'SIT DOWN GIRLIE'

Legal issues from a feminist perspective

'SIT DOWN BOONG, SIT DOWN POOF AND SIT DOWN IDIOT!'

■ One of *Girlie's* learned readers has suggested that the *Alternative Law Journal* should include a new column, 'Sit down boong, sit down poof, sit down idiot' on the grounds that revealing stereotypes is a good way to cure them. It is a sad indictment of our society that there is no shortage of material — even sadder when it comes from the judiciary. Consider, for example, the playful little monoculturalist quip of Fullagar J in the as yet unreported case of *Morlend Finance Corporation v Westendorp*, Supreme Court of Victoria, 17 December 1992:

> It is I think not too much to say that the rapid dissemination of knowledge amongst borrowers and their advisers of the reasoning of the High Court in *The Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 has been followed in this State by the giving in many cases of evidence before the credit tribunals and the courts of law which alleges representations, usually to persons of foreign extraction, which have over nine years moved progressively from the mildly surprising through the quite extraordinary to the utterly fantastic.

■ In similar vein, Mr Justice Bollen of Adelaide caused a public furore with his now infamous remarks condoning 'rougher than usual handling' of wives who do not agree to sex. David Johns was acquitted of five charges of raping his wife and one charge of attempted rape. He pleaded guilty to a charge of occasioning actual bodily harm, a charge described by the judge as being 'of not much significance'. The South Australian DPP has launched a Full Court appeal on the issue of the judge's summing up to the jury which included a story about a woman who made false allegations of rape on a train. The Full Court will consider if the judge was in error to warn the jury of false allegations in the example he used and whether he erred in using the terms he did to direct the jury in relation to consent and persuasion. Would the law be as sympathetic to a wife who nudged the old cods too hard in a spot of 'rougher than usual handling', muses Girlie?

■ However, *Girlie* is nothing but fair — not all judges are of the 'Sit down moron' ilk. Consider, for example, the enlightened and thoroughly up-to-date remarks concerning women's work by Justice Mary Gaudron, of the High Court, in *Garvan v Fenton*, unreported, 28 October 1992, p.20:

> The valuation of work is neither an exact science nor an exercise that proceeds by reference to objective and non-controversial criteria. Certainly, there is a degree of controversy as to the true value of work that is usually perceived as 'women's work', whether that work is done in the home or in the paid workforce.

Her Honour provides a reading list which includes Jocelynne Scutt's *Women and the Law*, Graycar and Morgan's *The Hidden Gender of Law*, Graycar's 'Compensation for loss of capacity to work in the home' (10 *Syd.LR* 528), and Waring's *Counting for Nothing: What Men Value and What Women are Worth*, 1988.

■ All power to magistrate, Pat O'Shane, whose decision in the Berlei Five case raised more than a few eyebrows. Five women had been charged with malicious damage when they changed the wording on a sexist underwear advertisement. A billboard showed a woman in underwear being sawn in half by a male magician and carrried the caption, 'You'll always feel good in Berlei'. The women had added the words 'Even if you're mutilated'. Magistrate O'Shane, who found the charges proven but did not record convictions, said the real crime had been committed by the advertisers who used images of violence against women to sell their products. In a radio interview following the case, she told an interviewer: 'It seems to me that the concept of justice is a much broader concept than the issue of legality and I remind myself of that every day'. So should we, and let feminists congratulate Magistrate O'Shane. After all the 'strident and shrill' voices of the conservative forces who came down on her with a vengeance following the decision should not be the only ones to be heard.

WAITING FOR THE CHANGE

■ When the dark ages end and the courtroom benches bear the imprint of more representative bottoms what changes can be expected? Mr Justice Michael Kirby, in an erudite and entertaining piece on the Conference of Women Judges in the *Australian Law Journal*, vol. 66, December 1992, pp.782-783, reminds us that in 1253 there was great alarm and consternation when Queen Eleanor was appointed as Lord Chancellor and the Lady Keeper of the Great Seal. This occurred when King Henry III galloped off to join his boys in Gascony to quell a bit of a punch up. Her Majesty was pregnant at the time but in spite of the 'accouchement of the judge' and completely ignoring the prospect of placidity she presided in court where her 'arbitrary' proceedings saw Parliament responding 'in the usual manner' by refusing supply.

Admittedly, this was a less than auspicious beginning and Kirby J concludes: 'It cannot really be said that this rather unfortunate beginning for the place of women on the bench in our legal tradition explains the great delay in appointments which ensued'.

■ At the third Australian Law and Literature Conference in Sydney in July 1992, a forum attended by Justice Mary Gaudron of the High Court, Justice Jane Mathews of the Supreme Court of New South Wales as well as other women judges, it was concluded that while there have been significant improvements the dominant force of the legal world in Australia remains resolutely Anglo-Saxon male (see 66 *ALJ* 782). Perhaps we need a new column entitled 'Sit Down Boyie'?

■ See also the analysis of Sandra Day O'Connor's decisions and 'the power of maternal legal thinking' by Susan Behuniak-Long (Summer 1992 *The Political Review*). She concludes that O'Connor has developed her very own, unique feminine, as opposed to feminist, jurisprudence. The article includes

an interesting critique of the expectations that were held concerning the contribution which O'Connor was, as a female, expected to make. Meanwhile Justice Day O'Connor has been named 'Judge of the Year' by the *National Law Journal* for establishing a cohesive conservative bloc on the United States Supreme Court.

■ Courtroom humour has certainly begun to develop a different emphasis. In a Victorian country Magistrates' Court just the other day an embarrassed practitioner kept gesturing towards his lobes in a desperate attempt to stop his client addressing the Bench as 'Sir'. The client, his attention otherwise engaged, had failed to notice the earrings adorning magistrate Jenny Coate. In a last-ditch almost despairing attempt to remedy the situation the practitioner, in an all too audible whisper, hissed at his client 'Stop calling her sir!'

■ Women in court may wish to consider adopting the riposte used by Deirdre O'Connor, Judge of the Federal Court, President of the Administrative Appeals Tribunal. On the occasion of her first court appearance as a barrister, the opposing barrister said 'Excuse me sweetheart' to which Her Honour, as she now is, coldly responded, 'Do I know you?' whereupon the barrister blinked and shut up. This early training laid the foundations for the calm and collected manner in which the good judge now approaches her work. Recently an unsophisticated witness addressed the Bench as 'Excuse me love'. Following some prompting from her trusty barrister, the witness appeared on the following day bowing obsequiously and continually addressing the judge as 'Your Honour'. However, at one stage of the proceedings she [the witness] blurted out 'Oh shit, I just committed perjury'. Oh well, you can't get it all right first go.

PREGNANCY AND DRUGS

Rorie Sherman of the *National Law Journal* (2.11.92) reports that efforts to prosecute pregnant addicted women on charges of child abuse have largely been ineffective but attempts still continue. In October, the Californian Attorney-General pursued murder charges against a woman said to have ingested cocaine in the ninth month of her pregnancy and who bore a stillborn child. Increasingly women's advocacy groups are not only fighting such prosecutions, they are also using local laws to force directors of drug and alcohol programs to provide some assistance to these women. In Philadelphia, Carol E. Tracey of the Women's Law Project has asked the local human rights body to investigate her claim that 15 of the local programs have refused to admit pregnant women altogether and another six impose unreasonable restrictions on their admission. Two New York hospitals are also refusing to treat pregnant women on the grounds that they do not have obstetric units and cannot properly care for pregnant drug users. The counter claim is that the hospitals are asked to provide treatment for the addiction, not for the pregnancy. In the case of *Elaine W v Joint Diseases North General Hospital Inc.* 180 AD 2d 525 (February 1992), the hospital won but the ACLU Women's Project has asked for leave to appeal. Ms Tracey says that many service providers overestimate the problems which pregnancy can cause and are frightened of law suits. The US National Institute of Drug Abuse reported in 1990 that an estimated six million women of child bearing age abuse drugs and alcohol.

(See also Calluy, Jo, 'Drug use and pregnancy' (1992) *Connexions* 14 for an analysis of New South Wales health services for pregnant drug users which looks at medical protocols and treatment for users of heroin, methadone, alcohol, etc. and examines the attitudes of health providers.)

PREGNANCY AND BUSES

On 24 December 1992, the West Australian Equal Opportunity Tribunal awarded $28 600 to a bus driver who had been discriminated against because of her pregnancy. The driver was employed by the state-owned Transperth bus service and was told by a doctor examining her on behalf of her employer, 'When you have the bubby and lose weight, you come back and see me'. The Tribunal found that the woman's pregnancy was probably the major factor in the doctor's assessment of her being unfit to work as a driver.

DISCRIMINATION AT THE BAR

A report published by the English Bar Council and the Lord Chancellor's Department has established what many women have known for years. It gives detailed and substantial evidence of unequal treatment between the sexes within the law profession. It reveals how discrimination against women early in their careers later disadvantages them in becoming QCs or judges. In the UK there are 760 QCs, only 41 of whom are women. There are no women Lords of Appeal in Ordinary, one woman Lord Justice of Appeal (compared with 26 men), three High Court judges (80 men) and 19 circuit judges (402 men). There is evidence of discrimination based on child bearing in the areas of recruitment and selection procedures, choices of work specialisation and earnings. Hilary Heilbron, QC, is Vice Chair of the Bar Council and she says that some progress is at last being made. Women have practised at the English Bar since 1922 and in the last 12 months the Bar has commissioned the report, appointed equal opportunity officers, established a sex discrimination office, introduced a maternal policy and appears to be showing real purpose in tackling the problem.

GIRLIE'S MAN OF THE MONTH

This month's prestigious Girlie award goes to David Weisbrot for his analysis of the Berlei Five case in the *Australian* 22 January 1993. Weisbrot writes:

> The process and techniques of judging have not changed significantly over time. However, the composition of the Australian judiciary is changing and will continue to do so, and the mores, attitudes and sensibilities of Australian society are changing and this should be recognised by the courts.
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> Judging from the recent cases, we have almost reached the stage where it is both 'common sense' and 'the law' to recognise that the threat or use of violence against women to procure 'consent' to sexual relations is criminal, and the casual use of violent images to sell products is, at the very least, horribly inappropriate.

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