

Session 6.2

Social Context Workshop

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- 1 I am going to talk about barriers that we face in introducing social context education. I have come up with eight of them, five of what I choose to call 'attitudinal' barriers and three institutional barriers. I have come across these in working with the NJI on national programs and as Education Chair at my own court, the Supreme Court of British Columbia, among my colleagues.
- 2 Starting off with the attitudinal barriers, the first one is that some judges continue to feel that social context programs come from some kind of hidden agenda, that is, that we are giving special interest groups privileged access to the judicial mind. According to this view, this kind of information should come to the judge through witnesses on the witness stand as qualified experts who can be cross-examined. They see social context education as indoctrination rather than education. It is similar to what Chief Justice Black said yesterday about how Australian judges felt twenty years ago about education. Some people still feel that way about social context education and Chief Justice Black put it very well when he said that judicial ignorance is no longer considered 'quaint'. I will take that home.
- 3 A second attitudinal problem is that some judges just do not see the need. Sheilah talked about the judge whose nephew is gay, or whose father is sick, and one of the problems is that this can be particularly so with new judges. It is not as though we are coming along with social context and get to a point where we no longer need it. New judges often see their appointment as confirmation of their present state of learning as being entirely satisfactory. In other words, the correctness of their current thinking is confirmed by this judicial appointment.
- 4 A third one is just to do with our attitude towards our task as judges, what Sheilah referred to as an 'abstraction'. Some see judges as simply applying statutes and jurisprudence to the facts of cases before them, but the more conventional view today is that we are participants in building a better society through bringing equality principles to bear.
- 5 A fourth is kind of a new one. The nature of the opposition has changed. Years ago, some publicly expressed the view that this 'indoctrination' had no place in judicial education. But now, as Sheilah said, this concept of social context is mandated by the Chief Justice of Canada, by the Canadian Judicial Council and, of course, the NJI. The Canadian Judicial Council passed this resolution:

*Be it resolved that credible, in-depth and comprehensive social context education must be an ongoing part of judicial education ... supports a three-dimensional approach to judicial education in which substantive content, skills development and social context awareness are continually addressed in judicial education programming and course development ... mandate the NJI to continue to implement social context education in its curriculum.*

- 6 This is strong language, but it is entirely appropriate. It is consistent with and in furtherance of what the Canadian Judicial Council has published in Equitable Principles for Judges, where it includes this: “judges should conduct themselves and proceedings before them so as to assure equality according to law.” The principle goes on to state, “judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, ethnic background, sexual orientation and disability”. And that is exactly how social context education assists judges, in these very specific ways, to be aware of and understand these differences.
- 7 But the problem is that the opposition has gone underground. It is no longer debated. People do not say, ‘well, we really don’t need social context education because it is no longer debatable’, but some courts and some parts of courts simply ignore it and plan education conferences without really paying heed to it.
- 8 The fifth one is a variation on that, and that is that some judges believe, ‘we’ve already done social context. There’s no need because we had a conference in 2001 on social context and so it’s okay’. That misses the boat for several reasons. Obviously, new judges are being added all the time and, as the resolution states, social context is to be an ongoing part of all programs. Judges would never say that about education in substantive law or skills training – ‘oh, we did something on running a criminal jury trial six years ago; we don’t need to do that’.
- 9 There are some institutional barriers as well. First of all is the inherent lack of feedback for what we do. There may be a statement and a judgment, for example, that contains a generalisation about a marginalised group. You might learn of your error through exposure in a newspaper article. Very embarrassing, and very educational, but not the best kind of education. An appellate court might have the opportunity to correct the error or to point out the inappropriateness of what has been said, but those are very limited circumstances. The nature of our work means that not everything is appealed. Some days it seems like it in my office, but the cost of litigation makes it much more random. The fact that you have not been reversed on a particular matter is not very cogent evidence that you were actually correct, and the press doesn’t read all our judgments so there is a certain lack of feedback. Things can happen for which there are not consequences.
- 10 Second, the nature of litigation itself. We do not decide what comes before us. We do not decide how the case is argued before us. There are lots of tort law claims that have built within them a perpetuation of inequality, through female-specific contingencies. If that is not an issue between the parties it is the unusual trial judge who will say, ‘just a minute, I think we should add a couple more issues to this’. We need to foster those arguments and we need to be writing about these issues, but the lack of it right now is a barrier.
- 11 Finally, I think the make-up of the judiciary is a barrier. There is insufficient diversity in our court. There is an undue emphasis, it seems, on middle-aged white males, Canadian-born, like me. As the Judicial Service Commission in South Africa stated, about the importance of diversity in judicial appointments, ‘it is a quality without which the court is unlikely to be able to justice at all, to all citizens of the country. It is a component of competence. The court will not be competent to do justice unless as a collegial whole it can relate fully to the experience of all those who seek its

protection'. In Canada, thirty-one percent of federally appointed judges are women and it is noteworthy that four of the nine Supreme Court of Canada Justices are women. That is quite a development. When I finished law school there were no women on the Supreme Court of Canada, none in the British Columbia Court of Appeal, none in the British Columbia Supreme Court. There was one county court judge and two women in our provincial court.

- 12 But the numbers have remained somewhat stagnant. In the last three-and-a-half years, the proportion has hovered around 31%. We should strive for better. As Lyn Smith of my court, who has also been an Acting Director of NJI, said last year, 'the more the face of the bench looks like the face of the community, the better'. At 31% female we have a long way to go. This is an institutional barrier, in my view, to social context education. Sean Cooney wrote, in the Melbourne University Law Review in 1993, something we accept today:

"It is unlikely that the unconscious assumptions in current legal reasoning will be corrected unless there is a significant proportion of women judges on the bench. Male judges in general do not have the background and the experience to recognise the male-centredness of law. Women bring a different life experience to the bench. The same can be said, of course, in diversity of the bench in other ways, in terms of ethnic background, but social context education is enshrined in a court which reflects equality in its competition".

- 13 Those are the barriers that we face.