

SOUTH AFRICA / JUDGMENT

**Fourie and Another v Minister of Home Affairs
and Another (232/2003) [2004] ZASCA 132;
[2005] 1 All SA 273 (SCA); 2005 (3) SA 429 (SCA);
2005 (3) BCLR 241 (SCA) (30 November 2004)
[2004] ZASCA 132**

COURT

Supreme Court of Appeal

BEFORE

E Cameron, Mthiyane, Farlam

CASE / FILE NUMBER

232/2003

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Constitution – Bill of Rights – Right to equality – Sexual orientation – Right to marry –
Development of common law – Definition of marriage developed to include same-sex partners –
Order developing common law not to be suspended – ORDER IN PARA 49

CAMERON JA:

‘ a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance’.

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)
- (h)
- (i)

‘ Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.’ (para 57)

‘ Our Constitution contemplates that there will be a coherent system of law built on the foundations of the Bill of Rights, in which common law and indigenous law should be developed and legislation should be interpreted so as to be consistent with the Bill of Rights and with our obligations under international law. In this sense the Constitution demands a change in the legal norms and the values of our society.’

Relief the appellants seek: the Marriage Act 25 of 1961

‘ The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.’

‘ Nothing in this Act contained shall be construed so as to compel a marriage officer who is a minister of religion or a person holding a responsible position in a religious denomination or organisation to solemnize a marriage which would not conform to the rites, formularies, tenets, doctrines or discipline of his religious denomination or organisation’ (s 31).

Should our order be suspended?

‘ This is so because the effect of reading in is to cure a constitutional deficiency in the impugned legislation. If reading in words does not cure the unconstitutionality, it will ordinarily not be an appropriate remedy. Where the unconstitutionality is cured, there would usually be no reason to deprive the applicants or any other persons of the benefit of such an order by suspending it.’

The reasoning in J seems to me to apply with even greater force where the court’s order does not touch on legislation at all, but develops the common law. Legislation is the province of Parliament. If granting the remedy of ‘reading in’ does not intrude on the legislative domain, then development of the common law in accordance with the Constitution – the particular responsibility of the judiciary – does so even less.

ORDER

1. The appeal succeeds with costs.

2. The order of the court below is set aside. In its place is substituted:

‘

(1) It is declared that:

(a) In terms of sections 8(3), 39(2) and 173 of the Constitution, the common law concept of marriage is developed to embrace same-sex partners as follows:

(2) The respondents are ordered to pay the applicants’ costs.’

E CAMERON

JUDGE OF APPEAL

CONCUR :

MTHIYANE JA

FARLAM JA:

[50] This is an appeal against a judgment of Roux J, sitting in the Pretoria High Court, who dismissed with costs an application brought by the appellants against the respondents, the Minister of Home Affairs and the Director General: Home Affairs, for orders (a) declaring that the marriage between them be recognized as a legally valid marriage in terms of the Marriage Act 25 of 1961, provided that it complied with the formalities set out in the Act; and (b) directing the respondents to register their marriage in terms of the provisions of the Marriage Act and the Identification Act 68 of 1997.

[51] The appellants are two adult females who have been living together in a permanent same-sex relationship since June 1994. The first appellant stated in her founding affidavit, which was confirmed in a supporting affidavit by the second appellant, that the purpose of the application was to obtain a declaratory order that the intended marriage between the appellants be recognised as legally valid. She stated further that she and the second appellant had approached a magistrate at one stage and asked her if she would be prepared to solemnize a marriage between them. The magistrate’s reply was that she was prepared to perform such a marriage ceremony for them but that it would not be legally valid and that she would not be able to record it in the marriage register. The first appellant also stated that she and the second appellant had learnt that the Department of Home Affairs would not be prepared to register their intended marriage in terms of the provisions of the Marriage Act.

[55] Before the respondents’ opposing affidavits were filed the appellants caused a notice to be given to the registrar of the Pretoria High Court in terms of Rule 16A in which they indicated that they would raise in their application a constitutional point, which they formulated as follows:

‘Whether the common law has so developed that it can be amended so as to recognise marriages of persons of the same sex as legally valid marriages in terms of the Marriage Act, provided that such marriages comply with the formality requisites set out in the Act.’

The purpose of the Rule is to enable parties interested in a constitutional issue to seek to be admitted as amici curiae in the case in which the issue is raised so that they can advance submissions in regard thereto. As a result of the appellants’ notice to the registrar in terms of Rule 16A a voluntary association known as The Lesbian and Gay Equality Project was allowed to intervene as amicus curiae in the case and submissions were made on its behalf at the hearing in the court a quo. Being of the opinion that the conduct of the amicus went well beyond what was regarded as proper in the Constitutional Court decision *In re certain amicus curiae applications: Minister of Health and Others v The Treatment Action Campaign and Others*, Roux J ordered the amicus to pay the respondents’ costs jointly and severally with the appellants. The respondents subsequently abandoned this part of the order of the court a quo.

[57] The respondents caused an affidavit to be filed on their behalf in which they asked that the application be dismissed with costs. In this affidavit it was averred that the magistrate who told the appellants that a ‘marriage’ between them would not be legally valid was correctly stating the law as it stands. It was also conceded that the Department of Home Affairs is not prepared to register the proposed marriage between the appellants. (It is clear that the Department’s attitude in this regard is based on its contention regarding the validity of the intended marriage between the appellants. There is no reason to think that this attitude will be persisted in if the Department’s contention on this point is not upheld.) The respondents did not deny the first appellant’s statements regarding the practical difficulties the appellants experience in consequence of the fact that they are not married but contented themselves with putting the appellants to the proof thereof.

‘This despite airing my view on how appropriate this relief could be in the light of the facts and the Statute to which I will refer later.’

He held that the appellants were seeking a declaratory order. Such an order, he said, is catered for by s 19 (1) (a) (iii) of the Supreme Court Act 59 of 1959, which vests the court with a discretion, at the instance of any interested person, ‘to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination’.

“ 1. In solemnising any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by his religious denomination or organization if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister, or in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative:

“ Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?”

This section ..., as I have already pointed out, is peremptory. It contemplates a marriage between a male and a female and no other.

- [61] The applicants applied to the Pretoria High Court for leave to appeal against this judgment. As Roux J had in the interim retired, the application came before Mynhardt J, who refused to grant the appellants a positive certificate in terms of Rule 18 of the Constitutional Court Rules but did grant them leave to appeal to this Court.
- [62] The appellants then approached the Constitutional Court for leave to appeal directly to it against the judgment and order of Roux J. This application was refused on the ground that the interests of justice required that the appeal be heard first by this Court. The judgment of the Constitutional Court, which was delivered by Moseneke J, has been reported: see *Fourie and Another v Minister of Home Affairs and Another* .
- [63] Before the issues arising for decision in this case and the contentions of the parties in regard thereto are considered it will be appropriate to set out the relevant provisions of the Constitution as well as ss 3, 29A, 30 and 31 of the Marriage Act (as far as they are relevant) and ss 3, 5(1) and 8(e) of the Identification Act 68 of 1997.
- [64] The following provisions of the Constitution are relevant in this matter: s 7, s 8 (1), (2) and (3), s 9 (1), (2), (3) and (5), s 10, s 31(1) (a) and (2), s 36, s 38 (the general part of the section and paragraph (a)), s 39(1) and (2) and s 172(1).
- ‘ 7. (1) This Bill is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.’
- ‘ 8.
- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- ‘ 9.
- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

‘ 10. Everyone has inherent dignity and the right to have their dignity respected and protected.’

- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.’

‘ 36.

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.’

‘ 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

...’

‘ 39.

- (1) When interpreting the Bill of Rights, a court, tribunal or forum-
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

‘ 172.

- (1) When deciding a constitutional matter within its power, a court-
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including-

- (i) an order limiting the retrospective effect of the declaration of invalidity; and

[65] As far as they are relevant ss 2, 3, 11(2) and 3, 29A, 30(2) and (3) and 31 of the Marriage Act read as follows:

‘ 2.

- (1) Every magistrate, every special justice of the peace and every Commissioner shall by virtue of his office and so long as he holds such office, be a marriage officer for the district or other area in respect of which he holds office.
- (2) The Minister and any officer in the public service authorized thereto by him may designate any officer or employee in the public service or the diplomatic or consular service of the Republic to be, by virtue of his office and so long as he holds such office, a marriage officer, either generally or for any specified class of persons or country or area.’

‘ 3.

- (1) The Minister and any officer in the public service authorized thereto by him may designate any minister of religion of, or any person holding a responsible position in, any religious denomination or organization to be, so long as he is such a minister or occupies such position, a marriage officer for the purpose of solemnizing marriages according to Christian, Jewish or Mohammedan rites or the rites of any Indian religion.’

- (a) an error, omission or oversight committed in good faith by the marriage officer; or

but such marriage has in every other respect been solemnized in accordance with the provisions of this Act or, as the case may be, a former law, that marriage shall, provided there was no other lawful impediment thereto and provided further that such marriage, if it was solemnized before the commencement of the Marriage Amendment Act, 1970 (Act 51 of 1970), has not been dissolved or declared invalid by a competent court and neither of the parties to such marriage has after such marriage and during the life of the other, already lawfully married another, be as valid and binding as it would have been if the said provisions had been strictly complied with.’

(The text of ss 11(1) and 30(1), which are also relevant, were quoted by Roux J in the extracts from his judgment set out in para [60].)

[66] Sections 3, 8(e) and 13 of the Identification Act 68 of 1997 read as follows:

‘ 3. This Act shall apply to all persons who are South African citizens and persons who are lawfully and permanently resident in the Republic.’

...

‘ 13

(1) The Director-General shall as soon as practicable after the receipt by him or her of an application, issue a birth, marriage or death certificate in the prescribed form after the particulars of such birth, marriage or death were included in the register in terms of section 8 of this Act.

[67] In the course of the argument it became clear that the following issues arise for decision in this case:

- (1) Does the common law definition of marriage which precludes two persons of the same sex from marrying one another discriminate against the appellants?
- (2) If so, is such discrimination unfair?
- (4) If there is unfair discrimination, and/or an infringement of human dignity, should this court give the appellants the remedy they seek, namely a development of the common law definition of marriage so as to allow same sex marriages?
- (6) That in turn will necessitate consideration of the question:

what is the essence of the concept of marriage as it has developed down the centuries and especially since 1994 in this country?

If all these questions are answered in favour of the appellants it will be necessary to ask:

[68] Before I proceed to consider these issues it is in my view desirable to say something about the history of the institution of marriage in our law.

‘It is possible for someone indeed to call one marriage a political marriage and the other a church marriage inasmuch as one is contracted in the face of the church and the other before a court. But if this distinction were to be approved it proceeds from the incidentals of the marriage and is of no force if one has regard to the bond of the marriage itself, honourableness, the legitimate status of the children who are born therefrom and all the rights which the spouses obtain. Because the same legal position applies in both cases, the same dignity, the same honourableness, the same bond. Indeed a marriage contracted in church can be called a political marriage in so far as it is solemnized in the church by the authority of a magistrate through a delegated person, namely a minister of God.’

This analysis is clearly correct and as applicable today as it was in 1665 when it was first published.

[83] Against that background I turn to the question whether the common law definition of marriage discriminates unfairly against homosexual persons.

‘With us marriage is a union of one man with one woman, to the exclusion, while it lasts, of all others’.

He approved this statement in *Seedat’s Executors v The Master (Natal)*.

A useful expanded paraphrase of the concept was given by the great Scots jurist Viscount Stair in his Institutions, published in 1681. He said that the consent to marriage is :

‘ the consent whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds, as the general end of the institution of marriage is the solace and satisfaction of man [by which I take it he meant humankind].’

[85] Mr Oosthuizen, who appeared for the appellants, submitted that our law and societal practice grants many rights and privileges to married persons because they are married. Mr Sithole, for the respondents, did not dispute this. It is clear therefore that our law, in terms of the common law definition to which I have referred, permits heterosexual persons to enter a conjugal society as described by Viscount Stair, by Modestinus and Justinian, it recognises and protects that relationship in many ways, and grants the parties thereto many legally enforceable rights and privileges.

‘ The law does not prohibit marriage by homosexuals, provided it takes place between persons of the opposite sex. Some homosexuals do marry. The fact that many homosexuals do not choose to marry, because they do not want unions with persons of the opposite sex, is the result of their own preferences, not a requirement of the law.’

[88] This approach to the matter was expressly rejected by Ackermann J in the Home Affairs case at para 38 where he said:

IS SUCH DISCRIMINATION FAIR?

[89] Section 9(5) provides that discrimination on a ground listed in s 9(3) is unfair unless it is established that the discrimination is fair. No attempt was made by the respondents to establish the fairness of the discrimination. Instead they contended that there was differentiation in this case but not discrimination, a submission which for the reasons given above I cannot accept.

‘

[53] The message that the total exclusion of gays and lesbians from the provisions of the subsection conveys to gays and lesbians and the consequent impact on them can, in my view, be conveniently expressed by comparing (a) the facts concerning gays and lesbians and their same-sex partnerships which must be accepted, with (b) what the subsection in effect states:

(a) (i) Gays and lesbians have a constitutionally entrenched right to dignity and equality;

(ii) sexual orientation is a ground expressly listed in s 9(3) of the Constitution and under s 9(5) discrimination on it is unfair unless the contrary is established;

(vii) in short, they have the same ability to establish a consortium omnis vitae;

(viii) finally, and of particular importance for purposes of this case, they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.

(b) The subsection, in this context, in effect states that all gay and lesbian permanent residents of the Republic who are in same-sex relationships with foreign nationals are not entitled to the benefit extended by the subsection to spouses married to foreign nationals in order to protect their family and family life. This is so stated, notwithstanding that the family and family life which gays and lesbians are capable of establishing with their foreign national same-sex partners are in all significant respects indistinguishable from those of spouses and in human terms as important to gay and lesbian same-sex partners as they are to spouses.

[54] The message and impact are clear. Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians.

[93] That reasoning clearly applies here. The effect of the common law prohibition of same-sex marriages is clearly unfair because it prevents parties to same-sex permanent relationships, who are as capable as heterosexual spouses of establishing a consortium omnis vitae, of constituting a family and of establishing, enjoying and benefiting from family life, from entering into a legally protected relationship from which substantial benefits conferred and recognized by the law flow.

[94] It is clear from the reasons given in the passage cited from the House Affairs case that the common law definition of marriage not only gives rise to an infringement of the appellants' constitutional right not to be the victims of unfair discrimination in terms of s 9 of the Constitution but also to their right to human dignity in terms of s 10.

[95] It is not suggested by the respondents that the common law definition of marriage in so far as it prevents homosexual persons from entering into same sex marriages constitutes a justifiable limitation on the appellants' rights under ss 9 and 10 of the Constitution. In my view, there would be no merit in any such suggestion.

[9] It is now necessary to consider what remedy, if any, should be given to the appellants. The respondents contended that the court a quo correctly dismissed the application for the reasons given in the judgment which I have summarized in paras [59] and [60] above. They laid great stress on the point, which had found favour with the court a quo, that, as the appellants had not attacked the validity of those provisions of the Marriage Act which appeared to place a legislative imprimatur on the common law definition, the application

could not succeed.

‘ In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.’

[102] In *Du Plessis v Road Accident Fund* that this Court extended the action for loss of support to partners in a same-sex permanent life relationship similar in other respects to marriage, who had a contractual duty to support one another. Cloete JA said that this extension would be ‘an incremental step to ensure that the common law accords with the dynamic and evolving fabric of our society as reflected in the Constitution, recent legislation and judicial pronouncements.’

[103] Counsel for the respondents contended that the step which the appellants ask the Court to take is not merely an incremental one but one which would require a fundamental rewriting of important aspects of what can be described as the essence of marriage. He incorporated in his argument portion of the submissions advanced by Counsel for the Attorney General of Canada in a matter heard in November 2001 in the Ontario Superior Court of Justice, Divisional Court, in which the divisional court declared the common law definition of marriage recognised in Canada (which is the same as ours) to be constitutionally invalid and inoperative but suspended the effect of the declaration for 24 months to permit the Canadian Parliament to act. (On appeal to the Ontario Court of Appeal, the Court, in a judgment delivered on 10 June 2003, upheld the declaration of invalidity but set aside the suspension and ordered the declaration to have immediate effect.)

‘ This case is about our humanity ... There are different aspects, but at its core is our femaleness and maleness. The issue before this court is a legal one. It is whether government action, embodied in common law, and statutes, meets the charter rights that the applicants possess. ... It is a unique institution, and the court has to decide whether to change marriage forever. ... The purpose of marriage has nothing to do with excluding the applicants. That is an effect, but the purpose of marriage, outside the law, at its roots, was to define an institution that would bring together the two core aspects of our humanity; our maleness and our femaleness, because at its essence this is the basis for humanity. If you take that purpose away, we have something else; the institution has changed.’

[105] Counsel for the respondents contended further that the essence of marriage in our law is a combination of factors: the characteristics going together to make up marriage, so he contended, were procreation, the consortium omnis vitae and what counsel for the Attorney General of Canada in the Halpern case in the divisional court called ‘the complementarity of the two human sexes’, ‘our femaleness and our maleness’.

‘In reality, a strong, independent judiciary forms the foundation of representative democracy and observance of the Rule of Law and human rights. [However] it is primarily the confidence of the community in the legal system which encourages observance of the law ... [The practice of judicial independence] also relies on a community perception that in resolving disputes between parties, the judiciary reflects and acts upon the basic and enduring values to which the community subscribes’

[109] Counsel for the respondent submitted that, if this Court were to be of the opinion that the definition of marriage should be extended to cover same-sex unions, it should suspend whatever relief it was minded to grant to the appellants for 24 months so as to give the legislature time to consider the matter and pass such legislation as it considered necessary to deal with the problem.

‘[i]t hardly needs saying that this approach would involve a fundamental change in the traditional concept of marriage’.

Lord Hope of Craighead was of the same opinion. At para 69 of his opinion he said:

‘... problems of great complexity would be involved if recognition were to be given to same-sex marriages. They must be left to Parliament.’

[113] These statements do not apply with the same force in this country. With us the concepts of marriage and the family have to be seen against the background of the numerous strands making up the variegated tapestry of life in South Africa. In addition the influence of the Constitution and its express recognition of the importance of the democratic values of human dignity and equality have played a major role in transforming attitudes in this as in many other areas of the law. The point is well put by Professor Joan Church in her valuable and scholarly article ‘Same-sex unions – Different Voices’. Professor Church says:

For the union of two persons of the same sex is to be detested and is condemned by the law of God, the law of nature and the laws of all nations.’

Brouwer, after quoting the definitions of Justinian and Modestinus, says:

‘The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed.’

The learned judge went on to say that ‘a family defined by heterosexual marriage continues to be the most prevalent social structure into which the vast majority of children are born, nurtured and prepared for productive participation in civil society’ and continued:

‘It is difficult to imagine a State purpose more important and legitimate than ensuring, promoting and supporting an optimal social structure within which to bear and raise children. At the very least, the marriage statute continues to serve this important state purpose.’

He then considered whether the Massachusetts statute, construed (as he held it had to be) as limiting marriages to couples of the opposite sex, remains a rational way to further that purpose. He concluded that it did. In reaching that conclusion he said, amongst other things:

‘ As long as marriage is limited to opposite sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavour; that if they are to procreate, their society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes.

[127] In my view it is appropriate to consider what importance or relevance is to be attached in the present context to the fact that the parties to a same-sex union are incapable of procreating ‘naturally’ with each other.

‘ While it is true that, due to biological realities only opposite-sex couples can “naturally” procreate, same-sex couples can choose to have children by other means, such as adoption, surrogacy and donor insemination.’

This fact in itself may well constitute sufficient refutation of the arguments set out in Cordy J’s judgment in the Goodridge case which I have quoted above.

‘ [50] A second stereotype, often used to bolster the prejudice against gay and lesbian sexuality, is constructed on the fact that a same-sex couple cannot procreate in the same way as a heterosexual couple. Gays and lesbians are certainly individually permitted to adopt children under the provisions of s 17(b) of the Child Care Act 74 of 1983 and nothing prevents a gay couple or a lesbian couple, one of whom has so adopted a child, from treating such child in all ways, other than strictly legally, as their child. They can certainly love, care and provide for the child as though it was their joint child.

[52] I find support for this view in the following conclusions of L’Heureux-Dubé J (with whom Cory J and McLachlin J concurred) in *Mossop Canada (Attorney-General) v Mossop*) 100 DLR (4 th 658]:

[132] I proceed to consider whether, as the court a quo held, this Court is precluded from granting relief to the appellants because they did not challenge the constitutional validity of s 30(1) of the Marriage Act, which sets out the marriage formula. This formula, which has been quoted above, is clearly based on the declaration prescribed by the Order in Council of 7 September 1838. Section 7, as amended by an Order in Council of 3 April 1840, provided that in the case of marriages other than those using the form and ceremony or ritual of the Anglican or Dutch Reformed Churches, each of the parties had to make the following declaration: ‘I do solemnly declare that I know not of any lawful impediment why I, A.B., may not be joined in matrimony to C.D., here present.’ Thereafter each of the parties had to say to the other: ‘I call upon these persons here present to witness that I, A.B., do take C.D to be my lawful wedded wife (or husband).’

‘ states the principle, enunciated by the Victorian draftsman Lord Thring, that an ongoing Act is taken to be always speaking. While it remains in force, the Act is necessarily to be treated as current law. It speaks from day to day, though always (unless textually amended) in the words of its original drafter. As Lord Woolf MR said of the National Assistance Act 1948 –

Later on Bennion says:

‘ Each generation lives under the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original framers intended sinks gradually into history. While their language may endure as law, its current subjects are likely to find that law more and more ill-fitting. The intention of the originators, collected from an Act’s legislative history, necessarily becomes less relevant as time rolls by. Yet their words remain law. Viewed like this, the ongoing Act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.

[137] Among the examples he gives of the application of the working of the presumption are the following:

‘ Changes in the practices of mankind may necessitate a strained construction if the legislator’s object is to be achieved.

Example 288.16 The Carriage by Air Act 1961 gives legislative force to the Warsaw Convention as amended at The Hague in 1955, which is set out in Sch 1. The Convention limits liability for loss of or damage to “registered baggage”, but does not explain what “registered” means or what “registration” entails. Lord Denning MR explained that originally airlines kept register books in which all baggage was entered, but that this had been discontinued. He added: “What then are we to do? The only solution that I can see is to strike out the words ‘registered’ and ‘registration’ wherever they occur in the articles. By doing this, you will find that all the articles work perfectly, except that you have to find out what a ‘baggage check’ is.”

Developments in technology The nature of an ongoing Act requires the court to take account of changes in technology, and treat the statutory language as modified accordingly when this is needed to implement the legislative intention.

[139] I am satisfied for the reasons I have given that the appellants have established that the continued application of the common law definition of marriage infringes their constitutional rights to equality and human dignity and that it is possible for this Court to give them an effective remedy because the extension of that definition to cover same-sex unions would be an incremental step in the development of the law and would not involve the court in trespassing on the domain of the legislature by effecting extensive amendments to the law involving problems of great complexity.

‘ make any order that is just and equitable, including –

Even if one assumes that a decision to develop the common law - because without the development it is not in accord with the spirit, purport and objects of the Bill of Rights - does not amount to a declaration of invalidity (a matter on which it is not necessary for me to express an opinion), it is clear that the Court's powers to grant 'any order that is just and equitable' must include the power to suspend an order developing the common law, when the problem under consideration can also be solved by other methods which only Parliament can employ and where the ultimate decision as to which method should be employed depends to a substantial degree on policy considerations.

'Temporarily suspending the declaration of invalidity to give Parliament or the provincial Legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:

A. striking down the legislation without enacting something in its place would pose a danger to the public;

I should emphasize before I move on that the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context.'

Professor Hogg points out that these 'guidelines' were not referred to in and do not accommodate five subsequent decisions of the Supreme Court of Canada in which temporary validity was given to certain laws to enable the legislature to redraft them and in one case to allow for consultation with Aboriginal people before a new law was drafted.

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