COMMENT

An unfair attack on a decent judgment

ALEX KOZINSKI

Celebrated criminal defence lawyer Edward L. Greenspan has delivered a sledgehammer assault on Madame Justice Claire L'Heureux-Dubé of the Supreme Court of Canada, claiming she was "intemperate, showed a lack of balance, and a terrible lack of judgment." And these were among the nicer things Mr. Greenspan said about the justice. This is one of the latest volleys in the verbal battle which was launched 10 days ago by Judge John McClung of the Alberta Court of Appeal. He took the unprecedented step of writing a letter to the *National Post* complaining about the treatment he received at the hands of Justice L'Heureux-Dubé in the now-famous "no means no" case.

Mr. Greenspan comes down hard on the side of Judge McClung, accusing Justice L'Heureux-Dubé of being a bully: "By labelling Judge McClung, in effect, the male chauvinist pig of the century, the chief yahoo from Alberta, the stupid ignorant, ultimate sexist male jerk, Judge L'Heureux-Dubé did an unnecessary and mean-spirited thing." In fact, Justice L'Heureux-Dubé said nothing of the sort. What is truly remarkable about Mr. Greenspan's diatribe, verdant with hyperbole and bristling with insult, is that it says not a thing about Justice L'Heureux-Dubé's judgment. He neither quotes it, nor describes it, nor even identifies what about it he finds offensive – other than to attribute to its author a mindless feminist ideology that makes her "hell-bent on re-educating Judge McClung, bullying and coercing him into looking at everything from her point of view."

Say what?

Mr. Greenspan's characterization is so disconnected from reality one must wonder whether he actually read what she wrote. Justice L'Heureux-Dubé's judgment is, in fact, neither particularly strident nor particularly ideological. Rather, it reflects common sense, shared, I am confident, by most Canadians. She does, to be sure, take issue with certain passages from Judge McClung's decision – passages that show a remarkable lack of judgment on his part. Indeed, Justice L'Heureux-Dubé had to identify Judge McClung by name (rather than referring to the judgment of the Court of Appeal, as usually happens) because no other member of his own court signed on to Judge McClung's quaint views. (In point of fact, there was a forceful and articulate dissent by Court of Appeal Chief Judge Catherine Fraser, whose careful analysis was, for the most part, accepted by Justice John Major, writing for the majority of the Supreme Court.)

Perhaps we can cast our minds

MOST JUDGES FEEL A DUTY TO REPUDIATE OFFENSIVE LANGUAGE FROM LOWER COURTS

back to the facts of the case, something Mr. Greenspan also fails to do. The complainant was a 17-year-old woman who came for a job interview. The interview, which was businesslike at first, was conducted in the accused's van but, at his suggestion, moved to his trailer. The accused, who was almost twice her age and size, appeared to lock the door, and she became frightened. The accused then became personal and tactile; he asked her to massage him and then "return[ed] the favour" by massaging her shoulders and eventually her breasts, at which point she said no. He stopped briefly but soon resumed the massage. She again said no and he again paused. Soon he was fondling her inner thigh and pelvic area and climbed on top of her. She neither moved nor reciprocated and asked him to stop. He seemed to comply, asking her, "You were scared, weren't you?" But even after she told him she was "very scared," he started up again, this time touching her with his naked penis. When she asked him, now for the fourth time, to stop, he gave her $100 and told her to keep mum. She promptly contacted the police. This was her story (the accused chose not to testify) and the trial judge believed her and found that she had been frightened.

Judge McClung justified the accused's conduct by noting that the young woman did not come to the interview dressed in a "bonnet and crinolines." He thought it pertinent that she was living with her boyfriend and that she had a six-month-old baby. He characterized the accused's conduct as "far less criminal than hormonal." Judge McClung also suggested that the young woman ought to have extricated herself from the situation by means of "a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee."

These are the statements with which Justice L'Heureux-Dubé disagreed. Calmly, and without rancour, she addressed each of Judge McClung's points and refuted them. She said (here, I paraphrase):

- When a woman dresses in short pants, appropriate to the weather, this is not an invitation for groping by perfect strangers.

- Not being a virgin makes the complainant no less worthy of belief, nor is it implied consent to have sexual relations with every willing male.
- By saying "no" and "I am very scared" the complainant was not inviting the accused to climb on top of her, fondle private parts of her anatomy and touch her with his penis.
- Responding to "hormonal" urges is not a defence to sexual assault charges, or else most sexual assaults would be excusable.
- A woman is not required to insult, slap or kick her way out of an intimidating situation involving a man twice her age and weight.

Are these the examples of the "feminist world view" that Mr. Greenspan complains so bitterly about?

Mr. Greenspan's extravagant prose makes it sound like Justice L'Heureux-Dubé hurls bolts of invective at Judge McClung. In fact, her judgment neither berates nor chastises him. She does argue that his analysis — which puts a large share of the blame for the assault on the victim — does not reflect contemporary notions of how men and women should relate in a civilized society.

Mr. Greenspan believes that Justice L'Heureux-Dubé should have overlooked the rococo passages in Judge McClung's judgment. For her to have remained silent would, indeed, have served the cause of collegiality; it would have spared Judge McClung the discomfort of seeing his words refuted one by one. But collegiality is only one value judges must serve, and — in the hierarchy of values — not a terribly important one. Far worse than hurting the feelings of another judge is unjustly insulting a litigant or (as in this case) the victim of the sexual assault. Not to mince words, Judge McClung's statements about the victim were cruel and offensive. What should a Supreme Court justice do when she sees such language in a lower court judgment? Is she to remain mute? Or does she have a duty to repudiate the language and the sentiments behind it?

While different judges answer this question in different ways, most conscientious judges would not let pass without comment sexist, racist, anti-Semitic or similar statements in a lower court judgment. What judges say in their published judgments is, after all, in the public domain. Even when overruled as to result, lower court judgments can be cited for their language and reasoning — they have a life of their own. If a lower court judge were to say that, "The complaining witness deserved to be robbed because all Jewish shopkeepers cheat their customers," the Supreme Court would surely feel obligated to point out that this reflects invidious stereotypes, not reality. Why then was it wrong for Justice L'Heureux-Dubé to explain that by dressing in shorts and being a single mother, the complainant was not angling for sex during a job interview?

The only dismaying thing about the Supreme Court's decision is that most of the other justices did not see fit to condemn Judge McClung's unfortunate language. But there is a very significant difference between disagreeing with someone's words and ideas, and descending into personal invective. It is a line Justice L'Heureux-Dubé respected scrupulously. Unfortunately, Mr. Greenspan and Judge McClung did not.

Alex Kozinski is a Federal Court of Appeals judge in California. He was appointed by President Ronald Reagan in 1985. He welcomes your comments at kozinski@mizar.usc.edu