Department of Justice Canada
Ministère de la Justice Canada

Corporate Policy and Programs Sector

Research Section

Sexual Assault Legislation in Canada An Evaluation

A Review of the Sexual Assault Case Law 1985-1988

Report No. 6

Canada

SEXUAL ASSAULT LEGISLATION IN CANADA: AN EVALUATION

A REVIEW OF THE SEXUAL ASSAULT CASE LAW 1985-1988

Report No. 6

SEXUAL ASSAULT LEGISLATION

IN CANADA

AN EVALUATION

**A Review of the
Sexual Assault
Case Law 1985-1988**

Report No. 6

**Research Section
Department of Justice Canada
1992**

Canadian Cataloguing in Publication Data

Main entry under title:

A Review of the Sexual Assault
Case Law, 1985-1988

Issued also in French under title:
La Loi sur les agressions sexuelles au Canada,
une évaluation

Report No. 6
"JUS-604"
ISBN 0-662-19475-6
DSS cat. no. J23-9/6-1992E

Published by authority of the Minister of Justice
and Attorney General of Canada
Government of Canada

by

Communications and Consultation Branch
Department of Justice Canada
Ottawa, Ontario
K1A 0H8

(613) 957-4222

Printed in Canada

A NOTE TO THE READER

The Research Section of the Department of Justice Canada commissioned a number of studies to help to determine the impact of the new sexual assault law that was proclaimed in January 1983. This report is based on a larger report prepared by Susannah Worth Rowley. Vicki Schmolka, a lawyer, was contracted by the Department to undertake major editing of this earlier report.

The purpose of this report is twofold: firstly, to review court decisions made between May 1985 and April 1988; and secondly, to examine how courts were interpreting the legislation, thus identifying any new trends in decisionmaking. The report is a follow-up to Report No. 2, "The New Sexual Assault Offences: Emerging Legal Issues," prepared by Gisela Ruebsaat in 1985. A list of the complete Department of Justice sexual assault evaluation series can be found in Appendix 3.

For this report, close to 240 court decisions were considered. It provides a perspective on the early years of jurisprudence following a major change in the criminal law.

Please note that when the review was undertaken, the Revised Statutes of Canada, 1985 were not yet in force; on January 1, 1989, most Criminal Code sections were renumbered. In this report, Criminal Code sections are referred to by their numbers before 1989. The new reference numbers appear in brackets. Please note also that the report was written before the Supreme Court decision on the Seaboyer case. In that decision, section 276, which stated that an accused cannot bring up the complainant's past sexual history, was ruled unconstitutional.

CONTENTS

PREFACE

For this study, the author set out to canvass all reported cases from May 1985 to April 1988 which in any way relate to the sexual assault legislation. Upwards of 240 reported cases were included. Other digested and unreported cases were examined with a view to sentencing; however, this issue does not form a significant part of the review.[1]

The author also reviewed relevant articles, research, and case comments all gathered from as many different Canadian sources as possible. Selected American authorities are cited but a comprehensive survey of authorities and literature from the United States was not undertaken.

There are serious limitations in drawing conclusions about the effects of the sexual assault legislation based on a survey of reported cases such as this one. The sample of reported cases is not scientific. Not all cases are published; those that are have passed though an editorial filter and the reasons why editors choose to publish certain cases are not known. Thus, it is important to recognize that this report does not consider all decisions on sexual assault charges that have been handed down, but only presents a selection of cases from a limited sample.[2]

No data are available on the number of prosecutions and their disposition.[3] Since jury trial decisions are not reported in the law reports (a jury is not required to give reasons for its verdict), the only way these will come to light in a case law review is if a conviction results and a subsequent sentencing hearing is reported; if the sentence is reported in a sentencing digest; or if a conviction is appealed and the appeal decision is reported. In sum, with respect to both jury trials and trials before a judge alone, we do not have access to information about all of them or even about what proportion have been reported.

---

[1] See Appendix 4, p. 96.

[2] The case survey is not a reliable guide to the number of such incidents that have taken place. It may be that many cases of sexual assault of a relatively minor nature do not get to court: The victims may not report them, the police may decide not to lay charges, the prosecution may decide not to proceed.

[3] Statistics Canada records the number of offences reported, the number of those that were classified as founded by the police, and finally the number of the founded reports that resulted in charges being laid. However, there are no data beyond that to show how many of the total cases charged proceeded to trial either by judge or by jury, whether the accused pleaded guilty, whether a conviction or an acquittal resulted, and what the sentence was.

Finally, since most reported cases in the area of sexual assault deal with convictions, important information about acquittals is missing. For these reasons, a review of judicial decisions is, from the outset, doomed to be somewhat incomplete.

These limitations being noted, however, the importance of a review of the case law must be acknowledged. Together with the law itself, reported cases are the major source of information, argument and analysis used by judges and lawyers. This report will provide insight into how judges have interpreted the new law and how lawyers can be expected to build their legal arguments.

By considering the application of the legislation, we gain perspective on its impact and can consider the possible need for further amendments. It is the author's view that judicial education is an essential component of law reform and that much more work needs to be done in this area in the future.

INTRODUCTION

An Act to Amend the Criminal Code[4] in relation to sexual offences and other offences against the person came into force on January 4, 1983, bringing about significant changes to both the substantive and evidentiary law concerning sexual offences. The crimes of rape, attempted rape, sexual intercourse with the feeble-minded, and indecent assault were repealed.[5] In their place, the new law set out three levels of sexual assault: Level I -- sexual assault; Level II -- sexual assault with a weapon, threats to a third party, or causing bodily harm; and Level III -- aggravated sexual assault.

An important element of the new law is that it is gender neutral. Whereas the crime of rape could only be committed by a man against a woman, sexual assault is not defined by the act of penetration of a penis into a vagina. Either men or women can be perpetrators of a sexual assault crime and either sex can be its victim.

The new law also changed many of the rules of evidence which applied to sexual offences. Rape victims had been expected to complain of the crime immediately; this requirement of recent complaint was repealed. As well, courts could not previously convict an accused solely on the testimony of the victim: The new law removed the requirement for corroboration. It also narrowly restricted the circumstances under which the court could hear evidence of a victim's past sexual history and it prohibited the introduction of evidence of a victim's sexual reputation. In general, these changes mean that the rules of evidence that apply in trials of other violent offences also apply in sexual assault trials.

A key document in developing these legislative amendments is the Report on Sexual Offences[6] prepared by the Law Reform Commission of Canada in 1978. That document proposes many changes to the rape laws, basing its proposals on three major principles: the protection of the integrity of the person, the protection of children, and the safeguarding of public decency. In 1980, the Department of Justice Canada produced an information paper on sexual offences[7] in which it introduced proposed changes to the law and endorsed the

---

[4] S.C. 1980-81-82-83, c. 125.

[5] Provisions not repealed in 1983 include sexual intercourse with females under 14; sexual intercourse with females of previously chaste character; incest; the seduction offences; sexual intercourse with children, wards and employees; and gross indecency. Many of these provisions were, however, amended or repealed when the new legislation on child sexual abuse came into force on January 1, 1988.

[6] Ottawa: Supply and Services Canada, 1978.

[7] Information Paper: Sexual Offences Against the Person and the Protection of Young Persons, Minister of Justice, 1980.

principles identified by the Law Reform Commission of Canada. It also stressed that changes to the law were being developed with the following goals in mind: the elimination of sexual discrimination from the Criminal Code, the focusing on the violent nature of sexual assault, and the protection of complainants from harassment in the courtroom.

These principles and goals form a backdrop against which the changes to the law can be viewed. However, a selected case law review such as this one cannot measure the degree to which the new law meets these objectives, nor is it within the author's purview to examine Parliament's intentions in adopting new legislation and comment on the results. Rather, this report presents a summary of selected cases that the author believes indicate emerging trends in the case law.

The constitutional challenges to the law are of major importance. The Canadian Charter of Rights and Freedoms has been used to question the validity of some of the sections of the law, notably the section banning the publication or broadcast of information that would identify the complainant and the sections that limit the introduction of evidence about a complainant's sexual history and sexual reputation. The Supreme Court of Canada has already decided a number of cases that interpret key provisions in the new law. However, there are a number of issues, as yet unresolved, that Canada's highest court still must consider.

During the period covered by this review, a new law came into force concerning the sexual abuse of children.[8] This law is likely to have a major impact on the types of charges laid in sexual assault cases in which people under age 18 are the victims, and on the prosecution of these cases. Considering this change in the law, the author has not cited in this report many of the cases involving children, although the cases were reviewed. Many of these cases are now only of historical significance, although some provide valuable insight into the courts' interpretation of the sexual assault law. These latter cases are discussed in the pages that follow.

[8] Bill C-15, which came into force on January 1, 1988, set out a series of new offences relating to the sexual abuse of young people under age 18. The new offences include sexual interference (touching a young person under age 14 for a sexual purpose), invitation to sexual touching (encouraging a young person under 14 to touch his or her own body or someone else's body for a sexual purpose), and sexual exploitation (engaging in sexual activity with a young person between the ages of 14 and 18 when one is in a position of trust or authority with respect to that young person).

While it is too early to draw any conclusions about the ultimate impact of the new sexual assault legislation, the cases selected for discussion in this report may shed some light on how the courts have begun to interpret the law.[9]

[9] This report is a follow-up to that of Gisela Ruebsaat, which is volume 2 in the Department of Justice Canada series on the new sexual assault law. That study considered cases decided between January 1983 and May 1985. See G. Ruebsaat, The New Sexual Assault Offences: Emerging Legal Issues, *Sexual Assault Legislation in Canada: An Evaluation, Report No. 2,* Ottawa: Department of Justice Canada, 1985.

1.0 THE NATURE OF THE SEXUAL ASSAULT OFFENCE

1.1 Sexual Assault: An Act of Violence

When Bill C-127 came into force on January 4, 1983, the purpose of replacing the crime of rape with the sexual assault offences was to shift the emphasis from a sexual context to a recognition of the violence of the criminal activity. In other words, society was to view sexual activity without consent as essentially violent, not sexual.[10]

During the House of Commons debate on the proposed legislation, Member of Parliament Flora MacDonald observed that it "calls a spade a spade. It says that sexual assault is primarily an act of violence, not of passion; an assault with sex as the weapon."[11]

In keeping with this view, the new offences were included with the existing assault offences in Part VI of the *Criminal Code*, Offences Against the Person and Reputation (now Part VIII), whereas the old law had been found in what was then Part IV, Sexual Offences, Public Morals and Disorderly Conduct.

The offences of assault and sexual assault share a common definition found in section 244 (now section 265) of the *Criminal Code* ("A person commits an assault when"). Although the Code does not define "sexual" or "sexual assault," it does set out three specific types of sexual assault offences and three levels of sentencing options. The penalties for a sexual assault offence are generally more severe than those for an equivalent level of assault that does not have a sexual aspect. For instance, the maximum penalty for the lowest tier of sexual assault as set out in section 246.1 (now section 271) is 10 years incarceration, twice the maximum available for a conviction on a common assault charge.

The nature of the conduct covered by the term sexual therefore quickly became an important issue in interpretating the new sexual assault legislation. It is ironic that despite the political goal to shift the focus away from the sexual aspect of the offence and emphasize its violence, in the first years following the law's coming into force the judicial focus necessarily turned to finding a suitable definition for sexual in order to distinguish sexual assault from common assault crimes.

---

[10] Everyone does not agree on this characterization. For some persons, rape is the ultimate expression of sexuality as our society understands and practices it, the essence of sex being dominance and submission. See, e.g., Susan Estrich, Real Rape (Harvard University Press, 1987), p. 62 et seq.

[11] Canada, House of Commons, Debates, August 4, 1982, p. 20041.

1.2 The Meaning of the Word "Sexual" in "Sexual Assault"

Various courts[12] grappled with the meaning of the word "sexual" until the Supreme Court of Canada handed down its decision in Chase v. R.[13]

McIntyre J., writing for a unanimous Supreme Court, rejected the New Brunswick Court of Appeal decision in Chase. The New Brunswick court had held that the accused could not be convicted of sexual assault because he had only grabbed the 15-year-old victim's breasts and had failed in his attempt to touch her genitalia. The New Brunswick court had held that breasts were a "secondary sexual characteristic," similar to a man's beard, and that an assault could only be classified as sexual if the accused made contact with the victim's genitalia.

The Supreme Court drew on various formulations and definitions of sexual assault found in decisions by lower courts, notably R. v. Alderton,[14] R. v. Bernard,[15] R. v. Cook,[16] and R. v. Taylor.[17]

McIntyre J. emphasized several points:

1. The test for recognizing sexual assault does not depend solely on a person's contact with particular portions of another person's anatomy.

2. Because the offence of sexual assault is truly new, it is not limited to the scope of the crimes it replaced.

---

[12] See for example: R. v. Alderton (1985), 49 O.R. (2d) 257, 44 C.R. (3d) 254 (C.A.); R. v. Cook (1985), 46 C.R. (3d) 129 (B.C.C.A.); and R. v. Taylor (1985), 44 C.R. (3d) 263 (Alta. C.A.).

[13] (1987), 59 C.R. (3d) 193.

[14] Supra, note 11.

[15] (1985), 44 C.R. (3d) 398, Ont. C.A., leave to appeal to S.C.C. granted 15 O.A.C. 237.

[16] Supra, note 11.

[17] Supra, note 11.

3. The approach used to define indecent assault ("an assault in circumstances of indecency") is appropriate to adopt in formulating a definition of sexual assault.[18]

4. The test for recognizing sexual assault should be an objective one.

As McIntyre J. observed:

> The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force, will be relevant. . . . The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.[19]

The test set out by the Supreme Court in Chase is: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?"[20] The test is based on objective factors and an important factor is that it does not depend on the accused's intentions or state of mind. A court will hold that a sexual assault has occurred if a reasonable observer were to consider the assault sexual in nature, regardless of the accused's desire (or lack of desire) for sexual gratification.

1.3 The Degree of Force which Determines Sexual Assault

As has been noted, assault and sexual assault share a common definition under the new law (see section 244, now section 265). The use of force or the threat of

---

[18] McIntyre J. admits that the definition was imprecise, "but everyone knew what an indecent assault was. The law in that respect was reasonably clear and there was little difficulty with its enforcement." Supra note 12 at 199.

[19] Supra, note 12, at 199-200.

[20] Supra, note 12, at 199.

force is an element of both the assault and sexual assault offences. The case law on assault charges indicates that, provided there is no consent, the degree of force needed to constitute an assault is only slight. Is the same true for sexual assaults?

In general, the courts have found that sexual touching of children by adults, however slight, over or under clothing, of breasts or the genital area, constitutes a sufficient application of force to qualify as sexual assault.[21] Two cases came to light involving older children (aged 15 and 17) where the sexual touching was relatively minor. In both cases, the accused pleaded guilty.

In Hoskins,[22] a 29-year-old parish priest pleaded guilty to the sexual assault of a 17-year-old male. The teenager had accepted the priest's invitation to to his home one Sunday after mass. The trial judge described the sexual assault as follows: "the accused approached the complainant from behind a couple of times, and put his arms around him. He pressed his pelvic area against the complainant's buttocks, then sat down, pulled the complainant onto his lap and put his hand on the complainant's genitals outside his clothing. Following that, the complainant called his parents and asked them to pick him up."[23]

The priest made no attempt at any further advances. He was sentenced to three months in jail and two years probation. He appealed the sentence but the Court of Appeal dismissed the appeal.[24]

In the Cross[25] case, the complainant was a 15-year-old girl. The accused, an older man, gave her a ride in his truck to a town 45 miles from her home town, ostensibly for the purpose of selling her a car. On the way home, he stopped the truck a number of times and continually suggested that they have intercourse. At one point he placed his hand on her thigh and moved it toward her groin area. This

---

[21] See, e.g., R. v. Kelly (1987), 65 Nfld. & P.E.I.R. 45 (Nfld. S.C., T.D.); R. v. Quigley (1987), 66 Nfld. & P.E.I.R. 24 (Nfld. S.C., T.D.); R. v. Pascoe, Oct. 31, 1985, Ont. C.A. (unreported, fondling over clothes of several children, 18-month sentence); R. v. Lysack, (1988), 26 O.A.C. 338.

[22] R. v. Hoskins (1987) 63 Nfld. & P.E.I.R. (Nfld. C. A.), on appeal from judgment of Soper, J., reported at (1987), 63 Nfld. & P.E.I.R. 119 (Nfld. S.C., T.D.).

[23] Ibid.

[24] The majority of judges placed considerable importance on the position of trust that the priest had with respect to the boy. The judgment also states: "The assault itself was relatively minor. Advances were made. They were rejected. That was the end of the matter. It was a first offence. Nevertheless, there was a sexual assault and it cannot, in any circumstances, be condoned." Ibid, at 114.

[25] R. v. Cross, (1986), 1 Y.R. 213 (S.C.).

action was the subject of a charge of sexual assault to which he pleaded guilty. The trial judge fined him $350 and the Crown attorney appealed the sentence without success.[26]

In his book, The Case for the Defence, renowned criminal defence lawyer Eddie Greenspan suggests that the type of touching that occurred in the Hoskins cases is nothing more than normal social interaction when men and women are involved.

> In Canada every day a thousand men kiss, touch, or put their arms around a woman (or vice versa), and not one of them commits a crime. Touching, kissing or putting one's arms around a person is not a crime, whether it is done at the first encounter or after the thousandth (provided the person is not underage or feeble-minded). When done with sexual undertones, such acts have always been regarded as a "pass," which could be welcomed or rebuffed by the recipient. Only if someone persisted after a rejection did a pass run the risk of becoming a sexual assault.[27]

It remains to be seen how open the courts will be to convict an accused who has touched another adult in a sexual way without that person's consent but using little force and stopping after the touch.

1.4 A Victim's Lack of Resistance and the Issue of Consent

A victim's lack of consent to sexual activity is key to obtaining a conviction for sexual assault. No crime has taken place if both adult parties to a sexual act consent to it. Consent, therefore, is often at issue in a trial and a victim's lack of resistance was traditionally a way for the defence to show that there had been consent or, at least, that the accused believed that there had been consent. The new law says that a victim's consent is not a real consent if it was obtained by reason of one of the factors listed in subsection 244(3) (now subsection 265(3)).

---

[26] Although in both Hoskins and Cross the complainants were under 18 years of age and the accused pleaded guilty, the disparity in the sentences imposed suggests that the courts may view same-sex touching as more serious than heterosexual touching. If so, women, who are frequently subject to unwanted and uninvited sexual touching from men (at work, on the street and on dates) may find the courts unreceptive to charges of sexual assault stemming from minor touching incidents.

[27] E. Greenspan, The Case for the Defence, (Toronto: MacMillan 1987), p. 211.

Subsection 244(3) (now subsection 265(3)) states that "no consent is obtained where the complainant submits or does not resist by reason of the application of force to the complainant or to a person other than the complainant, threats or fear of the application of force to the complainant or to a person other than the complainant, fraud or the exercise of authority." It would seem, then, that courts need not consider a victim's attempts to resist a sexual assault and are required only to see if consent was vitiated by one of the factors listed in this section. However, in three cases that went to three separate courts of appeal, the victim's lack of resistance was an issue.

In R. v. Dawson[28] the Manitoba Court of Appeal overturned the trial judge's guilty verdict.[29] In that case, the complainant, experiencing trouble at home, moved in with her best friend's family. The accused was an adult member of her new household, although his relationship to the best friend is not specified. The complainant's testimony was that the accused was like a second father to her.

The complainant testified that when she and the accused were alone watching television at night, the accused raped her. She offered no resistance. She said, "I was froze, like I froze up." The charges involved three incidents of intercourse and an act of cunnilingus when the complainant was age 14 and 15.

On the issue of consent, Philp J.A. stated:

> I think it is relevant to that determination that there was no evidence of force or the threat of force; that the complainant had the opportunity to cry out, to alert [her best friend] and [her best friend's] mother who were sleeping in adjacent bedrooms, but did not do so; that she did not communicate her refusal of consent to the accused by words or gestures, or by physical resistance, and that she was not restrained in any way from doing so.
>
> The conduct of the complainant following each act of intercourse is also relevant. Her actions belie the absence of consent. Immediately after each incident she had the opportunity to complain to her [best friend], . . . but she did not

[28] (1987), 45 Man. R. (2d) 130 (Man. C.A.).

[29] An interesting aspect to this case is that the appellant accused had decided to drop the appeal, but the Court of Appeal urged him to reconsider, as in its opinion he had a good chance of success. In his dissent, Hall J.A. strongly disapproved of the actions of the other members of the court in urging the appellant to proceed with the appeal after he had indicated that he wanted to discontinue the proceedings. Ibid. p. 134.

do so. And after each incident her relationship with the accused continued as if nothing had happened.[30]

In spite of the fact that the trial judge found that there had been no consent, the appeal court acquitted the accused. Sullivan J.A.'s reasons for overturning the trial verdict were that it was unreasonable and could not be supported by the evidence. Philp J.A. thought that the evidence did not establish the absence of consent beyond a reasonable doubt. Hall J.A. dissented.

The Quebec Court of Appeal dealt with the issue of consent, although not within the context of subsection 244(3) (now subsection 265(3)), in the case of R. c. Bourgouin.[31] In this case, a man and woman had been drinking together at three different bars during the evening. They went back to the accused's apartment, both apparently with the intention of having sexual relations. However, the woman became ill, vomited, and fell asleep. When she woke up with a pain in her abdomen, she found that the accused had inserted a bent coat hanger ("un cintre recourbé") in her vagina. She quickly left the apartment, taking the coat hanger with her, and went to a nearby fire station where she spoke to the police. The accused was charged with sexual assault, but the trial court (Cour des Sessions de la Paix) found that she had consented to the act. The Quebec Court of Appeal held that the trial judge had erred in law, basing his decision on the conjecture that had she been awake, she would have consented. The appeal court found that all the elements of a sexual assault had been proved: an assault which was sexual in nature, the use of force, and the complainant's lack of consent to the act. It overturned the trial court's decision and convicted the accused.

In R. v. Boliantz,[32] a woman was sexually assaulted by her estranged husband. He pleaded guilty. Therefore, the law as stated in subsection 244(3) (now subsection 265(3)), was not in issue. However, the husband appealed the sentence of 18 months incarceration. The Saskatchewan Court of Appeal reduced his sentence by half. Cameron J.A., writing for the unanimous court said:

---

[30] Ibid. at 133. It is noteworthy that the court refers to the lack of recent complaint in finding that the complainant's evidence lacks credibility. Her lack of resistance also led the appeal court to conclude that she consented to the acts. There is no mention of the shame, embarrassment, humiliation, and fear of being thrown out of that home when she had bad relations with her own family that might have explained her "lack of resistance." It would seem that the accused was in a position of trust to her as well, although the court does not note this in its reasons.

[31] (1987) R.J.Q. 2027.

[32] (1987), 56 Sask. R. 78 (Sask. C.A.).

> She did not consent to his sexual advances, nor to the act of intercourse which followed, but it should be noted that she offered only minimal resistance and that the act was accompanied by no violence whatsoever. She was more angry with him than anything else, and, according to the information before us, would not likely have laid a complaint except for the urgings of the police. . . . Looking at it from his point of view, he had remained highly affectionate of his wife and had missed the physical contact with her. He said he was overcome with desire. . . .[33]

This decision raises the question of whether, in situations involving a husband and wife, the courts will be influenced by the old law, which held that a husband could not rape his wife, or whether the courts will expect obvious and strong resistance before believing the complainant.

In general, it seems that a victim of sexual assault may still have to resist strenuously in order for the courts to recognize that an assault took place.

1.5 Factors Indicating a Victim's Lack of Consent

The new legislation (subsection 244(3), now subsection 265(3)) adopted the same test for consent applicable in assault cases, expanding on the list of factors existing prior to 1983. Whereas the old law stated that the threat or fear of bodily harm vitiated consent, the new law is broader. A victim's consent is invalid if the accused obtained it by applying force to the victim or to another person or if there was a threat or the fear of the application of force, either to the victim or to another person.

As well, while the old law specifically identified two types of fraud that vitiated consent -- pretending to be the victim's husband and false representations as to the nature and quality of the act -- the new law simply lists fraud as a factor. Finally, the new law adds a new factor indicating lack of consent: the exercise of authority.

---

[33] Ibid. at 79.

1.5.1 Fraud as a factor vitiating consent

The new law provided the courts with an opportunity to expand on the meaning of fraud in sexual assault cases, since they were no longer limited to the specific examples of fraud outlined in the old law. However, in R. v. Petrozzi,[34] the British Columbia Court of Appeal considered the new fraud provision and decided to interpret it narrowly. The complainant was a prostitute who had been approached by the accused at an intersection in Vancouver. She agreed to engage in sexual activity with him for $100, and they drove to a nearby underground parking garage. When the complainant asked to be paid in advance, Petrozzi refused and immediately assaulted her violently, forcing her to have sexual intercourse with him as well as perform an act of oral sex. Further sexual assaults occurred when the accused drove to an industrial area. A police car arrived and the officers began to search the area, so Petrozzi ran away and the complainant ran to the officers. A police officer noticed that one side of her face was "puffy" and that there were marks on her throat.

Petrozzi's testimony at his jury trial was completely at odds with the complainant's. According to his version, all sexual activity had been consensual. However, Petrozzi admitted he had never intended to pay $100 for the sexual services as he had promised, since he only had $10 in his wallet.

The Crown counsel's argument was simply that Petrozzi was guilty of sexual assault because no consent had been obtained by reason of the physical assault on the complainant. However, the judge raised the issue of whether consent had not been obtained by reason of fraud, in this case the fraudulent representation that Petrozzi would pay $100, which he admittedly had no intention of doing. In the opinion of the trial judge, it was Parliament's intent in enacting the new sexual assault provisions to broaden the scope of fraud to any case where fraud had a causal connection with consent.

The judge instructed the jury that they could find lack of consent if Petrozzi offered to pay $100 with no intention to pay it, and if this was the only reason the complainant consented. In such a case there would be no consent because of the fraud.

The jury found the accused guilty. He appealed on the grounds that the trial judge had incorrectly instructed the jury on the issue of fraud as a bar to obtaining consent.

---

[34] (1987), 58 C.R. (3d) 320 (B.C.C.A.)

The Court of Appeal examined the fraud issue carefully. It reviewed the century-old case of R. v. Clarence[35] in which a man was charged with "occasioning actual bodily harm" because, knowing he had gonorrhoea, he had intercourse with his wife and infected her. The wife stated she would not have agreed to intercourse had she known her husband was infected. The jury convicted the husband but the conviction was quashed on appeal.

The reasoning of Stephen J. in the Clarence decision (quoted by the B.C. Court of Appeal in Petrozzi) was as follows:

> It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled. (Emphasis added by B.C.C.A.)[36]

The court also quoted from a book by David Watt[37] published just after the new sexual assault provisions came into force:

> It may be observed that the provisions of section 244(3)(c) do not require that fraud be of any specific nature or type in order that a consent thereby obtained be legally ineffectual. Fraud is not limited, for example, to "false and fraudulent representations

---

[35] (1888), 22 Q.B.D. 23.

[36] Ibid. at 43, cited at supra, note 34, at 328; in Petrozzi, counsel for both sides agreed that paragraph 244(3)(c) had no application in the case. The court therefore had to call upon an amicus curiae to argue the opposing position. Crown counsel had told the court:

> To adopt an expansive interpretation would lead to a whole series of socially unacceptable results. One example would be that an adult who lied to another adult and thereby had consensual intercourse with that individual, would render themselves liable to a charge of sexual assault. Supra, note 35, at 333.

[37] D. Watt, The New Offences Against the Person: The Provisions of Bill C-127 (Toronto: Butterworths, 1984).

as to the nature and quality of the act" as it had previously been in respect of the former offences of rape and indecent assault upon a female.[38]

The court considered a passage from Driedger[39] suggesting that when Parliament re-enacts a statute repeating words from the repealed statute, one cannot assume that Parliament intended those words to have their original meaning. A court can, however, conclude that this was the intention.

In spite of the opportunity to expand on the meaning of fraud in sexual assault cases, the British Columbia Court of Appeal took a narrow and restrictive approach, holding that it was Parliament's intention to retain the old construction of fraud. Petrozzi's conviction was set aside and a new trial ordered.

1.5.2 The exercise of authority vitiates consent

In the case of R. v. Duffney,[40] a father was accused under section 246.1 (now section 271.1) of sexually assaulting his teenage daughter. There was no question that sexual activity had taken place: the complainant alleged 20 to 30 instances over a period of about four years, while the father admitted to sexual activity on two or three occasions. The complainant testified that she was afraid. The defence suggested that she had consented to the sexual activity.

The judge (Soper J.) convicted the accused:

I don't think that there is any doubt that the complainant did not consent. The accused was certainly exercising his authority, and there was also a fear engendered in the complainant. She described that and it came through in her statement that she felt she had no other choice, that she was frightened. There is no

---

[38] Ibid. at 219, cited at supra, note 34, at 331; See also Mewett and Manning's Criminal Law, also cited by the court. By paragraph 244(3)(c) submission or failure to resist is not consent if the complainant resists or does not resist by reason only of fraud. The former provision, both in rape and in indecent assault required such fraud to go to "the nature and quality of the act." But the new provision refers to "fraud" with no limitation as to the nature and quality of the act. This superficially slight change may actually have profound consequences. . . All that the new provisions seem to require, however, is a fraud and a causal connection between the fraud and the submission or failure to resist. Ibid. at 596-97, cited supra, note 34, at 331-332.

[39] The Construction of Statutes, 1st ed. (1974).

[40] (1986), 61 Nfld. & P.E.I.R. 176 (Nfld. S.C., T.D.).

doubt in my mind that the accused did use his position as a parent to have his own way with his daughter.[41]

However, in R. v. Guerrero,[42] the Ontario Court of Appeal declined to find that the accused was "exercising his authority" and absolved him of criminal responsibility for his sexual activity with a 14-year-old girl. In that case it was alleged that the accused extorted the girl's consent because he threatened to forward nude photographs of her to her school if she did not comply with his wishes. The trial judge convicted the accused, finding that the complainant considered the accused to be a father figure, and that he had obtained her consent by exercise of authority, one of the enumerated grounds in subsection 244(3) (now subsection 265(3)).

The accused appealed the conviction. At the appeal, the Crown attorney conceded that the evidence did not support the conclusion that the accused had obtained the complainant's consent because he was a father figure to her. The Court of Appeal therefore considered only whether section 244(3) (now section 265(3)) is exhaustive. It held that it is and overturned the conviction.

It should be noted that in this survey of cases, the author found none in which the court relied on subsection 244(3)(d) (now subsection 265(3)(d)) to convict an accused because the accused used the position of employer to obtain sexual favours from an employee. Nevertheless, it would seem that paragraph 244(3)(d) (now paragraph 265(3)(d)) -- no consent by reason of the "exercise of authority" -- provides the possibility of a criminal charge of sexual assault in cases of sexual harassment by an employer.[43]

1.5.3 Is the list of factors vitiating consent exhaustive?

As has just been discussed, the Ontario Court of Appeal, in Guerrero, addressed the question of whether or not the list of factors in subsection 244(3) (now subsection 265(3)) is exhaustive. Having decided that the complainant's consent had not been obtained by reason of one of the factors listed in the section, the court looked to the section to determine whether the list contained in it was illustrative or complete.

---

[41] Ibid. at 177.

[42] (1988), 27 O.A.C. 244 (Ont. C.A.).

[43] Cf., however, R. v. Sterne (1986), 67 A.R. 34 (Alta. C.A.), appeal to S.C.C. heard and dismissed on June 14, 1988, in which a man was convicted on charges of buggery, rape and sexual assault of three women who had been employed in his household as 'nannies' for his children.

> . . . the vitiation of consent, if it occurs, must occur by reason of one of the enumerated sorts of behaviour. The appellant's conduct in this case, reprehensible as it was, does not fall within any of the enumerated kinds of conduct.[44]

The factors vitiating consent therefore seem to be limited to those expressly stated in subsection 244(3) (now subsection 265(3)).

1.6 Cases Involving Husbands and Wives

The new legislation provides that a husband or wife can be charged with sexually assaulting his or her spouse, whether or not the spouses were living together at the time of the offence (section 246.8, now section 278). This was a significant change as, under the pre-1983 law, a husband could not be charged with raping his wife.

This study revealed no case where a husband living with his wife was convicted (or for that matter charged) with the sexual assault of his wife.[45] However, in at least nine cases an estranged husband was charged with sexually assaulting his wife. One such case will be discussed in some detail in the part of this study dealing with honest but mistaken belief in consent.[46] The other eight cases all resulted in convictions with sentences varying from two and one-half months to three years.[47]

---

[44] Supra, note 42, at 245.

[45] As was indicated in the Preface, it is unwise to conclude therefore that no such charges were laid.

[46] R. v. White (1986), 24 C.C.C. (3d) 1 (B.C.C.A.).

[47] R. v. Gleason (1987), 3 Y.R. 2 Yukon Court of Appeal, two and one-half months; R. v. D.F.M., unreported, Nov. 28, 1986. B.C. Co. Ct., six months; R. v. H.B.N., unreported, Dec. 5, 1986, B.C. Co. Ct., six months; R. v. Boliantz, supra, note 33, Saskatchewan Court of Appeal, nine months; R. v. Ryan, unreported, August 15, 1985., B.C. Court of Appeal, one year; R. v. McGuiness, (1985), 43 Sask. R. 98 (C.A.). Saskatchewan Court of Appeal, two years less a day; R. v. N.A., unreported, Nov. 27, 1986. Quebec Provincial Court, two and one-half years; R. v. H. unreported, June 16, 1986., B.C. Court of Appeal, three years.

2.0 THE MENTAL STATE OF THE ACCUSED

2.1 The Intent to Commit the Crime

In order for a person to be convicted of a sexual assault offence, the person must have intended to commit the crime. Following the Supreme Court decision in R. v. Chase,[48] a court can convict an accused if there is proof of the accused's general intent to commit the crime. Proof of the specific intent of either sexual gratification or sexual intercourse is not required. In Chase, the Court found that the accused's state of mind, although a factor that might reflect the nature of the assault, was not essential to classifying the offence as a sexual assault.[49]

The Supreme Court's decision in Chase is significant because it blocks the way for a defence of drunkenness. Drunkenness can be used as a defence in a specific intent offence: the accused claims to have been too drunk to have formed the specific intent to commit the crime (i.e., too drunk to know what he or she was doing). However, if sexual assault is a general intent offence, then the defence of drunkenness is not available.[50]

---

[48] Supra, note 12.

[49] Before the Supreme Court decision in Chase, lower courts considered that perhaps an added mental element was required in order to convict an accused. The Ontario Court of Appeal in Alderton, supra, note 11, while declining to formulate an all-inclusive definition of sexual assault, nonetheless concluded that in any case "it includes an assault with the intention of having sexual intercourse with the victim for the purpose of sexual gratification." In R. v. Taylor, supra, note 11, the Alberta Court of Appeal stated that sexual assault "includes an act which is intended to degrade or demean another person for sexual gratification." This passage was quoted with approval by the Supreme Court in Chase.

In another Ontario Court of Appeal case, R. v. Bernard, supra, note 14, the argument that a sexual intent was a necessary element of the mens rea of a sexual assault offence was considered but rejected.

[50] See for example: R. v. Bernard, supra, note 14, where the defence of intoxication was raised along with the argument that sexual assault was a specific intent offence; and R. v. Moreau (1986), 51 C.R. (3d) 207 (Ont. C.A.), where the defence to a charge of sexual assault was honest belief in consent, and the accused was acquitted by a jury at trial. One of the Crown's grounds of appeal was that the judge had erred in instructing the jury that they should consider the accused's consumption of alcohol in deciding whether the accused's mistaken belief in consent was honestly held, as consumption of liquor can affect a person's perception of reality. The Ontario Court of Appeal, per Martin J.A., found that on grounds of public policy, a mistake induced by voluntary intoxication does not exempt an accused from liability to an offence of general intent. See also R. v. Cook (Supra, note 11), decided by the B. C. Court of Appeal. One ground of appeal was that the judge erred in instructing the jury to ignore drunkenness insofar as it related to mistaken but honest belief in consent. And see R. v. Murray (1986), 75 N.S.R. (2d) 361 (App. Div.).

It is interesting to note that in Chase the Supreme Court considered the consequences of requiring proof of specific intent in a sexual assault case. It said that to make sexual assault a specific intent crime would hamper the enforcement process and open up the defence of drunkenness. The Supreme Court thus explicitly recognized the strong policy reasons for making sexual assault a general intent crime.[51]

2.2 The Accused's Belief in Consent

A crime has been committed when a person does not consent to sexual activity, but how does the law respond when a person mistakenly believes that there was consent when, in fact, there was not? Is belief in consent a sufficient defence to justify an acquittal?[52]

Subsection 244(4), now subsection 265(4), addresses the defence of a mistaken belief in consent. Its interpretation has proved to be problematic. The courts have had to consider whether the section requires that the accused merely have an honest belief in the complainant's consent no matter how unreasonable such a belief might appear to be to an objective observer, or the belief has to be not only honest but also reasonable. The former subjective approach was established by the Supreme Court of Canada in the 1980 decision Pappajohn v. R..[53] When the new law came into force, the courts had to decide whether the law codified the Supreme Court's approach in Pappajohn or whether it established an objective standard that must be met.[54]

In R. v. Robertson,[55] Wilson J. wrote for a unanimous Supreme Court that subsection 244(4), now subsection 265(4), is simply a restatement of the views expressed by Dickson J. in Pappajohn. After citing passages from Pappajohn at great length, she stated:

---

[51] Supra, note 12, at 200.

[52] See, e.g. R. v. White, supra, note 46; R. v. Guthrie (1985), 20 C.C.C. (3d) 73 (Ont. C.A.); R. v. Tremblay, (1986), 3 Q.A.C. 141 (Que. C.A.); R. v. Sansregret (1985), 45 C.R. (3d) 193 (S.C.C.); and R. v. Moreau supra, note 50.

[53] (1980), 14 C.R. (3d) 243 (S.C.C.).

[54] See, e.g., "The 'New' Sexual Offences" (1983), 31 C.R. (3d) 317 at 320-321, and "Mistake of Fact: the Legacy of Pappajohn v. The Queen" (1985), Can. Bar Review 597 at 609.

[55] (1987), 58 C.R. (3d) 28.

> It seems to me, therefore, that section 244(4) still contemplates that an honest but unreasonable belief in consent will constitute a defence. Nevertheless, it directs the jury to consider the presence or absence of reasonable grounds as an important evidentiary factor in determining whether the accused had an honest belief in consent.[56]

This interpretation of subsection 244(4), now subsection 265(4), as a codification of the ruling in Pappajohn was far from inevitable, but it is now the guiding rule.[57]

2.3 The Burden of Proof Regarding Consent

Speaking for the court in the Robertson[58] case, Wilson J. noted that there has been some difference of opinion in the past on how to view questions of mistaken belief in consent.[59] Is it an element of the offence (i.e., part of the Crown's proof must show that there was no consent or belief in consent) or is it a defence that is left to the accused to raise? Notwithstanding this question, Wilson J. stated:

> [T]he court has been unanimous in its agreement on one proposition -- there must be evidence that gives an air of reality to the accused's argument that he believed that the complainant was consenting before the issue goes to the jury. In addition, I believe that previous case law establishes the proposition that, where there is sufficient evidence for the issue to go to the jury, the Crown bears the burden of persuading the jury beyond a reasonable doubt that the accused knew the complainant was not

---

[56] Wilson J continued "This was the view of the British Columbia Court of Appeal in R. v. White, supra, note 49, and the Ontario Court of Appeal in R. v. Moreau (supra, note 53). It is also the view taken by the academic commentators (see D. Watt, The New Offences Against the Person: The Provisions of Bill C-127 (1984), p. 83; G. Parker, "The 'New' Sexual Offences" (1983), 31 C.R. (3d) 317, at pp. 320-321), although some arrived at this conclusion with reluctance; see for example, C. Boyle, Sexual Assault (1984), at p. 79." Ibid. at 44.

[57] For a critique of the Robertson decision see "Le consentement en matière d'agresssion sexuelle: peut-on sortir du labyrinthe sans le fil d'Ariane?" (1988), 29 Cahiers de Droit 535.

[58] Supra, note 55.

[59] See, for example, R. v. White, supra, note 46; R. v. Guthrie, supra, note 52; and R. v. Tremblay, supra, note 52.

consenting or was reckless as to whether she was consenting or not.[60]

Mistaken belief in consent was an issue in another Supreme Court decision, Laybourn, Bulmer and Illingworth v. R. (indexed as R. v. Bulmer).[61] Although this case involves charges of rape, attempted rape and indecent assault (the law before 1983), the Court's ruling nevertheless serves to further clarify the law concerning mistaken belief in consent, and when and how the issue should be put to a jury.

In discussing the defence of honest belief in consent, the Court concluded that two steps must be followed. First, the judge must decide whether to put the defence to the jury. Then the judge must correctly explain the law to the jury, review the evidence, and leave the jury with the question of guilt or innocence.

Writing for the majority, McIntyre J. found that the evidence must have an "air of reality" before the judge can legitimately put the defence to the jury.

In discussing the application of the "air of reality" test in the Pappajohn case, I said, at p. 133:

---

[60] Wilson J. also commented on the role of the Crown and defence counsels when mistaken belief in consent is at issue: "Using the language of Glanville Williams in Criminal Law: The General Part, 2nd ed. (1961), pp. 871-910, there are two separate burdens in relation to the issue of honest but mistaken belief -- the evidentiary burden and the burden of persuasion. Evidence must be introduced that satisfies the judge that the issue should be put to the jury. This evidence may be introduced by the Crown or defence counsel. The accused bears the evidentiary burden only in the limited sense that, if there is nothing in the Crown attorney's case to indicate that the accused honestly believed in the complainant's consent, then the accused will have to introduce evidence if he wishes the issue to reach the jury. Once the issue is put to the jury, the Crown counsel bears the risk of not being able to persuade the jury of the accused's guilt." Ibid. at 39.

[61] The complainant was a prostitute who had agreed to have sexual intercourse and oral sex with one of the accused persons for $80. She went to his hotel room and found the two other accused there. She said that she had asked them to leave but that they returned soon after, forcing her to give back the money she had been paid and to have sex with each of them without payment. She had asked to leave but, frightened, submitted to sex with the accused. The police arrived and she complained that the men had raped her. She said that she had not consented to sex with them and had not been paid. The accused said that they had haggled over price, that she had agreed to have sex for $20 each and that she had not asked to leave. They said that she had consented to sex or, in the alternative, that they believed she had consented.

The trial judge put the issue of mistake of fact as to consent to the jury, who convicted two of the accused of rape and the third of indecent assault. The British Columbia Court of Appeal [(1987), 58 C.R. (3d) 48 (S.C.C.)] dismissed the appeal from the convictions, although the judges disagreed on whether or not the question of mistaken belief in consent should have been put to the jury.

> "To require the putting of the alternative defence of mistaken belief in consent, there must be, in my opinion, some evidence beyond the mere assertion of belief in consent by counsel for the appellant. This evidence must appear from or be supported by sources other than the appellant in order to give it any air of reality."
>
> These words appear, on occasion, to have been misunderstood, but I do not withdraw them. There will not be an air of reality about a mere statement that "I thought she was consenting," not supported to some degree by other evidence or circumstances arising in the case. If that mere assertion were sufficient to require a trial judge to put the "mistake of fact" defence, it would be a simple matter in any rape case to make such an assertion and, regardless of all other circumstances, require the defence to be put.[62]

In a separate opinion, Lamer J. wrote that he would allow the defence of mistaken belief in consent to be put to the jury in all cases where the accused testifies at trial that the complainant had consented or that he believed that the complainant had consented. He did not believe that juries would be fooled by false claims of the defence. He stated that:

> Juries are constantly assessing and then discarding defences because they lack an air of reality and do not raise reasonable doubt. Sexual offence cases are not different.[63]

The Supreme Court allowed the appeal and ordered a new trial.

2.4 The Relevance of the Facts to a Defence of Mistaken Belief in Consent

Faced with a case in which the question of consent is at issue, the judge must make an important decision: is the issue whether or not there was consent or is the issue the accused's (alleged) honest, but mistaken, belief in consent? Consent (or lack of it) concerns the elements of the offence: has a crime taken place? However, a mistaken belief in consent concerns the accused's state of mind: did the accused intend to commit a crime (a mens rea issue)?

---

[62] Ibid. at 55-56.

[63] Ibid. at 62.

Three appellate cases provide some insight into the analytical difficulties inherent here. In each case, the court decided that there was no issue of mistaken belief in consent to put to the jury. It should be noted, however, that these three cases were decided before the Supreme Court decisions in Robertson and Bulmer, so the impact of the highest court's rulings on those two cases remains to be seen.

The Ontario Court of Appeal considered the problem in R. v. Guthrie.[64] The complainant, in this case, was waiting in the lobby of an apartment building in the early morning for a friend to return. The accused entered and, after talking with the complainant, invited her to his apartment to wait. She took off her dress to avoid wrinkling it and put on a shirt of the accused's, intending to sleep on the couch in the living room.

The complainant's story was that the accused suddenly attacked her with a razor (cutting her neck), tied up her hands, and performed various sexual acts on her without her consent. She was terrified and remained rigid throughout.

The accused said he thought that, because of their earlier conversation about sexual matters, she would cooperate with him. He denied cutting her with a razor, although he admitted he had a razor with him. He said she voiced no objection to the sexual activity, but was a willing participant.

The trial judge refused to put the defence of mistaken belief in consent to the jury. The only issue was actual consent. If the jury believed the accused, then there was consent. If the jury believed the complainant, there could have been no consent, nor any mistaken belief in consent. The Ontario Court of Appeal notes that if the jury accepted the complainant's evidence that she remained rigid and passive throughout, this could conceivably be construed as evidence that the accused believed she was consenting. However, the accused's evidence was that she was an active participant. Therefore, the question of mistaken belief in consent did not arise. It was simply a matter of credibility: whose story was to be believed?

In the British Columbia case of R. v. White,[65] the accused was charged with breaking and entering and sexual assault causing bodily harm. The accused was the complainant's estranged husband; the couple had been separated about two years. The complainant's evidence was that when she arrived home, the accused was there, wearing surgical gloves and carrying a pillow. She screamed, he put a bandage over her mouth, threatened to rape and kill her, and hit her several times. After much conversation, lasting about an hour and a half, during which time the accused was

---

[64] Supra, note 52.

[65] Supra, note 46.

alternately "rough" and "loving," they went into the bedroom and had sexual intercourse. The complainant's testimony was that she agreed to intercourse out of fear of the consequences if she did not, and in order to get the accused out of the house.

The accused's story was quite different. He claimed to have been invited over to the house, where he and the complainant had a long conversation. At one point he became very angry with her and was physically violent with her, but later apologized for having hurt her; the complainant said she and the accused always talked better after having sex, whereupon they went into the bedroom and had sexual intercourse.

The accused never said he had a mistaken but honest belief that the complainant was consenting. According to his version, not only did she consent, but she also was the one who suggested intercourse.

The British Columbia Court of Appeal found that there were no grounds for putting the defence of mistaken belief in consent to the jury. (In fact, the trial judge had put that defence to the jury, but incorrectly instructed them that the accused's belief had to be based on reasonable grounds. The Court of Appeal found that even though such an instruction was incorrect, the accused had received more favourable treatment than he ought to have. If the jury instruction had been proper, the outcome would have been no different.) "This was a case of consent or no consent, and the resolution of that issue depended upon who the jury believed."[66]

The Quebec Court of Appeal case, R. v. Tremblay,[67] also involved significantly different evidence given by the complainant and by the accused. The complainant testified that the accused entered her apartment when she was alone with her baby and, despite her explicit instructions to leave her alone, kicked her and dragged her by the hair into the living room, pushed her to the floor, tried to penetrate her anus with his penis, and finally succeeded in raping her, causing scratches to her thighs and buttocks.

The accused's story, on the other hand, was that there had been no tears, no violence and no resistance. The complainant consented to everything, and even asked to be scratched on the thighs and buttocks, as she found this sexually arousing.

The Quebec Court of Appeal held that this was quite simply a case of credibility: if the complainant's story was accepted as true by the jury, "then it was

---

[66] Supra, note 46, at 16.

[67] Supra, note 52.

inconceivable that the appellant could have been unaware that she was not consenting." On the other hand, if the jury believed the accused's evidence, or had a reasonable doubt about his guilt, they would be obliged to acquit.

On whether the issue of mistaken belief in consent should have been left to the jury, the Court of Appeal stated:

> I can see nothing in the record which could convey a sense of reality to that defence. Appellant, in his evidence, did not suggest merely that he believed she was consenting. He said she consented and, on the facts related by him, there was no room for any alternate question as to honest but mistaken belief in consent. If the complainant's version was accepted as true, there simply was no consent and no basis for any honest belief to the contrary.[68]

In support of this analysis, the court cited Dickson J. in Pappajohn:

> where, as here, the accused makes no assertion of a belief in consent as opposed to actual consent, it is unrealistic in the absence of some other circumstance or circumstances, to consider the judge . . . bound to put the mistake of fact defense.[69]

These three cases suggest that, when the stories of the accused and the complainant differ, the question is one of credibility and the issue of mistaken belief in consent is not relevant. However, where the complainant's and the accused's stories do not differ, except on the question of consent, there may be an issue of mistaken belief in consent for the judge or jury to consider.

This approach has a direct impact on the conduct of a trial. When a mistaken belief in consent is at issue, the defence has more scope to introduce evidence concerning the complainant's past sexual history. (See section 246.6, now paragraph 276(c))

---

[68] Ibid. at 148.

[69] Cited at supra, note 52, at 148.

2.5 Wilful Blindness to the Complainant's Lack of Consent

The defence of honest but mistaken belief in consent is qualified by the doctrine of wilful blindness. The leading case is the Supreme Court of Canada's decision in Sansregret v. R..[70] Although Sansregret was acquitted at trial on the grounds that he held an honest although manifestly unreasonable belief in the consent of the complainant, the Manitoba Court of Appeal overturned the acquittal and the Supreme Court of Canada upheld the conviction. It found that he was wilfully blind to the obvious.

The accused, a man in his early twenties on parole, had lived with the complainant, a 31-year-old woman, for about a year in a violent relationship. However, the complainant decided to end the relationship and asked him to move out permanently, and he complied. A few days later he broke into her house at 4:30 a.m., angry and threatening her with a file-like instrument. At that time the complainant, in an effort to calm him and fearful of what he might do, held out hope of reconciliation. They had intercourse. The complainant subsequently reported to the police that he had raped her; nevertheless, no charges were laid and the probation officer asked the complainant not to press the matter as it would interfere with the accused's probation.

However, three weeks later, according to the complainant's evidence, the accused again broke into the house at about 4:30 a.m. When the complainant tried to call the police, the accused pulled the cord out of the wall jack. He picked up a butcher knife in the kitchen, made her strip and stand in the kitchen doorway while he repaired the window he had broken to gain entry. He then tied her hands behind her back with a scarf, he struck her on the mouth hard enough to draw blood, and rammed the butcher knife into the wall three times, once very close to her. He told her that if the police came he would put the knife through her.

The complainant gave evidence that she feared for her life and sanity. The complainant tried to calm the accused by talking about the possibility of reconciliation and they eventually had sexual intercourse. She had consented to intercourse for the sole purpose of calming down the accused, in order to protect herself from violence. She said on the stand:

> I didn't consent at any time. I was very afraid. My whole body was trembling. I was sure I would have a nervous

---

[70] Supra, note 52.

> breakdown. I came very, very close to losing my mind. All I knew was I had to keep this man calm or he would kill me.[71]

The complainant subsequently dressed allegedly to go to a business appointment at 8:00 a.m. She dropped off the accused, and then went to her mother's house where she called the police.

At trial, it was found that the accused did in fact have an honest belief in the consent of the complainant. That is to say, he honestly believed her consent was genuine and not extorted by threats or fear. Therefore, no matter how outrageous the conduct, and no matter how unreasonable such a belief might be, and although he was wilfully blind to the obvious, the trial judge felt compelled, applying the rule in Pappajohn, to acquit the accused on the charge of rape. The complainant's own evidence was that the accused probably really did believe she was consenting.[72]

On appeal to the Manitoba Court of Appeal, the appeal was allowed and a conviction entered, the court splitting two-to-one on the issue. The judges had some difficulty in getting around the rule in Pappajohn, but did not rely on wilful blindness.

The Supreme Court upheld the conviction of the accused by the Manitoba Court of Appeal. It relied on the finding of fact by the trial judge that the accused had been wilfully blind, even though he held an honest belief in consent. There are many hints by the Court that this case could and should have been disposed of on the basis of recklessness. The accused apparently knew his previous conduct had resulted in a complaint of rape, and the Court felt the judge was in error in not drawing the proper inferences from this fact.

The Court differentiated the concepts of recklessness and wilful blindness:

> recklessness, to form a part of the criminal mens rea, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who seeks the risk and who takes the chance.[73]

---

[71] Supra, note 52, at 197 (SCC).

[72] See the Manitoba County Court decision, reported at (1983), 34 C.R. (3d) 162, at 168.

[73] Supra, note 52, at 203-204.

> . . . Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.[74]

In Sansregret, the accused apparently knew of the previous complaint of rape when he claimed an allegedly honest belief in consent. The Court felt that this was the basis on which he could be said to be wilfully blind.

The decision in Sansregret might suggest that wilful blindness can only be argued in cases of a second sexual assault, where the first one was reported to the police. However, in a case involving a young offender,[75] the court ruled that the accused was wilfully blind to the complainant's lack of consent and convicted him, even though it was the first occurrence of sexual assault.

In R. v. J.W.B., the young offender was charged with sexual assault of a female. The accused and a male friend took the victim to a cemetery and forcibly stripped her of her clothes. The accused then touched various parts of the victim's body, both with his hands and with his mouth. The other male forced the complainant to perform fellatio upon him, but she refused to do the same to the accused.

In his defence, the accused argued that the complainant had consented. White Y.C. J. stated:

> His evidence was to the effect that while she protested against engaging in any or all of the activities, that is not what she meant. The accused testified that "she said no but it was the way she was saying no" which lead him to believe that she did not mean no.[76]

---

[74] Ibid. at 206.

[75] R. v. J.W.B. (1986), 72 N.S.R.(2d) 122 (Youth Court).

[76] Ibid. at 125.

Counsel for the accused wanted to submit evidence about the past sexual history and sexual reputation of the girl to prove that "no" did in fact mean "yes." Such evidence is precluded by sections 246.6 (now section 276) and 246.7 (now section 277) of the new legislation,[77] and the judge refused to admit it. The defence was able to get in evidence that the complainant had the nickname of "Slurpy." The court stated:

> The conclusion to be drawn from that, one would expect, would be that the complainant was given of a penchant for the performance of fellatio. This is to be coupled with the testimony of the accused, from his understanding and not from any personal knowledge, that the complainant was easy.[78]

The court concluded that there was wilful blindness on the part of the accused, rather than honest belief in consent:

> It is necessary to balance his belief that she was easy with his actual knowledge that she did not want anything to do with him. By blindly disregarding that knowledge, he cannot rely on his belief as providing him with the defence submitted on his behalf.[79]

The doctrine of wilful blindness sets a limit on how far courts will go in allowing the defence of honest but mistaken belief in consent.

---

[77] These sections will be discussed more fully below.

[78] Supra, note 75, at 128.

[79] Ibid. at 133.

3.0 EVIDENTIARY MATTERS RELATING TO A SEXUAL ASSAULT TRIAL

Court cases proceed following established rules of evidence that are designed to ensure a fair hearing and to protect the rights of the accused, who is presumed innocent until proven guilty. The rules of evidence are found in the Canada Evidence Act,[80] in the Criminal Code, and in the common law.

Certain rules of evidence that were developed in relation to the crime of rape (pre-1983) were exceptions to the general principles of evidence that apply in all other situations. These special rules are historic examples of how the law protected men -- as accused, as husbands, and as fathers[81] -- and how it protected female victims only in so far as they were the property of an aggrieved male whose possession had been defiled and devalued by rape.

One example is the rule concerning corroboration.[82] The usual rule is that the credibility of a witness is to be assessed by the trier of fact who must decide who is telling the truth and who is not. However, until 1976, the judge in a rape trial had the duty to tell the jury that it was dangerous to convict the accused on the testimony of the victim alone. Amendments to the law in 1976 removed the requirement to tell the jury of the danger of convicting an accused without corroborating evidence and left it up to the judge's discretion as to how to advise the jury.

The doctrine of recent complaint is another example of the evidentiary anomalies concerning rape. The usual rule of evidence is that a witness is to be believed. Prior consistent statements by the witness are not admissible because they are seen as merely bolstering the witness's testimony. However, if the other side suggests that the evidence has been recently made up by the witness, then prior consistent statements are admissible. For women who complained of rape, the rule was reversed: unless a woman could prove she had complained of the rape as soon as possible after it took place, and that her statement at that time was consistent with the one she made at the trial, the court could presume that she was lying.[83] A women was expected to raise a "hue and cry" and to tell the first person she saw after she had been raped what had happened.

---

[80] R.S.C. 1970, c. E-10, (now R.S.C. 1985, C-5).

[81] See generally Christine Boyle, Sexual Assault (Toronto: Carswell, 1984) pp. 1-10.

[82] For an account of the history of the corroboration requirement, see generally Jeffrey G. Hoskins, "The Rise and Fall of the Corroboration Rule in Sexual Offence Cases" (1983), 4 Canadian Journal of Family Law 173.

[83] Supra, note 81, at 14.

Another anomaly under the pre-1983 law was the link made between a woman's chastity and her truthfulness. A woman's past sexual history was considered relevant to her testimony at a rape trial. Defence counsel were permitted to question a woman extensively about her past sexual encounters in an effort to show that she was immoral, unchaste, and therefore presumably lying about the alleged rape. Furthermore, there was an inference that a woman who had consented to sexual intercourse with other men on previous occasions was probably more likely to have consented on this particular occasion.[84]

A victim's sexual reputation could also be examined at trial. If a victim was said to be "easy" or "loose," such talk was considered relevant to the accused's defence, presumably because the complainant was more likely to lie about her lack of consent later.

These rules resulted in the complainant being routinely subjected to humiliating cross-examination, thereby causing a second victimization, this time within the judicial process itself.

The new law addressed this sexism in the rules of evidence. The rule about corroboration and the requirement to make a recent complaint were dropped (section 246.5, now section 274 and section 246.4, now section 275) and the questioning of a victim about past sexual history was expressively prohibited except under precise and limited circumstances (section 246.6, now section 276). Questioning about a victim's sexual reputation was prohibited (section 246.7, now section 277).

3.1 Corroboration

The new legislation states that no corroboration is required for a sexual assault conviction and that the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration (section 246.4, now section 274).[85]

---

[84] See generally C. Boyle and S. Rowley, "Domestic Violence and Sexual Assault: Reflections on the Meaning of Bias," in Equality and Judicial Neutrality, ed. Mahoney and Martin (Toronto: Carswell 1987).

[85] Ruebsaat (1987) discusses the legislative history leading to this change in some detail. She notes that, in many instances, the issue was complicated because the complainant was a child and there were conflicting rules relating to the testimony of children. For example, section 586 of the Criminal Code, now repealed by Bill C-15, precluded anyone from being convicted on the uncorroborated and unsworn evidence of a child. Subsection 16(1) of the Canada Evidence Act, also now repealed, stated that the evidence of a child of tender years who does not understand the nature of an oath must be corroborated by some other material evidence in order for such evidence to result in a conviction.

Because these sections have been repealed, this paper will not discuss the cases that considered the conflict between them, these issues now being moot. Furthermore, by passing Bill C-15, Parliament confirmed its intention that the noncorroboration requirement apply to the testimony of children as well.

The courts of appeal in British Columbia, Alberta, Saskatchewan, Ontario and Nova Scotia were all called on to clarify the meaning of this provision in the new legislation.

In R. v. Lang,[86] the Manitoba Court of Appeal overturned the conviction of the accused on two charges of gross indecency and one charge of sexual assault.

The victim was a girl 11 years old at the time of trial, although the assaults took place when she was 7 to 9 years old. The accused allegedly had subjected the complainant to fellatio, cunnilingus and, on one occasion, digital penetration. The child's evidence was sworn, and she passed the judge's test regarding her understanding of the nature of an oath with flying colours.

However, Twaddle J.A., writing for the majority of the court of appeal, said:

> I am of the view that it would have been unreasonable on the facts of this case for any trier of fact to have reached a guilty verdict. The credibility of the complainant was not of itself, in the particular circumstances, a reasonable basis for conviction.
>
> It is well within judicial experience that even the most convincing witness may be an inventive one. . . .
> Apart from the testimony of the complainant herself, there was no evidence which confirmed that she had been the victim of an assault or of an indecency, that the accused had been involved with her in any improper way or, even, that connected the complainant's account with reality.[87]

---

[86] (1987) 46 M. R. (2d) 135 (Man. C.A.).

[87] Ibid. at 141.

Monnin C.J.M. wrote a vehement dissent to the opinion. He referred to the trial judge's findings, noting that the judge had cautioned herself about the absence of corroboration, the dangers inherent in the testimony of a person of tender years, and the implications of the delay in making the complaint. He was satisfied that the trial judge had made the right decision. He noted that the trial judge had the

> great advantage of seeing and hearing the witnesses and assessing their respective credibility. She therefore had a marked advantage over any one of us sitting on this appeal. Hearing and seeing the witnesses in this particular case and with this particularly bright child, I am unable to find error and would dismiss the appeal.[88]

According to the new law, no corroboration is necessary for there to be a conviction on a sexual assault charge, but it is clear that the Manitoba Court of Appeal was reluctant to follow the path set in the new legislation. The judges refused to convict the accused on the basis of the uncorroborated evidence of a young girl.

Later, the Manitoba Court of Appeal again overturned a trial court's conviction for gross indecency on the grounds that the complainant's testimony was not supported by any other evidence. As section 246.4 (now section 274) includes gross indecency among those offences which do not require corroboration, the appeal decision in R. v. Lamirande[89] is puzzling.

In Lamirande, it was alleged that the young victim, M., regularly visited the accused in his suite where they would play cards alone. On one occasion, M. became tired and lay down on the bed in the next room. She fell asleep, and when she awoke her pants were down and the accused was performing an act of cunnilingus.

Philp J.A., writing for the majority, found that the complainant's story "strained credulity":[90]

> There was no evidence to corroborate her story and no circumstances to support her allegations . . . [I]n the circumstances of this case it was unsafe to convict the accused solely on M.'s evidence . . . [W]ithout some independent

---

[88] Ibid. at 149-50.

[89] (1988) 53 Man. R. (2d) 265 (Man. C.A.).

[90] Ibid. at 268.

> evidence supporting M's story, the case against the accused was not proved beyond a reasonable doubt.[91]

Monnin C.J.M. seemed resigned to the verdict and did not dissent, as he had in Lang. He stated, however:

> I am satisfied that in this case there was evidence to convict the accused Lamirande on the charge of gross indecency but I do not propose to repeat the same arguments I unsuccessfully raised in R. v. Lang, supra, as that would be an exercise in futility. The Crown has now received ample warning that unless it produces all available witnesses and if it fails to provide corroboration or other factual support for the evidence of young complainants, it is wasting its time and that of everyone else.[92]

In R. v. Thomas, Grant and McPherson,[93] the Ontario Court of Appeal considered whether the trial judge had erred in convicting three co-accused of sexual assault on the basis of the uncorroborated testimony of the complainant alone. The complainant in this case was 18 years of age, and according to her testimony had been forcibly raped by the three accused in succession while being held down on a bed.

The trial judge disbelieved the three accused and found that the complainant's testimony had the "ring of truth" to it. The trial judge stated:

> The charge which the accused face is of the type which is easy to make and hard to deny, and I believe that a Court should scrutinize the evidence of a girl like Maria with great care. . . . I believe in matters of this sort a judge should scrutinize the evidence carefully, look for corroboration and determine whether there is evidence that supports the complainant's story in the material particular.[94]

---

[91] Ibid.

[92] Ibid. at 270.

[93] (1987), 24 O.A.C. 194 (Ont. C.A.).

[94] Ibid. at 202.

The Court of Appeal majority found that the trial judge had properly instructed himself following the decision in Vetrovec v. The Queen,[95] a case involving the law on accomplices.[96] The majority opinion noted:

> Dickson J., as he then was, in giving the reasons for the court [in Vetrovec], observed that a jury might convict on the evidence of an accomplice or complainant, or a witness of disreputable character. However, common sense might, in some circumstances, require the trial judge in his charge to administer "a sharp warning . . . [as] to the risks of adopting, without more, the evidence" of such a witness. Here, the judge, sitting alone, indicated that he was aware of the risks and still found that he nevertheless believed the evidence of the complainant and disbelieved that of the appellants. . . .[97]

The Court of Appeal also noted that a judge should not use the term "corroboration" but could refer to confirming or supporting evidence. In this vein, the 1977 case R. v. Camp[98] was cited:

> . . . [T]he effect of the repeal [of section 142 of the Code] does not limit the discretion of a trial Judge, nor relieve him of the duty in appropriate cases, while commenting on the weight to be given to the evidence of a complainant, to caution the jury in simple language as to the risk of relying solely on the evidence of a single witness, and to explain to them the reasons for the necessity of such caution. In doing so, the trial Judge ought not to resort to the term corroboration, but is free to point out to the jury any evidence which, in his opinion, supports the trustworthiness of the testimony of a complainant . . . .[99]
> (emphasis added by the Court)

---

[95] [1982] 1 S.C.R. 811.

[96] This instruction is often referred to as a "Vetrovec warning."

[97] Supra, note 93, at 198.

[98] (1977), 17 O.R. (2d) 99.

[99] Supra, note 93, at 203.

The result in Thomas, Grant and McPherson was that the trial judge's conviction was allowed to stand, although the Court of Appeal[100] did seem to suggest that supporting evidence could be required, and did bring in the Vetrovec case suggesting that a complainant in a sexual assault case is similar to an accomplice witness or a witness of disreputable character.[101]

The issue of supporting evidence came up in the Alberta Court of Appeal case, R. v. Rodgers.[102] The Court of Appeal ordered a new trial, finding that the judge had misdirected the jury by instructing it that it was unsafe to convict on a sexual assault charge without "supporting or confirmatory" evidence. In this case the complainant was a 13-year-old boy. The Court of Appeal cited Vetrovec[103] and R. v. Camp,[104] but found that the trial judge's definition of "supporting evidence" was precisely the definition of corroboration.[105]

The Court of Appeal further noted that section 246.4, (now section 274), explicitly prohibits a judge from instructing a jury that it is unsafe to convict without corroboration. "The reality of this misdirection is not altered by simply changing its label from 'corroboration' to 'support'."[106]

The British Columbia Court of Appeal was asked to overturn a conviction on two counts of sexual assault because (among other reasons) the trial judge had failed to instruct the jury properly on the lack of corroboration of the complainant's -- the

---

[100] Finlayson J.A., in dissent, while agreeing that the trial judge was entitled to instruct himself as he did, nevertheless said the trial judge erred in finding supporting evidence where there was none. He would have acquitted one of the accused, Thomas, on the grounds of lack of confirming or supporting evidence.

[101] As one commentator notes: "This comparison of the complainant in a sexual offense case and an accomplice is one frequently made but unfortunate and unfair, reflecting as it does the tendency to see the complainant in these cases as on trial". Judith A. Osborne, "Rape Law Reform: The New Cosmetic for Canadian Women," in Criminal Justice, Politics and Women, (Haworth Press, 1985).

[102] (1987), 82 A.R. 319 (C.A.).

[103] Supra, note 95.

[104] Supra, note 98.

[105] The trial judge defined "supporting evidence" as "independent evidence which affects the accused by connecting or tending to connect him with the crime or crimes alleged. In other words, it must be evidence which is independent of and in addition to the evidence of the complainant, which not only implicates the accused and confirms in some material particular that the crime was committed, but also confirms that the accused was the person who committed it." Supra, note 102 at 320.

[106] Supra, note 102, at 320.

daughter of the accused's -- evidence.[107] Hinkson J.A. disposed of the matter quickly:

> The third issue raised by the appellant was that the trial judge ought to have warned the jury that they should be cautious in their approach to the evidence of the complainant and have commented on the fact that the evidence of the complainant was not corroborated by other independent evidence.
>
> Defence counsel sought to persuade the trial judge to give such a direction to the jury but the trial judge declined to do so. Whether or not such a direction is appropriate is a matter for the discretion of the trial judge. I am not persuaded the trial judge erred in declining to give such a direction in this case.[108]

The appeal was dismissed.

In R. v. Brown,[109] the Saskatchewan Court of Appeal considered the appeal of an accused, convicted by a jury of having sexual intercourse with a female under age 14 (subsection 146(1), and having intercourse with his stepdaughter (subsection 153(1) (now see subsection 151 and subsection 153)). The offences occurred over a nine-year period. One ground of appeal was that the trial judge erred in his charge to the jury by failing to warn them about the lack of confirming evidence. The Saskatchewan Court of Appeal found that for an offence under section 153, there is no need for corroboration or for the trial judge to warn about the risk of convicting on the unconfirmed evidence of the complainant.

In R. v. Leggett,[110] the Nova Scotia Court of Appeal affirmed that corroboration is no longer required, and accepted the trial judge's discretion in judging the evidence.

> The charge in this case was under section 246.1 of the Code. Section 246.4 is clear and applies in this case. The authorities referred to by counsel predate the enactment of section 246.4 and are no longer applicable to the offences referred to in

---

[107] R. v. L.E.D. (1987) 20 B.C.L.R. (2d) 384 (B.C.C.A.).

[108] Ibid. at 392.

[109] (1987) 59 Sask R. 220 (C.A.).

[110] (1986), 75 N.S.R. (2d) 373 (App. Div.).

section 246.4 of the Code. It is clear that the trial judge was aware of the importance of carefully assessing the evidence of the child.

With reference to ground five, the credibility of the witnesses was a matter for the trial judge. He carefully reviewed the evidence of the complainant and accepted her evidence.[111]

Thus, during the period covered by this case law review, some courts continued to require corroborating evidence and were not prepared to convict an accused solely on the basis of the complainant's testimony.[112]

3.2 Recent Complaint: Options in Interpreting Section 264

During the period covered by this review, the section of the new sexual assault law concerning recent complaint read simply: "The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated."[113]

In enacting the section in 1983, the legislator removed a provision that created an adverse inference with respect to a woman who did not complain of a rape at the first possible moment.[114]

As one commentator pointed out:

. . . This rule had been severely criticised (McTeer, 1978; Clark and Lewis, 1977; Jackman, 1982) for its assumption that

---

[111] Ibid. at 379.

[112] See also these lower court decisions: R. v. Eisenhauer, (1987), 77 N.S.R.(2d) 297 (Co. Ct.), accused acquitted of sexually assaulting his 13-year-old niece because her evidence was uncorroborated; R. v. Keough, (unreported decision of the Trial Division of the Supreme Court of Newfoundland, dated March 12, 1987), accused acquitted of the sexual assault of a 17-year-old because there was no corroboration; R. v. Fehr, [1985] N.W.T.R. 267 (S.C.). where the accused was acquitted of the sexual assault of a 10-year-old girl but an appeal was successful because the trial judge had failed to consider evidence that corroborated the complainant's testimony.

[113] The section was subsequently amended by Bill C-15 (proclaimed on January 1, 1988) and now includes a list of specific offences to which the section applies. The list includes the sexual assault offences (section 246.1, now section 271; section 246.2, now section 272; and section 246.3, now section 273) as well as sexual offences against children.

[114] See generally, B. Dawson, "Abrogation of Recent Complaint: Where Do We Stand Now?" (1984), 27 Criminal Law Quarterly 57.

> a rape victim would hysterically run to the first person seen after the attack and report what had happened. If the victim did not do so, it was possible for her complaint to be dismissed. As the critics have noted, people respond to stressful situations and events differently. Some may seek out the "first person"--even if a stranger--while others may prefer to wait until they are in the company of trusted friends or relatives. Under the rule of recent complaint, however, there was a danger in not reporting the incident to the first person seen. Although intended, perhaps, as a rule by which to demonstrate the consistency of the complainants' statements, the rule was used as much to test for inconsistency (see McTeer, 1978), thus aiding the process by which to determine cases as "unfounded."[115]

The new section abrogating the rules on recent complaint presents three options: (1) the presence or absence of a recent complaint should be irrelevant and neither the Crown attorney nor the defence counsel should be permitted to raise it; (2) the Crown attorney should be able to introduce proof of recent complaint if it wants, but no adverse inference should be drawn from any failure to complain at the first possible moment; and (3) the general principles of evidence regarding prior consistent statements that apply in all other criminal cases should apply in sexual assault cases as well. (That is, evidence of recent complaint would only be admissible when the defence counsel alleges fabrication. The defence counsel could then question the victim about recent complaint, while the Crown attorney would be precluded from putting forward that evidence in the examination-in-chief of the victim.)

In R. v. Yadollahi,[116] a decision by the Ontario Court of Appeal, the accused was charged with sexual assault. Few facts are given. The accused was convicted at trial and appealed his conviction. One ground of appeal was that

> . . . the Crown improperly adduced evidence of the content of a complaint made by the complainant soon after she arrived at her aunt's house at two o'clock in the morning. It is conceded that this evidence was inadmissible. This evidence was not objected to by defence counsel, but the trial judge was, nonetheless, under an obligation to instruct the jury to disregard it or, at

---

[115] R. Hinch, "Canada's New Sexual Assault Laws: A Step Forward for Women?" (1985), 9 Contemporary Crises 33 at 37.

[116] (1987), 19 O.A.C. 392 (Ont. C.A.).

least, to expressly instruct the jury that the complaint was not evidence of the truth of its contents.[117]

A new trial was ordered in light of the cumulative errors that occurred at trial, one of which was the improper admission of evidence of recent complaint.

There appears to be a catch-22 implicit in the case law: lack of evidence of recent complaint may be prejudicial to the prosecution's case and result in an acquittal; on the other hand, such evidence introduced as part of the prosecution's case may be grounds for an appeal as the improper admission into evidence of prior consistent statements.

The Ontario Court of Appeal addressed this latter issue in R. v. Owens.[118] In this case a teacher was accused of three counts of sexual assault on young boys. The assaults consisted of genital touching. The teacher was convicted, but appealed his conviction and the sentence of nine months. The appeal from the conviction was dismissed but the sentence was reduced to three months.

One ground of appeal from the conviction was the question of whether improper use had been made of the prior consistent statements of the young boys. The Court stated:

> The abrogation of the rule relating to evidence of recent complaints in sexual assault cases by section 246.5 of the Criminal Code . . . . does not have the effect of rendering evidence of such complaints inadmissible in all cases. In certain circumstances the statement may be an important part of the narrative [citations omitted], or may be admissible to show the witnesses' consistency of position [citations omitted].[119]

In this case the Court of Appeal also held that evidence of prior consistent statements may be put forward by the Crown attorney as part of the case-in-chief if the conduct of the case suggests that recent fabrication (i.e., that there was consent at the time) is being alleged.

> It is not necessary to show that an allegation of recent fabrication has been expressly made before the prior consistent

---

[117] Ibid. at 393.

[118] (1986), 18 O.A.C. 125 (Ont. C.A.).

[119] Ibid. at 127.

statement becomes admissible. The allegation may be implicit from the conduct of the case.[120]

The Manitoba Court of Appeal, in one case, seems to rely on the notion of recent complaint in order to overturn a sexual assault conviction. In R. v. Dawson,[121] discussed earlier in the context of consent, the appeal court reversed the trial judge's finding that there had been no consent in a case involving the sexual assault of a 15-year-old girl.[122]

In effectively reversing the finding of fact and entering an acquittal, the majority of the court relied on the lack of recent complaint. The evidence of the 15-year-old was that she simply froze when she was assaulted by the adult whom she considered "almost a second father." With respect to each of the incidents of sexual assault and gross indecency (intercourse and cunnilingus),

> . . . [s]he put up no resistance, either physical or verbal; and she did not cry out. After it was over she went to bed without telling [her best friend] what happened. She told no one and made no complaint.[123]

> . . . The conduct of the complainant following each act of intercourse is also relevant. Her actions belie the absence of consent. Immediately after each incident she had the opportunity to complain to her "best friend" . . . but she did not do so.[124]

In R. v. Childs,[125] the Nova Scotia Appeal Division considered the appeal against the sentence given to a 38-year-old father convicted of sexually assaulting his nine-year-old daughter over a three-year period. At trial, the father was sentenced to two years less a day. The Appeal Division reduced his sentence to ten months. The court noted that: "His daughter did not make known the assaults until August 1986.

---

[120] Ibid. at 128.

[121] Supra, note 28.

[122] Technically, the court found that no reasonable trier of fact could have convicted the accused on the evidence.

[123] Ibid. at 132.

[124] Ibid. at 133.

[125] (1987), 81 N.S.R. (2d) 380 (App. Div.).

When the appellant's wife found out she left him, taking the four children of the marriage." The assaults occurred between 1983 and 1986. Although the court enumerated the mitigating factors in this case (none of which was lack of recent complaint), one cannot help but wonder if the fact that the child failed to complain at the first instance had an impact on the court's decision.

The Nova Scotia Appeal Division also reduced the sentence on appeal in a case in which the complaints did not come to light for some time after the sexual assaults occurred. In R. v. C.J.M.,[126] a 15-year-old boy attempted intercourse with two young girls, granddaughters of the accused's foster parents, twice a week for about two months. The court noted that the situation did not come to the attention of the authorities until two years later. At that time the accused was "doing well." Because he had been rehabilitated and was remorseful, and because of the court's policy with first-time offenders, the court reduced his sentence from one year open custody to time served (one month) and two years probation. Again, it is impossible to know if lack of recent complaint was a consideration in reducing the sentence.

In R. v. George,[127] a 17-year-old was accused of the sexual assault of his 14-year-old female cousin. The accused admitted to having had sexual intercourse with the complainant but claimed she had consented. The young girl had told no one except her grandmother, whom she told the next day. The grandmother informed the parents and the girl was taken to the hospital and the police were called in.

On appeal, the accused submitted that the Crown attorney had breached the provisions of section 246.5 (now section 275) by introducing evidence of recent complaint, that is the evidence of the girl, the grandmother, the father, and the doctor. The British Columbia Court of Appeal, after looking carefully at the transcript, found

> that evidence which ought not to have been admitted was given during the course of this trial. It should be explained, however, that the evidence was admitted in reaction to a suggestion by the defence that the girl had consented, but overnight had changed her mind and had decided to complain to her grandmother. . . .
>
> Such evidence, in those unusual circumstances, was admissible, not as a recent complaint to show consistency of conduct, but

---

[126] (1986), 77 N.S.R. (2d) 1 (App. Div.).

[127] (1985), 23 C.C.C. (3d) 42.

because it was an important part of the narrative in the case.[128]

In R. v. Westgard,[129] the accused was charged with sexually assaulting his 20-year-old sister-in-law by, in effect, raping her on two occasions.[130] In his charge to the jury, the trial judge said:

> You should consider [the complainant's] behaviour when she got back to the farm, the fact she didn't tell her sister what happened; the fact she went along with [the accused's] story of what happened.[131]

The accused was convicted on one count, and the jury could not reach a verdict on the other count. The sentence was 60 days intermittent, followed by 18 months probation. On appeal to the Saskatchewan Court of Appeal, the sentence was increased to six months.

Given the new law abrogating the rules relating to recent complaint, it would seem that the jury should not have been instructed to consider the complainant's failure to complain to her sister immediately.

The reluctance to set aside recent complaint as a criteria in judging the truthfulness of the complainant is also reflected in a Newfoundland Supreme Court case. R. v. Payne[132] involved a stepfather's sexual assault of his 16-year-old stepdaughter. The stepfather entered a plea of guilty.

---

[128] Ibid. at 44-45.

[129] (1987), 60 Sask. R. 123.

[130] It is not clear why in this case the accused was not charged with sexual assault causing bodily harm or aggravated assault: "Evidence was presented to the court that as a result of these activities, the complainant suffered bruising on her breast, in her vaginal area and a small tear to the vagina itself." (Quoted from the Crown's factum by the Court of Appeal at page 124.) If the vaginal tear bled, one would think that that should be sufficient to constitute wounding, and hence justify a charge under section 246.3 (now section 273), or at the very least a charge of sexual assault causing bodily harm.

[131] Supra, note 129, at 126.

[132] (1988), 68 Nfld. & P.E.I.R. 162 (Nfld. S.C., T.D.).

In the judgment, Woolridge J. stated:

> Under normal circumstances this court has habitually dealt harshly with such offenders. However, this is not a normal case. The crime was committed four years ago in 1983. It was not reported until 1986. Had the accused elected trial by jury and pleaded not guilty, as is his right, the outcome of that trial would be far from certain in my view. Instead the accused has pleaded guilty.[133]

Despite the accused's admission of guilt, the judge was dubious about the case, presumably because of the lack of recent complaint, and sentenced the accused to 90 days, to be served intermittently. The ostensible reasons for such a light sentence were that the accused would have lost his unemployment insurance benefits and could not continue to make support payments to his family; that he was remorseful; and that his guilty plea saved the complainant the trauma of testifying.

R. v. Eisenhauer,[134] a decision of the Nova Scotia County Court, also touches on the issue of recent complaint. The complainant, a 13-year-old girl, had allegedly been sexually assaulted by her uncle. In finding the accused not guilty, the judge, Clements C.C.J., remarked:

> I find it peculiar that [the complainant] would wait two weeks before telling her mother. She saw her Uncle Ike [the accused] on two further occasions at her home . . . and their relationship appeared to be quite normal.[135]

In this case it seems fairly clear that the judge continues to apply the old rules and presumptions regarding a complainant who fails to complain at the first opportunity.

These cases all suggest that the courts were struggling with how best to interpret section 246.5 (now section 275) and that the expectation that a sexual assault victim ought to complain about the attack right away has not yet been completely dispelled.

---

[133] Ibid. at 162.

[134] Supra, note 112.

[135] Ibid. at 302.

3.3 The Admissibility of Evidence about the Complainant's Past Sexual History

The new law addressed an important concern by limiting the situations in which evidence of a complainant's past sexual history could be brought in as evidence at a trial.[136] The notion that sexually experienced women would be more likely to consent to sex and then more likely to lie about the circumstances afterwards was out of step with social norms. However, women complainants continued to be subjected to personal and humiliating questioning by the defence counsel at a trial.

Section 246.6 (now section 276) says that an accused cannot bring up the complainant's sexual activity with anyone else (other than the accused) except under three specific circumstances. Defence counsel questioning is allowed to rebut evidence of such sexual activity (or the lack of it) raised by the prosecution. It is also allowed if the complainant's past sexual activity would permit the identification of the person with whom the complainant had sexual contact on the occasion set out in the charge. And it is permitted if it concerns sexual activity that took place on the same occasion as the sexual activity of the charge and the evidence relates to the consent the accused alleged the complainant gave.

This section has been challenged as violating the Canadian Charter of Rights and Freedoms. Defence lawyers have argued that it denies an accused the guaranteed right to make a full answer and defence to a charge and to have a fair trial.

The cases of R. v. Seaboyer and R. v. Gayme[137] are key cases on the constitutional validity of section 246.6 (now section 276) and the admissibility of evidence of a complainant's past sexual history. In R. v. Seaboyer, the accused met a woman in a downtown Toronto bar and was alleged to have sexually assaulted her later in his home. He was charged under section 246.1 (now section 271). At the preliminary inquiry, the defence counsel tried to question the complainant about her sex life before the alleged assault and about her sexual activities afterward. The Ontario Provincial Court judge refused to hear this evidence.

---

[136] Parliament had attempted to address this concern when section 142 was brought into force in 1976. That section limited the scope of cross-examination on a complainant's past sexual history at a trial. It required a judge to hold an in camera hearing to determine if the evidence was relevant. The complainant was a compellable witness at the hearing. The result of this legislative change was actually to expand the rights of the defence to cross-examine the witness, by providing a chance to question the complainant out of the courtroom and then to build on that information in court. The complainant often ended up being subject to two rounds of defence questioning on her sexual past. See R. v. Forsythe (1980), 2 S.C.R. 268.

[137] (1987), 58 C.R. (3d) 289 (Ont. C.A.), leave to appeal to S.C.C. granted.

In R. v. Gayme, the complainant was a 15-year-old girl. The accused was charged with sexually assaulting her in the basement of his school in Toronto. The defence counsel tried to introduce evidence that the complainant frequently came to the school (not her own school) to have sex with students there and that she often initiated such contact. The defence counsel asked the preliminary inquiry judge to declare unconstitutional the sections of the Criminal Code limiting evidence of a complainant's sexual history and prohibiting evidence of her sexual reputation. The judge ruled that he had no jurisdiction to declare the law unconstitutional and he refused to hear evidence about the complainant's sexual activities and reputation.

Both cases were appealed to the Ontario High Court, where it was held that sections 246.6 (now section 276) and 246.7 (now section 277) were invalid and that the preliminary inquiry judge should have heard evidence concerning the complainants' sexual history and reputation.

This decision was appealed to the Ontario Court of Appeal. That court was unanimous in holding that the preliminary inquiry judge had no jurisdiction to decide that sections of the Criminal Code were invalid. For that reason, he had been correct in refusing to hear evidence of the complainants' sexual history and reputation. The Court of Appeal restored the committals for trial for Seaboyer and Gayme. However, the Court of Appeal also addressed the question of the constitutionality of the two sections and on this question they split three to two.[138]

Grange J.A., writing for the majority, found that the three specific exceptions in section 246.6 (now section 276) would cover the vast majority of cases.[139] However, he expressed concern that there may be instances where evidence of past sexual conduct not encompassed by the paragraphs might support a legitimate defence.

> If, for example, the defence was that the complainant was a prostitute who sought after the act to obtain a larger fee on threat of exposure or false accusations of assault, evidence of similar acts of that nature in the past would be relevant; if, by way of another example, the complainant notoriously attended a

---

[138] While the court's opinion on the constitutional question is obiter, that is, not essential to its decision in the case, it does indicate how the judges approached the issue and has influence on courts considering the question of the admissibility of evidence that would fall under section 246.6 (now section 276) and section 246.7 (now section 277) in the future.

[139] A. Mewett has argued persuasively that the "sexual activity" that is alleged to be relevant in Seaboyer but also alleged to be excluded by the provision of section 246.6, is not in fact excluded on a "narrow" interpretation of section 246.6. See "Prior Sexual Activity" (1987), 30 Criminal Law Quarterly 1.

> certain place and regularly offered herself to anyone there without charge, that might go to an honest belief in consent if that were the defence. . . .[140]
>
> In my view the evidentiary restriction contained in section 246.6 is not on its face contrary to any provision of the Charter. As I have stated, there may be occasions--very difficult to define--where that effect might result. But those occasions will be rare and will depend upon the circumstances of the case. I see no reason why it cannot be held that in those circumstances the section will be inoperative. In the great majority of cases, however, the section will be valid and operative.[141]
>
> . . . it would be disastrous to declare the section invalid for all purposes and return to the position at common law, where any evidence of prior sexual conduct was admissible so long as it was relevant to a material issue (and it was generally deemed relevant to the issue of consent . . .).[142]

The two judges who dissented on the constitutionality issue found that the sections violated the Charter because they did not give an accused the right to make a full answer and defence and therefore did not provide the right to a fair trial as guaranteed by the fundamental principles of justice. Their view was that the usual rules of evidence should apply and that evidence relevant to the charge should be admissible.[143]

In the case of R. v. Coombs,[144] the Newfoundland Supreme Court Trial Division took an approach similar to that of the Ontario Court of Appeal in Seaboyer. The accused was a taxi driver paid to deliver clients to the complainant, who worked

---

[140] Ibid. at 305.

[141] Ibid. at 309.

[142] Ibid. at 310.

[143] Brooke J.A., writing on behalf of Dubin J.A. as well, did, however, suggest that this would not mean returning to the situation that existed before the new law was passed, i.e., extensive questioning of the complainant. "Relevancy is not static, nor can it be determined solely on the basis of now-rejected assumptions. In my view, such evidence [of past sexual history and reputation] is not relevant per se. I have confidence that trial judges will make careful decisions based on proper values to determine what is logically probative of a fact in issue, and so admissible." Supra, note 137, at 297.

[144] (1985), 49 C.R. (3d) 78.

as a prostitute. He was alleged to have sexually assaulted her and there was medical evidence of a severe beating and forced intercourse. The accused claimed to have driven two customers to the complainant's premises the day after the alleged assault and that she had no signs of injury then. He admitted to intercourse with her but claimed it was consensual.

The trial judge found that section 246.6 (now section 276) precluded the accused from making a full answer and defence to the charges against him. As such, it infringed the principles of fundamental justice guaranteed by the Charter. However, in declaring section 246.6 (now section 276) to be invalid, Steele, J. stated that it was not his intention to hold it invalid for all purposes and at all times.

> I can only say that in the circumstances of this case and considering the nature of the questions to be asked of the complainant and evidence to be adduced as to her sexual relations with others, all critical to the defence, section 246.6 must yield. The intention is that section 246.6 be deemed inoperative only to the extent that it is necessary for defence counsel to cross-examine the complainant and adduce evidence of her sexual activities with others in order to properly state the defence.[145]

Steele J. concluded by noting:

> It seems inevitable that until Parliament amends sections 246.6 and 246.7 or the Supreme Court of Canada decides the issues by fixing an equitable balance (ultimately acceptable to Parliament) between the concerns of a female complainant on the one hand and the protection of legal rights of an accused on the other it will be necessary for the trial court to conduct voir dires to settle the vexing problem that will arise.[146]

Not all courts have held that section 246.6 (now section 276) is unconstitutional. The Manitoba Court of Queen's Bench decided, in R. v. Bird and Peebles,[147] that sections 246.6 and 246.7 (now sections 276 and 277) did not infringe Charter rights, and if they did, such infringement was justifiable under section 1 of the Charter. Simonsen J. stated:

---

[145] Ibid. at 87.

[146] Ibid. at 87-88.

[147] (1984), 40 C.R. (3d) 41; See Ruebsaat (1985), supra, note 8, at 72 et seq. for a discussion of this case.

> [The legislation] recognizes that the victim of a sexual assault should not be subjected unnecessarily to the distasteful social consequences and psychological trauma associated with the disclosure of unrestricted evidence of her sexual conduct even though marginally relevant.
>
> Society has an interest in fostering persons to report crime. This could be encouraged by the evidence restrictions.[148]

The British Columbia Court of Appeal addressed the question of whether section 246.6 (now section 276) was unconstitutional in R. v. LeGallant.[149] Although McLachlin J. of the British Columbia Supreme Court had found that the section violated the Charter by denying the accused the opportunity to make a full answer and defence to a charge against him,[150] the Court of Appeal overturned her ruling. It found that it is necessary, in considering the Charter's fairness requirements, to balance the interests of the accused against other societal interests. Fairness cannot be considered solely from the point of view of the accused; the interest of the complainant must be considered as well.

The Court noted that in striking down section 246.6 (now section 276), the trial judge

> lost sight of the other considerations that motivated Parliament in enacting section 246.6 of the Code . . . namely, that the common law did not afford sufficient protection to complainants and that because of this many rape cases were not being reported and prosecuted. . . . In my opinion section 246.6 achieves a balance of fairness between the complainant and the accused.[151]

---

[148] Supra, note 148, at 55.

[149] (1986), 54 C.R. (3d) 46 (B.C.C.A.).

[150] See Ruebsaat, supra, note 8, at 71 et seq.

[151] Supra, note 149, at 59-60; Ann Stalker, in her article "LeGallant: Law Reform and the Charter" (1986), 54 C.R. (3d) 61, argues that judges should be left some discretion in determining what evidence should be admitted, as the proper balancing of interests cannot be done in advance by Parliament. She refers to Doherty's article in support of more judicial discretion (D.H. Doherty "'Sparing' the Complainant 'Spoils' the Trial" (1984), 40 C.R. (3d) 55). However, she realizes the dangers of unlimited discretion, and notes the difficulties in drafting and enforcing a statute that would strike exactly the right balance. As to the court's position that complainant's interests should be protected as well as those of the accused, she finds it "hard to see" that women's interests can override the interest in ensuring that the accused is granted a fair trial.

By granting leave to appeal the Ontario Court of Appeal's decision in Seaboyer and Gayme, the Supreme Court of Canada is indicating the importance of the constitutional question regarding evidence of a complainant's sexual history at a sexual assault trial. The Court's decision is eagerly awaited.

3.4 The Admissibility of Evidence of the Complainant's Sexual Reputation

Section 246.7 (now section 277) says that evidence of a complainant's sexual reputation is not admissible if its purpose is to challenge or support the complainant's credibility.

This section has been challenged under the Charter as not providing an accused the right to a fair trial. However, the courts seem to have found it less problematic than the section on sexual history (section 246.6, now section 276). In R. v. Seaboyer; R. v. Gayme, Grange J.A., writing for the majority, found section 246.7 (now section 277) constitutional.

> I think that section 246.7, which excludes evidence of sexual reputation for the purposes of challenging or supporting credibility, is a true reflection of modern standards. Sexual reputation is no more an indicator of credibility in a woman than it is in a man. It should no longer be recognized as relevant to that issue. It may, of course, be relevant to other issues, such as an honest belief in consent, but the subsection does not exclude cross-examination for that purpose, or indeed any other purpose than credibility.[152]

Similarly, in R. v. Wiseman,[153] Ontario District Court Judge Cusinato held, before the Ontario Court of Appeal decision in Seaboyer and Gayme, that the section does not violate the Charter.

> To conclude, Parliament may, if such action is not arbitrary or unreasonable and falls within the terms of section 1 of the Charter, make exceptions as to the admission of evidence and the questions which may be asked, if such limitations are reasonable and fall within the competence of Parliament. . . . I

---

[152] Supra, note 137, at 305.

[153] (1985), 22 C.C.C. (3d) 12 (Ont. Dist. Ct.).

have concluded that section 246.7 . . . is such a policy decision of Parliament . . . and constitutionally valid.[154]

The Supreme Court decision in Seaboyer and Gayme will in all likelihood address the constitutional validity of this section on sexual reputation as well as the section on sexual history.

3.5 The Accused's Behaviour -- the Admissibility of Similar Fact Evidence

As has been seen, despite the repeal of the requirement of corroboration to convict an accused on a sexual assault charge, some courts continued to expect some supporting or confirming evidence before being prepared to issue a guilty verdict. The corroborating evidence may be sought in the behaviour of the complainant but it can also be found in the form of similar fact evidence: proof that the accused did the same thing, or something like it, to someone else.

The general rule is that previous wrongful acts of an accused are inadmissible as proof that the accused probably did the wrongful act at issue in the trial. However, within narrow restrictions, similar fact evidence can be admissible for other purposes, in keeping with the general rule of evidence that all relevant and material evidence should be admissible.

The Supreme Court of Canada has dealt with the question of similar fact evidence in the context of sexual assault cases in two recent cases, R. v. Robertson[155] and R. v. Greene,[156] both on appeal from the Manitoba Court of Appeal.

One issue in R. v. Robertson concerned whether certain evidence of the roommate of the complainant should have been admitted as similar fact evidence. Robertson involved the forcible rape of a 19-year-old woman in her apartment. The accused, under false pretences that he was a friend of her roommate's and had something for the roommate, gained entry to her apartment at 4:30 a.m. where he proceeded to terrorize the victim with violence, pulling her by the hair and striking her, forcing her to the floor, and then having nonconsensual intercourse with her. The similar fact question was whether or not the judge should have admitted evidence that the accused had, on a previous occasion, told the victim's roommate that he

---

[154] Ibid. at 26-27.

[155] Supra, note 55.

[156] (1988), 40 C.C.C. (3d) 333 (S.C.C.).

wanted to sleep with her and refused to leave the apartment when told to. The roommate then left the apartment, but the accused followed her, pinning her to the wall and telling her he could never love her, only hurt her.

The parties admitted that the roommate's evidence was relevant. The questions therefore were: (a) Did this evidence fall within the scope of the similar fact evidence rule? and (b) Did this evidence meet the criteria for exclusion contained in that rule?[157] Wilson J. found that it did fall within the scope of the rule, but did not meet the criteria for exclusion. In assessing probative value, Wilson J. states that relevancy must be considered as well as the strength of any inference that can be drawn. Here the roommate's testimony provided background for the circumstances in which the assault occurred. Evidence of the proposition made the whole narrative clearer. Arguably, it had some relevance to the issue of motive and intent. Wilson J. stated:

> The probative value of evidence may increase if there is a degree of similarity in circumstances and proximity in time and place. However, admissibility does not turn on such a striking similarity: see L.H. Hoffmann, "Similar Facts After Boardman" (1975) 91 L.Q. Rev. 193, at p. 201.[158]

Having rejected the "strikingly similar" test, and having found the evidence relevant, Wilson J. then went on to inquire whether it was prejudicial. She found that it caused prejudice, but very little, and hence was properly admitted.

In R. v. Greene,[159] the trial judge convicted a male school teacher of the sexual assault of a 12-year-old girl. The teacher had fondled her breast. A number of male children testified that they had spent nights at the home of the accused, taken baths there, and while they were bathing, the accused had entered the bathroom and fondled their genitals. The Manitoba Court of Appeal overturned the conviction, finding that similar fact evidence had been improperly admitted by the trial judge.

The Supreme Court restored the conviction in a very short decision, two out of five judges dissenting (Lamer J. and Estey J.).

---

[157] In Robertson, Wilson J. stated the rule as "Evidence of the accused's discreditable conduct on past occasions." Supra, note 55, at 45.

[158] Supra, note 55, at 47.

[159] Supra, note 156.

> This evidence was admissible to show a system adopted by the respondent, and its probative force was sufficient to outweigh any prejudicial effect upon the respondent.[160]

It should be noted that in another Manitoba Court of Appeal decision, R. v. Krawchuk,[161] given after the Supreme Court's decisions in Robertson and Greene, a father's conviction for incest was quashed by the Court of Appeal. It found that the trial judge had improperly admitted evidence from a sister of the complainant that she had been sexually assaulted by her father some years before. The Court of Appeal found that the sister's evidence should have been excluded.

In R. v. Vernacchia (No. 2),[162] a gynaecologist, in the course of an internal examination of a 35-year-old patient, had sexual intercourse with her and sodomized her. The testimony of another patient who had had a similar experience with the same doctor on the previous day was admitted into evidence by the trial judge as similar fact evidence. The Quebec Court of Appeal found that the evidence had been properly admitted.

The Court of Appeal approved the reasoning of the trial judge, which it quoted:[163]

> Dans la présente cause, la preuve d'actes similaires si similaire dans sa commission et si près des faits reprochés dans l'acte d'accusation devant moi, en vertu des principes de la Cour suprême est admissible, pour tenter de démontrer, d'abord, l'intention de l'accusé au moment où il reçoit Madame Bertrand, et le modus operandi de l'accusé. Cette preuve d'actes similaires est donc admissible.[164]

---

[160] Supra, note 156, at 355.

[161] (1988), 51 Man. R. (2d) 239 (Man. C.A.).

[162] (1988), 11 Q.A.C. 175.

[163] Ibid. at 178.

[164] Translation: In the present case, similar fact evidence relating to acts so similar in their commission and so close to the facts alleged in the offence charged before me, are admissible according to principles enunciated by the Supreme Court to attempt to demonstrate, first, the intention of the accused at the time he received Mrs. Bertrand, and the modus operandi of the accused. Such similar fact evidence is therefore admissible.

Similar fact evidence has therefore been allowed as evidence in some cases[165] and serves to confirm the evidence against the accused.

[165] See also for example R. v. Sterne, supra, note 43; and R. v. L.E.D., supra, note 107.

4.0 PROCEDURAL ISSUES

4.1 Charging Patterns: The Three Levels of Sexual Assault

The new sexual assault law created three sexual assault offences. "Simple" sexual assault (section 246.1, now section 271) can be charged as an indictable offence or a summary conviction offence with the maximum punishment for an indictable offence being 10 years imprisonment. Sexual assault with a weapon, threats to a third person or causing bodily harm (section 246.2, now section 272) is an indictable offence with a maximum punishment of 14 years imprisonment. A conviction for aggravated sexual assault (section 246.3, now section 273) can result in life imprisonment.

In contrast, assault (under section 244, now section 265) is punishable as either an indictable or summary conviction offence with the maximum punishment as an indictable offence being five years in prison.

Given the new three-tier structure for sexual assault offences and the seriousness of each as reflected by the possible sentences, it is instructive to review what charges were laid in which kinds of situations. Presumably the most violent assaults of a sexual nature would be charged under the most serious offence (aggravated sexual assault) and successful penetration by the penis into the vagina would no longer be the key element of the offence when charges were laid, as it had been under the old offence of rape.

Before the law was changed, the physical injuries suffered by the complainant were factors only in sentencing but were not elements of the offence that would affect charging. Now the three sexual assault offences are, in part, defined by the physical injury done ("causes bodily harm" -- section 246.2, now section 272; "wounds, maims, disfigures" -- section 246.3, now section 273),[166] it would seem that charging would be based on the victim's injuries. This is not always the case.

In several cases, a first-level sexual assault charge was laid although there was physical injury -- in some cases, significant physical injury.[167]

---

[166] If one applies the case law from common assault, "wounding" means a breaking of the skin, and includes bodily harm; "maiming" includes broken limbs; and "disfigurement" means a permanent marring of the appearance, such as a permanent scar. See also Boyle, supra, note 81 at 99.

[167] Knocking the victim unconscious - R. v. Elliot, unreported, July 17, 1985, B.C. Co. Ct.; R. v. Downey, (1986), 76 N.S.R.(2d) 217 (App. Div.); R. v. Brun, (1987), 81 N.S.R. (2d) 384 (App. Div.); Tearing the vagina of an adult victim - R. v. Conyers, unreported, July 12, 1985, B.C.S.C. Vancouver No. 841790;

Penetration still seems to be a factor in charging. In all but one of the cases of aggravated sexual assault, intercourse had occurred and, in that case, it had been attempted.[168] As well, in four cases,[169] the lack of penetration seems to have precluded a charge of sexual assault causing bodily harm or aggravated sexual assault. In those cases, sexual intercourse had not occurred and a first-level sexual assault charge was laid even though the complainants had been badly beaten. Sentencing did, however, reflect the seriousness of the assaults, with the accused receiving prison terms of 10, 5½, 4, 2½ years.[170]

Tearing the vagina of a child if it is not certain that the tear was a result of sexual intercourse - R. v. D.W.P., [1987], 5 W.W.R. 374 (Man. C.A.). or if the accused is a young offender R. v. M.E.D., (1985), 47 C.R.(3d) 382 (Ont. P.C.); Choking that results in bruising - R. v. Elliot, unreported, July 17, 1985, B.C. Co. Ct. See also R. v. Moorcroft, (1985), 54 Nfld. & PEIR 80 (Nfld. C.A.); R. v. Nilaulak, [1987] N.W.T.R. 201 (N.W.T., S.C.); R. v. J.R.S., unreported, January 9, 1986, Ont. Dist. Ct., Windsor No. 1470/84; R. v. Leon, unreported, March 13, 1986, B.C.C.A. Vancouver No. 004906; R. v. Sovey, unreported, August 1, 1986, Ont. Dist. Ct. Toronto; R. v. C.K.F., unreported, February 18, 1987, B.C.C.A. Vancouver No. CA 006160; R. v. Ryder, unreported (QL), January 19, 1988, B.C.C.A., Vancouver CA 00726.

[168] Cases in which the charge was aggravated sexual assault include: R. v. Smith (1985), 37 Man. R. (2nd) 249 (Man. C.A.); R. v. Pronovost (1987), R.J.Q. 1485 (Que. C.A.); R. v. Plourde (1985), 23 C.C.C. (3d) 463 (Que. C.A.); R. v. Stoddart (1987), 20 O.A.C. 365 (Ont. C.A.); R. v. Dugan (1987) 67 Nfld, and P.E.I.R. 247 (Nfld. S.C., T.D.); R. v. Buckley, 1986 N.W.T.R. 42 (N.W.T.S.C.); R. v.E. (K.) unreported, March 3, 1987, N.B.Q.N., newcastle; R. v. Champagne (1987), 7 Q.A.C. 129 (Que. C.A.); R. v. E.L., unreported April 8, 1987, Ont. Dist. Ct., Toronto; R. v. Tewsley, unreported April 19, 1985, Ont. Dist. Ct., Ottawa; R. v. Brogan unreported, December 13, 1985, B.C.C.A. Vancouver, No. 003254; R. v. DeForge, unreported, July 18, 1986, B.C.C.A., Vancouver, No. 005014; R. v. Gudmundson, unreported, June 28, 1985, B.C. Co. Ct. Cariboo, No. 2139; R. v. McEachern, unreported, November 27, 1986, B.C.C.A. Vancouver No. 003839; R. v. W.A.P., unreported. October 19, 1987, B.C.C.A. No. CA 007862.

[169] R. v. Sovey, supra, note 172; R. v. Wasylenko (1987), 48 Man. R. (2d) 234 (C.A.); R. v. Leon, unreported, March 13, 1986, B.C.C.A.; and R. v. Elliot, unreported, July 17, 1985, B.C. Co. Ct.

[170] For cases charged under sexual assault causing bodily harm in which there was serious physical injury see: R. v. McKenzie (1986), 38 Man. R. (2d) 319 (C.A.); R. v. J.S., unreported, Feb. 18, 1987, B.C.C.A.; R. v. T. and B., unreported, October 30, 1986, B.C.C.A. Other cases in which the charge was sexual assault causing bodily harm include: R. v. Madore (1985), 70 N.S.R. (2d) 86 (N. S. App. Div.); R. v. Murray, supra, note 53; R. v. Sparks (1986), 75 N.S.R. (2d) 91 (N. S. App. Div.); R. c. Synnot (1986), 3 Q.A.C. 246 (Que. C.A.); R. v. Jondreau (1986), 18 O.A.C. 120 (Ont. C.A.); R. v. Tuckey, Baynham and Walsh (1985) 20 C.C.C.,(3d) 502 (Ont. C.A.); R. v. Glassford (1988), 27 O.A.C. 194; R. v. G.B. et al. (1988), 65 Sask. R. 134 (C.A.); Beaulieu v. R. [1988] N.W.T.R. 1 (C.A.); R. v. B.M.G., unreported, Jan. 11, 1988, Ont. Dist. Ct. Doc. No. 1396187; R. v. D.S., unreported, April 6, 1987, Ont. Dist. Ct., Toronto; R. v. Henson, unreported, Oct. 30, 1985, Ont. Dist. Ct., Toronto, No. 933185; R. v. Simon, unreported, March 27, 1986 (Appeal, Feb. 2, 1987), Ont. Dist. Ct. York, No. 1239184, Ont. C.A. No. 608; R. v. Meesto, unreported (QL), March 11, 1988, Sask. C.A.; R. v. Moensch, unreported, Jan. 21, 1986, Alta. C.A. No. 17968; R. v. Dyck, unreported, June 3, 1985, B.C.S.C. Vancouver, No. CC 850135; R. v. James, unreported (QL), Nov. 4, 1987, C.C.A., CA 007839; R. v. T. & B., unreported, October 30, 1986, B.C.C.A. Vancouver No. CA 005384; R. v. I.S., unreported, February 18, 1987, B.C.C.A. Vancouver No. CA 006856.

It should be added that the sexual assault offences make no mention of psychological injury suffered by the victim of the assault. In cases where the victim has been severely traumatized but has no visible signs of injury the charge will be at the lowest level of sexual assault.

4.2 Charging With Attempted Sexual Assault

Section 24 of the Criminal Code states:

> (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
>
> (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, is a question of law.

Theoretically, then, a person could be charged with attempted sexual assault. However, the charge seems at odds with logic since subsection 244(1) (now subsection 265(1)) does not require that there be battery for an assault to have taken place. An attempt or threat, by act or gesture, to apply force to another person is sufficient to constitute an assault, if there is, or appears to be present, the ability to carry out such an intention. In other words, an attempted assault already meets the definition of an assault and the charge of assault can be laid.

Given that subsection 244(1) (now subsection 265(1)) also applies to sexual assault, it is difficult to imagine what an attempted sexual assault could be.[171] In spite of this, a few cases of convictions for attempted sexual assault were found, although most were overturned on appeal.[172]

---

[171] A person convicted of an attempted crime generally receives a lighter sentence than a person convicted of committing the crime.

[172] See also S. J. Usprich, "Two Problems in Sexual Assault: Attempts and the Intoxication Defense" (1987), Criminal Law Quarterly 296, which discusses two unreported cases involving convictions for attempted sexual assault. In R. v. Elliott (July 17, 1985, B.C. Co. Ct., summarized in (1985) B.C.D. Crim. Conv. 6108-05 and 15 W.C.B. 235) "the accused threw the victim onto a bed, threatened to 'fuck her or feel her tits' and attempted to pull up her T-shirt and loosen her pants." In R. v. Payne (December 17, 1985, Ont. Dist. Ct., summarized in (1986) Ont. D. Crim. Conv. 6108-05 and 16 W.C.B. 40), the case summary gives the facts as follows: "Causing her to fall and getting on top of her twice without the consent of the victim was an assault and the Court can see no other purpose for that assault but to do something of a sexual nature to the victim and, but for

In R. v. Alfred,[173] a decision of the Yukon Court of Appeal, the accused was convicted on the following facts of attempted sexual assault. A woman had passed out at a party after consuming too much alcohol. Several men apparently took advantage of her condition to have sexual intercourse with her. The accused was discovered after he had pulled down his own pants and was in the process of pulling hers down to have sexual intercourse with her.

While pulling down a woman's pants may have been sufficient proof of the actus reus of attempted rape under the pre-1983 law, under the new law it seems clear that a sexual assault had occurred.

In R. v. Ricketts,[174] the accused negotiated with a prostitute for sex. She got in his car and asked to be paid in advance. He did not pay but pulled out a knife and threatened her, demanding that she perform fellatio. She struggled and got free. The trial judge convicted the accused of attempted sexual assault with a weapon. The Alberta Court of Appeal overturned the conviction, finding that a sexual assault had taken place. The court of appeal stated:

> . . . [T]he very act of a lascivious suggestion accompanied by an expression of force sufficient to constitute an assault is, without more, a sexual assault as defined by Taylor.[175]

In R. v. Alderton,[176] the accused, wearing a mask, entered the complainant's bedroom and held her down on her bed. She struggled and managed to escape. Despite the fact that there had been no sexual contact, the Ontario Court of Appeal held that a sexual assault had taken place (although under the old law it might have been characterized as attempted rape). The fact that a complainant manages to escape does not turn a sexual assault into an attempted sexual assault.

These trial court convictions for attempted sexual assault seem to be anomalies and have been overturned, in any case, by courts of appeal (except in Yukon). Given

---

the intervention of a third party, something would have happened along those lines. That interruption was ' before anything of a sexual nature in fact took place." Usprich notes that in both these cases a conviction for sexual assault would seem to have been required.

[173] (1986), 1 Y.R. 9, (Yukon C.A.).

[174] R. v. Ricketts (1985), 61 A.R. 175 (Alta. C.A.).

[175] Ibid. at 175; Taylor, supra, note 11.

[176] Supra, note 11.

the wording of the new law, a person who attempts to sexually assault someone, even if the assault is not carried out, should be charged with sexual assault.

4.3 The Level of Detail Required in a Sexual Assault Charge

The term sexual assault covers a broader range of criminal behaviour than the term rape. While the latter refers to forced penetration of the penis into the vagina, the former can apply to everything from touching a breast without consent to gang rape. For the defence, this has raised the argument that a sexual assault charge does not have sufficient detail to meet the law requirements.

Subsection 510(3) (now subsection 581(3)) of the Criminal Code states:

> A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

Four decisions by courts of appeal consider the level of detail required in the case of a sexual assault charged as an indictable offence. In R. v. R.I.C.,[177] a provincial court judge, on his own motion, quashed the information containing the charges against the accused on the grounds that the alleged acts which constituted the assault were not described with sufficient specificity. The Ontario Court of Appeal overturned the decision. It found that an information need not contain the particulars of the sexual assault, such as rape, attempted rape or indecent assault. The court further noted that several "transactions" may constitute one count.

In R. v. Bohler,[178] the accused alleged that the indictment did not comply with the requirements of section 510 (now section 581) of the Code. The Alberta Provincial Court agreed with the accused's argument and quashed the indictment. On appeal to the Alberta Court of Queen's Bench, the appeal was allowed and the court ordered the lower court judge to proceed with a trial on the charge.[179]

---

[177] (1986), 17. O.A.C. 354 (Ont. C.A.).

[178] (1985), 67 A.R. 315 (Q.B.).

[179] Stratton J. compared the present situation to the one that applied to gross indecency prior to 1983. Stratton J. quoted from McDonald J.A. in R. v. Dugdale (1979), 7 C.R. (3d) 216 at 224: "Failure of the charge at bar to specify the details of what is alleged to constitute the act of 'gross indecency' in this case is nothing more than a failure to specify the means by which the offence is alleged to have been committed, and this is, in

However, in R. v. Hart,[180] decided after Bohler, a provincial court judge quashed seven of the nine counts with which the accused was charged on the grounds that the charges

> fail to disclose adequate details to identify the transaction in order for the accused to make full answer and defence . . . [T]he counts do not provide specific dates, locations or disclose the nature of the particulars or acts so that he can identify the transactions which form the basis of the charges.[181]

The charges involved five females whom the accused allegedly assaulted over periods of time ranging from four months to eight years.

It is interesting that the trial judge used the Bohler[182] decision to support the quashing of the counts, relying on the discretion the Bohler decision gives the trial judge and on the direction that "the entire indictment must be viewed as a whole and considered in the light of section 510."

In R. v. Cook,[183] the accused had been convicted and had appealed his conviction on the ground, inter alia, that the indictment failed to comply with section 510 (now section 581).

The British Columbia Court of Appeal found that it was not necessary to specify whether the particular nature of the assault was rape, attempted rape or sexual assault. Here the indictment specified the victim and the date of the offence. The court held that sufficient.

In Myhren v. R.,[184] the indictment was found not to comply with the requirements of subsection 510(3) (now subsection 581(3)). Two counts were contained in the indictment, each one alleging a sexual assault of a child within a four and one-half month period in 1984. Northwest Territories Supreme Court Justice De Weerdt objected to the lack of details on the alleged activity. He noted that the term

---

substance, the complaint of the respondent . . . that does not render the charge insufficient."

[180] (1987), 80 A.R. 321 (Prov. Ct.).

[181] Ibid. at 323.

[182] Supra, note 178.

[183] Supra, note 11.

[184] Myhren v. R. (1986) N.W.T.R. 15 (S.C., T.D.).

sexual assault is new and that it is perhaps too early to attempt a definition. R. v. Chase was subsequently decided by the Supreme Court so, as discussed earlier, there now is a definition for sexual.[185]

In considering the level of detail required in a sexual assault charge, the courts of appeal were satisfied that the law had been met.

4.4 The Mandatory Ban on the Publication or Broadcast of Information that Could Identify the Complainant

Subsection 442(3) (now section 464) of the new legislation provided:[186]

> Where an accused is charged with an offence mentioned in section 264.4, the presiding judge, provincial court judge or justice may, or if application is made by the complainant or prosecutor, shall, make an order directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast.

In R. v. D.D.,[187] the complainant was the wife of the accused. At the prosecution's request, on behalf of the complainant, the court banned the publication or broadcast of any information that could disclose her identity.

The Canadian Newspapers Co. asked for permission to intervene in the criminal proceedings and also presented a civil motion asking the court to declare subsection 442(3) (now section 464) unconstitutional. It argued that this law violated the right to freedom of the press as guaranteed in the Canadian Charter of Rights and Freedoms. The judge denied the motion, finding that the law was constitutional, and also denied leave to intervene.

---

[185] Before the decision in Chase, the Newfoundland Court of Appeal considered whether or not the lack of a definition of sexual in the Criminal Code meant that a charge under section 246.1 (now section 276) was vague and therefore invalid. It overturned the lower court's decision to dismiss the charge and remitted the charge to the trial judge, finding that the Criminal Code defines assault and that sexual merely connotes the type of assault. R. v. Piercey (1986), 60 Nfld. and P.E.I.R. 76 (Nfld. C.A.).

[186] This provision was amended by Bill C-15. Under the amendments, the provision covers more offences and extends the publication ban to cover witnesses under the age of 18 as well. The language of the section was also changed slightly.

[187] (1985), 7 O.A.C. 161 (Ont. C.A.).

Canadian Newspapers Co. appealed the decision. The Ontario Court of Appeal held that the section infringed a Charter right by making the ban mandatory upon the complainant's request. However, the Court found that the part of the section that gave a judge discretion in ordering a publication or broadcast ban was valid.[188]

The provision banning the publication of information that would identify a complainant protects a complainant from publicity and is important to the goals of the new sexual assault legislation. In general, these two cases suggest that the courts will stand behind the publication ban in order to encourage victims to report sexual assault crimes.

4.5 The Right to a Ban on the Publication or Broadcast of Information that Could Identify the Accused

In Regina v. R.,[189] the complainant requested a media ban on publishing or broadcasting information that could identify her. The judge granted the application. The accused then made a similar request to have the publication or broadcast of his name banned as well. The accused relied on the Canadian Charter of Rights and Freedoms, arguing that subsection 442(3) (now section 487) discriminates against men. Since the accused could suffer serious consequences if his name were publicized in connection with a sexual assault trial, he argued that he, too, had an interest in protecting his privacy, at least until such time as he was found guilty.

The judge noted:

---

[188] The Supreme Court of Canada, in a unanimous decision written by Lamer J., and handed down in September 1988, overturned the appeal court decision. The Supreme Court held that the section was constitutional. It noted that the mandatory ban on public communication at the complainant's request was an intrinsic aspect of the new law, since the law's purpose was, in part, to encourage victims to report sexual assaults, the most underreported of crimes. The Supreme Court found that victims need to be assured that their names will not be included in media reports. Leaving a publication ban to a judge's discretion--rather than having it as the complainant's absolute right--would give the victim of a sexual assault no ironclad assurance of privacy, and sexual assault would continue to be underreported. Hence, the goal of encouraging victims to report crimes would be defeated.

An argument raised by Canadian Newspapers Co. was that if a complainant's name were broadcast or published and if the complainant had, in the past, made false accusations of sexual assault, then others might come forward to prevent an erroneous conviction.

In any case, Lamer J. finds that, although freedom of the press is infringed by subsection 442(3) (now section 487), the limitation is justified under section 1 of the Charter.

[189] (1986), 28 C.C.C. (3d) 188 (Ont. H.C.).

> But if Parliament in its wisdom enacts legislation to protect or to curtail the right of the press or media to publish the name of a complainant, then it strikes me as being unfair if the right to publication of the name of the accused is not equally curtailed.[190]

The judge ordered that no information identifying the accused or the complainant could be published or broadcast until the trial was over, at which time, if the accused was convicted, his name could be made public.

In Re Southam Inc., et al., v. The Queen,[191] an Ontario High Court judge prohibited publishing the name of the accused, since to do so when the accused stood in loco parentis to the complainant or shared the same name would disclose the complainant's identity. However, the trial judge found that in other circumstances the public had a legitimate interest in knowing the name of the accused. For that reason, an order banning publication of the accused's name would only be justified if doing so would reveal the complainant's identity. The judge concluded that the public has a right to know the accused's name because that is the only means of verifying the accuracy of a report that the accused had been charged and of preventing speculation and damaging rumours about innocent parties.

4.6 Allowing Third Parties to Present Arguments in Court -- the Granting of Intervenor Status

Our judicial process is adversarial. Usually, only parties directly involved in a dispute are heard in court. Occasionally, the court will allow another party to be heard. This party is given the status of amicus curiae or friend of the court and is allowed to intervene in the case to assist the court in making its decision. Intervenors have expertise in a particular matter and normally their intervention does not raise any new issues.

Although Canadian courts, unlike their American counterparts, have historically granted intervenor status only sparingly, they have recently become more open to the idea. The complexity of Charter issues and the widespread ramifications of Charter interpretations have probably prompted this shift.

---

[190] Ibid. at 192.

[191] (1987), 37 C.C.C. (3d) 139 (Ont. H.C.).

Where litigants may only present arguments and analyses that directly relate to their own situation, an intervenor can present arguments on the broader significance of a decision and its potential impact on society as a whole.

It is unusual for intervenor status to be granted in criminal cases, but intervenors were permitted to make presentations in two cases concerning the sexual assault legislation -- one a criminal trial, the other a civil action. It is interesting that the civil action arose at a criminal trial where intervenor status had been refused.

In R. v. Seaboyer and Gayme,[192] counsel for the accused opposed the intervention of the Women's Legal Education and Action Fund (LEAF), arguing that its interests were identical to those of the Crown and that LEAF's intervention would place an unnecessary burden on the accused. Nonetheless, the Ontario Court of Appeal granted LEAF intervenor status. Howland C.J.O. stated:

> The right to intervene in criminal proceedings where the liberty of the subject is involved is one which should be granted sparingly. Here no new issue will be raised if intervention is permitted. It is a question of granting the applicant a right to intervene to illuminate a pending issue before the court. While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the court.[193]

The Canadian Civil Liberties Association was also granted leave to intervene.

Leave to intervene in a criminal trial was at issue in the case of R. v. D.D.,[194] discussed earlier in the section on publication bans. The trial judge prohibited the publication of the complainant's name or any identifying information (the accused was her husband). Canadian Newspapers Co. applied to intervene, arguing the section allowing a publication ban violated the Charter. The trial judge

---

[192] (1986), 50 C.R. (3d) 395 (Ont. C.A.).

[193] Howland C.J.O. held that . . . "[S]uch intervention will be limited to the question of the constitutionality of sections 246.6 and 246.7 of the Criminal Code." Ibid. at 389; It is interesting to note that Howland C.J.O. refused LEAF intervenor status in the case of R. v. Morgentaler (1985), 44 C.R. (3d) 189 (Ont. C.A.). That case involved an appeal against an acquittal on the charge of procuring an abortion and a number of groups applied for intervenor status. LEAF's application was opposed by both the Crown counsel and the accused.

[194] Supra, note 187.

refused to grant the application, whereupon Canadian Newspapers Co. appealed. The appeal with respect to intervenor status at the criminal trial was dismissed on the grounds that it is entirely within the discretion of the trial judge to grant such intervention, and that no right to appeal such a refusal exists.

However, Canadian Newspapers Co. also launched a civil action, challenging the constitutionality of the Criminal Code section. LEAF and a number of other groups representing women's and children's interests were granted intervenor status in the civil action.

These two cases suggest that courts are prepared to recognize the broad social implications of their decisions on the sexual assault law and, on occasion, to accept the added perspective that parties other than the defence and the prosecution can bring. Although such third party interventions are rare, they can be an effective way for various interest groups to be heard when courts are considering landmark cases, especially those in which Charter arguments are being made.

5.0 CONCLUSION

During the period covered by this review, the Supreme Court of Canada rendered a number of important decisions that clarify the meaning of the new sexual assault legislation.

The decision in Chase provides a definition of sexual in sexual assault, which is objective and not grounded in the motives of the accused. The test is broad ("Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?") and does not focus on the genitalia as being the only sexual part of the body. This is a positive development, although an objective test leaves a great deal of latitude to judges to characterize an assault from their own perspective. As one author noted, objective tests are problematic because, when the judiciary is male-dominated, such tests "inevitably invoke a male-defined perspective of female sexuality."[195]

The decision in Chase also establishes that the sexual assault offences are general intent offences to which a defence of, for instance, drunkenness cannot be made. This too is a positive development; the accused cannot avoid conviction by claiming to have been very drunk at the time the sexual assault took place.

The decision in Robertson is less encouraging. It took a narrow approach to the question of honest but mistaken belief in the complainant's consent. While the new law left room for courts to abandon the subjective test established in the 1980 Pappajohn decision, the Supreme Court declined to do so. Instead, it ruled that an accused may be acquitted of a sexual assault charge if it can be shown that he had an honest, even though possibly mistaken, belief in the complainant's consent. The reasonableness of the belief is not at issue.

However, the Court's decision in Sansregret does set a limit. An accused will not be successful with a defence of honest but mistaken belief in consent if the facts show that the accused was wilfully blind to the obvious. This decision may serve to neutralize the ruling in Robertson.

The decision in Bulmer also tempers the Robertson decision. In Bulmer, the Court held that it is insufficient for an accused merely to assert an honest belief in the complainant's consent. Before the defence can be put to the jury, the judge must be convinced that there is an "air of reality" to it.

Finally, the Supreme Court decision in the Canadian Newspapers Co. case has protected the right of the complainant to be free from the media's glare. A Charter

---

[195] T. Bretell Dawson, "Legal Structures: A Feminist Critique of Sexual Assault Reform," Resources for Feminist Research, 14, 3 (November 1985), 42.

challenge to the provision that instructs a judge to order a publication and broadcast ban if the complainant so requests was not successful.

The Supreme Court still must decide the admissibility of evidence of a complainant's sexual history and/or sexual reputation. The Seaboyer and Gayme decision will be illuminating.

In courts of appeal, as well, a number of important decisions have shed light on the way courts will interpret the new legislation.

The British Columbia Court of Appeal opted for a narrow definition of fraud as it applies to the issue of consent. Given a chance to expand on the pre-1983 law that fraud only vitiates consent when it is a fraud about the nature and quality of the act or an impersonation, the appeal court declined to do so. The decision in Petrozzi is significant because it declines to protect prostitutes, who seem, from this review of cases, vulnerable to unscrupulous customers who refuse payment and take by force what they cannot have for free.

The Ontario Court of Appeal, considering the factors that vitiate consent, found the list exhaustive. The judges were not prepared to consider coercive situations that might vitiate consent if these were not listed in section 244 (now section 265) such as the threat to damage a person's reputation if a complaint is filed.

The Manitoba Court of Appeal refused to allow convictions in two cases in which there was no corroboration. These decisions are troubling because they seem to reflect the pre-1983 attitude that, in cases of rape, a woman's word is not to be trusted.

It is interesting to note that, among all the cases reviewed, the accused was female in only six. The new law is gender-neutral but the perpetrators of the crime of sexual assault are still predominantly male.

This selected case summary is drawn from cases decided during the first five years following the proclamation of the new sexual assault law. Clearly, there are some glaring examples of courts being slow to grasp the significance of the changes in the legislation and persisting in applying outdated concepts and values to their decision-making. It is the author's view that major law reforms such as this one should automatically be accompanied by judicial education programs that highlight the changes in the law.

In terms of jurisprudence, however, five years is not a long time to judge the impact of legislation. Now that some key decisions of the Supreme Court of Canada have been rendered and the child sexual abuse legislation is in place, the next few years should provide people with the opportunity to fully understand the changes resulting from the new legislation.

APPENDICES

SECTIONS OF THE CRIMINAL CODE PERTAINING TO SEXUAL ASSAULT

Section 244 (now section 265) (1) A person commits an assault when
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
(b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or
(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
(a) the application of force to the complainant or to a person other than the complainant;
(b) threats or fear of the application of force to the complainant or to a person other than the complainant;
(c) fraud; or
(d) the exercise of authority.
(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

Section 246.1 (now section 271) (1) Every one who commits a sexual assault is guilty of
(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
(b) an offence punishable on summary conviction.
(2) Where an accused is charged with an offence under subsection (1) or section 246.2 (now section 272) or 246.3 (now section 273) in respect of a person under the

age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused is less than three years older than the complainant.

Section 246.2 (now section 272) Every one who, in committing a sexual assault,
(a) carries, uses of threatens to use a weapon or an imitation thereof,
(b) threatens to cause bodily harm to a person other than the complainant,

(c) causes bodily harm to the complainant, or
(d) is a party to the offence with any other person,
is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

Section 246.3 (now section 273) (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.
(2) Every one who commits an aggravated sexual assault is guilty of an indictable offence and is liable to imprisonment for life.

Section 246.4 (now section 274) Where an accused is charged with an offence under section 150 (incest) (now section 155), 157 (gross indecency) (now section 161), 246.1 (sexual assault) (now section 271), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm) (now section 272) or 246.3 (aggravated sexual assault) (now section 273), 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.

Section 246.5 (now section 275) The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated.

Section 246.6 (now section 276) (1) In proceedings in respect of an offence under 246.1 (now section 271), 246.2 (now section 272) or 246.3 (now section 273), no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless
(a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
(b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
(c) it is evidence of sexual activity that took place on the same occasion as the sexual

activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.
(2) No evidence is admissible under paragraph (1)(c) unless
(a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to adduce the evidence together with particulars of the evidence sought to be adduced; and
(b) a copy of the notice has been filed with the clerk of the court.
(3) No evidence is admissible under subsection (1) unless the judge, magistrate or justice, after holding a hearing in which the jury and the members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of this section are met.
(4) The notice given under subsection (2) and the evidence taken, the information given or the representations made at a hearing referred to in subsection (3) shall not be published in any newspaper or broadcast.
(5) Every one who, without lawful excuse the proof of which lies upon him, contravenes subsection (4) is guilty of an offence punishable on summary conviction.
(6) In this section, "newspaper" has the same meaning as in section 261 (now section 297).

Section 246.7 (now section 277) In proceedings in respect of an offence under section 246.1 (now section 271), section 246.2 (now section 272) or section 246.3 (now section 273), evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

Section 246.8 (now section 278) A husband or wife may be charged with an offence under section 246.1 (now section 271), 246.2 (now section 272) or 246.3 (now section 273) in respect of his or her spouse whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred.

Appendix 2

TABLE OF REPORTED CASES

R. v. Adams (1986), 68 A.R. 84 (N.W.T. C.A)

R. v. Alderton (1985), 44 C.R. (3d) 256 (Ont. C.A.)

R. v. Alfred (1986), 1 Y.R. 9 (Y.T. C.A.)

R. v. Amyot (1987), N.W.T.R. 337 (Ont. Prov. Ct.)

Andre v. R. (1987), N.W.T.R. 219 (N.W.T. C.A.)

R. v. Andrews (1987), 66 Nfld. and PEIR 336 (Nfld. S.C.T.D.)

R. v. Arias (1987), 20 O.A.C. 235 (Ont. C.A.)

R. v. Ashoona (1986), N.W.T.R. 238 (N.W.T. S.C.)

R. v. Atkins (1987), 63 Nfld. and P.E.I.R. 271 (Nfld. S.C.T.D.)

R. v. Atlin (1986), 1 Y.R. 19 (Y.T. C.A.)

R. v. B. (1986), 29 C.C.C. (3d) 365 (Ont. C.A.)

R. v. Bacik (1987), 58 Sask. R. 1 (Sask. Q.B.)

R. v. Barrons (1985), 70 A.R. 107 (Alta. Q.B.)

R. v. Bearhead (1986), 27 C.C.C. (3d) 546 (Alta. Q.B.)

Beaulieu v. R. (1988), N.W.T.R. 1 (N.W.T. C.A.)

R. v. Bernard (1985), 44 C.R. (3d) 398 (Ont. C.A.)

R. v. Big Tobacco (1985), 65 A.R. 206 (Alta. C.A.)

R. v. Blackburn (1986), 75 N.S.R. (2d) 30 (App. Div.)

R. v. Blazeski (1986), 13 O.A.C. 65 (C.A.)

R. v. Bohler (1985), 67 A.R. 315 (Q.B.)

R. v. Boliantz (1987), 56 Sask. R. 78 (C.A.)

R. v. Bougouin (1987), R.J.Q. 2027 (C.A.)

R. v. Boyle; R. v. Hess (1988), 25 O.A.C. 43 (C.A.)

R. v. Brown (1985), 70 N.S.R. (2d) 152 (App. Div.)

R. v. Brown (1987), 59 Sask. R. 220 (C.A.)

Brown & Murphy v. Queen (1985), 21 C.C.C. (3d) 477 (S.C.C.)

R. v. Brown & Murphy (1982), 1 C.C.C. (3d) 107 (Alta C.A.)

R. v. Brun (1986), 71 N.B.R. (2d) 295 (Q.B. T.D.)

R. v. Brun (1987), 81 N.S.R. (2d) 384 (App. Div.)

R. v. Bryson (1987), 30 N.S.R. (2d) 334 (App. Div.)

R. v. B.T. (1987), 58 Sask. R. 293 (C.A.)

R. v. Buckley (1986), N.W.T.R. 42 (S.C.)

R. v. Burke (1986), 60 Nfld. & P.E.I.R. 234 (P.E.I. S.C.)

R. v. Bush (1986), 40 Man. R. (2d) 78 (C.A.)

Canadian Newspaper v. Canada or R. v. D.D. (1985), 7 O.A.C. 161 (C.A.)

R. v. Champagne (1987), 7 Q.A.C. 129 (C.A.)

R. v. Chartrand (1986), 43 Man. R. (2d) 79 (C.A.)

R. v. Chase (1987), 59 C.R. (3d) 193 (S.C.C.)

R. v. Chase (1984), 55 N.B.R. (2d) 97 (C.A.)

R. v. Chevrier (1985), 10 O.A.C. 86 (C.A.)

R. v. Childs (1987), 81 N.S.R. (2d) 380 (App. Div.)

R. v. Chisholm (1987), 81 N.S.R. (2d) 421 (App. Div.)

R. v. C.J.L. (1986), 59 Nfld. and P.E.I.R. 76 (Nfld. C.A.)

R. v. C.J.M. (1986), 77 N.S.R. (2d) 1 (App. Div.)

R. v. C.J.M. (1986), 74 N.S.R. (2d) 388 (Y.C.)

R. v. Collins (1986), 59 Nfld. and P.E.I.R. 316 (Nfld. D.C.)

R. v. Cook (1985), 46 C.R. (3d) 129 (BCCA)

R. v. Cooke (1986), 64 Nfld. and P.E.I.R. 163 (Nfld. S.C.T.D.)

R. v. Cooke (1986), 76 N.S.R. (2d) 52 (App. Div.)

R. v. Coombs (1985), 49 C.R. (3d) 78 (Nfld. S.E.T.D.)

R. v. Cooper (1986), 72 A.R. 63 (C.A.)

R. v. Corbiere (1987), 79 A.R. 179 (C.A.)

R. v. Cormier (1986), 70 N.B.R. (2d) 107 (C.A.)

R. v. Cross (1986), 1 Y.R. 213 (S.C.)

R. v. Davison (1986), 75 N.S.R. (2d) 99 (App. Div.)

R. v. Dawson (1987), 45 Man. R. (2d) 130 (C.A.)

R. v. D.C.C. (1987), 79 N.S.R. (2d) 4 (App. Div.)

R. v. D.D. (1985), 70 A.C. 161 (C.A.)

R. v. DeHann (1986), 60 Nfld. and P.E.I.R. 267 (Nfld. C.A.)

R. v. Desbiens (1985), 43 Sask. R. 169 (C.A.)

R. v. D.I.L. (1985), 46 C.R. (3d) 172 (Ont. Dist. Ct.)

R. v. D.I.L. and Neely (1986), 51 C.R. (3d) 296 (Ont. C.A.)

R. v. Dobson (1985), 7 O.A.C. 145 (Ont. C.A.)

R. v. Dobson (1985), 9 O.A.C. 400 (S.C.C.)

R. v. Dobson (1987), 22 O.A.C. 119 (C.A.)

R. v. Downey (1986), 76 N.S.R. (2d) 217 (App. Div.)

R. v. Doyle (1987), 79 N.B.R. (2d) 131 (Q.B.)

R. v. Drolet (1986), 73 N.S.R. (2d) 192 (App. Div.)

R. v. Drybones (1986), N.W.T.R. 161 (N.W.T. S.C.)

R. v. Duffney (1986), 61 Nfld. and P.E.I.R. 176 (Nfld. S.C.T.D.)

R. v. Dugan (1987), 67 Nfld. and P.E.I.R. 247 (Nfld. S.C.T.D.)

R. v. D.W.P. (1987), 5 W.W.R. 374 (Man. C.A.)

R. v. E.G. (1987), 20 O.A.C. 378 (C.A.)

R. v. Eisenhauer (1987), 77 N.S.R. (2d) 297 (Co. Ct.)

R. v. Emisch (1985), 45 Sask. R. 1 (Q.B.)

R. v. Fadelle (1985), 69 N.S.R. (2d) 102 (App. Div.)

R. v. Fehr (1985), N.W.T.R. 267 (N.W.T.S.C.)

R. v. Ferguson (1987), 16 B.C.L.R. (2d) 273 (C.A.)

R. v. Frankland (1985), 12 O.A.C. 321 (C.A.)

R. v. Fraser (1987), 20 O.A.C. 78 (C.A.)

R. v. G.B. et al. (1988), 65 Sask. R. 134 (C.A.)

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

R. v. Giffin (1986), 69 A.R. 158 (C.A.)

R. v. Glassford (1988), 270 A.C. 194 (C.A.)

R. v. Gleason (1987), 3 Y.R. 2 (C.A.)

R. v. Goler (1985), 68 N.S.R. (2d) 311 (T.D.)

R. v. Goo Goo (1986), 75 N.S.R. (2d) 97 (App. Div.)

R. v. G.L. (1985), 64 N.B.R. (2d) 116 (C.A.)

R. v. Green (1987), 63 Nfld. & P.E.I.R. 229 (Nfld. S.C.T.D.)

R. v. Greene (1988), 40 C.C.C. (3d) 333 (S.C.C.)

R. v. Greening (1987), 68 Nfld. & P.E.I.R. 201 (Nfld. C.A.)

R. v. Grohs (1987), 59 Sask. R. 65 (C.A.)

R. v. Guerrero (1985), 27 O.A.C. 244 (C.A.)

R. v. Guns (1986), 75 A.R. 200 (C.A.)

R. v. Guthrie (1985), 20 C.C.C. (3d) 73 (Ont. C.A.)

R. v. Hallett (1987), 79 N.S.R. (2d) 48 (App. Div.)

R. v. Halleran (1987), 66 Nfld. & P.E.I.R. 314 (Nfld. C.A.)

R. v. Hambly (1985), 55 Nfld. & P.E.I.R. 24 (P.E.I.S.C.)

R. v. Hannam (1985), 70 N.S.R. (2d) 438 (App. Div.)

R. v. Harmon (1985), 64 N.B.R. (2d) 267 (Q.B.)

R. v. Hart (1987), 80 A.R. 321 (C.A.)

R. v. Hawkes 81 N.S.R. (2d) 15 (App. Div.)

R. v. Horne (1987), N.W.T.R. 168 (N.W.T. S.C.)

R. v. Horvat (1986), 43 Man. R. (2d) 158 (C.A.)

R. v. Hoskins (1987), 63 Nfld. & P.E.I.R. 119 (Nfld. C.A.)

R. v. Howell (1986), 57 Nfld. & P.E.I.R. 198 (Nfld. Dist. Ct.)

R. v. Hummell (1986), 1 Y.R. 19 (Y.T. Terr. Ct.)

R. v. H.W.B. (1987), 68 Nfld. & P.E.I.R. 195 (Nfld. C.A.)

R. v. Idlout (1988), N.W.T.R. 5 (N.W.T. C.A.)

R. v. Jacks (1986), 50 Sask R. 150 (C.A.)

R. v. Janes (1987), 63 Nfld. & P.E.I.R. 288 (Nfld. C.A.)

R. v. J.C.B. & N.J.M. (1985), 80 N.B.R. (2d) 184 (Q.B. T.D.)

R. v. J.C.L. (1987), 64 Nfld. & P.E.I.R. 81 (Nfld. C.A.)

R. v. Jenkins (1987), 65 Nfld. & P.E.I.R. 255 (Nfld. S.C.)

R. v. Jesso (1987), 66 Nfld. & P.E.I.R. 339 (Nfld. S.C.T.D.)

R. v. J.F.D. (1988), 25 O.A.C. 78 (C.A.)

R. v. J.J.E. (1986), 57 Nfld. & P.E.I.R. 204 (Nfld. C.A.)

R. v. Johnny (1986), 1 Y.R. 229 (Y.T.S.C.)

R. v. Johnstone, Goler & Johnstone (1985), 68 N.S.R. (2d) 302 (S.C.T.D.)

R. v. Johnstone (1985), 70 N.S.R. (2d) 153 (App. Div.)

R. v. Johnstone et al. (1986), 26 C.C.C. (3d) 401 (App. Div.)

R. v. Jondreau (1986), 18 O.A.C. 120 (C.A.)

R. v. Joudrey (1985), 68 N.S.R. (2d) 4 (App. Div.)

R. v. Jowett (1986), 44 Man. R. (2d) 77 (C.A.)

R. v. J.N. (1986), N.W.T.R. 128 (C.A.)

R. v. J.S. (1986), 39 Man. R. (2d) 234 (C.A.)

R. v. J.W.B. (1986), 72 N.S.R. (2d) 122 (Y.C.)

R. v. Kelley (1985), 69 N.S.R. (2d) 4 (App. Div.)

R. v. Kelly (1987), 65 Nfld. & P.E.I.R. 45 (Nfld. S.C.T.D.)

R. v. Kergan (1985), 62 A.R. 161 (C.A.)

R. v. Krawchuk (1988), 51 Man. R. (2d) 239 (C.A.)

R. v. L. (1986), 69 A.R. 159 (C.A.)

R. v. Lamirande (1988), 53 Man. R. (2d) 265 (C.A.)

R. v. Landrie (1987), 59 Sask. R. 270 (Q.B.)

R. v. Lang (1987), 46 Man. R. (2d) 135 (C.A.)

R. v. Langille (1987), 77 N.S.R. (2d) 224 (App. Div.)

R. v. Lapointe (1986), 50 Sask. R. 107 (C.A.)

R. v. Lavoie (1986), 56 Sask. R. 161 (Q.B.)

Laybourn, et al. v. R. (1987), 58 C.R. (3d) 48 (S.C.C.)

R. v. Bulmer, et al. (1983), 10 C.C.C. (3d) 256 (BCCA)

R. v. LeBlanc (1986), 77 A.R. 158 (C.A.)

R. v. L.E.D. (1987), 20 B.C.L.R. (2d) 384 (C.A.)

R. v. LeGallant (1986), 54 C.R. (3d) 46 (BCCA)

R. v. LeGallant (1986), 47 C.R. (3d) 170 (BCCA)

R. v. Leggett (1986), 75 N.S.R. (2d) 373 (App. Div.)

R. v. Lestrat (1986), 43 Man. R. (2d) 61 (Q.B.)

R. v. Louvine (1986), N.W.T.R. 256 (N.W.T.S.C.)

Lyons v. R. et al. (1987), 61 C.R. (3d) 1 (S.C.C.)

R. v. Lyons (1986), 72 N.B.R. (2d) 189 (Q.B.)

R. v. Lysack (1988), 26 O.A.C. 338 (C.A.)

R. v. MacDonald (1987), 79 N.S.R. (2d) 215 (S.C.T.D.)

Madalena v. Kunn (1987), 35 D.L.R. (4th) 222 (B.C.S.C.)

R. v. Madore (1985), 70 N.S.R. (2d) 86 (App. Div.)

R. v. Maley & Edgington (1985), 43 Sask. R. 178 (C.A.)

R. v. M.B. (1986), 53 Sask. R. 55 (C.A.)

R. v. McGinty (1986), 1 Y.R. 72 (Y.T.S.C.)

R. v. McGuiness (1985), 43 Sask. R. 98 (C.A.)

R. v. McKenzie (1986), 38 Man. R. (2d) 319 (C.A.)

R. v. M.E.D. (1985), 47 C.R. (3d) 382 (Ont. Prov. Ct.)

Mezzo v. The Queen (1986), 30 D.L.R. (4th) 161 (S.C.C.)

R. v. Milberry (1987), 78 N.S.R. (2d) 88 (App. Div.)

R. v. Monk (1985), 43 Sask. R. 318 (Q.B.)

R. v. Moorcroft (1985), 54 Nfld. & P.E.I.R. 80 (Nfld. C.A.)

R. v. Moreau (1986), 51 C.R. (3d) 209 (C.A.)

R. v. Murray (1986), 75 N.S.R. (2d) 361 (App. Div.)

Myhren v. R. (1986), N.W.T.R. 15 (S.C.T.D.)

R. v. Nagam (1986), 44 Man. R. (2d) 29 (C.A.)

R. v. Nagitarvik (1986), 69 A.R. 1 (N.W.T. C.A.)

R. v. Neely (1985), 22 C.C.C. (3d) 73 (Ont. Dist. Ct.) (See R. v. D.I.L.)

R. v. Nilaulak (1987), N.W.T.R. 201 (N.W.T. S.C.)

R. v. Noyes (1987), 22 B.C.L.R. (2d) 45 (C.A.)

R. v. Nutt (1985), 9 O.A.C. 82 (C.A.)

R. v. Oake (1987), 63 Nfld. & P.E.I.R. 175 (Nfld. S.C.T.D.)

R. v. Ogden (1986), 68 N.B.R. (2d) 180 (C.A.)

R. v. Okkuatsiak (1987), 65 Nfld. & P.E.I.R. 223 (Nfld. S.C.T.D.)

R. v. Onalik (1987), 65 Nfld. & P.E.I.R. 74 (Nfld. C.A.)

R. v. Owens (1986), 18 O.A.C. 125 (C.A.)

R. v. Paul (1985), 37 Man. R. (2d) 68 (C.A.)

R. v. Payne (1988), 68 Nfld. & P.E.I.R. 162 (Nfld. S.C.T.D.)

R. v. Perkins (1987), 59 C.R. (3d) 56 (N.W.T. S.C.)

R. v. Petaulassie (1986), N.W.T.R. 294 (N.W.T. C.A.)

R. v. Petrozzi (1987), 58 C.R. (3d) 320 (B.C.C.A.)

R. v. Piercey (1986), 59 Nfld. & P.E.I.R. 155 (Nfld. Dist. Ct.)

R. v. Piercey (1986), 60 Nfld. & P.E.I.R. 76 (Nfld. C.A.)

R. v. P.J.L. (1985), 35 Man. R. 2(d) 233 (C.A.)

R. v. Plourde (1985), 23 C.C.C. (3d) 463 (Que. C.A.)

R. v. Poirier (1985), 69 N.B.R. (2d) 1 (Prov. Ct.)

R. v. Pronovost (1987), R.J.Q. 1485 (Que. C.A.)

R. v. Punch (1985), 22 C.C.C. (3d) 289 (N.W.T. S.C.)

R. v. Quigley (1987), 66 Nfld. & P.E.I.R. 24 (Nfld. S.C.T.D.)

R. v. R. (1986), 28 C.C.C. (3d) 188 (Ont. H.C.)

R. v. Rafuse (1985), 54 Nfld. & P.E.I.R. 59 (P.E.I.C.A.)

R. v. Randall 75 N.S.R. (2d) 416 (App. Div.)

R. v. R.I.C. (1986), 17 O.A.C. 354 (C.A.)

R. v. Ricketts (1985), 61 A.R. 175 (C.A.)

R. v. R.J.P. (1987), 2 Y.R. 221 (Y.T.C.A.)

R. v. R.J.P. (1986), 72 A.R. 309 (C.A.)

R. v. Robertson (1987), 58 C.R. (3d) 28 (S.C.C.)

R. v. Roche (1985), 9 O.A.C. 391 (C.A.)

R. v. Rodgers (1987), 82 A.R. 319 (C.A.)

R. v. Rothenberg (1986), 18 O.A.C. 252 (C.A.)

R. v. R.R.W. (1986), N.W.T.R. 69 (N.W.T. S.C.)

R. v. Ruby (1986), 60 Nfld. & P.E.I.R. 120 (Nfld. C.A.)

R. v. Sacrey (1985), 54 Nfld. & P.E.I.R. 249 (Nfld. C.A.)

R. v. Sacrey (1984), 52 Nfld. & P.E.I.R. 131 (Nfld. Dist. Ct.)

R. v. Sandercock (1985), 62 A.R. 382 (C.A.)

R. v. Sansregret (1983), 34 C.R. 162 (Man. Co. Ct.)

R. v. Sansregret (1983), 10 C.C.C. (3d) 164 (Man. C.A.)

Sansregret v. R. (1985), 45 C.R. (3d) 193 (S.C.C.)

R. v. Sauer (1986), 52 Sask. R. 155 (C.A.)

R. v. Seaboyer (1983), 38 C.R. (3d) 16 (Ont. Co. Ct.)

R. v. Seaboyer and Gayme (1986), 50 C.R. (3d) 395 (Ont. C.A.)

R. v. Seaboyer; R. v. Gayme (1987), 58 C.R. (3d) 289 (Ont. C.A.)

R. v. Sheppard (1987), 67 Nfld. & P.E.I.R. 323 (Nfld. S.C.T.D.)

R. v. Singh (1987), 83 A.R. 69 (C.A.)

R. v. Shunamon (1986), 75 N.S.R. (2d) 393 (App. Div.)

R. v. Smith (1985), 37 Man. R. (2d) 249 (C.A.)

R. v. Smith (R.W.) (1987), 77 N.S.R. (2d) 76 (App. Div.)

R. v. S.N. (1986), N.W.T.R. 282 (N.W.T. C.A.)

Southam Inc. et al. v. The Queen (1987), 37 C.C.C. (3d) 139 (Ont. H.C.)

R. v. Sparks (1986), 75 N.S.R. (2d) 91 (App. Div.)

R. v. Starr (1985), 36 Man. R. (2d) 186 (C.A.)

R. v. Sterne (1986), 67 A.R. 34 (C.A.)

R. v. Stoddart (1987), 20 O.A.C. 365 (C.A.)

R. v. Sullivan (1987), 20 O.A.C. 323 (C.A.)

R. v. Synnot (1986), 3 Q.A.C. 246 (C.A.)

R. v. Taylor (1986), 18 O.A.C. 219 (C.A.)

R. v. Taylor (1985), 44 C.R. (3d) 263 (Alta. C.A.)

R. v. Terceira (1986), 12 O.A.C. 220 (C.A.)

R. v. Thomas et al. (1987), 24 O.A.C. 194 (C.A.)

R. v. Thorburn (1986), 26 C.C.C. (3d) 154 (B.C.C.A.)

R. v. Tremblay (1986), 3 Q.A.C. 141 (Que. C.A.)

R. v. Tuckey, Baynham & Walsh (1985), 20 C.C.C. (3d) 502 (Ont. C.A.)

R. v. Vernacchia, (No. 2) (1988), 11 Q.A.C. 175 (C.A.)

R. v. Verstegg (1985), 63 A.R. 238 (C.A.)

R. v. W.A.A. (1986), N.W.T.R. 170 (N.W.T. C.A.)

R. v. W.H. (1986), 63 Nfld. & P.E.I.R. 302 (Nfld. S.C.T.D.)

R. v. Wadden (1986), 71 N.S.R. (2d) 253 (App. Div.)

R. v. Wasylenko (1987), 48 Man. R. (2d) 234 (C.A.)

R. v. Watson (1987), 22 O.A.C. 239 (C.A.)

R. v. W.D.P. (1987), 82 N.S.R. (2d) 81 (App. Div.)

R. v. Wellington (1985), 24 C.C.C. (3d) 252 (Ont. C.A.)

R. v. Westgard (1987), 60 Sask R. 123 (C.A.)

R. v. White (1986), 24 C.C.C. (3d) 1 (B.C.C.A.)

R. v. Whitney (1986), 45 Sask. R. 280 (C.A.)

R. v. Williams (1987), 80 N.S.R. (2d) (App. Div.)

R. v. Williams (1987), 46 Man. R. (2d) 105 (C.A.)

R. v. Wiseman (1985), 22 C.C.C. (3d) 12 (Ont. Dist. Ct.)

R. v. Wood (1986), 74 N.S.R. (2d) 31 (App. Div.)

R. v. Yadollahi (1987), 19 O.A.C. 392 (C.A.)

R. v. York (1985), 45 Sask. R. 134 (C.A.)

Appendix 3

RESEARCH REPORTS FROM THE SEXUAL ASSAULT EVALUATION PROGRAM

Stanley, Marilyn G., The Experience of the Rape Victim with the Criminal Justice System Prior to Bill C-127, *Sexual Assault Legislation in Canada: An Evaluation, Report No. 1*, Department of Justice Canada, Ottawa: July, 1985.

Ruebsaat, Gisela, The New Sexual Assault Offences: Emerging Legal Issues, *Sexual Assault Legislation in Canada: An Evaluation, Report No. 2*, Department of Justice Canada, Ottawa: July, 1985.

Roberts, Julian V., Sentencing Patterns in Cases of Sexual Assault, *Sexual Assault Legislation in Canada: An Evaluation, Report No. 3*, Department of Justice Canada, Ottawa: 1990a.

Roberts, Julian V., An Analysis of National Statistics, *Sexual Assault Legislation in Canada: An Evaluation, Report No. 4*, Department of Justice Canada, Ottawa: 1990b.

Research Section, Department of Justice Canada, Overview, *Sexual Assault Legislation in Canada: An Evaluation, Report No. 5*, Department of Justice Canada, Ottawa: 1990.

Research Section, Department of Justice Canada, A Review of the Sexual Assault Case Law, 1985-1988, *Sexual Assault Legislation in Canada: An Evaluation, Report No. 6*, Department of Justice Canada, Ottawa: 1992.

Roberts, Julian V., Homicide and Sexual Assault, *Sexual Assault Legislation in Canada: An Evaluation, Report No. 7*, Department of Justice Canada, Ottawa: 1992.

Working Documents

Baril, Micheline; Bettez, Marie-Josée; Viau, Louise, Sexual Assault Before and After the 1983 Reform: An Evaluation of Practices in the Judicial District of Montreal, Quebec, Department of Justice Canada, Ottawa: November, 1988, WD1991-2a.

Ekos Research Associates Inc., Report on the Treatment of Sexual Assault Cases in Vancouver, Department of Justice Canada, Ottawa: September, 1988a, WD1991-3a.

Ekos Research Associates Inc., Report on the Impacts of the 1983 Sexual Assault Legislation in Hamilton-Wentworth, Department of Justice Canada, Ottawa: July, 1988b, WD1991-4a.

J. and J. Research Associates Ltd., An Evaluation of the Sexual Assault Provisions of Bill C-127, Fredericton and Saint John, New Brunswick, Department of Justice Canada, Ottawa: November, 1988, WD1991-5a.

University of Manitoba Research Ltd., Report on the Impact of the 1983 Sexual Assault Legislation in Lethbridge, Alberta, Department of Justice Canada, Ottawa: August, 1988a, WD1991-6a.

University of Manitoba Research Ltd., Report on the Impact of the 1983 Sexual Assault Legislation in Winnipeg, Manitoba, Department of Justice Canada, Ottawa: September, 1988b, WD1991-7a.

CS/RESORS Consulting Ltd., The Impact of Legislative Change on Survivors of Sexual Assault: A Survey of Front Line Agencies, Department of Justice Canada, Ottawa: November, 1988, WD1991-8a.

Appendix 4

THE SEARCH FOR CASES

For this report, the following computer databases were searched: DLR (covering the Dominion Law Reports), CCC (covering the Canadian Criminal Cases report series), ORP (covering the Ontario Reports), WWR (covering the Western Weekly Reports), and NRS (which covers the Atlantic Provinces Reports), the Alberta Reports, the Federal Trial Reports, the Ontario Appeal Cases, the Newfoundland and Prince Edward Island Report, the National Reporter, the Nova Scotia Reports, the Manitoba Reports, the Saskatchewan Reports, and the Yukon Reports. In addition, manual searches were conducted of the British Columbia Law Reports, the Northwest Territories Reports, and Criminal Reports. The computer searches were augmented by a manual check of the indices of the relevant report series to ensure that no cases were missed.

Special care was taken with Quebec cases, as those reported in French only were not included in the databases searched. A manual search was done of the Recueils de Jurisprudence du Québec from 1986 through April, 1988, of Quebec Appeal Cases for 1985, and of the Recueils de Jurisprudence du Québec Cour Supérieure for 1985. In addition, the Annuaire de Jurisprudence du Québec was consulted for digests of unreported cases. Digests of cases are simply short summaries of decisions, which may or may not appear in a report series.

As a further check to make sure all relevant reported cases had been found, all cases in the Table of Cases from Ruebsaat (1985) were subjected to a computer search for "cases judicially cited" to see if any of them had been referred to in subsequent cases and to make sure all reported appeals of any decisions mentioned in that report had been found.

Finally, a computer search was done to find unreported decisions. Unreported cases from the following databases were obtained: CJ, including all Canadian jurisdictions except Ontario and Quebec, and ORP, which includes only Ontario decisions. Unreported cases for Quebec were obtained from digests.

GLOSSARY

appellant Either the accused or the crown counsel can ask a higher court to review the decision made at the trial. The party that asks for the review is called the appellant. The appellant appeals the lower court decision.

actus reus The elements that must be present for the court to conclude that a crime has been committed. In a trial for sexual assault under section 246.1 (now section 271), there must be proof of an assault that was sexual in nature; in which force was used or there was the threat of force; and to which the complainant did not consent.

complainant The person who states (complains) that a crime has been committed.

general intent offence Some crimes require only that the accused had a general intent to commit the crime in order for there to be a conviction. Manslaughter, assault and sexual assault are examples of general intent crimes. The distinction between general intent crimes and crimes requiring a specific intention is that for the latter a person may show, for instance, that he or she was too drunk to form the specific intent to commit the crime. In that case, the accused could not be convicted. (See also "mens rea".)

hybrid offence In the Criminal Code, offences are summary conviction offences, indictable offences or hybrid offences. Hybrid offences can be charged either as a summary conviction offence or as an indictable offence, depending on what happened. This option allows the police and the prosecution to decide the most appropriate charge in the circumstances. "Simple" sexual assault (section 246.1, now section 271) is a hybrid offence so, for example, a summary conviction charge would probably be laid in a situation where a stranger grabbed a woman's breast while she was walking down the street. If the stranger grabbed her, tore off her clothes and attempted intercourse, then the more serious charge as an indictable offence would probably be laid.

indictable offence An indictable offence is the more serious criminal offence. The punishment for an indictable offence can be from a maximum two years in prison to life imprisonment, depending on the offence. Aggravated sexual assault is an indictable offence with a maximum sentence of life imprisonment.

mens rea A Latin expression referring to the accused's state of mind. To be convicted of a sexual assault, the accused must have intended to commit the crime.

summary conviction offence A less serious criminal offence with a possible maximum punishment of six months in jail and/or a $2000 fine.

voir dire A special hearing at which the judge decides whether evidence can be presented at the trial. In sexual assault cases, a voir dire is often held in private, with the jury, if there is one, and the public excluded.