

**RH V DE: A FEMINIST MINORITY JUDGMENT ON ADULTERY**

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I  **INTRODUCTION: ADULTERY AND THE FEMINIST JUDGMENTS PROJECTS**

The common law action against a third party who had committed adultery with a spouse has long been regarded as a legal peculiarity. Its presence in our law was awkward, and out of step with the legal positions in other countries. The Supreme Court of Appeal (SCA) judgment in *RH v DE*1 abolishing the actions for contumelia2 and loss of consortium3 on the basis of adultery therefore elicited great public and legal interest.

The history of the action for adultery is more fully discussed in the SCA judgment.4 Briefly, adultery led to criminal sanctions in Roman law and a civil action based in delict in the Roman Dutch law. In 1914 the criminal sanctions for adultery were abandoned in South African law, but the civil action was confirmed and formed part of South African law since the late 1800s. Initially the civil action was only available for husbands against men who had committed adultery with their wives. In 1950 the action was also made available to wives, who could then sue third parties who committed adultery with their spouses. However, the civil action was not available against the adulterous spouse, against whom the only legal remedy was divorce and certain punitive financial consequences upon divorce. In 2009 the High Court in *Wiese v Moolman*5 was called upon to decide whether the action still formed part of South African law in the democratic, constitutional era. The court held that the common law action for adultery should be retained in our law.

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1 2014 (6) SA 436 (SCA).
2 Contumelia is insulting behaviour which infringes upon a plaintiff’s dignity and which could lead to an action for damages in delict (tort).
3 This is the reciprocal bundle of rights, duties and privileges which spouses attain upon marriage and includes affection, companionship, sexual intercourse and a joint household.
4 Paras 16, 19–24. See also para 8 of the ‘judgment’ in this note.
5 2009 (3) SA 122 (T) (*Wiese*).
The SCA in *RH v DE* provided solid policy arguments for reversing the *Wiese* decision. On the whole the logic and pragmatism of these arguments are strong, though possibly subject to disagreement. In the past the criminal sanctions for adultery and the need to prove fault in order to obtain a divorce led to such absurd and unjust situations that the impulse entirely to rid our law of this anachronistic and outmoded phenomenon is understandable. Nevertheless, the judgment left me with a sense that the gendered issues underlying adultery had not been considered in sufficient depth by the SCA.

Despite the court’s acknowledgment of the sexist origins of the actions for adultery and its sympathy for the indignities to which the adulterous wife was subjected in the court a quo, I felt that the legal regulation of adultery called for a more overtly feminist judgment. A simplistic, gender-neutral abolition of the action for iniuria based on adultery fails to address the extent to which the legal rules and discourses on sex and sexuality simultaneously reflect and produce deeply gendered sexual subjectivities. Adultery never has been, and in our society still is not, a gender-neutral transgression and it has different consequences for women and men. I was therefore frustrated by the court’s failure to subject the legal rules dealing with adultery to a thoroughly gendered examination.

Family law contains many archaic common law rules and in the face of legislative inertia, the SCA has been proactive in changing the law in the past five years. For instance, its recent expansion of universal partnerships in order to alleviate the iniquitous position of unmarried opposite sex cohabitants was admirable and timely. However, two problematic features of the SCA jurisprudence on family law are the preference for predominantly common law reasoning and their concomitant reluctance to engage fully with the interaction between the common law rules dealing with family and the fundamental rights in the Bill of Rights. In particular, the SCA judgments, although advancing gender equality in many respects, fail to acknowledge the impact of existing rules on gender equality. It seems as if the SCA prefers to leave the issue of gender equality to the Constitutional Court, rather than engaging in its own analysis of gender. This results in legal developments which are too often formally rather than substantively equal and judgments which rely on the simple mechanism of gender neutrality in contexts where women and men are differently situated. It also means that major developments of the common law, which need not be confirmed by the Constitutional Court, tend to lack a proper gender perspective.

In a constitutional context which demands gender equality, all judges should as a matter of course commit themselves to furthering substantive equality on

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6 The action iniuriarum is an action in delict (tort) by which a plaintiff seeks compensation for an infringement of her or his personality rights such as dignity, reputation or feelings. See also the discussion from para 18 of the judgment.

7 See for instance *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA); *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA); *Butters v Mncora* 2012 (4) SA 1 (SCA).

the basis of gender, and on other grounds like race, sexual orientation and so forth. Failure to do so could be regarded as a failure to apply the law of the country fully and correctly.\textsuperscript{9} Constitutional norms of equality and non-discrimination should therefore also permeate those judgments which develop the common law.\textsuperscript{10} This is particularly apposite in family law cases in which gender is routinely implicated. The gendered elements of a case dealing with tax, company law or contract may be less obvious, while family law concerns itself with the roles, duties and rights of husbands and wives, of mothers and fathers. The profoundly gendered nature of these roles and expectations form such an integral and ‘natural’ part of our social fabric and our thought patterns that that they become invisible to us and resistant to critique. These naturalised gender roles and expectations form the very foundation of many legal rules like the maternal preference, actions for seduction and so forth. For this reason I believe that all family law cases should be approached in a manner that is mindful of their potential for reinforcing pervasive social and legal structures of gender inequality and that is committed to countering sexist stereotypes.

I could have raised these concerns by way of the usual academic criticism of the judgment, but I’ve done that many times before. Instead I presumptuously decided to pretend to be a judge on the SCA and in that capacity to ‘ghost write’ a feminist judgment in the case. Of course, this is a very fanciful thing to do. However, feminists have been doing exactly this in Canada, the United Kingdom and Australia. In 2004 a group of Canadian feminists, in reaction to the declining numbers of innovative, gender-sensitive judgments by the Canadian Supreme Court, devised the ‘Women’s Court of Canada Judgment Project’ aiming to re-write well known Canadian Charter judgments on the right to equality as feminist judgments.\textsuperscript{11} The UK-based ‘Feminist Judgments Project’ next took up the challenge in relation to English law.\textsuperscript{12} Unlike the Canadian judgments this project deals with a wide array of legal topics, spanning the law relating to parenting, property, crime and evidence, public law and equality. The \textit{Australian Feminist Judgments: Righting and Reviewing Law} was published in 2014.\textsuperscript{13} In this article I will attempt to produce a feminist judgment on adultery in South African law.

Writing alternative feminist judgments is not meant as a parody of the existing judgments. Instead, it blends, in equal measure, the idealism to

\begin{itemize}
  \item \textsuperscript{9} See the argument by N Friedman ‘The South African Common Law and the Constitution: Revising Horizontality’ (2014) 30 \textit{SAJHR} 63, 77 that s 39(2) requires this.
  \item \textsuperscript{10} See for instance D Bhana ‘The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution’ (2013) 29 \textit{SAJHR} 351.
  \item \textsuperscript{11} D Majury ‘Introducing the Women’s Court of Canada’ (2006) 18 \textit{CJWL} 1, 1–2. See also J Balkin (ed) \textit{What Brown v Board of Education Should have Said: The Nation’s Top Legal Experts Rewrite America’s Landmark Civil Rights Decision} (2002); J Balkin (ed) \textit{What Roe v Wade Should have Said: The Nation’s Top Legal Experts Rewrite America’s Most Controversial Decision} (2005) for further examples of re-writing key judgments in the United States context.
  \item \textsuperscript{12} See R Hunter, C McGlynn & E Rackley (eds) \textit{Feminist Judgments: From Theory to Practice} (2010).
  \item \textsuperscript{13} H Douglas, F Bartlett, T Luker & R Hunter (eds) (2014). 
\end{itemize}
produce ‘a legal decision that reflect[ed] our best hopes for equality’ and an attempt at a realistic use of the existing processes and forms to generate a plausible alternative framing of the issues and a plausible alternative mode of reasoning. The authors of these judgments wish to illustrate that the court seized of the matter could have come to a different conclusion or used a different form of reasoning even within the existing legal paradigms and to highlight the opportunities to make more progressive decisions. Feminist judgments are therefore a particular kind of legal critique which subvert the idea (long discredited in academic thinking, but perhaps still prevalent in some circles) of judgments as objective, neutral applications of pre-existing legal norms. Feminist judgments are also acts of imagination and optimism about the potential for social change flowing from judicial commitments to the constitutional equality guarantees. We are fortunate to have had several such judgments, which I shall try modestly to emulate.

My focus in this note is on two themes which are insufficiently emphasised in the real judgment. First, I address the double standards which apply to male and female extra-marital sexuality and the manifestation of these double standards in treatment of the adulterous wife in the trial court. I argue that the treatment of the adulterous wife by various legal actors in the trial court reflected the same stereotypical views of appropriate female and male sexual behaviour which are generally found in society. Although the SCA strongly censured the general victimisation of the adulterous wife, I suggest that they failed to acknowledge the way in which this victimisation reflected particularly gendered stereotypes and norms. In this way the legal system, comprised by both courts, is complicit both in creating and upholding, or at least failing to identify and challenge deeply sexist norms of appropriate male and female behaviour.

The second area of focus is the common law consortium omnis vitae. My first task in this area is to argue that the consortium is protected by public policy via the constitutionally protected rights to dignity and privacy, as illustrated by the existing Constitutional Court jurisprudence. I then argue that, if protection of the consortium is indeed mandated by public policy, then the concept must itself be transformed in the light of constitutional rights and values, specifically the right to equality. Such a transformation would, I contend, require first

14 Majury (note 11 above) 6.
16 Hunter et al (ibid) 5.
18 For instance the judgments by O’Regan J in Brink v Kitshoff NO 1996 (4) SA 197 (CC) and Harksen v Lane NO 1998 (1) SA 300 (CC); Mokgoro J in Bannatyne v Bannatyne 2003 (2) SA 363 (CC) and Volks NO v Robinson 2005 (5) BCLR 446 (CC); Sachs J in S v Baloyi 2000 (2) SA 425 (CC) and Volks NO v Robinson; Langa DCJ in Bhe v Magistrate Khayelitsha 2005 (1) SA 580 (CC).
that the scope of the consortium be extended from marriage to cover hitherto unprotected relationships like opposite sex cohabitation. This broadening of the consortium has already been initiated by the jurisprudence which held that unmarried same-sex couples could establish a consortium. In addition to extending the range of relationships in which it is recognised, the content of the consortium should also be normatively reconfigured from the traditional patriarchal right to control wives and children towards a respectful, gender-equal relationship which both values women’s traditional contributions, and allows them to undertake non-traditional family roles. The whole train of this reasoning is not relevant to this particular case, and so I have tried to limit my discussion of the consortium in the judgment. However, re-developing the consortium towards gender equality is the ultimate aim of the note.

Obviously mine is not ‘the’ feminist judgment, since feminists hold different opinions and sometimes disagree fundamentally on the outcome of a particular case or issue. In fact, I am not entirely convinced that I really agree with the substance of my conclusion, which is that the action for adultery should be retained in certain limited cases. However, the point is that, as Deeksha Bhana argues, it is not sufficient for the content of common law rules to change in response to the Constitution. True commitment to transformation of the common law would also require a changed way of thinking and reasoning, different priorities and commitments, and other assumptions about the places of women, children and men in the world. Feminist reasoning is one such alternative. I will therefore try to incorporate the elements of a feminist judgment as identified by Rosemary Hunter: investigating the gendered dimensions of a particular case or legal rule, known as ‘asking the woman question’; paying particular attention to the experiences of women litigants and witnesses and taking their perspectives seriously; taking account of the particular social, cultural, economic and legal contexts within which legal rules operate rather than making ‘abstract’ judgments; and handing down judgments which promote substantive gender equality and improve women’s lives. It should be added that a feminist judgment does not and cannot always find for the female in a particular case. In this case, for instance, the woman was not a party to the case, but merely a witness. Nor does every aspect of the judgment need to make a feminist point, since feminist judges must engage with legal rules in a proper, legally acceptable manner. My judgment concurs with the SCA’s orders but dissents on the crucial issue of the abolition of the action for adultery. Moreover, the modes of reasoning and the long-term agendas insofar as the development of family law is concerned are discernibly different.

Hunter (note 17 above) 138.


II  THE FEMINIST MINORITY JUDGMENT

(a)  Gender discrimination and adultery

[1] This is a case about the legal manifestations of two aspects of patriarchy which continue to influence the lives and relationships of women – those middle class, educated, white women like the adulterous wife in this case, but actually women in all social, cultural and economic contexts. The first aspect is the double standards applying to male and female sexuality and the second, which flows from the first, is the extent to which society tolerates and even encourages male control over women in intimate relationships. It is therefore a case about gender discrimination and the law.

[2] While admitting the need to develop the common law in line with the fundamental rights in the Constitution and the influence of these rights on the concept of public policy, the majority judgment disposes of the legal issues on the basis that the common action for iniuria based on adultery has become outdated and finds ‘it unnecessary to consider the further contention … that the continued existence of the action is in conflict with our constitutional norms’.

[3] I am unfortunately unable to agree. The imperative for social and legal transformation to advance substantive gender equality and to protect human dignity is central to the constitutional project and integral to this judgment. Any legal development of the common law of adultery must therefore take account of the gendered contexts in which the legal rules and processes operate and be committed to the achievement of substantive, rather than formal gender equality.

[4] There are few more pervasive and persistent illustrations of the subordination of women in our society than the double standards which apply to female and male sexual behaviour. At different times these double standards have been reflected in the legal rules on sexual offences and in family law. Historically sexual transgressions of the wife or wife-to-be were visited with harsher legal consequences than those of the husband. For example, a husband had the choice to void a marriage if his wife was pregnant with another man’s child at the time of marriage (stuprum). Wives had no similar remedies where, at the time of marriage, another woman was pregnant with her husband’s child.

[5] In Roman law adultery constituted a crime which could be committed only by or with a married woman, but sex outside marriage did not constitute adultery for the husband, unless he had sex with someone else’s wife. Adultery by a woman constituted grounds for divorce in Roman and Roman-Dutch law, but a woman could not rely only on her husband’s extra-marital sexual activity

23  Para 17, referring to s 39(2) of the Constitution.
24  Para 18.
25  Para 40.
26  Constitution s 1(a), (b).
to obtain a divorce. In addition to being able to divorce adulterous wives, husbands had, at common law, legal remedies against the men with whom their wives had committed adultery. Until the 1950 decision in *Foulds v Smith* wives had no similar legal remedies against those who committed adultery with their husbands. The majority judgment in this case acknowledged that the law relating to adultery was based on a historical perception of the husband as owner of his wife’s body and, indeed, this formed one of the reasons for its abolition of the action for adultery. However, in my respectful opinion, acknowledging the sexist history of the action fails sufficiently to address the gendered consequences of the action for adultery in contemporary South Africa.

[6] As illustrated by the legal history, the double standard for extra-marital sexual behaviour sets stricter norms for women’s sexual conduct than that of men. In addition, it has two further implications for women. First, it reflects a deep suspicion and fear of female sexuality as being always possible, yet difficult to detect, and as having particularly dire consequences. In this view, women are always suspected of sexual impropriety and of lying about it. For this reason, female sexuality and, by extension women, must be constantly controlled lest they stray from the paths of sexual virtue. It is this very same fear of women’s unruly and uncontrollable sexuality which lies at the root of the cautionary rules in paternity and sexual assault cases.

[7] The second aspect of the sexual double standard relevant to this case is that women are classified in terms of what is commonly described as the Madonna/whore dichotomy, on the basis of their compliance or failure to comply with sexual norms. On the one hand, sexually irreproachable women either do not engage in sex at all (like virgins or ‘good’ widows), or they are good wives who are sexually faithful in ‘nurturing family relationships’. Their sexual virtue is regarded as an important indication of their moral pre-eminence and is respected and admired by society. On the other hand, promiscuous or adulterous women are seen as irredeemably tainted by their sexual activities. They are social and legal pariahs who have reduced their dignity and value as human beings by their sexual transgressions and they are stigmatised and treated with contempt. Both of these aspects of the sexual double standard are reflected in this case.

[8] Of course double standards for female and male sexual behaviour were justified by women’s capacity to bear children, but they persist, even after birth control and ‘sexual liberation’ and even though we are constitutionally
committed to gender equality. They persist in our law and in the legal treatment of adulterous wives, as illustrated in this case.

(b) The facts

[9] The respondent in this court (to whom I shall refer as the plaintiff, as he was in the court a quo) sued the appellant (to whom I shall refer as the defendant) for adultery with his then wife. The claim for R1,000,000 represented both contumelia and loss of consortium. The Gauteng North High Court awarded a combined amount of R75,000 and costs to the plaintiff.

[10] Despite not being a party to the case, the testimony and cross-examination of the former wife, to whom I shall refer as Ms H, formed the nub of the case. She had grown up and lived in Pretoria, an attractive and well-groomed young mother of two small children, with a white, Christian, Afrikaans-speaking middle-class background. She was raised with and adhered to traditional ideas of marriage and sexuality but nevertheless also worked outside of the home and earned a good salary, whilst continuing to take primary responsibility for her children. Her parents lived nearby and, in addition to regular social contact between the families, her mother also helped with the children when necessary. Ms H and the plaintiff met in high school when she was 15 years old and he was 16. He was from a similar religious and socio-cultural background and, from his testimony, appeared to hold similarly traditional views of marriage. Surviving a short break-up when the plaintiff was working in the United Kingdom, the relationship continued and culminated in marriage in 2005. Ms H met the defendant when she started work in a new company, in April 2009. In March 2010 the plaintiff moved out of the common home and the divorce summons was served in June 2010.

[11] The plaintiff and his former wife provided conflicting reasons for why their marriage had ended. The plaintiff submitted a large collection of family and holiday photographs as evidence that the couple had had a normal and happy marriage until the latter part of 2009 when his wife had started to hide things from him, stayed out late in the evenings, rejected his sexual advances and became secretive about her telephone calls and messages. According to the plaintiff the cause of the marital breakup was Ms H’s adulterous relationship with the defendant, which allegedly commenced in December 2009. The plaintiff also testified how, after leaving the common home, he had used the opportunities to visit the house in his wife’s absence to search the bathroom cabinet to discover that Ms H was still using birth control pills, and had downloaded emails showing affectionate correspondence with the defendant from her computer. He copied and showed this correspondence to her employers in an attempt to get them to stop the relationship. He displayed a certain pride in these actions as illustrations of his willingness to ‘fight for his marriage’.

34 Insulting behaviour which impairs the dignity of a plaintiff.
Ms H told of a different and less ideal marital experience. Her evidence was that she had been unhappy with the way in which the plaintiff controlled their finances, taking charge of her monthly salary and controlling what she could spend. She testified, and it was admitted by the plaintiff, that she asked to be allowed an account at Edgars for clothing and cosmetics, but was only permitted to spend R400 per month. She had tried to negotiate that R4,000 a month be allocated to her personal spending, but the plaintiff would not allow this. Plaintiff did not dispute this.

Another problem was that the plaintiff would demand sex without having behaved towards her in an affectionate way beforehand. She also gave evidence of two occasions on which he had ‘forced himself upon her’. Evidence by her mother confirmed that Ms H had told her about this and had been extremely upset as a result. Plaintiff also experienced sexual problems in the marriage, namely that he felt that he had insufficient sexual access to his wife because she had allowed one or both of the children to sleep in their bed. His complaint seems to have been that she prioritised the children over their sexual relationship. Ms H responded that she had to prioritise the needs of the toddler and the baby over those of her husband. Both agreed that Ms H was very upset about finding pornography on the plaintiff’s computer, but the plaintiff thought that an apology from him had disposed of this issue.

The third major problem according to Ms H was the plaintiff’s unwillingness to discuss problems which she raised in relation to the marriage. She testified, as confirmed by her mother, that the plaintiff would ignore her and other people when he was displeased instead of discussing his feelings with her. Finally, there was evidence, which was not disputed, of more than one occasion when she had felt ill during her last pregnancy. When asked to take her home or to hospital, the plaintiff had refused and said that she was feigning illness.

Before the plaintiff moved out of the common home in March 2010, Ms H had had three appointments with a marriage counsellor to discuss these issues. In addition, the divorce action was preceded by the granting of two interim domestic violence interdicts. However, both of these were discharged.

By the time the relationship between Ms H and the defendant turned from friendship to romance, therefore, the marriage was already in serious trouble. According to Ms H and the defendant, they only had sexual relations in July 2010, four months after the plaintiff had left the common home, but before the granting of the divorce. They admitted that they shared a bed on two occasions before that, but testified that they did not have sex at these times and that both occasions happened after March 2010.

(c) Treatment of Ms H in the court a quo

It must be emphasised that Ms H was not a party to the case. The undisputed evidence was also that she no longer had a romantic relationship with the defendant at the time of the trial. Nevertheless, the conflicting versions of what had caused the marriage to break down were crucial to the resolution
of the case. Because the case pivoted upon her sexual conduct during the marriage, she was subjected to cross-examination which far exceeded that of the plaintiff or the defendant in length and intensity.

[18] The majority judgment expresses the view that the judge in the court a quo ‘had considerable personal sympathy with the plaintiff and his plight while at the same time it found the conduct of the defendant and Ms H unpalatable’ (para 5). It finds that the court a quo erred in its assessment of the evidence in various respects (paras 5–10) and I agree fully with this view. However, I wish to examine the treatment of Ms H in the trial court in more depth.

[19] On numerous occasions during cross-examination counsel for the plaintiff addressed Ms H not as Mrs H, Mrs E or Ms H, but as ‘mevroutjie’. Literally translated, this is the diminutive of Mrs in Afrikaans, but in tone it is dismissive and condescending in a particularly gendered way. It implies that the person so addressed is immature or incompetent and needs the assistance of some other adult, like a husband. It is not common to refer to adult men as ‘meneertjie’ in a similar way. From the repeated use of this term in the court a quo, it seems that counsel for the plaintiff deliberately questioned the agency and dignity of the witness. Other remarks include ‘Mevroutjie kom ons kom nou bietjie terug na die realiteit toe’ and ‘O, nou raak Mevroutjie nors, laat ek dit maar doen’. The former remark suggests that Ms H’s testimony resides in the realms of fantasy and the latter that she is grumpy in a child-like manner. Combined with the use of ‘mevroutjie’ these remarks are deeply insulting and imply that Ms H is childish and irrational. Neither the witness, counsel for the defence nor the court objected to this form of address. It must be added that counsel for the plaintiff also referred to Ms H’s mother, as ‘mevroutjie’, but this occurred only once.

[20] Not only did the court a quo fail to protect the witness from sexist insult, it joined in the general male merriment at Ms H’s expense. In her evidence in chief, Ms H testified that, as a result of her religious beliefs, she did not want to have sex with her husband before they were married, but that he insisted. The phrase she used was: ‘Hy het gese mens moet ’n kar toetsbestuur voor jy hom koop.’ This means that before you buy a car, you should test-drive it. Unsophisticated and perhaps amusing though it may be to some, this in itself is demeaning to the witness, whether or not she realised it, because it depicted her as a mere (mechanical) object for the plaintiff’s sexual pleasure. The phrase could be interpreted to mean that both parties should test drive sex (the vehicle) together before they get married, but subsequent remarks make it clear that Ms H was seen as the vehicle, to be test-driven by her future husband.

[21] There was some cross examination on the question of whether or not Ms H had had sexual intercourse with her husband before the marriage. The metaphor of test-driving a car proved to be irresistible to the learned judge.

35 ‘Mevroutjie, can we return to reality?’ and ‘Oh, now Mevroutjie is becoming peevish! Let me do it then.’
When the witness proved reluctant to go into exact detail of whether sexual intercourse happened the judge assisted with the following clarification:

Kom ons maak dit baie meer verstaanbaar: hy het gesê jy kannie … jy koop nie ‘n kar as jy hom nie eers toetsbestuur het nie. Nou het hy bestuur of het hy nie bestuur nie?

[22] Later during her cross-examination, the issue arose of whether Ms H and the defendant had had sex when they shared a double bed. On the point of why Ms H had booked accommodation with only one bedroom, the judge interjected:

Dis veilig, hy is nie ‘n toetsbestuurder nie – Ekskuus tog. Ek sê, dit is dalk veilig, hy is nie’n toetsbestuurder niej. [Lag]

[23] At the risk of reading too much into this, I must add that the test-driving metaphor is particularly offensive because of the unspoken association with the word ‘ry’ (drive or ride) which is another term for driving a car, but which also suggests a particularly crude reference to sexual intercourse whereby it could be said of a man that he had driven or ridden a particular woman. I would suggest that these remarks are shockingly unbecoming to a judicial officer, both in connoting his obvious enjoyment of and participation in the humiliation of the witness and in the judge’s apparent inability to grasp the sexist implications of this kind of discourse.

[24] It is not, however, totally unexpected. Ms H had admitted to adultery and so transgressed the sexual norms applicable to good white Afrikaans Christian wives; she was irredeemably tainted thereby. The insulting and demeaning treatment to which she was subjected in the trial merely reiterated the sexual double standard to which I referred above. Clearly sexual double standards do not exist only outside of the law. The stigmatising and ritual public humiliation of ‘fallen women’ happen inside our courts and are perpetrated by members of the legal profession and by judges. Hopefully it is the exception rather than the rule, but even if it occurs very infrequently, the message is totally inexcusable. Jesse Elvin’s observation is apt:

a stereotype does not need to be widespread in order for it to be important if the person wielding it is in a position of power over others…

I shall therefore refer the behaviour of the judge to the attention of the Judicial Services Commission (JSC).

[25] The improper treatment of Ms H in the court a quo formed one of the motivations for the majority in this court to decide that the actio iniuriarum based on adultery should be abolished. The majority must be commended
for unequivocally censuring this treatment. However, I respectfully disagree with their failure to highlight the specifically gendered nature of this ill-treatment. When sexist double standards are perpetrated in courts, the judicial system becomes complicit in and tainted by the punitive treatment of less than absolutely chaste women. It reinforces the message that the legal system will provide no redress, and will not respect the dignity of ‘promiscuous’ women. How, under such circumstances, should ‘bad’ women, or indeed, any woman, trust the courts to provide justice when they are the complainants in sexual assaults? How are women to believe that they will not be demeaned and insulted when they appear as complainants or witnesses in cases involving sex and their sexual history dragged into court with obvious relish and ridicule? How are sex workers to trust the legal system to protect them from sometimes ‘respectable’ but abusive clients and policemen who extort sex from them? Public confidence in the legal system is enhanced when senior judges acknowledge the sexist nature of certain forms of behaviour, even as it reprimands it in the strongest terms.

**d)** The scope of the majority’s change to the common law

[26] The common law contains two distinct sets of claims against a third party who had committed adultery with a plaintiff’s spouse. One set of claims are less common, namely the actions for abduction, enticement or harbouring of a spouse and the remedy is compensation for the loss of the consortium of the spouse. The reason why they are not often encountered is because the plaintiff must prove a causal connection between the behaviour of the third party and the eventual loss of consortium and also that the third party had the intention to abduct, entice or harbour the other spouse. In this case neither of these claims was made and the majority judgment clearly states that it does not find that these actions have fallen into disuse.

[27] This case involves the other legal claim for adultery, the common law actio iniuriarum. According to Neethling’s Law of Personality, this claim gives rise to two categories of damages. First, the damages which compensate for the insult or contumelia; second the damages for the loss of the consortium omnis vitae. The latter, in turn, includes the loss of ‘comfort, society and services’ of the adulterous spouse, comprising, therefore a non-financial element relating to the loss of companionship together with a financial element for the patrimonial loss caused by the loss of the services of the spouse. The two categories of damages therefore overlap in that the compensation for the loss of consortium also represents non-material losses and there is some debate whether this is compensation for injured dignity or also for hurt feelings.

40 Gower v Killian 1977 (2) SA 393 (E); Smit v Arthur 1976 (3) SA 378 (A).


42 Neethling et al (ibid) 208–11. See also Carnelley (note 29 above) 191–92.

43 Neethling et al (ibid) 208 argues that it infringes the plaintiff’s feelings of piety and dignity and Carnelley (ibid) 192–93 agrees that the right to feelings can be incorporated into the right to human dignity.
[28] Neethling’s Law of Personality also refers to the possibility of a third claim based on adultery where the adultery caused patrimonial loss other than the loss of consortium, such as loss of support. This, according to the learned authors, should be claimable under the Lex Aquiliae.  

[29] The majority decision of this court explicitly limits its finding that adultery must no longer be regarded as wrongful to the actio iniuriarum for contumelia and the loss of consortium (para 41(a)). This means that the judgment applies to the most frequently used action for adultery and leaves intact only the seldom used old actions for harbouring, abduction and enticement and the possible claim for pecuniary loss under the Lex Aquilia. It also begs the question on which basis it could be argued that adultery remains wrongful for the purposes of these actions if it is no longer wrongful for the actio iniuriarum. The same policy arguments would apply to those actions.  

[30] The actio iniuriarum for adultery protects two categories of legal interests. The first, dealt with by the claim for contumelia, protects the dignity, reputation and feelings of the claimant. The second interest is the consortium omnis vitae which comprises both social and financial interests. The latter is usually phrased in terms of the husband’s right to his wife’s labour in the household and her assistance in his business ventures.  

[31] On the claim based on interference with the consortium omnis vitae the majority in this court found that, at the time when the defendant and the plaintiff’s wife first had sex, the plaintiff had already left the common home and the consortium had therefore already ceased (para 13). The court added that, at that time the marital relationship was already in trouble, as seen from the fact that the wife had consulted a marriage counsellor and had tried unsuccessfully to discuss her problems in the relationship with the plaintiff (para 8). The end of the consortium does not, however, mean that the plaintiff lost his claim for contumelia (para 15).  

[32] The reasons given by the majority for concluding that the actio iniuriarum for adultery should be abolished are weighty. They include: the legal anomaly that no action is available against the adulterous spouse who, after all, is the one who primarily owes the plaintiff a duty of sexual fidelity ( paras 29–32); the fact that legal actions against third parties who commit adultery with a spouse had been abolished in most other common law jurisdictions ( paras 21–28); that the social environment and the legal convictions of the community have changed to regard marital fidelity as a moral rather than a legal duty ( paras 17–18); the SCA’s recent limitation of the actio iniuriarum in cases of breach of promise and the resulting need to harmonise the rules (para 19); that the action is not an effective deterrent to adultery (para 34); and finally the history of the action as reflecting sexist views of wives as their husbands’ property (para 38); which provide opportunities for vengeful husbands to humiliate former wives in court (para 39). In its recognition of the gendered nature of the action for adultery the majority decision is to be
welcomed. However, I am not convinced that abolition of the actio iniuriarum is necessarily the optimal response to ingrained sexism within the law and the legal system.

[33] In the following paragraphs I will deal with the issues of contumelia (or iniuria) and the loss of consortium separately.

(e) The meaning of no-fault divorce

[34] First, however, I must deal with the majority judgment’s argument that the abolition of the delictual claim for adultery should follow from the abolition of the crime of adultery and of fault as the basis for divorce (para 21). This reasoning is echoed by June Sinclair and Jacqueline Heaton who contend that the duties flowing from the consortium omnis vitae ‘have become merely hortatory, that is, an expression of what society expects from marriage’.

[35] However frequently resorted to, these arguments do not stand up to close scrutiny. First, abolition of the crime of adultery does not mean that all forms of protecting the consortium should be simultaneously jettisoned. There are many interests which receive legal protection, even though they are not the basis of criminal liability. The law of defamation and other forms of iniuria are examples of this. The fact that criminal law is not an appropriate vehicle to discourage certain forms of behaviour does not mean that there can be no other form of legal regulation or sanction.

[36] Second, the essential characteristic of fault-based divorce was not that adultery was the only ground upon which divorce could be granted. There were other grounds, like malicious desertion and insanity which did not depend on sexual infidelity. The problematic aspect of fault-based divorce was therefore not that it punished sexual infidelity, but that that the guilty spouse could not obtain a divorce and therefore remained trapped in the marriage at the pleasure of the innocent spouse. Moreover, the guilty spouse would lose rights in relation to the children in addition to certain financial penalties. Adultery remains a basis for divorce insofar as it provides evidence that the marriage has irretrievably broken down. Financial penalties against an adulterous spouse also remain in the sense that certain aggravated forms of adultery are taken into account in determining maintenance and forfeiture or redistribution orders. Incidentally, the survival of these penalties rebuts the argument that the law punishes only the third party for adultery but leaves the guilty spouse unpunished. Our divorce law therefore retains vestiges of fault-based rules. Nevertheless, that should not clinch the argument. The idea that adultery cannot found delictual actions because it no longer forms the basis for divorce is as unconvincing as arguing that there can be no delictual remedies for behaviour which carries no criminal liability. The availability of a particular legal remedy is not entirely dependent upon the existence of a similar remedy in another area of law. A more direct and coherent way to investigate the question would be to assess whether the delictual action for

45 Sinclair & Heaton (note 44 above) 423.
adultery is in and of itself worth retaining in our legal system. This should be done by considering the protected interests in the light of public policy as informed by the spirit, purport and objects of the Constitution.

(f) Contumelia

[37] The protected interest in the claim based upon contumelia is the personality rights of the plaintiff. At common law these are generally classified as either fama (reputation) or dignitas.\(^{46}\) The relationship between fama, the common law concept of dignitas, and the constitutional concept of dignity has been described by the majority of the Constitutional Court in \emph{Le Roux v Dey}.\(^{47}\)

In terms of our Constitution, the concept of dignity has a wide meaning which covers a number of different values. So, for example, it protects both the individual’s right to reputation and his or her right to a sense of self-worth. But under our common law ‘dignity’ has a narrower meaning. It is confined to the person’s feeling of self-worth. While reputation concerns itself with the respect of others enjoyed by an individual, dignity relates to the individual’s self-respect.

[38] Whether or not a particular infringement of a personality right, whether fama or dignitas, is wrongful, depends on public policy read in the light of the fundamental rights in the Constitution.\(^{48}\) These fundamental rights include the constitutional concept of dignity, but can also include other rights such as the right to privacy and, in the case of adultery, the right to freedom of association. In addition, in determining wrongfulness a court must also take account of ‘the objective element’, namely whether ‘a reasonable person would feel insulted by the same conduct’.\(^{49}\) The minority judgment by Froneman and Cameron JJ in \emph{Le Roux v Dey} explicitly distinguishes the objective tests applied to infringements to the rights of fama and dignitas.\(^{50}\)

In dignity claims, the injured interest is self-esteem or the injured person’s feelings. In defamation, it is public esteem or reputation. And the objective reasonableness in a dignity claim is assessed in relation to feelings of the individual affront, not in relation to the audience that sees the image or reads the statement as in a defamation claim.

[39] Applying the objective test, the majority judges in this case conclude that ‘in this day and age the reasonable observer would rarely think that the innocent spouse was humiliated or insulted by the adultery of his or her spouse’.\(^{51}\) I must respectfully disagree, especially insofar as the common law concept of dignitas or self-esteem is concerned.

[40] The facts of \emph{Van der Westhuizen v Van der Westhuizen}\(^{52}\) provide an illustration for why I am reluctant to find that reasonable people would no

\(^{46}\) Neethling et al (note 41 above) 44–5.
\(^{47}\) Freedom of Expression Institute and Restorative Justice Centre as amici curiae 2011 (3) SA 274 (CC) para 138 per Brand AJ.
\(^{48}\) Ibid para 122.
\(^{49}\) Ibid paras 143 & 149. See also para 180 of the judgment by Froneman & Cameron JJ.
\(^{50}\) Para 179.
\(^{51}\) Para 35.
\(^{52}\) 1996 (2) SA 850 (C).
longer think that an innocent spouse’s fama or dignitas could be affected by adultery. In that case a wife sued the receptionist who had conducted a sexual relationship with her husband in a company described as belonging to the couple and in which both worked. The relationship was therefore conducted openly in the plaintiff’s workplace and, in her house, when the husband brought the defendant into a bedroom in the common home at night. When the plaintiff confronted her husband, he became violent towards her and ‘dismissed’ her from the business which she had assisted in building. Finding the situation intolerable, the plaintiff moved from the common home, and the defendant moved in. The plaintiff testified that it was ‘very difficult to live with the fact that a receptionist whom I employed eventually ended up serving me coffee in the morning (i.e. at the office) after having had sex with my husband the night before and this went on for months on end’. In a situation like this, I would contend, it is quite possible for reasonable observers to agree that the plaintiff’s self-esteem, and probably also her fama had been unlawfully infringed. In certain cases the adultery may be conducted so blatantly and with such disregard for the feelings and dignity of the innocent spouse, that reasonable people would agree that a legal remedy should lie for the infringement of personality rights.

(g) The consortium omnis vitae and public policy

[41] Apart from citing extreme and perhaps exceptional examples, an evaluation of wrongfulness requires an engagement with public policy, as dictated by the constitutional rights and interests at stake. The first constitutional right to consider is the innocent spouse’s constitutional right to dignity; second, the privacy rights of all the parties involved; and third, the adulterous spouse’s and the third party’s rights to freedom of association.

[42] I deal first with the constitutional right to dignity. From the outset the Constitutional Court has recognised the right to family life as a component of the right to dignity, thereby confirming that relationships with family members are crucial to human identity. The concept of Ubuntu recognises exactly this – that our humanity is forged and moulded by our relationships with others and that these relationships are therefore worthy of social and legal protection. In the context of immigration regulations, the Constitutional Court has repeatedly held that state actions which deprive people of their right to family life impermissibly infringe upon their constitutional rights to dignity.

53 Para 8511-J.
54 In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC) paras 98–102; Dawood, Shalabi & Thomas v Minister of Home Affairs 2000 (8) BCLR 837 (CC); Patel v Minister of Home Affairs 2000 (2) SA 343 (D); Makinana & Keely v Minister of Home Affairs 2001 (6) BCLR 581 (C); Booysen v Minister of Home Affairs 2001 (7) BCLR 654 (CC).
56 See the cases of Dawood, Patel, Makinana & Booysen cited in note 54 above.
[43] The consortium omnis vitae can be seen as a common law aspect of family life between the spouses or life partners. It is a collection of legally protected and recognised rights and duties which spouses have in respect of each other, some of which relate to emotional and physical intimacy, others to companionship and yet others to more tangible benefits like the rights to share the common home and the duties to render each other mutual assistance.\(^{57}\)

[44] Although the right to family life extends beyond the spouses to include children and other family members, the legal recognition and protection of the right to family life must necessarily also encompass the more limited rights and duties of the consortium. Thus, if family life is protected against state interference, it stands to reason that the consortium should be similarly protected. This was acknowledged in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*\(^{58}\) in which the Constitutional Court explicitly recognised the consortium of same-sex partners and held that the state should respect these rights. A common law example is the rule that spouses are not compellable witnesses against one another, protecting the spousal relationship from intrusion by the state even in criminal matters, where the substantial public interest in preventing crime is subordinate to the public interest in protecting the consortium. In principle therefore the protection of the consortium omnis vitae against interference by third parties can be justified in light of the value placed on family life and the right to human dignity.

[45] The second group of fundamental rights to be considered are the third party’s and the adulterous spouse’s rights to freedom of association. One could argue, as the court in *Wiese* did,\(^{59}\) that the adulterous spouse voluntarily limited her own freedom of association by entering into marriage and thereby undertaking to be faithful to her husband. However, since divorce is freely available in our law, this undertaking cannot irrevocably limit her freedom of association and the existence of a marriage can therefore not be an absolute bar to the ability to establish new relationships. Nevertheless, the right to freedom of association must be given due weight in the enquiry into the wrongfulness of adultery.

[46] Finally, the court must consider the parties’ rights to privacy. The majority decision correctly expressed concern about the intrusive questioning of Ms H in this case. Her rights and those of the defendant to shield certain aspects of their lives from public scrutiny are of course constitutionally protected.\(^{60}\) It must be said though, that for Ms H, many of the most intrusive aspects of the process resulted not from the availability of an action for adultery per se, but from the disrespectful behaviour which should not have

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58 2000 (2) SA 1 (CC) paras 45–6.

59 Note 5 above 129E-F.

60 *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 32 (NCGLE).
been permitted in the trial court. In any event, the right to privacy extends beyond the purely negative right to non-interference. Sachs J has held that:

the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the State to choose or to arrange the choice of partner, but for the partners to choose themselves.

[47] The right to privacy would therefore encompass the ability to enter into relationships and would protect the intimate relationships which people have with one another. These would include, as a matter of course, the consortium omnis vitae, in addition to other significant and even transient sexual and emotional relationships outside of marriage. The consortium of the spouses is therefore included in the protection provided to the rights to privacy, as is the relationship between Ms H and the defendant.

[48] The concept of privacy is particularly important because of the manner in which definitions and delineations of privacy have historically excluded certain abusive practices from social and legal censure. Especially in family law the notion of privacy is invoked to exclude certain forms of behaviour from the ambit of legal regulation because they belong to the sphere of what is private or consensual, rather than public. Consider for instance how the idea that the law should not intrude into the private area of the home has historically averted the legal gaze from violence directed against wives and children. For this reason, Sachs J cautioned that the constitutional right to privacy is not absolute, but that:

[i]he law may continue to proscribe what is acceptable and what is unacceptable even in relation to sexual expression and even in the sanctum of the home, and may, within justifiable limits, penalise what is harmful and regulate what is offensive.

[49] One mechanism for shifting the boundary of what is amenable to legal regulation is using the metaphor of (private) moral versus (public) legal norms. The majority judgment in this case involves exactly this: it consciously shifts the boundaries so that adultery, which was public in the sense of being legally actionable, has now become a ‘moral commitment’ (para 34) which falls into the realm of the private, where law should not intervene. Such boundary shifts may shield the behaviours from legal regulation precisely in order to protect certain socially privileged people or behaviour from legal accountability and thus to maintain the gendered status quo. Furthermore, reclassifying a particular harm as morally rather than legally wrong means that the legal rules involved are merely abolished, rather than developed. This ignores the ways in which legal and moral boundaries coincide, especially in relation

61 Ibid para 117.
63 NCGLE (note 60 above) para 119.
64 M Davies ‘Feminism and the Idea of Law’ (2011) 1 feminists@law 1, 3 & 5.
to sex and gender and the extent to which law itself creates social attitudes. Hunter et al reiterate the well-known observation that:

65 law is not simply a coercive force, but is also a powerful and productive social discourse which creates and reinforces gender norms. In other words, law does not simply operate on pre-existing gendered realities, but contributes to the construction of those realities …

[50] In South Africa the common law must be developed in the direction of the constitutional aim of substantive gender equality. Interrogating and altering offensive common law rules is far more transformative than simply relegating the issue to the sphere of morality for which law bears no responsibility. In other words, when law retreats from a particular norm by reclassifying it as ‘moral’, this does not mean that this norm ceases to operate in society in its most sexist form. The symbolic power of law lies in confronting and negating sexist norms rather than retreating from its responsibility to transform society in line with the constitutional project.

[51] Weighing up the competing rights to dignity, privacy and freedom of association I would hold that an action for loss of consortium may lie in certain contexts. Where the intrusion upon this relationship is so blatantly disrespectful that a common law action for contumelia would generally lie, namely where reasonable people would recognise that the nature of the interference with the marital relationship infringed the dignitas and fama of the innocent spouse as in the case of Van der Westhuizen, adultery remains legally wrongful. It goes without saying that the legal protection of the marital relationship is not an absolute bar to new relationships, but they must be entered into without unduly undermining the reputation and self-worth of the other spouse. Furthermore, if the marital relationship has broken down to such an extent that the consortium no longer exists, no action for the loss of consortium should lie.

(h) Reconceptualising the consortium omnis vitae

[52] This brings me to the second task of this judgment. I have argued that the law should, in certain circumstances, protect the consortium omnis vitae against interference by third parties. However, at the same time it is imperative that the nature of the consortium must be interrogated and developed in line with the need for gender equality.

[53] The facts of this case provide a woeful illustration of two irreconcilable paradigms of marriage. On the one hand, we find a genuinely bewildered, deeply sad and angry young husband who cannot understand why his marriage had broken down. His role as husband, father and family man was deeply important to him and his loss at the dissolution of his marriage sincere. He clearly felt that he did what was expected of a good husband: he provided the bulk of the family income, took firm control of the family finances and he went to church like a good Christian man. In exchange, he expected his
wife to be sexually available to him and to take the primary responsibility for the home and children. Essential to his view of the relationship was that he was the head of the household, responsible for controlling and guiding his wife and children. Twice he testified that he felt the need to confront the defendant ‘as man van my huis (man of the house)’. He did not communicate effectively, and neither understood, nor saw any need to discuss his wife’s concerns about their relationship. When the marriage started to falter he could therefore not imagine that he could be at fault, and believed instead that the marital problems were the result of his wife’s unfaithfulness.

[54] She, on the other hand, had different expectations. She had contributed to the family income, while continuing to take the traditional responsibility for the home and children and she deeply resented his control over her salary and the family budget. She expected to be treated, if not as an equal financial partner, as at least a capable adult who wanted emotional involvement and respectful communication from her husband. She felt that spouses ‘moet saggeaard teenoor mekaar optree, respekvol, liefdevol, mooi met mekaar praat, dinge met mekaar deel’.  

[55] The husband’s version of the marriage relationship reflects, almost exactly, the traditional common law view of the consortium omnis vitae as inherently patriarchal in the sense of being premised on male control over other family members. It included the marital power limiting the wife’s legal capacity and requiring her to obtain her husband’s permission for certain financial transactions. Even where the marital power had been excluded, the husband would still be regarded as the head of the household – the final authority on all important matters. The husband had to provide his wife with a home and she had to live in it. He had to maintain the household and she had to provide ‘household services’.  

[56] This nettle must be grasped and the consortium developed to unequivocally reflect the constitutional imperative of substantive gender equality. This is not optional and it does not matter whether or not spouses agree. Gender equality is required by the Constitution and this court should state clearly that husbands cannot exclusively control the money earned by their wives. Husbands cannot force wives to have sex with them whenever and however they want. Husbands have no more authority over wives than wives have over husbands and husbands are no longer the heads of households. Indeed, the financial, physical and other forms of control exerted over the wife in this marriage amounted to a relationship of coercive control, not a consortium omnis vitae based on mutual respect and affection. This notion of consortium is not limited to civil marriage only, but, as the Constitutional

66 ‘Spouses should treat each other kindly and gently, with respect and love. They should speak kindly to one another and share things’. My translation.
67 Hahlo (note 28 above) 130–39.
68 Clark & Goldblatt (note 62 above) 202–04.
Court jurisprudence shows, it can be created in same sex relationships and in other intimate relationships where there is mutual care, respect and affection. [57] In the context of the action for adultery this development of the consortium would require that a court refuse the claim for loss of consortium to a party who had merely controlled and dominated his spouse during the relationship and whose legal claim simply constitutes a continuation of this domination. Although there is no direct common law authority for such an approach, it could be argued that the old case of *Michael v Michael and McMahon* provides a precedent by holding that a husband who had abandoned his wife and children was not entitled to claim for loss of consortium against a third party.69 Nevertheless, I do not believe that it is necessary to point to the existence of this idea in old cases or historical legal sources because public policy, as informed by the spirit, purport and objects of the Constitution, requires the redevelopment of the concept of the consortium omnis vitae. In this case the controlling nature of the marital relationship and the husband’s unwillingness to heed his wife’s legitimate complaints would deprive him of an action for the loss of consortium.

(i) The order

[58] Although adultery resulting in the loss of consortium could be wrongful, no award is made for loss of consortium in this relationship. I agree with the majority judgment that, on the facts, the sexual relationship only commenced when the husband had left the common home and that there was therefore no consortium at that time. Moreover, even before he left the home the plaintiff enjoyed no consortium worth protecting, since he had used the marriage simply as a tool to control his wife.

[59] Although I recognise that the marriage relationship is a protectable interest or at least an important part of the context which will determine whether the plaintiff’s rights to dignitas or fama were infringed in this case I find no infringements. For infringement of the plaintiff’s fama I award no damages since the plaintiff’s reputation suffered no damage as a result of the defendant’s conduct.

[60] For infringement of the plaintiff’s dignitas I make no award. Although the plaintiff clearly felt that his sense of self-worth had been affected, objectively speaking, this did not happen. What was diminished was the plaintiff’s sense of control over his wife which is not a legally protectable interest.

III Conclusion

As a simulated judgment, this note is quite different from my usual academic writing. For one, although judgments inevitably reflect particular theoretical positions and social commitments, the fact that they tend to contain less
theoretical discussion means that these underlying positions are not usually articulated or examined in the same depth as would be the case in academic literature. I have therefore tried to avoid excessive theorising, but my academic habits may have caused me to do otherwise.

Conversely, judges often take judicial notice of ‘ordinary’ or ‘commonly known’ social facts, whether by explicitly acknowledging that they take judicial notice of a particular fact, or by tacit ‘common sense’ assumptions about life in general. Academics have argued that judicial notice about factors like race and gender has often provided an entry point for racist and sexist stereotypes in judgments and legal doctrine. Graycar’s examination of Australian and Canadian judges’ ‘common sense’ assumptions about women in rape trials provide a list of disconcertingly familiar and recent examples. In my ‘judgment’ I have therefore consciously ‘assumed’ certain dynamics which would appear commonplace to a feminist judge such as the persistence of sexual double standards and the Madonna/whore dichotomy which punishes women who are regarded as lacking in sexual virtue. I have also tried to focus on the experiences of Ms H, both as a witness and as a wife, taking seriously her version of the marriage and her aspirations for an egalitarian, respectful relationship.

In doing so, was I demonstrating inappropriate bias? The literature on the frequency and vehemence with which women and black judges have been accused of bias and even asked to recuse themselves is well-known. The argument seems to be that a commitment seriously to consider the perspectives of previously marginalised groups and to use the law to overcome historical and present structures of disadvantage constitutes discrimination against advantaged groups like middle class men, or white people. In response, I can do no better than quoting Australian judge, Keith Mason, who wrote:

> Judges should not aspire to neutrality. When Judges have the opportunity to recognise inequalities in society, and then to make those inequalities legally relevant to the disputes before them in order to achieve a just result, then they should do so.

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70 SM Behuniak ‘How Race, Gender, and Class Assumptions enter the Supreme Court’ (2003) 10 Race, Gender & Class 79.

