REFLECTIONS ON A TRIAL

by Madeleine Heath

Recently I had the opportunity to watch parts of a District Court criminal trial. As a lawyer who is infrequently inside a courtroom, I found this a fascinating and frustrating experience. A young Aboriginal man stood accused of assaulting and strangling his former partner (also Aboriginal) and the mother of their three children. He had been charged with similar assaults against her before. However, by the time matters went to court she felt unable to help secure convictions against him. Like many survivors at such times she had been under intense pressure. She had been scared of retribution, fearful of community backlash and under duress to withdraw her allegations. Mixed feelings about the accused, his potential incarceration and their family breakdown also played on her mind. I knew the survivor. She had told me what she had been through. I knew how stranded on 'tender hooks' she had been weeks before the trial began. The 'death imprint' from these latest attacks had steeled her with a resolve I hadn't seen in her before. Before she had been constrained by invisible internal binds that kept her silent. These dissolved after she realised how very close to death she had been. She didn't want to risk being in that place again. This time it was different.

The start of the trial was delayed. A new Crown prosecutor had to be appointed at late notice. Fortunately, he turned out to be thorough, composed, well-prepared and polite. His instructing solicitor from the Office of the Director of Public Prosecutions was the only female amongst the five key legal representatives including the Judge. The Judge steered the trial with an even hand and a no-nonsense approach. The defense barrister appeared relaxed and confident; something I found strangely unnerving given how much was at stake. The trial began. The Crown succeeded in having the accused's previous charges admitted as tendency evidence. At first this seemed like a win. However, by the end of the trial I wondered whether this had been a double-edged sword. Had the survivor's inability to follow through previously cast her in an unfavourable light in the jury's mind? The jury was mixed in age and gender (slightly more men). Most appeared to be of an Anglo-Celtic background, and I don't think any were Aboriginal. I wondered, how many members of the jury had ever met any Aboriginal people? Various supporters on either side shuffled in and out of the courtroom throughout the trial. There was a varied group of friends, family, and community at the trial in support of the survivor, including mostly women but also some men. In contrast, only women were supporting the accused when I was at court. I think they were all family members. I wondered what kinds of lives these women lead or have led? I wondered if any of them experienced domestic violence? The chances that they had, or known someone who had were high: one in four women in Australia have experienced violence by an intimate partner.[1] Aboriginal and Torres Strait Islander women experience violence by a current partner at 1.1 times the rates of non-Indigenous women in NSW.[2]

Unfortunately, I missed the survivor giving her evidence and being cross-examined. I know that afterwards she didn't stay around to watch the rest of the proceedings. It was too hard for her to be in the same room as the accused and his supporters. I imagine that listening to others present her story in court would be quite a surreal an experience, so she would want to get out of there as quickly as possible. Or maybe she was simply too busy looking after her kids and waiting for trial to end. I wondered if the jury could appreciate her courage in testifying and why it was hard for her to stay afterwards?

I wondered what kind of life the accused had lived? What had he seen and experienced which brought him here to this courtroom? I heard later he had a difficult time of it. From what I saw of proceedings the accused appeared alternatively attentive and inattentive. Often, he would yawn loudly, or hang his head down as though he were bored. At other times, his head was lifted as he strained to decipher legal jargon. Generally, he appeared very contained. I suspect he was well prepped, or experienced. Knowing that, although he was a main player, for the most part he takes a back seat. I noted the accused's barrister referred to him on several occasions as '*unsophisticated*'. This made me squirm.

It felt like code for 'dumb'. The accused didn't look dumb to me. Just very powerfully built. I found these references to his lack of sophistication patronising even though I held no sympathy for him. Personally, I struggled with the legal jargon too. It is detailed, layered, inaccessible and '*fancy*' for want of a better word. I can appreciate the difficulties a layperson would have in understanding much of what was going on. But in this case, I couldn't help but feel that the barrister was trying to plant a seed in the jury's mind that if the accused was 'unsophisticated', and by implication stupid, he was not fully responsible for his actions. Halfway through it, most of the male jury members had obviously started to flag and were falling asleep. A well-directed blast of fresh air in the jury's direction at this point in time would not have gone amiss.

The trial ended. The accused was found guilty of assault, but not of strangulation. The specific offence for choking and strangulation is relatively newly introduced into the *NSW Crimes Act* 1900 in 2014.[3] Only a handful of people had been charged with it at the time of these proceedings. The survivor was understandably very disappointed with the outcome, as was I, and in disbelief. The accused, now the perpetrator, was released that afternoon, his time served in remand covering his sentence for the assault conviction. I understand he went home and celebrated with a party in the evening—a man who had just been found guilty of assaulting his former partner. It dawned on me that the aim of the justice system to deter criminal behaviour through incarceration would not work in this case, just as it had failed to do in so many cases before it. I feared for the continued risk posed to the survivor.

In my mind, I knew that the reasons for the high criminal threshold of '*beyond a reasonable doubt*' were sound. I knew convictions for domestic violence matters were hardly a breeze to secure. I had worked as a paralegal in a criminal law practice that had defended many Legal Aid clients, and understood the concept of unfair prejudice. However, I felt the chances of convictions on all charges in this matter were reasonably good. The survivor benefited from improved evidence-gathering practices by police in domestic violence matters and I felt the Crown had appropriately discharged their onus of proof. Before observing this case I knew about the low conviction rates for domestic violence related crimes, but now I experienced first-hand what the statistics bear out. It was a cold insight into how unfairly weighted the justice system is in favour of the accused, and against survivors, even if they have a good, strong case.

After the dust had settled, it took a while for me to compose my thoughts. I realised as a frontline worker I took for granted my understanding of domestic violence and how it works. I thought what was missing in this trial, and needed to be canvassed by the Judge or expert witnesses, was the current evidence and statistics about domestic and family violence. I suspected the average jury member might not know very much about this kind of secondary information, which I thought was crucial and relevant to how well they did their fact-finding job. For example, did they know:

- domestic violence is the biggest cause of death and disability world-wide for women under 45 years of age (this is why domestic violence is overwhelmingly a gender-based issue);[4]
- strangulation is a common warning sign before the victims of domestic violence are killed by perpetrators;[5]
- on average, it takes a woman eight attempts to finally leave an abusive relationship;
- Aboriginal women and children are over-represented as victims of domestic/family violence and, like other survivors, often 'minimise' the severity of the abuse;
- Indigenous women and girls are 35 times more likely than the wider female population to be hospitalised due to family violence.[6]

Unless an Aboriginal person is in an Indigenous Sentencing Court they are highly unlikely to be judged by their 'peers', or indeed by a person with a realistic understanding of the issues that face Indigenous communities.

At common law, secondary knowledge, referred to as 'legislative facts', form part of the doctrine of judicial notice. Judicial Notices are also part of the *NSW Evidence Act 1995* ('the Act') and is replicated in some other jurisdictions. Section 144 (2) states that the 'judge may acquire knowledge of that kind in any way the judge thinks fit. Under s144 (3) 'the court (including, if there is a jury, the jury) is to take knowledge of that kind into account'. In Australia, 'legislative facts' about 'battered woman syndrome' has made its way into court proceedings for abused women charged with murdering their abuser.[7] However, the implementation of general knowledge about domestic violence more generally in less extreme cases to my mind appears limited. The utilisation of legislative facts in criminal trials involving Indigenous people is particularly important because of their minority status. With a population of less than 3 per cent,[8] it is unsurprising that many Australians have never met an Aboriginal person: only 30 per cent of the general community socialise with Aboriginal and Torres Strait Islander people.[9] Unless an Aboriginal person is

in an Indigenous Sentencing Court they are highly unlikely to be judged by their 'peers', or indeed by a person with a realistic understanding of the issues that face Indigenous communities.

Whether legislative facts can be considered by the courts is an unsettled area of the law. In his 2015 speech to the 14th Australasian Conference on Child Abuse states, Justice McClellan said that:

> the law in relation to legislative facts in Australia has been rendered uncertain by the decision of the High Court in *Aytugrul v Queen 2012* …The High Court decision has come to be understood, at least that of the joint judgment, as excluding recourse to legislative facts unless determined in accordance with the rules in relation to judicial notice in s 144 of the Uniform Evidence Act.[10]

He goes on to talk about the difficulty of including empirical research, particularly where it illuminates the psychology of human behaviour as evidence at trial. The desirability of including legislative facts that would help the court interpret certain evidence must be balanced against ensuring evidence is informed by science to avoid running the 'risk of undermining community confidence in the law'. [11] It must also be balanced against considerations such as procedural fairness and ensuring appropriate notice is given to parties. It is in part for these reasons that the current law around enabling legislative facts to be considered by the courts remains unsettled.

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The judicial allowances for considering legislative facts are largely very narrow.[12] Yet, there are potential benefits in certain circumstances for more leniency. Hamer and Edmond argue that 'the underlying goals of factual accuracy, efficient dispute resolution, fairness and institutional integrity justify a more liberal—though by no means unregulated—approach to judicial notice in relation to some kinds of knowledge'.[13] The release of the first stage of the National Domestic and Family Violence Bench Book appears to be a move in this direction. It provides:

> A central resource for judicial officers considering legal issues relevant to domestic and family violence related cases that will contribute to harmonising the treatment of these cases across jurisdictions along broad principles and may assist them with decision-making and judgment writing.[14]

It contains a social science and related literature section, which aims to promote a greater understanding of the dynamics of domestic and family violence. However, its admissibility in judicial proceedings will be regulated by rules of evidence applicable in the jurisdiction where proceedings are heard. It is not intended to direct judicial officers as to how they do their job. I hope the current Royal Commissions into Institutional Responses to Child Sexual Abuse and the recent Royal Commission into Family Violence in Victoria, which are uncovering valuable knowledge about specific types of violence, change the legal landscape about 'judicial notice' and its implementation.

The Bureau of Crime Statistics and Research NSW have reported that in 2016, prison sentences under 12 months are no deterrent for domestic violence offenders, compared to suspended sentences.[15] Significantly, Indigenous offenders have higher odds of re-offending than non-Indigenous offenders.[16] With this in mind, I agree with Aboriginal commentators like Marcia Langton and Josephine Cashman that the focus on reducing Aboriginal incarceration levels often leaves Aboriginal domestic victims at risk. It is well understood that social issues such as increased drug and alcohol abuse, welfare dependency, discrimination and unemployment within Indigenous populations arises as a consequence of cultural dispossession and trauma.[17] However, these social issues are experienced differently by Indigenous women, who are further marginalised within their own communities. Aboriginal women face specific cultural barriers reporting this type of violence. For example, over my career I have seen Aboriginal women fail to report domestic violence because of fear of 'white' authorities. This is understandable considering the coercive and violent use of force against Indigenous communities in the past. I have met Aboriginal women who are concerned that if they report, their partners or family members will die or be killed in custody. I have also seen Aboriginal women fail to report domestic violence because they fear their children will be removed, or that they will face racial discrimination. Emma Buxton-Namisnyk argues that domestic violence prevention must be approached through a lens of 'intersectionality'.[18] That is, that the justice system and frontline services, including police, must consider the culture and gender of an Indigenous woman, as well as her experiences of discrimination and marginalisation in order to be affective. Enabling legislative facts to be included in cases involving domestic violence against Indigenous women may be one way to create a more culturally appropriate justice system.

The reasons why Indigenous people are imprisoned in the first place is a step towards reducing incarceration numbers. To effectively address the issues that lead to family violence we need to implement a long-term strategy targeting the two key drivers: sexual inequality and gender stereotyping. This strategy must be implemented within the judicial system and frontline services. We also need to urgently tackle the specific drivers of personal violence in Indigenous communities, which include drug and alcohol abuse, difficulties with parenting, poor school retention and performance and unemployment. Reducing family violence in Indigenous communities, and in the broader Australian community, requires a holistic policy approach. Only then can we hope to break the often intergenerational cycle of abuse in Indigenous communities and lessen the role of the criminal justice system in this most human of tragedies.

Madeleine Heath is a Solicitor at the Wirringa Baiya Aboriginal Women's Legal Centre.

1 ANROWS 'Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012'.

2 Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators 2016' Productivity Commission, Canberra.

3 *Crimes Act 1900* (NSW) s 37.

4 Victorian Government, Victorian Health Promotion Foundation The health costs of violence: measuring the burden of disease caused by intimate partner violence (2004) 8.

5 Queensland Government, Department of Justice and Attorney-General, *The Domestic and Family Violence Death Review and Advisory Board Procedural Guidelines* (2016-19) 68.

6 *National Plan to Reduce Violence Against Women and their Children 2010-2022*, Council of Australian Governments (2010).

7 See, eg, *R v Roberts* (unreported, 31 August 1989); *R v Russell* [2006] NSWSC 722 (21 July 2002).

8 Australian Bureau of Statistics, 'Estimates and projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026' (Catalog No 3238.0, Australian Bureau of Statistics, 17 December 2014).

9 Reconciliation Australia, *Australian Reconciliation Barometer* (21 October 2014).

10 The Hon Justice Peter McClellan, 'Keynote Address' (Speech delivered at the 14th Australasian Conference on Child Abuse and Neglect 31 March 2015).

11 Ibid.

12 See, eg, *Dupas v the Queen* (2012) 226A Crim R 575; *Aytugrul v the Queen* (2012) 247 CLR 170 (HCA).

13 David Hamer and Gary Edmond 'Judical Notice: beyond adversarialism and into the exogenous zone' (2016) 25(3) *Griffith Law Review* 291, 312.

14 Australasian Institute of Judicial Administration and The University of Queensland, *The National Domestic Violence and Family Violence Bench Book* (Australian Government, Department of Attorney-General, 2016).

15 Judy Trevena and Suzanne Poynton, 'Does a Prison Sentence Affect Future Domestic Violence Reoffending?' (2016) 190 *Crime and Justice Bulletin*.

16 Robin Fitzgerald and Timothy Graham, 'Assessing the Risk of Domestic Violence Recidivism' (2016) 189 *Crime and Justice Bulletin*.

17 Kyllie Cripps and Megan Davis 'Communities Working to Reduce Indigenous Family Violence' (2012) 12 *Indigenous Justice Clearinghouse Research Briefs* 1,1.

18 Emma Boxton-Namisnyk 'Does and Intersection Understanding of International Human Rights Law Represent the Way Forward in the Prevention and Redress of Domestic Violence Against Indigenous Women in Australia' 18(1) *Australian Indigenous Law Review* 119.

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