BOOK REVIEW: *FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND – TE RINO: A TWO-STRANDED ROPE*

Suzanne Robertson*

Book review of Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds) Feminist Judgments of Aotearoa New Zealand – Te Rino: A Two-Stranded Rope *(Hart Publishing, Portland, 2017).*

> Feminist legal scholars remind us that any judicial opinion is one of many possibilities: "Alternative opinions and decisions can always be made which are based on more imaginative approaches to equality (and other) jurisprudence".[1]

Every trial counsel knows that a judgment provides a particular perspective on the facts and relevant law. On occasions, counsel wonders if the judge was in the same courtroom. The facts that are included, the facts that are omitted and the way the facts are portrayed in the judgment are very influential in the way the law is applied and the conclusions reached.

As an undergraduate law student, I subconsciously held the view that the law was a set of rules, able to be articulated with as much certainty as a mathematical equation and able to be observed with the same certainty. From my experience of advising clients, this view is also held by many laypeople.

After 20 years in practice, I have learnt that law is very unlike a mathematical formula. A judgment is an opinion of the judge who writes it. It is borne out of the personal experience and perspective of the writer as much as any other legal opinion.

Feminist Judgments of Aotearoa New Zealand – Te Rino: A Two-Stranded Rope provides an insightful illustration of this.[2] The stated goal of the book is to provide the reader with a new

* Suzanne Robertson is a Queen's Counsel at Bankside Chambers. She provides advice and advocacy in a wide range of commercial and civil disputes.

1 Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand – Te Rino: A Two-Stranded Rope* (Hart Publishing, Portland, 2017) at 132 quoting Margaret Davies "Feminism and the Idea of Law" (2011) feminists@law <http://journals.kent.ac.uk>.

perspective, or new *perspectives*, in the reading of New Zealand law.[3] The book certainly achieves its goal.

The collection of judgments is co-edited by University of Canterbury School of Law academics Professor Elisabeth McDonald and Dr Rhonda Powell, Māmari Stephens of Victoria University of Wellington and Professor Rosemary Hunter of Queen Mary, University of London. Written with the assistance of funding from the New Zealand Law Foundation, the book contains contributions from 57 academics, lawyers and judges, including a contribution from a retired Family Court judge, Judge John Adams, who rewrote one of his own relationship property judgments. Although the product of individual contributors, it is a collaborative work with contributors meeting together at workshops to learn about judgment writing and to discuss draft judgments and commentaries.

The collection asks how key New Zealand judgments might read if they were written by a feminist judge. Uniquely this feminist judgment collection also includes a set of judgments written using an approach based on mana wahine, which is the use of Māori values that recognise the complex realities of Māori women's lives. The book contains alternate judgments together with commentaries for 25 important New Zealand cases from 1914 to 2015. Nineteen of the judgments are written from a feminist perspective and six use an approach based on mana wahine.

Feminist judging is a developing practice worldwide, in which judgments are written in significant leading cases through a feminist lens. Collections of feminist judgments have been published in England and Wales, Australia, the United States, Northern Ireland and Ireland. Feminist judging as a legal theory is based on the premise that men and women in general have distinctly different experiences of and perspectives on the world. An underlying presumption of feminist judging is that the original judgments in the cases were written from a male perspective and that the gender perspective influenced the resulting judgment.

The mana wahine approach derives from kaupapa Māori and includes five aspects: claiming visible space for Māori women and Māori people generally; identifying rights and obligations that uphold the mana of Māori women and their families; placing Māori people and their concerns at the centre of the factual and legal analysis (not the margins); applying the legal tests to the reality of everyday Māori life (not an abstract or idealised notion); and paying respect to Māori values and principles. The narrative and reasoning in the mana wahine judgment in *Bruce v Edwards* deserves special comment.[4] The alternate judgment was a fascinating read and was indeed a powerful dissenting judgment from the original decision.

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2 McDonald and others, above n 1.

3 At ix.

4 At 43. See *Bruce v Edwards* [2002] NZCA 294, [2003] 1 NZLR 515.

The judgments are written within the constraints of the legal principles, context and procedure at the time of the original judgments. Professor McDonald says:[5]

> The challenge for the participating feminist Judges was to reimagine a decision from a feminist or mana wahine perspective while operating within the social and legal context that existed at the time. The judgments are a plausible and powerful critical commentary that demonstrate that such a decision-making approach would have been possible.

The editors describe common themes underlying feminist judgments as applying feminist theoretical approaches, recognising women's stories and experiences, and challenging gender bias and the delivery of equality.[6] I did not observe the first theme coming through as strongly as the second two mentioned. This is possibly because I fall within the description of the general reader to whom Professor Hunter described feminist theory as not being necessarily obvious.[7]

In contrast, the recognition of women's stories and experiences and the challenges to the delivery of equality ensured the alternative judgments were extremely interesting to read and thought-provoking to contemplate. One example of a decision in which redefining of the notion of equality was particularly striking is the alternative judgment provided by Ruth Ballantyne in the Family Court case *Caldwell v Caldwell [Relocation]*.[8] The alternate judgment highlighted the injustice of requiring Ms Caldwell to have to prove that it was in her children's welfare and best interests to relocate to Australia, even at substantial cost to her own welfare and best interests, without putting any onus on Mr Caldwell to show how remaining in New Zealand was in his children's welfare and best interests.

The fresh approach to the original cases did not necessarily result in different outcomes. In many cases the outcome of the alternate judgment was the same as the judgments written by the original judge, although the judgments were substantially rewritten. One of the consistent features of all the judgments in the book was the much greater emphasis on recognising the participants' stories and experiences. Usually the significant player was a woman but not always. In some judgments stronger voices were given to the land, nature and male victims of crime. This affected the process of judgment writing more than the ultimate decision.

The judgments are grouped into 12 broad subject areas: civil rights, social welfare, medical decisions, family relationships, relationship property, employment, commercial relationships,

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5 University of Canterbury "New NZ law book shows how to judge like a feminist" (7 December 2017) <www.canterbury.ac.nz>.

6 McDonald and others, above n 1, at 31 and following.

7 At 31.

8 At 211. The original judgment was *AMO'H v AJO'H* [2011] NZFLR 298 (FC). The feminist judge used fictitious names for the parties as part of personalising the participants.

customary rights, environment, sexual offending, defences and sentencing. There were two to three alternate judgments together with commentary in each subject area. The alternate feminist judgment was completely fictional, although based on an actual case.

In the book, the commentary precedes the alternate feminist judgment in each section. First in each commentary is a discussion of the legal and social context of the original case and a discussion of particular aspects of the original judgment. Next is a comment on the feminist judgment. At the end of the commentary is the feminist judgment.

In some instances, the commentary was almost a description of the feminist judgment, which was then followed by the feminist judgment itself. As I progressed through the book, I started reading the feminist judgment before the commentary on it. This enabled me to form my own impression about the judgment, the issues upon which the writer had focused and the differences there might be from the original judgment without first being told what I should be reading and observing. I would have preferred to see the order of each section changed so that the comments on the context of the case and the original judgment were followed by the feminist judgment itself, which was then followed by the commentator's remarks about it.

In some cases, the alternative approaches put forward did not seem to be necessarily dependent on gender or feminist theory. For example, Clare Abaffy's alternative judgment in *Quilter v Attorney-General*, which challenged preconceived or traditional notions about marriage, was equally valid if the plaintiffs had been two men who applied for a marriage licence.[9] This is true both for the thought-provoking reasoning in the alternate decision and the outcome, which would apply equally to permit marriage between two men as to the issue before the Court, which was a marriage between two women. As one of the editors, Dr Powell, says:[10]

> This project has huge potential to affect the ability of the judicial system to deliver justice for New Zealanders. Although we focused on women and Māori women, the lessons learnt are able to be generalised to other disadvantaged groups.

To this I would add that the lessons are able to be generalised to many participants in the legal system, even if they are not within a disadvantaged group.

The approaches taken in the final two sections of the book, on defences and sentencing, are obviously different to those taken in the original cases. Both of these sections contained a judgment adopting a mana wahine approach and a judgment adopting a feminist approach. The different approaches in all four judgments, which led to different outcomes, appear to make so much more sense than the original judgments.

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9 At 191. See *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

10 University of Canterbury, above n 5.

The humanist approach, which personalised participants by giving them first and last names, emphasised positive parts of the narrative and de-emphasised irrelevant negative parts of the narrative, was an approach equally applicable to men and women. I understand the thesis behind the judgments in this book that this humanist approach had not been applied to the women central to the narrative in the original judgments. I thought this humanist approach was a striking feature of the alternate judgments. This might reflect my own experience and perspective as a commercial civil lawyer with an often intellectual approach. Other aspects of the alternate judgments may stand out more to other readers and this shows the premise underlying the collection that we all, including judges, come to our work with particular experiences and perspectives.

On occasions, stated aspects of feminist theory seemed to perpetuate gender stereotypes. For example, the assertion that Western company law embodies masculine values of individualism, competition, hierarchy, aggression and strict classification of roles suggests there are values that are inherently masculine and feminine.[11] This might be a valid historical perspective but I question it as being representative of future thought.

The book should certainly not be thought to be a collection of eccentric judgments. The alternate judgments are immensely interesting, refreshing and thought-provoking. The collection provides a very valuable lesson that the law and judgments are not neutral and encourages all participants in the legal profession to think about their own subconscious biases in expression and outcomes. The challenge is given to all those framing cases and writing judgments to consider all relevant voices and perspectives.

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11 At 314.