

# **The Justice System's Endorsement of Mental Health Assessors' Sexism and Other Biases: Charter Issues and Other Forms of Injustice**

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Mirroring our society in general, the mental health system has been shown to be rife with sexism, racism, classism, ageism, able-ism, and other forms of bias.<sup>1</sup> It is not unusual for the various major societal institutions and systems to echo and reinforce each other's biases; by definition, however, the "justice" system is supposed to be free from bias or, at the very least, to be exquisitely aware of biases and imbalances so that they can be overcome. Although not all mental health professionals are dangerously biased and not all lawyers and judges are insensitive to their own and other people's biases, unfortunately, distressingly often, members of the justice system accept and codify these biases and issue formal decrees that perpetuate them.

In Martin and Mahoney's pioneering book on bias, *Equality and Judicial Neutrality*, the authors point out that "[t]he existence of non-neutral judicial behaviour conflicts with the common belief that judges are completely objective, disinterested, and impartial in all cases."<sup>2</sup> They note further that this "exaggerated perception of constant judicial neutrality" has "helped prevent a close examination of some important issues."<sup>3</sup> Their concern is further described as follows:

*The fact that judicial attitudes toward equality issues have rarely been scrutinized for discriminatory practices and conduct is evidence of the pervasive hold of this idea. Unquestioning acceptance of judicial neutrality limits the kind and scope of questions that should be asked about judicial use of societally induced assumptions and untested beliefs [...]. Rarely is a judgment or group of judgments criticized for the conception of society and the stereotypic treatment of individuals they may contain.*<sup>4</sup>

This is precisely the kind of issue I want to address here.

I ask you to consider from two perspectives the issues I shall present. One is the familiar perspective that the administration of justice ought to include various safeguards aimed at reducing judicial biases. The other perspective I want to suggest is that judicial bias is a contravention of the *Canadian Charter of Rights and Freedoms*.<sup>5</sup> In preparing this paper, I learned from consultations with members of the judicial and legal community that some of them regard the *Charter's* provisions as applicable to legislation but not directly to the justice system. Other members of the judicial and legal community do not agree, and as one who is neither a lawyer nor a judge, I share the view that the *Charter's* provisions ought

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1. Women and Mental Health Committee, *Women and Mental Health in Canada: Strategies for Change* (Toronto: Canadian Mental Health Association, 1987); N. Gerrard, *Racism and Sexism in Mental Health Systems: The Voices of Women of Colour* (Doctoral Dissertation, University of Toronto, 1990) [unpublished]; A.B. Hollingshead & F.C. Redlich, *Social Class and Mental Illness: A Community Study* (New York: Wiley, 1958); R. Butler, *Why Survive? Being Old in America* (New York: Harper & Row, 1975); M. Fine & A. Asch, *Women with Disabilities* (Philadelphia: Temple University Press, 1988).
  2. S. L. Martin & K. E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) at iv-v.
  3. *Ibid.* at v.
  4. *Ibid.*
  5. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter* or *Charter of Rights*].

properly to apply to the judicial system. I suggest that judicial bias is incompatible with the *Charter* in three important ways:

*Section 15(1) provides that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."*

*Perhaps more indirectly, the importance of a bias-free justice system is surely implicit in Section 24(1), "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." If one's recourse in the face of biased treatment is to the justice system, then clearly that justice system itself would need to be unbiased in order to be able to redress the wrong.*

*Section 7 provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."*

There is a *Charter of Rights* issue when the justice system, rather than guarding against bias, helps to perpetuate it. I shall focus in this paper on sexism in particular, though not exclusively, and on *Charter* issues in particular though not exclusively; however, it should be noted that other prejudices are jointly reinforced by the justice and mental health systems in similar ways. As noted in the Martin and Mahoney book:

*Non-neutral or biased judicial behaviour includes [...] cases where stereotypes are improperly allowed to influence decision making. It extends to such practices as viewing issues solely from the dominant perspective and failing to acknowledge alternative views; failing to contextualize equality by ignoring actual inequalities and the real life experience of disadvantaged groups [...] and failing to measure, or measuring and underestimating, the effect judicial decisions have on the litigants and society. Unless judges acknowledge the importance of variability of perspective, context, contingency and change, certain traditional social and legal limitations will be maintained as barriers to equality.<sup>6</sup>*

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6. *Supra* note 2 at iv.

## I. BIAS IN THE JUSTICE SYSTEM: A COMPOSITE CASE

To illustrate briefly some of the common manifestations of this joint reinforcement of bias, while protecting the identities of the people involved in some of these cases, I shall present parts of a composite case. I make no attempt to present an entire case but only those aspects on which my discussion will be focussed. It is crucial to realize that, although this is a composite case, the number and the seriousness of instances of bias are not unusual in actual cases. And every instance of bias that is included in the composite case, has characterized numerous cases I personally have observed.

Mary and John Smith, married to each other for eight years, get a divorce. A battle for custody of their three children ensues. Trying to resolve the dispute without going to court, Mary and John enter into mediation with Mr. Brooks, a social worker noted for his long experience as a mediator. In the course of the mediation, Mr. Brooks accedes to John Smith's request for a private meeting with him and improperly fails to disclose this to Mary. Shortly thereafter, John takes Mary to court on an emergency basis, claiming that for the sake of the children's mental health, they must immediately come to live with him. The court refuses his request. Months later, John refers in a conversation with Mary to the private meeting he had had with Mr. Brooks. Mary confronts Mr. Brooks, who calmly admits to having had that meeting and having failed to disclose that fact to her. Mary points out that in doing so he broke important rules about the conduct of mediation, and she asks what he had said to her ex-husband in that session. Mr. Brooks replies, "I told him that you were feeling extremely vulnerable just now, and I didn't think it would be a good time for him to take you to court." It emerges that Mr. Brooks felt he was being chivalrous, trying to protect Mary at a vulnerable time. In his eagerness to be gallant, he did not stop to consider what effect the information about her vulnerability was likely to have on a husband who had been repeatedly psychologically abusive toward her. Mr. Brooks expresses surprise that John had used the information to drag Mary immediately into court.

The mediation breaks down, and the court orders an assessment on the custody matter. The wife's lawyer, Ms Reed, refuses to agree to any mental health professional the husband's lawyer suggested, and so the judge instructs the two lawyers to come up immediately with a name acceptable to both. Ms Reed suggests a well-known psychiatrist, Dr. Mendel. The husband's lawyer agrees, although he knows little about the psychiatrist, because he fears appearing to the judge to be obstructive. During the last week of the months-long assessment, John Smith learns at a cocktail party that Ms Reed had attended high school and university with Dr. Mendel, and that a large proportion of the psychiatrist's child custody referrals had for many years come from Ms Reed. He also learns that Ms Reed and Dr. Mendel regularly lead workshops together on child custody. No one had disclosed this information to John Smith. John's lawyer had not been aware of it, but, when told about it, advises John not to bring the matter up, because the assessment "might go in his favour." After the months of agonizing participation in the assessment, all parties are anxious to have it completed and the matter resolved, especially because the children are suffering greatly from the strain.

When the case goes to court, John Smith's lawyer points out the conflict of interest between Dr. Mendel and Ms Reed. The judge listens carefully but pronounces it irrelevant,

on the grounds that Dr. Mendel has had a great deal of experience in child custody matters. During the hearing, Ms Reed had Mary Smith testify about her ex-husband's extreme psychological abusiveness toward her, much of which had been witnessed by the children and by third parties who testify to that fact. John's lawyer calls in an expert witness, a psychologist who "explains" that Mary has an unconscious need to be humiliated, and that was why she chose to marry John. John claims that the abusive incidents never occurred.

In his decision, the judge finds that John lied about not having behaved abusively, but he also finds that the abusive treatment of Mary in front of the children is irrelevant to John's ability to be a custodial parent and that, in any case, Mary has brought the abuse on herself. He awards custody of the children to John. Mary files an appeal, but for reasons beyond her control, 18 months pass before it is heard. The appeals court agrees to consider statements from Mary and from John, in which each gives an opinion about how John's custody is working out. Mary says it has been damaging to the children, and John says it has not. The appeals court finds that the lower court erred in accepting Dr. Mendel's testimony and says it should have awarded custody to the mother. However, they accept John's claim that the children are doing well, and they leave custody with him, saying that children who are functioning well should not be moved.

## II. BIAS IN MENTAL HEALTH ASSESSORS' EVIDENCE

As research has shown,<sup>7</sup> the people who conduct child custody assessments are plagued with biases just as most human beings are, but these biases and their possible conflicts of interest are all too rarely disclosed and discussed before assessments begin. This is especially important because in Toronto more than in many districts, judges virtually always accept the assessors' recommendations, and in most districts, the recommendations at least are highly regarded.<sup>8</sup> But too often, parents and children who are the subjects of these enormously stressful child custody assessments are simply not able to give informed consent for a given assessor to do the work, because many assessors do not disclose their biases, beliefs, or tendencies to prospective clients; still worse, most prospective clients do not even know that they are ignorant of a great deal of relevant information.

No central registry or regulating body exists for these assessors, and — with the striking exception of the Ontario Board of Examiners in Psychology — the other discipline bodies are plagued by egregious irregularities and problems in their rules of procedure and in their actual functioning. The same is true for the Law Society of Upper Canada, which shares with the Ontario College of Physicians and Surgeons and the Ontario College of Certified Social Workers the practices of:

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7. P. J. Caplan & J. Wilson, "Assessing the Child Custody Assessors" (Paper presented at Assessing the Assessors' Education Day, Law Society of Upper Canada, Toronto, December 1989) [submitted for publication].
  8. P. Tobin, *Clinical Recommendations in Child Custody Disputes: An Analysis of Sex-Related Factors in the Decision Making Process* (Doctoral Dissertation, University of Toronto, 1990) [unpublished].

- (a) not necessarily ensuring that parties filing complaints are given a chance to see the response (or even a summary of the arguments) of the defendant;
- (b) failing to ensure that their investigators or complaints committees actually address the issues specified in the complaints when dismissing them.

This often leaves the consumers of mental health services in a justice system context with only the illusion of, but no truly effective, recourse when faced with conflicts of interest or unprofessional or unethical conduct.

### III. CHARTER ISSUES RELATED TO BIAS

The field of human behaviour has produced two types of theories. What I shall call Type A theories are those that are supported by some evidence and, often, by common sense. Type B theories are generally unsupported by firm evidence, often counterintuitive, and more likely than Type A theories to be riddled with bias and subjectivity that rush into the vacuum created by absence of evidence. In any given case, mental health professionals have a choice of theories to use in supporting their conclusions and recommendations. When such expert witnesses choose Type B theories — such as the sexist myth that abused women enjoy suffering and bring it on themselves<sup>9</sup> — and when judges cite such testimony as a basis for judicial decisions, surely that is incompatible with the *Charter*. Remember, too, that this issue applies not only to child custody cases but also to rape and woman-battering cases in which mental health "expert" testimony is called for the purpose of exploring the victim's "motives."

A similar, fashionable practice, is for the ex-husband's lawyer in child custody cases, to claim that an ex-wife who reports her ex-husband's sexual abuse of their child is lying because she suffers from a psychiatric syndrome called "Munchausen's syndrome by proxy". This alleged syndrome is in fact a deeply sexist way of saying that the woman has a need (often claimed to be unconscious, so that her denials are dismissed as irrelevant) to believe that something terrible is happening to her child. In fact, the widely used handbook of psychiatric diagnosis, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM),<sup>10</sup> is so riddled with sexist bias that a complaint is currently being prepared for submission to the American Psychiatric Association's ethics committee. The DSM, for instance, includes a way to categorize women claiming to be victims of violence as psychiatrically disturbed, but does not have a formal category for the people, usually male, who inflict violence. Yet, too many mental health professionals, lawyers and judges are unaware of gross distortions in mental health diagnosis, practice, and research.

In our composite case, it is surely incompatible with the *Charter* for the appeals court to have refused to reverse the lower court's erroneous decision. Why is that a *Charter* issue? Because — and this comes directly from an actual, Ontario case — one of the findings had been that the husband has been known to lie, the lower court's decision was declared to

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9. P. J. Caplan, *The Myth of Women's Masochism* (New York: Signet, 1987).

10. American Psychiatric Association, 1987.

be in error, the only new evidence was a letter from the father and a letter from the mother, and the Court chose to accept the word of the father although he had been found to be an unreliable reporter. This would seem to be clear evidence that the decision was based upon a sexist presumption: that the father's word should be taken over the mother's, no matter what.

#### **IV. BIAS IN THE COURT SYSTEM**

What can the courts do about these problems? It is essential that they actively seek to learn about the possibilities and the limitations of material that comes from the mental health fields. Books, articles, and lectures are available about these issues, and they could easily be obtained. In fact, this endeavour needs to be major in scope and a top priority for members of the justice system.

Lawyers and judges have a reputation for being healthily skeptical, but it is astonishing how wholeheartedly many of them swallow some mental health professionals' claims to know the truth. I have observed that some do so because they long for solutions to complex human problems that they don't feel able to solve, and they genuinely believe that mental health professionals know the "right thing" to do; others, realizing that mental health professionals do *not* have a direct line to the truth, nevertheless use what the mental health professionals produce to further their own case as though it were the truth. The former are well-intentioned but alarmingly naive. The latter present a case of the arrogant leading the arrogant. Both are inexcusable and dangerous. And both are hard to stop because the biases in which they are awash are biases that flood our entire culture.

Bias in the Canadian courts is supposed to be prevented by the *Charter of Rights*. But there is no way that prevention of bias can be put into practice until those in the justice system understand the substantial limitations of psychiatric, psychological, and social work assessments and of mental health research. And prevention cannot be put into practice until those in the justice system take a courageous, thoroughly honest look at how their own biases tend to increase their willingness to use the court to legitimize those mental health workers' biases that echo their own and those of society at large.

#### **CONCLUSION**

When this paper was presented at the Canadian Institute for the Administration of Justice conference on "Health Care, Ethics and Law" in October, 1990, in the discussion that followed, judges and academics expressed dismay and perplexity. The essence of their concern was, "If judges cannot rely on mental health professionals as reliable witnesses, how *will* judges make their decisions?" This concern seems to me to reflect the unhealthy degree to which many judges and law school academics have come to rely too unquestioningly on such testimony.