imminent, but we are looking at events when the woman lives in a general atmosphere of fear and violence.

It may be, too, that women judges are needed and will make a difference because male judges may not fully empathise with women's experiences.²¹ Judge Lee said:

Recently when I was in Dunedin Judge Young took me to meet the residents of Moana House. This is a place which runs a programme for people who have been on drugs or who are trying to get off drugs. Judge Young said something to the men there which struck me as being very true and just one of the ways in which women's experiences differ from men's. "Guys like you and me, we will never know what it is like to be scared all the time", he said, "these women who have husbands who bash them up live in constant fear. This is something that you and I will never experience." And I think that's very true. I was very taken and I thought what a sensitive man he is.

VII DO THE JUDGES SEE THEMSELVES AS ROLE MODELS?

The problem for women judges as role models is that they are "participating in a system developed essentially without them".²²

20 See also *LawTalk*, (Magazine of the New Zealand Law Society), Wellington, November 1992, 17.

21 "The vast majority of judges are powerful white men and it is difficult for many of them to accept as real the experiences that those of us who are women and members of minority groups know are real because they have happened to us." LH Schafran "Issues and Models for Judicial Education about Gender Bias in the Courts" (1989) 26 *Court Review* 32, 36.

22 CM Durham "Gender Equality in the Courts: Women's Work is Never Done" (1989) 57 *Fordham LR* 981, 981.

Whether or not women do have something unique to contribute, or will have an impact on the development of the law once a sufficient number of women are judges (and in the High Court and Court of Appeal, as well the District Court,) "the mere fact that women are judges serves an educative function", as Madame Justice Wilson says.²³ It will "shatter stereotypes" and the judiciary will be more representative of those who come before the courts.²⁴

Judge Lee can see herself as a role model "in a sense".

I suppose inevitably you are, whether you see yourself as such or not. For women in minority groups or disadvantaged groups, I think it is very necessary to have role models, because by virtue of being a group that is in the minority or somehow disadvantaged there are barriers, and it is good to see that, despite the barriers, some do get there.

Judge Frater thinks role models are important too.

I am certainly conscious of the need for there to be women in senior positions, so that other women can see that it is possible, and not just women, I think women with children, because we carry extra responsibilities which we have to take into account apart from our work, and we don't have the same level of control over how we organise our time.

By and large women in our society still take the responsibility for children, Judge Frater believes. It is she who puts all the children's music and ballet exams in her diary, for example, and makes sure there is someone to take and collect them. Her husband is very supportive, but it is she who has the ultimate responsibility.

A role model? - sometimes I don't think I survive very well. But it is something that I need to do and if it's possible for me it's possible for other women.

Judge Henwood is frequently asked to speak to women's groups and students all around the Wellington region, and so she has a high profile as a role model. She sees public speaking as:

an opportunity to educate other women in the community about the law and about how the criminal justice system works, and to answer any questions that they raise. I believe in education for women and a law degree in particular is empowering. When young women hear me speak as a judge, which is a traditionally male position with standing in the community, I hope it illustrates to them the value of education, and the roles that women, as well as men, can play in the community. The community as a whole will benefit if women play their full part in society.

I asked the Judges whether they thought they had to work harder as women to get to the positions they have reached. Judge Lee said:

23 Above n 17, 517.

24 See S Sherry "The Gender of Judges" (1986) 4 Law and Inequality 159, 160.

So far as my own personal case is concerned, hard to say, because I didn't get there through the normal route, as it were, of going to university just after high school and then from there into a law career. In fact my case was quite the other way around. I worked, then I had a family, and then I went back to work and study. I do think that, in a way, my being a woman has been an advantage in my case because somehow I think that people are likely to see men in strict career paths if you like, and if I were a man they might have looked at me askance to go and do law at the age of 39, whereas being a woman they don't expect you to tread the trodden path. I think it worked to my advantage. But in general it is true that women have to work harder Women have to prove themselves whereas men don't seem to have to in quite the same way.

In some respects Judge Frater thinks it is not as easy for young women starting a legal career now.

The whole job scene was easier when I started. As long as you had a good degree you got a job. That is not necessarily the case now. My understanding is that if you are good enough and have proved yourself, law firms have got over their difficulties with having women as partners per se, but they probably still have difficulty with having a woman with young children, simply because she would not be as flexible. Looking at it from the firm's point of view, you're a different commodity; you don't fit in with what the men can do because you do have different pressures. It seems to me that it shouldn't be necessary to conform with what is expected of men. It should be possible to accommodate different working arrangements and personal commitments, provided the work produced is of an acceptable standard.

Like any working mother Judge Frater has to be well-organised and also flexible and ready to adapt to any changes (a child being ill, an alteration in a ballet exam timetable, for instance), and able to make on the spot decisions. This must be of assistance in her work, as District Court judges constantly need to adapt to changing rosters and schedules.

According to Resnik, "[a] great gulf lies between mothering and judging but judging may well have much to learn from maternal thinking".²⁵

Is this true?

"Judging" requires an ability to listen, to decide as impartially as possible between often conflicting versions of "the facts", to apply the law to the accepted facts in the hope that a just and equitable outcome will be found. Legal, logical and linguistic skills are required. In some cases, especially in criminal and family law, "the warmer tints of imagination and sympathy are needed to temper the cold light of reason if human justice is to be done".²⁶

²⁵ J Resnik, above n 14, 1928.

²⁶ Per Lord MacMillan quoted by BL Shientag "The Virtue of Impartiality" in CR Winters (ed) *Handbook for Judges* (The American Judicature Society, 1975) cited by Madame Justice Wilson, above n 17, 509.

Mothering (and fathering) requires caring and nurturing skills, but also an ability to listen, impartiality, and a responsible use of power. Linguistic, logical and decision-making skills are useful too.

So a person who combines the role of judge with the role of mother (or father) should find that the skills and qualities needed for the one role will be helpful in the other role. As Eleanor Fox says, "[c]ompassion, sympathy, insight, logic and skill must all combine ... to solve the legal problems of the twenty-first century".²⁷

And Patricia Cain suggests, "what we want from our judges is a special ability to listen with connection before engaging in the separation that accompanies judgment".²⁸

In Judge Joan Dempsey Klein's article she cited a study by Allen and Wall which observed that all the women justices whom they studied possessed strong personalities including high intelligence, dominance, adventuresomeness and unconventionality.²⁹ Such attributes could well describe all the Wellington women judges, and as the study said of the women justices:

Such traits will ensure their making a distinct contribution to the law.

27 Above n 1, 963.

28 PA Cain "Good and Bad Bias: a Comment on Feminist Theory and Judging" (1988) 61 S Cal LR 1945, 1954.

29 DW Allen and DE Wall "The Behaviour of Women State Supreme Court Justices: Are they Tokens or Outsiders?" (1987) 12 Justice System J, cited in "Women Justice", above n 9, 19.