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Husband and Wife are Two Souls in the One Flesh...

It hath beene resolved by the Justices that a wife cannot be produced either against or for her husband...[for they are two souls in one flesh], and it might be a cause of implacable discord and dissention betweene the husband and the wife, and a meane of great inconvenience. (Lord Coke, 1628, cited in David Lusty, 2004)

As a result of the Biblical principle that husband and wife are 'two souls in one flesh', there is a common law tradition whereby women may not be obliged to give evidence against their husbands. This principle has apparently extended to apply to men giving evidence against their wives.

There are different bases on which a person may be required to or be excused from giving evidence. Their *competence* differs from their *compellability* which differs from whether *privilege* attaches to their evidence, once they are giving testimony. I am not seeking to explore these legal differences - and for the purposes of this post, will refer to these laws by a non-technical use of the term 'privileges'. I recognise that this term in itself has in part created the ambiguity in aspects of the common law in the area of spousal privileges.

The issue of spousal privilege has recently arisen in Australia, in the 2011 High Court decision *Australian Crime Commission v Stoddart*. This decision found that (the technical legal) spousal privilege does not exist in Australia. (Others have discussed the case: eg here and here.) However the case did, particularly in Heydon J's dissenting judgement, discuss the nature, genesis and evolution of spousal privileges (in their generic sense).

While I have little, if any, expertise in the law or practice of evidence, what interested me about this topic and the High Court's recent decision on it, was the foundation of spousal privilege laws - that husband and wife are 'two souls in the one flesh'. In considering the *idea* of spousal privilege laws and the Court's approach to them, I am therefore interested in the notion of status-based laws, and their implications.

Foundation of spousal privilege

The foundation of spousal privilege lies, according to Lusty, in the 'moral and legal dilemma' experienced by wives whose husbands had committed a crime. Do they report in accordance with the law? Or withhold the information in furtherance of their God-given duty as part of the 'one flesh'? The law, he explains, was 'sympathetic' to the plight of the wife and thus the privilege came into use.

Lusty also points out the historical importance of women 'obeying' their husband - the dilemma for wives, recognised by the law, was whether to obey the law or their husband. The genesis of spousal privilege rules, he suggests, lies also in obedience.

This is not the only example of the law's adherence to the notion that husband and wife are one - and I have written before of the law's construction of women's identity upon marriage: namely, their identity as a person was subsumed by that of their husband. There was traditionally a suite of laws that inhibited married women's full participation before the law: for example, married women were precluded from holding property.

Spousal privilege laws however seem no longer to rest on the Bible. Instead, a variety of

ABOUT ME



Kate Galloway

I lecture in land law at James Cook University and I write and think about the nature of property and its representations in the law; about issues affecting women; about justice generally; and about legal education.

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arguments support them:

- Personal loyalty between husband and wife is of fundamental importance to the stability of the family as the basic unit in our society [see also here]
- 'The spectacle which, by reason of the interrelationship of the spouses, both emotional and financial, arising out of shared experiences in the past and the expectation of them for the future, would be repugnant to the public.' [Heydon J, para 159]
- 'This rule seems... to underline the supreme importance attached by the common law to the special status of marriage and to the unity supposed to exist between husband and wife.' [Heydon J para 159, citing Salmon LJ]
- Altruism as between husband and wife, to 'protect the children of the marriage, to preserve the family and to save a once-loved, perhaps still-loved, spouse from suffering.' [Heydon J, para 156]
- Loss of Court time and efficiency in trying to compel a spouse to testify against their partner

There seems to be a combination here of protecting *private* interests, ie the marriage relationship as a personal relationship, and the *public* interest ie to protect the institution of marriage (rather than individual partnerships) and Court resources - recognising the inevitable conflict of a spouse called to testify.

On the other hand, there is an argument that there is an overriding *public* interest in criminal justice that would trump any personal considerations of spouses. So depending on your view, there is a private/public conflict, or competing public interest arguments in retaining such privileges.

Australian jurisdictions have dealt with the conflict/s in a variety of ways. Some, like Queensland, have abolished spousal privileges. This has the additional advantage of avoiding having to consider former spouses, de facto spouses and same sex unions (whether legally sanctioned or not).

Other jurisdictions, such as the Commonwealth, provide the Court with a discretion to exempt the giving of evidence upon application by a close family member. Application of such a discretion to a 'spouse, de facto partner, parent or child' overcomes the limitations of privileging a de jure marriage alone, and seems to value familial 'intimate and committed' relationships. Thus a public policy argument of supporting family seems more likely than if the privileges were restricted to legally married couples.

In the Stoddart case, the Court looked to the common law because the relevant legislation, the Australian Crime Commission Act, did not address the alleged privilege directly.

Niggling doubts...

While these statutory solutions seem to resolve, in different ways, the public/private conflict concerning spousal privileges generally, I can't help but have some niggling doubts about the foundations of privileges that may continue to exist (notably at common law). These are borne out of Heydon J's comments concerning common law protections, and his presumptions about the unity between husband and wife, and the identity of interest between them. Even though the Court found the spousal privilege alleged did *not* exist, Heydon J's judgement reveals a particular kind of thinking about status-based laws.

In a similar vein, in *Cummins v Cummins* (another fairly recent decision) the Court made a series of presumptions about how married people intend their property to be held. It based this decision on no more than that the 'present case concerns the traditional matrimonial relationship'.

Marriage at law is such a useful legal construct. It amounts to a shorthand means of identifying a relationship - mainly for the purposes of allocating property, but in the past also for determining legitimacy of children (again, linked to property) and criminal liability (in the case of rape). In the case of compellability to give evidence, it likewise avoids the messy factual and legal determination of any other type of close familial relationship that might rest on intimacy and trust, such as de facto marriages whether same-sex or not. It also avoids trying to categorise a former intimate relationship (which may be relevant in terms of the policy arguments for spousal privilege).

The influence of both the 'one flesh' metaphor and the 'God-given' concept of marriage on the development of common law rules relating to spousal testimony is readily apparent and explains why the relationship of husband and wife was singled out for special treatment ahead of other close family

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ties, such as that of parent and child. (Lusty)

So does the so-called doctrine of unity continue to underpin laws concerning marriage - laws that depend upon one's status for their application? Or, as Brabyn points out, 'in a society of increased gender equality and committed individualism' has the doctrine of unity lost its currency?

I can see at least echoes of the doctrine in various laws (eg see Cummins above). I remain unclear about whether it is appropriate for laws to privilege the 'intimate and committed' and by implication communal or unified ambitions and expectations of a couple; or whether the law should uphold individualism and the independence of the parties to a committed relationship.

What do you think? Should husband and wife (or a committed partnership) be automatically regarded by the law as 'two souls in one flesh'?

Posted by Kate Galloway at 17:43

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