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A FEMINIST CRITIQUE AND COMPARATIVE ANALYSIS OF THE RULE OF EVIDENCE IN RAPE TRIALS IN SOUTH AFRICA

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ABSTRACT

The primary purpose of this paper is to indicate how Canadian legislative reforms could provide valuable insights regarding the reform of sexual assault law in South Africa. The first section of this paper contains an examination of three particular evidentiary rules in the South African context. In the second section a feminist critique of rape law is used to explore the significance of these rules in rape trials, using the framework of significant themes of the feminist enquiry. In the third section I look at the development of these evidentiary rules in Canada and evaluate the present legal position in this regard, with particular reference to decision of the Supreme Court of Canada in *R v Seaboyer, R v Gayme* (1991) 83 D.L.R. (4th) 193. In the final instance, an attempt is made to identify some significant lessons for those seeking to formulate the much needed reforms to these rules in South Africa.

RÉSUMÉ

Le principal objectif de ce mémoire est de montrer comment les réformes législatives canadiennes peuvent fournir des éléments utiles à la réforme du droit sud africain sur les violences sexuelles.

La première partie de cette thèse contient une étude de trois règles de preuve spécifiques dans le contexte sud africain.

Dans une deuxième partie, il sera fait recours à une critique féministe du droit sur le viol ainsi qu'aux éléments fondamentaux de l'enquête féministe afin d'étudier de manière approfondie ces règles dans le cadre de procès pour viol.

Dans une troisième partie, je me penche sur le développement au Canada de ces règles de preuves et évalue la position actuelle de la doctrine sur cette évolution. A cet effet, je me réfère tout particulièrement à la décision de la Cour suprême du Canada dans l'affaire *R* v. *Seaboyer*, *R* v. *Gayme* (1991) 83 D.L.R. (4^{th}) 193.

Pour finir, je tente de dégager certaines leçons qui pourraient avoir une grande portée pour ceux qui essaient de mettre en forme les réformes plus que nécessaires de ces règles en Afrique du Sud.

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1 INTRODUCTION

South Africa has one of the highest rape statistics in the world. In 1988, a total of 19 308 cases of rape were reported to the South African Police Service (SAPS). In 1994, this figure increased to 42 429 reported cases of rape. In 1996, 50 481 cases of rape were reported to the SAPS. According to the National Institute for Crime Prevention and Rehabilitation (NICRO), the situation is more serious. NICRO has estimated that only one in twenty rapes are reported to the police. On the basis of this estimate, it is calculated that one rape occurs every 83 seconds. The SAPS has recently presented an even bleaker picture and they have suggested that one rape occurs every 35 seconds.[1] Finally, of those cases of rape that are reported, only 1 out of every 11 rapists is ever convicted for this crime[2].

One may speculate regarding the various reasons for the high incidence of rape in South Africa. Some of these reasons include societal attitudes regarding rape which are informed by rape myths and misogynist stereotypes of women, a "culture of violence" which predominates in South Africa as a legacy of the apartheid struggle and the inadequacies in our criminal justice system which create an environment where it is relatively easy to

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1 M. Robertson, "An Overview of Rape in South Africa" (1998) Continuing Medical Education J . Mary Robertson is Coordinator of the Trauma Clinic at the Centre for the Study of Violence and Reconciliation. See also Vetten L, "A Comparison of Reporting, Prosecution and Conviction Rates for Crimes of Assault and Sexual Violence" (paper presented on 26 February 1997 at a seminar held by the Centre for the Study of Violence and Reconciliation (Sexual Harassment Education Project)).

2 D. Hubbard, *A Critical Discussion on the Law of Rape in Namibia* (Windhoek: University of Namibia & Namibian Institute for Social and Economical Research, 1991).

commit an offence of rape without any severe consequences.[3]

The primary purpose of this paper is to indicate how Canadian legislative reforms could provide valuable insights regarding the reform of sexual assault law in South Africa. My concern is specifically focused on the South African evidentiary rules which operate in rape trials and how these not only reduce the ability of courts to convict rapists or reduce the likelihood of a conviction, but more significantly how they lead to what has become known as the "second traumatisation" of rape victims - the rape trial itself.

The first section of this paper contains an examination of evidentiary rules in the South African context, tracing their development in common law and also assessing how they have been shaped by court decisions. In the second section a feminist critique of rape law is used to explore the significance of evidentiary rules used in rape trials and to examine how these rules effectively silence women's voices in the criminal justice system. In the third section I look at the development of these evidentiary rules in Canada and evaluate the present legal position in this regard. In the final instance an attempt is made to draw some parallels between the Canadian and South African developments.

The key reason[4] for my choice of Canada as comparative jurisdiction is the legislative

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3 Roberts, *supra* note 1.

4 Although these are in my view the most important reasons for a comparative enquiry of the present nature, there are also other similarities between the two jurisdictions which facilitates such an enquiry. In both countries, for instance, we find legal systems which are rooted in the Anglo-American system and which have moved from a system of parliamentary supremacy to one of constitutional supremacy. More significantly, perhaps,

transformation of Canadian sexual assault law in the last two decades. Given the similarities in constitutional context as well as the fact that the South African limitation clause has been molded on section 1 of the *Canadian Charter of Rights and Freedoms*[5], I submit that the reform of the South African law of sexual assault, which is in my view an urgent necessity, could benefit greatly from drawing on the insights gained from the Canadian experience.

2 SOUTH AFRICAN LAW

2.1 Introduction

In the following discussion I centre my enquiry of the law of rape on the evidentiary rules which come into play during a rape trial. I shall examine how rules have been implemented and dealt with in South Africa and conclude with a discussion of the recent decision of the South African Supreme Court of Appeal in *S* v *Jackson*[6], which marks a change in the approach of South African judiciary in its approach to the application of one of these rules.

Three evidentiary rules form the essence of this enquiry:

(a) the so-called "recent complaint" rule, according to which a previous consistent

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is the fact that in both these two jurisdictions legislation is applied on a national as opposed to a provincial level.

5 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

6 1998 (1) SACR 470 (SCA)[hereinafter *Jackson*].

statement by a primary witness[7] in a case of a sexual nature is admissible to prove the consistency of her evidence and as such also her credibility as a witness,

(b) the rule regarding the admissibility of evidence regarding the previous sexual history of the primary witness, and

(c) the cautionary rule which is applied to the evidence of primary witness in a case of a sexual nature.

These evidentiary rules are mostly found in common law, although certain aspects of these rules are in specific instances codified.[8] The cautionary rule, also referred to as the corroboration rule or the cautionary warning, is not codified in any way. It has been taken over from the English common law and shaped by case law.[9] The rule regarding recent complaint is also the product of common law and no reference is made to it in any legislative provision. The rule regarding the previous sexual history of the primary witness is contained in the *Criminal Procedure Act*[10] under the provisions of section 277, which deals with the admissibility of character evidence. The South African law of evidence was inherited from English law.

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7 Thus term is here borrowed from Brettel Dawson (who in turn relies on Christine Boyle) who considers it preferable to terms such as "victim", "complainant' or "prosecutrix" - see T. B. Dawson, "Sexual Complaint and the Past Sexual Conduct of the Primary Witness: the Construction of Relevance" (1988) 2 C.J.W.L. 310 at 311.

8 L. H. Hoffmann & D. H. Zeffertt, *The South African Law of Evidence*, 4th ed. (Durban: Butterworths, 1988).

9 See discussion *infra* in section 2.

10 Act 55 of 1977.

2.2 The rule regarding recent complaint

It is an accepted principle of the South African law of evidence that that which a person says off the witness stand is not admissible as evidence because it is irrelevant.[11] As a result, it is not admissible to use testimony of a previous statement made by a witness, which is consistent with the testimony presently given by the witness, to corroborate the evidence now given in court. The underlying premise is that repetition of a certain statement does not necessarily make that statement more true and also that such a statement could easily be manufactured.[10]

The rule with regard to recent complaint in sexual cases is an exception to the rule against previous consistent statements. This rule is also known as the rule against self-corroboration or the rule against narrative[11] and has been inherited from the English law. It has a somewhat peculiar history: in the Middle Ages it was of vital importance that a victim of rape should raise the "hue and cry" if she was to have any success in the subsequent trial of the accused[12]. This meant that the victim was expected to

> go at once and while the deed is newly done, with hue and cry, to the neighbouring townships and there show the injury done her to men of good repute, the blood and clothing

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11 South African Law Commission, *Report on Women and Sexual Offences in South Africa* (Project 45) (Pretoria: S A Law Commission, 1985)[hereinafter the Law Commission] at 51.

10 Hoffmann & Zeffert, *supra* note 8 at 117.

11 *Ibid.*

12 C. Tapper, *Cross on Evidence*, 7th ed. (London: Butterworths, 1990) at 282.

stained with blood, and her torn garments...[13].

In its earliest application the rule was used in cases of a non-sexual nature as well, but in its present form it applies only to cases where the offence is of a sexual nature[14]. The previous consistent statement of the complainant may, however, only be used for the purpose of showing consistency of conduct and absence of consent, and not to corroborate the evidence of the complainant (hence it being referred to as the rule against self-corroboration). Tapper notes that the original purpose of the admission of the evidence regarding the complaint was to prevent a situation where a negative inference is drawn from the fact that a victim failed to complain of the fact that she had been attacked.[15]

A number of conditions have to be complied with in order for this exception to the rule against previous consistent statements to apply. The first of these is that the complaint has to have been made voluntarily. This requirement was established in the English decision of *R v Osborn*[16], where it was said that complaints elicited by questions of an intimidating, inducing or leading nature would be inadmissible. This was confirmed in the South African decision of *S v T*[17] where a complaint made as a result of threats of force made to her by

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13 H. de Bracton, *On the Laws and customs of England vol 2* (translated by S. E. Thorne) (Cambridge, Mass.: Harvard University Press, 1968) 415.

14 P. J. Schwikkard, "A critical overview of the rules of evidence relevant to rape trials in South African law" in S. Jagwanth, P. J. Schwikkard & B. Grant, eds., *Women and the Law* (Pretoria: HSRC Publishers, 1994) [hereinafter *Women and the Law*] 198 at 200.

15 *Ibid.*

16 [1905] 1 K.B. 551.

17 (1963) 1 SA 484 (A).

the victim's mother was excluded. This requirement gives rise to the problem of determining whether the statement was in fact a complaint or whether it could rather be seen as a mere conversation.[18] Needless to say, it is very difficult to lay down exact rules as to when the statement will amount to a complaint and when it will merely form part of a conversation. It is equally difficult to determine which amount of prompting would be acceptable so as to keep within the required parameters of voluntariness. In *R v Osborn* this was said to be a matter best to be left with the discretion of the presiding officer, which discretion he or she should exercise with the proper consideration of all the relevant circumstances.[19]

A second requirement is that the complaint be made "at the first reasonable opportunity which presents itself"[20]. On the one hand, the argument goes, the attack is of such a nature that a complaint could be expected to be made to the first appropriate person[21]. Then again, it does not mean that the victim is required to complain to the first person she encounters[22]. The question as to what may be considered to be a contemporaneous complaint is yet again placed within the discretion of the court.[23]

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18 Tapper, *supra* note 12 at 285.

19 *Supra* note 16 at 561.

20 Tapper, *supra* note 12 at 285.

21 *Ibid.*

22 See *R v Gow* 1940 (2) PH H 148 (C), for instance, where it was said to be reasonable for a girl assaulted on a train not to complain to the ticket examiner and a later complaint to her mother was admitted.

23 *R v Gannon* 1906 TS 11 4; *R v Cummings* [1948] 1 All E.R. 551.

The third requirement for the admissibility of the complaint is that the complainant herself must testify. This requirement flows from the fact that the rule is not an exception to the hearsay rule - if the complainant does not herself give evidence, any reference to the complaint would amount to an infringement of the common law hearsay rule and as such the evidence regarding the complaint would be inadmissible.

A further aspect of this rule which is related to the requirement mentioned in the previous paragraph pertains to the question of what aspect of the complaint is admissible as evidence. Originally the rule was that the terms of the complaint were inadmissible and mention could be made only of the fact that the complaint had actually been made.[24] It was feared that, should the terms of the complaint be admitted, the jury might have used it as evidence of the terms of the complaint, which would then be contrary to the hearsay rule. In the English case of *R v Lillyman*[25] admissibility was extended to the terms of the complaint and the problem of the evidence being hearsay was said to be counteracted by a warning to the jury that the evidence regarding the complaint be used for no other purpose than to negative consent and to prove consistency (and as such credibility). The rule as it presently applies in South Africa is that evidence regarding the complaint itself (*i.e.* the terms of the complaint) be admissible, provided that the complainant herself testifies.

2.3 Previous sexual history of the complainant

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[24] Tapper, *supra* note 12 at 283.

[25] [1896] 2 Q.B. 167.

The second evidentiary rule I wish to discuss, is the rule regarding the previous sexual history of the complainant in a case of a sexual nature. The character of a witness is as a general rule not relevant and as such inadmissible. Since the primary purpose of cross-examination is to establish the credibility of a particular witness, or expose the lack thereof, the character of a witness will be admissible if it is relevant to credibility. In the case of indecent assault or rape, however, the defence may adduce evidence of the bad reputation or lack of chastity of the complainant[26] - evidence of this kind is considered relevant to the issue of consent. Three possible reasons may be advanced for the notion that the character of a complainant in a case of a sexual nature is of more significance than in any other case.[27] The first is that rape is a unique crime in that it centres on the state of mind of the complainant.[28] Furthermore, it is a defence to a charge of rape that the accused believed that the complainant consented - for this reason, the chastity of the complainant is seen as relevant. In the final instance, intercourse usually takes places in private and evidence in regard thereto is often scant.[29] The outcome of a particular case frequently pivots on the balance of credibility between the parties, which means that a conclusion that the complainant is not a credible witness is in most cases fatal to the prosecution's case.

At common law, evidence regarding the past sexual endeavours of the complainant **with**

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[26] Hoffmann & Zeffertt, *supra* note 8 at 47.

[27] Tapper, *supra*, note 12 at 322.

[28] See generally discussion *infra* in section 3.

[29] Regarding the problem of preservation of evidence, see also A. Armstrong, "Corroboration and rape trials in Zimbabwe" (1988) Zimbabwe L. Rev. 53 at 58.

the accused was admissible, evidence regarding her sexual acts **with other men** was not admissible during evidence-in-chief, but questions to this effect were admissible during cross-examination, since such questions were regarded as relevant to the issue of consent.[30]

Before being amended by the *Criminal Law and Criminal Procedure Law Amendment Act*[31], the position in South Africa corresponded with the common law position as set out above.[32] The relevant statutory provision now provides that evidence regarding the complainant's sexual history with the accused remains relevant and as such admissible[33] but that special application has to be made to court in order to tender evidence regarding her sexual history with other men[34] . This application must be made *in camera*[35] and relevance is the sole criterion according to which a court may decide to grant such an application.

In its report the Law Commission acknowledges that the premise which underlies this rule of evidence is a vestige from an era when public morals dictated that no decent woman had sexual intercourse outside of marriage.[36] Apart from the fact that the underlying assumption

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30 *Ibid.*

31 Act 39 of 1989.

32 Section 227.

33 Section 227(2).

34 Section 227(1).

35 Section 227(3).

36 *Supra* note 11 at 43.

of this rule is an outdated one and certainly no longer relevant in modern Western society, its application also has the effect of humiliating and intimidating the complainant, which in turn discourages the complainant from laying a charge.[37] Schwikkard[38] points out, however, that the legislative changes to section 227 which flowed from the Law Commission's recommendation has not done much to alleviate the position of rape complainants regarding evidence of their past sexual history. The new provision gives presiding officers a much wider discretion which at face value may seem conducive to the exclusion of irrelevant previous sexual history evidence but may have just the opposite effect [39].

2.4 The cautionary rule

The rules of evidence discussed up to this point dealt with the admissibility of evidence in rape trials. The third and probably most contentious rule which I shall look at deals with the weight or probative value of admissible evidence. This is the rule that the evidence of a complainant in a case of a sexual nature should be approached with caution so as to reduce the risk of a wrongful conviction.

This rule is one of a number of cautionary rules which was originally brought about when the jury system[40] was still applied in South Africa. The purpose of these rules was to warn

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37 *Ibid.*

38 *Women and the Law*, *supra* note14 at 204.

39 See discussion *infra* in section 4.

40 This rule subsequently survived the abolition of jury trials in South Africa. See Hoffmann & Zeffertt, *supra* note 8 at 572.

the jury that the evidence of certain witnesses[41] should be approached with circumspection and that, in order to avoid a wrongful conviction, the trier of the facts should always look for some form of corroboration of evidence emanating from these witnesses:

> The cautionary rules have ... evolved because the collective wisdom and experience of judges has found that certain kinds of evidence cannot be safely relied upon unless accompanied by some satisfactory indication of trustworthiness.[42]

The rationale for this rule is similar to that of the rules discussed above - rape charges are easily made yet difficult to refute, such charges may have been motivated by spite, sexual frustration or other "unpredictable" emotional causes, and so on[43]. It is also said that, where paternity is an issue, the complainant may have a financial motive for laying a false charge in that she may want to inculpate someone who is in a better financial position and who may be able to support her child more generously.[44] The rule is said to have evolved from practice[45] and to be the product of sound development in law[46].

What is particularly troubling about the cautionary rule as it has formed part of the South

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41 Most notably children, accomplices, complainants in sexual cases and single witnesses.

42 Hoffmann & Zeffertt, *supra* note 8 at 573.

43 For a list of reasons why this rule should be followed in cases involving sexual assault, see the general discussion of case law in Hoffmann & Zeffertt, *ibid.* at 579 (nt 74 to 77).

44 *Ibid.*

45 *Ibid.*

46 Law Commission, *supra* note 11 at 61.

African rules of evidence[47] is that, in cases involving an alleged offence of a sexual nature, the nature of the offence and the circumstances surrounding it often resulted in more than one version of the rule being applied. Since the application of the rule was required to the evidence of the primary witness in a case of a sexual nature as well as to that of a single witness, women testifying about having been the victim of a sexual offence often have a "double" cautionary rule applied to their testimony.

In addition, the misogynist view of women who are the victims of sexual offences may even result in the application of a third cautionary rule to their testimony - the rule applicable to the evidence of an accomplice. In *S* v *Snyman*[48] Holmes JA held that, although a complainant in a sexual case is not *ex hypothesi* a criminal, there are a number of reasons why the latter could be treated the same as the testimony of an accomplice.[49] These are that both the complainant in a case of a sexual nature and an accomplice may be motivated to "substitute the accused for the real culprit"[50]. Also, their participation in the event puts both in a position to fabricate false though convincing evidence by merely substituting the accused for the real perpetrator.[51]

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47 The rule has now been abolished to a great extent by the Supreme Court of Appeal decision in *Jackson*, *supra* note 6.

48 1968 (2) SA 582 (A). This is a decision of the Appellate Division of the Supreme Court of South Africa, the predecessor of what is now known as the Supreme Court of Appeal.

49 *Ibid.* at 585.

50 *Ibid.*

51 *Ibid.*

Until fairly recently South African courts refused to acknowledge the discriminatory nature of this rule. In the 1992 judgment of *S* v *M*[52], the Witwatersrand Local Division held that the rule did not in any way discriminate against women. This was decided on the basis that it was not a rule of law, but merely an admonition to adjudicators to follow a "common sense" approach. One of the reasons why the rule was held not to be discriminatory against women, was that it enjoyed some support in the United Kingdom, where sexual discrimination is an offence. As Schwikkard[53] points out, this is at best a halfhearted and superficial argument in the light of the scrapping of this rule suggested by the Law Commission in Britain.[54]

It seems curious that the court in *S* v *M*[55] chose to ignore the judgment of the Namibian High Court in *S* v *D*[56] which outrightly condemned the preservation of the rule and pointed out that the overwhelming majority of complainants in cases of a sexual nature are women.

As a result of the dismal situation in South Africa with regard to the cautionary rule and its application in sexual assault cases, feminists could breathe an (albeit apprehensive) sigh of relief when judgment was handed down by the Supreme Court of Appeal in *S* v

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52 1992 (2) SACR 188 (W).

53 P. Schwikkard, "Sexual Offences - The Questionable Cautionary Rule" (1992) 109 S.A.L.J. 46.

54 *Ibid.* at 47.

55 *Supra* note 52.

56 1992 (1) SA 513, 1992 (1) SACR 143 (Nm)

Jackson[57]. Olivier JA's pioneering judgment in this case represents a clear intention on the part of the Supreme Court of Appeal regarding the application of this rule and is in many respects a breakthrough for gender equality in the realm of criminal justice and evidence.

The facts of the case are fairly insignificant and it suffices to mention that the factual account of the accused differed substantially from that of the primary witness. On appeal it was argued on behalf of the accused that the trial judge had erred in not truly applying the cautionary rule in respect of the evidence of complainants in sexual cases. The appeal against the conviction and sentence was dismissed.[58]

Olivier JA makes it clear that the cautionary rule in question is, in his view, based on outdated and stereotyped notions of women:

> In our country, as in others, judges have attempted to justify the cautionary rule by relying on "collective wisdom and experience"... This justification lacks any factual or reality-based foundation, and can be exposed as a myth simply by asking : whose wisdom? Whose experience?[59]

He refers to a number of empirical studies which were done in other jurisdictions, most

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57 *Supra* note 6.

58 *Ibid.* at 473.

59 *Ibid.* at 475.

notably in England[60] and the United States[61], which found no evidence to support the view that complainants in sexual cases are more untruthful than other witnesses. What is significant is his outright rejection of Lord Hale's adage that rape charges are easily made. He emphasises that the contrary is true and enumerates the variety of reasons why it is indeed more difficult for a woman to allege that she had been raped.[62]

Another significant point made by Olivier JA in this judgment pertains to the issue of onus of proof. As mentioned previously, the cautionary rule applies to the weight or probative value which a court is to attach to the evidence of the primary witness in a case involving a sexual offence. It is often alleged by proponents of the cautionary rule in sexual cases that the rule does not affect the state's burden of proof. Olivier JA refutes this view by referring to the case of *R* v *W*[63] where it was said that, had the case been one of theft, the corroborative evidence would have been sufficient to satisfy the onus of proof beyond reasonable doubt. However, since this was a case involving sexual assault, the same evidence did not suffice for this purpose, although the trial court found strongly in favour of the truthfulness of the primary witness as opposed to that of the accused[64].

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60 English Law Commission Working Paper (No 115, 57-58) as quoted in D. Birch, "Corroboration in Criminal Trials: A Review of the Proposals of the Law Commission's Working Paper" (1990) Crim.L.Rev. 667 at 668.

61 Study done by the New York Sex Crimes Analyses Unit , as quoted by Olivier JA in *Jackson*, *supra* note 6 at 475.

62 *Ibid.*

63 1949 (3) SA 772 (A).

64 *Ibid.* at 783.

Great emphasis is also placed on the fact that the cautionary rule and its variations[65] have been abolished in comparable modern jurisdiction such as the UK, Canada, New Zealand and Australia. Olivier JA concludes as follows regarding the continued application of this rule in South Africa:

> In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the state to prove the guilt of the accused beyond reasonable doubt - no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.[66]

As to how such an approach should be formulated, he endorses the judgment of the Lord Taylor in the Court of Appeal case of *R* v *Makanjuola, R* v *Easton*[67]. In this judgment, which was given after the corroboration rule had been abolished in the UK, Lord Taylor provides a number of guidelines which should be used by a judge when considering evidence which calls for a cautionary approach. Whether such an approach will be called for in a particular instance will depend on the "content and manner of the witness's evidence, the circumstances of the case and issues raised"[68].

Of the eight guidelines provided by Lord Taylor in this judgment, Olivier JA considers one as particularly relevant for the situation at hand. According to Lord Taylor, a warning to the

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65 In Canada, for instance, this rule is generally referred to as the "corroboration rule".

66 *Jackson*, *supra* note 6 at 476.

67 [1995] 3 All E.R. 730.

68 *Ibid.* at 732.

jury as to the dangers of relying on the uncorroborated evidence of a certain witness would in some cases be called for. However, an evidential basis for suggesting that the witness may be unreliable would first have to be established. Suggestions made during cross-examination by the defence counsel regarding the credibility of the primary witness would not be sufficient for establishing such an evidential basis.[69]

I believe that the *Jackson* judgment indicates a move away from the traditional approach taken by South African courts regarding the cautionary rule in cases involving sexual assault, and Olivier JA's pioneering approach indicates that there may indeed be a light at the end of a very dark tunnel created by courts in judgments such as *S* v *M*[70]. What the approach of courts in future judgments will be regarding the nature of this "evidentiary basis" should be, remains to be seen.[71]

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69 *Ibid.* at 733.

70 *Supra* note 52.

71 See discussion *infra* in section 4, for a more detailed discussion of judicial discretion and its ramifications for the feminist enquiry.

3 FEMINIST CRITIQUE: THE NEED FOR LAW REFORM

The legal principles relating to rape and sexual assault raise a number of concerns at the heart of the feminist critique of law in general[72]. The notion that the dominant (male) group in society has the power not only to shape reality but also to define truth and to disqualify knowledge derived from any means other than its own, constantly echoes through feminist legal writing.[73]

Rape as a crime is particularly significant for feminists, since it is by its very nature a gendered crime - women are disproportionally raped by men. The definition of rape which is used in South Africa indicates that only men can be the perpetrators of this crime. According to this definition, rape is the "intentional, unlawful sexual intercourse with a woman without her consent"[74]. Sexual intercourse, in turn, is defined as "partial or full penetration of the vagina by the penis"[75].

This definition is unduly restrictive, since it excludes many forms of sexual assault which should be placed in the same category as rape. It is furthermore problematic for feminists

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72 The literature reveals an abundance of views expressed by feminists regarding female sexuality in general and those legal rules relating to it in particular. In this analysis I discuss the views of only a few of these, not because I regard them as the more important ones but simply because they provide clear and adequate illustrations of the application of feminist concerns to the legal principles of rape.

73 See generally C. Smart, *Feminism and the Power* (London: Routledge, 1989); C. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, M.A.: 1989); C. Hall, "Rape : the Politics of Definition" (1988) 105 S.A.L.J 67.

74 J Burchell & J Milton *Principles of Criminal Law*, 1st ed. (Durban: Butterworths, 1991)[hereinafter Burchell & Milton] at 435.

75 *Ibid* at 441.

because it is framed in male genital terms. In this sense, the law takes the male point of view as the starting point - vaginal penetration by the penis, which is seen as "normal" intercourse[76]. This definition is based on the male model of sexuality and introduces a distinct male bias into what law would like us to see as a "neutral" and "objective" measure for criminality.[77]

Its rejection of objectivity is a central point in which the feminist inquiry is grounded. Hall writes:

> (The feminist endeavour) is a struggle against the social power to maintain a male reality as the **"objective"** and therefore the only reality. It is a struggle against the norm of maleness which appears as **abstract universality in law**. [78] [Emphasis added.]

Another aspect relating to this definition and the legal doctrine relating to it which feminist commentators find troubling is the importance which it attaches to consent. The element of lack of consent in the legal definition of rape is capable of forming the topic of a dissertation all on its own, and I do not propose to labour this aspect in great detail. A few aspects of this element should, however be kept in mind when attempting to show

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76 Hall, *supra* note 73 at 71.

77 In Canada, however, there have been legislative reforms according to which a number of offences replaced the traditional offence of rape. These reforms regarding terminology were said to be the result of "concerns that the emotional and political baggage carried by the term rape was a serious impediment to the reporting of, and conviction for, the crime of rape". See C Boyle, *Sexual Assault* (Toronto: The Carswell Co. Ltd, 1984) [hereinafter *Sexual Assault*] at v. See also L. Clark and D. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977).

78 Hall *supra* note 73 at 82.

why feminists have such a problem with the legal definition of rape.

Characteristic of Western liberal thought and ingrained in legal method is a binary system of logic according to which everything is seen in dualisms or dichotomies, the one being the opposite of the other.[79] More significant for feminists, however, is the notion that the one opposite is always subordinate to the other, and that the subordinate category is attributed to women.[80] This binary system of logic enforces the concepts of truth/lie, emotional/rational, win/lose and guilt/innocence. This guilt/innocence dichotomy translates into consent/non-consent, and it is upon this dichotomy that the outcome of the rape trial is based.[81]

Finley uses the example of jury selection to illustrate how law's claim to objectivity precludes the possibility of achieving a gendered understanding of rape laws[82]. A woman who has been the victim of rape will hardly be seen as a good choice in a rape trial, since her actual experience is indeed seen as disqualifying her from being neutral and objective. From a feminist perspective, her experience gives her a useful insight, enabling her to challenge those biased myths about women's behaviour which have

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79 L. Bender, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J. Legal Educ. 3 at 27.

80 Smart, *supra* note 73 at 33.

81 *Ibid.* at 35.

82 L. Finley, "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning" (1989) 64 Notre Dame L. Rev. 886 at 897.

informed the law regarding in rape.[83]

The fact that consent is constructed according to the male perspective is clearly indicated by the fact that an accused could use mistaken belief in consent as a defence. This defence, which was first recognised in the case of *Pappajohn* v *The Queen*[84], allows the accused in a trial involving sexual assault to assert that he had mistakenly believed the complainant to be consenting. What the accused could, in effect, do is to "act on self-interested misconceptions about the wishes of others"[85].

Based on the rejection by feminists of the purported objectivity and universality of the law, it is possible to identify a number of aspects regarding the rules of evidence used in rape trials in South Africa which are vital to the feminist critique of law in general.

What is crucial to the feminist criticism of the requirement of lack of consent is that it moves the focus away from the behaviour of the assailant to the state of mind of the primary witness.[86] Hall views this emphasis on the consent of the primary witness as a way of obscuring the central issue: the presence of coercion. She notes that "law

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83 See also J. Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42 McGill L.J. 91, where the author explores the importance of body and emotion to support what she calls "embodied diversity" and to challenge traditional notions such as neutrality and impartiality.

84 [1980] 2 S.C.R 120 (S.C.C.), [1979] 1 W.W.R. 562.

85 C. Boyle & M. MacCrimmon, "The Constitutionality of Bill C-49: Analyzing Sexual Assault As If Equality Really Mattered" (1998) 41 Crim.L.Q. 198 at 200.

86 Hall, *supra* note 73 at 75.

evaluates the behaviour of the accused by reference to the behaviour of the victim, on the assumption that it is an interaction in which both parties have similar positions of power, and which has the same, shared meaning for both parties"[87].

The individualistic framework within which law operates is particularly problematic with regard to the issue of consent in rape trials. It is seen as a rule-bound system within which the competing interests of autonomous and equal individuals are refereed - individuals who are capable of making choices unrestricted by constraints of power, history, socialisation, gender or class.[88] As discussed previously, law's stance of neutrality keeps it from taking into account values and how it constructs knowledge. It does not leave any room for expressing the relationship between power, gender and knowledge. Regarding the issue of rape, it ignores the influence of any of these forces and assumes that consent is the "free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and disparity"[89].

The different social worlds men and women inhabit are magnified in the rape trial. Law divides women into categories of ability to consent, and the actual consent of an individual is then evaluated based on the extent to which they differ from these categories. Young girls, for instance, are seen as virginal and rapable, and their non-

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87 *Ibid.* at 74 (nt 35).

88 Finley, *supra* note 82 at 896.

89 C. MacKinnon, "Rape: On Coercion and Consent" in *Toward a Feminist Theory of the State* (Cambridge, M.A.: 1989) at 175.

consent will be taken much more seriously than that of, for instance prostitutes, who are seen as unrapable and whose consent is not take as relevant at all.[90] Married women fall somewhere between the two - if this was not the case, there should have been no necessity for the marital rape exemption.[91]

The legal requirement of non-consent also touches some other raw nerves for feminists, including the relevance of a prior relationship between the assailant and the primary witness. 'Legally imposed categories of capability to consent are also reflected by the weight attached to the prior relationship between rapist and the primary witness. Law assumes that the better you know your rapist, the more likely it is that you actually consented. This is once more illustrated by the marital rape exemption: to the extent that parties are related, consent is inferred and therefore it cannot be rape. This notion reflects the male perspective and is not indicative of what women experience when they are the victims of rape. For women it is equally traumatic, if not more so, to be raped by someone they know and trust than to be raped by a complete stranger.[92]

Susan Estrich's personal account of rape backs up what has been said thus far concerning the disparity between the legal definition of rape and the actual experiences

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90 *Ibid.*

91 This exemption applied in South Africa until 1993 when it was abolished by section 5 of the *Prevention of Family Violence Act* 133 of 1993.

92 MacKinnon, *supra* note 89 at 177.

of women.[93] The law is reluctant to determine whether there was indeed consent in a case where the parties had some kind of prior relationship (whether it is a casual acquaintance or a serious and intimate relationship). One of the reasons for this may be based on law's well known private/public dichotomy which has often been the target of feminist criticism.[94] A matter such as, for instance, domestic violence, is often treated as a "private" matter between the spouses and not something which the law feels it should interfere with. In the same vein, cases where there has been a prior relationship between the parties is seen as "personal" and not the business of the criminal justice system. It is asserted that the privacy of personal relationships should be respected and that it would be improper for the law to intervene. Keeping in mind that this relationship is very seldom one between two equally powerful individuals, this diffidence on the part of the legal system seems more like a bias towards the more powerful party in the relationship than like mere respect for personal relationships.

As a result of the specific nature of the crime, therefore, requirements which are often held to be neutral and objective are in fact far from it.[95] Turning to the rules of evidence, the rule requiring corroboration (commonly referred to in South Africa as the cautionary

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93 S. Estrich, *Real Rape* (Cambridge, M.A.: Harvard University Press, 1987) at 23.

94 See generally MacKinnon, *supra* note 73 at 35; M. Freeman, "Toward a Critical Theory of Family Law" (1985) 38 Current Legal Problems 153; N. Rose, "Beyond the Public/Private Division: Law, Power and the Family" (1987) 14 J. of L. & Soc. 61; N. Lacey, "Theory into Practice? Pornography and the Private/Public Dichotomy" (1993) 20 J. of L. & Soc. 93; M. Thornton, "The Public/Private Dichotomy: Gendered and Discriminatory" (1991) 18 J. of L. & Soc. 448.

95 Estrich, *supra* note 93 at 21.

rule) provides a significant example: although medical evidence may corroborate the complainant's testimony that sexual intercourse occurred, this does not corroborate the fact that it took place without the woman's consent.[96]

The crime of rape is such that it is mostly perpetrated in private, and evidence regarding the crime is often not preserved. Corroboration may be readily available in cases of a non-sexual nature, but with sexual offences and specifically rape, corroboration is not such a neutral requirement as it may seem.[97] Unless the woman resists (and this will often not be the case), there will be no torn clothes and no marks on her body. Demanding that women actively resist is also not a neutral requirement but yet again one which is framed from a male point of view.[98] The standard of acceptable force is a male standard - women are expected to resist the assault to the same extent as men would. The point of the woman's violation should be the standard, but instead the standard is taken as the level of force which forms part of normal male sexual behaviour.[99] As a result, the level of force in a certain cases may be found to be inadequate according to the standard set by law, but according to the primary witness the level of force was more than adequate to coerce her into having intercourse. It is no wonder that proof of resistance by the primary witness is a problematic issue for feminists. Not only are women conditioned to be passive, but instruction manuals on how to handle a possible

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96 *Ibid.* at 5.

97 S. Estrich, " Rape" (1986) 95 Yale L.J. 1087 at 1175.

98 *Ibid.*

99 MacKinnon, *supra* note 89 at 173.

rape situation stress that, in order to have any chance of survival, one should not fight back or resist in any way.[100]

The corroboration rule also treats a complainant in a rape case as an accomplice to the crime of which she is the victim.[101] This implies that she brought the rape upon herself, and in a certain sense illustrates how the rape victim is viewed by society and, more specifically, the criminal justice system. Her dressing attractively or hitchhiking is often interpreted to mean that she "asked for it"[102], which is only a short step from inferring that somehow she voluntarily assumed the risk for her own injury. In the South African context, the judgment of *S* v *Snyman*[103] (discussed in the previous section) is a clear manifestation of this victim-as-accomplice reasoning.

A critique of the rule regarding recent complaint from a feminist point of view would firstly involve a recognition of the male perspective's dual image of women.[104] On the one hand there is the image of the "vengeful creature who deliberately fabricates evidence when sexually rejected or frustrated in her attempts at attention"[105]. On the other hand women are stereotyped as having some kind of secret desire to be raped, thus giving rise to

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100 Estrich, *supra* note 93 at 23.

101 Armstrong, *supra* note 29 at 62.

102 *Ibid.* at 61.

103 *Supra* note 48.

104 F. Viljoen, "Removing insult from injury: Reviewing the Cautionary Rule in Rape Trials" 1992 (2) Tydskrif vir Suid-Afrikaanse Reg 743 at 745.

105 *Ibid.*

claims that rape charges are easily fabricated. These claims can be compared with those which are based on other stereotypes, such as racial stereotypes according to which blacks are unintelligent, Jews are mercenary, Indians are dishonest, etc.[106] These images of women are based on the male world view of women and sexuality, a view that was strengthened by the misogynist theories of psychologists like Freud.[107] The target of fierce criticism by feminists such as De Beauvoir[108] and Friedan[109], these theories are premised on concepts such as female masochism (women secretly desire to be raped and humiliated) and female fantasy (the neurotic symptom of sexual delusion and fantasy which results from jealous and imagined events).

When we look at the rule regarding recent complaint through the lens of the feminist enquiry, MacKinnon's view of rape goes a long way in explaining why men think women fabricate charges of rape. Because the power to define is in the hands of men, the interests of male sexuality also constructs what is meant by "sexuality".[110]

> Men's pervasive belief that women fabricate charges after consenting to sex makes sense in this light. To them, the accusations are false because, to them, the facts describe sex. To interpret such events as rape distorts their experience.

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106 V. Bronstein, "The Cautionary Rule: An Aged Principle in Search of a Contemporary Justification" (1992) 8 South African J. on Human Rights 556 at 559.

107 S. Edwards, *Female Sexuality and the Law* (Oxford: M. Robertson, 1981) 104.

108 S. de Beauvoir, *The Second Sex*, (1953: J. Cape, London).

109 B. Friedan, *The Feminine Mystique*, (1963: Penguin, Harmondsworth).

110 C. MacKinnon, "Sexuality" in *Toward a Feminist Theory of the State* (Cambridge, MA: 1989) at 129.

> Since they seldom consider that their experience of the real is anything other than reality, they can only explain the women's version as maliciously invented.[111]

Perhaps the most powerful argument against this rule is found in the words of Justice Lamer in the judgment of *Timm v The Queen*[112]. In this case the court expressed the view that this rule grants "special probative value to the silence of an alleged victim of a sexual offence".

Even the previous sexual history of the complainant is prodded in order to determine whether she may be someone who is unchaste and thus less "rapable".

A crucial point regarding the feminist critique of law relates the emphasis of "minority" feminists[113] on the importance of taking into account those differences between women which inform their experiences. Various feminist scholars have voiced their dissatisfaction with the tendency of white feminists to claim the right to speak for **all** women, assuming that there is one universal, common "women's experience" regardless of difference between women as a result of factors such as, for instance, race. The latest direction taken by the feminist project recognises the fact that there is no single, universal women's experience, but that differences between women based on class, colour, ethnicity and

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111 MacKinnon, *supra* note 89 at 181.

112 (1981), 59 C.C.C. (2d) 396, 21 C.R. (3d)[hereinafter *Timm* cited to C.C.C].

113 I use this term to refer to feminist scholars who are removed from the "paradigm" created by mainstream feminism in the sense that they are women of colour, lesbian, economically disadvantaged, uneducated and/or disabled (to name but a few).

sexual orientation, to name a few, substantially influence the way in which women experience subordination in a patriarchal[114] society.[115]

Angela Harris, in writing about gender essentialism, points out that essentialist arguments silence the voices of those without (or with less) power in the same way that law and masculine culture silence the voices of women.[116] Kimberley Crenshawe identifies what she calls a "single-axis framework" - the framework used by the law to respond to the experiences of black women ignores their multiple layers of consciousness, forcing them to seek legal intervention either as women or as persons of colour, but certainly not as both at the same time.[117] She expands the consequences of essentialism and the application of the single-axis framework by using the metaphor of a traffic intersection.[118] Standing at the intersection where discrimination flows through like traffic, the woman of

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114 I prefer Sheehy's explanation of this term to denote a patriarchal society as a society in which men dominate the major social, economic and political institutions, which themselves have decision making power over the lives of women as individuals and as groups. She also emphasises the fact that the beliefs generated by these institutions reproduce relations of dominance which are employed by decision makers in these institutions, regardless of the individual decision makers sex, race or class. See E. Sheehy, "Should the Charter insulate Bias?" (1989) Ottawa L. Rev. 741 at 745.

115 The notion that white, economically privileged, educated women can speak for **all** women is strongly rejected and women are encouraged to recognise the limitations of their experiences in order not to appropriate the voices of others. See generally b hooks, *Ain't I a woman : Black women and feminism* (Boston, MA : South End Press, 1984); A. Harris, "Race and Essentialism in Feminist Legal Theory" (1987) Stanford L.Rev. 581; K.Crenshaw, "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. Chicago Legal Forum 139.

116 Harris, *ibid.* at 585.

117 Crenshaw, *supra* note 115 at 139.

118 *Ibid.* at 149.

colour can be harmed in a number of ways. She is only protected by law, however, if she is struck by a form of discrimination which is recognised by the court - as soon as her injuries are caused by a combination of forces, she is not protected.

Feminist theory is often worthless for women of colour because it is developed in a white racial context which does not include the experiences of black women.[119] Southwell illustrates this point by using the example of the abortion rights movement in the United States[120]. White women were glad to have women of colour in their ranks because it strengthened their numbers. When the right was finally won in *Roe* v *Wade*[121], women of colour were the ones who suffered when the practical effect of the right was diminished by refusal to provide state funding for abortion since they were socially and economically disadvantaged.

The dangers of essentialism and of assuming a unitary experience for all women are particularly significant in the South African context. The suffering and oppression of black women in South Africa is augmented by the apartheid legacies of poverty and unemployment, the breakdown of the family as well as the authoritarianism of tribal

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119 *Ibid.* at 154.

120 V. Southwell, "The case if the invisible woman: essentialism, intersectionality and marginalisation in feminist discourse" (1994) (27) Comp.& Int. J. of South Africa 357 at 364.

121 410 U.S. 113 (1973).

traditions and customary law, to name some of the most significant factors.[122] One should also be attentive of the fact that South African women of colour do not fall into a single category but that the dynamics of the racial classification of the apartheid system have created hierarchies among women of colour. For purposes of the present discussion, however, I use the term "women of colour" as a single (albeit artificial) category of women in South Africa in order to focus on the position of these women *vis á vis* white South African women.

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122 C. Romany, "Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender" (1996) 21 Brook. J. Int.L. 857 at 861. See also A. Sachs *Protecting Human Rights in a New South Africa* (Cape Town, New York: Oxford University Press, 1990); C. Poinsette, "Black Women under Apartheid: an Introduction" (1985) 8 Harv. Women's L.J. 93.

4 CANADIAN POSITION

4.1 Introduction

In this section I examine the legal position in Canada with regard to the three evidentiary measures discussed in the previous section, tracing the legislative development of the rules in Canada but also paying particular attention to the role of the judiciary in the evolution of these rules, with particular reference to the constitutional challenges to these reforms and the manner in which they were dealt with by the Supreme Court of Canada.

4.2 Corroboration

The corroboration rule in Canada also has its origins in the requirement in the English law. Confirmatory evidence was required in certain types of cases and with respect to certain categories of witnesses. This was due to what was seen as the unreliability of a single witness' testimony. The need for confirmation of this testimony by multiple witnesses were rules of practice at first, but they evolved into common law and statutory rules.[123]

Two types of corroboration rules existed. The first, known as the "warning" rule"[124] consisted of common law and statutory rules which required that the trial judge warn the trier of fact of the danger of convicting the accused on the uncorroborated evidence of the particular category of witnesses. These included the common law rule regarding accomplice evidence as well as the statutory rule regarding evidence of complainants in

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123 J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) 891 [hereinafter *Evidence]*.

124 J.G. Hoskins, "The Rise and Fall of the Corroboration Rule in Sexual Offence Cases" (1983) Can. J. Fam. L. 173 at 177.

cases of a sexual nature. This version of the corroboration rule has been repealed by judicial as well as legislative reform, which will be discussed later in this section.

The second type of corroboration rule was known as the "mandatory rule"[125], as it made corroboration mandatory for a conviction. This rule was imposed by statute and a conviction found on uncorroborated evidence in a case of this nature was an error of law which could be overturned on appeal.[126] This rule found application, for instance, in cases where young children gave evidence.

I now venture into a discussion of these two versions of the corroboration rule as they found application in Canada with specific reference to their transformation as a result of law reform, judicial as well as legislative. As mentioned previously the warning rule has common law as well as statutory roots. In common law it originally pertained specifically to accomplice evidence, but also had serious repercussions for the position of complainants in cases of a sexual nature. The *locus classicus* with regard to this rule can be found in the English case of *R v Baskerville*[127], where it was required that the complainant's testimony be confirmed "in some material particular by evidence implicating the accused". It is not difficult to see that this strict requirement caused great difficulties where the testimony of complainant in a case of a sexual nature was under scrutiny.[128] In

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125 *Ibid.* at 176.

126 *Evidence*, *supra* note 123 at 892.

127 [1916] 2 K.B. 658 (C.C.A.).

128 *Sexual Assault*, *supra* note 77 at 157.

most rape cases the issue is the absence of consent, corroborating evidence of which is hard, if not impossible, to find.

This common law rule was codified in 1955 when a new section 134 was added to the Canadian *Criminal Code*. Hoskins[129] makes an interesting point regarding the language used by Parliament in wording this section. He points out that there has been a subtle shift in focus from the original concern that an accused should not be convicted based on the uncorroborated evidence of a single witness to a distinct suspicion regarding the gender of the witness. The language used in this section is an indication of the "deep-seated suspicion of women, rather than of complainants"[130] held by Parliament.

The first in a two-stage attempt by Parliament to change the law regarding corroboration came about in 1976. This stage involved the repeal of a mandatory warning regarding five sexual offences[131], which was contained in section 142. Subsequent to these legislative reforms the courts seemed to have loosened the restrictive meaning of corroboration which emanated from *Baskerville*[132]. Decisions such as *Warkentin*[133] and *Murphy*[134]

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129 *Supra* note 124 at 188.

130 *Ibid.*

131 *Ibid.* at 208.

132 *Supra* note 127.

133 [1977] 2 S.C.R. 355, [1976] 5 W.W.R. 1. In this case the majority of the Court expressed the view that the test should be whether the corroborative evidence would help the jury determine the truth of the matter, and that there was no need to relate the corroborative evidence to each individual accused.

134 [1977] 2 S.C.R. 603, [1976] 5 W.W.R. 65.

indicated a clear move on the part of the Canadian Supreme Court towards a corroboration test based simply on the issue of whether the complainant's testimony is strengthened by such corroboration.[135]

The Supreme Court decision in *R v Vetrovec*[136] put an end to the common law corroboration rule in general. In this landmark decision the court thoroughly reviewed the law of corroboration. Apart from finding that the rule had become unnecessarily complicated and in need of reform, the court further stated that the rule had been divorced from its original purpose, which was simply to determine whether there was sufficient evidence to strengthen the testimony of a potentially unreliable witness.[137]

Dickson J (as he then was) provided a detailed account of the criticism which could, in his opinion, be brought in against the technical approach to the rule formulated in *Baskerville*[138]. In the first place, this approach turns the attention away from the real issue, ie the credibility of the witness.[139] Secondly, it generates case law which is unnecessarily complicated and ultimately confusing.[140] In the third instance, Dickson J finds that the *Baskerville* definition of corroboration is based on an unsound principle, since a finding

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135 *Sexual Assault*, *supra* note 77 at 157.

136 [1982] 1 S.C.R. 811, [1983] W.W.R. 139[hereinafter *Vetrovec* cited to S.C.R] .

137 *Ibid.* at 824.

138 *Supra* note 127.

139 *Vetrovec*, *supra* note 136 at 824.

140 *Ibid.*

of credibility regarding the witness does not necessarily mean that the accused can be implicated.[141]

The following statement of Dickson J clearly illustrates the change in approach which the court intended to bring about in the present instance:

> Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his judgement, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. **If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an "accomplice", no warning is necessary**.[142] [Emphasis added]

Dickson J suggested that the common sense approach which existed before *Baskerville* should be reverted to and that the technical common law accomplice rule be reduced to a judicial discretion to warn the jury, where necessary, of the dangers of relying on the testimony of an unreliable witness in convicting.

Although the case specifically involved accomplice evidence, the judgment indicates that the present analysis also applies to other common law corroboration rules.[143] Dickson J's rejection of the "pigeon-holing" of witnesses with regard to corroboration in cases of

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141 *Ibid.* at 826.

142 *Ibid.* at 823.

143 *Evidence*, *supra* note 102 at 895.

accomplice evidence indicates his disdain for the notion that witnesses be categorised and corroboration be required accordingly. It can thus be concluded that *Vetrovec* does, indeed, have the effect of doing away with the common law corroboration rule in cases of sexual assault.

Only months after the *Vetrovec* decision, on January 4, 1983, Parliament engaged the second stage of the legislative reforms which it initiated in 1976 by introducing Bill C-127[144]. The first vital change to the law brought about by the new legislation was the enacting of section 246.4, which "sweeps away any remaining vestiges of a corroboration rule"[145] concerning certain offences. These offences are incest, gross indecency and, most importantly, all the sexual assaults. The provision states that, with regard to the mentioned offences, "no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration". This clearly indicates the intent of Parliament to eliminate the statutory corroboration rule regarding sexual assault cases, both in its mandatory form and with regard to the "warning" rule.

The second significant change to the corroboration rule brought about by the introduction of Bill C-127 was the repeal of section 139(l). This section contained the mandatory corroboration rule regarding sexual offences and survived the 1976 legislative

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144 *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c.125. s 19.

145 *Sexual Assault*, *supra* note 77 at 158.

amendments. A number of questions arose as to how these two changes affected the practical application of the corroboration rule. Hoskins, for instance, moots the point that these changes may indeed make it rather difficult for the court to give effect to Parliaments intent to eliminate the application of corroboration rules in sexual offence cases. Since section 246.4 expressly mentions only one of the offences for which corroboration was mandatory under section 139(l), the position is not clear as to how courts should approach the remaining offences.[146] Is the common law warning rule revived by the repeal of section 139? The general consensus among authors seems to indicate that it is highly unlikely that the courts will revive the old rules of practice.[147]

The last word with regard to the corroboration rule now seems to have been spoken with the introduction of section 274 of the *Criminal Code* by Bill C-49[148]. This Bill came into effect in August 1992 and once more brought about vast changes to the law of sexual assault in general. In terms of section 274, a judge shall not instruct a jury that it is unsafe to convict in the absence of corroboration.

4.3 Previous complaint

As is the case with its South African counterpart, the rule regarding recent (previous) complaint flows from the English law and is based on the principle that women who have

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146 Hoskins, *supra* note 124 at 209.

147 *Evidence*, *supra* note 122 at 899.

148 *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38. s 2.

been raped are expected to raise "hue and cry" as soon as possible after the alleged rape takes place. It is important for present purposes because, in its common law form, it existed virtually unchanged until 1983, when it was said to have been "abrogated" by legislation. It is also important because it illustrates once more how law and particularly evidentiary rule are informed by male stereotypical notions of what a "true" victim of "real" rape should "properly" do[149].

In this section of my review of Canadian law, I shall firstly focus on the position prior to the legislative amendments of 1983. I shall then consider the amendments and the manner in which they changed the recent complaint rule, looking also at the views of various scholars as to whether these changes were in line with the objectives which Parliament sought to achieve. In the final instance I shall reflect on some post-amendment case law.

4.3.1 Position before 1983 Amendments

The common law position regarding the rule against recent complaint can be seen by some as an exception to the rule against hearsay[150], while others view it as a rule against narrative or self-corroboration[151]. Others, still, regard it as an exception to the rule against

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149 L. Clark, *Evidence of Recent Complaint and Reform of Canadian Sexual Assault Law: Still Searching for Epistemic Equality* (Ottawa: Canadian Advisory Council on the Status of Women, 1993) at iii.

150 Canada, *Information Paper on Bill C-127* (Ottawa: Minister of Justice and Attorney General of Canada, 1983) at 5.

151 G.Ruebsaat, *The New Sexual Offences: Emerging Legal Issue, Report No. 2* (Ottawa: Department of Justice Canada, 1985) at 59.

the admissibility of character evidence[152]. The Supreme Court of Canada expressed the view that it was indeed an exception to the rule against previous consistent statements[153] If one takes any of these as the possible rationale for the existence of this rule, one could possibly see is as favourable to victims of sexual offences since it allows them to introduce evidence which the trier of the fact may otherwise not have been permitted to hear.

This view, however, seems very superficial since, in practice, this rule only works to the benefit of those rape victims who acts according to the male stereotypical view of rape. In those cases (and these make up the vast majority) where she does not, according to the rules set by the evidentiary rules, complain "timeously", an adverse inference is drawn from such failure to complain[154]. Clark views the rationale of this rule as strictly based on the subordination of women by a male legal system: women are generally seen as not competent to testify in matters relating to their own sexual victimisation[155], and they were not regarded as credible witnesses in such cases[156].

Under common law, the rule of recent complaint determined that the complaint could only

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152 S. Schiff, *Evidence in the Litigation Process* (Toronto: Carswell, 1988) at 591.

153 *Timm* , *supra* note 112 at 401. See also F. Dawson, "The Abrogation of Recent Complaint: Where Do We Stand Now?", (1984) 27 Crim. L.Q. 59 at 67.

154 Clark, *supra* note 149 at 11.

155 *Ibid.* at 14.

156 *Ibid.* at 15.

be admissible in certain circumstances. As to the requirements for the admissibility of the complaint, the trial judge alone had to determine, during a *voir dire*, whether the complaint was admissible. This decision should be made while taking into consideration certain aspects set out in *Timm* [157]. These considerations were the following:

(1) Is there a "complaint", the latter being defined as "a statement by the alleged victim", given the circumstances of the case, which, if believed, will be of some **probative value in negating the adverse conclusions the trier of the fact could draw as regards her credibility had she been silent**"[158] [emphasis added]?

(2) Was the complaint elicited by questions which were of a "leading and inducing or intimidating character"[159]?

(3) Was it "made at the first opportunity after the offence which reasonably offers itself"[160]?

Each of these requirements presented a separate obstacle to the credibility of the primary witness.[161] In addition, the judge was required to warn the jury that a complaint which did not fall within the ambit of these "rules", must be regarded as negatively impacting on the

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157 *Supra* note 112 at 413.

158 *Ibid.*

159 *Ibid.*

160 *Ibid.*

161 Clark, *supra* note 149 at 19.

truthfulness of the primary witness.[162] According to Dawson, this requirement is the one which is potentially most dangerous to the credibility of the primary witness[163]; even if she did make a complaint but such complaint did not fit the required parametres, the jury would firstly not have the opportunity to hear the complaint and secondly be instructed to draw a negative inference from the fact that the complaint was not recent.

4.3.2 Legislative reforms: the objectives and the impact

The objectives of law reform, at least coming from feminist commentators, were to prevent any reference to the timeliness of a complaint in a case of sexual assault.[164] However, once legislative reform had been enacted, quite a number of aspects relating to the effects of the new legislative provision were unclear. Firstly, what did "abrogation" mean? Fletcher Dawson notes that it is " a word without a judicial or statutory history in Canada"[165]. Boyle's view is that it means to annul, which should imply that the underlying rationale for the reform was to get rid of any special rule relating to sexual assault in general.[166]

The central question seems to be what the abrogation of the recent complaint rule meant in a practical situation in court. As framed by Fletcher Dawson: does this mean that no

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162 *R.* v. *Kinstendey* (1975) 29 C.C.C. (2d) 382 (O.C.A.).

163 Dawson, *supra* note 153 at 64.

164 *Ibid.* at 69.

165 *Ibid.* at 68.

166 *Sexual Assault*, *supra* note 77 at 152.

reference is to be made to the presence or absence of the initial complaint made by the primary witness under any circumstances at all?[167] Although an argument to this effect may be possible, Fletcher Dawson rejects it for mainly two reasons. The first of these relates to the situation where the defence asks the primary witness questions regarding any previous complaint, which then has the effect that the testimony given by the witness loses credibility. In such a situation, it would be permissible for the Crown to introduce evidence of recent complaint to "rehabilitate" the credibility of the witness. The argument here is that, because the legislation is aimed at counteracting a negative inference being drawn from the silence of the primary witness, the evidence would still be admissible if it were to strengthen the credibility of the accused.[168]

The second instance where evidence of recent complaint would still be admissible under the provisions of section 246.5, is where the defence accuses the primary witness of fabricating evidence. One of the other[169] exceptions to the general evidentiary rule that the previous consistent statements of a witness is inadmissible, may be used to rebut an allegation of recent fabrication.[170] This would be allowed to prove the consistence of the

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167 *Supra* note 153 at 65.

168 *Ibid.* at 69. This is also the view of Schiff, *supra* note 152 at 591.

169 In using the word "other" I am assuming that the recent complaint rule in sexual cases is indeed an exception to the rule against previous consistent statements.

170 An example would be where the eyewitness in a case involving an automobile accident testifies that he saw the plaintiff jumping a red light. He is then accused by counsel for the defendant of fabricating his evidence. In such a situation he would be able to show his consistency by referring to an earlier statement to the same effect which he had made to the police officer at the scene of the accident.

witness and to counteract the accusation of fabrication.[171]

Clark strongly disagrees with the argument of Fletcher Dawson that evidence may be admitted in the second instance mentioned above.[172] Her argument is based on the fact that there is no empirical evidence to show that a person who had "truly" been raped, would have done in circumstances such as these. She also notes that the influence of factors such as intimidation and humiliation are not taken into account by those who assert that evidence of recent complaint would still be admissible under the amended section 246.5.[173] In her view, the rationale for the rule (the inherent lack of credibility of female complainants in rape cases) also provides the intent behind the amendment, which is to prevent any adverse inference being drawn from failure to complain quickly: She emphasises that, if this was indeed the rationale, "then the intent was to abolish everything and anything based on that rationale, **whether or not** the general rules of evidence would now permit the admissibility of evidence which reflects and perpetuates this"[174] [emphasis in the original].

Boyle is also concerned about the fact that recent complaint evidence may still be used to prop up the credibility of the primary witness, since it risks undermining credibility in

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171 *Sexual Assault*, *supra* note 77 at 154.

172 *Supra* note 149 at 25.

173 *Ibid.* at 26.

174 *Ibid.* at 28.

cases where women fail to complain although it would have been "natural" to do so[175]. Her concern is that, if this type of evidence may still be admitted, the legislative abrogation of the recent complaint rule would not be of much consequence in furthering the original purpose of the reforms, ie to prevent a negative inference being drawn in the cases of "failure to speak"[176]. She does, however, conclude that the new provision could be construed in a way which makes it a significant improvement of the law of evidence as it existed before the amendment.[177]

Clark is less optimistic about the effect of the amendments. In her view, the provision should have been worded in such a way that the introduction of recent complaint evidence should be completely restricted and, in the instance where the defence does raise the issue, the Crown should be allowed to lead expert evidence with regard to what is and what is not "normal" behaviour for someone who has been the victim of rape[178].

4.3.3 Practical effects of the legislative reforms regarding recent complaint

The reforms brought about by section 246.5 of the *Criminal Code* did not, as was hoped, bring about a big change in the position of female complainants in sexual assault cases

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175 *Ibid.* at 155.

176 *Ibid.*

177 *Ibid.*

178 *Supra* note 149 at 29. Temkin made a study of the provisions regarding the admissibility of previous sexual history evidence in three common-law jurisdictions and she is also severely critical regarding the reforms brought about by section 246.5 in Canada. See J. Temkin, *Rape and the Legal Process* (London: Sweet & Maxwell, 1987).

with regard to recent complaint. Clark illustrates this by referring to case law as well as a research project commissioned by the Department of Justice[179].

The empirical research basically showed that not much had changed since the introduction of the reforms.[180] A few points which emerged from the research report are, however, worth taking note of. There seems to have been an increase in the number of cases that had been prosecuted, which seems to indicate that at least victims of sexual assault would now be less reluctant to file charges in such cases.[181] Also, it would seem that "less serious" cases now made it to the court more readily than was the case before the reforms were introduced.[182]

It has also been noted by some of the defence lawyers interviewed that the legislative reforms, together with the changing attitudes on the part of the public and the judiciary, lead to an improvement of the Crown's position in these cases[183].

Prosecutors, on the other hand, felt that the timeliness of the complaint was still an important factor in getting a conviction. The jury may be instructed that recent complaint

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179 Department of Justice Canada, *Sexual Assault Legislation in Canada: An Evaluation*, (Report no. 5) (Ottawa: Minister of Supply and Services, 1990) as discussed in Clark, *supra* note 149 at 31.

180 *Ibid.* at 39.

181 *Ibid.* at 33.

182 *Ibid.* at 35.

183 *Ibid.* at 32.

evidence is inadmissible, but a negative inference may still be drawn from the lack of evidence of recent complaint.[184]

Clark concludes that the reforms have had a negative impact both on the complainant and the accused's case. Although the reforms were aimed at assisting those complainants who were too afraid or too traumatised to report the incident, the Crown was now said to have been deprived of one of the few tools it had in demonstrating the truthfulness of the complainant, since it would appear that "the vast majority of those victims who reported at all, do so with considerable promptness"[185].

A survey of the post-amendment case law does not, unfortunately, clarify the situation with regard to what should and what should not be admitted into evidence as a result of the "abrogation" of the recent complaint rule.[186] The cases can be divided mainly into two categories. On the one hand there were those cases where the prccedural issues were interpreted very narrowly and the underlying substantive issues were not considered. On the other hand, there were a few cases where the court interpreted the procedural issues very broadly and also focused on the substantive issues, leading to an implementation of

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184 *Ibid* at 33.

185 *Ibid*. at 37, quoting one of the participating prosecutors at 167 of the Fredericton and Saint John report.

186 *Ibid*. at 40.

the deeper objectives of the reforms.[187]

The two central questions which featured in the case law and which had to be assessed by the court were, firstly, whether previous consistent statements made by the complainant in a sexual assault case, if it was not admissible as a recent complaint, were indeed still admissible under any of the other exceptions to the rule against previous consistent statements. If the answer to this first question was yes, the second question arose: at which stage of the proceedings may such evidence be introduced by the Crown?[188]

The principles emerging from those cases where the procedural issues were indeed interpreted broadly so as to facilitate a consideration of the objectives of the reform, could be summarised as follows:

(1) the Crown may introduce evidence of recent complaint, either as part of *res gestae* or as spontaneous outflow of the events, and may also use such evidence in rebuttal[189] ;

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187 These objectives are said to have been, among others, to get rid of the procedural hurdles that have prevented sexual assault cases from being judged solely on their merits; to do away with the notion that there is no "normal" response of a "true" sexual assault victim; to enforce the notion that sexual assault complainants are just as credible as men who are accused of sexual assault. See Clark, *ibid.* at 41.

188 *Ibid.* at 42.

189 *R* v *Colp* (1983) 36 C.R.(3d) 281; 60 N.S.R. (2d) 175.In this case O' Hearn J of the Nova Scotia County Court expanded the *res gestae* exception to include statements made after the alleged offence that met the test of first reasonable opportunity.

(2) the grounds for admissibility of previous complaint evidence are extended to include consistency[190] as well as narrative[191];

(3) expert evidence with regard to the complainant's state of mind following the commission of the alleged crime is admissible, particularly when doubt is being cast on here credibility because she did not complain within the preriod of time which was seen as "reasonable"[192]. The Crown also need not elicit such expert evidence directly, but can do so in rebuttal.[193] Clark notes the importance of the practical effect of this principle: the evidence can be kept "on hold" and then only be introduced in the event that the defence indeed raises the issue of delayed complaint, which would eliminate the risk that the evidence will be ruled inadmissible when introduced directly[194];

(4) the allegation of fabrication which the complainant's prior consistent statement is designed to counteract, need not be express, but may even be implicit from the conduct of the case[195];

(5) more flexibility should be allowed with regard to the testimony of children, regarding

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190 Although rejected in *R* v *Page* (1984)12 C.C.C. (3d) 250, 40 C.R. (3d) 85 (Ont. H.C.) and *R* v *Jones* (1988) 66 C.R. (3d) 54 (Ont.C.A.), 29 O.A.C. 219, 44 C.C.C. (3d) 248, the principle that evidence regarding recent complaint may be admitted to prove consistency of the complainant's evidence was subsequently confirmed in *R* v *Owens* (1986) C.C.C. (3d) 275, 55 C.R. (3d) 386, 18 O.A.C. 126 (Ont.C.A).

191 *R* v *George* (1985) 23 C.C.C. (3d) 42 (B.C.C.A.).

192 *R* v *Mohr* (1984) 13 W.C.B. 134, [1984] B.C.J. No 577 online: QL (B.C.J.).

193 *R* v *Guthrie* (1985) 20 C.C.C. (3d) 73; 8 O.A.C. 277 (Ont.C.A.)

194 *Supra* note 149 at 55.

195 *R* v *Owens*, *supra* note 190. This principle was confirmed in *R* v *Jones*, *ibid.* and also in *R* v *N.(L.)* (1989) 52.C.C.C. (3d) 1 (N.W.T.C.A.), [1990] N.W.T.R. 28 (C.A.).

prior consistent statements as well as other traditional exceptions, such as hearsay evidence[196].

Although mostly commendable for the manner in which they improve the position of female complainants in sexual assault cases with reference to recent complaint evidence, it should be clear that none of these judgments contribute to the prevailing dilemma of what exactly "abrogation" means and how it should be interpreted by the judiciary. Of all the post-reform cases, only in one does it seem as if abrogation was really taken seriously.[197] In *R* v *Temple*[198] it was decided that all evidence relating to previous complaint should be excluded. This includes defence cross-examination regarding the nature and timeliness of the complaint. The problem with this case, it seems, is that section 246.5 was not, according to authorities, intended to exclude all such evidence.[199] What was indeed done away with, was the requirement that the Crown had to lead evidence of recent complaint in order to prevent a negative inference being drawn from the complainant's silence. If one would follow the *Temple* interpretation to its full conclusion, it would mean that the Crown would not be able to introduce such evidence at any stage of the trial, also not to establish the complainant's consistency in the face of an allegation of fabrication. Expert evidence regarding the state of mind of the complainant immediately following the alleged assault would also not, according to

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196 *R* v *Khan* [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92.

197 Clark, *supra* note 149 at 62.

198 (1984) 12 W.C.B. 71 (Ont.C.A.).

199 Clark, *supra* note 149 at 62.

Temple, be admissible.

4.3.4 Conclusion regarding legislative amendment

The conclusion to be drawn from both the post-amendment case law and the empirical studies referred to earlier indicate that total abrogation would not further the complainant's case at all and that it would, indeed, do more harm than good. A proper interpretation of the amendment, that is one which is consistent with the aims and objectives of the reforms, would abolish, firstly, the requirement that evidence of recent complaint must be introduced by the Crown in order to prevent a negative inference being drawn from the complainant's silence and, secondly, the warning given to the trier of the fact by the judge to the effect that the absence of such a complaint should necessarily justify an inference of lack of credibility.[200] As for other evidence regarding recent complaint, this could indeed be most beneficial to the complainant's case, especially since complainants do, in the majority of cases, complain timeously[201].

4.4 Sexual history evidence

4.4.1 Legal position prior to the decision in R v Seaboyer, R v Gayme[202]

Two aspects of rape legislation have been on centre stage for the past number of years: the rule dealing with the past sexual history of the primary witness and the defence of

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200 *Ibid.* at 63.

201 See *supra* note 185 and accompanying text.

202 (1991) 83 D.L.R. (4th) 193; (1001), 66 C.C.C. (3d) 321[hereinafter *Seaboyer* cited to D.L.R.).

honest but mistaken belief in consent.[203] The former has been said to "epitomize the challenge for feminist legal theorists to ensure that women receive equal protection and benefit of the law"[204] and will be discussed at great length in the paragraphs that follow. The latter is strictly speaking an issue of substantive law which falls beyond the scope of this paper.

The common law position regarding the admissibility of the primary witness with persons other than the accused prevailed until the first legislative reforms took place in 1976. Under common law, the primary witness could be questioned about her prior sexual conduct without proof of relevance to a specific issue in the trial.[205] She could be asked questions about her prior sexual conduct with the accused as well as with other persons. With regard to evidence about sexual conduct with other persons, she could, however, not be compelled by the accused to answer. The accused could also not lead evidence to contradict her testimony.[206] This approach was based on the view that an unchaste woman was more likely to consent to intercourse and less likely to tell the truth under oath (the "twin myths"[207] mentioned by Madam Justice McLachlin in presenting the majority

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203 C. Boyle, "Recent developments in the Canadian law of sexual assault' in Jagwanth e a *Women and the Law* (1994, HSRC Publishers: Pretoria)[hereinafter "Recent Developments"] 178 at 179.

204 C. Boyle, "Sexual Assault in Abusive Relationships: Common Sense about Sexual History" (1996) 19 Dalhousie L.J. 223.

205 Boyle, *supra* note 77 at 134.

206 *Laliberté v The Queen* (1877), 1 S.C.R. 117.

207 These myths are (1) that an unchaste woman is more likely to consent to intercourse, and (2) that she is less likely to tell the truth under oath. See *Seaboyer*, *supra* note 202 at 278.

judgement in *Seaboyer*, as discussed later in this section).

The result of this position was that defence lawyers often went on extensive "fishing expeditions" to illicit evidence which might be advantageous to their case, having the effect that this freedom was frequently abused to the embarrassment of the primary witness. Parliament decided to intervene in an effort to curb these abuses. The reason for this intervention seems to have been grounded primarily in the concern that a woman will not report a case of sexual misconduct if she anticipates that her sexual history will be made into a public spectacle during the trial by the defence lawyer.[208]

The mentioned intervention by Parliament took the form of the introduction of section 142 of the *Criminal Code* in 1976[209]. This section provided that the accused was not allowed to lead evidence regarding the previous sexual conduct of the primary witness unless reasonable notice was given of his intention to do so, such notice containing particulars of the evidence which the accused seeks to adduce. Also, such evidence will only be allowed if the judge (after an *in camera* hearing) exercises his or her discretion in favour of the admission of the evidence. The judicial discretion involved consideration of whether the exclusion of the evidence would prevent just determination of an issue in the proceedings, including the credibility of the primary witness.[210]

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208 Schaffer, M. "*Seaboyer v R.*: A Case Comment' (1992) 5 C.J.W.L 202 at 203.

209 R.S.C 1970, c. C-34.

210 Section 142(3)

If the intention of the legislator was to protect the primary witness against a public display of her sexual history, the judiciary obviously did not share this vision for section 142. The judgement in *Forsyth v. The Queen*[211] seems to imply that the witness is compelled to answer all the questions put to her by the judge or magistrate during the *in camera* investigation, an important change in the direction suggested by Parliament and indeed a narrowing of the witness's right to privacy.[212] She is in a worse position that she would have been under common law, since she becomes a compellable witness and also because the defence could now provide countering evidence regarding her sexual conduct with other persons.

A second attempt at reforming the rules of evidence regarding previous sexual conduct evidence was made in 1982. The introduction of Bill C-127[213] resulted in the repeal of section 142 and the introduction of drastic changes in the rules with regard to corroboration, recent complaint and previous sexual conduct evidence. It also brought about changes to the substantive law, reforming the structure of sexual assault by instituting a three-tiered system of sexual assault and also removing the mistaken belief in consent defence.

Two sections of the *Criminal Code* now regulated the position with regard to past sexual

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211 (1980), 53 C.C.C. (2d) 225; 15 C. R. (3d) 280, 32 N. R. 520.

212 "Recent developments", *supra* note 203 at 257.

213 *Supra* note 144.

conduct of the primary witness[214], both of them doing away with the exercise of any form of judicial discretion as to the admissibility of this evidence. Section 277 seems to be the less problematic of the two. This section renders evidence of sexual reputation completely inadmissible and seems to indicate a general realisation that evidence of a woman's sexual reputation can in no way be relevant to her credibility as a witness. Section 276 provides for a strict exclusionary rule with regard to evidence of the complainant's past sexual conduct with persons other than the accused, with the exception of three distinct situations. Before examining each of these situations provided for in section 276, it should be mentioned that this section did not affect the situation where the defence introduced evidence regarding the past sexual conduct of the primary witness with the accused. Such evidence would remain admissible unless it contravened section 277 (in other words if the accused introduced evidence of past sexual conduct between the primary witness and the accused, this may be done unless the purpose of the evidence is related to the sexual reputation of the primary witness).

The situations where evidence of the past sexual conduct of the primary witness with persons other than the accused would still be admissible are the following:

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214 Sections 276 and 277, collectively known as the "rape shield law".The use of this terminology as shorthand for the provisions of section 276 and 277 is rejected in the minority judgement of L' Heureux-Dubé J in *Seaboyer*: "(I)mplicit in this description is a presumption as to their purpose: that it is solely to shield a complainant from the rigours of cross-examination at trial. ...(A)lthough protecting the complainant may be one of the purposes of the provisions, it is neither the only one, nor necessarily the most important....". See *Seaboyer*, *supra* note 202 at 205.

(i) The case of "rebuttal evidence"[215] where the prosecution adduces evidence regarding the past sexual history of the primary witness and the accused knows that this evidence is false. In such a case, the accused is allowed to dispute such evidence, even though the "disputing" evidence contravenes the general provision in section 276.

(ii) With regard to evidence going to identity - it is the accused's defence that someone other than himself is responsible for the assault. Where the identity of the perpetrator is in issue, evidence may be led by the defence of sexual conduct which allegedly took place between the primary witness and such other person.[216]

(ii Relating to "same occasion" evidence: it is alleged that the primary witness engaged in sexual activity with another person on the occasion when the incident took place for which the accused is now charged. The accused alleges that, as a result, he honestly (though mistakenly) believed that the primary witness had also consented to sexual conduct with him.[217]

4.4.2 Discussion of R v Seaboyer; R v Gayme[218]

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215 Section 276(1)(a).

216 Section 276(1)(b).

217 Section 276(1)(c)

218 *Supra* note 202.

BACKGROUND

The judgment of the Canadian Supreme Court in *R v Seaboyer; R v Gayme* has been the focus of a great deal of discussion and has been widely critisised. It is remarkable for a number of reasons. This judgement presented the first challenge to the "rape shield"[219] law before the Canadian Supreme Court. It has been called, among other things, a setback for women[220] and a clear manifestation of the fact that "the right to speak and make an argument does not include a corresponding obligation on the part of the judges to listen, to understand or even to answer to feminist analysis"[221]. On the other hand, scholars accede that it provides an opportunity to reflect on the direction and shape feminist jurisprudence relating to sexual assault should be taking[222]. Perhaps the most noteworthy aspect of this judgement is that it produced an example of feminist analysis in its most piercing and uncompromising form in the minority judgement written by Madame Justice L'Heureux-Dubé.[223]

My discussion of this judgement is threefold. Firstly, I provide a very brief overview of the facts of the appeal and raise some preliminary points regarding the judgement. I then give a brief overview of the majority judgement, emphasising the main points made by Justice

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219 See discussion of this terminology, *supra* note 214.

220 Schaffer, *supra* note 208 at 203.

221 E. Sheehy, "Feminist argumentation before the Supreme Court of Canada in *R v Seaboyer, R v Gayme*: The sound of one hand clapping" (1991) 18 Melbourne U. L.Rev. 450 at 451.

222 Schaffer, *supra* note 208 at 203.

223 Sheehy, *supra* note 221 at 455.

McLachlin. In the final instance, and most importantly, I examine the minority judgement with the purpose of drawing some valuable insights from it for purposes of the present discussion.

PRELIMINARY POINTS

The appellants were charged with sexual assault on two unrelated incidents, and both wanted to introduce evidence of the complainant's previous sexual history with other men, such evidence being precluded by section 276. They argued that the admission of the evidence was vital for mounting a proper defence and that, as a result of the exclusion of the evidence, they were being denied a fair trial. They further alleged that sections 276 and 277 were unconstitutional and in violation of sections 7[224] and 11(d)[225] of the *Canadian Charter of Rights and Freedoms*[226]. The case made its way to the Supreme Court of Canada.

The Supreme Court had no qualms about upholding section 277, affirming that evidence of sexual reputation is clearly irrelevant. With regard to section 276, the court was split 7 to 2 in its judgement, the majority holding that section 276 did, indeed, infringe the constitutional rights of the accused under sections 7 and 11 (d) of the *Canadian Charter*

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224 This section provides that "(e)veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

225 This section provides that "(a)ny person charged with an offence has the right: (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".

226 *Supra* note 5.

of Rights and Freedoms, and further stating that the provision cannot be saved by the limitation clause contained in section 1 of the *Charter.* The minority stated that the provision did not infringe the constitutional rights of the appellants and, even it it did, it could be justified in terms of section 1 as applied in *R v Oakes.*[227]

MAJORITY JUDGEMENT

In the first instance, Justice McLachlin (delivering the majority judgement) sets out what she believes the core issues raised by this appeal are: the constitutionality of the legislative provisions in question and the question whether "the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice"[228].

Justice McLachlin then sets out the yardstick according to which legislative measures should be assessed when a constitutional challenge regarding these provisions have to be considered. According to this standard, the primary purpose of the rules of evidence is to enable the court to determine the truth and the issues at hand. It follows, then, that a law which prevents the trier of the facts from getting to the truth by excluding relevant evidence in the absence of a clear justification for such exclusion, endangers the notions of fundamental justice and a fair trial, which are the underpinnings of the justice system. McLachlin J also emphasises the importance of the judiciary's responsibility of balancing

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227 *Seaboyer, supra* note 202 at 287.

228 *Ibid.* at 257.

the value of the evidence against its potential prejudice and the corresponding duty to exclude evidence, the potential prejudice of which is outweighed by its probative value.

As part of her attack on section 276, she sets out a number of instances where the provision contained in this section would have the effect that evidence which is relevant to the accused's defence is excluded:

(a) The first of these deal with the situation where the accused wants to introduce evidence that he honestly believed that the complainant had consented to intercourse with him as a result of her sexual conduct with other men. To rule evidence of the complainant's past sexual history with other men inadmissible would have the effect of denying the accused the possibility of raising the defence of honest but mistaken belief in consent.[229]

(b) Secondly, an accused would be prevented from adducing evidence of the complainant's past sexual history where his intention is to show that the complainant has a motive for fabricating her charge or to show her bias towards the accused.[230]

(c) The third example provided by Justice McLachlin relates to the right of the defence

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229 See dsicussion of *Pappajohn*, *supra* note 84.

230 *Seaboyer supra* note 202 at 265, where McLachlin J refers to the case of *S v Jalo* 557 P. 2d 1359 (Or. Ct. App.1976). In this case the father of a young girl was accused of sexual acts with his daughter and sought to present evidence of her previous sexual encounters with her brother to prove bias.

to attack the credibility of the complainant on the basis that the complainant was biased or had motive to fabricate the evidence. Where, for instance, the accused is charged with having intercourse with a young complainant whose version of the facts of the case contains details of sexual intercourse, the judge points out that the accused would have to adduce evidence to prove that the complainant did actually engage in sexual intercourse in order to explain the intimate knowledge of the complainant regarding sexual intercourse.[231]

(d) The final case where past sexual conduct evidence would be excluded under section 276 although it may be relevant to the accused's defence, is found in the situation where the accused seeks to adduce so-called "pattern of conduct' evidence. The particular example used by Justice McLachlin to illustrate this is that of the "extorting prostitute" who threatens her clients with a rape charge, should they not be willing to pay her more than the amount initially agreed upon.[232]

The majority's view is that section 276 is essentially flawed in two respects:

(1) It contains a "blanket exclusion" which is the result of a misdefinition of the evil which is to be addressed - this evil is not evidence of sexual activity, but rather the misuse of evidence of such activity for irrelevant and misleading purposes.

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231 *Ibid.* at 266.

232 *Ibid.*

(2) The "pigeon-hole approach" manifested in section 276 is not equipped to deal with the fundamental evidentiary problem which has to be dealt with in this case: is the evidence truly relevant or not?

According to McLachlin J these examples clearly show that evidence which is capable of being excluded by section 276, may be critically relevant to the accused's defence. This results in the situation where the ultimate goal of the trial process (ie determining whether the accused is guilty or innocent under the law) is actually jeopardised by the provision in question.[233]

The legislative provision is said to furthermore "overshoot the mark" - in order to prevent the judge and the jury from drawing illegitimate inferences from the evidence of the sexual history of the primary witness, evidence is excluded which may be crucial to the acquittal of an innocent person.

In the second place, the infringement of sections 7 and 11 (d) of the *Charter* can furthermore not, in the opinion of the majority, be justified in terms of section 1 of the *Charter*[234]. The test as set out by Dickson C J C in *R v Oakes*[235] which is used to determine whether a specific legislative provision can be "saved" by section 1, briefly comprises the following:

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233 *Ibid.* at 267.

234 *Supra* note 5.

235 [1986] 1 S.C.R. 103, 2 C.C.C. (3d) 339[hereinafter *Oakes* cited to S.C.R.].

In order to sustain legislation under section 1, the State carries the burden of showing that

(a) the objective promoted by the legislation is "pressing and substantial;" and

(b) the legislative means used to promote the objective must be "reasonable and demonstrably justified." The means must satisfy a "proportionality" test, which in turn, is made up of three components. These are that the legislation must:

- be carefully designed to achieve the object in question, and must not be based on arbitrary, unfair, or irrational considerations (the "rational connection" test);
- "minimally impair" the right in question; and
- not have effects on individuals or groups that are disproportionate to the objective sought to be achieved.

In her application of this test to the provision contained in section 276, McLachlin J concedes that a pressing and substantive objection is addressed in the present case, but she holds that this objective is not, however, proportional to the rights which the legislation infringes. Her interpretation of the phrase "minimally impair the rights in question" is that the legislative measure should impair this right as little as possible and this, it is stated, is not done in this case:

> "The degree of impairment is ... not appropriately restrained. The section excludes relevant evidence whose value is not clearly outweighed by the danger it represents and is therefore overbroad"[236].

With regard to the final component of the *Oakes* test, McLachlin J expresses the view that there is no balance between the legislative goal of section 276 and its effect.

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[236] *Seaboyer, supra* note 202 at 278.

In the final instance McLachlin J dismisses outright the notion that the introduction of evidence of past sexual history will be used for the purpose of suggesting that a sexually active woman is more likely to consent or to perjure herself by fabricating rape. She goes on to state that the "twin myths" upon which the exclusion of sexual history evidence is based (that the unchaste woman was more likely to consent to intercourse and less likely to tell the truth under oath) are now discredited and that " the reality in 1991 is that evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent. Although they may still inform the thinking of many, the twin myths which section 276 sought to eradicate are just that - myths - and have no place in a rational and just system of law"[237].

Justice McLachlin provides a number of guidelines aimed at assisting judges in determining when sexual history will be admissible. The process she suggests is that a *voir dire*[238] be held to determine whether the probative value of the evidence outweighs its potential prejudice. In the final instance, having determined that the evidence could be admitted, the judge should then warn the jury against the dangers of drawing improper inferences from the sexual history evidence.

The problem which feminist scholars have with Justice McLachlin's judgement is that the

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237 *Ibid.*

238 The term *voir dire* literally means "to speak the truth". According to H. Black, *Black's Law Dictionary* (St Paul, Minn.: West Publishing, 1968) at 1746, this phrase denotes the preliminary enquiry which the Court may make of one presented as a witness or juror, where his competency, interest, etc. is objected to. The South African counterpart of *vior dire* is the trial-within-a-trial.

examples mentioned in the above four cases directly contradict her assertion that myths and stereotypes about women do not have a role to play in the use of sexual history evidence. Sheehy's view[239] is that, by merely mentioning the hypothetical cases of the "extorting prostitute" and the "sexually active teenager who cries rape" as relevant, Justice McLachlin articulates an expansive and uncritical view of the concept of relevance and indeed one that deems relevant any evidence which may influence the verdict. Others, such as Shaffer, are worried about the fact that Justice McLachlin did not, in the guidelines she provided, send a clear message that sexual history will rarely be relevant[240].

MINORITY JUDGEMENT

Myth and stereotype

The most comprehensive criticism of Justice McLachlin's majority judgement comes from Justice L'Heureux-Dubé's dissenting judgement. At the outset L'Heureux-Dubé J stresses the importance of addressing the constitutional issues in this case in its wider political, social and historical context. L'Heureux-Dubé J's view is that "a consideration of the prevalence and impact of discriminatory beliefs on trials of sexual offences "[241] necessarily forms part of the process of addressing the issues in the present case.

Referring to the results of extensive empirical research in this area, she then emphasises

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239 *Supra* note 221 at 453.

240 Schaffer, *supra* note 208 at 209.

241 *Seaboyer, supra* note 202 at 204.

that, as a result of its mythical basis, rape is not like any other crime. Throughout the process regarding the prosecution of sexual assault, the woman's victimisation is measured against rape mythologies which are still prevalent[242]. These mythologies determine who she must be in order to have been "really" raped (a virginal young girl could be raped, a prostitute not) and what her attacker should look like (an abnormal or mentally ill stranger, rather than the man she has been living with for a number of years). Her injury is also seen as definitive of her credibility.

A vital point regarding the uniqueness of this crime noted by L'Heureux-Dubé J is that "the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society"[243]. It is interesting to note that L'Heureux-Dubé J draws a parallel between this victimisation of women and the harmful effects of hate speech propaganda targeted at minority groups.[244] She refers particularly to Dickson J's opinion in *R v Keegstra*[245] that such propaganda not only has a detrimental impact on the individual's sense of self-worth but that it also forces the victims into solitude in the sense that they withdraw from activities involving those who are not members of the minority group.

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242 *Ibid.* at 207. L'Heureux-Dubé J refers to the extensive research documented in Holstrom and Burgess *The Victim of Rape: Institutional Reactions* (1983) 58.

243 *Ibid* at 206.

244 *Ibid.* at 212.

245 (1990), 63 C.C.C. (3d) 110, [1991] 4 W.W.R. 136.

The discussion of stereotype and the role it plays in the realm of sexual assault law in this judgement is impressive and obviously a detailed account of this discussion is beyond the scope of this section. A few points made by L'Heureux-Dubé J do, however, warrant mentioning. Stereotypes are seen as a way of understanding the world and as a result they operate at an unconscious level. This makes it difficult to confront them and even more difficult to root them out.[246] Even those dealing directly with sexual assault law are not immune from these stereotypes - all the way from the police officer to whom the crime is reported to the jury member or judge who has to determine the innocence or guilt of the accused, myth and stereotype are at play. Ultimately, stereotype and myth have "carved out a niche in both evidentiary and substantive law governing the trial of the matter"[247].

Relevance

Against the backdrop of the larger common law and legislative context regarding the issues of the present matter, L'Heureux-Dubé J critically analyses the concept of relevance - one of the cornerstones of the law of evidence and the chief determinant for the admissibility of evidence. In the first instance, relevance has been injected with the very stereotypes discussed previously about female complainants and sexual assault. Although relevance may be a straightforward issue in some areas of law, private beliefs still play a pivotal role in the decision of whether evidence is relevant or not in the case of sexual assault law.

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246 *Seaboyer*, *supra* note 202 at 209.

247 *Ibid.* at 210.

She takes this point further by stating that, only once we have uncovered the mythical basis upon which relevancy decisions are made in this arena do we realise exactly how irrelevant most evidence of past sexual conduct really is. As a result, section 276 excludes evidence which is, indeed, irrelevant if one operates in a "decision making context free of stereotype and myth"[248].

The categories of evidence which, in the opinion of the majority of the court, may be relevant but which are excluded by section 276 are subsequently dealt with by Justice L'Heureux-Dubé. Before dealing with each in particular, L'Heureux-Dubé J expresses the view that evidence contained in the examples given by counsel for the appellants depends for its relevance on the acceptance of stereotypes about women and rape. She also states that these examples are mostly grounded in a misapprehension of the scope of the legislative provision currently under scrutiny[249].

The first scenario sketched by counsel for the appellant and supported by the majority of the court relates to so-called "pattern of conduct" evidence. L'Heureux Dubé J examines the arguments in favour of the contention that this type of evidence, although relevant, is excluded by the provision in question. Her general opinion is that this contention is not only a "prohibited propensity argument"[250] but also that it jeopardises the integrity and

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248 *Ibid.* at 230.

249 *Ibid.* at 232.

250 This argument would often be used to indicate that a particular person regularly responds to a repeated situation in the same manner. An example found in E. W. Cleary, ed., *McCormick on evidence*, (St Paul.: West Publishing,1984) at 574-5, for instance, is the

fairness of the trial process.

The argument has been made that this type of evidence falls into the same category as "habitual conduct" evidence, which may be admissible to show that a person lis inclined to act in a certain manner in certain circumstances. The judge rejects any analogy between "habitual conduct" evidence and volitional sexual conduct and avers that such an analogy is sustained only by the myth that woman, frivolous as they are in matters relating to sexual conduct, will consent depending on such immaterial factors such as the age, race, and profession of the assaulter and the nature of the sexual activity.

A further parallel which L'Heureux-Dubé J finds unsustainable is that between pattern of conduct evidence and evidence that a particular person had a history of violent conduct, the latter being introduced to prop up a defence of self-defence.[251] Another significant point she makes here is that evidence of a victim's history of violent conduct will not tend to invoke stereotype as easily as pattern of conduct evidence does in a case involving sexual assault. L'Heureux-Dubé J's final conclusion on the matter is that aim of the exclusion of pattern of conduct evidence can, in any event, be met by the introduction of past sexual conduct evidence between the primary witness and the accused, the latter not being excluded by section 276.[252]

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case where a person may habitually go down a stairway two or three steps at a time.

251 The particular situation she refers to can be found in the facts of *R v Scopelliti* (1981), 63 C.C.C. (2d) 481, (1981) 34 O.R. (2d) 524 (C.A..).

252 *Seaboyer supra* note 202 at 233.

The admissibility of evidence pertaining to honest but mistaken belief in consent is said to be another case where relevant evidence is excluded by the legislative provision in question. At the outset I made it clear that this is, as far as I am concerned, an issue of substantive law and that it will not be dealt with at any length in this paper. It is, however, perhaps not uncalled for to note briefly L'Heureux-Dubé J's view on the matter. She refers to the requirement set out in *R v Layborn*[253] that there must be a certain "air of reality" in order for this defence to be to be validly upheld. It is her conclusion that evidence excluded by this legislative provision would in any event not comply with the "air of reality" requirement and that the exception contained in the provision does indeed provide for the sustainability of the defence.

With regard to the exclusion of evidence which may establish bias or fabricating of the charge by the primary witness, L'Heureux-Dubé J points out that evidence of such a nature is clearly based on yet another myth: that women fabricate rape charges in order to earn the good graces of those who may monitor their sexual conduct[254]. Another myth upon which this evidence is based, is that women fabricate false rape charges in order to "get back at" men with whom they had consensual sexual activities but who earned their contempt for some reason. One is yet again reminded of the theme of the "extorting prostitute".

A final aspect of L'Heureux-Dubé J's minority judgement which is essential for the present

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253 (1987), 33 C.C.C. (3d) 385, 39 D.L.R. (4th) 641, [1987] 1 S.C.R. 782.

254 *Seaboyer, supra* note 202 at 236.

discussion is her analysis of the judicial discretion to exclude relevant evidence. Firstly she points out that, although relevance is an essential part of the test for admissibility of evidence, traditional law of evidence also acknowledges the fact that other factors may warrant the exclusion of relevant evidence.[255] These exclusions could have various underpinnings, including the protection of important societal values, lack of reliability of the evidence and the distortion of the search for truth.[256]

It is in the latter category where the exclusion of sexual history evidence finds itself. As noted by Sheehy[257], "(t)he truth of what happens becomes concealed by antipathy towards the victim,... regardless of the manner in which the offence occurred"[258]. Rather than jeopardising the search for truth, the exclusion of sexual history evidence justifies and enhances such a venture.

Constitutional analysis

Having discussed the effect of myth and stereotype on the process of determining relevance, L'Heureux-Dubé J assesses the constitutionality of the legislative provisions in question.[259] It is significant to note that she does not provide an independent analysis of section 11 (d) of the Charter, since it is her view that the latter is a manifestation of the

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255 *Ibid.* at 237.

256 *Ibid.*

257 *Supra* note 114.

258 *Ibid.* at 774.

259 Her discussion is restricted to the provisions contained in section 276, since she concurs with the majority's view regarding section 277- *Seaboyer, supra* note 202 at 239.

principles of fundamental justice, as provided for in section 7. This already sets the stage for her broad interpretation of the term "principles of fundamental justice", upon which she elaborates later in this judgement.

Her first point is that accused persons do not have any constitutional rights to adduce irrelevant evidence. Furthermore, neither the right to a fair trial nor the right to "full answer and defence" allows an accused to adduce evidence of any nature whatsoever as long as it can secure an acquittal. Such a contention would be based on a very narrow interpretation of the notions "fairness" and "fundamental principles of justice" and distorts the true scope of the Charter provisions in question.[260]

The principles of fundamental justice are not found only in the Charter provisions, but also in the actual foundations of the criminal justice system. Principles such as "fairness" have been around for much longer than the period since the inception of the Charter, and a proper construction of these principles warrants the invocation of certain established common law exclusionary rules, relevance being one of them.[261]

The second vital point raised by L'Heureux-Dubé J with regard to the constitutional validity of section 276 pertains to those interests which are protected constitutional provisions such as section 7. These include not only the interests of the accused, but also the interests of the larger society and, most significantly, those of the trial process. She refers

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260 *Seaboyer, supra* note 202 at 240.

261 *Ibid.* at 241.

to a number of judgements[262] in support of her view that society's interests are equally important in the interpretation of these Charter rights. With respect to the exclusion of sexual history evidence, she points out that society has a definite interest in the reporting and prosecuting of sexual offences. It is furthermore in the interest of the integrity and legitimacy of the justice system that trials are conducted in such a way that the fact-finding process is not subordinated to myth and stereotype[263].

Counsel for the appellants raised the point that the evidence excluded by section 276 violates the accused's constitutional rights in the sense he is denied the opportunity to mount a proper defence and as a result may be convicted. L'Heureux-Dubé J supports Dawson's view that the admission of sexual history evidence "may advantage the accused in a way that is not related to innocence"[264] . In this way, the accused is allowed to adduce evidence which is hazardous to the integrity of the trial and which does not, in any event, advance the inquiry as to the guilt or innocence of the accused.

L'Heureux-Dubè J's application of the test set out in *Oakes*[265] clearly indicates that, if section 276 was in any way found to constitute an infringement upon the accused's constitutional rights, she considers such infringement to be justified in terms of section 1

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262 These include, for instance, *Reference re: s. 94(2) of Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536; [1985] 2 S.C.R. 486, and *R* v *Corbett* (1988), 41 C.C.C. (3d) 385, [1988] 1 S.C.R. 670.

263 *Seaboyer, supra* note 202 at 241.

264 Dawson, *supra* note 7 at 330.

265 *Supra* note 235.

The legislative objectives of section 276 envisioned by Parliament are said to be twofold: the elimination of sexual discrimination in trials of sexual offences, and the encouragment of the reporting of such cases.[266] L'Heureux-Dubè J views these objectives as of obviously sufficient importance to prevail over the rights of the accused, especially if one keeps in mind the high frequency of the such crime and the discrepancy between its incidence and the number of cases that are reported. Other Charter provisions also add weight to these legislative objectives - in the present case the equality clause (section 15[267]) and section 28, which provides for equal protection of the rights of men and women[268]. It seems clear, then, that the first obstacle in section 276's way to constitutionality has been surmounted.

The second requirement of this test is that of proportionality: the legislative provision must be rationally connected to the stated objective, it must impair the rights of the accused as little as possible and it must also not have effects on individuals or groups that is disproportionate to the objective sought to be achieved. L'Heureux-Dubè J stresses that the introduction of sexual history evidence allows those responsible for getting to the truth

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266 *Seaboyer, supra* note 202 at 245.

267 This section provides that "(e)very individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

268 This section provides that "(n)otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons".

to measure the complainant against the prevailing stereotype with the result that, to the extent that she does not measure up, her complaint is considered unfounded:

> (I)t is only reasonable to conclude, then, that any efforts on the part of Parliament to exclude sexual history evidence at trial .... are rationally connected to the stated objectives of ridding the law in this area of discriminatory beliefs and encouraging the increased reporting of such offences.[269]

With respect to the "minimal impairment" component of this test, L'Heureux-Dubè J considers previous attempts of Parliament as integral in depicting the fact that the present provisions have been designed to not to impair the rights of the accused more than what is necessary. Stereotyped notions of complainants in cases of a sexual nature have been so impervious to change that Parliament had to intervene on two occassions, the latter resulting in section 276 now in issue.[270]

As a final remark regarding the required "minimal impairment"test, L'Heureux-Dubè J points out that, rather than having to protect the rights of a single individual against those of the mighty state machinery, Parliament had to strike a balance between the interests of various groups in society.[271] The history of how predecessors of the present legislation have been dealt with by the judiciary shows, in her view, that Parliament may be in a better position than the courts to engage in this balancing exercise.

Regarding the final "leg" of the proportionality test (the requirement that the effects of the

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269 *Seaboyer, supra* note 202 at 247.

270 *Ibid.* at 248.

271 *Ibid.* at 248-249.

legislative measure must no be so injurious that they outweigh the importance of the objective), L'Heureux-Dubè J states that there are still numerous ways in which an accused may introduce evidence of past sexual history under section 276, and that "(c)onfining the accused to such evidence goes little distance towards the conclusion that the last stage in the proportionality inquiry is not met"[272].

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[272] *Ibid.* at 251.

4.5 BILL C-49[273]

4.5.1 Introduction

As stated previously, the judgement in *Seaboyer* was an illustration of how far the judciary still had to go in order to rid themselves and the system of myths and stereotypes about sexual assault laws. It did, however, also produce a positive corollary in the sense that it sparked the introduction by Parliament of Bill C-49[274] in August 1992.

Before embarking on a discussion of the provisions of this Bill, one very notable aspect of this legislation should be mentioned. This regards the wide spectrum of consultations with women's groups and experts in the field of legal practices surrounding the sexual assault which was held in drafting the legislation. As pointed out by Boyle[275], these consultations elucidated two ideas which can be viewed as universally applicable to the process of law reform from a feminist legal perspective: the interconnectedness between issues of adjective law (evidence and process) and the underlying subjective law, and the recognition of the intersection between legal doctrine and stereotypes. Boyle views the first of these notions as having been mirrored in the provisions of Bill C-49 to a much greater extent than the latter. I shall, however, return to the latter notion in the conclusive section of this paper.

4.5.2 Discussion

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273 *Supra* note 144.

274 *Supra* note 148.

275 "Recent developments", *supra* note 203 at 181.

The Bill can generally be divided into four segments: the preamble, changes to the law on consent, changes to the law on mistaken belief in consent and new provisions regarding the admissibility of evidence of past sexual conduct. Although, for purposes of comprehensiveness, brief mention will be made here regarding each of these segments, the focus will obviously be on the provisions regarding past sexual conduct evidence, as embodied in the new section 276.

PREAMBLE

It is not common practice in Canadian criminal legislation to have a preamble in which the reasons for the enactment of this statute. The majority in Seaboyer did not pay attention to the guarantee of sexual equality (contained in section 15 of the Canadian Charter of Rights and Freedoms) when striking down the previous section 276. It has been said that this was the motivation for Parliament's explicit recognition of its commitment to sexual equality in the preamble.[276] As said earlier, the issue of diverse experiences among women and its impact on the varying degrees of their victimisation was not, as suggested by the Women's Legal Education and Action Fund, acknowledged in the preamble. Such an acknowledgement would no doubt have drawn attention to the fact that sexual assault, apart from being a sex equality issue, is also an issue of racial equality, sexual orientation equality, or any other type of equality. [277]

CONSENT

The impact of this Bill on the contentious and vague issue of consent in sexual assault

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276 *Ibid.* at 182.

277 *Ibid.* at 183.

cases is twofold. In the first place it provides a definition of consent[278] and secondly it lists a number of situations where consent cannot be obtained, some of these merely codifying common law. Others are, nevertheless, quite significant for the feminist analysis of sexual history evidence. The so-called "no means no" provision, for instance, should be instrumental in bringing about an end to situations where, despite a clear indication by the primary witness to the contrary, the accused person still gets away with the argument that he interpreted "no" to mean "yes" or "maybe".[279] The provision stating that there can be no consent where the accused abused a position of "trust, power or authority" is also of particular significance given the pervasiveness of power imbalances in the arena of sexual assault.[280]

MISTAKEN BELIEF IN CONSENT

This Bill adds a crucial qualification to the defence of honest but mistaken belief in consent as enunciated in *Pappajohn*[281]. An accused can no longer rely on this defence without establishing that he had taken reasonable steps to ascertain that the primary witness had consented to the sexual activity in question. This provision may be particularly valuable in removing certain stereotypes which are embedded in the criminal

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278 The provision defines consent as "the voluntary agreement to the sexual activity in question".

279 In the recent case of *R* v *Ewanchuk*, [1999] 1 S.C.R. 330, (1999) 169 D.L.R. (4th) 193 the Supreme Court of Canada overturned the judgement of the Court of Appeal of Alberta to confirm the "no means no" provision.

280 See generally discussion *supra* in section 2.1.

281 *Supra* note 84.

justice system, most notably the idea that passivity is indicative of consent.[282]

PAST SEXUAL HISTORY EVIDENCE

This Bill brought about radical changes to the admissibility of evidence of the past sexual history of the primary witness. The first of these is that the scope of legislative regulation of this type of evidence has been broadened to include sexual conduct between the primary witness and the accused'. This is a significant change since under common law it seems to have been assumed that this evidence is admissible. Under the new provision this evidence now falls in the same category as evidence of the primary witness's sexual activities with persons other than the accused and as such must also comply with the requirements set out in sub-sections 2(a), (b) and (c) in order to be admissible.

In the next instance the new section 276 sets out a process for determining the admissibility of this type of evidence. The first component of this process is signified by the legislative rejection of what has become known as the "twin myths"[283]. In terms of section 276.1, evidence regarding the previous sexual conduct of the primary witness will not be admissible to prove her lack of credibility or her consent in the instance under scrutiny.

The second component provides that past sexual conduct may only be used for other

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282 For a comprehensive discussion of the possible impact of this qualification, see "Recent developments", *supra* note 203 at 185 -189.

283 See discussion, *supra* note 214.

purposes if it complies with certain requirements: it must be relevant and its probative value must not be outweighed by the danger of its prejudice to the proper administration of justice.

The final component of this process involves a lists of factors, set out in the new provision, according to which the tests in the second component must be applied. Feminist commentators are skeptical of such a discretion being granted to the judiciary[284]. Distrust in the judiciary's ability to exercise such a discretion with the required consciousness of the myths and stereotypes imbued in judicial beliefs is also ardently expressed in L'Heureux-Dubè J's minority judgement in *Seaboyer*.[285]

4.5.3 Constitutional Challenge: R v Darrach[286]

The Ontario Court of Appeal handed down judgment in the case of *R v Darrach* during the early part of 1998. This case involved a constitutional challenge to the evidentiary provisions in section 276 with regard to the admissibility of previous sexual history evidence. The court dismissed the appeal against the conviction of the appellant and also ruled that the legislative provisions in question do not, as alleged by the appellant, infringe his constitutional rights in terms of sections 7 and 11 (d) of the Charter.

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284 C. Boyle, "Section 142 of the Criminal Code: A Trojan Horse?" (1981) 23 Crim. L. Q. 253.

285 *Seaboyer, supra* note 202 at 251, where she states that "Parliament was faced with a historical record which demonstrates that this discretion was abused and exercised in a discriminatory fashion by trial judges and with overwhelming social science research that says things have not changed."

286 (1998),122 C.C.C. (3d) 225, (1998) 38 O.R. (3d) 1[hereinafter *Darrach* cited to C.C.C.]..

Morden J, who wrote the decision, ruled on various aspects regarding the alleged infringement of the appellant's constitutional rights by the legislation in question. For purposes of the present discussion, however, only the evidentiary issues will be dealt with, since these were at the heart of the appeal.

The evidentiary objections raised by the appellant against the new section 276 consists of mainly six components. The first three of these is embodied in section 276(1) of the legislation[287]. They are subsequently discussed.

The appellants' first challenge relates to the use of the words "by reason of the sexual nature of that activity". He submits that this provides a "blanket provision" against the amissibility of evidence of the complainants previous sexual history and "is more Draconion than the law invalidated in *Seaboyer*"[288]. The court compares the wording of the provision to the guideline set out by McLachlin J in *Seaboyer*[289] and finds that the meaning and scope of the provision, when properly interpreted, is in accord with the guideline. In spite of the fact that the wording of the provision and that used by McLachlin

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287 This section reads as follows:
In proceedings in respect of an offence under [number of sections listed], evidence that the complainant has engaged in sexual activity, **whether with the accused or with any other person, is not admissible to support the inference that, by reason of the nature of that activity, the complainant**
(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
(b) is less worthy of belief.
[Emphasis added)

288 *Darrach*, *supra* note 285 at 239.

289 *Supra* note 202.

Jis not identical, the court views the phrases used in both as having the same meaning, intended to exclude evidence grounded in the twin myths.

The next matter raised by the appellant relates to the use of the words "is not admissible to support and inference that", the argument once again being that it provides for evidence which may be seen as relevant and probative, to be excluded. The court makes it clear that Parliament, in making use of this wording, envisioned the situation where past sexual history evidence may be relevant for more than one purpose and aimed at excluding only use of such evidence which may be aimed at perpetuating the twin myths. The court also refers to the Supreme Court judgment in *R v Crosby*[290] for an indication of the scope of section 276(1) in this regard. In this case it was decided that the provision does allow the admission of evidence that the primary witness had made I a prior inconsistent statement about her consensual sexual intercourse with the accused three days before the alleged assault in question.

The third important feature of the appellants argumentation on the evidentiary aspects of the legislation in question relates to one of the crucial features of the legislation: the fact that it also covers evidence of past sexual conduct between the parties. The case involved a factual situation where the parties had previously been involved, by admission of the primary witness, in a sexual relationship. The appellant submitted that this new feature of the legislation is unconstitutional. The court dismissed his submission, stating

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[290] (1995), 39 C.R. (4th) 315, 98 C.C.C. (3d) 225.

that it has the potential of once again resulting in "twin myth reasoning". The possibility of this type of evidence passing the test more often than evidence of sexual conduct of the primary witness with others is indeed contemplated by the court. The bottom line, however, is that such evidence will, in any event, have to pass the test for admissibility set out in subsection (2).

4 The appellant's next two objections regarding the constitutionality of the legislation relates to section 276(2)[291]. It is the appellant's submission that the words "is of specific instances of sexual activity" infringes his constitutional right as contained in section 1 1 (d) of the Charter, since he would be compelled to give evidence contrary to this section. The court once more dismissed this argument on the basis that this phrase in the provision merely indicates, as stated by the trial judge, that the evidence will be excluded if it is character evidence of a more general nature. Morden J also points out that this phrase does not in any way place the accused under any compulsion to testify[292].

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291 This section reads as follows:
In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
(a) is of specific instances of sexual activity;
(b) is relevant to an issue at trial; and
(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

292 *Darrach*, *supra* note 285 at 242.

The appellant suggests that the use of the word "significant" limits his right to make full answer and defence to such a degree that this right is essentially compromised. The court accedes that requiring the evidence to be of "significant probative value" is a stricter test than the usual one of "sufficient probative value", but emphasises the inherent nature of the prejudice which will inevitably flow from the admission of the evidence, The court concludes that it is possible to interpret this provision so that it is in line with the constitutional rights in sections 7 and 11 (d). Morden J states that the section in question requires "no more than evidence which is, together with other evidence, capable of enabling a reasonable jury properly instructed to have a reasonable doubt on the guilt of the accused"[293].

The sixth and final feature of section 276 at which the appellants objection is leveled relates to section 276(3). As mentioned previously, the new section 276 vests the court with a discretion to admit evidence of previous sexual history of the primary witness. This subsection contains a list of those factors which the court is required to consider in exercising its disctretion in this regard. The appellants objection mainly concerns the following two factors:

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(f) the potential prejudice to the complainant's personal dignity and right of privacy.

It is mooted by the appellant that these two factors have the effect of the

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293 *Ibid.* at 243.

subordinating the accused's constitutional rights to the interests of the primary witness and of society.

5 CONCLUSION

In the preceding section I have attempted to highlight some of the most significant legislative changes to sexual assault law brought about in Canada in recent years. These changes have taken place within a context where individual rights and freedoms are constitutionally entrenched in the *Canadian Charter of Rights and Freedoms*[294]. Specific constitutional obstacles have had to be overcome in the process. These constitutional obstacles essentially entailed challenges to legislative reforms based on the rights of individual accused persons to a fair trial and the balancing of these against the rights of complainants in cases of sexual assault.

The key reason[295] for my choice of Canada as comparative jurisdiction lies in this transformation of the Canadian sexual assault law during the last two decades. The differences between the two jurisdictions can, however, not be ignored, since these obviously limit the possibilities of applying the lessons from the Canadian experience to the South African context. Firstly, the two legal systems contain different definitions of offences relating to sexual assault. In South Africa, rape is a common law crime

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294 *Supra* note 5.

295 Although these are in my view the most important reasons for a comparative enquiry of the present nature, there are also other similarities between the two jurisdictions which facilitates such an enquiry. In both countries, for instance, we find legal systems which are rooted in the Anglo-American system and which have moved from a system of parliamentary supremacy to one of constitutional supremacy.

which is defined as "intentional, unlawful sexual intercourse with a woman without her consent "[296]. In Canada, the vast legislative changes brought about in 1984 with the introduction of Bill C-127[297] codified the position regarding sexual assault. Bill C-127 replaced the old crimes regarding sexual assault which included rape, attempted rape, sexual intercourse with the feeble-minded, indecent assault on a female and indecent assault on a male[298]. The new sexual offences introduced by this Bill was sexual assault[299], sexual assault with a weapon, threats to a third party, or with a another person[300], and aggravated sexual assault[301].

Secondly, it is significant that the South African evidentiary rules which are the focus of this enquiry are mostly found in common law, although certain aspects of these rules are in specific instances codified. The cautionary rule, also referred to as the corroboration rule or the cautionary warning, is not codified in any way. It has been taken over from the English common law and shaped by case law.[302] The rule regarding recent complaint is also the product of common law and no reference is made to it in any legislative provision. The rule regarding the previous sexual history of

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296 Burchell & Milton, *supra* note 74 at 435.

297 *Supra* note 144.

298 *Sexual Assault*, *supra* note 77 at 46.

299 Section 246(1).

300 Section 246(2).

301 Section 246(3).

302 See discussion *infra* section 2.

the primary witness is contained in the Criminal Procedure Act[303] under the provisions of section 277, which deals with the admissibility of character evidence. In Canada, on the other hand, these rules are for the most part codified. As explained in the section of Canadian law, the corroboration rule has evolved from its two common law versions to the provision now contained in section 274 of the *Criminal Code* which was introduced in August 1992 by Bill C-49[304]. The recent complaint rule is also codified in the form of the present section 246.5, although in its common law form it remained virtually unchanged until 1983 when this section was introduced[305]. The rule regarding previous sexual history of the primary witness is presently contained in section 267 of the *Criminal Code*, as amended in 1992 by Bill C-49.[306]

Most significant, however, is the difference in social and historical context between the two jurisdictions. Apartheid has left its mark, to a greater or lesser degree, on all South Africans. One of its most powerful instruments has been the South African legal system, and more particularly the criminal justice system. During the era of apartheid, the struggle for democracy and racial equality necessarily took centre stage for black South Africans and the pursuit of gender equality was for obvious reasons not a priority among black women. Not only did they themselves suffer severely under this system

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303 Act 55 of 1977.

304 *Supra* note 148.

305 See generally discussion *infra* at 4.3.

306 The long and tumultuous history, both legislative and judicial, of this rule is discussed *infra* at 4.4.

of institutionalised racial segregation, but they also suffered the oppression of apartheid through the experiences of their husbands, sons and brothers[307].

The latter often involved a situation where a black man faced charges of rape brought against him by a white complainant. As noted previously, such an accused could very often be more readily convicted of rape or even be given a heavier sentence. The high incidence
of inter-racial rape coupled with these inconsistencies in the conviction and sentencing of black accused persons certainly adds a dimension to law refrom initiatives in the South African context which distinguishes it from the Canadian experience.

In this concluding section I set out some particular lessons which South Africa could learn from the Canadian encounter regarding the reform of sexual assault law and specifically the evidentiary rules discussed. The first relates to the question as to whether the South African reforms should be of a judicial or a legislative nature and sets forth my argument as to why it should be legislative. The second relates to the constitutional implications of such potential reforms and places particular emphasis on the role of equality as it has been interpreted by the Supreme Court of Canada.

5.1 Legislative vs Judicial reforms

The South African law regarding rape, it is submitted, is in dire need of reform, both

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307 Poinsette, *supra* note 122 at 94.

with regard to the substantive definition of rape and, more significantly for the present discussion, with regard to the evidentiary rules which come into play in rape trials. The judgment in *S* v *Jackson*[308] has indeed indicated that the Supreme Court of Appeal is serious about taking a new direction in the rejection of evidentiary rules which subordinate women. There are, however, some urgent reasons why these changes should take the form of legislative rather than judicial reform. What follows is a brief discussion of three of these reasons which are, in my view, most significant.

Firstly, legislative reforms would be a valuable means of providing some clarity on the content and sphere of application of these rules which, as mentioned previously, are for the most part found in the South African common law. The definition of rape as it is presently used in the South African criminal justice system is framed in masculine terms - the sexual assault which forms the *actus* of the crime is defined as "partial or full penetration of the vagine by the penis"[309]. Some commentators have suggested that such a redefinition of rape should emphasise the fact that rape is a form of sexual assault rather than an act of sexual intercourse or sexual gratification[310]. The argument is that, by viewing rape as an assault, the state would be released of the burden of proving consent, although the accused would still be able to use consent as a defence. The introduction of a statutory definition of rape which takes into account the feminist concerns raised in the second part of this paper would be a vital first step in the

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308 *Supra* note 6.

309 Burchell & Milton, *supra* note 74 at 441.

310 Vetten, *supra* note 2 at 9.

process of making this area of South African law more responsive to the needs of victims of sexual assault.

In the second instance, legislative direction is preferable to judicial discretion as a result of the stereotypical thinking which is still prevalent in the patriarchal South African legal system.[311] A review of the judgments handed down by members of the South African judiciary in the recent past involving sexual offences raises some vital concerns about male bias in judicial decision-making.[312] On the sentencing of a convicted rapist, a notable South African judge recently commented as follows:

> (I)n my opinion the lack of any serious injury to the complainant and the fact that she was evidently a woman of experience from the sexual point of view, justice would be served by a suspension of half the sentence imposed.

Feminists legal scholars have indicated a distinct scepticism regarding the ability of the judiciary to adequately rid itself of the influence of myth and stereotype when considering cases involving sexual assault.[313] They argue that judges (of either sex) may find it difficult to disconnect themselves from the inherently patriarchal principles of traditional legal scholarship.[314]

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311 See M. Torrey, "When will we be believed?" (1991) 24 U. C. Davis L. Rev. 1013 ; R. Andrias, "Rape myths" (1997) Criminal Justice 2.

312 "Justice for Rape Victims?", *The Saturday Star* (27 November 1996)

313 See generally Boyle *supra* note 284; C Boyle, "Sexual Assault and the Feminist Judges" 1985 1 C J W L 93; C Boyle & S W Rowley, "Sexual Assault and Family Violence: Reflections on Bias" in S. Martin & K. Mahoney, *Equality and Judicial Neutrality* (Calgary: Carswell Legal Publications, 1987) 312.

314 Sheehy, *supra* note 114 at 744.

L'Heureux-Dubé J's judgment in *Seaboyer*[315] and its focus on the role of myth and stereotype in interpreting the rape shield provisions which were under attack in that particular case should alert those seeking to reform South African sexual assault law to the dangers of giving the judiciary free reign in formulating such reforms. In her application of the *Oakes* test to determine the constitutionality of the provisions under attack in *Seaboyer*, she sums up the position as follows:

> In the face of a previous legislative provision that was emasculated by the courts and on the heels of this, the continued application of stereotype, Parliament's measured and considered response was to codify those situations wherein sexual history evidence may be both relevant and sufficiently probative such that its admission was warranted. **Parliament exhibited a marked, and justifiedly so, distrust of the ability of the courts to promote and achieve a non-discriminatory application of the law in this area.** In view of the history of government attempts, the harm done when discretion is posited in trial judges and the demonstrated inability of the judiciary to change its discriminatory ways, Parliament was justified in so choosing.[316] (Emphasis added)

Despite a clear intention to detach itself from the shackles of personal beliefs and convictions, the Canadian judiciary continues to be plagued by judicial reasoning informed by myth and stereotype[317]. Boyle and Rowley points out that, "an unbiased decision maker may be a conceptual impossibility"[318].

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315 *Supra* note 202.

316 *Ibid.* at 316.

317 *Ewanchuk*, *supra* note 278.

318 *Supra* note 313 at 313 (nt 1).

The third consideration which mitigates in favour of legislative reforms relates to the opportunity which it gives women's groups to take part in the legislative process. Most feminist reformers in Canada would agree that the wide range of consultations with women's groups surrounding issues of sexual assault which took place before the introduction of Bill C-49 had brought about a piece of law reform which, although not flawless, goes a long way towards eradicating the discriminatory practices which sexual assault victims have had to suffer in the past.[319]

Legislative reforms to the law of sexual assault in South Africa, though preferable to reforms by the judiciary, would however not be completely problem free. As indicated by Goldblatt[320], the process of law reform is still one from which the interests of women are in many ways excluded. In South Africa, perhaps more significantly than in other jurisdictions, race, gender, poverty and lack of access to education intersect to exclude the interests of women from this process.[321] In spite of these difficulties, the Canadian experience has, in my view, shown that, given the opportunity to do the same, South African women may likewise provide indispensable insights in the formulation of legislative reforms[322]. This is particularly true if one keeps in mind that the increase in

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319 Boyle, *supra* note 203 at 181.

320 B. Goldblatt, "A Feminist Perspective on the Law Reform Process: an Evaluation of Attempts to Establish a Family Court in South Africa" (1998) 13 S.A. Jnl. of Human Rts 372.

321 *Ibid.* at 377.

322 The discussions and debates surrounding the Domestic Violence Bill (South African Law Commission, *Discussion Paper 70 Project 100 Domestic Violence* (1997)) have involved submissions by a wide range of women's interest groups, including the Women and Human Rights Project of the Community Law Centre, University of the Western Cape,

the number of women members of Parliament has been significant since the country's first democratic elections in April 1994.[323]

Although I would therefore seriously argue in favour of the introduction of legislative reforms to the present South African sexual assault law, rather than leaving such an important task to the judiciary, it may not be possible to get rid of a judicial discretion altogether. If reforms to South African sexual assault law is indeed to take the form of judicial discretion, this discretion need to be structured and limited by clear guidelines.

Section 276(3) of the *Criminal Code* (as amended by Bill C-49) lists a number of factors which should be taken into account when considering whether evidence of previous sexual history should be admissible.[324] This section provides an example of how the objectives of the legislation in question and the concerns of those guarding against an unfettered discretion can be taken into account without doing away with judicial discretion.

Rape Crisis in Cape Town and the ANC's Parliamentary Women's Caucus.

323 Parliament is presently (after the June 1999 elections) made up of 400 members, of whom 119 are women. On the other hand, the judiciary is made up of a paltry six percent women. See C. Rickard, "The law is an ass when it comes to women" *Sunday Times* (8 September 1999) (C6).

324 These factors include the following:
(a) the interests of justice, including the right of the accused to make a full answer and defence;
(d) the need to remove from the fact-find process any discriminatory belief or bias;
(f) the potential prejudice to the complainant's personal dignity and right of privacy.

5.2 Role of equality in constitutional decision-making

I now come to the second significant lesson which could, in my view, be learnt from the reforms to Canadian sexual assault law. This relates to the manner in which the interpretation of the right to equality has been used in Canada to inform the exercise of balancing constitutional rights.

Equality of all South Africans is one of the cornerstones of the new constitutional dispensation. Section 8(1) of the *Constitution of the Republic of South Africa*[325] guarantees to every person the right to equality before the law and to equal protection of the law. Section 8(2) protects every person from unfair discrimination on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. Against the background of apartheid, a system of social ordering rooted in inequality and discrimination, the right to equality of all South Africans will be valorised and protected at all costs by those responsible for the upkeep of the new South African legal order.

On the other hand, given the apartheid regime's dismal track record regarding human rights abuses, it comes as no surprise that the new Bill of Rights also contains a detailed list of rights pertaining to arrested, detained and accused persons[326]. Since its establishment in 1995, a vast number of cases heard by the Constitutional Court have dealt with the rights of accused persons and the Court has been quite bold in its

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325 Act 108 of 1996[hereinafter *Constitution*].

326 Section 35(3) of the *Constitution*.

emphasis on the protection of individuals rights against infringements of these rights by the criminal justice system.

As mentioned in the introduction to this section, challenges to the legislative reforms to sexual assault law in Canada has essentially involved the balancing the rights of complainants in cases in sexual assault (the right to equality, including the rights to privacy, dignity and security of the person) with those of individual accused persons to a fair trial (these would include the right to full answer and defence, the right to silence and the presumption of innocence). This balancing process would take place according to the test set out by Dickson C J C in *R v Oakes*[327] which is used to determine whether a specific legislative provision were justified according to section 1 of the *Charter*

I think it is reasonable to assume that the suggested legislative reforms to the South African law relating to sexual assault, both in its substantive form and with regard to evidentiary rules, will at some point have to face constitutional challenges similar to those relating to reforms in Canada. It is my view that, in its adjudication of such challenges, South African courts can avoid the type of rights debates which have plagued their Canadian counterparts in cases such as *Seaboyer*. They can do so by using equality as a norm which underlies the balancing of individual rights and by using it as a vital touchstone in determining whether a particular legislative measure should survive in terms of the limitation clause.

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[327] *Supra* note 235.

Section 36 of the *Constitution*[328] was, as mentioned earlier, moulded on section 1 of the *Canadian Charter of Rights and Freedoms*.[329] The obvious implication of this is that, where the limitation of individual constitutional right are at issue, Dickson J's test as set out in *Oakes* can, and has been, very effectively used to determine whether a particular legislative provision or governmental act should survive constitutional scrutiny[330].

Of particular importance then for South African courts facing the task of balancing individual rights in terms of section 35, is the following statement taken from Dickson J's judgement regarding what the words "free and democratic society" should mean:

> "The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, **commitment to social justice and equality**, accomodation of a wide variety of beliefs, respect for cultural and group identity, and faith in the social and

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328 *Supra* note 325.

329 This section provides as follows:
(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 -
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(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.

330 The Constitutional Court has, indeed, used the *Oakes* test consistently in this balancing exercise. See *S v Zuma* 1995 (2) SA 642 (CC) (the first cases decided by the Constitutional Court after its inception) and *S* v *Makwanyane*1995 (3) SA 391 (CC)(the case in which this test was applied in determining whether the death penalty is unconstitutional)

> political institutions which inhance the participation of individuals and groups in society"(Emphasis added)[331].

Boyle[332] points out a number of instances where the Canadian judiciary has recognised that, in a constitutional context, equality could influence the section 1 analysis in the sense that, although the specific law or state action were found to infringe the right in question, equality can be used to "save" the infringement as a reasonable limit in terms of section 1. In *R* v *Keegstra*[333], for instance, it acknowledged the role of equality as it co-exists with the constitutional right to freedom of speech in challenging legislative protection of specific groups.

With regard to cases involving sexual assault, I agree enirely with Boyle's premise that, framed in the right terms, the right to a fair trial could co-exist with the right to equality. If the words of Dickson C J's view as stated above are to be taken seriously, I do not see how one could come to a conclusion with sees these rights as being in conflict with one another.

A prime example of how equality concerns can inform the balancing of individual rights can be found in the recent judgment of *R* v *Mills*[334]. This case dealt with the disclosure

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331 Dickson CJ in *R* v *Oakes supra* note 235 at 136.

332 C Boyle, "The Role of Equality in Criminal Law" (1994) 58 Sask. L. Rev. 203 at 207.

333 *Supra* note 245.

334 [1999] 3 S.C.R. 668.

of the complainant's therapy records.[335] The issues raised in *Mills* involved the balancing of the accused's right to full answer and defence with the right of the complainant to privacy. It was argued on behalf of the accused that sections 278.1 to 278.91 of the *Criminal Code*, which was introduced by Bill C-46 in May 12 1997, was unconstitutional in the sense that it infringed on his right to full answer and defence, as contained in sections 7 and 11(d) of the *Charter*.

The majority of the court reiterated the importance of interpreting competing rights in a contextual manner:

> "Considered in the abstract, these principles of fundamental justice may **seem** in conflict. The conflict is resolved by considering conflicting rights in the factual context of each particular case."[336]

As was done in the minority judgment in *Seaboyer*, the court emphasised an appreciation of the role of myth and stereotype in adjudicating sexaul assault cases and, with regard to this specific case, said that such an appreciation is "essential to delineate properly the boundaries of full answer and defence"[337].

It is in this respect that the Canadian Supreme Court judgment in *Seaboyer*[338] remains

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335 Although this is an issue which does not fall within the ambit of this thesis, it has been on the foreground of sexual assault jurisprudence for some time now. See for instance the debates regarding *R* v *O'Connor*[1995] 4 S.C.R. 411.

336 Place in report

337 Place in report

338 *Supra* note 202.

remarkable: the majority judgment provides an example of an instance where the Supreme Court has failed to interpret equality as a relevant constitutional value[339], while L'Heureux-Dubé J's minority judgment emphasises that equality as constitutional value should inform the consitutional balancing of individual rights.

Smith[340] notes the distinct difference between the characterisation of relevant constitutional provisions for purposes of this judgment[341]. McLachlin J, writing for the majority, lists only the constitutional protections afforded the accused and chooses not to take into account the sections relating to equality.[342] It is clear that she sees these cases as being strictly about the constitutionality of the two sections in question. The dispute which is to be resolved relates to whether the restrictions placed by these provisions on the admission of previous sexual conduct evidence violate the constitutional guarantees provided for in sections 7 and 11 (d) of the Charter. From this one can draw the inference that, in her view, the admissibility of sexual history evidence and its resulting systemic bias in the treatment of women by the Canadian criminal justice system is not about equality issues.[343]

L'Heureux-Dubé J, on the other hand, states in the very first sentence of her judgement

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339 Boyle & MacCrimmon, *supra* note 85 at 202.

340 M. Smith, "Language, Law and Social Power: *Seaboyer; Gayme v R* and A Critical Theory of Ideology" (1993) 1 U.T.Fac.L. Rev. 118

341 *Ibid.* at 128.

342 *Ibid.* at 256.

343 *Ibid.* at 129.

that "these two appeals are about relevance, myths and stereotypes in the context of sexual assault".[344] This contention is echoed throughout the judgement as she discusses in detail how myths and stereotypes still inform the way most people, including law-enforcement officers, perceive women who have been sexually assaulted. She also cites sections 7 and 11(d) of the Charter as well as the equality provisions in sections 15 and 28` indicating a recognition on her part of the fact that the rape shield provisions are inextricably linked to issues of gender equality.[345]

The differing perspectives of the two judges regarding the issues at stake in this case run through the two judgements like a golden thread, not only indicating the contrasting dispositions of the judges but also embodying two specific views regarding the role of substantive equality in the adjudication of Charter issues.

The South African Constitutional Court has already made some headway in using equality as a fundamental value in the interpreting of individual constitutionally entrenched rights. In President of South Africa v Hugo[346] Goldstone CJ used L'Heureux-Dubé's test for discrimination, as set out in Egan v Canada (AG)[347]:

> "(W)e need, therefore, to develop a concept of unfair discrimination which recognises that although a society

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344 (1991) 83 D.L.R. (4th) 193 at 201; (1001), 66 C.C.C. (3d) 321.

345 *Seaboyer supra* note 122 at 204.

346 (1997) CCT 11/96 at 38.

347 [1995] 2 S.C.R. 513

> which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve this goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional right to equality or not' [348].

Having said this, I think it is vital to keep in mind the difference in social and historical context between South Africa and Canada. As set out earlier in this paper, the legacy of apartheid will continue to haunt South Africans in decades to come. In the context of sexual assalt law, one should remain alert to the fact that rape trials often involved a black accused charged with the rape of a white complainant. In the majority of these cases the accused faced not only a higher possibility of being convicted, but defintely received a more severe sentence than in the instance where a white man had been the accused, or in the instance where the complainant was a woman of colour and the accused white.

Against this background it may seem more difficult to uphold legislative measures which improve the position of complainants in sexual assault cases, since one might imagine that courts could lean towards giving priority to the rights of the accused. I would agree once again with Boyle's view that the right to a fair trial should not be seen as in opposition to the right to equality, but that equality should be seen as one of the values

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348 *Ibid.*

which should be taken into account in determing whether the accused has, indeed, been given a fair trial.

If South African courts are truly committed to bringing about fairness and justice in accordance with the principles underlying a free and democratic society envisioned by the architects of the new Constitution, equality cannot be seen as simply another constitutional right of a particular individual. It should be seen as a central value in determining what such a free and democratic society should look like. In this respect, I submit, South Africa would do well in following the Canadian example of acquiring proficiency in the language of equality[349], particularly with regard to sexual assault laws.

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349 L'Heureux-Dubé, *supra* note at 336, uses language as a powerful metaphor for equality, pointing out that, not unlike language, an understanding of equality is an embodiment of "the norms, attitudes and culturews that are expressed through that language.

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