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What's language got to do with it? Learning from discourse, language and stereotyping in domestic violence homicide cases

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This article examines language, stereotypes, perpetrator accountability and victim visibility arising from domestic violence homicide cases in NSW. This study examines all sentencing remarks in the District and Supreme Courts, and the NSW Court of Criminal Appeal since 2000, highlighting the importance of judges making effective and careful statements about domestic violence.

In recent years domestic violence has been increasingly recognised as a significant social justice issue in Australia. Due largely to the sustained efforts of feminist scholars and activists, as well as numerous recent cases, society's attention has been sharply drawn to the high social cost of domestic violence and its radiating impact on individuals, families and communities.⁴ This focus has led to intensified scrutiny of criminal justice systems, and increased media attention on issues of domestic and family violence, particularly in relation to high profile, or very serious criminal cases. This scrutiny has highlighted the importance of strong criminal justice responses to domestic violence and the importance of judicial officers using careful and considered language and discursive strategies in their decision-making processes. This recognises that, as an adjunct to the discretion judicial officers exercise in judgments and sentencing

decisions, they also influence societal values and behaviours in the exercise of their functions.

Language is power⁵ and judicial officers wield significant social power with respect to discussing, naming and representing domestic violence.⁶ This power ensures judicial discourses echo through media representation and reflect social understandings of domestic violence.⁷

Definitional issues

In NSW legislation, the term "domestic violence" encompasses violence within a broad range of relationships, including current and former intimate partners, family members and even current or former flatmates.⁸ In other states, and within the family law jurisdiction, terms such

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4 S Riger, S Raja and J Camacho, "The radiating impact of intimate partner violence" (2002) 17(2) *Journal of Interpersonal Violence* 184.

5 M Foucault, *Power/Knowledge: selected interviews and other writings, 1972-1977*, Pantheon Books, 1980.

6 L Coates and A Wade, "Language and violence: analysis of four discursive operations" (2007) 22 *Journal of Family Violence* 511 at 511-512.

7 See also R Hunter and D Tyson, "Justice Betty King: a study of feminist judging in action" (2017) 40(2) *UNSWLJ* 778; R Hunter, "Analyzing judgments from a feminist perspective" (2015) 15 *Legal Information Management* 8; R Hunter, "Narratives of domestic violence" (2006) 28 *SydLR* 733.

8 *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 5.

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as “family violence” may be used to encompass both intimate partner violence and violence by one family member against another. In Aboriginal and Torres Strait Islander communities, the term “family violence” is often preferred as it is considered more culturally appropriate, and reflects an understanding of violence beyond only intimate partner relationships.⁹ For the purpose of this article we use the term “domestic violence” in reference to intimate partner violence only to reflect the language used in NSW legislation and case law.

Definitional issues have arisen as to what is considered “domestic violence behaviours”. The *Family Law Act 1975* defines domestic violence to include (but not be limited to) a wide range of behaviours such as physical violence, stalking, derogatory taunts, intentional property damage, intentional death or injury to animals, financial control, intentional isolation of the victim from friends and family, unlawful deprivation of liberty, and exposure to domestic and family violence during childhood.¹⁰ Importantly, the *Family Law Act* defines family violence as “violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family ... or causes the family member to be fearful”.¹¹ This is also reflected in s 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (CDPV Act) which defines a domestic violence offence as “a personal violence offence, or ... an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or ... an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both)”.¹²

The emphasis on the centrality of coercion and control in domestic violence in the CDPV Act and the *Family Law Act* illustrates that domestic violence is about exercises of power, in which physical violence is but one manifestation. This article considers the ways in which NSW judicial officers may negotiate some of these challenges, including

addressing the suite of behaviours (physical and non-physical) which constitute domestic violence.

In this article we adopt gendered language, referring typically to males as domestic violence abusers and females as domestic violence victims. This language is adopted due to the fact that our data show that the vast majority of domestic violence abusers are male, and almost all victims are female. Typically a male abuser will kill a female victim, but in some cases a female domestic violence victim will kill her abuser. Other cases may involve an abuser and victim in a same-sex relationship, and it may be possible that a female was a domestic violence abuser against a male.¹³

Background to this study

The social importance of the work of judicial officers at all levels is undeniable.¹⁴ Judges, in exercising their duties and functions, are required to be objective and impartial,¹⁵ perform their role in accordance with the highest integrity and in ways that maintain public confidence both in the functionality of the legal system, and in the judges themselves.¹⁶

However, the notion of impartiality or neutrality is a challenging one, as judges are in the business of using words — and words are not neutral.¹⁷ As Minow notes, when it comes to issues of family violence, words can convey assumptions or obscure stereotypes using a veneer of objectivity;¹⁸ words can be used to perpetuate violence, and silence can be used to render issues and persons invisible and their experiences “unutterable”.¹⁹ Further, lawyers routinely use stereotypes in relation to criminal acts in order to explain, minimise or justify the actions of the accused or the victim. In cases concerning domestic violence, leaning on inappropriate and gendered stereotypes can lead to prejudicial inferences, undermine victims’ claims to justice and improperly lend support to offenders’ defences.²⁰

9 A Olsen and R Lovett, *Existing knowledge, practice and responses to violence against women in Australian Indigenous communities: state of knowledge paper*, ANROWS, 2016, p v.

10 *Family Law Act 1975* (Cth) s 4AB.

11 Section 4AB(1).

12 This definition was expanded by the *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1[9], commenced 3 December 2016.

13 In none of the cases examined for this study was a woman a primary “domestic violence abuser” during a relationship that led to either a male or female killing a current or former intimate partner.

14 S Kiefel, “On being a judge”, paper presented at The Chinese University of Hong Kong, 15 January 2013 at www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefel/kiefel-2013-01-15.pdf, accessed 16 June 2017.

15 *ibid* p 4.

16 M Gleeson, “Public confidence in the judiciary”, paper presented at the Judicial Conference of Australia, Launceston, 27 April 2002, at www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_jca.htm, accessed 16 June 2017, p 1.

17 E Clark, “The construction of homosexuality in New Zealand judicial writing” (2006) 37 *Victoria University of Wellington Law Review* 199 at 199.

18 M Minow, “Words and the door to the land of change: law, language, and family violence” (1990) 43 *Vand L Rev* 1665 at 1668.

19 *ibid* at 1673–1674.

20 S Cusack, “Eliminating judicial stereotyping: equal access to justice for women in gender-based violence cases”, submitted to the *Office of the High Commissioner for Human Rights*, 9 June 2014, p 18.

As such, judicial officers by virtue of their role are placed in the important, yet unenviable, position of adjudicating conflicting and adversarial narratives. In arriving at their decisions, judges can utilise discursive and linguistic strategies to respond effectively to domestic violence.

In this study we have reviewed all available remarks on sentence for each domestic violence related homicide that has been finalised by way of conviction in NSW since July 2000. This article outlines some of our preliminary findings, and identifies some key messages and promising practices for judges in providing sentencing remarks in serious or fatal cases, and for all judicial officers making decisions about domestic violence.

Findings

Encouraging perpetrator accountability

As domestic violence was historically conceived of as a private issue, within the family, in many ways violence against intimate partners or family members was considered a male's proprietary right over his wife and children. When domestic violence was eventually recognised as being socially unacceptable, it was frequently dismissed as a manifestation of poor anger management or the pathology of the individual offender.²¹ Second-wave feminist activism from the 1970s onwards sought to challenge this individualised explanation however, drawing attention to the relationship between control and possessory attitudes, misogyny and patriarchy, and domestic violence, and identifying that domestic violence was both a consequence and reflection of a system of inequality privileging men, and subordinating women.²² Rather than "losing control", the actions of men who used violence needed to be reframed as attempts to maintain control (the men believed violence was the mechanism by which to restore their "rights"). Similarly, rather than being "jealous", the language concerning men who used violence needed to be reframed in terms of the individual's belief that they had lost possession or control over their partner.

A good example of a judge holding a perpetrator accountable is found in *R v Hosseiniamraei*²³ in which RA Hulme JA states:

He killed his estranged wife in the most callous and brutal circumstances and in the context of a history of physical violence and threats to kill her. He was not deterred by being subject to an ADVO. His attempt to justify his actions by blaming Ms Alavi for her disobedience of the "rule of marriage" which he said he "could not tolerate" discloses a breathtakingly arrogant and misogynistic attitude towards the right of his wife to choose her own destiny.

This statement arose in the context of assessing the offender's moral culpability for murdering his estranged wife. The judge acknowledges but clearly rejects the offender's explanation for his conduct. In denouncing the crime, his Honour states that:²⁴

The Courts must consistently denounce crimes of serious violence such as this in no uncertain terms. Those who feel that they are entitled to take advantage of a position of power and dominance in an intimate relationship must know that violence fuelled by anger, jealousy, feelings of being dishonoured, revenge or the like will be severely punished.

While these two passages acknowledge the offender's explanations for his actions, they reinforce the unacceptability of these explanations as well as the unacceptability of his attitudes towards his estranged wife and his expectations of her behaviour.

However, in some remarks on sentence reviewed in the course of this study, it is clear that language describing domestic violence as a "loss of control" persists (and indeed is invited by the criminal justice system's approach to assessing culpability). For instance, the judge will often describe that an offender "lost his temper" or "snapped" when there was no evidence of pre-planning, or that he was motivated by "jealousy" or "anger" when he killed the victim. The challenge inherent in using this kind of language is that these terms attempt to explain and provide reasons for the offender's behaviour which invariably attribute partial or total blame to something that the victim did (or that the perpetrator perceived the victim did), rather than holding the perpetrator accountable for his actions. These discursive strategies when used by the perpetrator or defence appear designed to ameliorate the perpetrator's responsibility for the crime, and are then reinforced by the court's acceptance and replication of an offender's explanations. These findings echoed those found in other jurisdictions.²⁵

This issue regularly arose across cases examined in this study. For instance, in a number of cases, the female victim had left the offender and started a new relationship, or alternatively was having a secondary covert relationship. In these cases the male offender typically killed either the woman or her new partner. Often such responses were attributed to the perpetrator's "jealousy" or "rage", but rarely was this explanation questioned or reframed to combat some of the damaging stereotypes this explanation would suggest in regard to the female victim (the gendered expectation that a woman remain chaste, faithful and controlled, or that she remain with her partner notwithstanding his behaviours). In failing to correct stereotyped moral judgments about the victim's conduct, some remarks on sentence reinforced stereotyped understandings about the ways in which

21 C Ashcraft, "Naming knowledge: a language for reconstructing domestic violence and systemic gender inequity" (2000) 23 *Women and Language* 3 at 4.

22 *ibid.*

23 [2016] NSWSC 1181 at [52].

24 *ibid* at [58].

25 Domestic Violence Resource Centre, *Out of character? Legal responses to intimate partner homicides by men in Victoria 2005–2014*, 2016, p 65; Ch 9, at www.dvrcv.org.au/sites/default/files/out_of_character_dvrcv.pdf, accessed 16 June 2017.

women should behave through language that was subsequently restated in media reports concerning those women's deaths.

While it is acknowledged that the offender might have subjectively "felt jealous" or may describe that he "snapped", judges can combat instances of rhetoric by reinforcing that violence against women is unacceptable, and the inadequacy or unacceptability of the male offender's explanations. Judges can also reject dangerous statements such as that drugs or alcohol use "cause" domestic violence homicides.²⁶

Avoiding mutualising language

Another challenge that arises in the sentencing remarks we examined in this study is that judges often accept and use "mutualising discourses" or language that removes agency from domestic violence victims and abusers, attributing violence "to a relationship" rather than to an actor. This accords with findings from studies in other jurisdictions.²⁷ For instance, terms such as "violent relationship", "stormy relationship", "turbulent relationship", "volatile relationship" or "rocky relationship" are often used inappropriately to describe relationships where there is a clear victim and an abuser. The effect of this is that the violence is never appropriately or clearly articulated and the victim is blamed for remaining with the abuser. This also has a flow on effect in terms of the way society discusses domestic violence and condemns all women who do not leave.

It is acknowledged that many of these mutualising discourses have their genesis in earlier aspects of criminal justice processes and terms such as "volatile relationship" often form part of the agreed statement of facts. However, judges can avoid replicating these terms and instead distinguish between the behaviours of victims and abusers, so as to avoid mutualisation. A number of judgments in this study avoided making sweeping statements about the quality of relationships, and instead focused on describing the offender and victim's behaviours where relevant. In adopting this approach, judges avoided both making a value judgement about "how violent" an offender was in circumstances other than those relating to the charge, and also avoided being in the position where, in the absence of evidence of "violence", they would describe a relationship as being "happy".

Avoiding stereotypes

Another common issue identified in this study was that judges would occasionally comment on why women remained with or returned to abusers, or would attempt to interpolate how serious the violence was prior to the

homicide, based on unrelated characteristics of the case. For instance, in one case a judge suggested that because a victim and abuser had another child after a police-reported episode of violence, the violence must have either diminished, or not have been "too bad". This was despite the fact that the abuser had subsequently killed that victim. Similarly, in another case a judge infantilised the victim, indicating that she may have been too "young" or "inexperienced" to appreciate the danger posed to her by her abusive partner, and suggesting that perhaps if she "knew better" she would have ended that relationship prior to her death.

These portrayals reinforce stereotypes about how abuse victims should behave and attribute responsibility to the victim for their death. Commentary around retaliatory violence, substance misuse issues and other characteristics also shapes ideas of what a proper, or "benchmark" victim looks like, and reinforces stereotypes around how "proper victims" should behave. A common question raised in relation to domestic violence is "why didn't she leave?", a question which ignores issues of power and control central to domestic violence, and a question which also ignores that leaving an abuser is a highly dangerous time for women. Our data show that almost two-thirds of women killed in the context of domestic violence are killed by a former intimate partner or were in the process of separating from an abusive partner.²⁸

Rather than focusing on explaining or judging the victim's conduct or how the domestic violence victim behaved, the most effective judgments are those that profile the victim's experience and reflect the value of their life, but do not judge her behaviours in remaining with the perpetrator/using substances/engaging in behaviours that may be perceived as "immoral". Those judgments that focus on condemning the behaviour of the abuser and recognising the centrality of power and control in these cases more effectively respond to domestic violence.

Recognising that domestic violence is more than physical violence

Another common issue in sentencing remarks reviewed in this study was the conflation of physical violence with domestic violence. This was a finding similarly echoed in other jurisdictions.²⁹ Domestic violence is brought within the purview of the law primarily in terms of prosecuting physical manifestations of abuse (such as punching, hitting and strangling) and conceived of as "incidents" rather than as episodes of violence within a pattern of controlling behaviours.³⁰ This is despite the *Family Law Act* and CDPV definitions. In society, more

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26 This was another finding in our study, echoed in the work of other jurisdictions see: Domestic Violence Resource Centre, *ibid*, p 65.

27 *ibid* p 67.

28 NSW Domestic Violence Death Review Team, *Annual Report 2013–2015*, 2015, p 5, at www.coroners.justice.nsw.gov.au/Documents/DVDRT_2015_Final_30102015.pdf, accessed 3/6/2017.

29 Domestic Violence Resource Centre, above n 25 at p 63.

30 D Wilson, R Smith, J Tolmie and I de Haan, "Becoming better helpers: rethinking language to move beyond simplistic responses to women experiencing intimate partner violence" (2015) 11(1) *Police Quarterly* 25 at 27. Although, note that s 9(3)(d) of the CDPV Act expressly recognises the centrality of the exploitation of power imbalances in domestic violence: s 9(3)(d).