CONSTITUTIONAL FORUM
CONSTITUTIONNEL

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Constitutional Forum Constitutionnel is the newsletter of the Centre for Constitutional Studies / Centre d'études constitutionnelles published with the financial support of the Alberta Law Foundation.

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Constitutional FORUM Constitutionnel is indexed in: Index to Canadian Legal Periodical Literature.

Alberta Law Foundation

R. v. Seaboyer: PORNOGRAPHIC IMAGINATION AND THE SPRINGS OF RELEVANCE

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Section 276 of the *Criminal Code* of Canada provided that, in a trial for sexual assault, the accused could not (other than in limited circumstances) adduce evidence of the sexual conduct of the complainant with persons other than the accused. The section was introduced[1] as an attempt to eradicate the effects of the assumption explicitly accepted by the common law that a woman who had sexual relations outside of marriage was likely to consent to any sexual activity and was also likely to lie under oath.[2]

In *R.* v. *Seaboyer*; *R.* v. *Gayme*, the Supreme Court of Canada struck down this section deciding that it violated two fundamental rights of accused persons protected by the *Canadian Charter of Rights and Freedoms*. These were the right under section 11(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an impartial tribunal; and the right under section 7 to life, liberty and security of the person and the right not to be deprived thereof other than in accordance with the principles of fundamental justice.

Interestingly, the two women on the court were pitted against one another in their judgements. Justice McLachlin wrote for a majority of seven members of the court and Justice L'Heureux-Dubé wrote a strong dissent concurred in by Justice Gonthier. Essentially, the view of the majority was that the legislation went too far in excluding evidence of the sexual history of the complainant. Justice McLachlin was quick to applaud the goals of the legislation. She conceded the weightiness of the objectives of encouraging the reporting of sexual assault, protecting the complainant from embarrassing and traumatic intrusion into her privacy, and eliminating the practice of inviting the inference from the complainant's sexual experience that she fabricated the incident or brought it on herself.

Notwithstanding her endorsement of these objectives, Justice McLachlin felt that evidence of the sexual conduct of the complainant could be relevant in ways that did not engage these discredited myths about female sexuality and that to preclude the introduction of that evidence in all cases potentially could unfairly restrict the accused in the conduct of his defence. To borrow the language of the law of similar fact evidence, she thought that not all use of evidence of the complainant's sexual conduct necessarily involved the use of "forbidden reasoning"— that is: female with extra-marital sexual experience = slut = liar/indiscriminate consenter.[3]

1. It was the second legislative effort to change the common law in this area. A similar section (s.142 of the *Criminal Code* enacted by *Criminal Law Amendment Act*, 1975 S.C. 1974-75-76 c. 93, s.8) had been nullified by judicial interpretation. See *R. v. Seaboyer and Gayme* (1991), 128 N.R. 81 at 186ff.

2. See *R. v. Seaboyer and Gayme, ibid.* at 110ff. Now, s. 277 of the *Criminal Code* provides that evidence of past sexual conduct may not be called simply to attack the complainant's credibility. This section was upheld by the Supreme Court in this case since it was found that evidence of sexual conduct could not, on its own, be relevant to credibility. However, since such evidence is invariably introduced to undermine the complainant's testimony the implied link between sexuality and mendacity is not eliminated where the evidence is called on a particular issue such as consent.

3. See *R. v. Wald* [1989] 3 W.W.R. 324 at 357 "... they will say that her reputation is that she is easy and the word that they would use to describe it in everyday language, to put it bluntly is slut. And one or more of them will say that she also has a reputation for having been easy in terms of consenting to sex with more than one man at the same time...".

She thought that the evidence could be relevant in a number of ways that did not spring from these myths. First of all, she thought that it could be relevant in that it could support the accused's statement that he had an honest but mistaken belief that the complainant had consented to the conduct complained of. As a result of the decision in *Pappajohn* v. *The Queen*[4], and its subsequent codification in section 265 of the *Criminal Code*[5] an accused person is entitled to an acquittal if he honestly believed that the complainant was consenting to the sexual conduct. That belief does not have to be reasonable. However, there must be an "air of reality" to the accused's story that he honestly believed there was consent before the judge is required to tell the jury that, if they believe the accused, he is entitled to an acquittal. The accused's belief that the complainant consented may be based on his beliefs about her past sexual conduct. That is to say, the accused may have thought that the complainant was easy and, therefore, that she would consent. The defence of honest (though not necessarily reasonable) belief excuses coercive sexual conduct where the accused sincerely believes that a woman's past sexual conduct is a decisive piece of information in determining whether she is consenting. Justice McLachlin's view was that, since the defence is available to the accused in law, it is contrary to the principles of fundamental justice to hamper the accused in his proof of that defence by depriving him of the opportunity to give his story an "air of reality" by calling evidence of the sexual conduct of the complainant that formed the factual basis of his honest belief that she would and did consent.

The evidence is not relevant to the issue of the complainant's credibility or her consent. The nature of the defence substantially eliminates both of those issues by focusing the inquiry on the state of the accused's mind. Thus, the evidence of the sexual conduct of the complainant was held to be potentially relevant to the issue of the accused's belief that the complainant consented.[6]

Another situation in which Justice McLachlin thought that the evidence could be relevant other than by way of discredited myth was to show that the complainant had a motive for fabricating the charge of rape. The example she used in support of this argument was a case of a child who complained that her father had sexually assaulted her. The father's defence was that he had discovered an incestuous relationship between the child and her brother. The child in anger and spite at her father's having reprimanded her for this conduct supposedly fabricated the allegation of sexual assault against the father. Justice McLachlin was of the view that here, evidence of past sexual conduct of the complainant does not derive its relevance solely from sexist myth and, therefore, that it is contrary to the principles of fundamental justice and a fair trial to preclude the accused from bringing to light the complainant's treachery. The evidence goes to the issue of motive to fabricate and does not simply use evidence of sexual experience to invite the inference of consent or fabrication. It is not because she had a sexual relationship with her brother that she is supposed to have lied, rather it is because she was caught by her father doing something "very naughty" that she is supposed to have had a motive to do him in.

Justice McLachlin focused on identifying situations in which evidence of sexual conduct with third parties could be relevant in a way that did not directly require the trier of fact to accept the background assumption that women who have sexual identities lie and consent to anything and anybody. By adopting this focus, she was able to interpret the provision as an attempt by the state to gain an unjustifiable advantage against the accused in the trial by tying his hands in the presentation of his defence and denying him the opportunity to prove the true facts of his case.

Justice L'Heureux-Dubé, writing for the dissent, took a completely different approach. In the first part of her judgment she gave extensive documentation of the ways in which widespread acceptance of myths about female sexuality and sexual assault distort the process of reporting, prosecuting and trying sexual offenses.[7] She saw the assumption (which also exists as an emotion), that female integrity is undermined and negated by female sexuality, as "baggage that belongs to us *all*".[8]

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4. [1980] 2 S.C.R. 120

5. It has also been argued that the third exception to the exclusionary rule in 276(1)(c) is a further codification of the defence. See T. Brettel Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1988) 2 C.J.W.L. 310 at 320.

6. For discussion of the defence of mistaken belief in consent see: Lucinda Vandervort, "Mistake of Law and Sexual Assault: Consent and *Mens Rea*" (1987) 2 C.J.W.L. 233; Toni Pickard, "Harsh Words on *Pappajohn*" (1980) 30 U.of T.L.J. 415.

7. For a comprehensive Canadian source on these issues see Lorenne M. Clark and Debra J. Lewis *Rape: The Price of Coercive Sexuality* (Toronto: The Women's Press, 1977).

8. *Supra*, note 1 at 170.

Justice McLachlin, by contrast, seemed to be of the view that the modern sensibility is all but cleansed of these discriminatory stereotypes, referring to them always as "discredited" myths. This difference in perception of the pervasiveness and depth of the problem helps to explain the different conclusions of the two women. Justice L'Heureux-Dubé, however, sets out a significant amount of evidence supporting the conclusion that these myths are alive and well and are controlling factors in sexual assault cases.

Justice L'Heureux-Dubé was of the view that the exclusion of the evidence cannot be a violation of the accused's rights since the evidence cannot be relevant other than through a process of reasoning which invokes sexist myths about women and rape[9]. The right to a fair trial conducted in accordance with the principles of fundamental justice does not include a right to introduce irrelevant evidence of a kind that has been proven to be a preemptively potent force in contorting and controlling the fact-finding process. It does not include the right to manipulate the emotive response to the case by harnessing misogynist prejudices. Here, L'Heureux-Dubé expands the understanding of the stereotypes that underwrite the relevance of the evidence, extending it beyond the slut = liar/ consenter equation. She notes that rape myths have more varied and subtle forms and include, among them, the idea that women — particularly promiscuous women[10] — tend to fantasize about having been raped, that prostitutes concoct rape charges to extort further fees from their clients, that if a woman really does not want sex that she can avoid it — i.e. "you can't thread a moving needle" or "a woman with her dress up runs faster than a man with his pants down" — and that if they are caught in the act, sexually active women and children will use the cry of rape to maintain a facade of chastity.

Justice L'Heureux-Dubé's essential point is that there is no case in which evidence of sexual conduct does not derive its relevance through some aspect of this misogynist social construction of the "truth" about sexual assault. In the context of the defence of mistaken belief in consent, she argues that in order for evidence of sexual conduct to be relevant it must be accepted that the sexual conduct of the complainant gives an air of reality to the accused's assertion of belief in consent. This conclusion can only be arrived at through the acceptance of rape myths about sexual experience and consent.[11]

Similarly, regarding Justice McLachlin's example of the incestuous child, Justice L'Heureux-Dubé would argue that the relevance of the evidence springs from an archetype of our pornographic imagination[12] of the sensually voracious, treacherous, malicious, sexual female child.[13] Further, as long as we allow the overwhelming power of this pornographic imagination free reign in the trial of sexual assault cases those trials will not be "fair" in any full sense of the word.

What we see in the disagreement between the majority and the minority is the collision of two very different approaches to constitutional litigation and the meaning of fundamental justice. Justice McLachlin views the process of constitutional adjudication in a criminal context as one designed to protect the individual in his contest with the state. The familiar theory behind this view is that the constitution exists to keep the state in check lest it grow into a dictatorship. The acquittal of some guilty individuals is seen as a small price to pay for the preservation of a state that respects the requirement of full proof of any allegations made against its citizens. Justice McLachlin views the notion of the principles of fundamental justice as intimately connected to the internal morality of the criminal law focused on the restriction of the great coercive machine of the state. This is why she is able to describe this legislation as "draconian"[14] and it is why she is able to quote with approval a passage describing the complainant as "merely a witness, entitled to no constitutional protection".[15]

Justice L'Heureux-Dubé takes a view of fairness and fundamental justice that goes beyond the conception of constitutional legal rights as protections of any advantages that an accused may be given in a trial. She recognizes that constitutional litigation engages questions about the collective situation of women as a group in the

9. I use the word rape instead of sexual assault to avoid the inference of gender neutrality that the new *Criminal Code* provisions suggest.

10. However, the old common law requirement of corroboration in all sexual assault cases accepted the idea that women generally were inclined to fabricate rape charges. Celibate women were not exempt, in law or common wisdom, from this suspect category. See E.M. Forester, *A Passage to India* (London: E. Arnold, 1924).

11. The next step in the line of reasoning which Justice L'Heureux-Dubé begins here is that the defense of honest but mistaken belief defines sexual assault in a way that trivializes women's refusal of consent. This misogynist definition of the crime itself must be eradicated.

12. See Elizabeth Sheehy, "Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?" (1989) 21 *Ottawa L. Rev.* 151 at 166. Sheehy borrows the phrase from Susan Griffin, as do I. See *Pornography and Silence: Culture's Revolt Against Nature* (New York: Harper and Row, 1981.)

13. See *R. v. Lessen*, [1990] B.C.J. No. 833 (B.C.C.A.) referring to the trial judge who described a three year old child as "sexually aggressive".

14. *Supra*, note 1 at 123.

15. *Ibid.* at 113 quoting J. A. Tanford and A.J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980) 128 U. Pa. L. Rev. 544 at 588.

society.[16] She understands the notion of fairness of the trial and the principles of fundamental justice also in terms of the distortion of the outcome of the trial and the effect that an accumulation of such distortions have on the position of women in the society. This is why she is able to view the accused's entitlement to trade on rape myths to build a defence as unfair. She understands the notion of prejudice to the trial not just in terms of prejudice to the accused but also in terms of prejudice to the complainant and prejudice to women's position as full participants in the society. This perspective is not one that has been given much voice in the legal tradition and it smacks of the uninitiated. The difficulty of using the existing body of rhetoric surrounding the exclusion of prejudicial evidence is apparent since that rhetoric has been spoken from the perspective of the accused. In a system that has deeply internalized the understanding of fairness as erring on the side of the accused, it is difficult to shift that focus to fairness as guarding against the distortion of sexist stereotypes.

The essence of the challenge to the legislation is summed up by David Paciocco in his argument that the legislation unfairly limits the inferences that a jury can draw by imposing a feminist world view in the rules of admissibility[17]. This view entails the belief that other rules of evidence do not impose any world view at all. This is not true. All of the exclusionary rules of evidence impose a particular world view and impose certain generalizations about what people do and do not do in deciding that some evidence is unreliable and inadmissible. For example, the rule excluding similar fact evidence and evidence of the criminal record of the accused imposes a particular view about human nature — that is, that people are capable of radical choice and transcendence of seemingly immutable aspects of their character.[18] Even where evidence of discreditable conduct is relevant, in that it would strongly suggest an inference of guilt, we exclude the evidence because we have accepted a world view which deems the inference to be unwarranted. So, in Justice McLachlin's example of the incestuous child and her father, we would exclude evidence of the father's prior conviction for rape even though it might be directly relevant in the sense that it would significantly strengthen the inference of guilt. The reason that we exclude it is that we simply don't accept the assumption that its relevance springs from: that people who act in a certain way in the past continue to act that way in the future. Similarly, with respect to the exclusion of evidence of sexual conduct, the justification for the exclusion is that we should not accept the sexist assumptions from which their relevance springs. The process of excluding evidence and limiting inference on the basis of the adoption of a particular world view is not new. What was new in this legislation was the adoption of a world view that took the sexual reality of women's lives seriously.

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16. Sharene Razack, *Canadian Feminism and the Law* (Toronto: Second Story Press, 1991) at 71.

17. "The Charter and the Rape Shield Provisions of the *Criminal Code*: More About Relevance and the Constitutional Exemptions Doctrine."(1989) 21 Ottawa L. Rev. 119 at 130.

18. I discuss this point in much more detail in "Similar Fact Evidence and the Principles of Inductive Reasoning: Makin Sense" (1991) 11 O.J.L.S. 63 at 68.