RHETORIC VERSUS REALITY IN SENTENCING VIOLENT DOMESTIC OFFENDERS IN WA: H (1995) 81 A Crim R 88

By Karen Whitney

Introduction

In June 1994, Western Australian Chief Justice David Malcolm's Taskforce on Gender Bias reported that:

All domestic violence must be stopped and the criminal justice system is the first place that can affirm and enforce societal condemnation of violence against women. [D]omestic violence is a crime and must be consistently treated as such by the criminal justice system; it is not a social problem to be 'managed' by welfare agencies. Judicial response to domestic violence has traditionally left women victims without sufficient protection or remedy. The court system, as the police system, tends to view domestic violence as a family/private problem.¹

Within one year of these criticisms of judicial response to domestic violence, Chief Justice Malcolm had the opportunity to meet the challenge raised by his Taskforce. In H,² the Chief Justice had the chance to demonstrate that he fully appreciated the criminal nature of domestic violence, and that he was willing to sentence accordingly. Unfortunately, the Chief Justice and Justice Kennedy failed to meet this challenge on behalf of the Court. To the contrary, their Honours demonstrated that they continue to view domestic violence as a marital and/or social problem, and that they are reluctant to deal seriously

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² Chief Justice's Taskforce on Gender Bias, Report of the Chief Justice's Taskforce on Gender Bias (30 June 1994) at 154-55.
³ H (1995) 81 A Crim R 88
with violent domestic offenders. This view does not conform with their rhetoric that domestic violence 'will not be tolerated'.

In this article, I critically review the decisions of the Chief Justice and Justice Kennedy in H. I argue that despite their rhetoric, their use of the 'welfare approach' test and their application of it to the facts in H demonstrates that they view domestic violence as less serious than non-domestic violence. To support this position, I argue first that use of the 'welfare approach' is inappropriate in the context of sentencing domestic offenders because it rewards an offender for exercising economic, social and/or emotional control over the victim. Second, I argue that the Chief Justice's application of the welfare approach test in H demonstrates an inability to fully comprehend the gravity of the criminal conduct, and to consider the need for general deterrence raised by the assault. I conclude that despite its rhetoric, the reality is that the Court continues to view domestic violence as a private family problem.

The Facts
The assault committed by Mr H upon his wife was extremely brutal. On 22 May 1994, Mr and Mrs H attended a work function at a restaurant, which later continued at an hotel. Both Mr and Mrs H consumed alcohol in the course of the evening, and by midnight both were 'clearly affected' by alcohol.

In the car on the way home from the function, Mr H commenced the assault on his wife. He grabbed Mrs H by the hair, pulled her towards the floor of the vehicle, and ordered her to unzip his boots. She was

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3 Id, 104.
4 Id, 89.
unable to do so and began to cry. Upon arrival at their home, Mr H punched Mrs H in the face and in the side of the head several times, and kicked her on the living room floor. By this time Mrs H was bleeding from the nose. The assault was witnessed by a friend of Mrs H ['the friend'] who was at the time in the H home minding the H children as well as her own. Two of the children witnessed this aspect of the assault upon Mrs H.\(^5\)

The friend did not call the police in relation to the assault because Mr H threatened to kill Mrs H if she did so. The friend was also concerned that Mr H would harm her children as well as the H children if she summoned assistance. Further, at some point during the attack, Mr H pulled the telephone out of the wall. Accordingly, the assault continued. Mr H grabbed Mrs H by the hair and dragged her into the bedroom, where he attempted to force his penis into her mouth. When Mrs H fought to escape, Mr H punched her several times in the head. He finally succeeded in achieving penetration of her mouth with his penis (count 1).\(^6\)

Mrs H began vomiting blood. Mr H responded by stating, 'All right, bitch, I'll root you up the arse', and penetrated Mrs H in the anus with his penis (count 2). Mrs H, still bleeding from the nose, continued to struggle and call for help during the attack. Mr H then got a wet towel and placed it on Mrs H's face. Mr H again demanded that Mrs H suck his penis, and again attempted to penetrate her mouth (count 3). Mrs H

\(^5\) Ibid.  
\(^6\) Id., 89-90.
pulled away, and Mr H proceeded to masturbate, ejaculating on Mrs H's face and hair. Mr H let his wife go, and fell asleep on the bed.  

Mr H was arrested and charged with three counts of aggravated sexual penetration, to which he pleaded guilty. Within several days of his arrest, Mrs H attempted to have the criminal proceedings against her husband discontinued. Mrs H had forgiven Mr H for the assault, they had reconciled, and shortly thereafter she became pregnant. When her attempts to have the charges withdrawn failed, she wrote to the Crown asking for leniency in sentencing her husband. She stated in her letter to the Crown that:

I am just hoping the charges can still be dropped through this letter this is my last hope [sic]. I do love my husband and by some miracle which I thought could never happen, we are closer now that [sic] we have ever been. It might hurt him to go to jail, but the person most affected would be me, as I'm pregnant without any family here whatsoever and can't really see myself coping financially or emotionally. I'm scared.  

Mrs H also gave evidence at the sentencing hearing to the effect that she had reconciled with Mr H and it would be a financial and personal hardship for her if her husband were to go to prison.

The sentencing judge commented that:

If it were not his wife, I have no doubt that a very substantial term of imprisonment would be justified. I would have thought something in the order of seven to eight years would be the appropriate sentence for offences of this description, were it not his wife - and that might be putting it on the low side but by way of a

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7 Id, 90.  
8 Id, 95-97.  
9 Id, 91.  
10 Id, 92-93.
moderate sentence. Now the fact that it is his wife who is being treated in this, I would have thought, disgusting and vicious manner - does that mean that the community interest justifies the imposition of a non-custodial term? ... In my opinion, your conduct on the night in question was so grave that it calls for condign punishment not only in the hope that it will deter you but also others in the community who act in such an abhorrent manner to women generally and wives in particular. These types of offences are far too prevalent in the community and will inevitably lead to substantial custodial terms. ... Because of the special circumstances in this case including the treaties [sic] of your wife and her wish to have the family unit reconstructed as quickly as possible, I intend to impose a much more lenient sentence that would otherwise be appropriate.\(^\text{11}\)

The sentencing judge then sentenced Mr H to three years imprisonment.

Mr H appealed from that sentence to the Court of Criminal Appeal. His grounds of appeal were that the sentencing judge failed to have sufficient regard for the wishes of the victim of the offence (ground 1) and the manner in which the charges came before the court (ground 2).\(^{12}\)

**Reasoning of the Court of Criminal Appeal**

In a 2-1 decision, the Court of Criminal Appeal allowed Mr H’s appeal and substituted a probation order for the sentence of imprisonment. The Chief Justice and Justice Kennedy agreed that the case fell ‘within the exceptional circumstances in which a non-custodial disposition was justified.’\(^{13}\) Justice Murray dissented.

The Chief Justice identified the ‘dilemma’ of this case:

> On the one hand, the community recognises that domestic violence is a significant problem and that where it has been perpetrated it constitutes a criminal offence which should be dealt with accordingly. It needs to be demonstrated that the courts are prepared to ensure that

\(^{11}\)Id. 94-95 (emphasis added).

\(^{12}\) Id. 95.

\(^{13}\) Id. 104.
victims of domestic violence are protected and that, where appropriate, sentences are imposed which will mark the community’s disapproval of domestic violence and will serve the ends of both personal and general deterrence. At the same time, the courts have been repeatedly asked to take full account of the position of the victims of such offences in the sentencing process. In addition, it has been recognised that full regard should be paid to the prospects of rehabilitation and the maintenance of the family unit where that is possible. This has sometimes been called a ‘welfare approach’. 14

The Chief Justice then went on to discuss a series of cases involving violence within the family unit where this ‘welfare approach’ was considered.15 The test that he adopted from these cases was whether the gravity of the criminal conduct concerned and the need for personal and general deterrence outweighed the desires and wishes of the complainant and the future prospects of not only reconciliation, and maintaining the continuity of the family unit, but also the rehabilitation of the offender.16

The Chief Justice then purported to apply this test to the facts of the H case. He assessed the gravity of the offence as light, because Mrs H had ‘forgiven’ Mr H for the attack. He assessed the need for personal deterrence as low, because Mr H had committed himself to abstain from alcohol, and had succeeded in doing so in the nine months between the attacks and sentencing. However, despite articulating it as a component of the test, the Chief Justice then failed to assess the need for general deterrence as a factor in weighing this arm of the equation.17

14 ibid, 98
15 ibid, 99, citing Boyd [1984] WAR 236; Van Roosmalen (1989) 43 A Crim R 358; Johnson, Court of Criminal Appeal, unreported, 5 March 1992, SCLN 920110; Spence, Court of Criminal Appeal, unreported, 22 December 1992, SCLN 920699; Terranova, Court of Criminal Appeal, unreported, 26 October 1993, SCLN 930576; Redg, Court of Criminal Appeal, unreported, 22 September 1994, SCLN 940532; Wilson, Court of Criminal Appeal, unreported, 26 May 1995, SCLN 9500158. But, however, that of these seven cases cited by the Chief Justice, six held that after weighing these factors, a sentence of imprisonment was appropriate (Van Roosmalen, the Victorian case, was the only exception.)
16 H (1995) 81 A Crim R 88, 103-104
17 ibid.
On the other side of the equation, the Chief Justice assessed as severe the impact that Mr H's imprisonment would have on Mrs H and the H family. On balance, the Chief Justice concluded that the case fell within the 'exceptional circumstances in which a non-custodial disposition was justified.'

In a concurring opinion, Justice Kennedy emphasised the need to ensure that the victim in circumstances such as these was entirely genuine, and not influenced to any extent by the assailant. He further noted that in his view it was appropriate for the courts to take into account the probable effects that a custodial sentence would have on the offender's family.

Justice Murray dissented, indicating that he would dismiss the appeal. He characterised the issue as whether hardship on the part of victim or someone other than the offender should have any impact upon the sentencing process. He emphasised that in this case, the sentencing judge had not overlooked this issue. To the contrary, the sentencing judge had considered the impact on the H family, and reduced the length of Mr H's imprisonment from what would have ordinarily been 7-8 years down to 3 years.

Justice Murray considered a number of decisions in which the court had been asked to consider the impact of the sentencing process on innocent persons. He concluded that it would be an extremely rare case where such factors would be considered. As examples, he cited cases stating...

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18 Ibid.
19 Ibid, 106.
20 Ibid.
21 Ibid, 107.
that it should be done only where it would be 'inhumane to refuse to do so,'\textsuperscript{22} or where it 'will result in children being left to fend for themselves as best they can without parental supervision or support'.\textsuperscript{23}

Justice Murray reasoned that in his view, the question to be resolved was whether the sentencing judge erred, not in overlooking the elements of hardship placed before him, but rather in reducing the sentence of imprisonment as opposed to imposing a non-custodial sentence. He maintained that such a proposition was not made out in this case. There was no evidence that Mrs H could not cope in the absence of her husband. The only evidence of hardship was financial, and although there was no doubt that the family would struggle, 'that does not make the case sufficiently exceptional to require this Court to conclude that the exercise of sentencing discretion has miscarried.'\textsuperscript{24}

**Critique**

Justice Kennedy opened his concurring opinion in \( H \) with the following statement:

> This Court has stressed time and again that the fact that an offence is committed in a domestic setting does not make the offence one of purely domestic or private concern. It is necessary that the courts should demonstrate very clearly that domestic violence, which is now recognised as an extremely serious social problem, will not be tolerated.\textsuperscript{25}

Despite these sentiments, the Chief Justice's and Justice Kennedy's use of the 'welfare approach' test and their application of it to the facts in \( H \)

\textsuperscript{22}Id. 109 (citing Wirth (1976) 14 SASR 291)
\textsuperscript{24}H (1995) op. cit. 88, 111.
\textsuperscript{25}Id. 104 (emphasis added). Note that even while purporting to emphasise the seriousness of domestic violence, Justice Kennedy undermines his statement by referring to domestic violence as a social problem rather than a criminal one.
demonstrates that they consider domestic violence to be less serious than non-domestic violence. In this section, I support this position by arguing that use of the 'welfare approach' is inappropriate in the context of sentencing domestic offenders because it rewards an offender for exercising economic, social and/or emotional control over the victim. Second, I argue that the Chief Justice's (incomplete) application of the welfare approach test in H demonstrates an inability to appreciate the gravity of the criminal conduct, and a failure to assess the need for general deterrence raised by the assault. I conclude that despite its rhetoric, the reality is that the Court continues to view domestic violence as a private family problem.

'Welfare approach'
The welfare approach adopted by the Chief Justice in H is a balancing test. On the one hand, the court must assess the gravity of the criminal conduct and the need for personal and general deterrence. On the other hand, the court must consider the desires and wishes of the complainant, the future prospects of reconciliation, maintenance of the family unit, and rehabilitation of the offender.

Although the welfare approach may be appropriate in some sentencing contexts, it is inappropriate in matters involving violence within the family. To apply the welfare approach in matters of domestic violence risks rewarding the offender for his exercise of economic, social, and emotional control over the victim (which itself constitutes domestic violence).

There is no dispute that in H, the victim herself pleaded for leniency in sentencing the offender. However, because of her social, emotional and
economic dependence on her assailant, she had little choice. The victim was a 23 year old woman with no local family trying to raise three small children. Her husband had subjected her to violent assaults in the past. She was convinced that her family could not survive without her husband. Significantly, she was afraid of poverty for herself and her children. Given her options, she chose to accept the possible risk of further physical violence rather than the undoubted reality of economic deprivation.

In her letter to the Crown she emphasised this fear: '[I] can't really see myself coping financially or emotionally. I'm scared'. She also admitted 'I am the one taking the risks'. She discounted her husband's accountability for the assault, shifting responsibility to herself. 'I feel my husband is not a threat to society[,] it is the first time he has assaulted anybody and it was me.' When asked how she knew Mr H would not be violent to her again, Mrs H replied, 'Well if I see him pick up a beer I will be out of there. I'm not taking the chance with me getting hurt or anything like that.' Given her clearly expressed inability to cope without her husband, and her tolerance of his violence and alcohol abuse in the past, her statement that she would leave him if he resumed drinking and abuse rings hollow.

Although it may appease a victim in the short term, the welfare approach does nothing to protect her from similar abuse in the future. To the contrary, it may serve to perpetuate the cycle of violence. It creates an
incentive for an offender to keep the victim in a state of emotional, social and/or economic dependence.

Justice Kennedy’s concerns expressed in his concurring opinion that such requests by the victim must be ‘entirely genuine’ only serves to demonstrate his failure to appreciate that although the request may be ‘genuine’, it still may be the product of a destroyed self-esteem, or economic dependence and fear.

Application of the welfare approach in H
As discussed above, the welfare approach adopted by the Chief Justice in H is a balancing test. It weighs the gravity of the criminal conduct and the need for personal and general deterrence against the desires and wishes of the complainant, the future prospects of reconciliation, maintenance of the family unit, and rehabilitation of the offender. The Chief Justice purported to apply this test to the facts in H. However, his application of the test demonstrates an inability to appreciate the gravity of Mr H’s criminal conduct. It also demonstrates indifference to the need for general deterrence of violent assaults in the home. In his eagerness to bring this case within the ‘exceptional circumstances in which a non-custodial disposition was justified’, the Chief Justice was forced to strain to find legal support for his decision.

The Chief Justice’s decision would seem to contain ample evidence that he did not appreciate the gravity of the horrific offences committed against Mrs H, and that he was influenced by the domestic nature of the attack. In assessing the gravity of the offence, he emphasised that Mrs H

30 Id. 104
had 'forgiven' Mr H for the attack. He stated that 'the immediate consequences and impact of [the offences] upon [Mrs H] was apparently not great. It seems that [Mrs H] made a quick recovery from her injuries. Within four days she had accepted his apology and forgiven him. The two of them had resolved to solve the problem.'31 He implied that the assault by Mr H on Mrs H was a marital problem that could be resolved by mutual cooperation and effort, rather than a violent, degrading, and brutal criminal act against Mrs H. He did not address the fact that if these acts were committed by a stranger, whether the victim had 'forgiven' the offender would be irrelevant to prosecution and sentencing.

The Chief Justice's failure to appreciate the gravity of the attack by Mr H is further reflected in his interpretation of the cases he relied on as support for adopting the 'welfare approach'. All but one of the cases cited by the Chief Justice ultimately concluded that the gravity of the offence outweighed the harm to the victim and family, and a custodial sentence was warranted.32 This emphasises the truly exceptional nature of the welfare approach. The fact that the Chief Justice found the attack by Mr H to be less grave than those described in the 'welfare' cases demonstrates a fundamental failure to appreciate the seriousness of the violence to which Mrs H was subjected.

The decision of the Chief Justice suggests indifference to the need for general deterrence of domestic violence.33 Despite including the need for

31 Id, 104 (emphasis added).
33 Other courts have taken the view that it is appropriate to promote general deterrence by sending a message to men that domestic violence will not be tolerated. For example, in In re Murz (1993) 17 Family Law
general deterrence as a factor to be weighed in the welfare approach test, he did not factor its weight when assessing the need for a custodial sentence in H. This breach, whether intended or inadvertent, reduced the overall weight of the first arm of the balancing test, and reduced the likelihood that a custodial sentence would be imposed.

On the other hand, the Chief Justice considered that the impact of Mr H's imprisonment on Mrs H and the H family would be severe. He emphasised that without Mr H’s financial support, Mrs H would be a woman with three young children forced to survive on the Supporting Parent’s Pension from the Department of Social Services. He also ranked highly the fact that if Mr H did not go to jail, the family unit would be maintained. The Chief Justice, on the balance, concluded that the case fell within the 'exceptional circumstances in which a non-custodial disposition was justified.'34

The Chief Justice attempted to rationalise his decision by suggesting that he was merely responding to repeated demands that courts take full account of the position of victims during the sentencing process.35 However, the primary goal of the world-wide movement for greater recognition of victims' rights is to provide victims with a role in the criminal process. It is to give victims the right to have the full effects of the crime against them made known to the sentencing court.36 It is to give the court opportunity to appreciate, not depreciate, the gravity of the offence. Any suggestion that the welfare approach to sentencing violent

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34 H (1995) op. cit. 88, 104.
35 Id, 98.
domestic offenders responds to the call for victims' rights trivialises the goals of the movement.

Conclusion

As remarked by Justice Murray in the dissent, 'there is scarcely a case that comes before this Court, when a person is sentenced to imprisonment, in which it cannot be said that there is a great distress and hardship caused to the members of the family'\textsuperscript{37} Where the offender's family and the victim's family are the same, it is tempting to use the welfare approach to impose a non-custodial sentence to alleviate further suffering on the part of those innocent family. However, this temptation should be avoided in sentencing violent domestic offenders. As stated by Justice Murray, the court's responsibility is not only to the victim, but also to the public at large.

For my part, I consider that it is important to bear firmly in mind that a sentencing court has a public duty to perform and must not shirk its task which is primarily to arrive at a sentence proportionate to the gravity of the offence, having regard to the circumstances of its commission, and having regard to the personal circumstances of the offender and available mitigation. It will by that means inject into the sentencing process an appropriate degree of certainty and consistency, rather than severity, which is best calculated to achieve the protection of the community.\textsuperscript{38}

The decision of the Court of Criminal Appeal in H sets dangerous precedent in Western Australia. It opens the door for the courts to


\textsuperscript{38} H (1995) op. cit. 88, 110 (emphasis added).
impose non-custodial sentences on domestic offenders in positions of emotional, social, and economic power in the family, merely by reason of that power. It demonstrates the capacity of the two most senior jurists in Western Australia to overlook brutal violence against women merely because that violence occurs in the home. More importantly, however, it confirms what victims of domestic violence have always suspected: that despite their rhetoric to the contrary, the courts do not equate domestic violence with other forms of violence. Until the courts are willing to recognise that domestic violence is 'real' violence, they will continue to promote a culture of violence in the home at the expense of Australian women.