

## THE RAPE TRIAL AND SEXUAL HISTORY EVIDENCE - *R v A* AND THE (UN)WORTHY COMPLAINANT

*Georgina Firth, Law School, Lancaster University\**

*“Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society.”<sup>1</sup>*

On August 1 2002, *The Guardian* carried a report of a 17-year-old woman who had taken a fatal overdose of antidepressants.<sup>2</sup> She had been raped by a 14-year-old boy. However, a careful reading of that report, and of an article that was included in the “Women” section of the paper<sup>3</sup> on the following day, revealed that it was not only the physical and emotional violation of the rape that had driven her to such an extreme of despair but the experience that she underwent during the trial of her assailant. Her family are recorded as saying that she had never recovered from the attack or from the humiliation of the trial, when she was twice asked to hold up in court the underwear she had been wearing at the time of the assault and to read out what was written on it – “Little Devil”.<sup>4</sup>

It is beyond dispute that rape is an appalling crime, encompassing assault and violation. From the above example, it is also abundantly clear that rape trials can be horrible.<sup>5</sup> As Purdom has noted, it is often the victim of rape who is made to feel ashamed and dirty, particularly where there is a degree of

---

\* I would like to express my gratitude to Professor Peter Rowe, Professor Hazel Biggs, Dr Agata Fijalkowski and to the anonymous referee for their insightful comments on earlier drafts of this article. I would also like to thank Toby Denney for his support and encouragement.

<sup>1</sup> Madame Justice L’Heureux-Dube in *R. v Seaboyer* [1991] 2 SCR 577

<sup>2</sup> “Call to protect rape victims as boy is locked up” – Kirsty Scott: *The Guardian*, August 1 2002

<sup>3</sup> “She Couldn’t Take Any More” – Kirsty Scott: *The Guardian*, August 2 2002.

<sup>4</sup> There are aspects of the media reporting of this case and the representation of the complainant in particular, that are problematic from a feminist perspective. It was made clear in the report that there was a degree of casual acquaintance between the complainant and defendant and this appears to have been used against her in court and in the report, to the extent that it was recorded for example, that the defence counsel suggested that she had gone with the defendant to the park (where she was raped) voluntarily, therefore it was not a “real”, *i.e.* stranger rape. Further, the complainant’s parents appear to have attempted to “reclaim” their daughter’s “honour” by suggesting that she was a virgin, thus playing to the prevalent gender stereotypes of appropriate femininity. The construction of rape complainants and the media is outside the scope of this paper. For a consideration of this issue see Lees, S (1996) *Carnal Knowledge: Rape on Trial*, Penguin, London, chap.3. The purpose of the example at this point is to illustrate vividly the horror and degradation of rape and the second “judicial rape” that takes place during the trial.

<sup>5</sup> See, *e.g.* “Rape is never glamorous” – Julie Bindel, *The Guardian* (Comment) October 2 2003.

acquaintance between her and her alleged rapist as there was in the above example.<sup>6</sup> Yet in our modern, enlightened, equal opportunities society, in the era of so called “girl power”, why should this be so? Why is it that rape is equated with the degradation and shame of the victim? What conception of women and the body does such shame assume?<sup>7</sup> These questions are central to the issue of how women are judged within the arena of the criminal law and arguably infer that rape is a “concern of standards”<sup>8</sup> as much as a matter of assault. As Purdom has perceptively commented, shame is an implicit judgment against the complainant, who throughout the criminal process is made to feel dishonourable, unworthy, indecent, a “tart”.<sup>9</sup> This is particularly obvious in the humiliation that women so often suffer in rape trials, trials which often become as much a judgment of the woman complainant and her “honour,” as of the man and rape.

As several commentators have argued,<sup>10</sup> one of the most important issues in tracing criminal law’s patrolling of the boundaries of appropriate (hetero)sexuality<sup>11</sup> and sexual difference are the rules of evidence, which shape the relevant context and time frame within which the female subject (or in the case of rape, object) is conceptualised. A well-established body of research has considered how the sexing of rape complainants and their objectification happens in the interpretation of the substantive law of rape. This discussion remains relevant in the light of the legislative reforms of the Sexual Offences Act 2003<sup>12</sup> as the new Act focuses almost exclusively on the

---

<sup>6</sup> Purdom, J (2000) “Judging Women: Rethinking Shame through Corporeality” in Richardson, J & Sandland, R (eds) *Feminist Perspectives on Law and Theory*, Cavendish Publishing, London at p.209.

<sup>7</sup> Purdom (2000) *supra* n.6. Purdom’s article focuses on the construction of shame in relation to the female body through a consideration of the theories of Deleuze. For a further philosophical discussion of shame and “Woman as Victim” see the discussion of Girard in A. Young, (1996) *Femininity as Marginalia* in McVeigh, Rush and Young (eds) *Criminal Legal Practices*, Open University Press, Oxford.

<sup>8</sup> Purdom (2000) *supra* n.6, p.209.

<sup>9</sup> *ibid.* Purdom used the term “victim” advisedly as her paper is a study of inscriptions of victimhood and conceptions of shame within the law on sexual offences. Throughout this article, I intend to use the term complainant, as the content of the paper is critiquing the disempowerment of women in the Criminal Justice System and I consider that within the conceptions of “woman” constructed by that system, victim can have pejorative connotations. Writers seeking to critique the feminist position such as Camille Paglia (1994) *Vamps and Tramps*, Random House, New York and Katie Roiphe (1993) *The Morning After*, Little & Brown, Boston have certainly used the term victim in that sense.

<sup>10</sup> See generally, N. Lacey, (1998) *Unspeakable Subjects: Feminist Essays in legal and social theory*, Hart Publishing, Oxford; N. Naffine (1994) “Possession: Erotic Love in the Law of Rape”, *Modern Law Review* 10, P. Rumney, (2001) “The Review of Sex Offences and Rape Law Reform: Another False Dawn?” [2001] 64 *Modern Law Review* 890; J. McEwan, (2005) “Proving Consent in sexual cases: Legislative change and Cultural Evolution”, 9 *E & P* 1-28.

<sup>11</sup> I am concerned in this paper with female complainants, *i.e.* women that have been raped. For a consideration of male rape and some of the problems that arise see P. Rumney, (2001) “Male Rape in the Courtroom: Issues and Concerns” *Crim Law Rev* 205 and P. Rumney, and M. Morgan Taylor, (1997) “Recognising the Male Victim: Gender Neutrality and the Law of Rape: Part 1”, 26 *Anglo-American Law Review* 198.

<sup>12</sup> The Act came into force on 1 May 2004.

revision of the substantive law of rape. The consequence of this focus is inevitably, that important issues relating to the way in which legal definitions of rape are interpreted and enforced by the criminal justice system and the norms, assumptions, images and values that shape that enforcement process have been excluded from consideration.

In this paper, I wish to explore the way in which the rules relating to sexual history evidence continue this sexing and thus contract the rape victim's space for a meaningful expression of her violation.<sup>13</sup> This is an area that has attracted much comment since the provisions of the Youth Justice and Criminal Evidence Act 1999 came into force. However, it is my contention that much of the focus on section 41 YJCEA 1999 in academic literature seems to have shifted away from the concerns which led to the legislation in the first place – namely the low conviction rate in rape cases<sup>14</sup> and the myths about women that led to this type of evidence being misused.<sup>15</sup>

Underlying much of the commentary in this area is the traditional assumption that previous sex with the defendant ought to be treated differently to previous sex with third parties. This assumption is rarely made explicit<sup>16</sup> and indeed even when it is raised, it seems to have been accepted uncritically by many, including the House of Lords in the important case of *R v A*.<sup>17</sup> The questions I now want to address are why is previous sexual history with the defendant seen as self evidently relevant to a rape trial? What underlies the assumptions made about relevance and what does the admission of such evidence say about the complainant and her worthiness of protection by the law?

To do this, I will examine the position prior to the 1999 Act and then move on to consider how the judiciary have effected a shift in focus through the

---

<sup>13</sup> By this I mean the way that women are being denied a way of talking about their experiences in their own terms in the rape trial. Women need to be taken seriously for who and what they are and not what others, including the law, assume them to be. For a consideration of how female sexual abuse victims are constructed see C. Malone,; L. Farthing, and L. Mace, (1996) *The Memory Bird: Survivors of Sexual Abuse*, Virago Press, London. See also I. Bryan, & J. Wallbank, (2004) "The Lore of Sexual Difference in Social and Legal Discourse on 'Date Rape'" 15 *Law and Critique* 183.

<sup>14</sup> The conviction rate in rape cases has continued to decline since the inception of the 2003 Act. See A. Travis, "Rape Conviction rate falls to an all time low" *The Guardian* February 25 2005 and L. Kelly, J. Lovett, L. Regan, , *A gap or a chasm? Attrition in reported rape cases* Home Office Research Study 293 (February 2005).

<sup>15</sup> See N. Kibble, "Judicial Discretion and the Admissibility of Prior Sexual History Evidence under section 41 YJCEA 1999: "Sometimes Sticking to your Guns means Shooting Yourself in the Foot: Part 2" [2005] *Crim LR* 263.

<sup>16</sup> For a fuller consideration see N. Kibble, "The relevance and admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases (2001) 32 *L. Cambrian Rev* 27 and J. Temkin, (2002) *Rape and the Legal Process*, 2<sup>nd</sup> ed., OUP, Oxford pp196-225.

<sup>17</sup> [2001] 3 All ER 1.

case of *R v A* and the use of the Human Rights Act 1998 – a shift that is perpetuated in the more recent debates.<sup>18</sup>

### **The Troubled Past of Sexual History Evidence:<sup>19</sup>**

Ever since Parliament failed in 1976 to implement the proposal contained in the Heilbron Committee's Report for reform of the common law rules on the admissibility of sexual history evidence,<sup>20</sup> this area of the law has been steeped in controversy. However, as Kibble notes, much of the debate has centred on the general admissibility of sexual history evidence and in particular, the problem of third party sexual history evidence.<sup>21</sup> To some extent, this focus is understandable given that this rule of evidence is perhaps the clearest example of the law's exercise of disciplinary power to police female sexuality. Feminist commentators have rightly asked why is it that when birth control has liberated women from the fear of unwanted pregnancy, when a woman's right to sexual pleasure is allegedly widely recognised, when women in industrialised countries now comprise more than 50% of the workforce, that a rape complainant's credibility is still judged on her sexual reputation, a reputation that is constructed and enforced by male assumptions of appropriate femininity? However, these arguments have failed to address the distinction made by the law between previous sex with the defendant and with other men generally – a distinction that has been maintained throughout the history of the common law and legislation in the UK and a distinction that has continued to be used to the detriment of women who claim that they have been raped in the context of a relationship or acquaintance situation.

Historically, Temkin notes that when the common law rules on the treatment of previous sexual history were developed in the 19<sup>th</sup> century, it was assumed that previous sexual history with the defendant should be treated differently to previous sexual history with third parties in as far as the former was relevant to consent and credibility rather than simply to the issue of credibility.<sup>22</sup> This assumption was not questioned at the time of the Heilbron Report and indeed, Kibble notes that in that report there was no real consideration of the basis for the admission of sexual history evidence with

---

<sup>18</sup> *E.g.* see D. Birch, "Rethinking Sexual History Evidence: Proposals for Fairer Trials [2002] *Crim LR* 531; D. Birch, "Untangling Sexual History Evidence: A rejoinder to Professor Temkin [2003] *Crim LR* 370.

<sup>19</sup> For arguments for and against the 1999 legislation see J. Temkin, "Sexual History Evidence – Beware the Backlash" [2003] *Crim LR* 217; N. Kibble, "The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases (2001) 32 *Cambrian Law Review* 27; D. Birch, "Rethinking Sexual history Evidence: Proposals for Fairer Trials [2002] *Crim LR* 531; D. Birch, "Untangling Sexual History Evidence: a Rejoinder to Professor Temkin [2003] *Crim LR* 370; M. Redmayne, "Myths, Relationships and Coincidences: the New Problems of Sexual History (2003) 7 *E & P* 75; N. Kibble "Judicial Perspectives on the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios [2005] *Crim LR* 190.

<sup>20</sup> Report of the Advisory Group on the Law of Rape paras.137-138.

<sup>21</sup> Kibble (2001) *supra* n.19 p.30.

<sup>22</sup> Temkin (2002) *supra* n.16 at p.196-197. *Riley* (1887) 18 QBD 481; *Cockcroft* (1870) 11 Cox CC 410.

the defendant.<sup>23</sup> The assumption that such evidence was obviously admissible was not challenged and has rarely been challenged since, perhaps, in part, because comparative studies show that it is maintained in most other common law jurisdictions.<sup>24</sup> Consequently, although section 2 of the Sexual Offences (Amendment) Act 1976 prohibited the use of sexual history evidence in “third party” cases (with a power for the Judge to admit it if was relevant in the particular case), sexual history evidence between the complainant and the defendant was not included in the prohibition<sup>25</sup> and continued to be freely admissible.

The Home Office Report, *Speaking Up For Justice*<sup>26</sup> recognised that the 1976 Act had failed and recommended that the law be changed. Sections 41 to 43 YJCEA 1999 extended the embargo on the use of sexual history evidence and prohibited the use of such evidence save in 4 exceptional cases – where consent is not the issue,<sup>27</sup> where the evidence relates to sexual behaviour which is alleged to have taken place at or around the same time as the event which is the subject matter of the charge,<sup>28</sup> where the past sexual behaviour is so similar to the complainant’s behaviour on the occasion in question that the similarity cannot reasonably be explained as a coincidence<sup>29</sup> and to rebut or explain sexual history evidence adduced by the prosecution.<sup>30</sup> It is notable that, in contrast to “rape shield” legislation in other jurisdictions,<sup>31</sup> there was

---

<sup>23</sup> Kibble (2001) *supra* n.19, p.32. See also Heilbron Report *op cit* n.20, paras.100-101 at p.17.

<sup>24</sup> For a fuller consideration of the comparative position see Temkin (2002) *supra* n.16 at pp.205-225 and Kibble (2001) *supra* n.19 at pp. 43-58.

<sup>25</sup> The Criminal Law Revision Committee (CLRC 15<sup>th</sup> Report, *Sexual Offences* paras.2.88-2.89), took the view, “based on the opinion of some Old Bailey judges,” that the provision was working well. However, studies suggested otherwise and case law from the Court of Appeal on section 2 indicated that they were entirely unwilling to deal with the issues. See J. Temkin, (2000) “Prosecuting and Defending Rape: Perspectives from the Bar, 27 *Journal of Law & Society* 219. See also V. Baird, (1998) *Rape in Court*, Society for Labour Lawyers, London and “Beware of Barristers” – Jennifer Temkin; *The Guardian* March 8 2000. For a comprehensive view of the pre 1999 attitude of the Court of Appeal to sexual history evidence see A. McColgan, (1996) “Common Law and the Relevance of Sexual History Evidence” *Oxford Journal of Legal Studies*, Vol.6, No.2 275. See also S. Lees, (1997) *Ruling Passions: Sexual Violence, Reputation and the Law* Open University Press, Buckingham, p.69.

<sup>26</sup> Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System 1998, Home Office London para.9.70.

<sup>27</sup> S.41(3)(a) YJCEA 1999.

<sup>28</sup> S.41(3)(b) YJCEA 1999.

<sup>29</sup> S.41(3)(c) YJCEA 1999.

<sup>30</sup> S.41(5) YJCEA 1999.

<sup>31</sup> See n.24 and accompanying text. In the rape shield legislation of New South Wales (Crimes Act 1900 s.409B(3)) and Michigan (Michigan Criminal Sexual Conduct Act s.520j), there is a specific exception to the rule of exclusion so that defence counsel can apply for evidence of sexual history with the accused to be admitted. The ‘new’ Canadian provisions are more complex and rely upon judicial discretion in this area. See s.276 of the Canadian Criminal Code which has been interpreted in *R v Seaboyer* 83 DLR 193, *R v M (M)* (1999) Ont. Sup CJ LEXIS 1027 and *R v Darrach* [2000] SCC 46. Commentary on these cases can be found in Temkin (2002) *supra* n.16 and Kibble (2001) *supra* n.16.

no explicit exception in the legislation relating to previous sexual history with the defendant and so for the first time, this type of sexual history evidence was placed on the same exclusionary footing as sexual history evidence with third parties.

Generally, some writers have expressed concern that the exceptional categories in the 1999 Act were too broadly drawn in relation to third party evidence, allowing the defence ample scope to bring the defendant within one or other of the categories.<sup>32</sup> For example, a mistaken belief defence<sup>33</sup> continues under the Act to provide an opportunity to apply to the judge for the admission of sexual history evidence. The defendant would continue to be able to argue that he mistakenly believed that the complainant was consenting because for example, he knew of specific instances of sexual activity with other men and thought she would be willing to have intercourse with him.<sup>34</sup> Further, Temkin has specifically considered the position of sexual history evidence with the defendant and has persuasively argued that, as with third party evidence, there is scope for the defence to apply to adduce such evidence if it is relevant under each of the four exceptions set out in the Act.<sup>35</sup> Whilst, on the one hand, Temkin appears to argue generally against the admission of prior sexual history evidence with the defendant, she counselled that the lack of such an exception in the Act might lead to a wholesale admission of such evidence without a proper consideration of its relevance.<sup>36</sup> This latter concern appears to have been borne out by the House of Lords decision in *R v A*, which I will consider in some detail later in this paper, and is also evident in a recent study of judicial attitudes to the admissibility of prior sexual history evidence.<sup>37</sup>

As a starting point, I would argue generally that there is no logic in allowing evidence of a woman's sexual history either as an assessment of her truthfulness or to show that the man believed that she consented. There is a difference between what a man has heard, which makes him think that she might consent if he makes an advance, and how she behaves when he does. The latter is the issue in the trial and the evidence should relate to her conduct at the time. It cannot be affected by what he thinks she did with others in the past. Further, a previous relationship with the accused does not necessarily indicate that consent was given on the occasion in question. This point was raised by Lord Lester in the debate prior to the YJCEA 1999

---

<sup>32</sup> See N. Lacey, (2001) "Beset By Boundaries: The Home Office Review of Sex Offences", [2001] *Criminal Law Review* 3, p.11; K. Cook, (2001) "Sexual History Evidence: The Defendant fights back", *New Law Journal*, July 27 2001 1133; Temkin (2000) *supra* n.25, p.198; Temkin (2003) *supra* n.19 and McEwan (2005) *supra* n.10, p.20.

<sup>33</sup> It is worth noting here that the previous defence of "honest belief" set out in *DPP v Morgan* [1976] AC 182 has been replaced in the 2003 Act with a defence of reasonable belief in section 1(2).

<sup>34</sup> For examples of judicial attitudes to this scenario see N. Kibble, [2005] Part 1 *supra* n.19, p.196.

<sup>35</sup> Temkin (2002) *supra* n.16 at pp.217-218.

<sup>36</sup> *ibid.*, pp.218 and 224. See also Temkin [2003] *supra* n.19.

<sup>37</sup> N. Kibble, [2005] Part 1 *supra* n.19. Whilst Kibble argues at p.204 that judges appeared to "approach questions of relevance and admissibility thoughtfully", it was noticeable that in each scenario, the majority of the judges questioned would have admitted the evidence in some form.

where he stated that “*consent to engage in sexual relations in the past does not give a blank cheque for consent to engage in sexual relations in the future.*”<sup>38</sup> However, it seems that the principally male judiciary<sup>39</sup> are unable to follow the logic of these arguments or to exclude their own gender bias from the trial,<sup>40</sup> particularly when the complainant is alleging that she was raped by someone with whom she has had a previous relationship.

One possible reason for the continuing (judicial) popularity of such evidence has been suggested by Sue Lees. According to Lees, the reason for the continuing emphasis on a woman’s reputation in rape trials is that the rape complainant is often unmarried, a single mother, separated or divorced and is seen as occupying a space in particular need of regulation and control. Thus the “spectacle of degradation” visited upon her during the trial operates to protect the male defendant from an allegation by such a dangerous and inappropriate model of femininity, consolidate the privilege of men to decide when a woman says yes and acts as a mechanism to control and punish inappropriate expressions of female sexual autonomy.<sup>41</sup> This argument is particularly relevant in the context of “acquaintance” rape type situations where the law has long had difficulty in distinguishing between normal and coercive sexual encounters<sup>42</sup> and the whole issue of consent and who gets to say no to whom is fraught with difficulty.

### Procedural Developments

In response to the Home Office recommendations in *Speaking Up for Justice*,<sup>43</sup> the Youth Justice and Criminal Evidence Act (YJCEA) 1999<sup>44</sup> introduced a new regime which may have the potential to assist some complainants at trial. Complainants are to be eligible for assistance in giving evidence,<sup>45</sup> potentially including screens<sup>46</sup> to ensure that the complainant

---

<sup>38</sup> Lord Lester of Herne Hill, Report Stage, 8 March 1999, column 23. Also reported in Kibble (2001) *supra* n.16 at p.34.

<sup>39</sup> Interestingly, in 2001, Cherie Booth QC brought a legal challenge to the all male House of Lords prior to the hearing of *R v A* [2001] 3 All ER 1 arguing that they did not provide an impartial tribunal and could not strike a fair balance between the interests of male defendants and female complainants. She didn’t succeed. See “Rape Law Challenge to All Male Lords” – Clare Dyer: *The Guardian* March 19 2001.

<sup>40</sup> For recent examples of this see N. Kibble, “Judicial Perspectives on the Operation of s 41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios [2005] *Crim LR* 190. One telling quote at the end of the article was the following; “Left to myself I would let it all in but I know I can’t do that anymore” (p.205). Contrary to Kibble’s assertion that this demonstrates that judicial discretion is not necessarily unsatisfactory, I would argue that this comment indicates how far the judiciary have yet to go in understanding and being prepared to rebut robustly the myths surrounding rape.

<sup>41</sup> Lees (1997) *supra* n.25, p.88.

<sup>42</sup> Naffine (1994) *supra* n.10. See also Bryan, I & Wallbank, J (2004) “The Lore of Sexual Difference in social and legal discourse on ‘Date Rape’” 15 *Law and Critique* 183.

<sup>43</sup> Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System 1998, Home Office, London para.9.70.

<sup>44</sup> These sections came into force on 24 July 2002.

<sup>45</sup> S.17(4) YJCEA 1999.

doesn't have to see the defendant, TV links so that evidence can be given from outside the court room,<sup>47</sup> the clearing of press and the public from the court whilst the complainant is giving evidence,<sup>48</sup> and the use of recorded video evidence as a substitute for examination in chief.<sup>49</sup> The judge will decide whether to authorise the measures on the ground that they are likely to improve the quality of the evidence that the complainant is able to give. Further, consideration is to be given to the complainant's views when considering whether the measure would inhibit effective testing of her evidence.<sup>50</sup> These measures, which also preclude the defendant cross examining the complainant himself, were a response to the notorious Ralston Edwards trial<sup>51</sup> in 1996, when the defendant personally cross examined the complainant over 6 days. However, it has already been noted<sup>52</sup> that whilst well meaning in theory, they may not prove effective in practice. It will be particularly interesting to see how (or indeed whether) these provisions assist when the complainant is alleging that she has been raped by someone with whom she has had a previous sexual relationship and that is clearly a matter for further research. However, some indication of the views that may prevail in the court room have already been played out in the academic literature and the media.

First, Dea Birkett in an article for *The Guardian* has argued against both the protection against questioning on sexual history and the Home Office procedural proposals, as in her view, they have worked against women being recognised as full and equal citizens.<sup>53</sup> She argues that such protections imply that women are "too feeble" to stand up to the adversarial process and "too pathetic" to face their alleged attacker. She considers that when women are excused from cross examination or when they remain silent, too traumatised to give evidence or when they are allowed to give evidence by video link, they are situated as "damaged, blubbing women pitched against hardened rapists."<sup>54</sup> They are positioned as children, "incapable, vulnerable and needing guidance,"<sup>55</sup> whilst the accused is portrayed as a "monster." Birkett claims that this compromises the defence. She posits that the accused must be considered innocent until proved guilty,<sup>56</sup> so she argues that both parties should be allowed to have their say and the jury should decide.

---

<sup>46</sup> S.23 YJCEA 1999.

<sup>47</sup> S.24 YJCEA 1999.

<sup>48</sup> S.25 YJCEA 1999.

<sup>49</sup> Ss. 27 & 28 YJCEA 1999.

<sup>50</sup> S.19(3) YJCEA 1999.

<sup>51</sup> Cited in Temkin (2000) *supra* n.25, p.202. See also *R v Brown* [1998] 2 Cr App R 364.

<sup>52</sup> See A. McColgan, (2000) *Women Under the Law: The False Promise of Human Rights* Longman, Harlow, Essex generally and Temkin (2000) *supra* n.25, p.202.

<sup>53</sup> (1998) *The Guardian*, 4 August cited in J. Purdom, (2000) "Judging Women: Rethinking Shame through Corporeality" in J. Richardson, & R. Sandland, (eds) *Feminist Perspectives on Law and Theory*, Cavendish Publishing, London at 209.

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.*

<sup>56</sup> Vera Baird in a critique of rape trials prepared for the Society of Labour Lawyers makes the same point; that a complainant's past history may be relevant and must be allowed in evidence to forestall the assumptions about women which position her as innocent, vulnerable and in need of protection. Of course the danger with



This is also, to some extent, the position taken by Birch, who suggests that we should look for ways of debunking rape myths within the trial process rather than through excluding potentially prejudicial sexual history evidence. However, her article does not really suggest how this might be achieved. Interestingly, her argument for the inclusion of sexual history evidence with the accused seems to be based on the fact that theoretically it would be more coherent to do so rather than from any conviction that such evidence is probative of the issues at trial. She gets around this point by suggesting that sexual history evidence is important context or background evidence and should be admitted only to the extent that it is necessary to do so to enable the jury to make sense of the facts before them.<sup>57</sup> She argues that we should “think of ways of taking the jury into the light rather than deliberately keeping them in the dark.”<sup>58</sup>

However, as Purdom recognises,<sup>59</sup> this is not so easy as women do not have equal citizenship with men.

“They remain under the protection and definition of men. As child, she is ashamed and silent; as whore, she is shameful, and that indecency tempers her complaint of rape. There is both the shame **for** women and the shame **of** women. On both counts she is substandard. Where is her voice?”<sup>60</sup>

What Birkett and Birch fail to recognise, is that unless and until women are permitted to express an affective and embodied narrative of their experience and a female centred space is created in the legal and procedural rules, women will continue to be treated unjustly during the rape trial. Wishing it were otherwise, will not change the vicious reality of the trial for rape complainants and arguments based on the fairness of the trial for the defendant or “lack of theoretical coherence”<sup>61</sup> obscure this.

The second reason for scepticism about the efficacy of the new measures is that they are subject to the Human Rights Act 1998 and as McColgan<sup>62</sup> and Temkin<sup>63</sup> have both noted, the efficacy of similar provisions in Canada has been short-lived. The Canadian Charter of Human Rights and Freedoms was used to effect by defendants in rape cases in Canada to bring about the “dismantling” of legislation to protect complainants from sexual history

---

this is that if a woman is not positioned as a child, there is the risk that she will be positioned as a temptress. V. Baird, *Rape in Court*, 1998, London: Society for Labour Lawyers. Purdom argues and I would agree that women are never constructed within the rape trial as independent, with a voice of their own (p.210).

<sup>57</sup> On this analysis, sexual history evidence with the accused would always be relevant. Birch [2003] *supra* n.19. I have attempted to summarise here some of the arguments put forward by Professor Birch in her article.

<sup>58</sup> Birch [2003] *supra* n.19, p.10. Whilst I would not argue with Birch about the need to educate wider society about rape myths generally, I am concerned that her suggestion that such evidence is important background or context evidence would lead to previous sexual history evidence with the accused being considered relevant and admissible in all cases.

<sup>59</sup> Purdom (2000) *supra* n.6, p.211.

<sup>60</sup> Purdom (2000) *ibid.*, p.211.

<sup>61</sup> Birch [2003] *supra* n.19 at p.374.

<sup>62</sup> McColgan (2000) *supra* n.60, chap.9.

<sup>63</sup> Temkin (2000) *supra* n.9, p.202.

evidence<sup>64</sup> and its substitution with a much weaker provision.<sup>65</sup> I will move on to discuss the effect of the Human Rights Act on the protection of rape victims in more detail in the next section of this article, but it is clear from the Canadian experience that the Act will be used by defence lawyers in an attempt to subvert increased protection for rape complainants. Some authors have sought solace in the fact that the jurisprudence of the European Court of Human Rights has latterly demonstrated recognition of the need to protect victims in the criminal justice system as well as defendants. However, the protection of female complainants will be in the hands of the UK judiciary as it interprets the Convention and, given the House of Lords decision in *R v A* and the lack of available gender awareness training for the judiciary,<sup>66</sup> I would suggest that this does not bode well for women,<sup>67</sup> particularly in cases where the complainant alleges that she was raped by an acquaintance or intimate.

### Sexual History Evidence and the Human Rights Act 1998

*R v A* was a case concerned with the wording of section 41 of the Youth Justice and Criminal Evidence Act 1999 and the blanket prohibition on the use of sexual history evidence as between the defendant and the complainant. The Lords were able to consider the circumstances under which such evidence could be admitted, despite the explicitly exclusionary nature of the legislation involved, because of the introduction of the Human Rights Act 1998 into English law. In brief, the facts of the case were that the defendant, A, had been charged with rape. His defences were that the complainant had consented or alternatively that he honestly believed that she had consented. The basis for his belief in consent was that he asserted that he and the

---

<sup>64</sup> McColgan (2000) *supra* n.60, chap.9.

<sup>65</sup> *ibid.* See Canadian Criminal Code, s.276. The previous Canadian provision referred to is s.246 of the Canadian Criminal Code. This was enacted in 1982, challenged in the case of *Oquataq* (1985) 18 CCC (3d) 440 and repealed in 1992 to be replaced by s.276. S.276 was then challenged in *Seaboyer*, declared to be unconstitutional and re-interpreted to allow for judicial discretion on admissibility. The full text of s.246 can be found in Temkin (2002) *supra* n.16 at p.206 and a fuller discussion of both provisions can be found on pp.206-225.

<sup>66</sup> Kibble [2005] *supra* n.16, p.205 argues that there has been some significant improvement in the attitudes of the judiciary through specific training for those who sit on trials involving serious sexual offences and I would not seek to undermine the importance of such training. However, my position on this is similar to that of McEwan (2005) *supra* n.10, p.2 that there is evidence that the operation of gender myths and stereotypes continues to impact on judicial directions and judicial decision-making.

<sup>67</sup> See McEwan (2005) *supra* n.10, p.20; *R v Mokadi* [2004] *Crim LR* 373 and commentary by Birch, DJ [2004] *Crim LR* 373 at 375. In *Mokadi*, the defendant sought to cross examine on the basis that the complainant, who was wearing a short skirt and vest top, had accepted a lift from a much older man, shortly before going to Mokadi's flat with him. The trial judge excluded the evidence under s 41 YJCEA 1999. However, on appeal, the Court of Appeal held that the evidence was relevant to consent and should have been allowed. In allowing the appeal, the Court of Appeal appeared to assume that the car incident reflected a willingness to engage in sexual activity with the driver, which could be transferred to a willingness to consent with Mokadi. Both Birch and McEwan are rightly critical of this decision.

complainant had been having a consensual sexual relationship for three weeks prior to the alleged rape. She denied this.

In the course of lengthy judgments, the Lords held that, subject to the importance of seeking to protect the complainant from indignity and humiliating questions, the test of admissibility was whether the evidence and questioning relating to it was nevertheless “so relevant to the issue of consent that to exclude it would endanger the fairness of the trial.” The decision as to relevance was to be a matter for the trial judge based on the individual facts of each case.

The judgment therefore appears, on the face of it, to be an attempt to balance the rights of the defendant to a fair trial under article 6 against the interests of the complainant.<sup>68</sup> However, as I will now explore, the narratives and discourses operating throughout the judgments are likely to have the effect of subverting the intention and policy behind the enactment of section 41, of turning the provision completely on its head by inserting a condition of relevance subject to judicial control and of re-introducing the possibility of sexual history evidence being routinely admitted in trials that do not conform to the ideal of “real rape.”<sup>69</sup> This clearly has important implications for women who have had a sexual relationship with their alleged rapist in the past.

There was a marked shift in their Lordships’ judgments from an acceptance of general notions of the unfairness of admitting sexual history evidence to an attempt, through a particularistic approach, to justify the admission of sexual history evidence as between the complainant and defendant. The Law Lords re-introduced the traditional distinction between sex with the defendant and sex with other men in order to enable them to justify a difference in treatment between the admissibility of such evidence by a logical process of syllogistic reasoning. For example, Lord Steyn supported the “commonsensical” nature of his argument by drawing an analogy between evidence of sexual history between the two parties to the incident in question and a murder suspect who has previously vowed to kill the victim. This, he argued, is logically relevant to the issue of intent in the same way that evidence of previous sexual history may be relevant to consent.<sup>70</sup> The

---

<sup>68</sup> This tendency to concentrate on the fairness of the trial for the **defendant** at the expense of considerations of fairness for the **complainant** is precisely the issue that I wish to criticise in some of the contemporary academic literature. *E.g.* see N. Kibble, [2005] *supra* n.16 and D. Birch, (2003) *supra* note 16.

<sup>69</sup> See K. Cook, (2001) “Sexual History Evidence: The Defendant fights back”, *New Law Journal*, July 27 2001 1133 for a further critique of this decision and the consequences of it. Cook suggests that s.41 YJCEA 1999 seems destined in the hands of the judiciary to be rendered as ineffectual as section 2 SO(A)A 1976. For a full examination of s.2 and the judicial “dismantling” of the intention behind it see McColgan (1996) *supra* n.25. See also P. Mirfield, “Human Wrongs” [2002] *LQR* 118 (Jan) 20-27.

<sup>70</sup> Lord Steyn at para.31. This argument was rehearsed by Kibble (2001) *supra* n.16 at p.51. My concern is that this analogy ignores the question of context. There are considerable differences between a murder trial where the prosecution is seeking to prove intent to kill, an important part of which may be motive to do so and a trial for rape where the issue is whether or not the complainant consented to sex with the defendant on this occasion.

Lords thus purported to show that it was a matter of “common sense” that the inadmissibility of sexual history evidence generally had never been intended to encompass evidence relating to a sexual relationship between a complainant and the assailant.<sup>71</sup>

Further, they posited that the test for the admissibility of such evidence must be relevance and that the determination of relevance is best left to the discretion of the judges. This raises several questions, not least as to what meaning the Lords were placing on the term relevance in this context. As Redmayne suggests relevance can be a complex issue, encompassing “common sense” intuitions and notions of probative force, *i.e.* ability to assist in proving one of the issues in the case.<sup>72</sup> Their Lordships appeared to be arguing that sexual history evidence with the defendant is relevant because it is probative of the issue of consent and they were eager to focus on this and distance themselves from any accusation that they were undermining the legislation by attacking the credibility of a complainant through the admission of such evidence. However, I would suggest that throughout the judgments there is a continual slippage between the discrete issues of consent and credibility. Clearly underlying the use of the terms ‘relevance’ and ‘common sense’ in at least some of the judgments, is the intuition or assumption that if the complainant has slept with the accused before, then she is more likely to consent to sleep with him again than she would be if he were a stranger. However, is this assumption a legitimate one to draw? In order to consider this, it is helpful to turn to the available research evidence on sexual behaviour in the UK.<sup>73</sup>

One report that has been drawn upon by McColgan<sup>74</sup> and Redmayne<sup>75</sup> is the National Survey of Sexual Attitudes and Lifestyles.<sup>76</sup> Generally, whilst this report found that sexual activity outside marriage was common, it also suggested that it was rare for women to have a large number of sexual partners and uncommon for them to have sex outside the context of a relationship.<sup>77</sup> It could therefore be inferred from this that the majority of adult female rape victims could be expected to have a sexual history and what is more, it may not be uncommon for them to have had a sexual relationship with the accused in the case. To some extent, this finding is borne out by the increase in reported acquaintance rapes.<sup>78</sup> So what does this indicate about the relevance to consent of a previous sexual history with the accused? If the research evidence is to be accepted then perhaps that such evidence is not as obviously relevant as might previously have been thought.

---

<sup>71</sup> For further examples of the use of “common sense” by the Lords see Lord Slynn at para.10 and Lord Steyn at paras. 31 and 45 although such references can be found throughout all five judgments.

<sup>72</sup> Redmayne (2003) *supra* n.19 at p.2.

<sup>73</sup> Johnson, A.M *et al* (1994) *Sexual Attitudes and Lifestyles*, Blackwell Scientific, Oxford and Wellings, K *et al* (1994) *Sexual Behaviour in Britain: The National Survey of Sexual Attitudes and Lifestyles*, Penguin, London.

<sup>74</sup> McColgan (1996) *supra* n.25 at 285-286.

<sup>75</sup> Redmayne (2003) *supra* n.19 at p.3.

<sup>76</sup> Commonly known as NATSAL, *supra* n.73. Redmayne (2003) *supra* n.19 notes the methodological problems of such research at n.18.

<sup>77</sup> NATSAL *supra* n.73 at 97, 113, 115, 130-3, 239-241.

<sup>78</sup> Kelly, Lovett & Regan (February 2005) *supra* n.14.

Further, as Redmayne notes, in the context of the rape trial, the information that the complainant and the accused know one another will already be apparent to the jury.<sup>79</sup> So where does this leave the Lords' reasoning that such evidence is important to the issue of consent rather than to the issue of the complainant's credibility as a witness and why were they so eager to re-insert a condition of relevance subject to their discretion into the legislation?

As Nicholson<sup>80</sup> and Young<sup>81</sup> have suggested in a different context, this jealous guarding of judicial discretion, through the admission of a test of relevance, allows the judiciary to maintain a strict control of the facts and themes in summing up a case. What this may mean in practice, is that the judge in an individual case will be able to manipulate the rules of admissibility and the discourses of consent to privilege a particular notion of (hetero)sexuality and to reward women who exhibit "approved characteristics", for example those who are seen to be "respectable" *i.e.* sexually inexperienced and thus worthy of the law's protection.<sup>82</sup> In this way, through its strict control of the discourses, the law will be able to continue to police the sexuality of women and to maintain the privileged position of male centred notions of sexual intercourse at the heart of rape law.

In general, the Lordships' judgments develop their commonsensical proposition by setting up a sliding scale of "connection" between at one extreme, an isolated incident of sex some time in the past<sup>83</sup> and at the other, a continuous period of co-habitation during which "two young people had lived together and had sex as part of a happy relationship".<sup>84</sup> Lord Slynn noted that he suspects that the "*ordinary man or woman on the street would find* (the exclusion of such evidence) *very strange*"<sup>85</sup> thus inferring that their Lordships' understanding of common sense was drawn from and encompassed societal and cultural notions of what is right and appropriate. The inclusion of the "ordinary woman" in this context could be said to smack of tokenism given the general thrust of the judgments but it is clearly a rhetorical device to suggest that the Lords are enlightened; that they do not subscribe to purely male concepts of common sense but that they appreciate the concerns of women about the issue of rape and its enforcement.

---

<sup>79</sup> Redmayne (2003) *supra* n.19 at p.7.

<sup>80</sup> D. Nicholson, (1995) "Telling Tales: Gender Discrimination, Gender Construction and Battered Women", *Feminist Legal Studies* 3(2) 185.

<sup>81</sup> A. Young, (1996) "Femininity as Marginalia" in McVeigh, Rush and Young (eds) *Criminal Legal Practices*, Open University Press, Oxford. Both Young and Nicholson were discussing judicial control of the defence of provocation in cases of "battered" women who kill their partners. However, I would argue that the points that they make are valid in many trials in which the law needs to construct the female gender. As Naffine has commented at p.58 in N. Naffine, & R. Owens, (1997) *Sexing the Subject of Law*, Sweet & Maxwell, London, the law needs to get specific when it considers women, as women are the non standard case which therefore requires definition.

<sup>82</sup> For a reading of the law's construction of "worthy" women in the context of section 2 SO(A)A 1976 and in particular the Court of Appeal decision in *R v Viola* [1982] 1 WLR 1138 see McColgan (1996) *supra* n.25.

<sup>83</sup> Lord Steyn at para.32, Lord Hutton at para.152.

<sup>84</sup> Lord Slynn at para.10.

<sup>85</sup> *ibid.*

Lords Steyn and Hope focused on the difference between (real) rape, where there is extreme violence and little difficulty in proving the fact of the rape, and the acquaintance situation, where consent is in issue and proof is more “sensitive and difficult.”<sup>86</sup> In stressing the difficulties of proof in dating or acquaintance situations, Lords Steyn<sup>87</sup> and Hope<sup>88</sup> both implicitly placed judges in a position of authority as the most likely persons to be able to find the “truth”<sup>89</sup> of an allegation and yet reflected the difficulty that the law has in distinguishing between rape and normal masterful seduction. They utilised this “difficulty”, situated as one of proof rather than one of ideology, to infer that a woman’s sexual reputation, at least as far as the specific defendant is concerned, may be relevant in the jury’s determination of her consent. In drawing this implicit inference, they thus reinforced the very myths and stereotypes about the “woman scorned” that they purport to have disregarded in this “modern” age.

Lord Clyde, however, went slightly further and in doing so interestingly revealed that, on the level of imagination, it is beyond the law’s understanding that there may be many reasons why a woman, having had consensual sex with a man on one occasion, would be less likely to agree to sexual intercourse with him on a future occasion, that acquaintance rape can be “real” rape. He notes at paragraph that section 2 of the 1976 Act dealt only with **rape** and not the complainant’s **sexual experience** with the defendant.<sup>90</sup> In distinguishing rape as involving “other men” and (normal) sexual experience as involving this defendant, Lord Clyde thus, perhaps unwittingly, revealed the inherent sexism inscribed into the language of the criminal law. Clearly, in order to reach his conclusion, Lord Clyde must have started from the historical premise that “unchaste” women were more likely to consent to sexual intercourse and to lie about it when they did. For Lord Clyde, it seems that in an acquaintance situation, all sex is normal *i.e.* consensual sex and once a woman has shown a propensity to have sex with a particular man, her right to withdraw her consent is severely circumscribed.<sup>91</sup>

Clearly, in seeking to justify their “commonsensical” intuitions as to relevance, the Lords struggled to differentiate between a general propensity to consent to sex and a specific propensity to consent to sex with this defendant. In order to avoid appearing to subscribe to the myth that unchaste women are more likely to consent to sex, some of their Lordships and in particular, Lord Hutton attempted to justify the inclusion of sexual history

---

<sup>86</sup> Lord Steyn para.35, Lord Hope at para.77, Lord Clyde at para.115.

<sup>87</sup> Lord Steyn at paras.32, 39. Ironically, Lord Steyn argues at 32 that to a blanket exclusion risks “disembodying the case before the jury”!

<sup>88</sup> Lord Hope at para.77.

<sup>89</sup> In Foucault’s explanation of the relationship between power, knowledge and truth, he posits that knowledge claims, such as those made here by the Lords, give rise to the power to assert that what one is saying is the “truth”. M. Foucault, (1980) *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, (ed.) C. Gordon, Harvester Wheatsheaf.

<sup>90</sup> Lord Clyde at para.114.

<sup>91</sup> These are precisely the “twin myths” described as discredited in each of their Lordships judgments and this example perhaps most clearly demonstrates the inherent contradiction in the arguments presented by the Lords to allow the admission of certain types of sexual history evidence.

evidence with the defendant by stating that it was not relevant simply because of the bare fact of the relationship (in comparison with Lord Steyn) but because it has some different quality, *i.e.* that it is evidence to show a particular mindset or to show affection.<sup>92</sup> But what does this mean? What is behind this if not the inference that a complainant has a propensity to consent with a particular defendant because she has consented before?

Lord Hutton used the point made by Harriet Galvin<sup>93</sup> and cited in Seaboyer<sup>94</sup> that previous sex with the defendant is relevant to consent because its probative value rests on the nature of the complainant's specific mindset toward the accused rather than on her general unchaste character. This question of affection is raised in a number of the judgments to justify inclusion. But the question must then be raised as to how affection is to be defined in the context of an 'acquaintance' rape trial and what connection exists between previous sexual activity with the defendant, affection and consent on this occasion? These are difficult questions that are not really addressed by their Lordships' judgments, despite (or perhaps because of) the fact that the answers could have serious consequences for the law's assessment of particular women's worthiness of protection, *i.e.* women's ability to say no to past or present partners and be supported in that no by the law.

Boyle and MacCrimmon<sup>95</sup> have argued, in relation to a similar interpretation of Canadian rape shield legislation that the relevance of mindset to show consent "*depends on the sexual nature of the activity and draws on discriminatory generalisations.*"<sup>96</sup> They suggest that an acceptance of reasoning based on a disposition to consent to sex with a particular person –

"reinforces patterns of discriminatory fact finding which legitimates presumptive sexual access and draws on cultural images which invite the inference that women are less likely to be raped by their sexual partners than others."<sup>97</sup>

If past affection or even previous sexual attraction<sup>98</sup> is the key to admissibility, then in their Lordships' terms, very little 'relationship' evidence will be excluded from the rape trial.

---

<sup>92</sup> Lord Hutton at para.152.

<sup>93</sup> H.R. Galvin, (1980) "Shielding rape victims in the State and Federal Courts: A Proposal for the Second Decade" 70 *Minn L Rev* 763 at 807. Galvin's work is discussed further in *Seaboyer per McLachlin* at p.279, Kibble (2001) *supra* note 16 at pages 44-45 and Redmayne (2003) *supra* n.19 at p.10.

<sup>94</sup> *Per McLachlin* at 279.

<sup>95</sup> C. Boyle, & M. MacCrimmon, (1998) "The Constitutionality of Bill C-49: Analysing Sexual Assault as if Equality really mattered" 41 *Crim LQ* at 229. This article is considered in some detail in Kibble (2001) *supra* n.16 at p.49 and Redmayne (2003) *supra* n.19 at pp.4 and 10. For a contrary view see: Paciocco, DM (1993), "The new rape shield provisions in section 276 should survive Charter Challenge", 231 Cr (4<sup>th</sup>) 223.

<sup>96</sup> Boyle and MacCrimmon (1998) *ibid.*, p.229.

<sup>97</sup> Boyle and MacCrimmon (1998) *ibid.*, p.229.

<sup>98</sup> The question as to whether the reasoning that sexual attraction without affection should be permissible is addressed in Redmayne (2003) *supra* n.19 at p.10.

Further, the Lords' acknowledgement of a difference between stranger rape and acquaintance rape risks undermining the experience of women who allege rape against an acquaintance as being 'real rape' and fails to take the further step of appreciating that acquaintance rape is something very different from consensual sex. In a case involving an allegation of acquaintance rape, something has happened that has led the complainant to accuse the defendant of rape. It is therefore a question of context. This issue has been raised by Schwarz<sup>99</sup> in relation to a similar line of reasoning in interpreting the Canadian legislation. He argues that allowing evidence of specific propensity, such as previous sexual history evidence with the accused, fails to acknowledge the autonomy of an individual complainant to say no on a particular occasion and comes dangerously close to suggesting that she is the type of woman who will be likely to have sex.<sup>100</sup> He suggests that what this kind of reasoning fails to recognise is that there is nothing about the mere fact of other consensual activity in itself which can inform or be logically probative of the issue of actual consent at the time of the sexual assault.<sup>101</sup> In other words, it shifts the focus of the trial away from the accused's behaviour on the night in question (what he said or did to the complainant, her reaction and emotional state) and back to her sexual reputation. In this way, it can be seen that such reasoning risks supporting the myth that rape is committed by strangers and severely circumscribes the ability of a complainant to say no to a previous sexual partner or acquaintance and be believed in her no.

In re-enforcing the assumption that a woman is more likely to consent to sleep with a person she knows, the Lords have failed to appreciate one of the main findings of research on rape, namely that acquaintance rape is far more common than stranger rape.<sup>102</sup> It could be inferred from this that women are most at risk of rape from their partner, in which case, as Redmayne suggests, an ongoing relationship could be both evidence of consent and evidence of rape at the same time.<sup>103</sup> Having made this important point, Redmayne does not go on to tackle the relevance question further but suggests that previous sexual history evidence with the accused may be relevant but of little probative value and could therefore be excluded on policy grounds if there was sufficient evidence to be able to say that excluding such evidence poses no threat to the defendant.<sup>104</sup> He implies that at the current time, there is not the empirical evidence to justify this.

However, I would argue that this point is crucial to undermining the reasoning of the Lords. There are clearly two issues here. First, if previous

---

<sup>99</sup> H. Schwarz, (1994) "Sex with the Accused on other occasions: The evisceration of rape shield protection", 31 Cr (4<sup>th</sup>) 232. For a rejoinder to Schwarz's argument see D.M. Paciocco, (1995) "Techniques for eviscerating the concept of relevance: A reply and rejoinder to "Sex with the Accused on other Occasions: The evisceration of rape shield protection" (1995) 33 Cr (4<sup>th</sup>) 365.

<sup>100</sup> Schwarz (1994) *ibid.*, at pp.233-235.

<sup>101</sup> *ibid.*

<sup>102</sup> See, e.g. A. Myhill, and J. Allen, (2002) *Rape and Sexual Assault of Women: The extent and nature of the problem. Findings from the British Crime Survey*, Hors 237 at 30. See also Kelly *et al* (2005) *supra* n.14.

<sup>103</sup> Redmayne (2003) *supra* n.19 at p.7.

<sup>104</sup> *ibid.*



sexual history evidence with the defendant is not self evidently probative of consent (relevant) then where is the detriment in excluding it? Second, even if the arguments against relevance are rejected and such evidence is considered to be probative or relevant, then is it so prejudicial, in terms of its effect of re-inscribing myths and stereotypes about particular types of complainants into the law, that it ought to be excluded in any event? I would argue that it is and this was precisely the reason for exclusion in the legislation and the reason that this has proved such a vexed issue in many other common law jurisdictions.<sup>105</sup> Myths are not something that crop up only in the court room. They are imported there from society, popular culture and the media.<sup>106</sup> A growing body of research has considered the operation of these myths in informing attitudes in the Criminal Justice System and society at large to rape complainants in cases where acquaintance rape is alleged. For example, one study indicated that juries tend to be harsher on the complainant, attribute less responsibility to the defendant and more to the complainant where acquaintance rape as opposed to stranger rape is alleged.<sup>107</sup> Other studies have found that victims are considered less truthful when they have been involved in a close relationship with the defendant<sup>108</sup> and that jurors who hear evidence involving prior sex between the complainant and the accused are less likely to find the complainant credible, more likely to find her blameworthy and more likely to believe that she consented,<sup>109</sup> even when they have been given a judicial direction to the contrary.<sup>110</sup> Therefore, given what we know about the operation of myths in society and the effect that they play in influencing juries' attitudes to credibility (rather than the discrete issue of consent), I would argue strongly that a policy to exclude such evidence could be supported.

On studying the judgments in A, it very quickly becomes clear that the Law Lords, whilst purporting to respect the need to protect rape complainants and the reasoning behind this protection, are not providing a space within the discourses for mutuality of sexual desire or for women's affective experiences. Rather by a subtle process of gender construction, the judgments can be seen to define and limit female experience to social and cultural stereotypes. In other words, there is a subtle suggestion in the language (most explicitly that of Lord Clyde) that such evidence is relevant and admissible because women are inclined to lie about allegations of rape

---

<sup>105</sup> For a critique of the position in other jurisdictions see Temkin (2002) *supra* n.16 at pp.205-225.

<sup>106</sup> McEwan (2005) *supra* provides a helpful reconsideration of the nature and operation of rape myths in society and the court room at pp.2-9.

<sup>107</sup> Brown, Burman & Jamieson (1993) *Sex Crimes on Trial: The use of Sexual History Evidence in Scottish Courts*, Edinburgh University Press, Edinburgh. This report and an earlier one by the same authors is considered in Temkin (2003) *supra* n.19 at p.220.

<sup>108</sup> Schuller and Hastings (2002) "Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions" 26 *Psychology of Women Quarterly* 252 at p.253.

<sup>109</sup> Willis and Wrightsman (1995), "Effects of victim gaze behaviour and prior relationship on rape culpability attributions" 10 *Journal of Interpersonal Violence* 367.

<sup>110</sup> Schuller and Hastings (2002) "Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions" 26 *Psychology of Women Quarterly* 252 at p.259.

and that men need protection from women's dangerous sexuality. This inference is expressed most clearly in the frequent references in the judgments to "unchastity"<sup>111</sup> (historically a male rather than a female concern)<sup>112</sup> and the linkage in Lord Slynn's judgment between a woman who engages in sexual intercourse with more than one man and "promiscuity."<sup>113</sup>

A frequent concern expressed in the judgments is the perceived failure of section 41 to distinguish between the different purposes for which evidence may be tendered and the Lords took the view that the blanket exclusion of sexual history evidence, subject to the extremely narrow exceptions, went further than was necessary to prevent what the Lords saw as the "mischief" against which the section was directed, namely the misuse of evidence of sexual activity for irrelevant and misleading purposes, for example to draw the inference that the complainant consented to the act or that she is an unreliable witness. They further took the view that the "obvious"<sup>114</sup> consequence of the elimination of the possibility that the judge and jury may draw illegitimate inferences from the evidence, was that the section raised the real risk that an innocent person may be convicted,<sup>115</sup> thus invoking the spectre of miscarriages of justice to subtly shift the focus of unfairness from the (female) complainant to the (male) defendant.

This shift allowed the Lords to reconstruct admissibility as a matter of proportionality and having found that there was a potential breach of article 6, they were able to re-interpret the section so that sexual history evidence could in certain circumstances be re-admitted. They suggested that although the legislation addressed a pressing and substantial objective by helping to exclude unhelpful and potentially misleading evidence of the complainant's prior sexual conduct, the rights infringed were not proportionate to the pressing objective because the section operated to exclude relevant defence

---

<sup>111</sup> E.g. see Lord Steyn at para.27.

<sup>112</sup> O'Donovan, K (1991) "Defences for Battered Women Who Kill", *Journal of Law & Society* Vol.18, 720, citing Taylor on the Slander of Women Act 1891.

<sup>113</sup> Lord Slynn at para.3 where he argues that (the exclusion of questioning about previous sexual experience) was necessary in order to avoid the assumption...that a woman who has had sex with one man is more likely to consent to sex with other men and that the evidence of a **promiscuous** woman is less credible." Of course, if their Lordships accepted this assumption as untrue then their assertion that a distinction can be made for sexual history evidence as between the defendant and complainant falls away. If a woman is assumed not to be more likely to have sex because she has done so before with another man, why should she then be assumed to be more likely to consent to sex with the same man on the sole basis that she had done so before. Ironically at para.78, Lord Hope alluded to an argument put forward by Counsel that sexual history evidence relating to the defendant was likely to be less distressing to the complainant than sexual history evidence generally. He stated that to accept this argument would risk developing rules by reference to stereotype. This, I would suggest, is precisely what the Lords have done.

<sup>114</sup> The Lords made much of the danger to the defendant if such evidence was not admitted. See Lord Steyn at paras.32 and 34, where he argued that section 41 risked denying the right of the accused in a **significant range** of cases from putting forward (a) full and complete defence.

<sup>115</sup> Cook (2001) *supra* n.69, perceptively notes that given the attrition rates, miscarriages of justice in this field are more likely to affect the victim than the defendant!

evidence, whose value is not clearly outweighed by the danger it presents.<sup>116</sup> For the Lords, the provision thus strikes the wrong balance between the rights of the complainant and the rights of the accused.

The Lords characterised the purpose of the section as the avoidance of non-probative and misleading evidence, the encouraging of reporting and the protection and privacy of the witnesses.<sup>117</sup> By confining their concern to the blatant misuse of sexual history evidence (which misuse they inferred could be prevented by appropriate exercise of judicial discretion and warnings)<sup>118</sup> and by using the past tense when describing the use of sexual history evidence by defence lawyers in the past to discredit complainants and to characterise them as unworthy of protection against sexual assault,<sup>119</sup> the Lords could readily find section 41 inconsistent with fair trial rights, whilst explicitly stating that rape mythology was no longer operative in the criminal justice system.

As McColgan argues in relation to the majority reasoning in the Canadian case of *R v Seaboyer*,<sup>120</sup> I would dispute the assertion of the Lords that section 41 was directed primarily at encouraging the reporting and protection of the “security and privacy” of witnesses to sexual assault. Rather, the provision was in part an attempt to eliminate sexual discrimination in trials by prohibiting the use of prejudicial and irrelevant sexual history evidence, one aspect of which was to increase the reporting of rape. As I have argued earlier, the very notions of relevance referred to by the Lords are informed by stereotype and myth and any semblance of relevance plays on “*internalised assumptions about what women really want and male desires for specific sexual scenarios*”.<sup>121</sup> I would agree with McColgan<sup>122</sup> and Baird<sup>123</sup> when they argue that the use of sexual history evidence pre-empts considered decision-making. Its use transforms the determination of guilt and innocence into an assessment of whether or not the complainant is the sort of person who should be protected by the law thus undermining any basic principle of equal treatment between complainants and defendants.

Ironically, at the start of his judgment, Lord Steyn traced the development of general principles of equality developed since the end of the war and stated

---

<sup>116</sup> See n.91 and accompanying text.

<sup>117</sup> Each of the Lords addressed this matter at the start of their judgments. However each also referred to the fact that the Government had signed a declaration that the YJCEA 1999 was compatible with the HRA 1998. Lord Steyn used this fact at para.45 to suggest that he was proceeding on the basis that “the legislature, would not, if alerted to the problem, have wished to deny the accused the right to put forward a full and complete defence by advancing any truly probative material.” Thus Lord Steyn is able to assert that the Judiciary are in a better position than the Legislature to assess the “fairness” of individual cases.

<sup>118</sup> *ibid.* See also Lord Steyn at para.46.

<sup>119</sup> For an example, see Lord Steyn at para.28.

<sup>120</sup> McColgan (2000) *supra* n.52 at p.224 where she cites the minority judgement of Madame Justice L’Heureux-Dube in *R v Seaboyer* [1991] 2 SCR 577. See also Temkin, J “Sexual History Evidence – Beware the Backlash [2003] *Crim LR* 217 at p.228.

<sup>121</sup> *ibid.*

<sup>122</sup> McColgan (1996) *supra* n.25.

<sup>123</sup> Baird (1998) *supra* n.25.

that nowadays the autonomy of women is an accepted norm. He also set out the development of the rules of admissibility for sexual history evidence in relation to this development of principles of equality.<sup>124</sup> However interestingly, he then proceeded to reinforce the previous categorisation by asserting that the reasons for exclusion of sexual history evidence in the case of relations with other men haven't historically and shouldn't today apply to sexual relationships with the accused. The reason for this, according to Lord Steyn, was that such evidence is not introduced to discredit the complainant generally but "*it is a species of prospectant evidence which may throw light on the complainant's state of mind.*"<sup>125</sup> Thus it is not what the woman says on the particular occasion that is relevant to her consent but what she has done in the past, *i.e.* her propensity to agree to sex with the defendant. Lord Steyn continues, "*it is true that each decision to engage in sexual activity is always made afresh. On the other hand, the mind does not blot out all memories. What one has been engaged in in the past may influence what choice one makes on a future occasion.*"<sup>126</sup> Therefore Lord Steyn seems to be suggesting that having once consented, a woman cannot then withdraw her consent. What is more, a man is justified in assuming a woman will consent if she has done so in the past. I would suggest that Lord Steyn's distinction is a distinction without difference, as once the evidence has been admitted, it will inevitably affect the jury not only in relation to the issue of the complainant's "probative" credibility but also in relation to her "moral probity."<sup>127</sup> Further, there is no room in Lord Steyn's assessment for mutuality of desire. Consent continues to be framed by the man's perception not the woman's. In this way, Lord Steyn succeeds in undermining the harm done to rape complainants by unwanted intercourse in acquaintance situations, subordinates the language of the Act to the common sense of the judiciary and re-inscribes into the law the very myths and stereotypes about (hetero) sexual relations that the legislation was designed to undermine.

The reasoning in the decision is decidedly suspect. Despite the Lords repeated assertions that the sexual conduct of complainants was relevant neither to their credibility nor in general terms to the likelihood of their consent, a number of the situations in which the Lords regarded sexual history evidence as potentially relevant relied in part upon outdated and illegitimate notions concerning credibility and consent. It was the acceptance of such evidence as relevant that resulted in the conclusion that sexual history evidence could, in some circumstances, still be admissible. Further, by characterising the balance to be struck as one between the State and the accused, rather than one between the interests of rape complainants and their

---

<sup>124</sup> Lord Steyn at para.27. See McColgan (1996) *supra* n.25, *re* the history of admissibility of sexual history evidence in which she notes that ironically, at common law, sexual history was not admissible unless the complainant was a prostitute or of notorious ill repute!

<sup>125</sup> Lord Steyn at para.31.

<sup>126</sup> *ibid.*

<sup>127</sup> These terms are adopted by McColgan (1996) *supra* n.25, p.281. She quotes Adrian Zuckerman who suggests that probative credibility relates to the truth-value of a witnesses testimony, moral credibility to his or her standing as a person.

assailants, the Lords failed to pay much more than lip service to the appalling difficulties faced by the victims of rape.<sup>128</sup>

As noted above, The Lords appeared to reject the traditional view that a woman's sexual history was relevant to her credibility and to the likelihood of her having consented to the sexual intercourse at issue. However, by permitting the introduction of sexual history evidence on the grounds of a relationship between the complainant and the accused, the Lords are continuing to allow juries to judge women on the basis of their sexual behaviour. Research has shown that rape complainants are frequently subject to attack on the grounds of their sexual behaviour through physical evidence such as the humiliating display of their underwear. Complainants are made to feel "*cheap, unworthy of protection, not the kind of women who merit the full protection of the law.*"<sup>129</sup> As McColgan has noted, the admission of such evidence means that the focus of the trial is less one of what the defendant did and whether the woman consented, than whether she is a woman whose refusal of sexual intercourse is such that the full weight of the law should be visited on the man who fails to respect that refusal.<sup>130</sup> The potential consequences of such an attitude in a modern era, when many women have a number of sexual relationships outside marriage,<sup>131</sup> is alarming, as it seems to infer that the majority of women are not worthy of legal protection thus further legitimating male violence against them.

*R v A* demonstrates that in the area of defendant's rights, the Human Rights Act will be of great significance.<sup>132</sup> The rights enshrined in the ECHR tend to provide defendants with remedies against undue process violations such as undue delay or the admission and exclusion of certain types of evidence. They may also impact on the substance of criminal law in situations where criminal offences are drawn in discriminatory terms or fail to accord with fundamental principles.<sup>133</sup> However, it is clear from my analysis of the

---

<sup>128</sup> *E.g.* see Lord Steyn at para.45. The same argument was presented by the majority in *Seaboyer* and is critiqued by McColgan (2000) n.52 at 223. C. Douzinas, (2000) *The End of Human Rights*, Hart Publishing, Oxford sees the adoption of rights discourses by organs of the State as one of the main factors undermining the efficacy of rights for those groups, such as women, who have not historically been privileged with subjectivity in those discourses. See particularly chaps.13 and 14. See also J. Mc Ewan, "Proving Consent in sexual cases: Legislative Change and Cultural Evolution" (2005) 9 *E & P* 1-28.

<sup>129</sup> For a historical perspective on the legal construction of worthy/unworthy women see McColgan (1996) *supra* n.25.

<sup>130</sup> *ibid.*, p.241.

<sup>131</sup> McColgan *ibid.*, at p.297 draws on empirical research by Wellings *et al* to show that most women do engage in sexual intercourse outside marriage and the majority of women have had sex with more than one partner. See n.73 and accompanying text.

<sup>132</sup> For an unconditional endorsement of the HRA 1998 and the way in which it will assist in the protection of defendant's rights see K. Starmer, (2000) *European Human Rights Law*, Legal Action Group, London. For a more considered view of the efficacy and meaning of human rights in historical perspective see Douzinas (2000) n.128. He notes at p.2 that whilst the 20<sup>th</sup> Century has proclaimed the triumph of human rights, it has also been the era of genocide, massacre and ethnic cleansing.

<sup>133</sup> See generally, Starmer (2000) *supra* n.132, chap.8.

judgments in “A”, that the downside of incorporation of fundamental rights is that they may undermine or restrict the protection afforded to complainants where this conflicts with the rights of the defendant.

As McColgan has observed, the fundamental principles, which the judges apply through rights such as article 6, are the “*principles which they distil from the common law*.”<sup>134</sup> The difficulty that then arises has been clearly demonstrated in both legislative attempts to prohibit the use of sexual history evidence.<sup>135</sup> Given that the flaws underlying the common law may be precisely why an impugned piece of legislation is passed, when that legislation is then overruled or watered down on the basis of common law principles, this marks “*a triumph for the common-law over the legislature*”<sup>136</sup> and a disaster for those the legislation sought to protect. As McColgan notes, “*it is thus hard to escape the conclusion that where such principles are “found” to contradict legislation that the elevated position of rights serves to reinforce at best the position specific views and at worst the personal whims of the judiciary*.”<sup>137</sup>

From a practical perspective, these problems could be overlooked if the substance of judicial lawmaking was preferable in a particular area of

---

<sup>134</sup> McColgan (2000) *supra* n.52, p.291. She also makes the point at p.249 that the traditional view of the criminal defendant as a vulnerable individual pitted against the might of the State is frequently accurate but it fails to take account of the fact that the violence suffered by victims such as rape complainants is itself institutionalised. Further, I would argue that the “liberal” model of civil and political rights enshrined in the HRA 1998 does not provide any recourse to victims of such institutionalised violence. Beyond the right to a private life in Article 8, which generally operates in practice against women who suffer violence in the home, there is no civil right not to be beaten or raped by your partner.

<sup>135</sup> S.2 SO(A)A 1976 and s.41 YJCEA 1999.

<sup>136</sup> McColgan (2000) *supra* n.52, p.291.

<sup>137</sup> McColgan (2000) *supra* n.52, p.291. McColgan and Ahmed have both argued that the experience of human rights has shown their tendency to operate in the interests of the powerful whilst leaving the powerless unprotected. The civil and political rights enshrined in the HRA do not give women the right not to be abused by her husband or partner or the right to be protected by the State from such abuse. The main impact therefore of human rights consists of their role in the criminal prosecution of women’s abusers and thus not to the benefit of the women. In support of this argument, McColgan at chap.9 has drawn on a number of examples from the Canadian and US systems relating to the admission of medical records of rape victims in order to discredit them and to a number of attempts to remove the complainant’s rights to anonymity. In general, these examples help to explain in part the vexed nature of rights discourses for feminist analysis. For further discussion see S. Ahmed, (1995) “Deconstruction and Law’s Other: Towards a Feminist Theory of Embodied Legal Rights”, *Social and Legal Studies* Vol. 4:55; T. Murphy, & N. Whitty, (2001) “What is a fair trial? Rape Prosecutions, Disclosure and the Human Rights Act”, *Feminist Legal Studies* Vol. 8:217 and R. Sandland, (1998) “Seeing Double? Or why To Be or Not To Be is (not) the Question for Feminist Legal Studies”, *Social and Legal Studies* Vol.7(3): 307.

concern to that of the legislature.<sup>138</sup> However, it is clear from the previous discussion that this is not the case in the situation where women are victims of male violence. A close reading of the judgments in “A” clearly demonstrates that the judiciary are adept at shutting down any possible discourses from a woman’s standpoint and constructing a notional female sexuality which has little to do with women’s perspectives but everything to do with male standards of behaviour. Rather than assisting women to “speak to”<sup>139</sup> the law, the Lords acknowledgement of a differential standard for the admission of such evidence acts to further distance the reality of women’s sexuality and women’s experience from its “gaze”. Women remain “other”, strictly policed and unworthy of the law’s protection unless they can conform to the historically constructed male models of “appropriate femininity” and “real” rape.

Clearly, this conclusion has implications for the impact of the legislative reforms that have come about as a result of the Sexual Offences Act 2003 and the Criminal Justice Act 2004. The judgment in “A” has retrieved the power of the judiciary to interpret the statutory rules restraining the admission of sexual history evidence with the defendant and in the Human Rights Act 1998, the House of Lords has demonstrated that it has a powerful tool that can be used against the interests of women who claim to have been raped by acquaintances. Indeed, when one looks at some of the cases that have followed, such as *Mokadi*,<sup>140</sup> and continuing judicial attitudes to sexual history evidence with the defendant,<sup>141</sup> it may be, as McEwan argues, that “the European Convention (in conjunction with section 75) adds to section 41’s potential to make cross examination of complainants in sexual cases more, not less, intrusive.”<sup>142</sup>

---

<sup>138</sup> McColgan (2000) *supra* n.52, p.291. For a contrary argument suggesting that judicial discretion is the best safeguard see N. Kibble, [2005] *supra* n.19 and D. Birch, (2003) *supra* n.19.

<sup>139</sup> “Speaking to” is a term used by Gayatri Spivak to describe the process by which the Subaltern Woman can be given a voice in history. She advocates “speaking to” as a technique of constructing subjects rendered “other” by dominant discourses. I adopt the term in the same sense throughout this paper to indicate the way in which the law erases the subjective voice of the rape complainant. G. Spivak, (1988) “Can the Subaltern Speak?” in C. Nelson, & L. Grossberg, (eds.) *Marxism and the Interpretation of Culture*, University of Illinois Press, Urbana.

<sup>140</sup> See n.67.

<sup>141</sup> Kibble [2005] *supra* n.19.

<sup>142</sup> J. McEwan, (2005) *supra* n.10, p.20.