Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-legal Series, v. 8, n. 9 (2018) – Feminist Judgments: Comparative Socio-Legal Perspectives on Judicial Decision Making and Gender Justice
ISSN: 2079-5971

Feminist Judging in the 'Real World'

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Hunter, R., 2018. Feminist Judging in the 'Real World'. *Oñati Socio-legal Series* [online], 8 (9), 1275-1306. Received : 13-11-2017 ; Accepted : 19-06-2018. Available from: https://doi.org/10.35295/osls.iisl/0000-0000-0000-0995

Abstract

The various feminist judgment projects (FJPs) have explored through the imagined rewriting of judgments a range of ways in which a feminist perspective may be applied to the practice of judging. But how do these imagined judgments compare to what actual feminist judges do? This article presents the results of the author's empirical research to date on 'real world' feminist judging. Drawing on case study and interview data it explores the *how*, *when* and *where* of feminist judging, that is, the feminist resources, tools and techniques judges have drawn upon, the stages in the hearing and decision-making process at which these resources, tools and techniques have been deployed, and the areas of law in which they have been applied. The article goes on to consider observed and potential limits on feminist judicial practice, before drawing conclusions about the comparison between 'real world' feminist judging and the practices of FJPs.

Key words

Feminist judging; judicial interviews; judicial studies; feminist methods; feminist judgment projects

Resumen

Los proyectos de sentencias feministas, a través de la reelaboración imaginaria de sentencias judiciales, han explorado multitud de vías en las que las perspectivas feministas se podrían aplicar a la práctica judicial. Pero ¿qué resulta de la comparación entre dichas sentencias y la práctica real de las juezas feministas? Este artículo presenta los resultados de la investigación empírica de la autora. Se analiza el *cómo*, el *cuándo* y el *dónde* de la labor judicial feminista, es decir, los recursos, herramientas y técnicas feministas que las juezas han utilizado, las fases de audiencia y toma de decisión en las que se han utilizado y las áreas del derecho en que se han

This paper draws on work undertaken with several collaborators, in particular the co-organisers of the Australian Feminist Judgments Project who conducted the interviews with Australian judges: Heather Douglas, Trish Luker and Francesca Bartlett. I would like to record my considerable debt to them, together with Danielle Tyson, Kathy Mack, Sharyn Roach Anleu and Erika Rackley. The judicial interviews were made possible by funding from the Australian Research Council, DP 120102375. The paper was originally presented at the Oñati workshop on *Feminist Judgments: Comparative Socio-Legal Perspectives on Judicial Decision Making and Gender Justice*, and I would like to thank the organisers of the workshop and editors of this collection, Kathy Stanchi, Bridget Crawford and Linda Berger, and the other workshop participants for their insights, encouragement and great company.
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aplicado. Además, se toman en consideración los límites observados y potenciales de la práctica judicial feminista, y se extraen conclusiones sobre la comparación entre la labor judicial feminista en el “mundo real” y la práctica de los proyectos de tribunales feministas.

Palabras clave

Sentencias feministas; entrevistas judiciales; estudios judiciales; métodos feministas; proyectos de sentencias feministas

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1. Introduction

The various feminist judgment projects (FJPs) which are the subject of this issue of the *Oñati Socio-Legal Series* have explored a range of ways in which a judgment might be feminist, including incorporating women's experience into decision-making and the formulation of legal rules, drawing on feminist legal theory and/or seeking to achieve gender justice. At the same time these imagined judgments aim to remain plausible *as judgments* because they observe the same constraints on judicial decision-making that bind 'real life' judges:[1] they adhere to the doctrine of precedent, work within the law as it was at the time of the original decision, and use only the facts known and the contextual material available at the time. However, one constraint on 'real life' judges which does not operate within FJPs is the constraint of judicial ideology – the powerful (albeit usually unspoken) norms and traditions within a given legal culture concerning the appropriate role of judges, and the importance of conformity to those norms in order to maintain credibility as a judge (Berns 1999, Hunter 2015a, pp. 126-129, 132). Thus, while rewritten feminist judgments powerfully demonstrate that original decisions were not inevitable and cases could have been decided differently, they do not necessarily model how judgments *would be* written in reality.

In the 'real world' of judging, debates around the value of judicial diversity have questioned whether women judges can, should or do make a substantive – as opposed to a symbolic – difference (see, e.g., Feenan 2009, Kenney 2013, Rackley 2013, Hunter 2015a, pp. 124-126). Some commentators have focused solely on the symbolic value of having women represented on the formerly male bastion of the bench (see, e.g. Malleson 2003). For example, one of the judges in the interview study described below explained that for her, feminism simply meant having women as judges and showing they were as good as and no different from men (SCA7).[2] Others have focused on the fact that women have different life experiences to men, and therefore are likely to bring those different life experiences to their judicial role and consequently make law more inclusive (see, e.g. Wilson 1990, Hale 2005, Etherton 2010, Rackley 2013, ch. 6, Hunter 2015a, p. 124).

Some of us consider that the substantive difference feminist judges (as opposed to women judges *per se*) might make can go well beyond this. I developed this argument in an article titled *Can* feminist *judges make a difference?* (Hunter 2008), which was based on the then available literature on feminist judging (see, e.g., Boyle 1985, Sherry 1986, Resnik 1988, Rush 1993, Sheehy 2004) and was largely theoretical and speculative. Since then, I have been pursuing this question empirically, by investigating the 'real world' practices and accounts of 'real life' feminist judges. This article presents the fruits of this investigation to date. It first explains my data sources and then discusses the findings, which suggest that a feminist perspective might be brought into judging in quite a staggering variety of ways. In order to impose some order on this variety, I analyse the data in terms of how, when and where a feminist-informed approach to judging might be taken. *How* refers to the feminist resources, tools and techniques judicial officers have drawn upon. *When* refers to the stages in the hearing and decision-making process at which these resources, tools and techniques have been deployed. And *where* refers to the areas of law in which they have been applied. The article goes on to consider observed and potential limits on feminist judicial practice, before finally comparing 'real world' feminist judging with the practices of the FJPs.

[1] The phrases 'real life' and 'real world' appear in scare quotes throughout in order to trouble the notion of a fixed, external reality. As the paper demonstrates, the practice of judging is situated and contingent, multiple rather than monolithic and shifting rather than timeless, such that the separation between fictional feminist judgments and actual judgments may simply be heuristic.

[2] The code names given to interviewees are explained in the methodology section below.

Oñati Socio-legal Series, v. 8, n. 9 (2018), 1275-1306
ISSN: 2079-5971

2. Methodology

My empirical observations of 'real world' feminist judging have included both case studies and interviews. Case studies have involved the systematic study of the judgments of particular judges, examining the totality of their decisions over a period of time in comparison with those of their judicial colleagues, to discern what, if any, difference may be evident in their judgments. This is time-consuming research which thus far has looked at two Australian judges, Justice Marcia Neave and Justice Betty King. Justice Neave was a feminist academic and law reformer prior to her appointment to the Victorian Court of Appeal in 2006, and I studied her judgments during her first three years on the bench (Hunter 2013). Justice King was a Victorian Supreme Court judge whom Danielle Tyson and I 'discovered' in our study of sentencing decisions in domestic homicide cases in Victoria after the State abolished the defence of provocation in 2005 (see Hunter and Tyson 2017a). In the course of this investigation, it became clear that Justice King took a noticeably different approach to sentencing from that of her colleagues, and we identified her approach as feminist (Hunter and Tyson 2017b). I am also engaged in an ongoing case study with Erika Rackley of the judgments of Lady Hale since the inception of the UK Supreme Court in October 2009 (see Hunter and Rackley 2018).

The major source for this article, however, is a series of interviews conducted in 2013 as part of the Australian FJP. As well as producing a book of rewritten judgments (Douglas *et al.* 2014a), that project set out to investigate the extent to which feminist jurisprudence has had an impact on Australian law more generally. The methods adopted for this element of the project included a series of case studies of areas where feminist jurisprudence has been instrumental in shaping legal developments (battered woman syndrome, sexually transmitted debt, sexual harassment and pay equity), a compilation of judgments nominated by project participants or identified in feminist literature as contributing a feminist perspective to law,[3] and interviews with Australian judicial officers. Potential interviewees were identified as feminist or as sympathetic to feminism by means of personal knowledge and contacts, and snowballing (recommendations from other interviewees). Not all of those approached responded to our letters of invitation or agreed to be interviewed. Ultimately, we conducted interviews with 42 judicial officers, all but one of whom were women. Six were retired and the remaining 36 were currently sitting. All interviews were conducted on the basis of anonymity in the reporting of interview data.

Interviewees were drawn from a variety of different court levels and geographical areas. In Australia, the federal court structure consists of:

- the High Court: the apex court in the Australian legal hierarchy and final court of appeal from all Federal, State and Territory courts. The Court has seven members and sits *en banc*;
- the Federal Court of Australia and Family Court of Australia:[4] superior trial courts, the former generalist, the latter specialist. In both cases trials are conducted by a single judge, and appeals from a single judge are heard by a Full Court of three judges;
- the Federal Circuit Court of Australia: an intermediate trial court with jurisdiction in specified areas. Trials are heard by a single judge;
- a range of specialist tribunals dealing primarily with challenges to federal administrative decisions. Cases are usually heard by a single Tribunal member.

[3] The case studies and compilation of judgments can be found on the Australian feminist judgments project website at https://law.uq.edu.au/afjp-case-studies.
[4] The Family Court was in operation at the time of the interviews; however at the time of writing the government has announced plans to merge it with the Federal Circuit Court.

At State and Territory level there is:

- a Court of Appeal in most States, which sits as a bench of three judges, hearing appeals from single judges of the superior and intermediate courts;
- a Supreme Court: a superior trial court of general jurisdiction in which judges sit alone. Where there is no Court of Appeal, appeals are heard by a three-judge Full Court of the Supreme Court;
- a District Court or County Court in the largest States: an intermediate trial court which deals with all but the most serious criminal offences and the largest civil claims, and in which judges sit alone;
- a Magistrates' Court or Local Court: a summary trial court which deals with the vast bulk of less serious criminal cases, lower value civil matters and domestic violence injunctions, with magistrates sitting alone;
- a system of tribunals dealing with a range of areas historically assigned to specialist adjudicators, including planning, discrimination, and industrial relations. Tribunals may sit as a single member or as a panel of three members.

All decision-makers sitting on Australian courts are required to be legally qualified,[5] although this is not always a requirement for tribunal members. Unlike judges, members of most tribunals do not have security of tenure, but are appointed instead for a fixed term. Incumbents in the lowest level State and Territory courts are styled 'magistrates' rather than 'judges'. The term 'judicial officer' is intended to cover all three groups: judges, magistrates and tribunal members.

Our interviews did not include any of the judges of the High Court. Further, six of the 42 interviewees provided no accounts or examples of how feminism was relevant to their judging. The distribution among federal and State courts of the remaining 36 interviewees who are the subject of this article, was as follows:

TABLE 1

	Federal	**State / Territory**
Court of Appeal	n/a	4
Superior Court	4	7
Intermediate Court	2	9
Lower Court	n/a	9
Tribunal	5	2

Table 1. Interviewees by court level and jurisdiction.

The numbers in this table add up to more than 36, since five of the interviewees had experience on more than one court and/or tribunal. In the following discussion, judicial officers are referred to by a code name which incorporates their position in the court system – *F* or *S* for Federal or State/Territory, and *CA* (Court of Appeal), *SC* (Superior Court), *IC* (Intermediate Court), *LC* (Lower Court) or *T* (Tribunal). Interviewees were drawn from every State and Territory other than the Northern Territory, however geographical indicators are not included in code names order to avoid the possibility of identification, especially in small jurisdictions.

[5] For example, Australian magistrates are salaried professionals, by contrast with English magistrates who are lay people sitting on a voluntary basis.

The judicial interviews were semi-structured around a series of interview themes and prompts, and not all interviews covered all of the prompts, or covered them in the same level of detail. Relevant prompts for the purposes of this article included:

- How do your own background, experiences, beliefs and opinions affect your decisions?
- Do you take extra-legal matters (e.g. the broader factual context) into consideration in your decision making?
- Do you identify yourself as a feminist judicial officer?

  If yes: What does this mean to you? How does this manifest in your judgments (if at all)? Have you encountered limitations in being a feminist judge? If so, what were they? What makes it hard or easy to be a feminist judge?

  If no: Do you think there is any room for a feminist approach to judging?
- Can you give an example or examples of your own judgments you would consider feminist? Can you give examples of judgments you consider feminist made by other judges (male or female)?
- Have you ever experienced a case where you could not reach the result you would have liked as a feminist? Why was this not possible?
- Have you ever experienced a case where you afterwards regretted your decision from a feminist perspective?
- Does the nature of the court or tribunal in which you make decisions impose specific limitations on how you go about writing judgments? Does it offer possibilities not available in other legal decision making contexts?
- Are there other socio-cultural factors apart from gender which you try to take into account in your decisions?

It can be seen from the table above that the majority of interviewees sat on trial rather than appellate courts, and this is inevitably reflected in their accounts of feminist judicial practice, within which writing judgments formed only a small part. In reporting the interview data, no claim is made that these responses are in any way representative or generalisable. Neither is it claimed that interviewees' practices always matched their accounts. Rather, the aim is to show what forms of feminist judging are manifested (in the case studies) and perceived to be possible (by interviewees) in the 'real world', even within the constraints of judicial ideology.

Finally a note on what counts as 'feminist'. Feminism is a varied and wide-ranging set of ideas, and in this article the term broadly embraces anything that promotes the interests of women, draws on feminist theory or is motivated by feminist values. Thus, for instance, where an interviewee has identified a particular practice as feminist I have not sought to second-guess them, but I have sometimes identified examples as feminist when the interviewee or case study subject might not have. Further, feminist values may motivate a more general humanism. A concern with judging inclusively is likely to embrace not only women but other groups who have been traditionally marginalised by the legal system, and indeed all litigants appearing before the courts. Importantly, the fact that something may be considered feminist (such as a commitment to equality) does not mean that it cannot also be considered as an element of other philosophies (such as liberalism or anti-racism). Feminism is not the residue left over when all other categories have been exhausted. Rather, it might well overlap with, and indeed explicitly draw upon, other progressive agendas (see Hunter *et al.* 2016).

3. The *how* of feminist judging

At the most general level, interviewees described, and judges were observed, drawing on combinations of feminist epistemologies, feminist values and feminist practices in their judicial work. In other words, feminism influenced how they thought, what they believed, and/or what they did and said.

3.1. Feminist epistemologies

For many interviewees, having a feminist consciousness or feminist perspective was a starting point which was said to inform their judicial thinking generally (FT4, ST6, SIC12, SIC19, SLC20, SCA25, SSC29, FSC33, FIC35), and this was also evident in the judicial case studies. In the words of one magistrate, feminism "probably informs my worldview, and so when I'm making moral judgements, I'm sure that it informs my decision-making, as anyone's background does" (SLC20). Or as a superior court judge put it, she has:

> an immediate recognition of how pervasive are the patriarchal paradigms within which people abuse power and use power abusively. So without having to call it the architecture within which a particular societal issue has emerged and conflict arises to a point of either the commission of a criminal or civil wrong, it's there and I know it. You know it. So we know what we know and we work with what we know. (SSC29)

More specifically, judicial officers displayed many of the hallmarks of feminist thinking as applied to judging identified in my theoretical article (Hunter 2008, pp. 10-15). They "asked the woman question", that is, noticed how apparently neutral rules and practices impact differently on women (Bartlett 1990, p. 837), and hence perceived unfairness in situations where a male judge might not (SIC8). They understood the specificity of women's lives and experiences, including, for example, the gender division of labour within families, the dynamics of coercive and controlling violence and the difficulty of leaving an abusive relationship, the nature and effects of stereotyping, discrimination, harassment and fear, the variety of ways in which victims of sexual abuse might respond, the harm of rape, and the experience of pregnancy, childbirth, caring for children and menopause (SSC2, SIC3, FIC13, FSC14, SLC17, SIC19, SLC18, SLC20, FT21, SLC30, SLC31, FSC33, FIC35, SIC37, SSC39, SSC42; Hunter and Tyson 2017b, pp. 787-792). This was particularly notable in one of the cases decided by Justice Neave, which involved claims by a woman against her former partner for division of relationship property, and damages for serious assaults and breach of confidence. The trial judge dismissed or trivialised each of these claims, but on appeal, Justice Neave, writing for a majority of the court, demonstrated a much greater understanding of the plaintiff's position and experience and awarded significantly larger sums by way of property adjustment and damages (*Giller v Procopets* [2008] VSCA 236, Hunter 2013, pp. 413-417).

As well as drawing on their own life experiences as women, judicial officers were sensitive to the life circumstances of women very different from themselves (SSC2, SIC3, SIC36, SSC38, SSC39). For example one interviewee observed that although a specialist Drug Court had been set up in her State which was designed to take a therapeutic, problem-solving approach to offending, it was less accessible to women by virtue of their different criminal trajectories:

> … women with terrible problems would take longer to come into the criminal justice system, often because they've been able to fuel their drug habit through their boyfriend and so their offending had been prostitution or street prostitution, whereas the blokes had been doing burglaries and robberies and then they got into that, sort of, later in life. So you had these really complex lives, but with less serious offending at an early stage and the whole victim of being sexually abused and stuff, how that impacts on people in the way that they come through. (SLC37)

Another noted the need to listen carefully to women whose experiences were remote from her own:

> I'm a white, middle class woman. I don't know what it's like – it would be a conceit to say I had any idea what being a single mother of three kids in [deprived area] would be like or being married to any – it's a strongly Arabic area here – being married to any of those gentleman I'll meet tomorrow [in the domestic violence list] would be like. So yes, in terms of bringing to the job any kind of insight about that – I mean, I guess – perhaps a good feminist knows what they don't know and doesn't pretend that they know stuff or know what any woman goes through. A good feminist just – "yes, tell me your story". (SLC30; see also Cain 1988, p. 1955)

Justice King, in her sentencing judgments, demonstrated a keen understanding of the position of Indigenous women who had killed their abusive partners, placing their offending in the context of long histories of victimisation, and remaining carefully non-judgmental about the women's own choices in life, while reserving her condemnation for the multiple social systems which had failed to take care of them (Hunter and Tyson 2017b, pp. 785, 790-791, 794, 798).

Interviewees' awareness of difference and the position of those marginalised within society and the legal system very often extended to groups other than women and issues other than gender, including race, ethnicity, class, disability, sexual orientation and age – both as they intersected with gender, as already indicated, and as separate considerations. As one judge put it:

> Being a feminist means having a much more open mind to the barriers and the prejudice and the discrimination that are so subtly put in front of women that you can't help but become aware of the barriers and the prejudices and the discrimination that are put in front of other people. (FSC14)

As the quotations above indicate, one element of feminist knowledge was a familiarity with the social context within which legal issues coming before the courts had arisen (SIC24, FIC35, Hunter and Tyson 2017b), and this might include familiarity with research evidence on matters such as the feminisation of poverty (FIC13), the gendered nature of domestic violence (SLC20) or the cycle of violence (FSC14). One interviewee commented on the value of reading academic literature in her area of specialisation:

> I've found that (…) the journal articles that I could access – other writings and whatever that you could look at – I mean, even if you don't necessarily use them or reference them in the decision, they just broaden your mind and make you think a bit more broadly so that you might approach things in a slightly different way than if you didn't have access to them. So to that extent they're really, really useful (…) even if it just makes you have a more enquiring mind. (ST6)[6]

An appellate judge referred to using her background knowledge of the purpose of statutory rape laws, together with research evidence on teenage sexual activity, to try to shift the courts' approach where charges arose from "ordinary, consensual boyfriend, girlfriend sex" from a focus on the age of the alleged victim to a focus on whether there was an element of abuse involved. In one such case she had circulated research articles to the other judges and the parties and invited submissions on sentencing in light of them (SCA39). In several cases in my study of her judgments, Justice Neave referred to research evidence, took judicial notice of notorious social facts, or put the legal issues in their broader context in order to inform the court's decision-making, on matters such as delayed reporting of child sexual abuse, the cycle of violence, the risk of sexually transmitted infections from unprotected sex and the policy background to stalking legislation (Hunter 2013, pp. 405-409). Feminist background knowledge might also include awareness of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and other international human rights standards (SIC3).

3.2. Feminist values

Brenda Hale has observed that decision-making which promotes equality is "consistent with the fundamental principles of law" and as such, can hardly be a source of objection (Hale 2008, pp. 26-27, 2005, p. 286). Indeed it would be difficult to object to any of the feminist values embraced by the judicial officers observed and interviewed in the studies under discussion: an ethic of care, inclusivity, equality and

[6] One of the referees questioned whether interviewees had read any feminist judgments and if so, what they thought of them. While most interviewees were supportive of the Australian FJP and expected it to produce interesting and valuable results, none had read any of the judgments produced by the previous Canadian or English projects, although six noted that they had attended a presentation on the English project given at the International Association of Women Judges' Conference in London in 2012.

justice. While earlier legal feminist beliefs that all women judges would display an ethic of care by virtue of their gender (see, e.g., Sherry 1986, p. 580, Resnik 1988, drawing on Gilligan 1982) have clearly proved to be unsustainable, some feminist judges do consciously adopt an ethic of care (e.g. SIC8) and others, without referring to that label, evidence an approach towards the people before the court that is relational, connected, caring and responsible rather than abstract, distanced, disengaged and legalistic (e.g. Hunter and Tyson 2017b, and see also Hunter *et al*. 2016). One of the best-known examples of this in the UK is Baroness Hale's judgment in *R (on the application of Gentle and another) v The Prime Minister and others* [2008] UKHL 20. Here, the mothers of two soldiers killed in Iraq sought to compel the Prime Minister to establish an independent public inquiry into the government's efforts to establish the legality of the British invasion of Iraq. Their case was hopeless, but unlike the other members of the House of Lords, Hale acknowledged the position of the applicants:

> 53. Not surprisingly, the mothers of these young men wanted to know how and why their sons had died. The circumstances surrounding their deaths must have raised many questions in their minds. The Army inquiries took time and they did not feel that they had been kept fully informed. They felt, with some justification, that even in a situation of armed conflict these particular deaths might have been avoided. But on top of those inquiries they wanted to know why their sons had been sent to Iraq at all. What they really want is an inquiry into whether or not the conflict in which their sons died was lawful (…). If the use of force was lawful, it would be of some comfort to know that their sons had died in a just cause. If it was not, there might at least be some public acknowledgement and attribution of responsibility and lessons learned for the future. If my child had died in this way, that is exactly what I would want. I would want to feel that she had died fighting for a just cause, that she had not been sent to fight a battle which should never have been fought at all, and that if she had then some-one might be called to account.

This paragraph elicited the comment from Mrs Gentle that "only Baroness Hale (…) has had the decency to even consider how my family and I feel" (Kalu 2010).

A handful of interviewees referred to the value of being inclusive, for example, "everything we do, I think we should try and include rather than exclude" (SSC2), and the notion that feminism was about "taking everybody's perspective into account" rather than "privileging a particular sector of society" (SIC10). One noted her frequent references to the *Equality before the Law Benchbook* (produced by the Judicial Commission of NSW) to ensure that everyone appearing before the court was appropriately recognised and accommodated. Others talked about recognising inequalities and addressing them as far as possible within law (SIC3) or ensuring substantive equality (FSC27, SCC29, FSC33). This was a matter raised particularly by family judges in the context of substantive equality between breadwinner husbands and homemaker wives in post-separation property division, but it was by no means confined to that scenario. In her sentencing decisions in domestic homicide cases, Justice King stood out from her colleagues in strongly affirming women's rights to equality and autonomy and castigating male defendants who killed in circumstances where women were attempting to assert those rights:

> Our community, parliament and the courts have repeatedly said that women are not chattels, they are not something that is owned by a man, any man. Your wife was entitled to leave you. You may not have liked that, but she had the right to do so. She did not have to tell you where she was going, or if she was pursuing a relationship with another man. You had no right to know this, and you had no right to control what she did… (*R v Neascu* [2012] VSC 388, para. 43)

One interviewee maintained that what a judge should do is "try [for] the possibility of justice", not through the indifferent application of legal rules but through attention to the particularities of the litigants and the issues in each individual case (SIC10).

3.3. Feminist practices

Interviewees described a number of general feminist practices which might be used at any relevant point in order to operationalise feminist knowledge and values. One was acknowledging and engaging with emotion rather than taking the more traditional judicial stance of (supposed) dispassionate objectivity:

> You can in fact have a different approach (…). You could actually engage with the emotion and grief before the court. You can engage with it. Judges are told they mustn't. Jurors are told they mustn't. It's just wrong. It is wrong (…). It's why so many people come out of court – both accused and accusers (…) battered by the legal process. If we could – we could still do the job of adjudication, but we could engage with the emotion and grief. We don't have to sound like such *** cold bastards. (SIC10)

Likewise, a notable feature of Justice King's sentencing judgments was her compassion for victims and their family members, evident in her repeated acknowledgement of the devastating consequences and trauma produced by domestic killings and serious violence. She not only demonstrated her understanding of the pain and suffering of family members and others connected to the victim, whose lives had been forever changed by the loss of a loved one, but also acknowledged the inability of the sentencing process to alleviate that pain and suffering. Nevertheless, in her sentencing remarks she sought to offer solace to family members and to give them hope for the future as they came to terms with their loss (Hunter and Tyson 2017b, pp. 783-787).

A second strategy was actively seeking information in order to get to a fair or just result, especially (but not only) in the sentencing process. This might include asking about women defendants' domestic situation which might not have been mentioned by male barristers. Were they the primary carers of children? How old were their children? What arrangements would be made for them if their mother went to prison? (SIC3, also SLC5, SIC36) It might also extend to calling for additional psychological reports, or other expert evidence or material that might support alternatives to prison (SIC24, SIC37). Other contexts in which judicial officers mentioned they had sought further information included asking for details of the mother's circumstances in child protection proceedings (SLC42), questions about any history of violence or whether there were injunctions in place in family proceedings (FSC14), and finding material on underlying conceptual issues not addressed by the parties in important test cases (ST6).

A further step involved making use of court resources as part of a problem-solving approach where other sources of assistance were unavailable:

> So you have a woman with three kids on her third shoplift, and I invariably say after the first shoplift, 'you have got to talk to your doctor about this. I can't help you again'. So yes, that's problematic. Where are these women going to go? It's an illness. There's no social worker report [because she can't get Legal Aid]. I have a mental health clinical nurse here, I will get her to talk to him (…). Because she doesn't have a – she hasn't had access to the proper resources, there's me trying to fiddle around in there to protect her (…). If I dismiss it under the Mental Health Act she is put on a six month treatment plan, which might get her – if she's profoundly depressed and all of the things that wrap up with that, maybe six months with the [area] Mental Health Team will get her back on track. She'll be medicated or she'll get access to psychologists or psychiatrists to work through whatever is making her shoplift. That might be a good result… (SLC30)

Another well-established feminist judicial strategy is that of affirming and validating women's experiences of trauma, victimisation and abuse, taking care to hear, believe and acknowledge what has happened to them and the effects it has had, and to acknowledge that it was wrong (SIC8, SCA22, FIC35; Hunter 2013, pp. 408-409, 413-417). An intermediate court judge explained how:

> I was doing a lot of criminal compensation work, and it was all horrific and (…) hearing these horrific cases and these shattered lives, I decided I would acknowledge that the life was shattered and that I would apologise on behalf of the – by the power vested in me. So I used to say during my remarks – I would outline, I would make visible the pain that the victim had suffered. Then at the end I would say, by the authority vested in me as a judge of the [name of court], I apologise to you for what has happened to you. I hope you will be able to deal with what has happened to you and I wish you all the best for the future. (SIC10)

She acknowledged that sadly, "the Bar and my colleagues found that hugely, hugely controversial", but saw no valid basis for their concerns. For victims of domestic violence, judges might acknowledge the effect on their lives and their parenting, but also the effect of the court process itself:

> I would often write 'they were deeply distressed, they wept'. I would put what happened. 'She wept throughout her testimony. She was deeply distressed. I accept that it's genuine'. I want to actually paint this picture, for those sorts of things, so that any other judge that comes on the matter later, in a year or two later, or if they did appeal – I want to paint a picture in my judgment of what it's been like sitting watching this, and how it's been. So I hope you get this. It's been horrific for her. And it's also sometimes a validation I think, when people come into our court and something – horrific behaviour has been happening for years. I think for them, if they see a judge saying what's happened to you, it's been absolutely horrific. You have put up with all of these things for years. Nonetheless you've continued to maintain a relationship between the children and the father, and all those things. I hope in some ways it makes them feel someone's listened, and you've been vindicated. You're a good mother… (FIC13)

And a magistrate noted the additional importance in a small community of sending messages of vindication and support to victims of violence:

> If a woman's come along for instance, and complained bitterly about something that happened to her, and she was supported while she was in the courtroom but as soon as she'd given her evidence she wanted to get the hell out of there, then she's not there when you give a decision. If you don't say 'I believed every word she said, and you are absolutely guilty and you are going to have the book thrown at you', that'll get back to her. So (…)
>
> There have been times when I have said to a prosecutor, 'she was a very good witness, she was internally consistent, there were some really difficult things that she had to tell us and she managed to get through it all okay, but I have only got (…) what she's told me as against what he's told me (…). I can't be satisfied beyond a reasonable doubt that he's guilty (…)'. Now even giving that determination is going to really distress her in some ways. I don't want him to go away thinking that he's won because everybody thinks he didn't do it. It may be that there's a really strong suspicion he did do it, but it can't be proved. So you've got to modify your words a bit to let people know that this case doesn't actually change what happened. This case that the police were able to gather together is not enough for him to be convicted, but there is still an issue out there (…). Sometimes (…) I will say to the prosecutor (…) 'please make sure she doesn't think that nobody believed anything she said'. I think (…) in a country town, that becomes very important, because the question is, is she going to complain again? Is she going to come in next time? Maybe they can get better evidence next time. (SLC31)

The flip side of validating women's experiences of violence is to hold violent men to account. This is evident in the above quotation, and was a theme picked up by other interviewees (SIC12, FIC13, SLC18, FIC35; see also Hunter 2013). It was also a theme of Justice King's sentencing judgments in domestic homicide cases. In response to claims that defendants had "lost control", she often identified their actions as in fact the product of unprovoked anger and rage, and gave lectures on the need for men to control their anger (Hunter and Tyson 2017b, pp. 796-799), for example:

> The community, rightly, abhors violence of this level occurring as a result of someone's anger, our society is constructed on the basis of people maintaining self

> control and respecting the laws and mores that govern our society. A loss of temper, for whatever reason cannot excuse or mitigate in any way the seriousness of offending of this nature, particularly when there is no real explanation for the loss of temper or the display of anger. (*R v Singh* [2013] VSC 47, para. 23)

Holding to account might also occur in other areas, such as family responsibilities:

> I remember a particular one where a woman had - they were from Jordan maybe, I can't remember now. But she had been married to him very young, had a child, they'd come to Australia and he'd left her. The child was now eight, I think, and she'd remarried someone else. He suddenly swept in and put on an application for custody. I remember absolutely hosing that out. The only expression I can think of is I sent him away with an absolute flea in his ear. The child was in court. She was terrified (…). (SLC30)

In addition, some judicial officers sought to educate men about the unacceptability of violence (e.g. SIC24; Hunter and Tyson 2017b), and in one case this extended to educating young women about how to escape a life in which violence was likely to feature:

> I always say to blokes, 'I don't know if you grew up in a house where there was violence?' They'll either say yes or no. If they say yes then I'll say 'well, you know that little kids work out how to behave based on what you do. Little boys work out how to treat women in their lives. Little girls work out what to expect from the men in their lives and if they see you being violent that's how they'll learn (…).' You certainly get their attention because it's very much about you. 'Did you grow up in a house with violence?' 'No I didn't.' 'Well, why should your kids have to grow up in a house with violence?' (…)
>
> Young girls - I mean particularly young women, it's – I had a funny thing happen a few months ago where she was in custody. She was all of 18 or something. I said (…) - she'd left school and it was about – she left in year nine or something – 'if you don't go back to school – your only ticket out of here is education. Your only ticket out of this life and out of custody is going to be school. Otherwise you're going to move from dopey bloke to dopey bloke who will treat you badly'. (…)
>
> So yes (…), they have a short attention span and I don't have much time. They're the things that I've worked out are probably important. (SLC30)

As well as interactions with litigants, feminist practices typically included interactions with the law. This might involve criticising gender biased laws or authorities, ensuring the full implementation of progressive law reforms (see also Douglas *et al.* 2014b, pp. 33-34), and engagement in law reform activities (see also Hunter 2008, p. 27). Appellate court judges in particular used their position to criticise authorities embodying rape myths, even if they did not have the ability to overturn those authorities. An example given by one judge concerned the High Court case of *Phillips v R* (2006) 225 CLR 303, a decision on similar fact evidence (and which was one of the judgments rewritten as part of the Australian FJP – see Cossins 2014, San Roque 2014):

> I had to deal with *Phillips* and I said something like – as polite as I could be, because you know you read the High Court and they almost seem to be saying there's nothing remarkable about a bloke trying to have sex with girls even when they don't want to and being violent to achieve those aims (…).
>
> So I forget how it came up or maybe I just had a gratuitous shot at it. I said something like, 'well the High Court obviously didn't mean that because that would be stupid, that would be such a stupid thing to say that that was obviously not what they were saying'. So I said, 'what they mean is that it's not so exceptional so as to fall in the similar fact test'. There have been cases, there've been some interesting cases to do with again, child sex (…) and all those assumptions about girls will complain and girls will report and girls making it up for no reason, all those kinds of things. I've had a bit of a shot at those. I've had a bit of a shot at some of the defences too because – some of the consent issues. (SCA38)

Similarly, in one of her cases, Justice Neave went as far as she could to criticise the requirement for a *Longman* warning – a warning about the dangers of convicting on the uncorroborated evidence of a sexual assault complainant in circumstances including delayed reporting – while being compelled to uphold the defendant's appeal against the trial judge's failure to give an adequate warning to the jury (Hunter 2013, pp. 412-413).

Conversely, where progressive reforms have been enacted, feminist judges have been concerned to give full effect to their intentions. This was mentioned in interviews in relation to provisions of the Family Law Act 1975 (Cth) concerning the equality of financial and non-financial contributions to the marriage and the effects of the marriage on a party's earning capacity (FIC13, FSC27), and the ability to make exclusion orders under domestic violence legislation (SLC5). Likewise, Justice King was the only judge in our study of domestic homicide cases to applaud the abolition of the defence of provocation, in a case concerning a man who had killed his wife's new partner:

> you had no right to kill the man with whom she had formed a relationship because of your anger at being, as it was described, 'cuckolded'. Your relationship had been well and truly over and our society has moved forward and does not excuse any person on the basis of the crime being a 'crime of passion'. Provocation has been abolished in this State, and rightly so. (*R v Neascu* [2012] VSC 388, para. 43)

One magistrate noted how difficult it was in committal hearings to give full effect to the provisions of evidence legislation which empowered her to protect complainants from bullying cross-examination to enable them to give their best evidence. She inevitably met strong resistance from defence counsel, and colleagues told her, "oh don't bother, it's too hard". But, she concluded, "You think this is just not fair. The legislation's here. It's about my bravery in applying the law and being solid" (SLC18).

Several of the judges interviewed had engaged in law reform activities, either in areas of particular interest or as members of general law reform bodies (e.g. SIC10, SLC18, FSC27). For example, one intermediate court judge dealt with her frustrations about the perpetuation of rape myths in higher court authorities, meaning she was "required by law often to say things [to juries] that were quite wrong" by getting involved in law reform on the subject (SIC19). Another superior court judge in her law reform work was able to abolish a particularly objectionable common law doctrine she had encountered in her judicial role (SSC2). Notably, too, both Brenda Hale and Marcia Neave had been law reformers prior to being appointed to the bench.[7]

4. The *when* of feminist judging

4.1. Making a procedural difference

Quite a few interviewees, especially those sitting on tribunals and lower and intermediate courts, identified their main feminist contribution as managing the courtroom and conducting hearings so as to create a better environment for litigants (e.g. FT4, SIC10, SLC18, FT40, SSC41; see also Douglas and Bartlett 2016). This might involve generally running hearings in what was described as "a more people sensitive way", reducing formality, enabling claimants to tell the story they wanted to tell and not feeling intimidated (FT40), or not allowing sexist language in court (FT26). Alternatively, it might involve specific attention to the position of victims of

[7] Hale was a Law Commissioner for England and Wales from 1984-1994. She was the first woman and the youngest Commissioner to be appointed to the Law Commission. Landmark legislation stemming from her time there includes the Children Act 1989, the Family Law Act 1996 and the Mental Capacity Act 2005. Neave chaired the inquiry which led to the legalisation of prostitution in Victoria in 1986. She was also a part-time Commissioner of the NSW Law Reform Commission and foundation chair of the Victorian Law Reform Commission, where she was responsible, among other things, for a review of the law of homicide which included the recommendation to abolish the defence of provocation in Victoria. After her retirement from the bench in 2014 she chaired the Victorian Royal Commission into Family Violence.

domestic and sexual violence (see also Douglas 2016). Particular examples of the latter included:

> … just simple things, for example, like acknowledging victims. Making victims – and this applies to victims of both sexes, of course, but often women are the victims of sexual matters – making them feel comfortable and encouraging them to give their evidence in a relaxed fashion. Making the experience less oppressive for them. (SSC41)

As discussed above in relation to the implementation of evidence legislation, judges were concerned to prevent the abusive cross-examination of victims (FIC13, SLC18), and also to prevent counsel from engaging in prejudicial questioning or making prejudicial statements based on rape myths or stereotypes (SSC42, SLC18). As an intermediate court judge explained:

> when I am doing cases like rape cases, sex cases, I am careful to make sure that the barristers aren't feeding the jury stereotypical arguments that aren't necessarily cogent, I would suppose would be the word. Such as, we used to have this barrister who at 90 was still practising and doing a lot of sex cases. I often used to have to send the jury out so I could say, 'you can't submit that because she was wearing a G-string she was consenting to the rape'. Then we would have these long arguments because he couldn't quite see that that was a problem. (SIC12)

Judges might also proactively ensure that special measures such as screens or remote witness facilities were available when needed, and be alert to slight lines in the courtroom to avoid intimidation, for example:

> … if the need arose for a remote witness room or something of that nature, to raise that. It can be even down to where people are sitting in the courtroom. I mean, you could have a situation where, for example, just because of where our dock is positioned in the courtroom, an accused might be sitting at one end of the dock. That might be making things a little uncomfortable. Or the counsel may be standing in a position facing the witness so that the witness has to look at the accused. Well, I would - if that developed (…) the next available opportunity I would ask counsel to move so the witness didn't have to have the accused in their line of sight if that was obviously causing a discomfort or I was concerned that it may. Or you might have a situation which I can think of where a family of the accused have sat behind Crown counsel in a courtroom so that, from the video link, the child is looking at Crown counsel, and behind Crown counsel are sitting the family of the accused (…). I would want to know what that child could see. I would be pretty proactive about dealing with that. (SSC42; also SLC18)

Other strategies mentioned included assisting distressed witnesses by giving them breaks and ensuring they have a support person with them (SIC37), and excusing intimidated victims from appearing in court (SLC18, SLC20). As explained by a magistrate, when seeking a domestic violence injunction:

> … the [applicant's] at court but she doesn't – she's too scared to come into the courtroom. They've got secure waiting rooms and I don't require them to come in if there's usually a lawyer representing them, or the police are effectively there (…). If the respondent's consenting to the order, I don't need her to be re-traumatised by coming into court and seeing him. (SLC20)

The same magistrate described other innovations she was trying to introduce to improve the court experience for women:

> *… a lot of people in the Magistrates' Court might think that it's not their problem how people experience court. Or is that - do you think that idea's disappearing or… ?*
>
> Well they'd probably think yeah, it's not something that they can do anything about, whereas going back to the interventionist/activist role, I – one of my bugbears in life is to improve our IT systems so that we can interface with the community (…) so that, for example, a woman in refuge can fill out an application for [a domestic violence injunction] online (…). In the comfort and security of her refuge, and maybe not even have to come to court. (SLC20)

Some interviewees located their approach to courtroom management within a broader commitment to procedural justice, entailing concerns with how litigants experience the court process and ensuring fairness for all participants (SIC8, SIC12, SLC17, SIC19, SIC23; see also Hunter *et al.* 2016). For instance, one trial court judge explained how she attempted to engage directly with defendants, even in sentencing:

> I still speak to people and include the offender who I'm sentencing. I tend to speak to them directly about some matters and engage them in the sentencing process. I don't cut their lawyer out. I'm likely to say something – say, for example, I've got a pre-sentence report to say that some offender has – he has a six month old baby who he's very, very happy with, then I may in my sentencing comment and say, 'your little girl is six months old now'. I say, 'is she six months old still or is she…?' – and get them to clarify exactly how old and things like that. So I'll engage in something that's not going to be controversial like length of sentence or circumstances of offence or something like that. But I like to, even when sentencing people to prison, to show that I've acknowledged that they exist as a person. (SIC37)

Other interviewees mentioned their interest in therapeutic jurisprudence and problem-solving approaches which aim to make the court process helpful rather than harmful to litigants, and seek to address litigants' problems holistically rather than focusing narrowly on the legal issues and 'processing' people through the system (FT4, SLC5, SLC17, SLC20, SLC30, SIC36, SIC37, SSC41; see also Hunter *et al.* 2016, identifying both overlaps and distinctions between procedurally just, therapeutic and feminist approaches to judging in lower courts).

A final procedural aspect in which values of procedural justice, therapeutic jurisprudence, inclusivity or an ethic of care might come into play is in the writing of judgments, in terms of how a decision is expressed and conveyed, and in particular, the way in which litigants are addressed and written about:

> The primary audience [for a judgment] has to be the parties: they're the ones who are the subjects of the dispute, and they're the ones who want the matter dealt with. So, that must be your primary audience (…). Showing them good faith, I think means writing in a way that they can understand, using language that they will understand (…). It also means, I think (…) that you're careful and caring about how you write about them, because this is an enduring record – public record – for them. So, if you make adverse findings about them, which we often have to, or a comment on their character, or their conduct, or explain why we have not accepted some evidence that they've given, and accepted contrary evidence given by somebody else, that we do so in kind terms. (SIC8)

Several interviewees had sat as coroners and one explained how she approached inquest judgments:

> I always give a narrative about the person. I usually start (…) with giving at least a short description about who died and who they were as a person and what their interests were, because I think – for example if it's a suspicious or whether it's a hospital death, there's always a loved one there. The person is either a son, a daughter, a brother, a sister, a mother, a father. They're somebody to somebody, to someone out there. To just reduce them to volumes of material about their blood pressure, their heart rate, or what their final days or who threw the first punch, really does trivialise a whole set of circumstances that are their lives. So I think it's important to flesh them out. We give (…) the family an opportunity to tell you about their loved one. So I think it's important to let them know that they've been heard in relation to that and you flesh them out and you've given them some – a concept of who they are. (SLC28)

Another judge noted that in a case involving evidence from a number of women workers, she had tried to reference each of the witnesses in her decision so they could see that their contribution was valued, and the effort they had put into their evidence was validated (ST6). Justice King's similar approach to acknowledging victims in her sentencing judgments has been discussed above. Caring for litigants might also require a judge to leave things out of her decision so as not to belabour the appalling experience to which a victim of violence had been subjected, or to

protect a witness. A tribunal member, for example, was concerned about the position of women who gave evidence contrary to that of their husbands in some cultural contexts:

> If they contradict each other you've got to take into account they're operating in a very patriarchal society so the consequences of her contradicting his evidence and that affecting his case (…) it was something that always used to worry me.
>
> *So it would influence how you would express the material in the decision? You'd leave it out if you possibly could? (…) If you thought it was dangerous to her to have it there?*
>
> If I could, yes. Sometimes you just couldn't do that because it was critical to the case.
>
> *Do you think other tribunal members approached this the same way…?*
>
> No, I don't think all tribunal members are as sensitive on that issue. There may be other ways of getting evidence or reaching a conclusion on a case without going down avenues of inquiry which are going to be dangerous for the family unit or particularly for the woman. (FT21)

4.2. Making a difference in decision-making

As described by interviewees, a feminist approach might be brought in at any point in the process of decision-making process. Feminist knowledge and values might inform decisions on the admissibility of evidence, assessments of credibility, the analysis of facts and evidence, the formulation of jury instructions, the exercise of discretion, the interpretation of legislation, the application of precedent, the development of the common law, the development of sentencing considerations and the assessment of damages. They might also be brought into conversations with other judicial officers and in turn influence their thinking.

Decisions on admissibility were cited by several judicial officers as a site at which a feminist perspective might be influential (FT4, SIC10). A judge who said that her decision-making was generally informed by 'my feminist soul' noted, for example, that unlike some of her judicial colleagues, she was prepared to receive allegations of family violence in family law cases and would not dismiss or minimise them (FIC35). On appeal, too, Justice Neave brought a feminist sensibility to bear in dealing with objections to the admission of evidence at trial. In the case of *R v Abela* [2007] VSCA 22, one of the grounds for the defendant's appeal against his conviction for the rape of his partner was the fact that the trial judge had admitted evidence of his recent sexual assault of his partner's daughter. He argued that this evidence should not have been admitted because its prejudicial effect outweighed its probative value. However Justice Neave held that the evidence had a very high probative value, noting that "it is difficult to envisage an event which is likely to have a greater effect on the complainant's willingness to participate in sexual activity with the applicant" ([2007] VSCA 22, para. 75). Since there was no other, less prejudicial way of placing the act of sexual intercourse complained of within its proper context, the judge had correctly admitted the evidence. The other members of the court agreed with her, with one conceding that he would have been inclined to find in the defendant's favour, but on reflection, he was persuaded by Justice Neave's reasoning to dismiss the appeal on this ground ([2007] VSCA 22, para. 6).

Credibility assessments were frequently mentioned by interviewees as being informed by a feminist perspective. This might relate to a witness's demeanour ("I will perceive a woman giving evidence to be forthright and helpful and somebody else will perceive her to be quite different to that": FT4), their consistency, or the content of their assertions – very often related to domestic violence. On the issue of consistency, one interviewee noted:

> when there's an inconsistency between two accounts, you ask yourself why. Now I hope I did it with a man as well but might there be a really good reason you told the

> police something the night they came round and what you're now saying that happened? Does it mean you were lying when you're saying what you said now, because you told the police something different? I mean there's masses of research about this sort of stuff. Migrant people who won't tell the police – if you've come from Somalia or many places, you're not going to tell the police about your husband being violent. He'll get sent back there and be killed, you'll probably be killed by him (…).
>
> Well it's trying to realise that that may not be the whole story and that when somebody, with support, says this is what happened, you don't automatically say oh yeah, that's what happened. But you don't either say, well why didn't you tell that to those two police that came round at three in the morning? (SLC14)

Others said they started with the belief that domestic violence allegations are real, and are not made up by women in order to gain an advantage in family law litigation (FSC33, FIC35). As discussed earlier, Justice Neave took a much more positive view of the claimant's credibility in *Giller v Procopets* [2008] than the trial judge had done. In particular, in response to his assessment that Ms Giller had exaggerated the effects of the assaults on her, Justice Neave noted:

> Ms Giller's determination and her failure to be cowed by Mr Procopets' assaults is not inconsistent with her fearing him and suffering mental distress as a result of the violence she suffered. It cannot be doubted that the victim of such an assault would have feared for her own safety. Nor are the mental distress and fear caused by such an assault diminished by the fact that she did not seek medical treatment. (*Giller v Procopet*s [2008] VSCA 236, para. 486)

Conversely, as suggested above, Justice King tended to be sceptical of men's victim-blaming and other excuses and justifications offered for violent attacks in domestic homicide and serious assault cases, and she also subjected defendants' claims to mitigation on the basis of their remorse to close and critical scrutiny (Hunter and Tyson 2017b, pp.799-802).

The analysis of facts and evidence includes assessments of credibility but also includes assessments of plausibility and understandings of human behaviour. Writing in 1995, Reg Graycar questioned the sources of judges' knowledge of the world and suggested that such knowledge was (masculine) gendered (Graycar 1995). Feminist judges, therefore, are in a position to correct this imbalance. Examples given by interviewees again concerned domestic violence, and also mental health:

> … what I do know now from all of this training and thinking about it and listening to all of the things I've listened to over the years is that I now well know and accept the controlling behaviour as part of a pattern of family violence (…). It's not an assumption therefore, because she says he controls me, that it is family violence. I need to know more behind it still. But I'm already accepting that control is family violence because of the training.
>
> *I see, yes. So the question is whether she's being controlled (…) not whether controlling is a form of family violence, which is a step ahead of lots of people?*
>
> Yes (…) I accept that that's the case. I don't have to be convinced about control. (SLC18)
>
> I have to make a lot of assessments of risk, of people's risk to themselves or to the community. I think how you assess risk, your perceptions of women, the role of women, the violence they might be exposed to, anything like that, your thoughts about that are going to inform your assessment of the level of risk that's there (…). But as I said, I think that's one of the views that I bring to things. I [also] bring views about disability and the value of people's lives. (FT4)

Just as judges' feminist knowledge informed their own fact-finding, so they may also transmit that knowledge to juries to inform the jury's fact-finding in criminal cases. For example one judge, thinking about the difficulties for complainants of speaking in court about what had happened to them, advised juries: "I tell them that they're going to be assessing people's demeanour, but that people – you know, that everybody is different, some people feel really nervous, and go through that"

(SIC37). Another sought to counter mandatory jury directions she considered problematic with permissible *comments* of her own:

> if the law directed me to say that (…) a complainant's credibility could be affected by the lack of timely complaint, I would say (…) 'this is a comment of mine, but you may think a counter-argument is – but there may be good reasons', etc. So you're allowed to make a comment provided you make it very clear that it was a comment and your own view, and that the jury wasn't bound to accept that comment. (SIC19)

The exercise of discretion, as a matter entirely within the domain of the judge, was often mentioned as an area of decision-making informed by feminist knowledge and values. This might affect the weight given to various factors, for example, in family law parenting or financial cases, or in sentencing (SCA9, SIC10, FSC14, SLC20, FSC33). An intermediate court judge cited a case in which she had considered that the fact that the defendant was breastfeeding a baby was more important than her string of prior convictions, resulting in her decision to hand down a non-custodial sentence (SIC8). A family judge gave an example of a custody dispute in which the father argued that the mother was unfit to care for the children:

> It was a case where a man had – an Australian man, who was – belonged to the Merchant Navy, so he was away a bit – had a Filipino wife, and they had two little girls. He decided to leave her. He had family support, she didn't (…). The husband brought evidence that at a time when he was away at sea, she had worked in a brothel. She said that she only washed the towels and did the reception work. So they got a private detective to go in and take advantage of her services, which were actually more than she had said they were. Then brought – this private detective came to the court and said (…). And I said to the barrister for the husband, 'he's left her without any financial support. What is she supposed to do? If this is the job she can get (…)' 'Oh surely, you wouldn't say that a prostitute was a suitable parent?' I said 'why not?' He said 'well, it's socially unacceptable'. I said 'oh, is it? What does that mean?' (…) Because I thought, how dare this man go and leave her without means of support for herself or the children, then turn round and be critical of the kind of lifestyle that (…)? And I did feel in some ways that being a woman made a difference there. (FSC33)

While trial court judicial officers – especially those below superior court level – largely make decisions about facts and have little scope to develop as opposed to apply the law, superior and appellate court judges do have opportunities for legal decision-making, whether via statutory interpretation or developing the common law to apply to new circumstances. In one of her leading judgments on the Supreme Court, for example, Lady Hale overturned a line of lower court cases which had held that local authorities' statutory duties to rehouse anyone made homeless as a result of domestic "violence" extended only to victims of physical violence. She found that the legislation was not intended to be so confined, and interpreted it to extend to all forms of abuse giving rise to the risk of harm, in line with contemporary understandings of domestic violence more generally (*Yemshaw v London Borough of Hounslow* [2011] UKSC 3). As noted above, Justice Neave's cases included purposive interpretations of stalking legislation and de facto property legislation (Hunter 2013, pp. 408, 414). And several interviewees gave examples of decisions in which their feminist understanding of the legislative purpose of, for example, family law and anti-discrimination legislation, had informed their interpretations (FSC14, SIC19, FSC27, ST32). One cited a case in which she had interpreted a section of her State's criminal injuries compensation legislation which provided that in order to be awarded compensation, the victim of crime must not themselves have been committing a criminal offence.

> I said well, that section couldn't possibly mean that if you happen to have some cannabis in your pocket, you walk into the bank and you get shot by a bank robber, you can't get criminal injuries compensation. So I interpreted it as saying the two things would have to be linked before you could lose your right to criminal injuries compensation. I interpreted it in a case where the facts were that a woman was smoking methamphetamine with a friend of her housemate and then the friend raped

> her. I said the fact that she had been smoking methamphetamine with him was totally disconnected and to award compensation I had to interpret that section like that. But the Court of Appeal said I was wrong and so did the High Court (…). (SIC36)

In relation to developing the common law to be inclusive of women one interviewee asked rhetorically:

> If *terra nullius* can be overturned when it was upheld for such a long time but then there was a different way of thinking about that,[8] why can't you do that in relation to women's issues or other social justice issues? (ST6)

And it was a clear possibility for this appellate judge:

> … it comes into play in all decision making where you have got options about which way you could go and which way you can develop the law, slightly this way or that way. There is often a little bit of leeway. It's not that there is just one possible answer to the case that's right and no other answer. Most cases aren't like that. Most cases you have got room to make different decisions that will affect the ultimate decision. (SCA9)

Two intermediate court judges made specific mention of opportunities to extend the law of torts, in one case to provide redress to a victim of sexual violence:

> I'd always seen [the common law] as being reflective of this older, traditional male norm, and was in fact in some ways incredibly sexist and racist and classist. So I'd been a great believer in legislative change to reflect contemporary values rather than the common law (…) I thought it was too much infused with the individual values and often unexamined ones of those who were writing the judgments. But when I got the opportunity (…) to see if the [law could be developed to apply] to the circumstance of the particular case, I found it could. So I thought, maybe sometimes, as a judicial officer, you can get the common law to work and to nudge it in the direction of what you see as contemporary values, rather than what someone of a different background does. (FIC19)

And in the second case to limit restrictions on recovery:

> On one occasion the issue was whether a person had a right to damages where the person herself was involved in unlawful conduct. The issue was that a young Aboriginal girl didn't know how to get home after having been drinking in the city with others and she didn't have money so she wired a car to go home. She obviously committed an offence. But then as she and her sister were going to drive peacefully home in this car her uncle came and said 'look, I want this car for me and my friends'. They all squeezed in and because of her background she didn't feel like she could challenge the uncle. So she let him drive and he was drunk. He started driving crazily and she said 'stop, stop' repeatedly and 'let me out' but he didn't and eventually drove into a pole. She became a quadriplegic. So the whole issue was whether she could be given damages because she was involved in – had committed an offence herself.
>
> I wrote a judgment on the basis of saying that she should be given damages – it was a legal argument but essentially on the basis that she had asked him to stop and she had therefore stopped her illegal activity. It was also not on a frolic of committing offending, because in previous cases the judges had always said look, we can't give damages to somebody who's out on a frolic of their own, going on a car chase or driving crazily and then getting injured. I said look, this is a different situation. This woman admitted she stole a car but she was just trying to get home. I was overturned by the Court of Appeal but the High Court eventually upheld it, not quite on the same point that I had made. (SIC36)

In addition to setting their own precedents, interviewees gave examples of strategies they had used to evade bad precedents, including reading and finding important gaps

[8] *Terra nullius* was the legal doctrine which held that the Australian continent was empty – land belonging to no-one – when it was settled by the British in 1788. It was on this basis that English law was imported to the Australian colonies and Aboriginal law was disregarded. The doctrine was overturned in *Mabo v Queensland (No 2)* (1992) 175 CLR1, enabling pre-existing 'native title' to be 'recognised' by Australian law to the extent that it continued to subsist.

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in the research on which a particular authority had been based (FSC14), and paying lip service to a High Court decision in the wording of judgments while not actually changing the underlying approach to discretionary decision-making which the High Court had disapproved (FSC27).

In relation to sentencing, in addition to exercising their discretion in weighing up the various sentencing factors, judges might also develop new sentencing factors or general sentencing considerations based on feminist understandings. Two judges, for example, mentioned that they had established the failure to wear a condom as an aggravating factor in rape and attempted rape cases, due not only to creating the risk of pregnancy, but also the exposure of the complainant to the risk of contracting a sexually transmitted infection (SIC19, SCA22). A third described how she had changed the approach to sentencing for child sexual offences:

> There used to be these weird odd cases that said there were a variety of things that you had to take into account in deciding whether the offence was serious. One of them was – and they were just a list of random factors. One of them was whether there had been a loss of virginity. I thought I don't know if that would be at the top of my mind if my spouse has being abusing for 15 years. So it was at my initiative (…) that we had another look at why this was serious, because with the benefit of hindsight you can look at the effect on a child's self-esteem. We talked about some of the consequences that we'd seen coming through in the victim impact statements and they related to things like what the relationship is and the abuse of trust. So it's re-characterising the offence to say this isn't about sex so much, this isn't about loss of a child's sexual innocence, it's the loss of a child's needs and rights to be protected and bodily integrity and a sense of identity and all those sorts of things (…). So it was a matter of just bringing a new understanding to give it totally your own framework. (SSC39)

A feminist perspective might inform the process of assessing damages in terms of understanding the nature of gendered harms, and the assumptions made about future economic loss. As discussed above, Justice Neave's appreciation of the harm arising from assaults and breach of confidence in *Giller v Procopets* [2008] was substantially different from that of the trial judge and resulted in substantially higher damages for the plaintiff. Another judge observed that in a breach of privacy case concerning a rape victim who had been named by a media outlet:

> It had caused her considerable distress, particularly because the rape was her husband, so it became known within her community and circle of friends and family and acquaintances. So she'd lost her ability to have control over who knew and the circumstance in which they knew, and had set back her recovery from that. So to have a feminist judge who understood the reason – not the old paternalistic reason for protecting the identity of a rape victim – namely, she'd lost her marketable quality as a wife and her reputation for chastity might have suffered – but rather, control over who knows so that you're able to become a survivor and not feel a victim (…). My views and beliefs about this and my understanding about it (…) meant that my approach to the value of her suffering may well have been different from the approach of somebody else who might have said, well, her parents knew anyway, some of her friends knew anyway – where's the harm? (SIC19)

Several judges talked about how in assessing damages they had not accepted traditional assumptions about women's future earning capacity:

> We used to have cases where it would be said that in the working out of damages for a female, that their damages would be confined after they got married and after they had children, because they give up work – don't they, as we all know [laughs] – is the argument that is being put. [W]hen that argument has been put to me in court I have said, 'if you're going to make that submission I want to know what the evidence is that this plaintiff who said that she would go back to work will not go back to work. What is your evidence upon which you can make that submission?' I only had to make that point reasonably strongly a couple of times and people knew they weren't going to get very far with it. That style of argument has just gone. It's gone, perhaps because you have judicial statements to that effect (…). But I reckon (…) those sorts of arguments were still being made, notwithstanding the fact that most of us 10 or

> 15 – many, many, many females, a majority I would have thought but at least a significant proportion, went back to work after they had children. Such that you just could not make that assumption in the course of a case and you couldn't fashion your damages order based upon that assumption. (SCA25; also FT4)

An important point mentioned by a number of interviewees at which their feminist perspective came into play was in contributing to judicial conversations, both out of court and on the bench, and hence having an input into individual as well as collective decision-making (e.g. SSC2, SCA22, SIC36, SIC37, SSC38, SSC39). A tribunal member reflected that the fact that members had a variety of different backgrounds and experiences improved decision-making. While she might bring her own views, "inevitably [a male colleague] thinks from a different perspective and I think that then your decision-making is more sound as a result of that. People question you. You question them about why you've reached that view" (FT4). Some went further and talked about the importance of educating other members of their courts. A magistrate referred to "trying to get some of the blokes on the court to see things a bit more broadly" (SLC31). A tribunal member noted:

> I think I've been generally lucky with the people that I've worked with. Because we generally respect one another and respect each other's view you can have those sorts of discussions and people will listen to what you say. They mightn't agree with you but they will at least listen to what you say. Usually we can find some consensus positions. I know on [issues concerning women's employment], it really has been an educative role. (ST6)

And an appellate judge cited instances of persuading her colleagues to take a different view:

> there have been a number of occasions in which I think – because I've seen (…) things through a particular lens – that I've either been able to persuade others of a result that otherwise might not have been reached. That particularly relates to women's earning capacity and women's ability to perform tasks and women's – and these are very specific examples I'm now giving you because they came out of particular cases. (SCA25)

Likewise, in the studies of Justice Neave and Lady Hale, it is evident that in a number of cases the judge has produced a feminist-informed leading judgment and has carried the rest of the court with her (Hunter 2013, and e.g. *Yemshaw v London Borough of Hounslow*, above).

As well as engaging in collegial discussions of individual cases and informal discussions out of court, some of the judges interviewed had been involved in formal judicial education programmes within their respective courts on issues of gender, culture, class and violence (e.g. FSC14). A magistrate explained:

> I was on the Educational Committee for a long time. The work we did on systemic bias I think has made a difference (…). We're more aware of what makes us tick and what we're thinking, and what our assumptions are. I did a lot of work with syllogisms for the magistrates, and they'd never heard of syllogisms (…). We've addressed issues of gender. We've addressed issues of race, migrant groups and so on (…). Aboriginality obviously has been a very big thing. Assessment of witnesses. Understanding what it is you're being told and what you're not being told but which you should be aware of, demeanour and what you can judge from that and what you can't judge from that. A lot of work's been done there. (SLC31)

Another magistrate described a community education programme run by her court which was also useful for judicial officers:

> We run a 'walk in her shoes' tour of how you – the process of applying for [a domestic violence injunction]. I actually (…) I went and did that and it's terrifying (…). Our applicant support worker (…) takes people through what's involved and I'm usually at the end of the tour and I give a chat about what happens when people get into court. So it's for anyone, whether it's social workers, magistrates – and I actually run them for magistrates as well, because it's really useful for us to see what happens

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> outside the courtroom. So I recognise it's an extremely intimidating process, actually getting into court. (SLC20)

The multiple points at which a feminist perspective could be brought to bear in a case was well summarised by an interviewee who welcomed the opportunities so provided:

> I'm very pleased to be sitting in a position now where I can make sure that the equality plays out in the way the case is run, in the outcome, in the opportunity to be heard, everything. (FIC13)

5. The *where* of feminist judging

The legal issues and areas of law identified by interviewees and seen in the case studies as sites for the introduction of feminist perspectives were of course, as noted earlier, significantly related to the profile of those studied and interviewed, almost all of whom sat on generalist or family courts and handled largely run of the mill criminal, civil and family matters. It is not surprising, then, that the major subject-matters to emerge were those in which women as litigants were prominently represented before those courts. Domestic violence was an issue that arose in criminal law, family law and in the making of civil injunctions, and so unsurprisingly was raised most often by interviewees and in the case studies (see also Douglas 2016). Sentencing was another prominent issue, since it appears at all levels of state court hierarchies – summary crime, intermediate and superior trial courts, and on appeal – and involves women as victims as well as defendants. Similarly, women appeared frequently in cases and interviews as victims of sexual offences (see also Douglas 2016). On the civil side, the most frequently cited areas where women appeared as litigants were in family law and personal injuries.

Areas appearing in the case studies or mentioned by interviewees less frequently included child sexual abuse, discrimination and sexual harassment, breaches of privacy, crimes compensation, mental health law, employment and industrial relations law, immigration and refugee determinations and administrative law. If we had interviewed more members of specialist tribunals, some of these areas would no doubt have assumed greater prominence as again they are areas in which women frequently appear as litigants. Preliminary results from our study of Lady Hale's decisions on the UK Supreme Court would add education, housing, social welfare and medical law to this list.

None of this means – as the FJPs demonstrate – that there is no scope for a feminist approach to areas such as constitutional law (see, e.g., Women's Court of Canada 2006, Rubenstein 2014, Stanchi *et al.* 2016a, Yarwood and Pirini 2017), tax (see, e.g., Buckley 2006, Sadiq 2014) or commercial law (see, e.g., Auchmuty 2010, Mulcahy and Andrews 2010, Stace 2017). But these possibilities arise perhaps less routinely and for fewer judges than might be the case for the areas identified.

6. Constraints and limitations

As well as observing the wide range of possibilities for feminist judging outlined above, the case studies and interviews identified real limitations and constraints on such a role. In short, there was not always room for a feminist perspective, and even when there was, the feminist judge could not always reach the result she might have wanted.

I have elsewhere discussed the fact that feminist judging is dependent upon, among other things, whether the subject matter of the case provides any opportunity for a feminist approach (Hunter 2015a, pp. 133-140). In my study of Justice Neave I found that only around one third of the cases on which she sat raised any kind of a feminist or gender issue (Hunter 2013, p. 405). In our study of Lady Hale, the proportion appears to be even lower, at under one quarter of cases, including cases where the topic (such as race discrimination or the status of a particular group of workers as employees or independent contractors) does not involve women or gender issues but

the outcome might have implications for women. Several of the judicial officers interviewed, in State lower, intermediate and superior courts, considered that the areas of law they dealt with rarely raised gender issues, were not very conducive to a feminist approach, or did not provide much scope to promote women's rights, particularly in civil matters (SLC17, SIC36, SSC38). The list of subject-matters identified above bears out this observation.

In terms of constraints on reaching the desired outcome, a number of interviewees on tribunals and intermediate courts simply said they were constrained by the law, legislation or legal categories. One said she was "not infrequently" compelled to reach decisions that were in accordance with the law but not with her feminism (FIC35; also SIC37). Two federal tribunal members noted that sometimes it was clear that a woman applicant had been treated badly, but her situation did not fit within the remedial scope of the relevant legislation (FT21, FT40). A State superior court judge complained particularly about criminal law:

> A lot of the stuff that I have done my whole life is to do with crime. It's not the only area but it's certainly an area where there is a long-established (…) I don't know if you would call it misogyny or if you'd just call it stupidity, but a long-established view of women that doesn't reflect either my experience or anything that you could possibly describe as feminist, and to the extent that that law is binding on me then it is difficult (…). I think there are cases in which if I had an absolutely free hand I would have decided them differently. (SSC39)

The constraint of gender biased precedents was discussed above, and was mentioned by another trial judge in the context of jury instructions:

> in a trial you've got very little ability or power to do anything about [how the jury will decide]. So all you can do is ensure that your directions – well first of all they've got to comply with the law, you've got to put it all in. We know that the directions we have to give juries in rape cases are so prescribed, and so cautious, in other words they provide many, many protections for the accused person – as they should – so many protections for the accused person it's very hard to get a conviction. I haven't had a conviction in a rape case for ages. (SIC24)

Another constraint mentioned was mandatory sentencing legislation, which fettered judges' discretion to take people's individual circumstances into account and could thus produce results felt to be very unfair (SLC17). At appellate level, although unhelpful precedents were not such an issue, the court might have limited power to produce a just result where an appeal concerned findings of fact or the exercise of discretion by the trial judge. Although the appellate judge might themselves have decided the case differently, there may be no point of law on which to allow the appeal (FSC27).

Only two interviewees explicitly articulated judicial ideology – norms about what it is and is not permissible for judges to do – as opposed to laws and precedents with which they disagreed, as a constraint on feminist decision-making. One of these instances has been discussed above, where the judge adopted a practice of apologising to applicants in crimes compensation cases, which was considered "hugely controversial". This same judge was generally prepared to *push the envelope'* as far as it would go, and sometimes further, and so had something of an antagonistic relationship with the legal establishment. The other was more accepting of judicial culture, which in her view exerted definite limits on feminist possibilities:

> *I'm not sure whether there are cases that you can think of where, perhaps, a feminist principle could have been applied?*
>
> Look, if it could be applied legitimately I would have applied it, yes, always, always; but it's about whether it's legitimate to do so without extending out beyond permissible barriers. (SSC32)

It is notable that these two judges were among the 'first women' appointed to Australian courts. It is possible that their pioneering work as feminist judges may

have effected some shifts in judicial ideology, meaning that their successors have not had to face all of the same barriers as they did.

A final constraint mentioned by two interviewees, and which undoubtedly continues to operate, is the need for arguments put to the court to be informed by a feminist perspective, rather than expecting feminist judges to do all the work on their own. One judge made this point in relation to the failure of lawyers to seek spousal maintenance for women in divorce cases:

> [A]t some point along the track in family law it became very fashionable to think about the break in the relationship theory where you go to court, you sort out the kids, you get your property and I get my property and we go our separate ways. The clean break. A casualty of the clean break theory really was maintenance for women (…). There was a sort of notion that we'll give you a little bit more now, you'll get 60, I'll get 40, and that's an end of it, you're on your own now. Now I keep my earning capacity and I am (…) a barrister or a doctor or an architect or a pilot or a business and an earning capacity is about the most valuable thing you can take out of a marriage (…). And in a couple of years' time I'm in a house again and I'm skiing again and I've got another Porsche and I'm on my way, okay. She is looking after the kids, scrounging for a part time job, because she hasn't worked – in paid work – for perhaps 20 years, very hard (…). [S]o there was this clean break thing and theoretically it was included in this idea that you're getting a bit more. But the bit more got double counted all the time because a bit more was because you had the major responsibility for the kids, and a bit more was because you didn't earn as much and a bit more was that you really weren't going to be able to keep paying the rates on the house (…). [A]nd you would say to people when they brought in applications, 'why aren't you seeking maintenance for this woman in addition to the property? Alright, she's getting her share of the property, she's housing the kids, but she doesn't have the capacity to support herself, and your client – the other [party] has the capacity to contribute to her support'. And it would be 'ah, it's all a clean break'. You could write about it 'til you were blue in the face, you could encourage (…) (…). Judges could consider it, but the judges couldn't make the case. And you could write in a judgment about them not making the case. You could try and persuade them to make the case. But particularly in a court (…) if you're running a trial, that's the end of a 12 month or 13, 14 month case management pathway. You can't suddenly in the middle of the trial say 'hey you, why don't you ask for some maintenance?' (FSC14)

And a magistrate made a plea for feminist advocacy:

> [T]here's lots of very energetic young feminist women who particularly come on to the [magistrates court] and, with some dismay I imagine, are confronted with the inability to translate that feminism into a feminist output. So yes, I've had some discussions, I go back and talk to the community legal centres and say 'I can't be a feminist judge unless there are feminist advocates in front of me. If it's not argued I can't choose it as a result. So it's a little – it's a bit of a shock when you arrive because you think oh, I'm an agent for change (…). It's a real shock. I remember this quite distinctly, that if it's not argued you can't pluck it out of the air. So yes, it's far more important that I have feminist advocates, male and female, who then enable me as a feminist judge. But yes, unless it's argued you can't have it. If you've got two parties in front of you who aren't arguing it you're left high and dry. You can sort of suggest – you know, have we thought about blah? Do you want to address me about that? But yes, that's kind of – one of the key things I wanted to get across in this is that if there aren't feminist advocates, being a feminist judge is a waste of time. (SLC30)

Of course, this was an overstatement to make the point, and she then gave examples of being a feminist judge without the help of feminist advocacy. But the point is an important one, nonetheless, especially as a constraint not experienced within FJPs.

7. Conclusions

How, then, do the imagined judgments of the FJPs compare with the 'real world' feminist judgments discussed in this article? The FJPs have shown comprehensively

how feminist theories can be translated into practice in the form of legally plausible judgments, and have demonstrated powerfully that even at the same time, against the same background, with the law as it then stood and the facts as they were known to the court, original decisions were not inevitable and cases could have been decided differently. Many of the feminist rewrites change the result of the case, but in others, the result remains the same but the reasoning is different. That reasoning might involve attention to previously excluded experience, reference to important social context, the avoidance or rejection of gendered assumptions and stereotypes, and incorporation of feminist knowledge. Where the feminist judge reaches a different outcome from the original decision, it may be a result of reinterpretation of constitutional texts or legislation, development of the common law, or a different application of the law to the facts. In particular, the telling of the story and construction of the facts have often proved to be strategically important, both in achieving the legal recognition of the reality and specificity of women's lives, and in laying the foundation for a different legal analysis. At the same time, the rewritten judgments have made it clear that there is also scope for different feminist approaches to some cases – feminism is not monolithic and some feminists might disagree with the reasoning adopted by the feminist judge in question. As self-conscious projects, the FJPs lend themselves more easily to scrutiny and analysis than do 'real world' instances of feminist judging (for accounts of the FJPs published to date, see Majury 2006, Hunter *et al*. 2010, 2017, Davies 2012, Hunter 2012, 2015b, Rackley 2012, Douglas *et al*. 2014b, Stanchi *et al*. 2016b, McCandless *et al*. 2017, Enright 2017, Shine Thompson 2017).

As indicated above, the FJPs cover a wider range of subject-matters than the 'real world' examples given by interviewees, and they also reflect the different jurisdictional structures and national contexts within which they have been produced. The Canadian project focused solely and the US project substantially on key aspects of constitutional law (Women's Court of Canada 2006, Stanchi *et al*. 2016a). The Northern/Irish project was concerned with the gendered legal construction of national identity, and consequently its rewritten decisions cluster around issues of reproduction, motherhood, families, and citizenship (Enright *et al*. 2017). And the Aotearoa New Zealand project includes a number of judgments rewritten from a *mana wahine* perspective which puts Maori women at the centre (McDonald *et al*. 2017). Both 'real world' feminist judges – as the above examples and quotations show – and the FJPs include men and children as well as women (in all their variety) within their purview, however the range of vulnerable subjects in FJP judgments extends to include businesses (Mulcahy and Andrews 2010), animals and marine life (Fox 2017, Wheen 2017), the land (Johnston and Hori Te Pa 2017) and the environment (Godden 2014, van Wagner 2017).

In addition, the FJPs are more consciously informed by feminist legal theory. While some of the 'real life' judges interviewed are or had been readers of feminist legal literature, the great majority of interviewees said they knew little or nothing of feminist theory, had gone to law school before women and the law or feminist jurisprudence courses became available, and had gained their feminist knowledge from activist involvement in the feminist movement and/or from their experience in practice as lawyers and judges. Consequently, participants in the FJPs are likely to have been more reflective about their feminism and more conscious of the feminist choices being made in their decisions, especially where they took part in workshops to discuss draft judgments organised as part of many of the FJPs. By contrast, feminist judges in the 'real world' are not usually exposed to a range of feminist views or compelled to think about differing feminist approaches to a particular issue.

Furthermore, while the FJPs have largely engaged with appellate decision-making and included only a relatively small number of first instance and lower court decisions, the profile of interviewees, as noted earlier, was quite different. The majority of the latter were first instance decision-makers sitting on intermediate or lower courts and tribunals. As a result, there were several constraints on the 'real world' judges

interviewed which the fictional judges in the FJPs have not faced. The fictional judges have not had to operate in areas of law where there is no scope for a feminist perspective, and have not had to contend with gender biased precedents. Indeed, often the aim of writing feminist judgments is to change such precedents! Even by contrast with 'real world' appellate judges, FJP judgment-writers have not been reliant on feminist arguments being put to them, although in some cases judgment-writers have queried why particular lines of argument were not put to the court (e.g. Carr and Hunter 2010, p. 327, Rathus and Alexander 2014, p. 388). Judgment-writers in the FJPs have also, perhaps, been less cautious about introducing extrinsic evidence in the form of international conventions, national statistics, research reports and academic literature into their judgments, freed from the constraint experienced by 'real world' judges of having to put material to both sides for comment before being able to rely on it (see, e.g. Hunter 2010, pp. 37-40, Douglas *et al*. 2014b, pp.23-27). However practice in this regard varies between jurisdictions, and 'real world' judges may also resort to the expedient of asserting their background understanding as "common knowledge" which avoids the need to cite their particular sources (see Hunter 2013, pp. 406-407).

On the other hand, the 'real' feminist judges brought their feminist sensibilities to all aspects of the judicial role, including managing their courtrooms, working with juries, fact-finding, and interacting with other judges, as well as writing judgments. These are aspects of judging which have not entered into the FJPs, but are important to remember, since they probably consume the majority of all judicial time. The 'real world' examples also had a greater emphasis on sentencing, and on tort law and the assessment of damages as the major area of civil law dealt with by generalist courts in which gender issues arise. Feminist judgments on tort law and sentencing decisions have been included in the Australian (Burns 2014, van Riswijk and Townley 2014), Northern/Irish (O'Rourke 2017, Conaghan 2017, McCandless 2017) and Aotearoa New Zealand FJPs (Stace 2017, Toki 2017), but have not assumed the prominence they may have in reality.

Otherwise, however, there appears to be a substantial degree of confluence between imagined and 'real world' feminist judging, certainly in terms of 'how' it is done – its epistemologies, values and practices. Perhaps, then, feminist judging may be more of a shared enterprise than those of us involved in FJPs might have imagined, and there are many 'real world' feminist judges who have been there before us. Why does this come as a surprise? Partly it is a product of our academic focus on appellate decision-making or, to put it another way, our academic blindness to the bulk of the judicial iceberg: the procedural aspects of judging and the unreported decisions made day after day in the courts and tribunals most people encounter.

But it may also be at least partly due to another significant constraint on feminist judging in the 'real world', which is the ability to speak about it. Many feminist judges report that they are wary of identifying as feminists in public (as opposed to in a confidential interview) or even suggesting that gender might be relevant to judging, because they will be seen to be "letting the side down" (Hunter 2008, p. 16) or "replacing one bias with another" (SSC2). I have dealt with the accusation of bias elsewhere (Hunter 2008, pp. 15-27, 2010, pp. 30-35), but of course, as amply demonstrated in this article, the objective of feminist judging is not to privilege women but to correct historical exclusions so that *everyone* is treated fairly. A key element of judicial ideology, however, is to maintain the fiction that the law, and judges, are (already) fair, neutral and objective. For a judge – as opposed to an academic critic – to suggest otherwise is indeed "letting the side down". In light of this ideology, perhaps we have paid too much attention to what 'real world' feminist judges (don't) say than to what they (quietly but effectively) do.

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