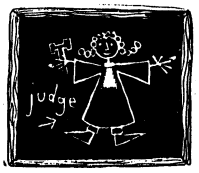
LEGAL STUDIES



Justice Bollen, community attitudes, the power of judges

Justice Bollen said 'a measure of rougher than usual handling' is acceptable behaviour by a husband seeking consent to sexual intercourse from his wife *(R v David Norman Johns*, unreported, Supreme Court of South Australia, transcript of summing up to the jury by Bollen J, 26 August 1992, p.13). He could have said 'the maximum force that is appropriate to persuade a person to have sex with you is a bunch of flowers and a massage' as suggested by Dr Karen Phelps (*Herald-Sun* 14.1.93).

Justice Bollen's attitude sparked a public outcry. The community called for his sacking and discussed at length how a judge of South Australia's Supreme Court could harbour views out of step with not only the community but the intent of criminal laws against assault and rape.

What happened?

In January of this year, the news media became aware of what had been said by Justice Bollen during a marital rape trial heard in August 1992. The accused, David Johns, faced five charges of rape of his wife and one of attempted rape. The judge had made his remarks while summing up to the jury.

What the judge said was brought to wider public attention when the Director of Public Prosecutions in South Australia sought to have the Full Court of the South Australian Supreme Court review the trial and what the judge said so that a ruling might be made on whether the judge spoke properly.

The judge had begun his direction to the jury by acknowledging: 'The community deplores rape and aggressive sexual conduct against unwilling women'.Despite that promising start, he later said:

> There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. It may be, in the end, that handling and persuasion will persuade the wife to agree . . .

In defence of the judge, it was said he was merely interpreting the law as it existed at the time of the trial. The law of rape under s.73 *Criminal Law Consolidation Act* (SA) requires the prosecution to prove:

- the fact that sexual intercourse happened;
- lack of consent by the woman; and
- knowledge by the man that the woman does not consent, or reckless indifference on his part, going ahead without caring whether she consents to the sexual intercourse or not.

At the time of the alleged rape, the law in South Australia only recognised marital rape had occurred if the circumstances included either gross indecency or an act calculated seriously and substantially to humiliate the wife. The law has since changed.

That the law was so is not relevant to the criticism made against Justice Bollen. Specifically, criticism is directed to his view that 'usual handling' of a woman involves 'rough' behaviour and worse, his view that a woman can be acceptably 'persuaded' by a show of force or violence when the man is seeking her consent to sexual intercourse.

English law (which we follow in Australia) has, for centuries, condoned or ignored violence in the home. The judge was seen to be following this old legal principle based on outdated attitudes towards women. He failed to take account of community attitudes towards violence and violence against women in particular. He failed to recognise the community's call for deterrence of *any* level of violence against women, any level of 'aggressive sexual conduct against women' (to use his own words) as unacceptable.

The controversy was fuelled by other anti-women comments made by Justice Bollen in his direction to the jury. He told an anecdote having very little to do with the factual situation in the trial before him but very plain in its message that women (as a group) tell lies. He demonstrated by the story a hostile attitude towards women which should not be present in a judge charged with the responsibility of being fair, objective, impartial and having a capacity to arrive at just solutions to social disputes.

The story he told was about a woman who alleged that 'a respectable married businessman with children' had raped her on a train. It was later found that the woman was mentally deranged and had made similar allegations against other men. The man here, however, committed suicide because of the shocking charge made against him. The judge's explanation was:

> That is a dramatic story, of course, removed from the facts here, but it is just an illustration of the need to scrutinise all the evidence very, very carefully, bearing in mind all the time that it is possible for a woman to manufacture a false allegation and that it has happened.

The judge also made comments defending other broad notions he held about men as a group and women as a group:

> It does not follow in the least that because a man has on an occasion or more than one occasion struck his wife, with hand, broom, or foot, that he has raped her. There are, I am afraid, men who strike their wives. Very many of them, the vast majority I apprehend, would not entertain the idea of raping their wives.

There is now a considerable literature in support of the view that aggression by men against women is often released in the form of sexual aggression/rape because rape is for men the ultimate power they have over women.[1]

For the review of the trial by the Full Court (three Judges) of the Supreme Court, Justice Bollen explained what he meant by 'rougher than usual handling'. It was reported that in referring to rougher than usual handling:

> I did not have violence as properly understood in mind. I had in mind persuasion by act, acts of an acceptable type performed in an acceptable way. I had in mind *vigorous hugging or squeezing or pinching*. [emphasis added]

The violence included in such acts as vigorous hugging, squeezing or pinching, as a matter of elementary observation would seem to be acts learned as long ago as kindergarten as behaviour attracting punishment, especially the *vigorous pinching!*

On 20 April 1993, the South Australian Court of Criminal Appeal, in a majority decision, ruled that Justice Bollen had made two errors of law when summing up to the jury. The first was in his direction on the matter of consent and the second, his direction which had the tendency to characterise the complainant in a sexual assault as a member of a 'class of suspect witnesses'.

How should judges behave?

Justice Michael Kirby, President of the New South Wales Court of Appeal, has said:

> Judges are there to give dispassionate decisions, uninfluenced by the strong forces that can rise and swell and then retreat again in popular opinion . . . By the same token, the courts serve the community of citizens of whom they are members and it is important for them to be aware of changing moral, social, technological values in the community and, in a general sense, to keep up with the times.[2]

There must be an avenue for the views of the community, arising out of informed public discussion, to be incorporated into the judgments that judges make in the cases that come before them. Possible mechanisms could include:

1. *Choosing judges from a wide or widening class of people.* Lionel Murphy, one of Australia's most progressive High Court judges certainly thought so. He held the view that to maintain confidence in the judiciary at least two things are needed:

> First there must be a balance in the selection of judges. Secondly, there must be informed public discussion about the judiciary and what it does. As the social values of the judges so greatly influence the laws and their application, it is of the utmost importance in a democratic society that those values reflect the prevailing values of the society in which the judges operate. [National Press Club Speech, 1980]

2. *Education.* Judges in Australia are given no formal training in sharp contrast to some other countries. There has been informed public discussion about sex bias in the judiciary more recently as the Australian Institute of Judicial Administration has initiated setting up an awareness program to assist judges understand how sex bias can be recognised and reduced in their deliberation.[3]

3. *Election of judges.* In some American States judges are elected by the people rather than appointed by the government. Chief Justice Nathan Heffernan of the Supreme Court of Wisconsin was elected to his position. His view is:

> Elections force judges to get out and tell people what the courts are doing and what the needs of the courts really are. . . It brings the judges close to the people and, although we want to avoid bending to every whim, nevertheless, it is very easy for a judge, cloistered in chambers, to lose sight of what is important, and to think that all the information is in books; and obviously it is not. Also, judges have to be aware of the art of the possible, they have to know the public can accept judicial ideas, even good ones. I think it is important for judges to know what the people think.[4]

4. *Enacting a Bill of Human Rights or a Charter of Rights and Freedoms.* Essentially this means positive rights of citizens are declared. Any laws or application of any laws contrary to those positive rights would be struck down by the courts. Under common law in Australia there is no protection of citizens' rights except by laws that provide for prohibition of certain activities. There is no law, for example, that provides that women have the right to have (criminal) laws interpreted so that they have equal protection to personal safety and bodily integrity as men — namely, no level of violence against them.

Unless we find ways of incorporating into our laws changes that the community, after informed public discussion, believes are correct ways of behaving, we will not progress in our endeavours to be and continue to be a free and democratic society.

Anne Thacker

Anne Thacker is a Melbourne barrister.

References

1. Brownmiller, Susan, *Against Our Will*, Penguin, 1975; Scutt, Jocelynne, *Women and the Law*, The Law Book Co., 1990, Ch.9; and Graycar, Regina, and Morgan, Jenny, *The Hidden Gender of Law*, Federation Press, 1990, Ch.12.
2. Quoted in Sturgess, Garry and Chubb, Phillip, *Judging the World*, Butterworths, 1988, at p.182.
3. Scutt, Jocelynne, 'Why Judges Must Wise Up to Training, *Australian*, 23.2.93.
4. Sturgess and Chubb, above, p.330.

DISCUSSION, RESEARCH AND ACTIVITIES

The preceding article by Anne Thacker raises some significant and topical issues, in particular:

- the connection between judges, legal judgments and community attitudes;
- violence against women and specifically the connections between sex and violence;
- judicial 'education'.

1. Judges, judgments and community attitudes

In the light of the information about Justice Bollen's comments and those of NSW Magistrate Pat O'Shane (see *Sit Down Girlie*, *Alt.LJ*, Vol. 18, Nos. 1 and 2, 1993), discuss:

- To which 'community' are judges responsible (the legal, the progressive, the conservative, the media)?
- Should judges *ever* speak out from the bench about 'social' issues? (If judges cannot or will not — are we operating a system of blind (and dumb) justice — or a system where the media rather than lawyers actually operate as those in pursuit of justice?

2. Violence against women

'The notion that women can be pressured into sexual relations by a little rougher than usual handling is typical of Australian males — and is obviously condoned by the Australian (predominantly male) legal system.'

Write 500-1000 words agreeing or disagreeing with the ideas in this statement

OR

If the law's notion of consent includes situations where that consent is gained through physical intimidation, then it is time we reviewed the criminal laws dealing with sexual assault.

Argue for or against this in 500-1000 words.

3. Judicial education

Anne Thacker sets out four possible ways of ensuring that judges act impartially — or at least not out of ignorance. Which ones are

- practical and workable
- desirable?

In groups, work out for each of the four suggestions what would be involved in introducing the change. Who would need to be lobbied and convinced? What legislative changes would be required?

Lynne Spender

Lynne Spender is a Sydney lawyer.