Justice Jane Mathews' contribution to the Law and Jurisprudence

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Justice Jane Mathews AO

Gender and judging

There is a temptation, when considering the contribution of a woman judge to the law, to separate the 'woman' from the 'judge'. Beyond mere temptation, perhaps there is compulsion to do so, if the principle of judicial neutrality is to be taken seriously. One might therefore argue that Justice Mathews' contributions to the law and jurisprudence should not, and do not, have anything to do with her gender – notwithstanding the symbolic 'firsts' for women which she achieved both in practice and on the bench.

On another view, to celebrate Justice Mathews' contributions to the law as if they could be compartmentalised from her gender would be a disservice to her memory. The two are inextricably connected, and to acknowledge that is to recognise no more than that judges are human beings, and that for a variety of cultural, biological, social and historic reasons, women judges do have different life experiences.[1] That different experience of life can only have been more acute at the time of Justice Mathews legal education and subsequent ascent within the profession. It is vital that diverse backgrounds and experiences be brought to bear on the difficult questions of judgment that comprise the modern judicial task, if the judiciary is to maintain the confidence of the diverse community it serves.[2]

Lest it be said that this is some politically-correct snowflake-millennial heresy, the same point was made by Benjamin Cardozo in his lectures on judging in 1921, who said:[3]

> The eccentricities of judges balance one another … out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.

It is doubtful that Justice Mathews herself would have disagreed. She resisted the understandable temptation to embrace what her brother judges thought to be the 'ultimate accolade'— that she 'argued like a man'.[4] Instead, she recognised and celebrated what her gender meant, and she recognised, celebrated and encouraged other women in the law. It is entirely appropriate that in remembering Justice Mathews' contributions to the law, attention is focussed on those areas of the law to which she contributed which tend to impact women in a particular way.

This paper focuses on three of those areas: the law of sexual harassment, sexual discrimination and sexual assault. It then briefly considers Justice Mathews' role as a trial judge, as this was where the vast majority of her judicial career was spent, in the District Court, in the common law division of the Supreme Court, and when she returned to the Supreme Court as an Acting Judge.

Sexual harassment

As a member of the Equal Opportunity Tribunal in 1983, Justice Mathews was the first Australian adjudicator to recognise sexual harassment as a form of unlawful discrimination, in the matter of *O'Callaghan v Loder & Commissioner for Main Roads* (1983) 2 NSWLR 89. Ms O'Callaghan was a junior lift attendant at the Department of Main Roads. She and another colleague lodged separate complaints, alleging sex discrimination on the basis that they had been sexually harassed by Mr Loder, the Commissioner for Main Roads. The power dynamic was stark.[5]

At that time, there was no concept of 'sexual harassment' written into the statute books of either the State or the Commonwealth. Thus, one of the many jurisdictional challenges launched on behalf of Mr Loder[6] was whether the allegations set out in the complaint were capable of amounting to a contravention of the *Anti-Discrimination Act 1977* (NSW) – that is, whether 'sexual harassment' could constitute discrimination on the basis of sex.[7]

Justice Mathews was first tasked with defining sexual harassment, and recorded that an appropriate 'starting point' was:[8]

> …that a person is sexually harassed if he or she is subjected to unsolicited and unwelcome sexual conduct by a person who stands in a position of power in relation to him or her.

This might read to the modern lawyer as overly narrow, and perhaps not particularly remarkable. It must be remembered, however, that there was no statutory definition of sexual harassment, and no prior occasion on which a court or tribunal in this country or in the United Kingdom had been asked to define it.[9]

It was then necessary to consider whether that conduct could fall within ss 24(1) and 25(2) of the *Anti-Discrimination Act* (NSW), namely, whether there was less favourable treatment in the same circumstances than that given to a male employee, and whether

this amounted to different 'terms and conditions' of employment or 'detriment' in employment.

Justice Mathews found that a woman subject to sexual harassment does receive less favourable treatment than would have been accorded to a male in the same or similar circumstances. In doing so, she rejected the clever hypothetical put by counsel for Mr Loder of the homosexual or bisexual employer. Justice Mathews response was as follows:[10]

> As to the homosexual employer: if an employee were to be sexually harassed by an employer of the same sex, then in my view, that employee would have precisely the same rights under the *Anti-Discrimination Act* as the complainant has in this case.

This comment, while obiter, is remarkable when it is noted that it took the Supreme Court of the United States almost another 40 years to recognise this simple point in the matter of *Bostock v Clayton County, Georgia* (2020) 140 S. Ct. 1731. The Court held that Title VII of the *Civil Rights Act 1964*, which relevantly prohibits employers from discriminating against any individual 'because of … such individual's … sex', prohibited an employer from firing someone only because they are homosexual or transgender. Justice Gorsuch, writing for the majority, said:[11]

> An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

With the greatest respect to Justice Gorsuch – Justice Mathews said it first.

The next question in *Loder* was whether the less favourable treatment of a harassed female employee was 'on the ground' of her gender. Justice Mathews reasoned that:[12]

> The fact that the complainant is female must, in my view, have both a proximate bearing and a causally operative effect on the sexual conduct towards her of a male heterosexual employer.

Finally, she held this could constitute both discrimination 'in the terms and conditions of employment', and 'subjecting' the employee to 'detriment', by virtue of the 'unwelcome sexual conduct itself' and the 'hostile or demeaning environment' thereby created.[13] Despite the fact that Ms O'Callaghan ultimately failed in her complaint,[14] it cannot seriously be doubted that the decision was landmark, in its recognition of both the seriousness and unlawfulness of sexual harassment.

Women in law... Carolyn Simpson QC (left), Justice Jane Mathews AO and Jill Segal

THE INVISIBLE BAR

HOW WOMEN LAWYERS ARE KEPT OUT IN THE COLD

The ongoing legacy of the *Loder* decision

Five years later, in *Hall v Sheiban* (1989) 20 FCR 217, French J (as his Honour then was) would refer to *O'Callaghan v Loder* in holding that sexual harassment constituted unlawful discrimination within the terms of *Sex Discrimination Act 1984* (Cth).[15]

The Full Court also expressed its disapproval of the reasoning of the tribunal below that it was necessary to show 'repetition after resistance or disapproval'.[16] This had, of course, earlier been held to be the case by Justice Mathews in *Loder,* where she had stated:

> [O]ne cannot discount the possibility of an employer's single act of sexual aggression so tainting the working environment as to come within this section.[17]

It is worth digressing for a moment to also note that the decision below in *Hall v Sheiban*, was decided by the President of the Commission, who was also a Federal Court judge, and who declined to award damages, because public exposure of the complaints was apparently sufficient relief. In relation to one of the complainants, the President said that:[18]

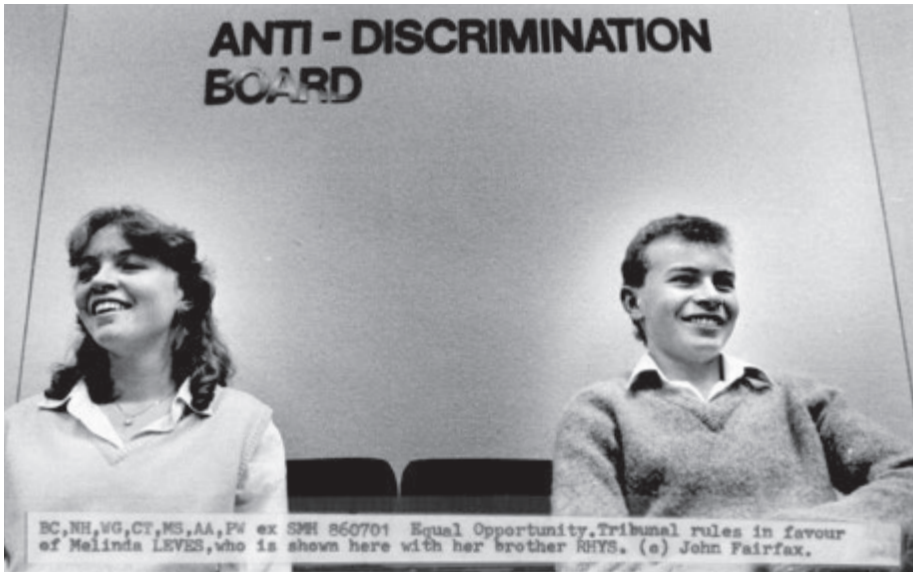
> [I]t offends common-sense and reasonable community standards and expectations that a woman who was almost 28 years old with average or normal life experiences, could when subject to mild if ridiculous advances or conduct … have suffered anything other than some temporary aggravation.

The President went on to reason that 'the effects of this complainant's sexual harassment by the respondent were so trivial, and this claim so exaggerated, that no compensation should be paid'.[19] Keeping in mind that the complainant had endured questions about her sex life, fondling, and the employer forcefully attempting to kiss her, it is perhaps evidence of the need for diverse judicial perspectives as to 'reasonable community standards and expectations'.

Commonsense prevailed in the Full Court, with the majority declaring that each complainant was entitled to an award of damages. Justice Lockhart noted that 'the Commission's robust view of womens' level of tolerance for harassment is not supported by the academic literature'.[20]

It would not be until 1997, however, that sexual harassment would be expressly prohibited under the law of NSW by passage of the *Anti-Discrimination Amendment Act 1997* (NSW). And it would not be until 2014 that the comments of the Court in *Hall v Sheiban* would work a meaningful change to the quantum of damages awarded to victims of sexual harassment, when Kenny J in *Richardson v Oracle Corp (Australia) Pty Ltd* (2014) 223 FCR 334 acknowledged that such amounts had failed to keep step with the community's deeper appreciation of the 'hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct'.[21] The award of damages in *Oracle* was increased from $18,000 to $130,000.[22]

Finally, just this year, *Oracle* was applied in the context of sexual harassment by a legal practitioner, in the matter of *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126. Justice Perram, in a stinging judgment, held that the use of the status of a legal professional 'for tawdry personal ends is an abuse of it', and that the trial judge was correct to measure in general damages the power differential which flowed from that privileged status.[23]



Sexual discrimination

The second landmark decision during Justice Mathews' time on the Equal Opportunity Tribunal is the case of *Leves v Haines* (1986) EOC 91-167. Miss Melinda Leves, who brought the complaint, was a student at Canterbury Girls' High School. Her twin brother was a student at Canterbury Boys'. At Canterbury Boys', her brother could study computer science and industrial arts. At Canterbury Girls', Melinda could study domestic science and textiles.

It is useful to understand Justice Mathews' particular perspective in dealing with this case by stepping back 10 years to her role as counsel assisting the Royal Commission on Human Relationships.[24]

The final report of the Commission contained a chapter on Equality and Discrimination. In noting the causes of inequality for women, the Commission found that 'education in Australia tends to reinforce attitudes which discourage female aspirations and deny girls equal education experience'. One of its recommendations, therefore was, the 'revision of curricula … to ensure equality in course options' and 'revision of vocational guidance programs to ensure that a wide choice is offered to boys and girls' and does not 'impos[e] any sex-based restrictions on choice'. [25]

Thus, faced with Miss Leves' complaint, 10 years later, Justice Mathews was well-attuned to the ongoing impact of discrimination in educational opportunity. Her Honour found discrimination, reasoning that:[26]

> [T]he means of acquiring a livelihood is among the proper objects which high school education is intended to promote. Therefore the opportunity to choose subjects whose study enhances the prospects of employment is a benefit; and the larger the prospect the greater the benefit. Hence, those excluded from studying such subjects are deprived of a benefit available to the rest, and are therefore treated less favourably than those upon whom the exclusion is not imposed.

The decision was upheld in the Court of Appeal.[27] Justice Kirby pointed out that the boys were also being discriminated against in being denied the 'domestic' subjects designated for the girls.[28] The full range of subjects were, thereafter, offered to both girls and boys.[29]

Sexual assault

Justice Mathews herself wrote the chapter on sexual assault law reform in the report of the Royal Commission.[30] She would later describe this experience as 'eye-opening'.[31] Two important recommendations were made in the report: first, the abolition of the marital rape immunity, and second, reform of the law around consent.

As concerns that second recommendation, the report noted that 'in no other crime is the action of someone other than the accused so critical to the question of whether an offence has taken place'.[32] Instead, it was said, the law should be changed to emphasise the unlawful means, in terms of violence, or threats of violence, by which 'non-consensual' intercourse is pursued, and 'so shift attention away from the victim and onto her assailant'.[33] This approach arguably now finds statutory reflection in presumptions as to non-consent, for example, in s 61HE(5) of the C*rimes Act 1900* (NSW). [34]

As concerns marital rape immunity, interestingly, the Commission did not go so far as to recommend complete abolition, but rather only in cases involving violence or threats, or where the spouses were separated.[35] Given the opposition to reform at the time,[36] we can perhaps view it as a product of its time. Indeed, in 1981, when the NSW abolition bill was debated in the State Parliament, a member of liberal opposition would argue that '[a] husband should not walk in the shadow of the law of rape in trying to regulate his sexual relationships with his wife'.[37] The bill was nevertheless passed in 1981, and with that the immunity in the State of New South Wales, at least, was abolished.[38]

Ten years later, Justice Mathews would sit on the Court of Criminal Appeal in the matter of *R v Hunter*[39] and consider whether sentences of periodic detention imposed in a case of martial rape, involving very serious circumstances, were manifestly inadequate. In deciding that they were, Justice Mathews noted that the 'fact that the parties had been married was in no way relevant to the sentencing process'.[40] Unfortunately, *Hunter* was expressly disapproved of, another 10 years later, in 2001, in the matter of *R v Dawson* (No 2) [2001] NSWCCA 186, because in the view of the Court of Criminal Appeal:

> [T]he impact on the victim is calculated to be significantly different than in the case where an attacker is unknown to her… [O]ne may expect that at least sometimes a victim will not feel as threatened by someone who they know, will not have the same fears of pregnancy or infection, and will not feel as degraded or humiliated, or psychologically traumatised by an event which, albeit with consent, may well have occurred hundreds of times before. I would certainly not be as ready to infer psychological, certainly significant psychological, injury as I would where the rape was by a stranger.

Justice Mathews' view has, however, prevailed in the Court of Criminal Appeal, with Adamson J noting in *SC v The Queen* [2019] NSWCCA 25 that the proposition marital rape was 'less serious than sexual assault by a stranger only has to be stated to be rejected'.[41]

Two points emerge from the foregoing. First, Justice Mathews has had a considerable impact on the law affecting women. Second, that impact is testament to the value in having a broad cross-section of the community represented in the judiciary. One only has to consider the Commission's original decision in *Hall v Sheiban*, or that of the Court of Criminal Appeal in *R v Dawson*, to appreciate the sagacity in Justice Cardozo's observations over 100 years ago.

An eminent trial judge

It would be remiss to consider Justice Mathews' contribution to the law without noting her many years spent as a trial judge. However, it is a difficult thing to identify with precision the contribution to the 'law and jurisprudence' that a trial judge makes. Perhaps it is important for that very reason; it should be expressly acknowledged that one of Justice Mathews' most significant contributions to the law is

one which is not to be recorded for posterity in the New South Wales Law Reports. Indeed, one finds evidence of the competence with which she conducted trials in the very absence of such reports. It is also important because it was the judicial work that Justice Mathews enjoyed most.

There are three short points to be made. First, continuing on from the earlier theme, it would undoubtedly have made a significant difference for female complainants in sexual assault trials to have a woman judge presiding. Justice Mathews herself noted that when she first started as a Crown Prosecutor, the complainant would be in 'tears with joy at having a female representing her issues'. She recalled that she would usually be the only person with an active role in court who was a woman, and that it made a huge difference to victims. It is a safe assumption that this sentiment would have persisted when she presided as trial judge.

The second point is that she was a good trial judge, not least because she was a fantastic communicator. She could explain things to juries, and she could do so clearly. As noted by Wood J in *R v Williams* (1990) 50 A Crim R 213, the role of the trial judge in summing-up is to give 'no more and no less than a clear and manageable explanation of the issues which are left to the jurors in the particular case before them'.[42] Perhaps a deceptively simple explanation of what is a herculean task. The High Court in *RPS v The Queen* (2000) 199 CLR 620 acknowledged the 'difficult task trial judges have in giving juries proper instructions'. And while directions must be clear and understandable, Justice Bell speaking extra-curially just last year, cautioned of the need for directions to 'address distinctions of no small refinement' warning that '[t]rial judges are right to have an eye on appellate review lest the endeavour to communicate in a folksy way leads to successful challenge.'[43]

Finally, and relatedly, Justice Mathews undertook this task with competence, and she was rarely found in error. And while this may not be reflected other than in the absence of appellate decisions, it has an immense value to the community. First, to the victims, who are not put through the ordeal of a second trial. Second, to the efficient operation of the courts and the rights of other accused persons to have their matters heard quickly.

Conclusion

Justice Mathews' elevation to the Supreme Court was significant for women as a symbolic first; so much is self-evident. However, the purpose of this paper was to celebrate the substantive effect that Justice Mathews' elevation had for women's lives under the law. This is not to say that women judges act or think as a homogenous group. Nor is it to say that cultural or class diversity is any less important than gender diversity. It is to say, however, that the experience of leading a woman's life should form part of the background and experience which shapes the law.[44] The legacy which Jane Mathews has left on the law and jurisprudence is a testament to this view. BN

ENDNOTES

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1 The Hon Beverly McLachlin, former Chief Justice of Canada, quoted in Lady Hale, 'Making a Difference – Why We Need a More Diverse Judiciary' (2005) 56(3) *Northern Ireland Legal Quarterly* 281 at 288.

2 See Lady Hale, 'Making a Difference – Why We Need a More Diverse Judiciary' (2005) 56(3) *Northern Ireland Legal Quarterly* 281 at 285-289.

3 Cardozo, *The Nature of the Judicial Process* (1961) at 177.

4 Mathews, 'The Changing profile of Women in the Law' (1982) 56 *Australian Law Journal* 634 at 640.

5 See generally Mason and Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' (2003) 31 *Federal Law Review* 195 at 201.

6 Mason and Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' (2003) 31 *Federal Law Review* 195 at 201-202.

7 Section 24(1) provided (relevantly) that '[a] person discriminates against another person on the ground of sex if, on the ground of – his sex … he treats him less favourably than in the same circumstances, or in circumstances which are not materially different, he treats or would treat a person of the opposite sex'. Section 25(2) provided that '[i]t is unlawful for an employer to discriminate against an employee on the ground of his sex— (a) in the terms or conditions of employment which he affords him; (b) by denying him access, or limiting his access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or (c) by dismissing him or subjecting him to any other detriment.'

8 *O'Callaghan v Loder & Commissioner for Main Roads* [1983] 2 NSWLR 89 at 92 per Mathews DCJ.

9 *O'Callaghan v Loder & Commissioner for Main Roads* [1983] 2 NSWLR 89 at 92 per Mathews DCJ. However, it should be noted that feminist scholars of the time criticised the decision for its overly narrow definition of sexual harassment: see Thornton, 'The Legitimation of Sexual Harassment' (1984) 18 *Scarlet Women* 2 at 3; Mills, 'Sexual Harassment as Sex Discrimination' (1984) 9 *Legal Services Bulletin* 5 at 6-7.

10 *O'Callaghan v Loder & Commissioner for Main Roads* [1983] 2 NSWLR 89 at 94.

11 *Bostock v Clayton County, Georgia* (2020) 140 S. Ct. 1731.

12 *O'Callaghan v Loder & Commissioner for Main Roads* [1983] 2 NSWLR 89 at 96.

13 *O'Callaghan v Loder & Commissioner for Main Roads* [1983] 2 NSWLR 89 at 103, 105.

14 *O'Callaghan v Loder* (1984) EOC 92-024, 75, 514.

15 Noting that sexual harassment was also explicitly prohibited by s 28 of the *Sex Discrimination Act 1984* (Cth), the drafting of which coincided with the *O'Callaghan* decision. An earlier draft (Sex Discrimination Bill 1981 (Cth)) did not expressly prohibit sexual harassment: see Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) at 59.

16 *Hall v Sheiban* (1989) 20 FCR 217 at 231 per Lockhart J, at 279-280 per French J.

17 *Hall v Sheiban* (1989) 20 FCR 217 at 243.

18 *Hall v Sheiban* (1989) 20 FCR 217 at 254.

19 *Hall v Sheiban* (1989) 20 FCR 217 at 255.

20 *Hall v Sheiban* (1989) 20 FCR 217 at 243.

21 *Richardson v Oracle Corp (Australia) Pty Ltd* (2014) 223 FCR 334 at [117] per Kenny J.

22 *Richardson v Oracle Corp (Australia) Pty Ltd* (2014) 223 FCR 334 at [118] per Kenny J, at [119] per Besanko and Perram JJ.

23 *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 at [51].

24 For an interesting account of the Royal Commission, see ABC Radio National, 'Public Intimacies: The Royal Commission on Human Relationships' (28 April 2013) <https://www.abc.net.au/radionational/programs/archived/hindsight/public-intimacies3a-the-royal-commission-on-human-relationships/4646926>.

25 *Report of the Royal Commission on Human Relationships* (1977), Vol 5 at 298.

26 *Haines v Leves* (1987) 8 NSWLR 442 at 447 per Samuels JA (summarising the reasoning of the Equal Opportunity Tribunal).

27 *Haines v Leves* (1987) 8 NSWLR 442.

28 *Haines v Leves* (1987) 8 NSWLR 442 at 270.

29 'Interview with Acting Justice Jane Mathews AO' (2015) (Summer) *Bar News: Journal of the New South Wales Bar Association* 54 at 55.

30 *Report of the Royal Commission on Human Relationships* (1977), Vol 5, Ch 12.

31 'Interview with Acting Justice Jane Mathews AO' (2015) (Summer) *Bar News: Journal of the NSW Bar Association* 54 at 55.

32 *Report of the Royal Commission on Human Relationships* (1977), Vol 5 at 204.

33 *Report of the Royal Commission on Human Relationships* (1977), Vol 5 at 204.

34 *Report of the Royal Commission on Human Relationships* (1977), Vol 5 at 216.

35 *Report of the Royal Commission on Human Relationships* (1977), Vol 5 at 206.

36 Featherstone, "That's what being a woman is for': Opposition to Marital Rape Law Reform in Late Twentieth-Century Australia' (2017) 29(1) *Gender & History* 87.

37 New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 March 1981 at 5216 (Mr Cameron, Member for Northcott).

38 *Crimes (Sexual Assault) Amendment Act 1981* (NSW).

39 (Unreported, NSW Court of Criminal Appeal, 12 August 1992).

40 *R v Hunter* (Unreported, NSW Court of Criminal Appeal, 12 August 1992).

41 *SC v The Queen* [2019] NSWCCA 25 at [101].

42 *R v Williams* (1990) 50 A Crim R 213 at 214.

43 The Hon Justice V M Bell AC, 'Reform of the law governing jury directions and the determination of criminal appeals' (Speech delivered to the NSW Supreme Court Judges' Conference, 24 August 2019).

44 See Lady Hale, 'Making a Difference – Why We Need a More Diverse Judiciary' (2005) 56(3) *Northern Ireland Legal Quarterly* 281 at 286-287.